DIVISION ONE
FILED: 06/09/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

BRADLEY R. BARTON, Plaintiff/Appellant, v. RANDY BOESEN and JOAN BOESEN, a marital community; BOBBY G. RHUDY and CATHY RHUDY, a marital community; RONALD J. BYRUM and MELVA BYRUM, a marital community; DAN SCHWARTZ REALTY, INC.; MARSHALL & ILSLEY BANK, a Wisconsin banking corporation registered as an Arizona foreign corporation dba M&I Bank, Defendants/Appellees.	No. 1 CA-CV 10-0756 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause Nos. CV2009-054294; CV2010-050165 (Consolidated)

The Honorable Harriet Chavez, Judge

AFFIRMED IN PART; REVERSED IN PART

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J O H N S E N, Judge

¶1 Bradley R. Barton appeals the superior court's order dismissing his complaint against M&I Marshall & Ilsley Bank FSB ("M&I") and Dan Schwartz Realty, Inc., Ronald and Melva Byrum, Bobby and Cathy Rhudy, and Randy and Joan Boesen. We affirm the dismissal of the claim against M&I, but reverse the dismissal of the claims against the other defendants.

FACTS AND PROCEDURAL BACKGROUND

¶2 In 2005 the Rhudys owned a parcel of undeveloped property in Wittman that lay within the Wittman Drainage Area.[1] On April 6 and 26, 2005, Cathy Rhudy attended meetings at which the Maricopa County Flood Control District discussed designating certain land within the Wittman Drainage Area as floodway or

[1] In reviewing a motion to dismiss, "we assume as true the facts alleged in the complaint and affirm the dismissal only if, as a matter of law, the plaintiff would not be entitled to relief on any interpretation of those facts." *Doe ex rel. Doe v. State*, 200 Ariz. 174, 175, ¶ 2, 24 P.3d 1269, 1270 (2001).

floodplain. The Rhudys sold their parcel to the Boesens in a transaction that closed on or about April 29, 2005. In connection with that transaction, the Rhudys gave the Boesens a Seller's Property Disclosure Statement ("Rhudy Disclosure") in which the Rhudys denied any drainage issues. In response to a question in the Rhudy Disclosure whether the property "is located in a flood way or flood plain," the Rhudys responded only, "Wash along West side of property." They also stated that the wash floods when it rains.

¶3 The Boesens sold the property to Barton on June 2, 2005. Ronald Byrum, an agent employed by Dan Schwartz Realty, represented the Boesens in their purchase of the property and also represented them in selling the property to Barton. The Boesens' Seller's Property Disclosure Statement ("Boesen Disclosure") denied drainage issues and failed to note that the wash on the west side of the property was subject to floods. It was not until sometime between November 18 and December 4, 2005, that Barton discovered the land had been designated a floodway and was, "therefore, worthless and unable to be improved in any capacity."

¶4 Barton filed a complaint against the Rhudys, the Boesens, the Byrums and Dan Schwartz Realty on May 2, 2007. He alleged the Flood Control District announced at the April 26, 2005 meeting that Cathy Rhudy attended that the property would

be designated as floodway or floodplain. Barton alleged all of the defendants were liable for "fraud/fraudulent concealment," negligent misrepresentation, "breach of contract/breach of the implied covenant of good faith and fair dealing," unjust enrichment, consumer fraud and civil conspiracy. He also alleged Dan Schwartz Realty, Cathy Rhudy and Ronald Byrum were liable for negligence *per se*. In each of the claims, Barton asserted he had purchased the property not knowing it was in a floodplain or subject to floods and asserted the defendants were liable for misrepresenting or failing to disclose material facts about the land.

¶5 After discovery, the parties filed cross motions for summary judgment. The superior court denied Barton's motion for summary judgment and dismissed his claims for unjust enrichment, consumer fraud and conspiracy. The court also granted the Rhudys' motion for summary judgment on the claim for negligence *per se*. The court dismissed the breach of contract/breach of implied covenant claim against all defendants except it preserved the breach of contract claim against the Boesens. The court also dismissed the negligent misrepresentation claim against the Boesens.

¶6 On April 29, 2009, for reasons not relevant to this appeal, the court dismissed Barton's complaint without prejudice for failure to prosecute. Over defendants' objections, the

court on December 23, 2009 granted Barton's motion for relief pursuant to Arizona Revised Statutes ("A.R.S.") section 12-504 (2003). Its minute entry stated, "[P]laintiff is authorized to [file] a new action for the same cause within thirty days of the file date of this order."

¶7 On January 12, 2010, Barton filed a new complaint that alleged "fraud/fraudulent concealment" against all the defendants named in the original complaint; negligent misrepresentation against the Rhudys, the Byrums and Dan Schwartz Realty; negligence *per se* against the Byrums and Dan Schwartz Realty; and breach of contract/breach of implied covenant of good faith and fair dealing against the Boesens. The complaint also sought rescission and restitution against the Boesens on the ground that the purchase contract was voidable due to mistake, impossibility, frustration, impracticability or mutual mistake. Lastly, the complaint contained a claim against M&I, which had made Barton a purchase money loan secured by the property. The complaint alleged the loan agreement was voidable based on mistake, frustration of purpose, impossibility and impracticability.

¶8 All of the defendants moved to dismiss. After oral argument, the superior court granted M&I's motion to dismiss based on limitations and granted the other defendants' motions

to dismiss on the ground that Barton's new complaint was not "a new action for the same cause" pursuant to A.R.S. § 12-504.

¶9 We have jurisdiction of Barton's appeal under Article 6, Section 9, of the Arizona Constitution and pursuant to A.R.S. § 12-2101(B) (2003).

DISCUSSION

A. Dismissal of the Claim Against M&I.

¶10 Barton's claim against M&I arose from an appraisal the bank obtained while underwriting its loan to him. The appraisal, which Barton admitted he received in May 2005, contained a warning that flood issues may affect the land. In relevant part, it stated, "Per the Maricopa County Flood Control District, the subject's area is currently under study, it is strongly urged that the buyer research and confirm whether the subject will be located in a future floodplain/floodway." In his complaint, Barton alleged he did not read the appraisal until long after he purchased the property and that as a result, he was unaware that the land was the subject of a floodplain study.

¶11 We review an order granting a motion to dismiss for an abuse of discretion, although we review issues of law *de novo*. *Dressler v. Morrison*, 212 Ariz. 279, 281, ¶ 11, 130 P.3d 978, 981 (2006).

¶12 At oral argument, Barton conceded that a three-year limitations period applies to his claim against M&I. *See* A.R.S. § 12-543(1), (3) (2003). An action does not accrue until a "plaintiff knows or, in the exercise of reasonable diligence, should know the facts underlying the cause" of action. *Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of Am.*, 182 Ariz. 586, 588, 898 P.2d 964, 966 (1995); *see, e.g., Coronado Dev. Corp. v. Superior Court,* 139 Ariz. 350, 352, 678 P.2d 535, 537 (App. 1984) ("The statute of limitations in a fraud case begins to run when the plaintiff by reasonable diligence could have learned of the fraud, whether or not he actually learned of it.").

¶13 Barton did not file his complaint against M&I until January 2010, more than four and a half years after the loan transaction. His claim therefore is barred unless he can show that by "reasonable diligence" he could not have learned of the bank's alleged wrongdoing until January 2007, more than a year and a half after the transaction closed. We agree with the superior court that Barton's claim against M&I accrued no later than the May 2005 closing of his loan. The appraisal Barton received at that time put him on notice of the facts that underlay his claim against M&I. Although the appraisal advised Barton to investigate the potential floodway issue, Barton did not do so. Indeed, by his own account, Barton first read the

appraisal in early 2007, "[a]pproximately two years" after he received the document.

¶14 Citing *Darner Motor Sales, Inc. v. Universal Underwriters Insurance Company,* 140 Ariz. 383, 682 P.2d 388 (1984), Barton argues that because he had no duty to read the appraisal, limitations did not begin to run when his loan closed. *Darner* offers no support for Barton's contention. That case held that Arizona courts will not enforce provisions in standardized contracts that are either contrary to the intent and understanding of the parties or contrary to the drafting party's representations regarding contract provisions. *Id.* at 393-94, 682 P.2d at 398-99. But Barton does not allege M&I made any representation that the property was not located in a floodplain. One of the purposes of the appraisal was to ascertain the property's unfavorable conditions; indeed, Barton's reasonable expectations with respect to the property should have been informed by the warning in the appraisal.[2]

¶15 Nevertheless, Barton contends the warning in the appraisal constituted a "boilerplate provision" similar to the

[2] Similarly, Barton cites *Formento v. Encanto Business Park*, 154 Ariz. 495, 744 P.2d 22 (App. 1987), and *Lombardo v. Albu,* 199 Ariz. 97, 14 P.3d 288 (2000), for support for his assertion that he had no duty to investigate flood issues. These cases, however, stand only for the proposition that buyers have the right to rely on representations by sellers. Here, the appraisal obtained by M&I informed Barton that the property may be located in a floodplain and "strongly urged" further investigation.

unread insurance contract at issue in *Darner*. A boilerplate provision, however, contains "[r]eady-made or all-purpose language that will fit in a variety of documents." Black's Law Dictionary 185 (8th ed. 2004). We do not agree that the appraisal's explicit warning about flooding on the property was mere boilerplate that Barton could choose to disregard without consequence.

¶16 The issue is whether Barton, with reasonable diligence, should have been aware of the facts underlying the cause of action. *Gust, Rosenfeld & Henderson,* 182 Ariz. at 588, 898 P.2d at 966. A litigant may not claim ignorance of information contained in a document based on his failure to read it. *See Condos v. United Benefit Life Ins. Co. of Omaha, Neb.,* 93 Ariz. 143, 145-46, 379 P.2d 129, 131 (1963) ("If a party in full possession of his mental faculties, able to read and understand an instrument, and dealing at arm's length with the other party, who admits that he did not take the trouble to read or examine it when presented to him for his signature, is permitted to set it aside on his oral testimony that false representations were made to him . . . written contracts of any nature are worthless.") (quoting *Mut. Benefit Health & Accident Ass'n v. Ferrell*, 42 Ariz. 477, 488-89, 27 P.2d 519, 523-24 (1933)). Barton's receipt of the appraisal in 2005 gave him constructive notice of the potential problem with the property

and of his claim against M&I. Accordingly, his claim against M&I accrued upon receipt of the appraisal in 2005, and his failure to sue within three years bars his claims.

¶17 Alternatively, Barton argues his claim against M&I did not accrue until March 2008, when he learned from an architect that he could not build a home on the property because of the floodplain designation. We reject that contention. *See Commercial Union Ins. Co. v. Lewis & Roca*, 183 Ariz. 250, 255, 902 P.2d 1354, 1359 (App. 1995) ("Commencement of the statute of limitations will not be put off until one learns the full extent of his damages. Rather, the statute commences to run when the plaintiff incurs some injury or damag[e] . . . .") (citations omitted) (internal quotation marks omitted).

¶18 Finally, Barton argues that A.R.S. § 12-504 "saves" his claims against M&I. Relief under that statute is available only to a plaintiff whose "action is commenced within the time limit for the action." A.R.S. § 12-504(A). Because Barton did not timely commence his action against M&I, § 12-504 does not apply.[3]

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[3] Barton also argues the superior court erred in awarding M&I its attorney's fees on its motion to dismiss. He cites *King v. Titsworth*, 221 Ariz. 597, 212 P.3d 935 (App. 2009), for the proposition that a request for attorney's fees made on a motion outside the pleadings is invalid. *King* is inapposite, however. The defendant in that case requested fees in a motion made after the decision on the merits. 221 Ariz. at 599, ¶ 12, 212 P.3d at 937. Here, M&I did not file an answer; its request for fees was

B. Dismissal of the 2010 Complaint Against the Other Defendants.

1. Legal principles.

¶19 The Rhudys, the Boesens, the Byrums and Dan Schwartz Realty argue the court properly dismissed Barton's 2010 complaint because it did not constitute a "new action for the same cause," pursuant to A.R.S. § 12-504.[4] They argue the 2010 complaint adds or amends the facts that underlay the 2007 complaint.[5]

¶20 Section 12-504(A) provides as follows:

> If an action timely commenced is terminated by abatement, voluntary dismissal by order of the court or dismissal for lack of prosecution, the court in its discretion may provide a period for commencement of *a new action for the same cause*, although the time otherwise limited for commencement has expired. Such period shall not exceed six months from the date of termination.

A.R.S. § 12-504(A) (emphasis added).

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contained in the motion to dismiss that it filed in lieu of an answer.

[4] We do not consider appellees' arguments concerning a much-expanded amended complaint that Barton filed on March 16, 2010. The superior court struck the amended complaint because it was untimely pursuant to Arizona Rule of Civil Procedure 15(a).

[5] Appellees also complain about the addition of the claim against M&I in the 2010 complaint. Because we have held the superior court properly dismissed the M&I claim, we need not decide whether the addition of a claim against a new party invalidates a new action re-filed against other parties pursuant to A.R.S. § 12-504.

¶21 The savings statute is remedial; it should be construed liberally. *Templer v. Zele*, 166 Ariz. 390, 391, 803 P.2d 111, 112 (App. 1990) ("[T]he statute is broadly worded and we must assume, unless and until the legislature informs us otherwise, that it is worded broadly to ensure its remedial purpose."); *Janson ex rel. Janson v. Christensen*, 167 Ariz. 470, 474, 808 P.2d 1222, 1226 (1991). "The important consideration is that, by invoking judicial aid, a litigant gives timely notice to his adversary of a present purpose to maintain his rights before the courts." *Templer,* 166 Ariz. at 391, 803 P.2d at 112 (quoting *Gaines v. City of New York*, 109 N.E. 594, 596 (N.Y. App. Div. 1915)); *see also In re Forfeiture of $3,000.00 U.S. Currency,* 164 Ariz. 120, 121, 791 P.2d 646, 647 (App. 1990) (the savings statute "was aimed at allowing litigants to cure defects after the statute of limitations had run so long as the opposing party had notice of the claim").

¶22 Although the parties have directed us to no Arizona case authorities addressing the issue, courts applying savings statutes in other states have held that a re-filed action is proper if it is based on the events that gave rise to the dismissed complaint. For example, the Oklahoma savings statute allows "a new action" to be filed within a year of the dismissal of the original complaint. Okla. Stat. tit. 12, § 100 (2000). Courts interpreting that statute and similar provisions use a

"transactional approach" that looks to the "operative event" in determining whether a claim may be filed and on that basis, allow a new theory of liability if it is based on the "factual setting underlying" the original complaint. *Chandler v. Denton*, 741 P.2d 855, 862-63 (Okla. 1987); *see Ferron v. Metareward, Inc.,* 698 F. Supp. 2d 992, 1005-06 (S.D. Ohio 2010) (Ohio savings statute's allowance of "new action" permits plaintiff to "present new claims or theories of recovery based on the same facts"); *State ex rel. Blackburn Motor Co. v. Litzinger*, 417 S.W.2d 126, 129 (Mo. Ct. App. 1967) (Missouri savings statute allowed filing of a "new action" that included an additional paragraph; "the rule is that only the causes of action in the two petitions must be the same, not the manner in which they are pleaded"); *Energy Saving Prods., Inc. v. Carney,* 737 S.W.2d 783, 784-85 (Tenn. Ct. App. 1987) ("new action" allowed by Tennessee savings statute may include claim arising out of the same conduct, transaction, or occurrence alleged in the original action); *cf. Taylor v. Int'l Union of Elec., Elec., Salaried, Machine & Furniture Workers, AFL-CIO*, 968 P.2d 685, 690 (Kan. Ct. App. 1998) (Kansas saving statute's allowance of "new action" permits filing of substantially similar claims, but did not allow filing of claim against different parties).

¶23 Although other states' statutes provide for the filing of a "new action," the Arizona statute is worded differently; it

allows only a "new action for the same cause." A.R.S. § 12-504(A). Barton argues the Arizona statute's reference to "the same cause" permits the filing of amended or new claims based on the same transaction. Citing Black's Law Dictionary 201 (5th ed. 1979), Barton argues that a "cause of action" is the "fact or facts which give a person a right to judicial relief." While that definition of "cause of action" may be consistent with the "transaction" approach applied under other states' savings statutes, what "same cause" means under Arizona law is not clear. *Compare Wetzel v. Commercial Chair Co.*, 18 Ariz. App. 54, 56-57, 500 P.2d 314, 316-17 (1972) (discussing whether plaintiff's "basic cause of action, or claim, lies in contract or in tort, and whether it constitutes a single claim or multiple claims") *with, e.g.*, *Guth v. Texas Co.*, 155 F.2d 563 (7th Cir. 1946) (distinguishing between causes of action for negligence and account), and *Nemitz v. Cunny*, 221 F. Supp. 571 (N.D. Ill. 1963) (separate "causes of action" are separate claims for relief even if based on same facts).[6]

¶24 We need not decide whether "same cause" in A.R.S. § 12-504 means the new action must allege the same claim for relief or whether it may add other claims based on facts alleged

[6] While the issue bears some resemblance to the question of when an amended claim "relates back" to a defendant pursuant to Arizona Rule of Civil Procedure 15(c), the language of the rule refers to a "claim" rather than a "cause."

in the original complaint. Even assuming § 12-504 only allows the filing of the same claim for relief as alleged in the dismissed action, we conclude Barton's 2010 complaint satisfied the statute because it contained the same claims for relief as existed after the summary judgment rulings in the prior litigation.

2. Fraud/fraudulent concealment.

¶25 In the 2007 complaint, Barton alleged fraud/fraudulent concealment against all of the non-M&I defendants. As noted, the 2007 complaint alleged each of the defendants misrepresented or failed to disclose material facts concerning flooding risks to the property. The complaint alleged the Flood Control District "made public" the results of its floodplain study at the April 26, 2005 meeting that Cathy Rhudy attended. Barton alleged that if he had known that the land was subject to the District's floodplain study, he would not have purchased the land. He sought damages of not less than $190,000.

¶26 The 2010 complaint contained generally the same fraud allegations. It provided more detail, but Barton's theory was the same: Defendants either misrepresented or failed to disclose to him that the property was at risk for floodway or floodplain issues. For instance, the complaint alleged Cathy Rhudy knew the land was going to be affected by the Flood Control District's drainage study because she attended the April

26, 2005 meeting at which the District displayed an exhibit that showed the property "was 100% within the designated floodway district." The complaint alleged Rhudy did not disclose that fact either in the Rhudy Disclosure or in a conversation with the Boesens about the wash on the west side of the property.

¶27 The defendants argue that while the 2007 complaint alleged they failed to disclose the Flood Control District had designated the property as floodplain, the 2010 complaint alleged they failed to disclose only that the Flood Control District was studying whether to designate the property as floodplain. The distinction does not render the 2010 complaint invalid under the savings statute. The defendants acknowledge that facts Barton added to the 2010 complaint came to light during discovery conducted on the 2007 complaint, and they cite no authority for the proposition that the savings statute does not permit new detail discovered in the prior litigation. The revised account alleged in the 2010 complaint merely reflected the evolution of the parties' understanding of the facts during discovery. In the normal case, a claim is not subject to dismissal when discovery reveals that a defendant breached in a slightly different manner than alleged in the complaint, and the same is true here.

¶28 Dan Schwartz Realty and Byrum further argue that while the 2007 complaint alleged they knew of the flood issues but

failed to disclose them to Barton, the 2010 complaint omitted that contention. Although the 2010 complaint omitted the allegation that the Rhudys informed Byrum about the flood issues, it alleged that Byrum knew of certain risks from the limited disclosures the Rhudys had made to the Boesens, and yet did not advise the Boesens to pass along those disclosures to Barton. The 2010 complaint also alleged that Byrum and Dan Schwartz Realty knew from a transaction involving nearby property that information about "flood and water" was material to the property but did not disclose those issues to Barton.

¶29 The 2007 complaint alleged that all defendants conspired with each other to commit "unlawful acts." The 2010 complaint omitted the conspiracy allegations and alleged that Byrum, Dan Schwartz Realty and the Boesens were partners and therefore were liable for the acts of the other. Although Dan Schwartz Realty and the Byrums complain that as a result, the 2010 complaint did not allege the "same cause," they do not explain how the 2010 partnership allegation is materially different from the 2007 conspiracy allegation.

¶30 We hold that the additional and/or refined facts alleged in support of the fraud allegations in the 2010 complaint do not render the complaint invalid under A.R.S. § 12-504. The complaint sets forth the "same cause" as alleged in the 2007 complaint: Defendants defrauded Barton by

misrepresenting or failing to disclose material facts concerning flood risks that affected the property.

3. Negligent misrepresentation, negligence *per se*.

¶31 Barton's 2007 claim for negligent misrepresentation was based on the same facts he alleged in support of his claim for fraud. Consistent with the court's summary judgment ruling, *supra* ¶ 5, the 2010 complaint alleged negligent misrepresentation against Byrum, Dan Schwartz Realty and the Rhudys but not against the Boesens. As with the fraud allegations, the theory of the 2010 complaint is the same as the 2007 complaint: The named defendants breached a duty to Barton by negligently misrepresenting or failing to disclose the truth with respect to flood risks that affected the property.[7]

¶32 The same is true with the claim in the 2010 complaint for negligence *per se*. Consistent with the court's prior summary judgment ruling, the 2010 complaint alleged negligence *per se* only against Byrum and Dan Schwartz Realty; as to those defendants, the allegations in the 2010 complaint are identical to those contained in the 2007 complaint.

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[7] Although the 2007 complaint alleged that the Rhudys "either provided plaintiff with false or incorrect information, or omitted or failed to disclose material information," the 2010 complaint alleged the Rhudys provided Byrum and/or Dan Schwartz Realty and/or the Boesens with false or incorrect information, on which Barton foreseeably relied. On appeal, the Rhudys do not argue the distinction is significant or prejudicial.

4. Breach of contract/covenant of good faith and fair dealing.

¶33 On summary judgment during the litigation on the 2007 complaint, the court dismissed Barton's claim for breach of contract/breach of the covenant of good faith and fair dealing as against all defendants except the Boesens, and ordered the claim be narrowed to allege only breach of contract against the Boesens. Consistent with that order, the claim for breach of contract/breach of the covenant of good faith and fair dealing in the 2010 complaint named only the Boesens and alleged simply that they breached their contract with Barton by failing to make truthful disclosures about the property. The Boesens do not complain on appeal that this claim in the 2010 complaint is any different than that alleged against them in the 2007 complaint.

5. Rescission and restitution.

¶34 In the 2007 complaint, Barton sought restitution from the Boesens in the alternative to damages as a remedy for his claim for breach of contract. His 2010 complaint contained a separate claim titled "Rescission & Restitution" that alleged he was entitled to rescission of his contract with the Boesens and restitution, in the alternative to his claim for damages, based on "mistake, impossibility or frustration/impracticability." The separately stated alternative claim for restitution in the 2010 complaint is not materially different from Barton's

allegation in the 2007 complaint that he was entitled to restitution from the Boesens as an alternative remedy for breach of contract.[8]

¶35 In summary, the differences in the factual allegations contained in the 2010 complaint are ones of form rather than substance; the expanded allegations about which the defendants complain merely add greater specificity to the facts on which the 2007 claims for relief were based. For that reason, we conclude the superior court abused its discretion in holding the allegations against the non-M&I defendants in the 2010 complaint did not constitute "a new action for the same cause" pursuant to A.R.S. § 12-504.[9]

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[8] Moreover, rescission and restitution generally are considered remedies, not causes of action. *See County of La Paz v. Yakima Compost Co.,* 224 Ariz. 590, 610, ¶ 62, 233 P.3d 1169, 1189 (App. 2010) (rescission is a remedy for breach of contract); *State v. Iniguez*, 169 Ariz. 533, 536, 821 P.2d 194, 197 (App. 1991) ("[R]estitution is not a claim which belongs to the victim, but a remedial measure . . . ."); *Mountain States Tel. & Tel. Co. v. Ariz. Corp. Comm'n,* 124 Ariz. 433, 435, 604 P.2d 1144, 1146 (App. 1979) ("Restitution . . . is a common-law remedy.") (citation omitted). Accordingly, their addition in the January 2010 complaint does not change the nature of the action and does not invalidate it under the savings statute.

[9] The Rhudys also argue we should affirm the dismissal of the claims against them based on the economic loss doctrine. The Rhudys made this argument in a motion for summary judgment that the superior court dismissed as moot after it granted the defendants' motion to dismiss. Given that the superior court did not address this argument, we decline to consider it.

C. The Denial of Barton's Motions for Summary Judgment Against the Byrums, Dan Schwartz Realty and the Boesens.

¶36 Barton moved for summary judgment on his claims against the Byrums, Dan Schwartz Realty and the Boesens in March and May 2010. The superior court denied his motions as moot after it granted the defendants' motions to dismiss. Barton asks us to reverse the denial of his summary judgment motions.

¶37 Generally, the denial of a motion for summary judgment is not subject to review on appeal. *Bothell v. Two Point Acres, Inc.,* 192 Ariz. 313, 316, ¶ 7, 965 P.2d 47, 50 (App. 1998). We may, however, review the denial if it is based on a point of law. *Hourani v. Benson Hosp.,* 211 Ariz. 427, 430, ¶ 4, 122 P.3d 6, 9 (App. 2005). Because the court's denial of Barton's summary judgment motions was not based on the merits, we will not review it on appeal. *See Grain Dealers Mut. Ins. Co. v. James*, 118 Ariz. 116, 117 n.1, 575 P.2d 315, 316 (1978). Barton's contention that the court's denial of his motion for summary judgment was based in some part on its conclusion that he had notice of the appraisal finds no support in the record.

CONCLUSION

¶38 For the reasons stated above, we affirm the dismissal of the 2010 complaint against M&I but reverse the dismissal of the complaint against the other defendants. Barton requests costs and attorney's fees pursuant to ARCAP 21(c), A.R.S. §§ 12-

341.01, -349 and -350 (2003). We deny the request for fees pursuant to A.R.S. §§ 12-349 and -350. We decline to award fees pursuant to A.R.S. § 12-341.01, but the superior court at the conclusion of the case may in its discretion award Barton fees incurred on appeal pursuant to § 12-341.01. We grant M&I's request for attorney's fees and costs pursuant to A.R.S. § 12-341.01(A), contingent on its compliance with ARCAP 21.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
MARGARET H. DOWNIE, Judge

/s/
JON W. THOMPSON, Judge