NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);
Ariz.R.Crim.P. 31.24

DIVISION ONE
FILED: 11/17/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STUART GRANT and MARCIA GRANT, Plaintiffs/Appellants/ Cross-Appellees, v. L. WILLIAM BENSON and ARLENE BENSON, husband and wife, Defendants/Appellees/ Cross-Appellants.	1 CA-CV 10-0493 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Coconino County

Cause Nos. CV2007-0236; CV2008-0330 (Consolidated)

The Honorable Danna D. Hendrix, Judge

AFFIRMED IN PART; VACATED IN PART; REMANDED

Eckley & Associates, P.C. — Phoenix
by J. Robert Eckley
Kevin B. Sweeney
Michael Raine
Attorneys for Plaintiffs/Appellants/Cross-Appellees

Deconcini McDonald Yetwin & Lacy, P.C. — Flagstaff
by Shelton L. Freeman
Attorneys for Defendants/Appellees/Cross-Appellants

I R V I N E, Judge

¶1 Plaintiffs Stuart and Marcia Grant, husband and wife (the "Grants"), appeal the amount of damages awarded for default judgment against defendants William and Arlene Benson, husband and wife (the "Bensons"), in their contract and tort claims. The Grants also challenge the trial court's denial of a motion to extend the time to file an affidavit of attorneys' fees. The Bensons cross-appeal the denial of their motions to set aside default judgment, and raise other arguments, including that the default judgment was void under the contract. For the reasons that follow, we vacate the award in part and remand for a determination of contract damages for loss rents.

FACTS AND PROCEDURAL BACKGROUND

¶2 In 1999, the Bensons moved into a house built by Casa Natural (the "Builder"). Three years later, the Bensons sold the house to the Grants. As part of the contract, the Bensons gave the Grants a "seller property disclosure statement" disclosing only a roof leak, which was then repaired to the Grants' satisfaction.

¶3 After the purchase, the Grants used the house as a rental property. Over three years later, the Grants discovered mold and, upon further inspection, other structural defects in the house requiring significant repairs. By letter dated March 26, 2007, the Grants demanded damages or rescission of the contract and offered mediation if the Bensons responded before

April 1. The Bensons received the letter in March or early April, but did not respond.

¶4 On April 2, 2007, the Grants filed a complaint against the Builder, the Bensons and unnamed fictitious defendants for contract and tort damages. The complaint alleged in part that the Bensons concealed or failed to fully disclose the defects and extent of repairs and gave false and incomplete information in connection with the sale. The complaint did not state the amount of damages but asserted that it would be proven at trial.

¶5 On June 4, 2007, the Bensons were served with the complaint, summons, offer to mediate under the contract, and other court documents. In a letter to the Grants' attorney dated June 9, 2007, the Bensons answered "requests," denied liability and attached supporting documents. Believing this was sufficient, the Bensons did not file anything with the superior court.

¶6 On July 18, 2007, the Grants filed an application for entry of default, and the Bensons received notice of the filing. On August 9, the Grants filed a motion to enter default judgment as to the liability of the Bensons. That same month, the Bensons met with a paralegal who advised them to retain counsel. In September, they met with an attorney to discuss the case, but did not immediately retain him.

¶7 On November 19, 2007, the Bensons' counsel filed a notice of appearance along with a motion to set aside the entry of default. The motion argued there was good cause to set aside the entry of default under Arizona Rule of Civil Procedure ("Rule") 55(c) and Rule 60(c), because they believed they did all that was required by contacting the Grant's attorney, who allegedly told them that "there was nothing for [the Bensons] to do at the (then) present time." The trial court denied the motion, finding that "it was over 100 days before [the Bensons] requested that default be set aside."

¶8 In November 2008, the trial court ruled that the Bensons were entitled to present evidence of comparative fault between them and the Builder. The trial court stayed the ruling to allow the Grants to file a special action petition, which this Court declined.

¶9 In April 2009, the Bensons, now represented by different counsel, filed a renewed motion to set aside default. The Bensons argued the default judgment was void because the Grants had agreed to waive all claims after the close of escrow unless the Bensons had actual knowledge of the defects, and because the complaint failed to specifically allege that fact, it failed to state a claim for relief. The trial court rejected this argument and again denied the motion to set aside.

¶10 Meanwhile, the Grants had settled with the Builder for $350,000. In July 2009, the Grants sought to preclude evidence of their own negligence or that of non-party defendants other than the Builder. The Grants argued comparative fault was an affirmative defense that had been waived due to the entry of default. The trial court granted the Grants' motion to preclude evidence of their own negligence. The court then granted a stay of the proceedings for the Bensons to file a special action petition, which this Court declined.

¶11 Following a two-day evidentiary hearing, the trial court found that the Grants proved damages in the amount of $473,120. Subtracting from this the $350,000 settlement with Builder, the trial court determined that the Bensons owed the remaining $123,119.94. The trial court declined to award damages for "loss of rent or reduction in value due to repairs," because they were "a result of the actions of [Builder] alone."

¶12 The court preliminarily awarded the Grants attorneys' fees and costs. The Grants' attorney, however, failed to timely file an affidavit of fees within twenty days pursuant to Rule 54(g), and sought an extension of time. The Bensons objected and argued that they would be prejudiced by it because the only reason for their liability was their own untimely response to the entry of default. The trial court denied an extension and

awarded no attorneys' fees, but awarded costs in the amount of $14,393.04.

¶13 The trial court denied the Grants' motion for new trial. The Grants timely appeal and the Bensons timely cross-appeal.

DISCUSSION

1. The Bensons' Cross-claims

¶14 The Bensons contend that the trial court erred in refusing to set aside the entry of default. Because resolution of this issue in the Bensons' favor would render the remaining issues moot, we address it first.

¶15 We review a superior court decision on a motion to set aside default judgment for a clear abuse of discretion. *Goglia v. Bodnar*, 156 Ariz. 12, 16, 749 P.2d 921, 925 (App. 1987). Although the Bensons argue substantive reasons for why the default judgment is invalid, we review only the denial of the motion to set aside, not the propriety of the underlying judgment. *Hirsch v. Nat'l Van Lines, Inc.*, 136 Ariz. 304, 311, 666 P.2d 49, 56 (1983).

¶16 Under Rule 55(c), a court may set aside a default judgment in accordance with Rule 60(c). The moving party must make an adequate showing (1) it acted promptly in seeking relief from the default judgment, (2) its failure to file a timely answer was excusable under one of the subdivisions of Rule

60(c), and (3) it had a meritorious defense. *United Imps. & Exps., Inc. v. Superior Court (Peterson)*, 134 Ariz. 43, 45, 653 P.2d 691, 693 (1982).

¶17 Here, the trial court implicitly found that the Bensons failed to act promptly in seeking relief.

> The Court finds that the defendants, the Bensons, were served and that default was entered in July 2007, that prior to that time they had been engaged in providing discovery to the plaintiffs in this case, that even if they called and talked to [the Grants' attorney] and she indicated that there was nothing for them to do, that conversation occurred prior to the motion for entry of default and the entry of default.
>
> The Court further finds that it was over 100 days before they requested that that default be set aside. The Court cannot find good cause again to set aside the default.

These findings are not contested. Because we defer to the trial court's determination that the Bensons did not act reasonably in the delay, we find no abuse of discretion in denying the motion to set aside the default. *See Hilgeman v. Am. Mortg. Secs., Inc.*, 196 Ariz. 215, 220, ¶ 15, 994 P.2d 1030, 1035 (App. 2000).

¶18 The Bensons further contend that the default judgment was legally void because the Grants had no right to recover damages under the express terms of the contract. The Bensons assert that the contract allocates risk of property damage to the Grants such that the Bensons' only liability after the

purchase is for defects they knew about but did not disclose. Because the complaint did not expressly state that the Bensons had actual knowledge of the defects, the Bensons argue the Grants are not entitled to any relief. Accordingly, they argue the complaint fails to state a claim, and the default judgment is void. The trial court rejected this argument in the Bensons' renewed motion to set aside the default.

¶19 By entry of default judgment, a defendant admits all material allegations, but not facts that are not well-pleaded or conclusions of law. *S. Ariz. Sch. For Boys*, *Inc. v. Chery,* 119 Ariz. 277, 281-82, 580 P.2d 738, 742-43 (App. 1978). Therefore, a default judgment cannot be based on a complaint which fails to state a cause of action. *Ness v. Greater Ariz. Realty, Inc.*, 21 Ariz. App. 231, 232, 517 P.2d 1278, 1279 (App. 1974).

¶20 In this case, the complaint pled sufficient facts to state several causes of action in tort, which we need not address because the trial court awarded only contract damages. Assuming, without deciding, that the Bensons were only contractually liable for defects that they actually knew about but did not disclose, we believe that the complaint sufficiently put the Bensons on notice of the full extent of their liability. The complaint specifically alleged that the Bensons

> *failed to identify* long-standing defects in the Property, such as roof leaks, floor covering issues, cracking, stucco issues and

> grading and drainage defects, failed to identify all of the repairs that had been done or needed further to be done, *and represented* that all repairs or improvements were fully permitted and done by fully-licensed people. In point of fact, on information and belief, there have been repairs done that were *not disclosed* . . . . In addition . . . repairs . . . were done incompetently and have actually magnified the original defects and damages, either by not attending to them or *by covering them so as to effectively conceal them . . . . The Seller's Property Disclosure Statement was false* in that it mis-stated [sic] or *omitted or only told half-truths respecting the Property and its past operations.*
>
> . . . .
>
> The Buyers reasonably and justifiably relied on the truth, accuracy and completeness of the information provided by Defendants.

(Emphasis added.) We reject the argument that the Rules required more specificity than this, particularly in light of the fact that the Bensons failed to timely respond and defaulted.

¶21 The Bensons argue that the Grants' alternative tort claims were barred by the economic loss doctrine, which limits a party to contractual remedies for economic damages unaccompanied by physical injury. *See Flagstaff Affordable Hous. Ltd. P'ship v. Design Alliance, Inc.*, 223 Ariz. 320, 321, ¶ 1, 223 P.3d 664, 665 (2010). They further contend the complaint failed to sufficiently plead a claim for negligent misrepresentation, and the trial court failed to consider the Grant's contributory negligence as part of the comparative fault determination.

Because the trial court awarded no tort damages, concluding that they were pled in the alternative and contractual remedies were greater, the Bensons suffered no prejudice from any of these alleged errors.

¶22 The Bensons also argue that the trial court considered a Prior Buyer Report that was not legally relevant to the Grants' claims. We disagree. The report was relevant because it tended to show the Bensons knew of repairs made to the property that were not disclosed. Moreover, the Bensons objected to the admission of this report based only on foundation. Their counsel explained that he was not objecting to the accuracy of the report, but only that Mr. Benson never received it. Having failed to object to the relevance of the report at the time it was offered into evidence, the Bensons have waived that objection on appeal. *State v. Kelly,* 122 Ariz. 495, 497, 595 P.2d 1040, 1042 (App. 1979) (noting that "raising one objection at trial does not preserve another objection on appeal.").

2. The Grants' Appeal

¶23 The Grants' primary issue on appeal is that the amount of damages awarded was too low. They contend the trial court erred in considering the comparative fault of each defendant to determine the amount of damages. They argue that the trial court could not apportion fault to the Builder because it previously

ruled that the Grants' claims for damages against the Builder and the Bensons were "identical." We disagree.

¶24 Default operates as a judicial admission to the material allegations of a complaint and establishes the plaintiff's right to recovery and the fact of damages. *S. Ariz. Sch.*, 119 Ariz. at 282, 580 P.2d at 743. In effect, the defendant admits to the truth of all material allegations in the complaint and to liability for the damages. *Id.* This does not mean, however, that the defendant admits to the amount of damages the plaintiff alleges. *Id.* Therefore, the trial court could find that the Bensons would be equally liable, but not equally at fault for certain tort damages.

¶25 Moreover, the trial court expressly did not award tort damages. Even if it had, we would find no error in considering comparative fault. In an action for property damage involving multiple tortfeasors, the amount of damages a plaintiff can recover is governed by the Uniform Contribution Among Tortfeasors Acts ("UCATA"), which Arizona has adopted. *See* A.R.S. §§ 12-2501 to -2509 (2003). UCATA expressly requires the trial court to determine the relative degree of fault of each defendant. Section 12-2506 states, in pertinent part:

> A. Each defendant is liable only for the amount of damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a

> separate judgment shall be entered against the defendant for that amount. . . .
>
> B. In assessing percentages of fault[,] the trier of fact shall consider the fault of all persons who contributed to the . . . damage to property . . . . Negligence or fault of a nonparty may be considered if the plaintiff entered into a settlement agreement with the nonparty . . . .

¶26 Therefore, to the extent tort damages were at issue at the apportionment hearing, the trial court correctly ruled that it must apportion those damages.

¶27 This leads to the issue of contract damages, which was the basis for the trial court's damages award. The trial court set forth various amounts constituting the total amount of contract damages, including $473,119.94 in costs for professionals and consultants, repairs and future repairs. It then offset that amount with the $350,000 settlement with the Builder. The Grants argue the offset was inappropriate because the Bensons should be responsible for all damages. We disagree. The offset was necessary to avoid double recovery. *See Seekings v. Jimmy GMC of Tucson, Inc.*, 130 Ariz. 596, 601, 638 P.2d 210, 215 (Ariz. 1981) (noting plaintiff is not entitled to double recovery for breach of warranty). Therefore, with one exception, we find no error by the trial court in determining overall damages and applying an offset.

¶28 The exception is the damages for lost rents. The trial court explained that it "does not award damages for loss of rent or reduction in value due to repairs. The remaining damages were incurred as a result of the actions of [Builder] alone." Damages for reduction in value may be included in the award for further repairs, but loss of rents does not appear to have been included at all. In denying the Grants' motion for new trial, the trial court "did not find that those damages were the result of defendants' liability." That liability, however, had already been established by default and the Grants presented evidence from a realtor that the loss of rents was $42,840. That amount was disputed, but we cannot conclude from this record that the trial court left it out because it determined there was no actual loss of rents damages. Therefore, we vacate the damages award to the extent it failed to include loss of rents in the calculation of total damages. We affirm it in all other respects. We remand to the trial court to determine the amount, if any, of awardable damages for loss of rents.

¶29 The Grants next argue that introducing evidence of comparative fault at the Rule 55(c) hearing permitted the Bensons to litigate "fault" and improperly raise affirmative defenses even though default judgment had been entered. We disagree. The Grants appear to confuse judicial admission of "liability" for damages that result from default, with the

amount of tort damages that can be recovered, which is based on "fault." A.R.S. § 12-2506(F)(2) (defining "fault" to include both breach of a duty and proximate causation).

¶30 As discussed above, a default only establishes the right to recover damages and the fact of damages. *S. Ariz. Sch.,* 119 Ariz. at 282, 580 P.2d at 743. The amount of tort damages that may be recovered from any particular defendant, however, is statutorily limited. A.R.S. § 12-2506(A). The Bensons could, after default, dispute the amount of damages based on the comparative fault of others, even to the point of zero, without denying liability for or the fact of damages. *See id.* Because tort damages were disputed, we find no error in the trial court's consideration of comparative fault.

3. Affidavit of Attorneys' fees

¶31 The Grants argue the trial court erred in refusing to extend the time to file their affidavit of attorneys' fees pursuant to *Azstar v. U.S. Fire Ins. Co.*, 223 Ariz. 463, 224 P.3d 960 (App. 2010), and *Nat'l Broker Assocs., Inc. v. Marlyn Nutraceuticals, Inc.*, 211 Ariz. 210, 119 P.3d 477 (App. 2005). These cases hold that it is not an abuse of discretion under Rule 54(g), for the trial court to extend the time to file an affidavit where there is no prejudice to the other party. *Aztar*, 223 Ariz. at 479-80, ¶¶ 61-62, 224 P.3d at 976-77; *Nat'l Broker*, 211 Ariz. at 218, ¶ 38, 119 P.3d at 485. This does not mean that

a trial court must do so. Nothing in the record suggests, as the Grants now contend, that the trial court was unaware of its discretion. The Bensons argued the Grants would not be prejudiced if the motion was granted. We assume the trial court considered this when it made its decision, but find no abuse of discretion.

4. Attorneys' fees on appeal

¶32 The Grants seek attorneys' fees on appeal because this case "arises out of contract" pursuant to A.R.S. § 12-341.01(C) (2003). Because paragraph A refers to "fees arising out of a contract," we assume they mean A.R.S. § 12-341.01(A). The Bensons also seek attorneys' fees and costs pursuant to A.R.S. §§ 12-341 and -341.01(A) and Arizona Rules of Civil Appellate Procedure 21. Because each side has prevailed in part, we award the Bensons attorneys' fees and costs on appeal for the portion relating to contract damages for loss of rents. We deny all other requests.

CONCLUSION

¶33 For the reasons stated, we affirm in part the damages award, vacate the award to the extent it does not include damages for loss of rents, and remand for a determination of

that amount. We affirm the trial court's rulings on the Bensons' cross-claims.

/s/
PATRICK IRVINE, Judge

CONCURRING:

/s/
ANN A. SCOTT TIMMER, Presiding Judge

/s/
DANIEL A. BARKER, Judge