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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| RUSSELL R. SHOLES and MARY L. SHOLES, husband and wife,<br><br>Plaintiffs/Appellants,<br><br>v.<br><br>JUDY R. FERNANDO,<br><br>Defendant/Appellee. | 2 CA-CV 2011-0060<br>DEPARTMENT A<br><br>MEMORANDUM DECISION<br>Not for Publication<br>Rule 28, Rules of Civil Appellate Procedure |

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20105162

Honorable Carmine Cornelio, Judge

AFFIRMED

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Russell R. Sholes
Cortaro
In Propria Persona

Mary L. Sholes
Cortaro
In Propria Persona

Mesch, Clark & Rothschild, P.C.
By Michael J. Crawford and Paul A. Loucks
Tucson
Attorneys for Defendant/
Appellee Fernando

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B R A M M E R, Judge.

**¶1** Russell and Mary Sholes (the Sholes) appeal from the trial court's order entering summary judgment against them and in favor of Judy Fernando-Sholes and her marital community, and awarding Judy her costs and attorney fees. The Sholes argue the court erred in determining their claims were barred by the statute of limitations and the doctrine of issue preclusion and by granting Judy her attorney fees. We affirm.

## Factual and Procedural Background

**¶2** When reviewing a trial court's grant of a motion for summary judgment, we view the evidence in the light most favorable to the non-moving party. *Grand v. Nacchio*, 214 Ariz. 9, ¶ 3, 147 P.3d 763, 767 (App. 2006). In June 2010, the Sholes filed a complaint in Pima County against Judy and her husband alleging breach of contract, breach of the covenant of good faith and fair dealing, unjust enrichment, and promissory estoppel. The Sholes alleged they and Judy had "entered into a verbal agreement, whereby the Sholes agreed to loan [Judy] and her husband . . . $222,000.00 so that she could save her home from foreclosure and avoid litigation." They assert the agreement provided Judy would repay them with proceeds from the sale of the home or, if the property did not sell by March 2006, she would execute a promissory note and a deed of trust in their favor. The Sholes alleged they had demanded execution of the documents, and Judy had refused to comply.

**¶3** Judy filed a motion to dismiss for failure to state a claim upon which relief could be granted, arguing the statute of limitations had expired and the claims previously had been litigated and reduced to a final judgment in her favor in a 2006 Maricopa county

case.[1] After a hearing on the motion, during which the parties stipulated that the trial court could proceed as if the motion was one for summary judgment, the court found the Sholes' claims barred by the doctrine of issue preclusion and because the statute of limitations had expired. The court granted judgment in favor of Judy and her marital community and awarded her costs and attorney fees. The Sholes moved for a new trial and to amend or alter the judgment, and the court denied the motion. This appeal followed.

## Discussion

**¶4** On appeal from a summary judgment, we review de novo whether the trial court erred in applying the law and whether any genuine issues of material fact exist. *Grand*, 214 Ariz. 9, ¶ 26, 147 P.3d at 772. Summary judgment is proper where "the facts produced in support of the claim or defense have so little probative value . . . 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).

### Statute of Limitations

**¶5** The trial court found the Sholes' 2010 complaint was filed beyond the three-year limit imposed by A.R.S. § 12-543 for oral debts. It found any breach of the alleged oral agreement had occurred by March 2006 when Judy did not execute the

[1]The Maricopa county case, based on the same alleged oral loan agreement, asserted claims against Judy of, inter alia, breach of contract, breach of the covenant of good faith and fair dealing, and unjust enrichment. Although Judy's husband, Appellants' son, was also named a defendant in that case, the claims were directed against Judy individually as her separate property debt.

promissory note and deed of trust and that the Sholes had "confirmed the breach and materiality by filing a lawsuit over that breach in May 2006 in Maricopa County." We agree.

**¶6** The Sholes argue the limitations period was "tolled by the filing of the [previous Maricopa county] lawsuit."[2] They support their argument in part by relying on *Third & Catalina Associates v. City of Phoenix*, 182 Ariz. 203, 895 P.2d 115 (App. 1994), and *Gideon v. St. Charles*, 16 Ariz. 435, 146 P. 925 (1915). As the trial court explained below, these cases clearly are distinguishable and do not support the conclusion that filing the Maricopa county action tolled the statute of limitations in this case. *See Third & Catalina Assocs.*, 182 Ariz. at 207, 895 P.2d at 119 (statute of limitations tolled while appellant exhausted administrative remedies as required by law); *Gideon*, 16 Ariz. at 439, 146 P. at 927 (cause not barred where complaint filed within limitations period and summons filed afterward).

**¶7** The Sholes also suggest the statute of limitations was tolled because a final determination in the Maricopa county action was a necessary prerequisite to bringing the subsequent claim because the possibility the loan could be a community debt "could hardly [have been] anticipated." The limitations period may be tolled when a pending action is "practically conclusive as to the nature and extent of a party's rights, and where

[2]The Sholes argue in their reply brief that the second action was saved by A.R.S. § 12-504, which allows a new action to be filed within six months of the termination of a previous action in some circumstances. However, we decline to address this argument because it was raised for the first time in the reply brief. *See Mason v. Cansino*, 195 Ariz. 465, n.1, 990 P.2d 666, 668 n.1 (App. 1999).

his success thereunder is a prerequisite to his right to maintain a new action." *City of Phx. v. Sittenfeld*, 53 Ariz. 240, 249, 88 P.2d 83, 87 (1939). However, the statute of limitations is not tolled by a related action unless the first action is a legal prerequisite to the second. For example, in *Desruisseau v. Cameron*, 125 Ariz. 511, 512, 611 P.2d 98, 99 (App. 1980), the plaintiff argued his right of action for fraud in the purchase of his property did not accrue until final resolution of an action quieting title to a strip of land in the neighboring landowner. However, the court determined he had notice of the possible fraud when the quiet title claim was filed and the limitations period therefore began at that time. *Id.* The court explained: "The fact that [the plaintiff] chose not to proceed . . . was a matter of strategy and fails to relieve [plaintiff] from the effect of A.R.S. § 12-543(3)." *Id.* at 513, 611 P.2d at 100. In this case, as the trial court correctly noted, the Sholes "did not need to file the Maricopa County suit to obtain a right or determination that this suit was valid." Rather, as in *Desruisseau*, the Sholes decided not to proceed against the marital community in the first case, a strategic decision that does not relieve them from the operation of the statute of limitations.

**¶8** In a related argument, the Sholes urge the statute of limitations period was tolled by the doctrine of equitable tolling because Judy "concealed the cause of action" by "not com[ing] out with the community debt argument until well into the Maricopa [c]ase." We review the trial court's determination there was no factual basis for an equitable tolling defense for an abuse of discretion. *See McCloud v. State*, 217 Ariz. 82, ¶ 17, 170 P.3d 691, 697-98 (App. 2007) (reviewing for abuse of discretion where doctrine unavailable based on facts). Equitable tolling may apply when a plaintiff is

"excusably ignorant of the limitations period and the defendant would not be prejudiced by the late filing." *Kyles v. Contractors/Eng'rs Supply, Inc.*, 190 Ariz. 403, 405-06, 949 P.2d 63, 65-66 (App. 1997) (equitable tolling applied where right-to-sue notice incorrectly stated deadline for filing action).

**¶9** The Sholes do not cite any part of the record to dispute the trial court's determination that "there are no facts upon which an equitable tolling defense is presented" because the fact the Sholes made a loan to Judy or the marital community during the marriage was not concealed. Where "plaintiffs were aware of a claim they failed to pursue in a timely manner . . . , equitable tolling simply does not apply." *Stulce v. Salt River Project Agric. Improvement & Power Dist.*, 197 Ariz. 87, ¶ 33, 3 P.3d 1007, 1015 (App. 1999). The Sholes' 2006 complaint in the Maricopa county case alleged Judy had borrowed money from them while she had been married to their son, and the money had not been repaid as promised. *See Cardinal & Stachel, P.C. v. Curtiss*, 225 Ariz. 381, ¶ 6, 238 P.3d 649, 651 (App. 2010) (debt incurred during marriage generally presumed community obligation absent evidence otherwise). Although the Sholes focus on Judy's characterization of the loan during the Maricopa county case, they had independent knowledge of its nature. The Sholes alleged in this case that they had agreed to loan "[Judy] and her husband" the money and that both had agreed to repay them. Taking the Sholes' allegations as true, they were aware at the time of the agreement that both Judy and their son were obligated to repay it. Therefore, once the loan was not repaid as promised, they should have had notice of the claim against the marital community. *See Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of Am.*, 182 Ariz. 586, 588, 898 P.2d

964, 966 (1995) (under discovery rule, cause of action accrues when plaintiff knows or should know through reasonable diligence facts underlying cause).

**¶10** The Sholes alternatively argue § 12-543, which provides that actions to collect an oral debt must be commenced within three years of accrual, is "the wrong statute of limitations" to apply to their action. The Sholes' complaint alleged "the parties [had] entered into a verbal agreement" about the loan. However, the Sholes later alleged a facsimile (fax) sent by Judy converted the agreement into a "contract in writing" controlled by the six-year limitation period in A.R.S. § 12-548.[3] The fax, attached as an exhibit to the Sholes' response to Judy's motion to dismiss, appears to be a printout of an electronic mail message (email) or letter from Judy to Bruce in response to a request for execution of a promissory note and deed. The email requests evidence of alleged payments and proposes an agreement to limit future claims, concluding with the statement: "My lawyer will look at these and then I may sign." There are various notes on the margins of the unsigned page in what appear to be the handwriting of several people. The fax does not include the required elements of a contract, and the Sholes offer no reason the fax should be considered a separate contract absent those elements. *See Contempo Constr. Co. v. Mountain States Tel. & Tel. Co.*, 153 Ariz. 279, 281, 736 P.2d

[3]The Sholes also propose the five-year limitations period for a "demand note" or the four-year period for "specific performance to convey . . . real estate" should apply. However, they fail to identify the relevant statutes of limitation or to explain how the facts of this action support their interpretation. Therefore, they have waived this argument. *See* Ariz. R. Civ. App. P. 13(a)(6) (appellate brief argument shall contain "citations to the authorities, statutes and parts of the record relied on"); *Polanco v. Indus. Comm'n*, 214 Ariz. 489, n.2, 154 P.3d 391, 393-94 n.2 (App. 2007) (appellant's failure to develop and support argument waives issue on appeal).

13, 15 (App. 1987) (enforceable contract must contain offer, acceptance, consideration, specific terms).

**¶11** Alternatively, the Sholes suggest Judy's fax was a written acknowledgment that began a new limitations period. An acknowledgment of the justness of a claim may terminate operation of the applicable statute of limitations where it is in writing and signed by the party to be charged. A.R.S. § 12-508; *De Anza Land & Leisure Corp. v. Raineri*, 137 Ariz. 262, 266-67, 669 P.2d 1339, 1343-44 (App. 1983). However, the portion of the fax to which the Sholes appear to refer in their brief is an unsigned, handwritten note at the bottom of a page which discusses "not be[ing] threatened and bullied anymore" and contains a postscript including the phrase, "You will get every penny back!" Even assuming, without deciding, the fax acknowledges sufficiently the justness of the Sholes' claim, it is not signed and therefore does not comply with § 12-508 so as to preclude operation of the statute of limitations. Moreover, any new promise under the statute "must be sufficient in itself to support an action for the debt, independent of the original promise." *De Anza*, 137 Ariz. at 267, 669 P.2d at 1344. As discussed above, the fax is not an enforceable contract. Therefore, it does not prevent the statute of limitations from barring the Sholes' claims.[4]

[4]The Sholes also allege a 2008 affidavit signed by Judy acknowledges the "justness" of their claim because it admits she offered to settle the claim by paying the amount requested. However, the affidavit makes no such acknowledgment, clearly stating even though she "owe[d] them nothing," she had offered to pay the Sholes to settle the dispute and "extricate" them from her personal affairs.

**¶12** Next, the Sholes argue Judy was "judicially estopped from den[]ying Russell Sholes had a disability that prevented the sta[t]ute of limitations from running as to him." The Sholes do not contend they have proven the disability's existence but rely instead on their allegation that Judy had argued Russell was incompetent during a previous proceeding. However, the document to which the Sholes refer containing Judy's alleged previous statements was stricken from the record, and so we may not review it. Therefore, the argument is waived. *See* Ariz. R. Civ. App. P. 13(a)(6) (appellate brief argument shall contain "citations to the authorities, statutes and parts of the record relied on").

**¶13** The trial court did not err in determining the Sholes' claims were barred by the statute of limitations. Because the Sholes' action was dismissed properly on that basis, we need not address whether their claims were barred by the doctrine of issue preclusion.

**Attorney Fees**

**¶14** The Sholes argue the trial court erred in awarding Judy her attorney fees pursuant to A.R.S. § 12-341.01 because the award was not supported by the record and because the court failed to make "appropriate findings of fact and conclusions of law." We review a court's decision whether to award attorney fees for an abuse of discretion. *Rowland v. Great States Ins. Co.*, 199 Ariz. 577, ¶ 31, 20 P.3d 1158, 1168 (App. 2001). The court found it was appropriate to award Judy attorney fees pursuant to § 12-341.01 but did not specify under which section of that statute the award was made. However, the record supports a determination that fees were appropriate under § 12-341.01(A), which

provides "[i]n any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney fees." A defendant is entitled to attorney fees even where "the plaintiff is not entitled to recover on the contract . . . , or if the court finds that the contract on which the action is based does not exist." *Berthot v. Sec. Pac. Bank of Ariz.*, 170 Ariz. 318, 324, 823 P.2d 1326, 1332 (App. 1991).

**¶15** In this case, the Sholes brought an action for, inter alia, breach of contract and breach of the covenant of good faith and fair dealing, specifically alleging this matter "ar[ose] out of contract." *See Dooley v. O'Brien*, 226 Ariz. 149, ¶ 12, 244 P.3d 586, 589 (App. 2010) (breach of duty created by contractual relationship and not by law sounds in contract). Moreover, § 12-341.01(A) applies to this case because the alleged loan agreement was "the main factor causing the dispute." *See Keystone Floor & More, LLC v. Ariz. Registrar of Contractors*, 223 Ariz. 27, ¶ 10, 219 P.3d 237, 240 (App. 2009). A trial court is not required to make specific findings to support an award of attorney fees under § 12-341.01(A). *State v. Richey*, 160 Ariz. 564, 565, 774 P.2d 1354, 1355 (1989) (court must make findings to support award under A.R.S. § 12-341.01(C) because clear and convincing evidence required, but such findings not required under § 12-341.01(A)). Therefore, the court was not required to make specific findings to support the attorney fee award in this case.

**¶16** The Sholes also argue that Judy did not incur attorney fees and that the amount of the award was "excessive, unreasonable and . . . outrageous." To support their argument that Judy did not incur fees in this case, the Sholes attempt to cite an attachment to their motion for a new trial; however, the attachment does not appear in the

record. Moreover, the Sholes describe the missing attachment as a motion to set aside judgment in the Maricopa county case but do not explain how a discussion of fees incurred in that case would support sufficiently their argument that no fees were incurred in this one. The trial court noted below that the Sholes provided "no basis" for the similar argument made in their motion for reconsideration. The Sholes fail to provide argument or evidence to support their contention the fee award was excessive and outrageous, and so we do not address it. *See* Ariz. R. Civ. App. P. 13(a)(6); *Polanco v. Indus. Comm'n*, 214 Ariz. 489, n.2, 154 P.3d 391, 393-94 n.2 (App. 2007) (appellant's failure to develop and support argument waives issue on appeal).

**Disposition**

**¶17** For the foregoing reasons, we affirm. Judy requests an award of attorney fees pursuant to § 12-341.01. We grant her request upon compliance with Rule 21, Ariz. R. Civ. App. P.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge