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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

LOUIS L. JOHNSON, JR., dba BUTCH JOHNSON FARMS, Plaintiff/Appellee/ Cross-Appellant, v. ROBERT M. BINKLEY and TAMMY L. BINKLEY, husband and wife, Defendants/Appellants/ Cross-Appellees.	2 CA-CV 2012-0167 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CV201000228

Honorable James L. Conlogue, Judge

AFFIRMED

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K E L L Y, Presiding Judge.

¶1 Robert and Tammy Binkley appeal from the trial court's judgment in favor of Louis Johnson, Jr., in which the court concluded the Binkleys had converted property belonging to Johnson after their purchase of three contiguous parcels of farmland (the Farm) at a trustee's sale. The Binkleys argue the court erred by concluding: (1) the deed of trust did not encumber personal property other than fixtures, (2) Johnson had not abandoned property left on the Farm, (3) storage containers, a fuel system, and fertilizer tanks were not fixtures, (4) Johnson owned corn grown by a tenant and stored on the land, and (5) the amount of corn converted was 420 tons. On cross-appeal, Johnson argues the trial court erred by: "analyzing the grain bins, elevator, and truck scale as a single unit" to conclude the granary was a fixture; concluding the grain bins, elevator, and truck scale were fixtures; and failing to award him attorney fees pursuant to A.R.S. § 12-341.01. We affirm.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to upholding the trial court's ruling." *Hammoudeh v. Jada*, 222 Ariz. 570, ¶ 2, 218 P.3d 1027, 1028 (App. 2009). In 2005, Johnson executed a promissory note in favor of J.P. Morgan Chase Bank secured by a deed of trust conveying Johnson's interest in the Farm. Thereafter, Chase Bank foreclosed on the property, and in December 2009, a trustee's sale was conducted, and the Binkleys purchased the bank's interest in the Farm.

¶3 In March 2010, Johnson filed a complaint alleging the Binkleys had converted machinery, equipment, and corn that remained on the Farm after the Binkleys had denied him access to the property. In response, the Binkleys alleged the disputed property no longer belonged to Johnson, citing language in the trustee's deed and bill of sale. Johnson filed a motion for summary judgment on the conversion claim and requested an evidentiary hearing. The court granted the motion, concluding the deed of trust and the trustee's sale had "conveyed no personal property other than fixtures." The court set an evidentiary hearing on damages.

¶4 After a three-day trial, the court found that the Binkleys had permitted Johnson to remain on the Farm for approximately one month following the sale and that the parties had discussed personal property issues during that time. The court also found "the parties' relationship became strained when [Johnson] removed personal property from the Johnson Farm without authorization from . . . Robert Binkley. Plaintiff was thereafter excluded from the Johnson Farm." The court concluded Johnson had not abandoned any property by leaving the Farm, and further concluded he had not "abandon[ed] any personal property through any discussions he had with . . . Robert Binkley."

¶5 The trial court found, inter alia, that two storage containers, three bulk fuel tanks, and multiple steel and polyethylene ("poly") fertilizer tanks were personal property, and not fixtures. It found the Farm's granary, including its constituent parts, was a fixture. The court also found Johnson was the owner of approximately 420 tons of corn that had been left in grain bins on the Farm, with a value of $170.00 per ton.

¶6 The trial court entered final judgment in Johnson's favor for the converted corn and personal property. It denied Johnson's request for attorney fees.

Discussion

Appeal

I. Deed of Trust

¶7 The Binkleys first argue the trial court erred by concluding as a matter of law that the bank "had no interest in personal property under the Deed of Trust and the trustee sale conveyed no personal property other than fixtures." They contend the deed's reference to "a security interest in the rent and personal property" and its definition of "personal property" establish the deed encumbered "all fixtures and personal property." We review issues of contract interpretation de novo. *Miller v. Hehlen*, 209 Ariz. 462, ¶ 5, 104 P.3d 193, 196 (App. 2005).

¶8 The deed of trust included the following language:

> **Cross-Collateralization.** . . . Trustor grants to Lender a Uniform Commercial Code security interest in the Personal Property and Rents.
>
> . . . .
>
> **Security Agreement.** This instrument shall constitute a Security Agreement to the extent any of the Property constitutes fixtures, and Lender shall have all of the rights of a secured party under the Uniform Commercial Code as amended from time to time.
>
> . . . .
>
> **Definitions.** . . . The words "Personal Property" mean all equipment, fixtures, and other articles of personal property

> now or hereafter owned by Trustor, and now or hereafter attached or affixed to the Real Property . . . .

¶9 Our purpose in interpreting a contract is to determine and enforce the intent of the parties. *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 152, 854 P.2d 1134, 1138 (1993). To determine intent, we look first to the plain meaning of the words in the context of the agreement as a whole. *Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, ¶ 9, 218 P.3d 1045, 1050 (App. 2009). When a provision is susceptible to only one reasonable interpretation, we will apply it according to its terms. *IB Prop. Holdings, LLC v. Rancho Del Mar Apartments Ltd. P'ship*, 228 Ariz. 61, ¶ 16, 263 P.3d 69, 74-75 (App. 2011).

¶10 The parties do not dispute the trial court's finding that the deed of trust contained the only security agreement between Johnson and Chase Bank. We agree the language in the document did not create a security interest in personal property other than fixtures. The Binkleys propose that the definition of personal property in the deed (and identical language used in the subsequent trustee's deed and bill of sale to the Binkleys) should be interpreted to create a security interest in "personal property 'now or hereafter owned by Trustor,' and personal property 'now or hereafter attached or affixed to the Real Property.'"[1] However, that interpretation would conflict with the deed's security

[1]In their reply brief, the Binkleys appear to concede that the deed's definition should be read more narrowly—to include only property attached or affixed to the Farm. And because the Binkleys have failed to state "the precise relief sought" on appeal, as required by Rule 13(a)(7), Ariz. R. Civ. App. P., we cannot determine conclusively whether they are asking this court to reverse the trial court's findings as to some or all items of property. However, because it is not clear they intended to abandon this

agreement provision, which provides the deed "shall constitute a Security Agreement to the extent any of the Property constitutes fixtures." We must harmonize the definition of "personal property," as it applies to the creation of a security interest, with the security agreement's express statement that it encumbers only fixtures. *See Tech. Constr., Inc. v. City of Kingman*, 229 Ariz. 564, ¶ 10, 278 P.3d 906, 910 (App. 2012) (we interpret agreement as whole and reconcile terms, "if reconciliation can be accomplished by any reasonable interpretation").

¶11 In any event, if the deed had purported to grant a security interest in "personal property 'now or hereafter owned by Trustor,'" it would not have created an enforceable security interest. The description of personal property in a security instrument must "reasonably identif[y] what is described," and general descriptions such as "all the debtor's personal property" are insufficient. A.R.S. § 47-9108(A), (C). For that reason, even if we were to accept the Binkleys' proposed interpretation of the deed, it would have been insufficient to create an interest in personal property. Therefore, the trial court did not err by concluding the deed of trust did not encumber personal property other than fixtures.

¶12 The Binkleys also argue Johnson's personal property was encumbered through Uniform Commercial Code financing statements. Citing A.R.S. § 47-1201(B)(35), they argue financing statements "are used to create" security interests. However, § 47-1201(B)(35) merely defines "security interest," and the Binkleys have not

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argument, we address their proposed interpretation as it was articulated in the opening brief and in the trial court.

provided any authority to support their suggestion that a party may create a security interest by filing a financing statement that claims a greater interest than that specified in an agreement. To the contrary, to create an enforceable security interest in the type of property involved in this case, the debtor generally must sign a security agreement containing a description of the collateral. A.R.S. § 47-9203(B)(3). And the purpose of filing a financing statement is merely to perfect an existing interest. *See* A.R.S. § 47-9501. Therefore, the trial court did not err by concluding the Binkleys did not acquire an interest in personal property other than fixtures.

II. Abandonment

¶13 The Binkleys argue that, even if personal property was not secured by the deed of trust, Johnson abandoned whatever personal property he left behind on the Farm. They argue the trial court abused its discretion by "fail[ing] to recognize [Johnson]'s actions and omissions as abandonment." We will defer to the trial court's findings of fact unless they are clearly erroneous, "even if substantial conflicting evidence exists." *John C. Lincoln Hosp. & Health Corp. v. Maricopa Cnty.*, 208 Ariz. 532, ¶ 10, 96 P.3d 530, 535 (App. 2004). However, we are not bound by the court's legal conclusions, which we review de novo. *Sholes v. Fernando*, 228 Ariz. 455, ¶ 6, 268 P.3d 1112, 1115 (App. 2011).

¶14 To abandon personal property, "one must voluntarily and intentionally give up a known right." *Grande v. Jennings*, 229 Ariz. 584, ¶ 13, 278 P.3d 1287, 1291 (App. 2012). Abandonment involves an intent to abandon, together with an act or omission that carries that intention into effect. *Mason v. Hasso*, 90 Ariz. 126, 129, 367 P.2d 1, 3

(1961). "Abandonment of personal property must be affirmatively proved, with clear and convincing evidence, by the party asserting it." *Strawberry Water Co. v. Paulsen*, 220 Ariz. 401, ¶ 16, 207 P.3d 654, 661 (App. 2008); *see also Grande*, 229 Ariz. 584, ¶ 18, 278 P.3d at 1292 (abandonment not presumed).

¶15 Johnson testified at trial that, when he had removed some personal property from the Farm after the sale, Robert Binkley became upset. He and Binkley then agreed he would have more time to remove his personal property from the Farm. However, before Johnson could finish doing so, the sheriff notified him Binkley had filed a complaint and he could not return to the property without facing trespassing charges. Johnson testified he had not intended to "leave behind any property," but "was told to leave." Robert Binkley testified at trial that, after going to the Farm and seeing much of Johnson's property was gone, he had called Johnson and asked, "are you finished?" According to Binkley, Johnson replied "yes."

¶16 The Binkleys argue that Robert Binkley's testimony established conclusively that Johnson had abandoned any property left on the Farm. In their reply brief, they argue there was a "lack of any other credible evidence to the contrary" because Johnson's testimony that he had been excluded from the farm was "self-serving." We cannot agree. First, the trial court would not have been required to accept Binkley's account of his conversation with Johnson even if it had been uncontradicted. *See Kocher v. Dep't of Revenue*, 206 Ariz. 480, ¶ 10, 80 P.3d 287, 289 (App. 2003) (fact-finder not bound by uncontradicted testimony of interested party). Moreover, the court was not required to reject Johnson's testimony merely because he was an interested party. *See*

City of Tucson v. Apache Motors, 74 Ariz. 98, 107-08, 245 P.2d 255, 261 (1952) (factfinder, being sole judge of credibility, "may or may not believe an interested party"). Rather, as the finder of fact, the court was in the best position to resolve any conflicts in the evidence. *See Barlage v. Valentine*, 210 Ariz. 270, n.9, 110 P.3d 371, 379 n.9 (App. 2005). Therefore, the court did not err in concluding Johnson had been excluded from the Farm, did not intend to abandon any property he had left behind, and did not abandon any personal property through his discussions with Robert Binkley.[2]

III. Fixtures

¶17 The Binkleys next argue the trial court erred by concluding the storage containers, fuel system, and fertilizer tanks were personal property, rather than fixtures. Section 47-9102(41), A.R.S., defines "fixtures" as "goods that have become so related to particular real property that an interest in them arises under real property law." In *Fish v. Valley National Bank of Phoenix*, 64 Ariz. 164, 170, 167 P.2d 107, 111 (1946), the court articulated the test in Arizona for whether an item of personal property has become a fixture:

> The rule is that for a chattel to become a fixture and be considered as real estate, three requisites must unite: There must be an annexation to the realty or something appurtenant

[2]The Binkleys allege in their reply brief that Johnson did not demand return of the property after being excluded from the Farm, but they offer no argument or authority to support their suggestion that a failure to demand property after being denied access to it can constitute the voluntary and intentional relinquishment of a right. Therefore, we do not address this argument further. *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).

> thereto; the chattel must have adaptability or application as affixed to the use for which the real estate is appropriated; and there must be an intention of the party to make the chattel a permanent accession to the freehold.

We apply the *Fish* rule in the absence of an agreement between the parties fixing the character of the property. *Voight v. Ott*, 86 Ariz. 128, 133, 341 P.2d 923, 926 (1959). Of the three parts of the *Fish* test, the most important is the intent of the parties respecting the property's use and adaptability. *Murray v. Zerbel*, 159 Ariz. 99, 101, 764 P.2d 1158, 1160 (App. 1988). When the affixor and purchaser of property have no relationship, we consider only objective manifestations of intent. *Id.* Permanent accession generally is presumed where the affixor also is the owner of the realty. *Id.* However, whether property has become a fixture depends upon the particular facts and circumstances of each case. *See Voight*, 86 Ariz. at 134, 341 P.2d at 927.

¶18 Although we review the trial court's ultimate legal conclusion de novo, *Sholes*, 228 Ariz. 455, ¶ 6, 268 P.3d at 1115, we will defer to its findings of fact unless clearly erroneous, *John C. Lincoln Hosp.*, 208 Ariz. 532, ¶ 10, 96 P.3d at 535. The trial court is in the best position to determine the weight to be given to evidence of objective intent to make property a permanent accession. *See In re Pima Cnty. Mental Health No. MH-2010-0047*, 228 Ariz. 94, ¶ 17, 263 P.3d 643, 647 (App. 2011) (trial court in best position to weigh evidence). We also will imply any additional finding necessary to sustain the court's judgment, if reasonably supported by the evidence and not in conflict with its express findings. *Sholes*, 228 Ariz. 455, ¶ 6, 268 P.3d at 1115.

¶19 The Binkleys state that the storage containers and fuel system were referenced in appraisals of the Farm that occurred in 2004 and 2009 for Wells Fargo Bank and Chase Bank, respectively. To the extent they suggest these appraisals constitute agreements that fixed the character of that property, or that the appraisers' opinions are relevant to the *Fish* inquiry, we disagree. Each appraisal was completed by an independent appraiser, and each provided specifically that it was intended solely for use by the bank for lending purposes.[3]

¶20 The Binkleys also argue the purchase agreement between Johnson and one of the Farm's previous owners "identified" some fuel tanks and fertilizer tanks as real property. First, we disagree with the Binkleys' characterization of the purchase contract, which identified those items as "equipment." Moreover, even if there had been such an agreement between Johnson and the previous owner, the Binkleys have not shown that it would bind the current parties. *See* 35A Am. Jur. 2d *Fixtures* § 22 (2013) ("As a general proposition, agreements fixing the status of property as realty or personalty are binding only on the contracting parties and their privies, and are not binding on third parties without notice thereof . . . ."). Therefore, we apply the *Fish* test to each category of property. *See Gomez v. Dykes*, 89 Ariz. 171, 175, 359 P.2d 760, 763 (1961) (*Fish* rule applies in absence of agreement "between the parties").

[3]Moreover, the Binkleys' description of the appraisals' content is misleading. For example, they propose the fuel system "was included in the [2004] appraised value of the Farm," but they cite only the appraisal's accounting of "hazardous substances" on the property.

A. Storage Containers

¶21 The Binkleys argue the trial court erred by concluding two twenty-foot and one forty-foot storage containers were not fixtures. They argue the containers were intended as permanent "sheds or workshops," as evidenced by the fact that they were placed in a "permanent location" with internal shelves and electricity.

¶22 The evidence presented at trial supports the trial court's conclusion that the containers were personal property. Alvin Ratliff, who operates a farm next to the farm at issue in this case and has bought and sold multiple farms, inspected the Farm after Johnson had been excluded. Ratliff testified the storage containers had been on the Farm when Johnson bought it, and the previous owner had "br[ought] them in from his New Mexico farm" on a "semi flatbed trailer." He explained the containers rest on cross ties or concrete blocks that keep them off the ground, but are not otherwise secured to the land. He stated it is typical for farmers to buy, sell, and transfer similar containers. He acknowledged there were electrical cables running to each storage container and there was a faucet adjacent to the forty-foot container. But, in his opinion, they were "[v]ery transportable." Ratliff had moved similar containers from one farm to another depending on the type of crop he was growing.

¶23 The evidence presented at trial supports the trial court's findings that the storage containers were not annexed or adapted to the real property and were not intended to become fixtures. We conclude the court did not err by concluding the containers were not fixtures. *See Fish*, 64 Ariz. at 170, 167 P.2d at 111 (fixture must be annexed to

realty, have adaptability or application to use for which real estate is appropriated, and intended to be permanent accession).

B. Fuel System

¶24 The Binkleys next argue the "fuel system" is a fixture, and the trial court erred in concluding otherwise. There are three fuel tanks on the Farm: a single 10,000 gallon tank and a two-tank system consisting of two tanks tied together and resting on "skids." They argue the tanks are "adapted to and integrated into the farming operation" because on-site fuel storage "is a common and necessary feature of large farms." At trial, an agricultural loan banker testified that all of the farms he has seen have fuel distribution systems, which reduce farmers' needs for fuel deliveries and allow them to "hedge" on fuel prices. Robert Binkley agreed that it would be "almost impossible" to run a farm of this size without a fuel system on site. He testified that there is underground electrical wiring running to a central location next to the two-tank fuel system.

¶25 On the other hand, Ratliff testified that such fuel tanks are moved "on a regular basis" within and between farms on trucks or by dragging them on skids. For example, he testified that one part of the Farm once had five fuel tanks on it but, before the previous owner sold the land to Johnson, he sold two of the tanks and moved another to his new farm. He testified the two-tank system could be "drag[ged] . . . from one spot to another." He stated the electric outlet did not affect the tanks' mobility, that "You disconnect the power, take a screwdriver and disconnect" two or three wires. A previous owner of the farm agreed that fuel tanks can be picked up, put on a truck, and used on another farm.

¶26 The record supports the trial court's determination that the fuel tanks were not annexed or adapted to the real property and were not intended to become fixtures. We therefore agree with the court's conclusion that the fuel tanks were not fixtures. *See Fish*, 64 Ariz. at 170, 167 P.2d at 111.

C. Fertilizer Tanks

¶27 There are a number of steel and poly fertilizer tanks on the Farm. Liquid fertilizer is stored in the tanks and pumped into the irrigation system so that it can be distributed to the crops. The Binkleys argue the trial court should have concluded the tanks are fixtures because they "connect to the irrigation system, annexing them to the Farm," and are "integral" to the farming operation.

¶28 In support of their position, the Binkleys claim Johnson testified he had purchased seven fertilizer tanks "for the purpose of having two tanks permanently located at each pivot." However, his testimony was merely that he bought the tanks for the "convenience" of not having to move the tanks during fertilizer deliveries. As Ratliff explained, it costs extra to have a truck deliver fertilizer to more than one location.

¶29 Ratliff testified that poly tanks are connected by a hose to the pipe that delivers water to the irrigation system. But he also stated that irrigation systems can function without a poly tank and there are other methods of applying fertilizer. He further testified that the fertilizer tanks are not anchored in any way to the ground. They can be lifted or rolled onto a trailer for transportation, and it is "common" to move them to a different location. The tanks also can be moved and used for purposes other than storing fertilizer; for example, Ratliff testified he would "bring or set a couple of these

tanks [to] the field where we are planting . . . and use the[m] as a nurse tank . . . to fill the planter." Ratliff also testified the steel fertilizer tanks were "readily traded between farmers and sold on the open market." He stated fertilizer tanks can be removed without harming the value of the land.

¶30 This evidence supports the court's finding that the fertilizer tanks were not annexed or adapted to the real property and were not intended to become fixtures. We conclude the court did not err by concluding the fertilizer tanks were not fixtures. *See Fish*, 64 Ariz. at 170, 167 P.2d at 111.

IV. Corn

¶31 The Binkleys argue the trial court erred by finding Johnson "was the owner of the corn in the grain bins on [the] Farm" because Johnson had "foreclosed any interest [his tenant] Mahalo Farms had in the corn." We review de novo the legal questions presented by this claim. *Sholes*, 228 Ariz. 455, ¶ 6, 268 P.3d at 1115.

¶32 After growing its 2008 crop on the Farm, Mahalo failed to pay a utility bill as provided in its lease with Johnson, and Johnson paid the outstanding amount to the electric company. To recover the amount he was owed, on December 29, 2009, Johnson held a public auction to sell his interest in 500,000 pounds of yellow corn stored on the Farm. He purchased his interest with a credit bid.

¶33 The Binkleys first contend Johnson did not hold a valid landlord's lien because Mahalo's rent had been paid in full and because any lien Johnson had on the crops pursuant to A.R.S. § 33-362(C) had expired before Johnson sold the corn. The clear implication of the Binkleys' argument is that Mahalo remains the proper owner of

the corn. However, Johnson presented evidence of ownership at trial, including a bill of sale naming him as the successful bidder at a public auction. Even assuming, without deciding, that Johnson did not possess a valid lien when he sold the corn, the Binkleys have provided no evidence to suggest Mahalo objected to the sale or that the sale otherwise has been invalidated. And they have provided no authority to support their suggestion that any technical deficiency in the sale rendered it void absent a direct challenge to the sale from a party with standing. Because the Binkleys have failed to develop an argument that would rebut the evidence of Johnson's ownership, we do not address it further. *See 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).

¶34 The Binkleys also argue on appeal that the trustee's deed conveyed the corn to them as "rental income." Because it appears they did not raise this argument below, we do not address it. *See Cont'l Lighting & Contracting, Inc. v. Premier Grading & Utils., LLC*, 227 Ariz. 382, ¶ 12, 258 P.3d 200, 204 (App. 2011) (legal theories must be presented to trial court so court has opportunity to address issue; failure to raise below waives argument on appeal).

¶35 The Binkleys also argue the trial court erred by finding "[t]here was approximately 420 tons of corn in the grain bins at the time [Johnson] was excluded from the property." We will uphold the trial court's finding unless it is clearly erroneous, "even if substantial conflicting evidence exists." *John C. Lincoln Hosp.*, 208 Ariz. 532, ¶ 10, 96 P.3d at 535.

¶36 The trial court's finding was supported by substantial evidence. Johnson testified that a "corn ticket" is a standard record made when corn is brought in from the field, which reflects the corn's weight and the date it was put in the storage bin. On the second day of trial, Johnson's bookkeeper, Lisa Hill, testified she had completed an audit "to verify the . . . corn tickets." She provided specific examples of errors she had found in a previous audit, and concluded the correct "end result tonnage" was 420 tons. Copies of the corn tickets were admitted into evidence.

¶37 The Binkleys argue the evidence supporting the trial court's determination was "not credible" because Johnson had "changed the amount of corn he was claiming throughout the litigation," Hill could not guarantee there were not missing corn tickets, and Robert Binkley's testimony provided evidence that Johnson had removed additional corn from the granary where it had been stored. However, as the finder of fact, the court was in the best position to resolve any conflicts in the evidence. *See Barlage*, 210 Ariz. 270, n.9, 110 P.3d at 379 n.9. Because its finding was not clearly erroneous, we will uphold it.

Cross-Appeal

I. Granary

¶38 On cross-appeal, Johnson argues the trial court erred by "analyzing the grain bins, elevator, and truck scale as a single unit for purposes of determining whether the 'granary' was a fixture." He argues that the constituent parts of the granary—the grain bins, elevator, and truck scale—were personal property rather than fixtures. We need not address whether the component parts should have been analyzed as a single unit

because, applying the *Fish* test described above, we conclude the grain bins, elevator, and truck scale were fixtures.

¶39 The Farm's granary includes three grain bins, each forty-eight feet in diameter and thirty-three feet high. The trial court found "[e]ach grain bin is attached to a concrete foundation with sixteen inch footings and a floor of approximately six inches of concrete. Each bin has a drying floor approximately twelve inches off the concrete." It also found the bins' location was "carefully selected" and a granary is "uniquely ad[a]pted for use on a grain farm."

¶40 Johnson challenges the trial court's finding that the grain bins were attached to the realty by proposing that "'attach' as it is used in the legal test of a fixture means that the personal property is attached in such a fashion that if [it] is removed, it would seriously damage the real estate . . . and would destroy the essential character of the personal property." Johnson offers no authority to support this definition, and it is not supported by Arizona law, which provides that whether removal would damage the real property is merely a factor "favor[ing] a finding that it is a fixture." *Murray*, 159 Ariz. at 102, 764 P.2d at 1161. In this case, there was sufficient evidence establishing that the grain bins were attached to the realty. Kenneth Babcock, who has been building grain elevators for thirty-five years, testified the bins were bolted to a steel-reinforced concrete foundation with sixteen-inch footings.

¶41 The grain bins clearly are adapted or applicable to the Farm's function. *Fish*, 64 Ariz. at 170, 167 P.2d at 111. Babcock testified a granary is "the profit center" of a farm because it allows the farmer to keep control of the grain until it is time to sell.

And Babcock testified the bins' concrete footings are designed specifically for each location, depending on such factors as the stability of the soil. Johnson proposes that "[t]he requisite degree of adaptation is that the article must become so essential to the real property that the real property cannot perform its desired function without the item." He proposes the item must "effectively become inseparable from the land." However, *Fish* did not set nearly such a high burden for this element of the test, stating only that the property "must have adaptability or application as affixed to the use for which the real estate is appropriated." 64 Ariz. at 170, 167 P.2d at 111.

¶42 The evidence supports the conclusion that the grain bins were intended to be permanent. Not only was each bin constructed with approximately 10,000 bolts and secured to its concrete foundation, Babcock testified it was important to choose a proper location for grain bins and that "[y]ou never plan on [moving them]." He explained it was "a very costly thing" to remove a bin, and often costs more than the bin is worth. For example, it took a month to "put [one of the Farm's] bin[s] up, put the leg up, and connect all the parts." And it can be more difficult to disassemble a grain bin than to assemble it because the process is more dangerous. We conclude the grain bins were fixtures.

¶43 The elevator leg is a structure that contains a "vertical container belt" to move grain from the ground to the top of the grain bins. The trial court found:

> The elevator (leg) is attached to a concrete foundation. A concrete "dump pit" is at the foot of the elevator. Grain is placed in the dump pit and then "augered" to a grain bin. The elevator can transfer grain to each of the three bins.

¶44 Babcock testified that he poured concrete for the leg to "stand[] on." Although Johnson contends "[t]he leg elevator is free standing and is not permanently attached to the realty," the portion of Ratliff's testimony he cites in support did not reveal whether or how the elevator was connected to the realty. At a later point in the hearing, Ratliff explained there is a dump pit between the grain bins, "connected to the [elevator] leg" and that concrete at the base of the leg "frame[s]" the dump pit "so that the leg can auger out of it." And the previous owner who installed the elevator leg agreed that it was "attached to . . . a grain dump . . . [that] sets in the ground around concrete." Accordingly, the evidence supports the trial court's conclusion that the leg is connected to the realty.

¶45 In addition, it is clear from the elevator's function—moving grain from the ground to the top of the bins—that it has "application as affixed to the use for which the [Farm] is appropriated." *Fish*, 64 Ariz. at 170, 167 P.2d at 111. Because testimony established that the elevator was installed on the land by its owner, we may presume it was intended to be permanent. *Murray*, 159 Ariz. at 101, 764 P.2d at 1160. And other evidence also indicated the elevator was intended to be permanent. Ratliff acknowledged that elevators can be moved; he testified that he saw the Farm's previous owner tear down the leg at its previous location, transport it to the Farm on a truck, and reassemble it. However, after the leg was reassembled, concrete was poured for it to stand on and it was attached to the dump pit. The objective evidence reflects that it was thereby intended to be permanently integrated into what Babcock termed the "complex" that included the bins and the leg. Therefore, we conclude the elevator leg in this case was a fixture.

¶46 The trial court found the eighty-foot truck scale was "attached to concrete footers." Testimony at trial established that the scale attached to anchor bolts in a concrete foundation or "pad." Concrete ramps also had been poured on either end of the scale to allow trucks to approach and depart.

¶47 The truck scale also has "adaptability or application as affixed" to use on the Farm. *Fish*, 64 Ariz. at 170, 167 P.2d at 111. Johnson does not dispute the trial court's finding that the scale "is used to weigh the grain contained in the truck prior to unloading and placement in the grain bins via the elevator." And Ratliff testified that this size scale, once it is moved to a farm for a cost of about five thousand dollars, must be releveled and either recertified or recalibrated in its new location. Johnson provides no support for his argument that the "legal test of adaptation" requires "special design or alterations . . . unique to this particular farm," and we conclude the scale was adapted or applied to use on the Farm as required by *Fish*.

¶48 Johnson argues the scale was not intended to be a permanent accession because its bolts were not "spotweld[ed]," the scale can be removed "without damage to the realty and without damage to the scale," and scales are "often resold and used on other farms." As discussed above, whether an item's removal would damage the real property is merely one factor that "favors a finding that it is a fixture," *Murray*, 159 Ariz. at 102, 764 P.2d at 1161, and Johnson has not supported his suggestion that failure to damage the realty upon removal disqualifies an object from being considered a fixture. And while there was testimony that truck scales are traded between farmers, the factual

circumstances surrounding this particular scale reflect that it was intended to be permanent. For those reasons, the truck scale is a fixture.

II. Attorney Fees

¶49 Johnson also argues the trial court erred by failing to award his attorney fees pursuant to A.R.S. § 12-341.01, which provides: "In any contested action arising out of a contract, . . . the court may award the successful party reasonable attorney fees." We consider de novo whether an action "aris[es] out of a contract." *See Schwab Sales, Inc. v. GN Constr. Co.*, 196 Ariz. 33, ¶ 9, 992 P.2d 1128, 1131 (App. 1998) (we review interpretation of statute de novo). Fees may be awarded when tort and breach of contract theories are intertwined, "as long as the cause of action in tort could not exist but for the breach of the contract." *Sparks v. Republic Nat'l Life Ins. Co.*, 132 Ariz. 529, 543, 647 P.2d 1127, 1141 (1982). However, an action does not "aris[e] out of a contract" if a breach of the contract is merely a factual predicate to, but not the essential basis of, the action. *Compare Deutsche Credit Corp. v. Case Power & Equip. Co.*, 179 Ariz. 155, 163, 876 P.2d 1190, 1198 (App. 1994) (conversion action arose out of contract because claim depended for its existence on alleged breach of security agreement), *with In re Bertola*, 317 B.R. 95, 101-02 (B.A.P. 9th Cir. 2004) (action did not "arise" out of contract under § 12-341.01 where implied bailment contract not substantive predicate to fraud and conversion actions).

¶50 Johnson argues this case can be compared to *Arizona Farmers Production Credit Ass'n v. Northside Hay Mill & Trading Co.*, in which the court concluded § 12-341.01 allowed attorney fees in a tort action for conversion of cattle based on claims of

priority between two competing lienholders. 153 Ariz. 333, 333-34, 336, 736 P.2d 816, 816-17, 819 (App. 1987). In that case, however, the plaintiff's alleged right to possess the cattle arose from its filed security interest, the priority of which was the determinative issue on appeal. *Id.* at 334-35, 736 P.2d at 817-18. Johnson's right to the converted property did not depend on the existence of a contract at issue here. And although one of the Binkleys' alternate defenses relied on their interpretation of a contract—a defense that necessarily was discussed below and on appeal—it did not transform the essential nature of Johnson's conversion action into one arising out of contract. *See, e.g., Benjamin v. Gear Roller Hockey Equip., Inc.*, 198 Ariz. 462, ¶¶ 1, 23, 11 P.3d 421, 422, 425 (App. 2000), *abrogated on other grounds by Phelps v. Firebird Raceway, Inc.*, 210 Ariz. 403, 111 P.3d 1003 (2005) (fees not available in negligence action, even though court determined defendant not liable based on interpretation of release of liability contract).

¶51 Even assuming, without deciding, that this action could be considered to arise out of contract, Johnson has not established error. A court has broad discretion to decide whether to award attorney fees pursuant to § 12-341.01, and there is no presumption that attorney fees be awarded in contract actions. *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 568-69, 694 P.2d 1181, 1182-83 (1985); *see also Motzer v. Escalante*, 228 Ariz. 295, ¶ 5, 265 P.3d 1094, 1095 (App. 2011). The trial court did not articulate its basis for denying Johnson's request, and Johnson has failed to argue the trial court abused its discretion by declining to award attorney fees in this case. He concludes only that "this matter did arise out of a contract dispute and [he] is entitled to attorney[]

fees as the successful party." Therefore, we cannot conclude the court erred by denying Johnson's request for attorney fees.

Disposition

¶52 For the foregoing reasons, the trial court's judgment is affirmed. Johnson requests an award of attorney fees on appeal and cross-appeal pursuant to A.R.S. § 12-341.01. For the reasons discussed above, we deny the request.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Presiding Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge