IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

LEONARD NOEL ROBERTS, AN INDIVIDUAL,
Plaintiff/Appellee,

v.

JOAN K. LIVDAHL, AN INDIVIDUAL;
JTC'S, LLC, AN ARIZONA LIMITED LIABILITY CORPORATION,
Defendants/Appellants.

No. 2 CA-CV 2016-0055
Filed July 12, 2017

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. C20118906
The Honorable Gus Aragón, Judge

AFFIRMED

COUNSEL

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By Frankie Adamo

and

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MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Judge Staring and Judge Kelly[1] concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Joan Livdahl appeals from the trial court's judgment entered against her following a bench trial on Leonard Roberts's claims for common law fraud and unjust enrichment.[2] She argues that Roberts's action was barred by the statute of limitations and the statute of frauds, that insufficient evidence supported some of the court's findings, that the court miscalculated the amount of damages, and that the court erred by finding clear and convincing evidence of fraud. Because we find no error, we affirm.

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[1]The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

[2]Livdahl was the sole member and manager of JTC'S, LLC, which was formed to hold title to her Scottsdale property and the Tucson home. JTC'S, LLC, has also appealed from the judgment.

Factual and Procedural Background

¶2 "When reviewing issues decided following a bench trial, we view the facts in the light most favorable to upholding the court's ruling." *Bennett v. Baxter Grp., Inc.*, 223 Ariz. 414, ¶ 2, 224 P.3d 230, 233 (App. 2010). In early 2004, Roberts and Livdahl met and began dating. Shortly thereafter, Roberts moved into Livdahl's home in Scottsdale.

¶3 That same year, Livdahl's son Chad purchased a home in Tucson (hereinafter, the "Tucson home"). In 2005, he was indicted on forty-seven federal charges and later pled guilty to conspiracy and mail fraud and was sentenced to concurrent terms of imprisonment.[3] The federal government had intended to seize the Tucson home, but Roberts paid $230,000 on Chad's behalf to avoid the forfeiture.

¶4 After Chad went to prison, Roberts moved into the Tucson home[4] and began work finishing various projects and making improvements to the property. He completed construction of the swimming pool, spa, and a large water feature Chad had begun before he was indicted. Roberts additionally finished landscaping the front and back yards and installed drip irrigation throughout both yards. He paid for the work himself and estimated it cost him at least $150,000.

¶5 After Chad was indicted, he executed a power of attorney naming his brother, Todd Livdahl, as his authorized agent and Livdahl as an alternate agent. In December 2005, Todd, on Chad's behalf, signed a promissory note payable to Roberts for $385,000, which was secured by a deed of trust he executed for the Tucson home. The amount represented the $230,000 Roberts paid to the federal government to avoid forfeiture of the Tucson home and an additional $155,000 for the improvements he made to the home.

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[3]Chad was released from federal prison in October 2009 and returned to the Tucson home.

[4] Throughout the remainder of their relationship, Livdahl remained in Scottsdale and visited Tucson on the weekends.

¶6 In April 2006, Todd, as Chad's agent, signed a quitclaim deed transferring a ninety-percent interest in the Tucson home to Livdahl. That September, Livdahl, as Chad's alternate agent, transferred Chad's remaining ten-percent interest to Todd. In April 2009, Livdahl became sole owner of the Tucson home after Todd transferred his ten-percent interest to her.

¶7 By May 2009, Livdahl was having difficulty keeping up with payments on the first mortgage for the Tucson home, and she sought a home-equity line of credit. She told Roberts the bank would not approve her application while his security interest remained on the home, and she asked him to release it. Although Roberts expressed his hesitation to do so, she assured him that, after the bank processed her application, she would re-sign the promissory note and deed of trust. Roberts then released his deed of trust, stating the promissory note had been paid in full. Livdahl was later denied the home-equity loan based on her debt-to-income ratio.

¶8 In September 2009, Roberts's attorney drafted a new promissory note, which was identical to the 2005 promissory note in all respects except that Livdahl, and not Chad, was listed as the borrower. The attorney also drafted a new deed of trust for the Tucson home securing the promissory note. In November, Roberts sent Livdahl the new promissory note and deed of trust, but she refused to sign either document. Shortly thereafter, Roberts became ill and returned to Scottsdale permanently.

¶9 In May 2012, Livdahl sold the home for $775,000. Roberts never received any portion of the proceeds from the sale. Additionally, despite his requests to pick up his personal property from the Tucson home after he became ill, the majority of it never was returned to him.

¶10 Roberts sued Livdahl personally, Chad, Todd, and JTC'S, LLC. Todd and Roberts entered a stipulation dismissing all counts against Todd with prejudice. As to Chad and Livdahl, Roberts asserted claims of fraud, unjust enrichment, and fraudulent transfers pursuant to A.R.S. § 44-1004. He additionally alleged breach of contract and breach of the covenant of good faith and fair dealing claims against Chad.

¶11 Following a bench trial, the trial court entered judgment as a matter of law against Chad for breach of contract, with damages totaling $794,290.53 for the principal and accrued interest on the promissory note. Chad did not appeal from that ruling. The court entered a separate judgment against Livdahl on the claims for fraud and unjust enrichment, awarding Roberts $794,290.53 compensatory damages and $1,000 in punitive damages. We have jurisdiction over Livdahl's appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Standard of Review

¶12 Following a bench trial, we defer to the trial court's factual findings "unless clearly erroneous, giving due regard to the opportunity of the court to judge the credibility of witnesses." *Castro v. Ballesteros-Suarez*, 222 Ariz. 48, ¶ 11, 213 P.3d 197, 200 (App. 2009), *quoting In re Estate of Zaritsky*, 198 Ariz. 599, ¶ 5, 12 P.3d 1203, 1205 (App. 2000). "We will not reweigh the evidence or substitute our evaluation of the facts." *Id.* We review issues of law, however, de novo. *Id.* ¶ 12.

Statute of Limitations

¶13 Livdahl first argues that Roberts's action was barred by the six-year limitation period governing enforcement of written contracts for debt. *See* A.R.S. § 12-548. She reasons that, because the promissory note was signed on December 9, 2005, Roberts's complaint, filed December 27, 2011, was untimely. Livdahl, however, did not raise this argument below. Consequently, she has waived review of any claim that Roberts's action was barred by any statute of limitations. *See Orfaly v. Tucson Symphony Soc'y*, 209 Ariz. 260, ¶ 15, 99 P.3d 1030, 1035 (App. 2004). Moreover, we note that Roberts's action against Livdahl was for common law fraud, which is governed by A.R.S. § 12-543, not § 12-548.[5] *See Coulter v. Grant Thornton, LLP*, 241 Ariz. 440, ¶ 9, 388 P.3d 834, 838 (App. 2017).

[5]Section 12-543 provides a three-year time limit for bringing claims for fraud, notably shorter than the six-year limitation provided for claims on a written contract, § 12-548. Because Livdahl did not

Sufficiency of the Evidence Supporting Amount of Note

¶14 Livdahl next argues the promissory note "should not be held at its face value and the trial court decision should be overturned," asserting Roberts did not provide sufficient evidence that he paid the federal government $230,000 or paid for improvements to the Tucson home totaling at least $150,000. Once again, however, Livdahl has waived this argument by not raising it in the trial court. *See Orfaly*, 209 Ariz. 260, ¶ 15, 99 P.3d at 1035. Additionally, Livdahl has failed to cite any legal authority to suggest Roberts was required to provide evidence explicitly tracing the $385,000 amount in the promissory note to establish the purpose for which it was loaned. *See* Ariz. R. Civ. App. P. 13(a)(7)(A) (argument must contain "citations of legal authorities . . . on which the appellant relies"); *Polanco v. Indus. Comm'n*, 214 Ariz. 489, n.2, 154 P.3d 391, 393 n.2 (App. 2007) (argument waived when appellant fails to develop and support it).

¶15 However, even were this argument preserved for review, ample evidence supported the trial court's findings on this issue. Both Roberts and Livdahl testified that Roberts paid $230,000 to the federal government to save the Tucson home from forfeiture because Livdahl did not have the funds to do so herself. And Roberts testified he had spent at least $150,000 on the significant improvements he made to the Tucson home and was able to provide detailed testimony as to the exact work he performed, whom he hired to perform the rest, and what materials were purchased and how they were purchased. Roberts also provided receipts and invoices for some of the work and materials totaling $61,238.41. Livdahl did not dispute that Roberts had, in fact, completed the work he attested to having done at the Tucson home. Giving due deference to the court's

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raise this issue below, nor has she made any argument related to § 12-543's applicability on appeal, we do not address it. *See Orfaly*, 209 Ariz. 260, ¶ 15, 99 P.3d at 1035; *see also* Ariz. R. Civ. App. P. 13(a)(7)(A) (argument must contain "citations of legal authorities . . . on which the appellant relies"); *Polanco v. Indus. Comm'n*, 214 Ariz. 489, n.2, 154 P.3d 391, 393 n.2 (App. 2007) (argument waived when appellant fails to develop and support it).

assessment of the evidence, *Bennett*, 223 Ariz. 414, ¶ 2, 224 P.3d at 233, we cannot say the court's factual finding that Roberts paid the federal government $230,000 to avoid forfeiture of the Tucson home and spent approximately $150,000 on improvements to that home was "clearly erroneous," *Castro*, 222 Ariz. 48, ¶ 11, 213 P.3d at 200, *quoting Estate of Zaritsky*, 198 Ariz. 599, ¶ 5, 12 P.3d at 1205.

Statute of Frauds

¶16 Next, Livdahl argues various sections of the statute of frauds preclude Roberts's claim.[6] *See* A.R.S. § 44-101(2), (3), (6), (9). The statute of frauds provides that, with regard to nine types of agreements, unless the agreement is in writing and signed by the party to be charged, "[n]o action shall be brought in any court." § 44-101. "Whether the statute of frauds applies is a question of law, which we review de novo." *Turley v. Ethington*, 213 Ariz. 640, ¶ 6, 146 P.3d 1282, 1285 (App. 2006) (citation omitted); *see Castro*, 222 Ariz. 48, ¶ 12, 213 P.3d at 201.

¶17 Livdahl first relies on § 44-101(2), which prohibits actions "[t]o charge a person upon a[n oral] promise to answer for the debt, default or miscarriage of another."[7] This provision does not apply, however, when the promisor's "leading object . . . is to protect his own interest and not to become the other's guarantor." *Graham v. Vegetable Oil Prods. Co.*, 1 Ariz. App. 237, 242, 401 P.2d 242, 247 (1965).

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[6]Roberts contends that the statute of frauds does not apply to a claim for fraud, and therefore Livdahl's arguments on this point are meritless. This court, however, has determined agreements that violate the statute of frauds cannot form the basis for an action for common law fraud. *Lininger v. Sonenblick*, 23 Ariz. App. 266, 269, 532 P.2d 538, 541 (1975).

[7] Livdahl relies on the 2009 promissory note prepared by Roberts's attorney and argues that, because the note substituted her name for Chad's as the borrower, it "was clearly an attempt to charge her or make her answer for the debt of Chad Livdahl." However, as it was in writing, the 2009 promissory note does not violate the statute of frauds but, rather, complies with it. § 44-101; *see Best v. Edwards*, 217 Ariz. 497, ¶ 9, 176 P.3d 695, 698 (App. 2008).

Consequently, if "the promisor has a personal, immediate and pecuniary interest in the transaction" and "benefit[s] by the performance of the promisee," the agreement is valid, even if it is not in writing. *Yarbro v. Neil B. McGinnis Equip. Co.*, 101 Ariz. 378, 380, 420 P.2d 163, 165 (1966). In determining the promisor's intent, we must consider the unique facts and circumstances of each case. *Id.*

¶18 When Livdahl asked Roberts to release his deed of trust on the Tucson home, she told him it was necessary to allow her to obtain a home-equity line of credit on the Tucson home to help her in making payments on the first mortgage. Indeed, "the sole purpose" of this deal "was to help financially" because Roberts had recently stopped receiving rental income from another property, his sole source of income, which had been largely helping to make payments on the Tucson home.

¶19 As Livdahl concedes, "[t]here is no evidence that [she] promised to sign a new note solely in her name to answer for the debt of Chad." Rather, the evidence, viewed in the light most favorable to upholding the trial court's judgment, demonstrates that Livdahl's promise was driven by her desire to obtain financing on the Tucson home to alleviate her own financial troubles. *See Bennett*, 223 Ariz. 414, ¶ 2, 224 P.3d at 233. The oral agreement is therefore enforceable because Livdahl's main objective was to serve her own pecuniary interests. *See Yarbro*, 101 Ariz. at 381, 420 P.2d at 166.

¶20 Livdahl also contends § 44-101(3) is applicable because it prohibits actions "[t]o charge a person upon any agreement made upon consideration of marriage, except a mutual promise to marry." She argues that Roberts's motivation in agreeing to release the deed of trust was his fear that his engagement to Livdahl would be harmed if he did not do so. She thus reasons that Roberts "released the lien in consideration of her agreeing to marry him."

¶21 This section, however, applies when "the only consideration of an agreement is marriage." *Brought v. Howard*, 30 Ariz. 522, 527, 249 P. 76, 78 (1926). Here, in exchange for releasing his deed of trust on the Tucson home, Roberts received Livdahl's promise that she would put the security interest back in place if the home-equity application were denied. Although Roberts testified his

willingness to release his interest was partly motivated by his fear that he and Livdahl's relationship and engagement would be harmed if he did not, the parties never agreed that Livdahl would marry Roberts if he released the deed of trust. Rather, the evidence established Roberts ultimately released the deed of trust because he trusted Livdahl and believed she would follow through on the promise to re-secure his interest. Consequently, marriage was not the consideration given and this provision does not apply. *See id.*

¶22 Livdahl next cites § 44-101(6) and (9), which prohibit oral contracts involving "the sale of real property or an interest therein" and financing agreements that involve more than $250,000. She did not, however, raise either of these issues before the trial court. These arguments are therefore waived and we do not address them. *See Orfaly*, 209 Ariz. 260, ¶ 15, 99 P.3d at 1035.

Calculation of Damages

¶23 Livdahl also argues the trial court miscalculated the amount of damages on the fraud claim.[8] She contends that Roberts's damages are limited to the profits remaining from the sale of the Tucson home after the first-position lien was paid. She again did not make this argument to the trial court, nor did she object to Roberts's calculation of damages included in his proposed findings of facts, which the trial court adopted.[9] This issue is therefore also waived. *See id.*

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[8]Livdahl notes that the amount listed in the trial court's final judgment is $795,290.53, while the amount of fraud damages calculated in the court's ruling is $794,290.53. She therefore "presumes a typo in the judgment." However, in addition to the damages for the fraud claim, the court also awarded Roberts $1,000 in punitive damages, for a total judgment in his favor of $795,290.53.

[9]In her motion for a new trial, Livdahl argued the damages award was excessive because the trial court could not award contractual damages on a fraud claim, and Roberts was therefore limited to collecting his "out–of-pocket" damages against her. Livdahl raises this argument again in her reply brief and expands

Sufficiency of the Evidence of Fraud

¶24 Livdahl lastly argues that the trial court erred by finding clear and convincing evidence of fraud. *See Enyart v. Transamerica Ins. Co.*, 195 Ariz. 71, ¶ 18, 985 P.2d 556, 562 (App. 1998) ("Fraud must be proven by clear and convincing evidence.").

> A fraud claim requires proof that the defendant made "a false and material representation, with knowledge of its falsity or ignorance of its truth, with intent that the hearer would act upon the representation in a reasonably contemplated manner," and that the plaintiff, "ignorant of the falsity of the representation, rightfully relied upon the representation and was thereby damaged."

Lerner v. DMB Realty, LLC, 234 Ariz. 397, ¶ 12, 322 P.3d 909, 914 (App. 2014), *quoting Dawson v. Withycombe*, 216 Ariz. 84, ¶ 26, 163 P.3d 1034, 1046 (App. 2007). Although fraud cannot generally be based on unfulfilled promises related to future events, *Ahmed v. Collins*, 23 Ariz. App. 54, 56-57, 530 P.2d 900, 902-03 (1975), such "[u]nfulfilled promises may form the basis for actionable fraud where made with the present intention not to perform," *Enyart*, 195 Ariz. at 77, 985 P.2d at 562, *quoting Sun Lodge, Inc. v. Ramada Dev. Co.*, 124 Ariz. 540, 542, 606 P.2d 30, 32 (App. 1979).

¶25 "Direct proof of fraud . . . is not required," and "[a] party can meet its burden of proof by showing circumstantial evidence through which fraud may reasonably be inferred." *Premier Fin. Servs. v. Citibank (Ariz.)*, 185 Ariz. 80, 85, 912 P.2d 1309, 1314 (App. 1995); *see*

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upon it. However, issues raised for the first time in a motion for a new trial are waived, *Conant v. Whitney*, 190 Ariz. 290, 293, 947 P.2d 864, 867 (App. 1997), as are arguments made for the first time in a reply brief, *Marquette Venture Partners II, L.P. v. Leonesio*, 227 Ariz. 179, n.8, 254 P.3d 418, 423 n.8 (App. 2011). We therefore do not address this issue further.

Lohse v. Faultner, 176 Ariz. 253, 259, 860 P.2d 1306, 1312 (App. 1992) (direct and circumstantial evidence carry same weight). Moreover, it is the trial court's, and not this court's, role to "draw a distinction between clear and convincing evidence and evidence that merely preponderates." *Premier Fin. Servs.*, 185 Ariz. at 85, 912 P.2d at 1314. Consequently, "we will not disturb a judgment if there is evidence to support it." *Id.*

¶26 After Chad was incarcerated and Roberts secured the promissory note with a deed of trust, Livdahl and Todd, acting as Chad's authorized agents, used a series of quitclaim deeds to transfer full ownership of the Tucson home to Livdahl. Livdahl paid no consideration for these exchanges. They did not tell Chad about the transfer in ownership of the Tucson home until after he was released from prison.

¶27 The month after receiving full ownership of the Tucson home, Livdahl asked Roberts to release his security interest on it so that she could obtain a home-equity line of credit. When Roberts expressed his reluctance to do so, she asked him, "You don't trust me after all we've been through?" and made other statements such as "I won't lie to you" and "[y]ou have nothing to worry about." Roberts testified that he relied on those assertions when he released the deed of trust because he trusted her. Livdahl, however, later refused to sign the new promissory note and deed of trust without explanation despite her earlier statements. Indeed, she has continually denied she and Roberts ever had such an agreement at all. Roberts has never been repaid any portion of the $385,000 he paid to make improvements to and prevent forfeiture of the Tucson home.

¶28 Based on the evidence and testimony presented, the trial court reasonably could have inferred that, first, Livdahl knowingly made the false and material representation that she would re-secure Roberts's $385,000 interest in the Tucson home after she applied for the home-equity line of credit. *See Lerner*, 234 Ariz. 397, ¶ 12, 322 P.3d at 914. Second, that she intended that Roberts would act and rely upon her statements without knowing their falsity. *See id.* And third, that Roberts, unaware of the falsity of Livdahl's statements, did act in reliance on those statements and incurred damages as a result. *See id.* Based on Livdahl's conduct surrounding and after their agreement,

the court reasonably could have inferred she knew her promise to re-secure Roberts's interest was false when she made it and she never intended to fulfill it. *See Enyart*, 195 Ariz. 71, ¶ 18, 985 P.2d at 562. We will not second-guess the court's conclusion that this evidence rose to the level of clear and convincing, rather than a mere preponderance. *See Premier Fin. Servs.*, 185 Ariz. at 85, 912 P.2d at 1314.

¶29 As support for her argument, Livdahl points to her own testimony that it was Roberts's idea for her to apply for the home-equity line of credit in order to pay the back taxes on a piece of property he owned and that she and Roberts had entered into an agreement that she would "take" the Tucson house and Roberts would "take" his separate property. She further attacks Roberts's credibility, pointing out that he had difficulty remembering Livdahl's precise words when she asked him to release his deed of trust. Additionally, she contends it is not credible that Roberts, who had extensive experience in real estate transactions and had stated "when it comes to money, trust no one," would have failed to put their alleged agreement in writing had it actually occurred. She also points out that Roberts was not able to provide documentation of the $230,000 he paid to the federal government to avoid forfeiture of the Tucson home.[10]

¶30 These arguments, however, ask us to reweigh the evidence and assess witness credibility, something we will not do. *See Castro*, 222 Ariz. 48, ¶ 11, 213 P.3d at 201. "[I]t is not the function of this court to reweigh the facts or to second-guess the credibility determinations of the judge who had the opportunity to evaluate the witnesses' demeanor and make informed credibility determinations." *In re Estate of Newman*, 219 Ariz. 260, ¶ 40, 196 P.3d 863, 874 (App. 2008). The trial court in this case explicitly stated it found Roberts "generally more credible than Joan [and] Chad Livdahl." Viewing the facts in the light most favorable to sustaining the court's ruling, sufficient evidence supports the court's finding that Roberts

[10]None of the parties provided documentation as to how the federal government was paid, or by whom. Livdahl, however, did testify that Roberts paid the federal government $230,000 in order to save the Tucson home from forfeiture.

presented clear and convincing evidence of fraud.[11] *See Premier Fin. Servs.*, 185 Ariz. at 85, 912 P.2d at 1314.

Attorney Fees and Costs

¶31 Roberts has requested his attorney fees on appeal pursuant to A.R.S. § 12-341.01(A). Fees under that statute are available "[i]n any contested action arising out of a contract." *Id.* Determining whether a tort claim arises out of a contract turns on an analysis of "the fundamental nature of the action rather than the mere form of the pleadings." *Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc.*, 198 Ariz. 10, ¶ 27, 6 P.3d 315, 320 (App. 2000). If "the tort could not exist 'but for' the breach or avoidance of contract," then it arises out of a contract. *Id.* However, "[w]hen the duty breached is one implied by law based on the relationship of the parties, that claim sounds fundamentally in tort, not contract." *Id.* "The test is whether the defendant would have a duty of care under the circumstances even in the absence of a contract." *Id.*; *see also Morris v. Achen Constr. Co.*, 155 Ariz. 512, 514, 747 P.2d 1211, 1213 (1987).

¶32 Here, the promissory note was a critical piece of the case between Roberts and Livdahl, but it was not the "main factor causing the dispute" between them. *Keystone Floor & More v. Ariz. Registrar of Contractors*, 223 Ariz. 27, ¶ 10, 219 P.3d 237, 240 (App. 2009). The dispute at the center of Roberts's claims against Livdahl stemmed from Livdahl's representations to Roberts regarding his release of his security interest. The note merely "put[] the parties within tortious striking range of each other." *Ramsey Air Meds, L.L.C.*, 198 Ariz. 10, ¶ 27, 6 P.3d at 320. Consequently, Livdahl's breach of that duty constituted a tort and does not arise out of a contract. Roberts is not entitled to an award of fees pursuant to § 12-341.01. *See Morris*, 155 Ariz. at 514, 747 P.2d at 1213; *see also Ramsey Air Meds, L.L.C.*, 198 Ariz.

[11]For the first time in her reply brief, Livdahl argues that the trial court also erred in finding that JTC'S, LLC could be liable for damages stemming from Livdahl's conduct. Livdahl, however, did not raise this argument below, thus waiving it for review. *See Orfaly*, 209 Ariz. 260, ¶ 15, 99 P.3d at 1035; *see also Marquette Venture Partners II, LLP*, 227 Ariz. 179, n.8, 254 P.2d at 423 n.8 (this court will not address issues raised for first time in reply brief).

10, ¶ 29, 6 P.3d at 321 (negligence claim did not arise out of contract where pilot's duty of care to all persons within foreseeable zone of danger existed independent of contractual agreement between pilot's employer and aircraft owner).

¶33 Roberts nevertheless argues he is entitled to fees under § 12-341.01(A), because Livdahl raised several arguments arising from contract in her opening brief. But whether an action arises out of a contract turns on the "fundamental nature of the action" and the duties that were breached, not the arguments raised by a particular party. *Ramsey Air Meds, L.L.C.*, 198 Ariz. 10, ¶ 27, 6 P.3d at 320.

¶34 Roberts additionally requests his fees pursuant to A.R.S. § 12-349(A)(1) and (3). Livdahl raised eight arguments in her opening brief, five of which were waived for failure to raise them below or failure to develop them on appeal. We find these five arguments, raised without substantial justification, unreasonably expanded the appeal, and therefore award Roberts a portion of his attorney fees incurred on appeal, upon his compliance with Rule 21, Ariz. R. Civ. App. P. *See* § 12-349(A)(1), (3). He is additionally entitled to his costs as the successful party pursuant to A.R.S. § 12-341.

¶35 Livdahl has also requested her attorney fees and costs pursuant to §§ 12-341 and 12-341.01. As she is not the successful party and § 12-341.01 is not applicable in this case, we deny her requests.

Disposition

¶36 For the foregoing reasons, we affirm the trial court's judgment.