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Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 03/31/11
RUTH WILLINGHAM,
ACTING CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

PLAZA LEYENDA, LP, an Arizona)	No. 1 CA-CV 10-0294
limited corporation; RICHARD L.)	No. 1 CA-CV 10-0404
JONES REVOCABLE TRUST,)	(Consolidated)
)	
)	DEPARTMENT C
)	
)	MEMORANDUM DECISION
)	(Not for Publication -
Plaintiffs/Appellees,)	Rule 28, Arizona Rules
)	of Civil Appellate
v.)	Procedure)
)	
LAWYERS TITLE OF ARIZONA, INC.,)	
)	
Defendant/Appellant.)	
)	
PLAZA LEYENDA, LP, an Arizona)	
limited corporation; RICHARD L.)	
JONES REVOCABLE TRUST,)	
)	
Plaintiffs/Appellants,)	
)	
v.)	
)	
LAWYERS TITLE OF ARIZONA, INC.,)	
)	
Defendant/Appellee.)	
)	

Appeal from the Superior Court in Maricopa County

Cause No. CV2007-008468

The Honorable J. Richard Gama, Judge
The Honorable Robert H. Oberbillig, Judge

AFFIRMED IN PART; REVERSED IN PART; REMANDED

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B A R K E R, Judge

¶1 Lawyers Title of Arizona, Inc. ("Lawyers Title") appeals from the trial court's judgment after a trial to the court in favor of the Richard L. Jones Revocable Trust ("the Trust") and Plaza Leyenda, LP, which had sued Lawyers Title for negligence and breach of fiduciary duty. The claims arose from the failure of Lawyers Title, the escrow agent, to promptly notify Plaza Leyenda and the Trust that the check provided by the buyer of a piece of property Plaza Leyenda was selling had been returned for non-sufficient funds. Plaza Leyenda contended that, as a consequence, it was unable to accept a bid for construction on the property, resulting in an increase in construction costs. Plaza Leyenda and the Trust appeal the trial court's denial of its request for attorneys' fees.

¶2 For the following reasons, we hold that Lawyers Title breached no duty to the Trust and so vacate the judgment in

favor of the Trust. We affirm the court's verdict in favor of Plaza Leyenda on its claims of negligence and breach of fiduciary duty. We vacate, however, the court's award of damages and remand with an order to recalculate damages in accordance with this decision. Finally, we reverse the trial court's finding that attorneys' fees are unavailable under Arizona Revised Statutes ("A.R.S.") section 12-341.01 (2003), and remand for further proceedings on Plaza Leyenda's request for attorneys' fees.

Facts and Procedural History

¶3 In May 2004, the Richard L. Jones Revocable Trust purchased a parcel of vacant land in Scottsdale, Arizona ("the Property"). In September 2004, Plaza Leyenda was formed to hold, develop, and sell the Property; the Trust was a partner in Plaza Leyenda. The property was ultimately transferred to Plaza Leyenda in August 2005.

¶4 On March 16, 2005, Plaza Leyenda entered into a contract for the sale of the Property to The Quaid Group ("Quaid") for \$5,000,000. The contract was signed by Richard Richmond¹ as an "Authorized Signatory" and William Gustafson, on behalf of Plaza Leyenda. Lawyers Title served as the escrow agent for the transaction, and escrow was opened on March 17,

¹ Richmond was the manager of the Trust; the contract, however, did not identify him as representing the Trust.

2005. The contract required an initial earnest money deposit of \$25,000, which Quaid paid. The contract further required an additional non-refundable earnest money deposit of \$225,000 due on or before April 4, 2005, with close of escrow scheduled for sixty days later on June 4. Quaid delivered a check for \$225,000 to Lawyers Title on or about April 4, 2005. The check was returned for non-sufficient funds ("NSF"), and the bank, Wells Fargo, notified Lawyers Title of the non-sufficient funds by notice dated April 11, 2005. Lawyers Title redeposited the check, and by notice dated April 26, 2005, Wells Fargo notified Lawyers Title that the check was again returned for non-sufficient funds.

¶15 On May 15, Marie Volm of Lawyers Title emailed Greg Hopley, Plaza Leyenda's broker, advising him of the NSF notice. The broker did not receive the email. Volm learned that Hopley had not received the email, and on May 23, 2005, she notified Plaza Leyenda (for the first time) that the check had been returned for non-sufficient funds.

¶16 Because Plaza Leyenda and the Trust initially intended to develop the Property themselves, on March 15, 2005, approximately the time that the purchase contract was executed, they received a bid from Palisade Construction, Inc. ("Palisade") for the development of the property. Lawyers Title was aware that the sale had to be completed within a short

period of time because Plaza Leyenda and the Trust did not want to release the contractor without a firm commitment to purchase from Quaid. By the time Lawyers Title advised Plaza Leyenda of the NSF check, the original construction bid was no longer available to Plaza Leyenda and the Trust.

¶17 When Plaza Leyenda learned of the NSF check it attempted to work with Quaid to complete the sale, but eventually determined that Quaid could not complete the transaction. Plaza Leyenda provided its cancellation notice on June 8, and pursuant to the contract, the contract was cancelled thirteen days later, on June 21, 2005.

¶18 Plaza Leyenda contacted Palisade within seven to ten days of learning of the NSF check to secure a new bid on the project and obtained a new bid on August 17, 2005.

¶19 On May 14, 2007, Plaza Leyenda filed a complaint against Lawyers Title for negligence and breach of fiduciary duty, claiming that the failure to timely notify Plaza Leyenda that Quaid's earnest money check had not cleared caused Plaza Leyenda several hundred thousand dollars in damages.

¶10 The court conducted a three-day bench trial. Prior to trial, the court granted Plaintiff the right to amend the complaint to add the Trust as a Plaintiff. Plaza Leyenda and the Trust (collectively "Plaza Leyenda") argued that, because Plaza Leyenda was unaware of the NSF check and believed that the

Property had been sold, it did not accept the March 15 construction bid. As a consequence, the cost to develop the Property increased because of escalating construction costs during that period. Plaza Leyenda asked for a pro rata share of the increase based on the number of days' delay caused by Lawyers Title's failure to notify of the NSF check. Plaza Leyenda contended that Lawyers Title was responsible for the delay between April 11, 2005, when Lawyers Title received notice of the NSF check and May 23, when Lawyers Title first advised Plaza Leyenda about the NSF check, a total of forty-two days. Plaza Leyenda also asserted that Lawyers Title was responsible for the delay between June 22, 2005, when the contract was cancelled and August 17, 2005, when Plaza Leyenda received the bid from Palisade and was restored to its prior position, a period which it calculated to be fifty-eight days. Plaza Leyenda also sought carry costs based on the loss of opportunity, asserting that, had Lawyers Title acted promptly, Plaza Leyenda could have put their money to use more expeditiously.

¶11 Plaza Leyenda presented testimony from Michael Gustafson, a commercial developer and member of Plaza Leyenda, who signed the purchase agreement for the property on behalf of Plaza Leyenda. Gustafson testified that had he been timely informed of the NSF check, he could have continued to pursue

development of the Property with Palisade, while also attempting to finalize the sale. He explained that the purchase contract with Quaid provided that under such circumstances, if the sale was finalized, Quaid would reimburse Plaza Leyenda for its development costs. Because he was not informed of the NSF check, he believed the sale was proceeding and did not accept the bid from Palisade. Gustafson testified that Plaza Leyenda was seeking the \$220,000 cost difference between what it would have cost to build the project had Plaza Leyenda been able to accept the March 15 bid versus the August 17 bid.

¶12 Plaza Leyenda also presented testimony from Barry Markham, a real estate development consultant, who testified that in spring to fall 2005, construction costs were increasing faster than he had ever seen, noting a percentage increase of 6% to 8%. He noted a difference of \$220,000 between the March and August bids and expressed surprise that the percentage difference was only 3%. He also testified that Plaza Leyenda could have incurred carry costs between 8% to 10% on the cash brought into the transaction to purchase the property.

¶13 Keith Wilson of Palisade testified that the March 15 bid was originally \$6.9 million, but after further negotiation the bid was reduced to \$6.7 million, which would have been communicated to Gustafson that night or a day later. He further testified that bids for Gustafson would have been open for

thirty days from the date of the bid, possibly longer depending on the circumstances. Wilson could not remember when he got the request from Gustafson to rebid the project, but testified that once he had the new set of plans it would typically take two to three weeks to produce a bid.

¶14 Richard Richmond, the manager of the Trust, testified that he signed the purchase agreement on behalf of the Trust, which was a general partner in Plaza Leyenda and which still owned the Property at the time the purchase contract was executed. He acknowledged that the purchase contract did not identify the Trust as the seller or identify him as signing on behalf of the Trust.

¶15 Marie Volm of Lawyers Title testified that she first learned of the NSF check on May 15, 2005, and notified the broker by email to inquire whether the parties were aware of the situation. She did not know when Lawyers Title received the NSF notice dated April 11, 2005, but assumed it had been put in the mail that date and received within days, noting that it was sent from the bank in Phoenix to Lawyers Title's Phoenix office. Volm agreed that the industry standard is to immediately notify all parties on the seller's side if a check has been rejected for non-sufficient funds and that the failure to do so fell beneath that standard.

¶16 Plaza Leyenda offered several methods to calculate damages. It proposed damages based on the difference of \$220,000 between the March 15 and August 17 bids divided by the total days between bids to get a per-day amount, then multiplied by the days attributed to Lawyers Title's delay.² Alternatively, it proposed damages based on Markham's testimony that costs increased by 6% resulting in a calculation using the March 15 bid times 6% times the number of days attributed to Lawyers Titles' delay divided by the total number of days between bids. Plaza Leyenda proposed carry costs based on Markham's testimony that the equity's loss of use had carry costs of 8% to 10% resulting in a calculation of \$5 million (the amount of equity) times 8% or 10% divided by 365 days and multiplied by the number of days attributed to Lawyers Title's delay.

¶17 The court found that Lawyers Title failed to conform to the required standard of care and breached its duty owed to Plaza Leyenda and the Trust. The court further found that Plaza Leyenda had demonstrated causation and established damages resulting from Lawyers Title's negligence. The court found that Plaza Leyenda had received a construction bid on March 15 in the amount of \$6,723,275, that construction costs were increasing at

² In closing argument, Plaza Leyenda used 102 days in making its calculations resulting in damages amounts of \$145,000, \$265,000, and \$335,000. It subsequently revised the number to 100 days.

that time, and that by the time Lawyers Title advised Plaza Leyenda that Quaid's check had been returned for non-sufficient funds, Plaza Leyenda could no longer accept the March 15 bid. The new bid obtained on August 17, 2005, based on the same "footprint development" was \$6,917,899, representing a 3% increase. The court determined that Lawyers Title was responsible for two periods of delay for a total of 100 days - from April 11, 2005, when the court found Lawyers Title learned of the NSF check, until May 23, 2005, when Lawyers Title provided notice to Plaza Leyenda; and from June 22, 2005, when the contract was cancelled until August 17, 2005, when Plaza Leyenda received the second construction bid. As for damages, the court found that Plaza Leyenda incurred damages in the form of increased construction costs and the loss of use of its resources. The court also found that Plaza Leyenda mitigated their damages, acting "reasonably to prevent or reduce the damages consequent to Lawyer's [sic] Title's failure to use due care." The court found that Plaza Leyenda sustained damages of \$225,000; the court reduced the damage amount by the \$25,000 Plaza Leyenda retained of Quaid's earnest money deposit. The Court entered judgment in favor of Plaza Leyenda and The Richard L. Jones Revocable Trust in the amount of \$200,000. Lawyers Title appealed.

¶18 The court denied Plaza Leyenda's request for attorneys' fees pursuant to A.R.S. § 12-341.01, which authorizes an award of fees to the successful party in a contested action arising out of contract. The court found that the matter did not arise out of contract, but arose out of tort and the breach of legal duties imposed by law. Plaza Leyenda appealed from the order denying its request for attorneys' fees. This court consolidated the two appeals. We have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

Discussion

¶19 On appeal from a trial to the court, we are bound by the trial court's findings of fact unless they are demonstrated to be clearly erroneous. *Sabino Town & Country Estates Ass'n v. Carr*, 186 Ariz. 146, 149, 920 P.2d 26, 29 (App. 1996). We view the evidence and reasonable inferences from the evidence in the light most favorable to the prevailing party and must affirm if any evidence supports the trial court's judgment. *Inch v. McPherson*, 176 Ariz. 132, 136, 859 P.2d 755, 759 (App. 1993). We consider legal questions de novo. *Id.*

1. Duty to the Trust

¶20 Lawyers Title first argues that only Plaza Leyenda and Quaid were parties to the contract and so no duty was owed to the Trust. Consequently, Lawyers Title argues, the judgment in favor of the Trust must be vacated.

¶21 We have held that "a title company's duties are to those with whom it has a contractual relationship" and "the scope of duty is limited by the terms of the contract." *Luce v. State Title Agency, Inc.*, 190 Ariz. 500, 502, 950 P.2d 159, 161 (App. 1997). "An escrow agent has a fiduciary relationship . . . to the parties to the escrow," which imposes the fiduciary duties to "comply strictly with the terms of the escrow agreement and to disclose facts that a reasonable escrow agent would perceive as evidence of fraud being committed on a party to the escrow." *Maxfield v. Martin*, 217 Ariz. 312, 314, ¶ 12, 173 P.3d 476, 478 (App. 2007). Where the instruments deposited into escrow are ambiguous as to the intention of the parties, the escrow agent has a duty to contact its principals for clarification and to obtain more definite instructions. *Burkons v. Ticor Title Ins. Co.*, 168 Ariz. 345, 352, 813 P.2d 710, 717 (1991). Whether a duty exists is a question of law we consider de novo. *Tostado v. City of Lake Havasu*, 220 Ariz. 195, 201, ¶ 26, 204, P.3d 1044, 1050 (App. 2008).

¶22 The purchase contract identifies Plaza Leyenda as the seller by a hand-written entry under the signature of William Gustafson; the contract does not list the Trust. Richard Richmond signed the document, but, although he testified that he signed the contract as a representative of the Trust, he identified himself under his signature in the document only as

"Authorized Signatory," with no reference to the Trust and acknowledged at trial that the contract communicated to Lawyers Title that Plaza Leyenda was the seller. Plaza Leyenda correctly notes that an addendum, executed contemporaneously with the purchase contract, refers to the Trust. However, that reference provides that Quaid agreed to complete development of a certain space at the project within 175 days after close of escrow and agreed to sell that space to the Trust for a specified price. It does not identify the Trust as a party to the contract. The addendum identifies Plaza Leyenda as the "Seller," and, although Richard Richmond signed the addendum, he again signed it as an "Authorized Signatory" and did not identify his signature as being on behalf of the Trust. The Trust was not a party to the contract.

¶23 In addition, when Lawyers Title discovered that the Trust, not Plaza Leyenda, held title to the Property, Lawyers Title sought to clarify the contract by preparing and sending to the parties supplemental escrow instructions noting that the contract should have been executed by the Trust and amending the contract to replace Plaza Leyenda with the Trust as seller; the parties did not execute the document.

¶24 Plaza Leyenda contends that "Lawyers Title owed duties to Appellees" because Plaza Leyenda was either the beneficial owner of the Property or an agent of the Trust. We need not

address whether there are facts under which an entity that is not a party to the escrow contract is nonetheless owed a duty of care by the title company. From our perspective the only basis for the duty would be that the Trust in fact held title to the Property. Here, however, any duty to the Trust was satisfied when Lawyers Title gave the Trust the opportunity to become a party to the contract (based on its ownership of the Property) and the Trust declined that offer. Thus, Lawyers Title either owed no duty to the Trust or did not breach its duty to the Trust, if one was owed.

¶25 Accordingly, the trial court's judgment in favor of the Trust is vacated. Because the court's award of damages was based in part on damages sustained by the Trust, the damages award is also vacated. We remand so that the court may recalculate its damages award, excluding any losses sustained by the Trust.

2. Notice to Plaza Leyenda and Causation

¶26 Lawyers Title asserts two grounds in support of its contention that the court erred in finding that Lawyers Title's failure to notify Plaza Leyenda of the NSF check caused Plaza Leyenda's damages.

a. Receipt of Notice on April 11

¶27 Lawyers Title contends that the court erred in finding that Lawyers Title received notice of the NSF check on April 11,

2005, asserting that the only evidence showing the date the check was received was a receipt dated April 19, 2005. Lawyers Title argues that, if the notice was received on April 19, then it was received outside the thirty-day window to accept the March 15 bid. Consequently, the bid would have expired regardless of Lawyers Title's failure to provide notice of the NSF check and therefore Lawyers Title's failure could not have caused Plaza Leyenda to lose the bid thereby incurring additional expense in developing the Property.

¶28 The notice of the NSF check was sent by Wells Fargo Bank Arizona at a Phoenix address to Lawyers Title's accounting department at a Phoenix address. The notice was dated April 11, 2005. Marie Volm, of the Lawyers Title office in Scottsdale, testified that central accounting at that Phoenix address notified them of the NSF check by interoffice mail. No testimony was elicited as to how quickly items were generally received in the Scottsdale office from central accounting. In its ruling, the court noted that the NSF notice was dated April 11, and then in calculating the days attributed to Lawyers Title's delay in notifying Plaza Leyenda, the court found that April 11 was the day Lawyers Title learned of the NSF check.

¶29 The court appears to have erred in concluding that Lawyers Title received the NSF notice on April 11. No evidence supports a finding that the notice, which was dated April 11,

was also received by Lawyers Title on April 11. However, on this record, the error does not undermine the court's finding of causation. As noted by Volm, the notice was issued on April 11 and sent from a Phoenix address to a Phoenix address; so it likely would have been received within days by Lawyers Title's Phoenix office. Even if it had been received as late as April 19, it would not necessarily result in the expiration of the bid. The court concluded that the bid period was "approximately 30 days." Wilson, the president of Palisade, testified that bids were generally open for thirty days from the bid date, but if accepted within thirty-five days or even longer he would work to take the project, depending on the type of job and the subcontractors involved; April 19 would be at the end of the thirty-five-day period. Gustafson testified that he had a longtime personal and professional relationship with Wilson and that he believed that because of that relationship Wilson would have tried to allow Gustafson to accept the March 15 bid long after the thirty-day expiration. Viewing the facts in the light most favorable to upholding the court's decision, even if the notice was received on April 19, as argued by Lawyers Title, the court could find that the bid had not expired.

¶30 Nevertheless, although the court's error does not undermine its finding of causation, it affects its calculation of total damages. Although it is unclear exactly how the court

calculated total damages, it appears to have adopted Plaza Leyenda's pro rata method, with the total increase in construction costs being divided by the amount of days between the March 16 bid and the August 17 bid, and then that amount being multiplied by the amount of days of delay for which Lawyers Title was responsible. The court found that Lawyers Title caused 100 days of delay - from April 11 to May 23 and from June 22 to August 17, 2005. If, for example, Lawyers Title received the notice on April 15 instead of April 11, it was responsible for four fewer days. We note, too, that the court erred in finding that the period between June 22, 2005 and August 17, 2005 consisted of fifty-eight days instead of fifty-six days. This six-day difference would have proportionally reduced the court's damages award. Therefore, in addition to the error discussed *supra* ¶ 25, we vacate the court's award on this basis as well.

b. Thirteen-Day Cure Period

¶31 Lawyers Title also challenges the court's finding of causation by arguing that the court did not consider the thirteen-day cure period when concluding that Lawyers Title caused Plaza Leyenda to lose the March 15 bid. The purchase contract required Plaza Leyenda to give Quaid thirteen days to cure its failure to timely provide the \$225,000 payment. Lawyers Title contends that, even if the bid period had not

expired by the time it received notice of the NSF check, it would have expired before the end of the thirteen-day period. Lawyers Title argues that Plaza Leyenda could not have accepted the bid prior to the cancellation of the contract and that even if Lawyers title had received notice of the NSF check on April 11 and had immediately notified Plaza Leyenda, the contract could not have been cancelled prior to April 24, by which time the March 15 bid would have expired.

¶32 Lawyers Title's argument does not take into account certain testimony by Gustafson. Gustafson testified that had he known of the NSF, he could have worked both with Palisade to develop the Property and with Quaid to complete the sale because the contract provided that Quaid would reimburse Plaza Leyenda for the development costs if it completed the sale. Quaid had already negotiated with Palisade for Palisade to be Quaid's contractor. Gustafson testified that he was going to build the project or Quaid would buy the project and reimburse the costs, so he would not have waited until the end of the cure period to accept the bid. From this testimony, the court could have concluded that Wilson would have worked with Gustafson to allow Plaza Leyenda to accept the March 15 bid prior to the expiration of the thirteen-day cure period and while still attempting to work with Quaid to complete the purchase. Consequently, the application of the thirteen-day cure period did not

automatically mean that the bid expired before Plaza Leyenda could accept it.

3. Loss of Use of Resources

¶33 Lawyers Title argues that evidence did not support the court's unexplained finding that "Plaintiffs sustained a loss of use of [their] resources as a result of the delay."³ As the court's finding refers to the Trust, we agree. We have already held that Lawyers Title did not breach any duty (if there was one) to the Trust. Thus, the trial court erred in finding that Lawyers Title's actions caused the Trust to sustain a loss of use of resources. As stated *supra* ¶ 25, the court on remand is to exclude damages sustained by the Trust in its recalculation of the damages award.

¶34 As the court's finding relates to Plaza Leyenda, however, we affirm. Barry Markham, the real estate development consultant testifying on behalf of Plaza Leyenda, testified that carry costs could be either the interest rate on a loan agreement associated with a property or the cash equity put into

³ Lawyers Title asserts that this court must reverse if the trial court's basis for its conclusions is unclear, citing *Kelsey v. Kelsey*, 186 Ariz. 49, 918 P.2d 1067 (App. 1996). This standard of review applies, however, where a party, prior to trial, has requested that the court make findings of fact and conclusions of law pursuant to Rule 52(a), Arizona Rules of Civil Procedure. *Id.* at 50-51, 918 P.2d at 1068-69. The record does not reflect that either party invoked Rule 52(a). We therefore affirm if any evidence supports the court's judgment. *Inch*, 176 Ariz. at 136, 859 P.2d at 759.

a project for which the participants receive a return; he further testified that the return was typically at a rate of between 8% to 10% of the property's value. No loan was associated with the Property so any carry costs arose out of the cash equity put into the project, which was stated to be \$5 million, the escrow amount.

¶35 Lawyers Title asserts that no evidence was presented to show that Plaza Leyenda had lost use of the Property and asserts that Plaza continued with development activities during the contract period. Gustafson testified that after entering into the purchase contract with Quaid, Plaza Leyenda continued to work on the project, trying to get a building permit, because if Quaid did not purchase the Property, Plaza Leyenda would develop the Property itself. He also testified, however, that Plaza Leyenda did not pursue development after April 4 because of the belief that Quaid had deposited the check and would close on the purchase of the Property. Consequently, during the period when Plaza Leyenda was unaware of the returned check, it was not developing the Property as it intended in the absence of a sale to Quaid. As for the period between the cancellation of the purchase contract and the August 17 bid, development was not proceeding because Plaza Leyenda had to redo the bid as a consequence of losing the March 15 bid. Taken in the light most

favorable to upholding the trial court's ruling as to Plaza Leyenda, we find the record supports the court's decision.

4. Appellant's Challenges to Damages Calculation

¶36 Lawyers Title argues that the court committed errors in its calculation of damages in addition to those errors discussed *supra* ¶¶ 25, 30. We will address each of these alleged errors in turn.

a. March Bid Amount

¶37 Lawyers Title argues that the court erred in relying on an inadmissible summary of bids to determine the amount of the March 15, 2005 bid.

¶38 Exhibit 21 is a document, dated March 1, 2006, which presented a side-by-side comparison of the bids by Palisade for March 15, August 17, and October 28, 2005. Wilson testified that he prepared the document, that the numbers on the document reflected the actual bids given on those dates, and that he had the actual bids when he prepared the document. The court admitted the document over Lawyers Title's hearsay objection. The exhibit showed the bid for March 15, 2005, to be \$6,723,275.

¶39 Lawyers Title argues that the correct bid for March 15 was shown in Exhibit 25. This exhibit was a bid sent from Palisade to Gustafson by email on March 15 at 4:43 p.m. and listed a bid proposal in the amount of \$6,900,755.27. Lawyers Title argues that the improper admission of Exhibit 21 was

materially prejudicial because the court relied on that document in finding that the March 15 bid was \$6,723,275 rather than the higher \$6,900,755.27.

¶40 We will not disturb a trial court's ruling on the admissibility of evidence unless a clear abuse of discretion appears and prejudice results. *Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 506, 917 P.2d 222, 235 (1996). Even were we to conclude that Exhibit 21 should not have been admitted, reversal would not be required.

¶41 Both Gustafson and Wilson testified that Exhibit 25 did not represent the March 15 bid. Both testified that upon Plaza Leyenda's receipt of that bid proposal, Gustafson and Wilson negotiated, resulting in an ultimate bid of \$6.7 million "and some change." The court apparently believed this testimony, rejecting Lawyers Title's position that Exhibit 25 represented the March 15 bid. Although the court's ruling clearly relied on Exhibit 21 in stating the specific amount of the March 15 bid, the testimony of Gustafson and Wilson would support the court's reaching essentially the same result - a March 15 bid of a bit more than \$6.7 million. We therefore find no prejudice necessitating reversal, even if the court erred in admitting Exhibit 21.

b. Delay for New Bid

¶42 Lawyers Title next argues that the trial court erred in finding that it was responsible for the delay between June 22, when the contract was cancelled and August 17, when Plaza Leyenda obtained the second bid. Lawyers Title argues that Wilson testified that producing a replacement bid would take three weeks, and that Lawyers Title should not be held responsible for any additional time, contending that Plaza Leyenda should have been more diligent in requesting the replacement bid.

¶43 The trial court found that Plaza Leyenda "worked expeditiously with the original contractor to obtain a new bid." Gustafson testified that he called Wilson at Palisade within seven to ten days of receiving notice on May 24 of the NSF check to tell Wilson that the project would be restarted and to ask if he needed to obtain new drawings. He testified that Wilson told him that the drawings from the March bid would be out of circulation and the drawings would need to be redone. Wilson testified that it would have taken a week or two to get new documents issued and that, once he had received the new documents, it would take two to three weeks to get the bid. Gustafson also testified that, at the time, because subcontractors had so much work, it was difficult to get subcontractors to respond. Viewed in the light most favorable

to upholding the court's verdict, the evidence supports the court's decision.⁴

c. August Bid Amount

¶44 Lawyers Title next argues that no evidence supports the court's finding that the August bid was \$6,917,899. Lawyers Title asserts that the amount was found only in exhibit 23, which the court had excluded from evidence. Lawyers Title is mistaken. The \$6,917,899 figure was introduced into evidence during Markham's testimony. On direct examination, Markham testified that the cost of construction rose 3% between the March and August bids. On cross-examination, counsel for Lawyers Title "want[ed] to know what numbers [Markham] used to show this 3[%] increase[.]" Counsel asked Markham, "[D]o you recall what number you used for your August 2005 number?" Markham responded, "6,917,899." Neither party objected to Markham's testimony. Regardless of whether Markham's estimate was based on an inadmissible document, the fact is that Markham's testimony was admitted evidence that the August bid amount was \$6,917,899. Thus, it was not error for the court to use this figure in its calculation of costs.

⁴ We also note that Plaza Leyenda was not seeking and the court did not award damages for the entire time it took to obtain the new bid, but only from June 22, the date the purchase contract with Quaid was cancelled.

d. Comparison of Bids

¶45 Lawyers Title also argues that the trial court erred in comparing bids with different scopes of work. Lawyers Title assumes that the court based its ruling on Exhibit 21, which presented the actual bid amounts and was not adjusted for any changes in the scope of work that might account for changes in the bid amount. The court found that construction costs increased by 3%. That finding indicates that the court relied instead on the testimony of Markham, whose analysis was based on numbers for which the scope of work had not changed. Moreover, the court as fact finder, having heard testimony that some changes in the actual bids could be due in part to changes in scope as well as increases in price, and having heard testimony as to what those changes in scope might be, could take those factors into account in determining damages. In fact, the court's ruling indicates that it did consider these factors as reflected in the court's finding that the "footprint" of the development remained the same. That finding would be consistent with Wilson's testimony that the project buildings did not change, but that changes in scope consisted of things such as adding pots and plants to a drawing that were shown on a landscape drawing but not on the architectural diagram.

e. Mitigation of Damages

¶46 Lawyers Title also contends that the trial court erred in concluding that Plaza Leyenda mitigated its damages. It argues that Plaza Leyenda failed to mitigate damages because upon learning of the NSF check on May 24, it chose to work with Quaid to complete the sale and failed to ask Palisade to honor the March 15 bid. Lawyers Title correctly notes that Wilson testified that if Gustafson had contacted him on May 24 Wilson "more than likely" would have let Plaza Leyenda accept the March 15 bid unless the prices had gone "way up."

¶47 Gustafson testified that upon learning of the NSF check he contacted Quaid and believed that Quaid intended to and would proceed with the sale. We note that had the sale gone forward, Plaza Leyenda would not have incurred the damages resulting from increased construction costs and in that respect attempted to mitigate damages. Moreover, although Wilson testified he might have honored the March 15 bid as late as May 24, given that that day exceeded the thirty-day bid acceptance period by approximately five weeks, we cannot conclude that the failure to pursue the bid constitutes a failure to mitigate damages. We note that, seven to ten days later, when Gustafson contacted Wilson, he was told he needed to obtain new drawings and could not accept the earlier bid.

¶48 The exact manner by which the court calculated the damages awarded is unclear from its ruling. However, aside from the small errors addressed *supra* ¶¶ 25, 30, the record supports the court's determination. Markham testified that in his forty years in real estate development he had never seen construction costs increase as rapidly as they did in spring to fall 2005. Gustafson and Markham testified to a difference in costs between March and August of \$220,000, and Markham indicated the expenses could have been higher. Prorating that amount for the 100 days of delay, for which the court found Lawyers Title responsible, results in damages for the increase in construction cost of approximately \$142,000. In addition, calculating carry costs at 8% on \$5 million prorated for the 100 days results in damages of approximately \$110,000. The court awarded less than the total derived from this calculation.

5. Attorneys' Fees

¶49 Plaza Leyenda appeals from the trial court's decision denying its request for an award of attorneys' fees. Plaza Leyenda requested fees pursuant to A.R.S. § 12-341.01; the court denied the request, finding that the action did not arise out of contract but out of tort and legal duties imposed by law.

¶50 Section 12-341.01 authorizes the court in its discretion to award reasonable attorneys' fees to the successful party in a contested action arising out of contract. A.R.S.

§ 12-341.01(A) (2003). Fees may be available under the statute for a tort claim "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). Where the claim arises out of the breach of a duty imposed by law rather than a contract between the parties, fees are not available under the statute. *Bar J Bar Cattle Co., Inc. v. Pace*, 158 Ariz. 481, 486, 763 P.2d 545, 550 (App. 1988). "Where, however, the duty breached is not imposed by law, but is a duty created by the contractual relationship, and would not exist 'but for' the contract, then breach of either express covenants or those necessarily implied from them sounds in contract." *Barmat v. John & Jane Doe Partners A-D*, 155 Ariz. 519, 523, 747 P.2d 1218, 1222 (1987). The question is whether a duty would exist under the circumstances absent a contract. *Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc.*, 198 Ariz. 10, 16, ¶ 27, 6 P.3d 315, 321 (App. 2000).

¶51 Generally, the duty of an escrow agent is created and defined by the escrow contract. *Luce*, 190 Ariz. at 502, 950 P.2d at 161. In the absence of a contract, therefore, an escrow agent generally owes no duty. Because no duty typically exists "but for" the contract, claims for breach of fiduciary duty or negligence related to the contractual obligations arise out of

contract and are eligible for an award of attorneys' fees under A.R.S. § 12-341.01.⁵

¶52 We conclude that fees are available pursuant to A.R.S. § 12-341.01(A) to Plaza Leyenda as the successful party in this action and remand to the trial court to determine, in its discretion, whether an award of fees is appropriate. Plaza Leyenda also seeks an award of attorneys' fees on appeal. In our discretion, we decline the request.

⁵ We have previously found that attorneys' fees may be awarded pursuant to A.R.S. § 12-341.01 in tort cases involving claims against escrow agents. *Burkons v. Ticor Title Ins. Co.*, 165 Ariz. 299, 312, 798 P.2d 1308, 1321 (App. 1989). In *Burkons*, this court found that claims for breach of fiduciary duty for failure to follow escrow instructions and breach of fiduciary duty for failure to disclose a known fraud arose out of contract for purposes of A.R.S. § 12-341.01 because "in Arizona, in the absence of a contract, an escrow agent owes no fiduciary duty." *Id.* This court found in that case that the appellant was entitled to fees on appeal under A.R.S. § 12-341.01 for having succeeded in reversing summary judgment. *Id.*

Lawyers Title correctly notes that the court of appeals' opinion in *Burkons* was vacated by the Arizona Supreme Court in *Burkons v. Ticor Title Ins. Co.*, 168 Ariz. 345, 813 P.2d 710 (1991). However, in vacating the decision, the Arizona Supreme Court agreed with the court of appeals' decision that the plaintiff/appellant was the successful party on appeal and authorized the trial court to award fees to the plaintiff on remand if the plaintiff was the successful party. The court did not disagree with or address the court of appeals' determination that fees were available under A.R.S. § 12-341.01 for tort claims involving escrow agents. *Id.* at 356-57, 813 P.2d at 721-22.

Conclusion

¶53 We vacate the court's verdict as to the Trust, as Lawyers Title either did not owe or did not breach any duty to the Trust. We affirm the court's verdict in favor of Plaza Leyenda, but vacate the court's award of damages and remand to the trial court to recalculate damages in accordance with this decision. We reverse the trial court's ruling that attorneys' fees are not available pursuant to A.R.S. § 12-341.01, and remand to the trial court to determine if an award of fees is appropriate.

/s/

DANIEL A. BARKER, Presiding Judge

CONCURRING:

/s/

MARGARET H. DOWNIE, Judge

/s/

MICHAEL J. BROWN, Judge