

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK
JUN 13 2007
COURT OF APPEALS
DIVISION TWO

PATRICK DYKES, dba PATRICK'S)
ANTIQUE CARS AND TRUCKS, an)
Arizona corporation,)
)
Plaintiff/Appellant,)
)
v.)
)
GRANDE PROPERTIES and THERMO-)
TEMP ROOFING,)
)
Defendants/Appellees.)
_____)

2 CA-CV 2006-0181
DEPARTMENT B

MEMORANDUM DECISION
Not for Publication
Rule 28, Rules of Civil
Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause Nos. CV200100400 and CV2000048583 (Consolidated)

Honorable Kelly Marie Robertson, Judge
Honorable Stephen F. McCarville, Judge

AFFIRMED

Patricia A. Taylor

Tucson
Attorney for Plaintiff/Appellant

Fitzgibbons Law Offices, P.L.C.
By Denis M. Fitzgibbons, Ann F. Schrooten,
and Tina L. Vannucci

Casa Grande
Attorneys for Defendants/Appellees

ECKERSTROM, Presiding Judge.

¶1 Appellant Patrick Dykes appeals from the trial court’s judgment against him on his claims for negligence, breach of warranty, and breach of contract against appellees Thermo-Temp Roofing, Inc. and Grande Properties. The case arose when a windstorm damaged the roof of Dykes’s commercial building. That roof had been installed two years earlier by Thermo-Temp on the request of the building’s then owner, Grande, from whom Dykes had purchased it. Dykes argues the trial court erred when it: (1) found he had not presented substantial evidence on a number of the elements of his claims, (2) required expert testimony to establish the standard of care for roof installation, (3) stated in its ruling that Dykes was not a proper party to the action, (4) made insufficient findings of fact and conclusions of law, and (5) awarded Thermo-Temp and Grande their attorney fees. Dykes also contends that the court violated his right to due process when it heard the facts of his case and then retired from the bench, leaving the litigation of post-trial motions to a subsequently assigned judge. For the following reasons, we affirm the judgment.

¶2 The court’s judgment stated it was granting Thermo-Temp and Grande’s motions for directed verdict. But when rendering a judgment at the close of a plaintiff’s case during a bench trial, the trial court does not technically direct a verdict under Rule 50, Ariz. R. Civ. P., 16 A.R.S., Pt. 1. Rather, it renders a judgment on partial findings pursuant to Rule 52(c), Ariz. R. Civ. P., 16 A.R.S., Pt. 1. *See Johnson v. Pankratz*, 196 Ariz. 621, ¶ 19, 2 P.3d 1266, 1271 (App. 2000); *Rempt v. Borgeas*, 120 Ariz. 36, 38, 583 P.2d 1356, 1358 (App. 1978). Under such circumstances, “we must review the trial court’s findings pursuant

to the standard of review applicable to final judgments on the merits,” which we may not set aside unless clearly erroneous. *Rempt*, 120 Ariz. at 39, 583 P.2d at 1359. And “[v]iewing the court’s findings as a ruling on the sufficiency of the evidence as the fact finder, we draw all inferences from the evidence in favor of the judgment.” *Johnson*, 196 Ariz. 621, ¶ 20, 2 P.3d at 1271.

¶3 In 1998, while Grande still owned the property at issue, it obtained bids from two roofing companies to repair some leaks in the roof. Because Grande is in California, Robert Harker, its president, asked a local realtor, Brett Eisele, to secure the bids. One bid called for the replacement of rotting plywood around the perimeter of the roof with a total estimated cost of over \$40,000. Thermo-Temp also provided a bid and therein offered to install a foam covering over the entire roof at an estimated cost of \$13,000. Before submitting that bid, James Tyus, the President of Thermo-Temp, inspected the roof. He walked the entire roof to check its condition and “it appeared perfectly solid to [him].”

¶4 Kim Myers of Roofing Specialists submitted the \$40,000 bid. Myers based that bid on the opinion of an appraiser, Walt Hitchcock, who had inspected the roof and prepared an estimate for its repair. Hitchcock testified that when he first stepped onto the roof in 1998, his foot penetrated through the edge of some rotting plywood that was exposed on the perimeter of the roof. As he walked the roof, he felt unsafe because the underlying plywood was “very soft . . . and it felt as if [he] was going to fall through in a number of places.” Hitchcock extracted a “core sample” of the roof and determined the existing roof was

delaminating and deteriorating. Overall, he concluded the roof was “in very poor condition.” His estimate called for at least one hundred sheets of plywood to “replace rotting plywood” at the perimeter of the roof only. Hitchcock sent the bid to Myers. Myers sent the bid to Eisele, who sent it to Harker. But Grande accepted Thermo-Temp’s less expensive bid to install the foam roof.

¶5 In May 2000, Dykes purchased the property from Grande. At the time, he hired his own inspector, Tim O’Malley. O’Malley walked the roof and testified at trial the roof felt and sounded solid. He did not take a core sample but stated he inspected the bottom side of the plywood from inside the building and it appeared to have been in good condition.

¶6 In July, after a severe windstorm, parts of the roof came off. O’Malley testified that “the foam had come off in big chunks, . . . underneath the foam there w[ere] areas that were not well-adhered to in the asphalt and in the plywood . . . [and] the upper members of the plywood laminate were delaminating.” According to Dykes, “[T]he foam that had been on the northern exposure of the building was all over everywhere.” When Dykes asked Thermo-Temp to repair the roof under the five-year warranty it had issued to Grande in 1998, Thermo-Temp maintained the roof had come off because of “an act of God” and therefore would not honor the warranty. Dykes contacted other roofing companies to obtain estimates to repair the roof. Coincidentally, Hitchcock was one of the appraisers that was sent out to inspect the roof. When he arrived, Hitchcock was “shocked that someone sprayed a foam roof over that existing roof.” He told Dykes he “knew this was going to happen.”

¶7 Dykes’s insurance carrier determined that the damage to the roof had been caused, in part, “by wet rot, decay and deterioration, and not associated with the windstorm event of July 30, 2000,” and paid approximately \$13,000 of his claim for the damage associated with the windstorm. But rather than hiring a contractor to repair the roof and repairing only the parts of the roof that had been damaged after the windstorm, Dykes undertook to repair the entire roof, replacing eighty-five to ninety percent of the plywood. And while one roofing contractor testified he and his crew could have repaired the entire roof in approximately two weeks, Dykes and his crew had spent from November 2000 to February 2001 repairing the roof.

¶8 In November 2000, Dykes filed a complaint against Grande and Thermo-Temp for negligence and breach of contract, arguing Grande had known about the poor condition of the roof when it hired Thermo-Temp to cover it up, and Thermo-Temp should not have installed foam over a defective surface. After Dykes presented his case in a trial to the court, the court found he had not proven his claims and entered judgment against him. Dykes moved for a new trial, the court denied his motion, and this appeal followed.

THERMO-TEMP’S NEGLIGENCE

¶9 In essence, the trial court rendered judgment for the defendants because Dykes had failed to prove causation. Specifically, it found that Dykes had not presented “sufficient evidence to prove that the cause of the roof damage was . . . either the repair of Thermo-Temp or that the plywood failed because the roof was rotten under the foam.” In assessing

the court's findings, "we draw all inferences from the evidence in favor of the judgment." *Johnson*, 196 Ariz. 621, ¶ 20, 2 P.3d at 1271.

¶10 As a threshold matter, we emphasize that Dykes had the burden of proving more than that Thermo-Temp's allegedly negligent installation was a possible cause of the wind damage. "It is not sufficient in an action for damages that plaintiff show a certain injury might have been caused by the negligence of defendant. It is necessary to establish that the injuries have been so caused." *Butler v. Wong*, 117 Ariz. 395, 396, 573 P.2d 86, 87 (App. 1977). Thus, to prove causation here, Dykes was required to present sufficient evidence from which the trier of fact could conclude that negligent installation of the roof over a defective surface "probably" caused it to dislodge in the windstorm. *See Martinez v. Woodmar IV Condos. Homeowners Ass'n, Inc.*, 189 Ariz. 206, 211-12, 941 P.2d 218, 223-24 (1997) (suggesting causation evidence sufficient to survive summary judgment if it demonstrated negligence was probable cause of injury).

¶11 Dykes contends that "there was overwhelming proof of causation." In support of this assertion, Dykes relies heavily on Hitchcock's opinion that "the roof came off . . . because . . . the surface layer of roofing that the foam was adhered to was . . . delaminating, . . . that means that the asphalt that hold[s] layers together has become brittle and dry and . . . because it was not sticking to the underlayer it separates. That's why the roof blew off." Dykes also directs us to the testimony of other witnesses suggesting that the foam roof

installed over a defective surface would have been especially vulnerable to failure in a windstorm.

¶12 But when viewed in context, this testimony demonstrated at most that negligent installation of the roof was a possible cause of its failure. When Thermo-Temp probed Hitchcock on his basis for concluding that the “roof blew off” because of its installation, Hitchcock conceded he did not know how much wind force would be required to dislodge a foam roof. He also acknowledged that each type of roofing system can be installed to meet “certain wind uplift requirements,” but did not specify what level of wind uplift requirements the Thermo-Temp system was designed to meet. Hitchcock also conceded that any roof can blow off in a windstorm even without negligence in its installation. In fact, he testified that usually when a roof blows off “it’s not an installation problem. It’s just the wind has exceeded the design criteria of that particular roofing system.” Lastly, Grande, not Dykes, offered the only evidence of the actual speed of the wind gusts caused by the storm. From this, and the failure of any of Dykes’s witnesses to refer to those numbers, we can only infer that such gusts would have been sufficient to damage even properly installed foam roofs.

¶13 Thus, although Dykes presented ample, albeit contested, evidence that the roof was negligently installed and that the installation would have rendered that roof more vulnerable to wind damage, he presented no testimony that such vulnerability was, more likely than not, the actual cause of the damage arising from the specific windstorm here. The trial court did not err in so finding.

¶14 Dykes also argues the trial court erred when it “applied an erroneous standard of care, claiming that expert testimony was necessary to set a standard of care in the community.” We agree with Dykes’s threshold premise that a witness need not be a “licensed roofing contractor in the State of Arizona” to be qualified to present testimony on the standard of care for roof repair. If a witness has “specialized knowledge” from experience, skill, or training that “will assist the trier of fact to understand the evidence or to determine a fact in issue,” the witness may testify thereto regardless of any special certification that others in the field may possess. Ariz. R. Evid. 702, 17A A.R.S.

¶15 But, here, the trial court did not state that Dykes’s witnesses were unqualified by lack of experience or certification to present potential testimony on the standard of care. Indeed, the trial court allowed and apparently considered the testimony of each. Rather, the court observed in its judgment that “[n]o competent expert testimony was ever elicited that the roof failed *because of* any negligence on the part of either of the defendants.” (Emphasis added.) That statement, when read in the context of the order, concludes only that Dykes had presented insufficient evidence on causation and, to the extent Dykes’s expert witnesses addressed causation, they lacked the appropriate foundation to do so. *See Selby v. Savard*, 134 Ariz. 222, 227, 655 P.2d 342, 348 (1982) (determination of whether witness possesses sufficient foundation to address subject within trial court’s discretion).

¶16 The record amply supports the conclusion that Dykes presented no competent expert witness on causation. As previously stated, to the extent Dykes presented any expert

testimony on causation, that testimony came from Hitchcock. And although Hitchcock was qualified by specialized knowledge to testify on roof installation and potential causes of damage, he lacked sufficient information about the nature of the windstorm and the rating of the foam materials used by Thermo-Temp to be competent to render an opinion on whether the manner of installation was an actual proximate cause of the damages to Dykes's roof.

¶17 Nor can we assume that the court's comment—a comment accurately addressing the deficiency of the expert testimony actually presented—was tantamount to a ruling that causation could only be proven by expert testimony. To the contrary, the court's ruling suggests it considered all evidence presented by the plaintiff's witnesses on that point.¹

¶18 Dykes also challenges the merits of the trial court's judgment against him contending he presented sufficient evidence that Thermo-Temp had breached the relevant standard of care when it installed the roof without fully replacing the existing substrata. But the trial court's ruling does not render judgment against him on that basis. And, we have already affirmed the trial court's conclusion that Dykes failed to present sufficient evidence on causation, which independently disposes of Dykes's claims regardless of the trial court's conclusions on standard of care.

¹The court noted in its ruling, "The plaintiff's own witnesses stated that roofs in good repair can be lost in a severe windstorm/thunderstorm and that this can happen without negligence on any [party's] fault."

THERMO-TEMP'S BREACH OF WARRANTY

¶19 Dykes argues Thermo-Temp is liable because Thermo-Temp warranted its work for five years and the roof did not survive the five years. The roofing contract between Thermo-Temp and Grande stated it was “warranted against leaks 5 years” in handwriting, and that the “Company guarantees workmanship for 5 years as specified under Arizona Contractors Code” in form language.

¶20 Dykes presented no evidence about Thermo-Temp’s compliance or lack thereof with the Arizona Contractor’s Code. And, as stated, the trial court reasonably concluded Dykes had not proved that Thermo-Temp’s actions or omissions caused part of the roof to come off. Accordingly, it implicitly concluded Dykes presented insufficient evidence that any leaks that arose because parts of the roof were missing were caused by Thermo-Temp’s work.² We find no error in the judgment against Dykes on his claim for breach of warranty.

GRANDE’S BREACH OF DUTY TO DISCLOSE

¶21 The contract between Dykes and Grande for the sale of the property states Dykes “inspected the property . . . and accepts the property in an ‘as is condition.’” Despite the existence of this clause, Dykes argues “the evidence clearly established a latent defect.” And he relies on the proposition that “a vendor *must* disclose *latent* defects in property that

²Although the handwritten warranty does not state it only applies to leaks caused by Thermo-Temp’s workmanship, it would be unreasonable to interpret the warranty otherwise. See *Grunewald & Adams Jewelers, Inc. v. Lloyds of London*, 145 Ariz. 190, 192, 700 P.2d 888, 890 (App. 1985) (we will not interpret phrase in contract to produce an absurd result).

are known to the vendor, notwithstanding the existence of a burden-shifting ‘as is’ clause or disclaimer of warranties.” *S Dev. Co. v. Pima Capital Mgmt. Co.*, 201 Ariz. 10, ¶ 11, 31 P.3d 123, 129 (App. 2001).

¶22 A latent defect is one that is hidden or concealed; the “very nature of a latent defect precludes the discovery of the defect upon a reasonable inspection.” *Id.* ¶ 12. Arizona jurisprudence requires a seller to disclose such defects to prevent sellers from concealing latent problems with the property and then “[hiding] behind contract language purporting to shift the risk of nondisclosure to the purchaser.” *Id.*, quoting *Haney v. Castle Meadows, Inc.*, 839 F. Supp. 753, 757 (D. Colo. 1993). Here, the trial court concluded Dykes “did not prove that if the latent defect of rotten plywood existed that the defendants Grande knew or should have known about it.” Therefore, it concluded, Grande “did not breach any contractual duty of disclosure when it sold the property to plaintiff.”

¶23 In assessing the trial court’s finding, we note it employed an incorrect standard to the benefit of Dykes. The question was not whether Grande “knew *or should have known*” about the defect, but rather, whether the latent defect was “*known* to the vendor.” *S Dev.*, 201 Ariz. 10, ¶ 11, 31 P.3d at 129 (emphasis added). Second, we find no error in the trial court’s conclusion, even under that erroneously relaxed standard, that Grande did not know about any defect in the structure of the roof.³

³Because we find no error in this conclusion and because Dykes has not proved either Eisele or Harker knew of any defect, we need not address Dykes’s argument Eisele was an agent of Grande when it solicited bids for Harker.

¶24 Based on the evidence, the trial court reasonably concluded that Hitchcock's bid, calling for one hundred sheets of plywood to replace rotting plywood on the perimeter of the roof, without more, was not sufficient notice to either Harker or Eisele that the roof had a latent defect. Neither Hitchcock nor Myers discussed the condition of the roof with Harker or Eisele beyond what was stated in the bid. Harker stated he had discussed the bid with Myers and was told the roof needed "repairs to the plywood." When he was questioned further, "Repairs to the plywood or replace plywood?" he responded, "I'm not sure what he said, repair, replace."⁴ But Thermo-Temp's bid also specified it would "Replace missing plywood." Therefore, Harker reasonably could have presumed that replacing plywood was a standard procedure when repairing a roof, that Thermo-Temp would also be fixing any problems involving the plywood on the roof, and that accordingly, it was not a defect when Grande sold the property to Dykes. We find no error in the trial court's conclusion that Dykes had not proved his claim of nondisclosure against Grande for failing to disclose a latent defect.

⁴It is unclear from Harker's deposition testimony whether the bid he is referring to is actually the bid originally submitted by Hitchcock to Myers because Harker refers only to speaking with Myers's brother, who works for a different roofing company than Myers, and receiving the bid from that different company. But because there is no evidence in the record before us of another bid from that company, we presume Harker's testimony relates to the bid prepared by Hitchcock.

ATTORNEY FEES

¶25 Dykes also argues the trial court erred when it awarded attorney fees to Grande and Thermo-Temp as the successful parties in an action arising from contract. We review the trial court's award of fees pursuant to A.R.S. § 12-341.01(A) for an abuse of discretion. *Robert E. Mann Constr. Co. v. Liebert Corp.*, 204 Ariz. 129, ¶ 13, 60 P.3d 708, 712 (App. 2003). When a tort case is intertwined with a contract case, attorney fees may be recovered under § 12-341.01(A) "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). We find no error in the conclusion that Dykes's claims against Grande could not have existed but for the real estate purchase contract between them, and that, therefore, Grande is entitled to its reasonable attorney fees as the successful party. *See* § 12-341.01(A); *S Dev. Co.*, 201 Ariz. 10, ¶ 11, 31 P.3d at 129 (duty to disclose latent defects arises from covenant of good faith and fair dealing implied in every contract); *Nelson v. Phoenix Resort Corp.*, 181 Ariz. 188, 201, 888 P.2d 1375, 1388 (App. 1994) (when action on appeal based on breach of covenant of good faith and fair dealing implied in written contract, successful party eligible for attorney fees under § 12-341.01(A)).

¶26 As to Thermo-Temp, after the trial court ordered defendants to submit proposed findings of fact and conclusions of law, Grande proposed a finding stating, "As prevailing parties, Grande Properties and Thermo-Temp are entitled to an award of their costs and reasonable attorneys' fees as determined by the Court pursuant to A.R.S. § 12-

341.01.” In opposition to this proposed finding Dykes stated, “Failure to disclose, and breach of warranty are tort claims. Plaintiffs[’] causes of action which include contractual issues are not the proper subject matter of attorney’s fee awards. No attorney[’]s fees in favor of Defendants are appropriate under the circumstances of this case.”

¶27 But Arizona courts repeatedly have held that a claim for breach of warranty arises out of contract for purposes of § 12-341.01(A). *See Chaurasia v. Gen. Motors Corp.*, 212 Ariz. 18, ¶ 27, 126 P.3d 165, 174 (App. 2006); *Colberg v. Rellinger*, 160 Ariz. 42, 51, 770 P.2d 346, 355 (App. 1998), *supp. op.*; *see also Woodward v. Chirco Constr. Co.*, 141 Ariz. 514, 516, 687 P.2d 1269, 1271 (1984) (claims for breach of implied warranty arise out of contract). And this court has rejected the argument that even if some of the claims arise out of contract we must deny a request for attorney fees because the tort claims are so intertwined or so significant. *See Ponderosa Plaza v. Siplast*, 181 Ariz. 128, 133, 888 P.2d 1315, 1320 (App. 1993) (awarding reasonable attorney fees to defendant under § 12-341.01(A) despite negligence claims because breach of express warranty against leaks arose out of contract).

¶28 Moreover, Dykes could have asked the court to apportion the attorney fees, awarding fees for time spent on the contract issues; instead, he limited his argument to the contention that Grande and Thermo-Temp were not entitled to any fees despite the existence of contract claims. *See Colberg*, 160 Ariz. at 51, 770 P.2d at 355 (petitioners abandoned on appeal theory of apportionment of fees between tort and contract claims under § 12-

341.01(A) because not argued below). We find no abuse of discretion in the award of attorney fees to Grande and Thermo-Temp. However, because we agree with Dykes that the thrust of the litigation related to tort claims, we decline Grande's and Thermo-Temp's requests for their attorney fees incurred on appeal pursuant to § 12-341.01. *See Colberg*, 160 Ariz. at 51, 770 P.2d at 355 (finding no abuse of discretion in trial court's award of fees under § 12-341.01(A) when tort case intertwined with contract case but exercising discretion not to award fees on appeal).

REMAINING ISSUES

¶29 Dykes raises several other issues that need only be summarily addressed. He implicitly argues the trial court erred when it “made reference to a claim that [he] was not a proper party to this action.” But the trial court did not base its ruling on Dykes's alleged lack of standing, but rather on his failure to prove his claims. Dykes argues, without citation to authority, that he was denied the benefit of his bargain and therefore entitled to recover the loss of value in his property. We do not address such undeveloped arguments on appeal. *See Ariz. R. Civ. App. P. 13(a)(6)*, 17B A.R.S.

¶30 Dykes also argues he is entitled to a new trial because the trial judge who heard the evidence and found he had not proven his claims retired from the bench while post-trial motions were pending. But we find no requirement in the rules of civil procedure that the same judge preside over the case from start to finish. And the case Dykes relies on to support his argument does not impose such a requirement. *See State v. Miller*, 178 Ariz. 555, 558

n.1, 875 P.2d 788, 791 n.1 (1994) (simply noting that retirement of original judge one factor weighing in favor of new trial rather than remand for hearing due to juror misconduct).

¶31 Dykes further argues the court’s findings of fact and conclusions of law were insufficient, but fails to explain how. The court ruled in a thorough minute entry that explained its reasons for ruling and that ruling was incorporated into the final judgment. We find no error. *Miller v. Bd. of Supervisors*, 175 Ariz. 296, 299, 855 P.2d 1357, 1360 (1993) (findings of fact sufficient if “‘pertinent to the issues and comprehensive enough to provide a basis for the decision’”), quoting *Gilliland v. Rodriguez*, 77 Ariz. 163, 167, 268 P.2d 334, 337 (1954). Finally, Dykes argues the trial court arbitrarily “disregarded the overwhelming evidence.” We have already addressed this contention in our determination there was sufficient evidence for the court to conclude as it did.

¶32 The judgment of the trial court is affirmed, and for reasons we have stated, we decline to award Grande or Thermo-Temp their attorney fees on appeal.

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

J. WILLIAM BRAMMER, JR., Judge

PHILIP G. ESPINOSA, Judge