

Arizona Case Law Update

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Duty to Disclose Continues After Discovery Deadline

Lexon v. Valley Springs Estates, LLC, et. al., 1 CA-CV 16-0096 (Ariz. App. July 13, 2017) – Memorandum Decision

In this case, the Arizona Court of Appeals held there was sufficient evidence presented at trial to support the jury's verdict, leave from the trial court is not required if a disclosure is made after the disclosure deadline so long as the disclosure is made more than sixty days before trial, and lay witnesses can provide opinion testimony based on their own experience. The Court of Appeals affirmed the trial court's judgment.

Appellants Valley Springs Estates, LLC, James Leo Crowley, LJC Development, LLC, and Cedar Ridge Investments, LLC, are real estate developers and investors. Appellants decided to develop two residential subdivisions, and needed a surety to provide subdivision performance bonds. Lexon Insurance Company agreed to issue the bonds. In March 2007, appellants signed a general agreement of indemnity. After 2008, appellants stopped paying annual premiums to

Lexon, and Lexon remained liable on the bonds. The bonds continued to automatically renew each year.

In February 2013, Lexon filed a complaint seeking contract damages from appellants for the unpaid premiums and attorneys' fees. The matter went to trial at which the sole issue before the jury was whether premiums on the bonds were due annually. The jury found in favor of Lexon. Appellants filed motions for a new trial and judgment as a matter of law, which the trial court denied.

Appellants timely appealed and raised three issues. First, they argued the trial court erred by refusing to grant the motion for judgment as a matter of law. Second, the trial court abused its discretion by allowing Lexon to admit into evidence a document it disclosed seven months before trial but after the parties' discovery deadline. Third, the trial court abused its discretion by allowing Lexon to present improper expert opinion testimony.

In Arizona, a motion for judgment as a matter of law is granted if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, a reasonable person could not agree with the conclusion advanced by the proponent of the claim or defense. *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000,

1008 (1990). Upon review of the evidence and testimony presented at trial, the Court of Appeals held substantial evidence of the terms of the schedule of rates were communicate to appellants or easily available to review at time of the agreement.

As for the second issue on appeal, Lexon found a document in June 2015 and subsequently disclosed the document. The parties' discovery deadline was April 30, 2015. Appellants filed a motion to strike the disclosure, but the trial court denied the motion since no evidence was presented of Lexon intentionally holding back the document. The trial court also noted parties' have a duty to continue to disclose even after the discovery deadline. Appellants filed a motion in limine to exclude the document, and the trial court denied the motion.

On appeal, appellants argue Lexon did not comply with Arizona Rules of Civil Procedure 37(c) because Lexon did not request leave from the trial court before disclosing the document. After reviewing Rule 37(c), the Court of Appeals concluded the trial court did not commit an error because under the rule, leave is not required if disclosure made after the deadline takes place more than sixty days before trial. In this case, the disclosure was made more than seven months before trial.

Lastly, appellants challenged the trial court allowing three of Lexon's lay witnesses to provide opinion testimony based on their firsthand experience, and allowing Lexon to comment on the testimony during closing argument. Appellants argued the testimony was improper because the trial court allowed Lexon to offer undisclosed expert opinion testimony. During trial, appellants successfully objected to Lexon's witnesses testifying about an industry standard since the witnesses had not been disclosed as expert witnesses. However, the trial court allowed the three witnesses to testify about their firsthand experience working with Lexon. The Court of Appeals found the testimony of the three witnesses admissible under Arizona Rule of Evidence 701, which allows a witness not testifying as an expert to provide opinion testimony if it is rationally based on the witness's perception, helpful to determining the fact in issue, and not based on specialized knowledge.

As for the challenge to the trial court allowing Lexon to comment on the opinion testimony during closing, the Court of Appeals ruled since appellants failed to make a timely objection during closing arguments, they waived the ability to appeal.

Attorneys' Fees

Gardner v. Scottsdale Waterfront Residences Condominium Assoc., 1 CA-CV 16-0506 (Ariz. App. July 25, 2017) – Memorandum Decision

In this case, the Arizona Court of Appeals held the trial court has broad discretion in deciding whether to award attorneys' fees under Arizona Revised Statute § 12-341.01(A).

William Gardner filed a lawsuit against Scottsdale Waterfront Residences Condominium Association ("SWRCA") alleging breach of contract because SWRCA allowed Gardner's rightful parking spots to be used by unauthorized users. SWRCA counterclaim asserting Gardner breached the contract by renting his unit out for short-term vacation rentals and failing to pay penalties assessed for that violation.

A settlement agreement was reached. As a part of the agreement, Gardner agreed to sign up for "sure pay" for his homeowner's association fees. In return, SWRCA agreed to stop infringing upon Gardner's parking spots and waived the penalties assessed against Gardner. Gardner failed to enroll in the "sure pay" program, and as a result, SWRC filed a Motion to Enforce Settlement Agreement along with a request for attorneys' fees. The trial court granted the motion and executed an order of judgment. While Gardner did not object to the form of judgment, he appealed the award of attorneys' fees.

Gardner represented himself. In his appeal brief, he failed to discuss in depth the award of fees to SWRCA. Gardner only mentioned A.R.S. § 12-341.01 and *Ocean West Contractors, Inc. v. Halec Constr. Co.*, 123 Ariz. 470, 473-74, 600 P.2d 1102, 1105-06 (1979) as citations. *Ocean West* explores what constitutes a successful party, and Gardner tried to use that case as an argument as to why he should be awarded his attorneys' fees.

On review, the Court of Appeals noted extensive briefing is not needed on the issue of attorneys' fees because the record on appeal and law is clear. As stated above, the trial court has broad discretion in deciding whether to award attorneys' fees under A.R.S. § 12-341.01(A). The statute allows for a discretionary award of attorneys' fees to the prevailing party in a matter arising out of contract. The Court of Appeals will affirm a trial court's award of fees if it is supported on any reasonable basis. *Maleki v. Desert Palms Prof'l Props., L.L.C.*, 222 Ariz. 327, 334, 214 P.3d 415, 422 (App. 2009). The Court of Appeals ruled since SWRCA was the successful party in a contract action and finding no abuse of discretion, SWRCA was properly awarded its attorneys' fees.

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