IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

C & G FARMS INC, a California corporation, and GEORGE AMARAL RANCHES INC, a California corporation, *Plaintiffs/Appellants*,

v.

FIRST AMERICAN TITLE INSURANCE COMPANY, a California corporation dba FIRST AMERICAN TITLE INSURANCE AGENCY INC; NORMA FAUDOA; DANIEL J. DINWIDDIE and ANDREA E. DINWIDDIE, Individually, as husband and wife, and as Co-Trustees and Beneficiaries of the Dinwiddie Family Trust Revocable Trust Agreement dated May 9, 2002, *Defendants/Appellees*.

No. 1 CA-CV 16-0600
FILED 3-13-2018

Appeal from the Superior Court in Yuma County
No. S1400CV201100395
The Honorable Lawrence C. Kenworthy, Judge

AFFIRMED

COUNSEL

Donald B. Engler, P.C., Attorney at Law, Yuma
By Donald B. Engler
Counsel for Plaintiffs/Appellants

Gust Rosenfeld, P.L.C., Phoenix
By Scott A. Malm
Counsel for Defendants/Appellees First American

MEMORANDUM DECISION

Judge James P. Beene delivered the decision of the Court, in which Presiding Judge Jon W. Thompson and Judge Peter B. Swann joined.

B E E N E, Judge:

¶1 Plaintiffs C & G Farms, Inc. ("C&G") and George Amaral Ranches, Inc. ("GAR"), owned respectively by Carlos Amaral ("Carlos") and George Amaral, (collectively the "Lenders") appeal from the superior court's judgment in favor of Defendants First American Title Insurance Company ("First American"), Norma Faudoa ("Faudoa"), and Daniel J. Dinwiddie ("Dinwiddie") and Andrea E. Dinwiddie both individually and as co-trustees and beneficiaries of the Dinwiddie Family Trust ("Dinwiddie Trust"). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 This appeal involves a dispute about five loans made by Lenders in 2005 to several borrowers for five parcels of land.

¶3 Eddie Mejorado ("Mejorado"), a California real estate agent for Smith Carter Real Estate ("Smith Carter"), represented Lenders in over twenty various loans since 2004. In August 2005, Mejorado arranged a meeting between Carlos and Dinwiddie. At that meeting, Dinwiddie told Carlos that he was looking for funds to purchase a 40-acre lot in Sierra Sands in Yuma County ("Sierra Sands Lot"), and Carlos agreed to fund the loans on behalf of Lenders.

¶4 In October 2005, the parties closed on five separate loan transactions. First, Smith Carter provided First American with two sets of specific and general closing instructions that referenced separate escrow numbers for loans of $150,000 and $175,000 to the Dinwiddie Trust. In response to First American's separate wiring instructions for each escrow number, GAR, on behalf of Lenders, separately wired $150,000 and $175,000. Next, Smith Carter provided First American with three sets of specific and general closing instructions that referenced separate escrow numbers for loans of $166,000 each to the Dinwiddie Trust for two parcels and to another borrower for the other parcel. In response to First American's three separate wiring instructions for each escrow number,

C&G, on behalf of Lenders, separately wired three transfers of $166,000 each. C&G's business records reference the October loans as three separate loans with different borrowers, and Lenders indicated they received the wiring instructions through Mejorado.

¶5 Each of Lenders' separate instructions contained individual promissory notes and deeds of trust that required issuance of separate insurance policies in favor of Lenders consistent with separate preliminary title commitments issued by First American to Lenders. Each preliminary title commitment for the five escrows had a distinct legal description of the parcel under "Exhibit A." First American sent each preliminary title commitment to Mejorado at Smith Carter and inserted the same distinct legal descriptions into each deed of trust.

¶6 Each of the five deeds of trust were recorded at the request of Lenders, and First American issued five different insurance policies to Lenders as part of the closing of the five escrows. Five separate checks totaling over $35,000 were made payable by First American to Lenders for loan fees.

¶7 After the borrowers defaulted on the loans, Lenders foreclosed four of the five deeds of trust, signed four Notices of Substitution of Trustee in February 2007, and received four trustee's deeds in May 2008. Lenders did not seek a rescission of the trustee's deeds.

¶8 In November 2010, Lenders wrote a demand letter to First American alleging that (1) Faudoa violated her fiduciary duties by helping Dinwiddie facilitate a conspiracy to defraud Lenders through illegal or invalid escrow transactions, and (2) First American was liable for civil damages as Faudoa was First American's authorized representative in the escrow transactions. In May 2011, Lenders filed a complaint against First American, Faudoa, and the Dinwiddie Trust alleging the following: (1) breach of contract, (2) breach of covenant of good faith and fair dealing, (3) tortious breach of covenant of good faith and fair dealing, (4) breach of fiduciary duty, (5) intentional misrepresentation, (6) negligent misrepresentation, (7) breach of promissory note, and (8) unjust enrichment.

¶9 Starting in September 2015, the superior court conducted a bench trial held over eight days. At trial, Carlos testified that when he met with Dinwiddie and Mejorado to discuss the loan, Dinwiddie told him that (1) the purpose of the loan was to purchase the 40-acre parcel in Sierra Sands that Dinwiddie showed him on an assessor's map, (2) Dinwiddie

needed an initial loan of $325,000 to be first position on the property, (3) Lenders would make a subsequent loan of $498,000 to both pay off the first loan and then subdivide the Sierra Sands Lot, and (4) Carlos would be first trustee on the Sierra Sands Lot. He testified that Mejorado told him he would hire a realtor in Arizona to make "sure that all laws were being followed." He further testified that he trusted Dinwiddie and Mejorado specifically to take care of the loan documents.

¶10 In March 2016, the superior court entered its ruling against Lenders on all counts and in favor of First American, Faudoa, and the Dinwiddie Trust and awarded them their reasonable attorneys' fees and statutorily recoverable costs. In August 2016, the court entered its judgment. Lenders timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1).

DISCUSSION

¶11 Lenders argue the following issues on appeal: the court erred by (1) incompletely stating and misapplying the law as to the fiduciary duties of an escrow agent; (2) incompletely stating and misapplying the law as to the evidentiary standard required to prove both a violation of A.R.S. § 32-2181(D), (E) and a conspiracy to commit either actual or constructive fraud; (3) determining that either Mejorado or Smith Carter were the agents of Lenders for any purpose or at any time; (4) adopting the technical definition of a defect in the insured title as a limit on title insurance coverage; and (5) awarding attorneys' fees to First American, Faudoa, and the Dinwiddie Trust.

¶12 We "must view the evidence on appeal in a light most favorable to support" the superior court's judgment, *State v. Veatch*, 132 Ariz. 394, 396 (1982), and will affirm the court's judgment "if there is any reasonable evidence supporting it." *Spaulding v. Pouliot*, 218 Ariz. 196, 199, ¶ 8 (App. 2008). We will not disturb the court's ruling in the exercise of its discretion unless there has been abuse of discretion. *Veatch*, 132 Ariz. at 396. However, we are not bound by the court's conclusions of law, and we review them *de novo*. *Univ. Med. v. Dep't of Revenue*, 201 Ariz. 447, 450, ¶ 14 (App. 2001).

I. The Court Did Not Err in Dismissing Lenders' Breach of Fiduciary Duty Claim

¶13 Lenders argue that the superior court incorrectly determined the fiduciary duties of an escrow agent. Specifically, Lenders argue that the court erred by relying solely on *Burkons v. Ticor Title Ins. Co. of California*,

168 Ariz. 345 (1991) to determine these duties. Lenders argue that the court should have also relied on *Maxfield v. Martin*, 217 Ariz. 312 (App. 2007) and *Berry v. McLeod*, 124 Ariz. 346 (1979), which they contend create "an objective reasonable escrow agent standard" that gives an escrow agent a duty to disclose upon becoming aware of any facts and circumstances that a reasonable escrow agent would perceive as evidence of fraud. They further contend the court erred when it concluded, without reference to "any evidence proffered by either party to support this bare conclusion," that First American and Faudoa did not breach any fiduciary duties owed to Lenders.

¶14 Here, the court did not err in determining the fiduciary duties of an escrow agent or by finding that First American and Faudoa did not breach any fiduciary duties owed to Lenders. First, in citing to *Burkons*, the court determined the fiduciary duties of an escrow agent by finding that

> [1] The escrow agent must be cognizant not only of the escrow instructions [2] *but of the provisions contained in the documents that are deposited in escrow*. [3] If there is a significant variance between the two, the escrow agent has a remedy. [4] When the terms of the instruments, *or any other fact known to the escrow agent, including the documents deposited in escrow*, "present an ambiguity of interpretation as to the intention" of the parties, *the agent has a "duty to call its principal(s) for clarification*." [5] When the "*agent should realize the possibility of conflicting interpretations, ordinarily [it] is not authorized to act*, since it would be [its] duty to communicate with the principal[s] and obtain more definite instructions."

¶15 The court also relied on *Burkons* to determine that

> [1] *Berry* requires the escrow agent to disclose information when it "knows that a fraud is being committed." It does not require the escrow agent to investigate and search for fraud. Id. [2] *But* our reading of *Berry* also leads to the conclusion that *it does not permit the escrow agent to close its eyes in the face of known facts and console itself with the thought that no one has yet confessed fraud*. [3] Although not required to investigate, when the agent is aware of facts and circumstances that *a reasonable escrow agent would perceive "as evidence of fraud*," then there is a duty to disclose.

These cases provide the standard for the fiduciary duties of an escrow agent. The court properly relied on them.

¶16 Second, reasonable evidence supports the court's decision that no breach of fiduciary duty occurred. First American and Faudoa strictly complied with the terms of the escrow instructions, which did not present facts that a reasonable escrow agent would perceive as evidence of fraud. Smith Carter initially provided First American with two sets of specific and general closing instructions that referenced separate escrow numbers for loans of $150,000 and $175,000 to the Dinwiddie Trust. Smith Carter later provided First American with three sets of specific and general closing instructions that referenced three separate escrow numbers for loans of $166,000 each to the Dinwiddie Trust for two parcels and to another borrower for the other parcel.

¶17 First American issued preliminary title commitments to Lenders for each of the five escrows with distinct legal descriptions under "Exhibit A." First American (1) sent each of these preliminary title commitments to Mejorado, (2) inserted the same distinct legal descriptions into each deed of trust, and (3) issued five different insurance policies to Lenders as part of the closing of the five escrows along with five separate checks totaling over $35,000 for loan fees. Nothing in this process would indicate "facts and circumstances that a reasonable escrow agent would perceive as evidence of fraud." *Burkons*, 168 Ariz. at 353.

¶18 Although Carlos testified that Dinwiddie told him the first loan from GAR would be used to be first position on the Sierra Sands Lot, the second loan from C&G would be used to both pay off the first loan and to subdivide the Sierra Sands Lot, and that Carlos would be first trustee on the Sierra Sands Lot, the superior court found his testimony to not be credible regarding "the terms of the agreement reached with [Dinwiddie]." "It is not our prerogative to weigh the evidence and determine the credibility of witnesses; that role belongs to the trial court." *Premier Fin. Servs. v. Citibank (Arizona)*, 185 Ariz. 80, 85 (App. 1995). Because reasonable evidence supports the superior court's judgment, the court did not err in dismissing Lenders' fiduciary duty claim.

II. The Court Did Not Err in Dismissing Lenders' Fraud Claim

¶19 Lenders next argue that the superior court erred by incompletely stating and misapplying the law as to the evidentiary standard required to prove both (1) a violation of A.R.S. § 32-2181(D), (E); and (2) a conspiracy to commit either actual or constructive fraud.

¶20 In relevant part, A.R.S. § 32-2181(D), (E) states:

> D. It is unlawful for a person or group of persons acting in concert to attempt to avoid this article by acting in concert to divide a parcel of land or sell subdivision lots by using a series of owners or conveyances or by any other method that ultimately results in the division of the lands into a subdivision or the sale of subdivided land. . . .
>
> E. A creation of six or more lots, parcels or fractional interests in improved or unimproved land, lots or parcels of any size is subject to this article[.]

Lenders contend that First American and Faudoa's assistance in facilitating Dinwiddie's illegal subdivision of the Sierra Sands Lot violates A.R.S. § 32-2181(D), (E). However, the superior court did not find that an illegal subdivision occurred, and Lenders did not request the court to make such a finding. "As a general rule, we will not review an issue on appeal that was not argued or factually established in the trial court." *Schoenfelder v. Ariz. Bank*, 165 Ariz. 79, 88 (1990). Therefore, the issue of whether an illegal subdivision occurred in violation of § 32-2181(D), (E) is waived on appeal.

¶21 Lenders also contend that the superior court erred by incompletely stating and misapplying the evidentiary standard required to prove a conspiracy to commit either actual or constructive fraud. Lenders cite several authorities as to what they perceive is the proper evidentiary standard for fraud. However, the superior court did not discuss the evidentiary standard required to prove a conspiracy to commit either actual or constructive fraud.

¶22 The proper standard for actual fraud reveals that

> A showing of fraud requires (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent that it be acted upon by the recipient in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the right to rely on it; (9) his consequent and proximate injury. Each element must be supported by sufficient evidence. Fraud may never be established by doubtful, vague, speculative, or inconclusive evidence.

Echols v. Beauty Built Homes, Inc., 132 Ariz. 498, 500 (1982) (citations and quotation omitted).

¶23 As to constructive fraud, it is a

> breach of legal or equitable duty which . . . the law declares fraudulent because [it] tends to deceive others, violates public or private confidences, or injures public interests. While it does not require a showing of intent to deceive or dishonesty of purpose, it does require a fiduciary or confidential relationship. Most importantly for our purposes, the breach of duty by the person in the confidential or fiduciary relationship must induce justifiable reliance by the other to his detriment.

Dawson v. Withycombe, 216 Ariz. 84, 107, ¶ 72 (App. 2007) (citation and quotation omitted).

¶24 Here, the superior court found that First American, Faudoa, and the Dinwiddie Trust "did not commit fraud or conspire to commit fraud as to the escrows," and Lenders "did not prove the damages they claim." *See Aaron v. Fromkin*, 196 Ariz. 224, 227, ¶ 13 (App. 2000) (one of the nine necessary elements of common-law fraud is the existence of damages). As to the fiduciary duty element under a constructive fraud claim, the court determined that First American did not owe Lenders a duty to apprise them of Arizona subdivision laws, and Lenders did not show that they reasonably relied on the fiduciary relationship as to the subdivision laws because they did not receive such a representation from First American.

¶25 Reasonable evidence supports the court's determination that neither fraud nor constructive fraud occurred. As previously stated, the court did not find that an illegal subdivision had occurred, which is the basis of Lenders' fraud claim. Moreover, Lenders admitted they did not hire First American to warn them of Arizona subdivision laws, and Carlos testified that he did not know if First American could even be hired to ensure lawful subdivision. Therefore, the court did not err in determining that neither fraud nor constructive fraud had occurred.

III. The Court Did Not Err in Finding Mejorado was Lenders' Agent

¶26 Lenders argue that neither Mejorado nor Smith Carter were their agents and that the record is insufficient to support the superior

court's conclusion that either Mejorado or Smith Carter were their agents for any purpose or at any time.

¶27 There are several types of authority given by principals to agents. "Actual authority may be proved by direct evidence of express contract of agency between the principal and agent or by proof of facts implying such contract or the ratification thereof." *Escareno v. Kindred Nursing Centers W., L.L.C.*, 239 Ariz. 126, 129-30, ¶ 8 (App. 2016) (citations and quotations omitted). In the absence of actual or express authority, "for one to be bound by an act of a purported agent, the evidence must be such as to justify a finding there was either actual implied authority or apparent authority." *Pac. Guano Co. v. Ellis*, 83 Ariz. 12, 16 (1957).

¶28 Implied authority is "founded on the principal's acquiescence to an agent's course of conduct which justifies the reasonable conclusion that actual authority was given though not in express language." *Id.* Apparent authority occurs when "the principal has intentionally or inadvertently induced third persons to believe that such a person was his agent although no actual or express authority was conferred on him as agent." *Reed v. Gershweir*, 160 Ariz. 203, 205 (App. 1989).

¶29 The superior court found that "[Mejorado] had express authority to act on [Lenders'] behalf with respect to the loans made to Dinwiddie including the escrows closed by [First American]." The court found it was "reasonable for Faudoa to believe [Mejorado] was acting as the agent of [Lenders] for purposes of the terms to be included in the escrows, and to believe that the escrow terms that closed were the same as [Lenders] intended." The court determined that Lenders' "manifestation of this agency included funding the August and October escrows." The court further determined that Carlos' testimony was not credible regarding Mejorado not being his agent.

¶30 Reasonable evidence supports the superior court's finding that Mejorado had express authority to represent Lenders. Lenders conceded that Mejorado was their agent in their complaint by stating "Mr. Eddie Mejorado a Realtor . . . represented my client's interests in the various loan transactions." Moreover, Mejorado had implied authority to represent Lenders. First American provided the loan wiring instructions to Mejorado's agency, Smith Carter, after which Lenders funded the loans by wiring five separate wires in accordance with the instructions. Lenders then accepted five checks for loan fees pursuant to the escrow instructions Mejorado had given to First American. Mejorado also had apparent authority to represent Lenders as they delivered funds and accepted fees

pertaining to the loans through him. Therefore, the court did not err in finding Mejorado was Lenders' agent.

IV. The Court Did Not Err in Finding that Lenders' Claim Was Not Covered Under the Title Insurance Policy

¶31 Lenders next argue that the superior court erred in its adoption of the technical definition of a defect in the insured title as a limit on title insurance coverage. They argue that because the policies were Lenders' alone, the policies only insured Lenders' security interests in the Sierra Sands Lot, and the court erred by finding that a third party needed to challenge the title for there to be a defect triggering coverage. They further argue that the foreclosures by trustee's sale prior to them knowing of the alleged illegal subdivision are immaterial as a matter of law to their damages, which they contend are based upon the lost benefit of their bargain.

¶32 It is unclear from Lenders' argument whether the correct standard of review is (1) reviewing *de novo* on a motion for summary judgment, *Logerquist v. Danforth*, 188 Ariz. 16, 18 (App. 1996), or (2) affirming the superior court's judgment if there is any reasonable evidence supporting it, *Veatch*, 132 Ariz. at 396. This confusion stems from Lenders seemingly arguing that the alleged illegal subdivision should have been covered under the title insurance policy, even though the court had already addressed on summary judgment the issue of whether the title policy covered an illegal subdivision. In fact, Lenders' opening brief states, "The court granted [First American, Faudoa, and the Dinwiddie Trust's] Second Motion for Summary Judgment as to the title defect relating to the illegal subdivision[.]" Of note, the record on appeal includes only the minute entry of the oral argument on this motion for summary judgment, not the transcript. Under either standard of review, however, Lenders' argument fails.

¶33 In reviewing a motion for summary judgment ruling, we determine *de novo* whether any genuine issue of material fact exists and whether the superior court erred in applying the law, and will uphold the court's ruling if correct for any reason. *Logerquist*, 188 Ariz. at 18. We construe the evidence and reasonable inferences in the light most favorable to the non-moving party. *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Tr. Fund*, 201 Ariz. 474, 482, ¶ 13 (2002).

¶34 Under a *de novo* standard, our review is limited because Lenders failed to provide a copy of the record transcript on the motion for

summary judgment that the court granted in favor of First American, Faudoa, and the Dinwiddie Trust. Thus, we presume the transcript supports the court's grant of this motion. *See In re Mustonen's Estate*, 130 Ariz. 283, 284 (App. 1981); ARCAP 11 (a party is responsible for making certain the record on appeal contains all transcripts or other documents necessary for us to consider the issues raised on appeal).

¶35 Reviewing this issue for an abuse of discretion, we will affirm the superior court's judgment if there is any reasonable evidence supporting it. *Veatch*, 132 Ariz. at 396. We conclude that the court did not err by finding that Lenders' claim on the title insurance policy fails because no one challenged the title and no actual loss occurred. The court correctly determined that "a 'defect' exists in the insured title when a third party claims an interest which interferes with the insured's use of the property . . . ." PALOMAR, TITLE INSURANCE LAW § 5.5 (2009). Lenders failed to provide evidence that a third party challenged the title and failed to prove that actual loss occurred. Accordingly, the court did not err in finding that Lenders' claims were not covered under the title policy.

V. The Court Properly Awarded Attorneys' Fees

¶36 Lenders lastly argue that the superior court erred by awarding First American, Faudoa, and the Dinwiddie Trust attorneys' fees. Specifically, they argue the court erred by awarding fees for travel time for First American, Faudoa, and the Dinwiddie Trust's counsel to attend depositions, appear before the court, confer with Faudoa, and confer with Lenders' expert witness, all under the guise of earned attorneys' fees. Lenders argue that the fees for "so-called travel expenses" were inappropriately measured as an hourly charge and billed as attorneys' fees. They contend that instead, such activity should be measured as non-taxable litigation costs pursuant to *Ahwatukee Custom Estates Mgmt. Ass'n, Inc. v. Bach*, 193 Ariz. 401 (1999). They provide several examples of First American, Faudoa, and the Dinwiddie Trust's counsel counting travel time as attorneys' fees instead of non-taxable direct costs.

¶37 The determination of the reasonableness of an attorneys' fees award is within the discretion of the superior court, and we will not disturb such a determination on appeal absent an abuse of discretion. *State ex rel. Corbin v. Tocco*, 173 Ariz. 587, 595 (App. 1992). "An abuse of discretion occurs where no reasonable basis exists in the record from which the trial judge could award the fees." *Id*.

¶38 Here, the superior court's attorneys' fees award was proper. The court agreed that, under *Bach*, non-taxable costs such as the costs of travel (*i.e.* mileage reimbursement or rental car costs) may not be recovered as attorneys' fees. However, the court found that the requested attorneys' fees were for "services [that] involved counsel's time, not out of pocket costs, for travelling to meet clients and experts, as well as attend depositions, mediation, hearings and trial." Necessary travel time may be included in an attorneys' fees application. *Schweiger v. China Doll Rest., Inc.*, 138 Ariz. 183, 188 (App. 1983). Therefore, the court did not err in its attorneys' fees award.

CONCLUSION

¶39 For the foregoing reasons, we affirm the superior court's judgment. First American, Faudoa, and the Dinwiddie Trust request an award of attorneys' fees incurred on appeal pursuant to A.R.S. § 12-341.01 because Lenders' claims arose from contracts such as the escrow instructions and title insurance policies. In the exercise of our discretion and because First American, Faudoa, and the Dinwiddie Trust are the prevailing parties on appeal, we award them reasonable attorneys' fees upon compliance with ARCAP 21.

COURT OF APPEALS
STATE OF ARIZONA

AMY M. WOOD • Clerk of the Court
FILED: AA