IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

SUNLAND DAIRY LLC,
Plaintiff/Appellee/Cross-Appellant,

v.

MILKY WAY DAIRY LLC, et al.,
Defendants/Appellants/Cross-Appellees.

No. 1 CA-CV 20-0057
FILED 3-18-2021

Appeal from the Superior Court in Maricopa County
No. CV2015-014128
The Honorable Danielle J. Viola, Judge

AFFIRMED

COUNSEL

Warner, Angle, Hallam, Jackson & Formanek, PLC, Phoenix
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OPINION

Presiding Judge James B. Morse Jr. delivered the opinion of the Court, in which Judge Maria Elena Cruz and Judge Paul J. McMurdie joined.

M O R S E, Judge:

¶1 A jury found Milky Way Dairy, LLC, Arie De Jong, and Jane Doe De Jong (collectively "Milky Way") liable under A.R.S. §§ 3-1304 and -1307 for converting 519 dairy cows owned by Sunland Dairy, LLC ("Sunland"). Milky Way appeals and argues the superior court made numerous errors of law. Sunland cross-appeals, arguing the superior court erred in calculating attorneys' fees and failing to award prejudgment interest. We hold that A.R.S. §§ 3-1304 and -1307 provide private rights of action. We also find that the superior court did not err in instructing the jury to award damages based on the cows' highest intermediate market value. For those reasons and the others stated herein, we affirm.

FACTS AND PROCEDURAL BACKGROUND[1]

¶2 Sunland and Milky Way are dairy companies that operate in Arizona. They entered a contract under which Sunland would transfer newborn calves to Milky Way, which would buy the bull calves and temporarily raise the heifers for Sunland. Sunland would pay Milky Way the costs of caring for the newborn heifers, less the amount Milky Way owed for the bull calves. Sunland tagged the ears of all the livestock it transferred to identify the animals as Sunland's property. Milky Way removed the tags, foreclosing any way of identifying which of the animals belonged to Sunland. Additionally, due to Milky Way's accounting problems, Sunland failed to reimburse Milky Way for the heifers' care.

¶3 Sunland demanded that Milky Way return its heifers. When Milky Way failed to return 519 of them, Sunland filed suit. Among other claims, Sunland alleged Milky Way converted the 519 heifers and was liable for treble damages under A.R.S. §§ 3-1304 (providing a tortfeasor is "liable to the owner of the animal for three times the value thereof") and -1307

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[1] "We view the facts and all inferences in the light most favorable to sustaining the jury verdict and the resulting judgment." *Hyatt Regency Phx. Hotel Co. v. Winston & Strawn*, 184 Ariz. 120, 123 (App. 1995).

(similar damages provision), two statutes addressing conversion of livestock. The parties both moved for summary judgment. Milky Way argued that neither A.R.S. §§ 3-1304, nor -1307, provide for a private right of action. The superior court found that they did, denied Milky Way's motion, partially granted Sunland's motion, and allowed the claims to proceed to trial.

¶4 The court held a six-day jury trial. Sunland proposed a jury instruction using the "highest intermediate value" method for calculating damages, which measured damages based on the highest market value of the cattle from the time they were converted until the time Sunland discovered the conversion. Milky Way objected and asserted the only proper measure of damages was the heifer's market value at the time they were converted. The superior court largely agreed with Sunland's proposed instruction and instructed the jury to base damages on the heifers' highest market value during the period between their conversion and Sunland's discovery of the conversion.

¶5 Ultimately, the jury found that Milky Way had converted Sunland's heifers and was liable under A.R.S. §§ 3-1304 and -1307. The jury separately found that Sunland owed Milky Way an offset for the costs for feeding, vaccinating, and breeding the heifers. The jury found the total value of the converted heifers was $1,304,075.73. The court trebled that amount to $3,912,227.19, pursuant to A.R.S. §§ 3-1304 and -1307(C). The court then subtracted $948,991.50—the costs the jury found Sunland had failed to pay Milky Way—added other damages amounting to $39,156, and arrived at a final damage calculation of $3,002,391.69. The court denied Sunland's request for pre-judgment interest.

¶6 The court also awarded Sunland attorneys' fees under A.R.S. § 12-341.01. Though Sunland requested a total fee award of $1,501,195.85, the court found the requested amount unreasonable and instead awarded $630,031.50 in attorneys' fees.

¶7 The parties timely appealed and cross-appealed, raising numerous issues. We have jurisdiction under A.R.S. § 12-2101(A)(1).

DISCUSSION

I. Milky Way's Appeal.

¶8 Milky Way argues the superior court erred in: 1) ruling that A.R.S. §§ 3-1304 and -1307 provide private rights of action; 2) trebling the jury's conversion damages *before* applying the offset for the unpaid costs of

care; 3) instructing the jury to use the "highest intermediate value" theory of damages; and 4) awarding Sunland its attorneys' fees under A.R.S. § 12-341.01. We address each argument in turn.

A. The superior court did not err in finding A.R.S. §§ 3-1304 and -1307 provide private rights of action.

¶9 Statutory interpretation is a question of law, which we review de novo. *McNamara v. Citizens Protecting Tax Payers*, 236 Ariz. 192, 194, ¶ 5 (App. 2014). Our goal in interpreting a statute is to ascertain the legislature's intent. *ABCDW, LLC v. Banning*, 241 Ariz. 427, 434, ¶ 29 (App. 2016).

¶10 As always, we begin with the text of the relevant statutory provisions. A.R.S. § 3-1304 states:

> A person who brands or marks an animal with a brand other than the recorded brand of the owner, or who effaces, defaces, alters or obliterates any brand or mark upon any animal, with intent to convert the animal to his own use, is guilty of a class 4 felony and is liable to the owner of the animal for three times the value thereof.

And A.R.S. § 3-1307 reads, in relevant part:

> A. A person who knowingly kills or sells livestock of another, the ownership of which is known or unknown, or who knowingly purchases livestock of another, the ownership of which is known or unknown, from a person not having the lawful right to sell or dispose of such animals, is guilty of a class 5 felony.
>
> [. . .]
>
> C. In addition to any other penalty imposed by this section, a person depriving the owner of the use of his animal or animals under subsection A or B of this section shall be liable to the owner for damages equal to three times the value of such animal or animals.
>
> [. . .]

¶11 We reject Milky Way's argument that these statutes do not provide for a private cause of action. Though the statutes do not explicitly

reference a "cause of action," they both provide that any individual who converts, kills, or sells, another's animal is "liable to the owner of the animal" for three times the value of the animal converted, killed, or sold. A.R.S. §§ 3-1304, -1307(C). Though Milky Way asserts this phrase refers to criminal liability, a statute establishing only criminal liability generally will not refer to liability *to an individual*. *See, e.g.*, A.R.S. § 13-1802 *et seq.* (defining and establishing penalties for the crime of theft). Likewise, the criminal code requires one convicted of a crime to make restitution to the victim "in the full amount of the economic loss," *see* A.R.S. § 13-603(C), but does not contemplate statutory treble damages as a component of any such calculation, *see Paroline v. United States*, 572 U.S. 434, 455-56 (2014) (noting that restitution in amounts exceeding the harm caused by a defendant may implicate the Constitution's Excessive Fines Clause). Accordingly, the most natural reading of "liable to the owner" is that A.R.S. §§ 3-1304 and -1307(C) provide for a civil cause of action. Accordingly, we affirm the superior court's determination that A.R.S. §§ 3-1304 and -1307 provide express private rights of action.

¶12 Moreover, even if the statutes were read as not expressly contemplating a private right of action, the statutes imply a private right of action. In determining whether a statute implies a private right of action, "we consider 'the context of the statutes, the language used, the subject matter, the effect and consequences, and the spirit and purpose of the law.'" *Napier v. Bertram*, 191 Ariz. 238, 240-41, ¶ 9 (1998) (quoting *Sellinger v. Freeway Mobile Home Sales, Inc.*, 110 Ariz. 573, 576 (1974)). The statutes in question are designed to protect the owner of livestock and hold a tortfeasor "liable to the owner." Their spirit and purpose is to allow punishment—both criminal, through felony designation, and civil, via treble damages—of anyone who unlawfully converts, kills, or sells another's livestock. We cannot read the remedies outlined in A.R.S. §§ 3-1304 and -1307 as limited to establishing criminal liability for the prohibited conduct. We affirm the superior court's holding that these statutes provide a private right of action.

B. The superior court did not err in trebling Sunland's damages before applying Milky Way's offset.

¶13 Milky Way argues the superior court erred by trebling Sunland's gross damages rather than net damages. Again, this is a matter of statutory interpretation, which we review de novo. *McNamara*, 236 Ariz. at 194, ¶ 5.

¶14 We agree with the superior court that this issue is resolved by the statutes' plain language. Both A.R.S. §§ 3-1304 and -1307(C) provide

that the owner of the converted, killed or sold animals is entitled to "three times the value thereof." The jury found each of the 519 converted heifers was worth $2,512.67. Therefore, the proper measure of Sunland's damages for each converted heifer is triple that amount. If the offset were applied before trebling the damages, then the offset would be trebled as well, and deny Sunland recovery of "three times the value" of the animals to which it is statutorily entitled. A.R.S. §§ 3-1304, -1307.

C. The superior court did not err in instructing the jury to find damages based on the heifers' "highest intermediate value."

¶15 Milky Way argues the superior court instructed the jury to use an incorrect measure of damages. "Whether the trial court applied the correct measure of damages is a mixed question of fact and law we review de novo." *Armiros v. Rohr*, 243 Ariz. 600, 606, ¶ 21 (App. 2018).

¶16 The superior court instructed the jury as follows:

> For property that fluctuates in value, such as the heifers, the law states that the market value is measured as the highest market value between the time Sunland heifers were sold or had their ear tags removed by Milky Way and Sunland learned that Milky Way had sold the heifers or removed their Sunland ear tags.

¶17 Milky Way argues the instruction misstated the law because "[c]onversion damages are fixed at the time and place of the tort." This accurately states one method of determining conversion damages. *See Jones v. Stanley*, 27 Ariz. 381, 384 (1925) ("The ordinary measure of damages in conversion is the reasonable market value of the goods at the time of conversion, with interest."). But our supreme court has acknowledged that the *Jones* method is not the exclusive means of determining damages in a conversion action. In a case involving the conversion of trees, our supreme court stated an appropriate measure of damages "would be the value of the trees at maturity less costs of preparation for sale." *Wolk v. Nichols*, 117 Ariz. 352, 353 (1977); *cf. also U.S. Fid. & Guar. Co. v. Davis*, 3 Ariz. App. 259, 261-62 (1966) (recognizing that measuring damages for the wrongful attachment of cattle at the time of the attachment "in many cases . . . would be absolutely inadequate to compensate the injured party for the loss sustained" (quoting *Am. Sur. Co. of New York v. Hatch*, 24 Ariz. 66, 71 (1922)).

¶18 The jury instruction given here fairly restated the principles approved in *Jones* and *Wolk*, *i.e.*, conversion damages are intended to make the plaintiff whole. Although the *Jones* court did not address a situation in

which the conversion was discovered until after the value of the property had increased, the court approved "instructing the jury the measure of damages would be the actual value, based on money loss, of the goods converted . . . ." *Id.* at 385. By recognizing that Sunland's losses were not fixed until Sunland became aware of the conversion, the instruction allowed the jury to determine the actual value of Sunland's losses.

¶19 Moreover, the instruction is consistent with the "highest intermediate value" theory of damages adopted in the Restatement and by other states in conversion cases involving goods of fluctuating value. *See* Restatement (Second) of Torts § 927(1) (1979); *Brougham v. Swarva*, 661 P.2d 138, 144 (Wash. Ct. App. 1983) ("[W]e hold that where personal property which has a sharply fluctuating value is willfully converted and such conversion is fraudulently concealed by the converter, the measure of damages is the highest value of the property wrongfully and knowingly converted between the time of conversion and a reasonable time after the victim learns of such conversion."); *Roxas v. Marcos*, 969 P.2d 1209, 1269 (Haw. 1998) (adopting the same rule); *Lamb Bros., Inc. v. First State Bank*, 589 P.2d 1094, 1102-03 (Or. 1979) (similar).

¶20 The Restatement refers to "commodities of fluctuating value customarily traded on an exchange," and the commentary to that section lists "stocks, bonds and other securities, or fungible goods such as grain, cotton, oil and the like." Restatement (Second) of Torts § 927 cmt. e (1979). But Milky Way does not contest the instruction on the basis that the calves were not customarily traded on an exchange, and *Wolk* addressed the value of converted trees without reference to a trading exchange. Accordingly, we find that this principle was used appropriately here. *See Ft. Lowell-NSS Ltd. P'ship v. Kelly*, 166 Ariz. 96, 102 (1990) ("Absent Arizona law to the contrary, this court will usually apply the law of the Restatement.").

¶21 Milky Way cites to a case from Texas that rejected the "highest intermediate value" theory. *See Sec. State Bank v. Spinnler*, 78 S.W.2d 275, 278 (Tex. Civ. App. 1935). In *Spinnler*, the Court of Civil Appeals of Texas noted that application of the theory could result in "vindictive damages" because victims could simply wait to file suit until after the market value of their converted property had fluctuated upward due to seasonal shifts. *Id.* As an example, the court suggested that a tomato farmer whose crop had been converted could receive a windfall by waiting until after the crop had gone out of season to file suit, as the "highest intermediate value" would be greater than the price the farmer would have reasonably been able to obtain. *Id.* This hypothetical concern is not present in this case.

¶22 *Spinnler* is premised on the notion that a plaintiff should not benefit from "willfully or negligently" failing to file suit. *Id.* Sunland did not receive any such benefit, given that the jury was instructed that the valuation period ended when Sunland learned its heifers had been converted. *See supra* ¶ 16. Further, Milky Way does not argue that the market value assigned to the heifers was factually flawed or unreasonable, making it difficult to understand how the damages the jury awarded are of the same "vindictive" sort that concerned the Texas court.

D. The superior court did not err in awarding attorneys' fees under A.R.S. § 12-341.01.

¶23 Finally, Milky Way argues the court erred in awarding attorneys' fees under A.R.S. § 12-341.01 because the action did not arise out of contract. We review the grant of attorneys' fees de novo. *Ramsey Air Meds, LLC v. Cutter Aviation, Inc.*, 198 Ariz. 10, 13, ¶ 12 (App. 2000).

¶24 Sunland argues Milky Way invited any error, given the parties stipulated that the matter arose under contract. We agree. "By the rule of invited error, one who deliberately leads the court to take certain action may not upon appeal assign that action as error." *Caruthers v. Underhill*, 235 Ariz. 1, 7, ¶ 23 (App. 2014) (quoting *Schlecht v. Schiel*, 76 Ariz. 214, 220 (1953)). Milky Way suggests the superior court did not rely on its stipulation when awarding fees. But the superior court noted the stipulation when it ruled that the contract, tort, and statutory claims "were intertwined." Milky Way expressly stipulated that this matter arose out of contract, and we hold Milky Way to its stipulation. We affirm the superior court's grant of attorneys' fees.

II. Sunland's Cross-Appeal.

¶25 Sunland cross-appeals the superior court's denial of prejudgment interest and its decision to award attorneys' fees based on standard hourly rates rather than a percentage of the judgment. We address these arguments in turn.

A. Sunland is not entitled to prejudgment interest.

¶26 Sunland argues it is entitled to prejudgment interest because its claims were liquidated. *See Employers Mut. Cas. Co. v. McKeon*, 170 Ariz. 75, 78 (App. 1991) ("Under Arizona law, prejudgment interest on a liquidated claim is a matter of right and not a matter of discretion."). "Whether a party is entitled to prejudgment interest is a question of law we

review de novo." *Flood Control Dist. v. Paloma Inv. Ltd. P'ship*, 230 Ariz. 29, 48, ¶ 75 (App. 2012).

¶27 A claim is liquidated "if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion." *McKeon*, 170 Ariz. at 78 (quoting C. McCormick, Damages § 54 (1935)). The jury was asked to determine the "highest intermediate value" of the heifers based on expert opinion proffered by Sunland. Sunland's damages were also offset by the cost of care of the livestock. Accordingly, we reject Sunland's contention that the superior court erred by ruling that Sunland's damages were not liquidated.

B. The superior court did not err in awarding Sunland attorneys' fees based on a reasonable hourly rate.

¶28 Sunland argues the superior court erred in refusing to award attorneys' fees based on Sunland's contingency fee arrangement with its counsel. We review a determination regarding the amount of fees awarded for an abuse of discretion. *Thompson v. Corry*, 231 Ariz. 161, 163, ¶ 4 (App. 2012).

¶29 The superior court calculated Sunland's reasonable attorneys' fees based on the number of hours the court concluded were reasonably expended, multiplied by what it found to be a reasonable hourly rate. *See Schweiger v. China Doll Restaurant,* 138 Ariz. 183, 187-88 (App. 1983). Sunland argues the court instead should have based its award on the factors listed in *In re Swartz*, 141 Ariz. 266, 272 (1984). We disagree.

¶30 At issue in *Swartz* was whether a contingency fee arrangement violated the rules of professional conduct, not whether a court's award of attorneys' fees was reasonable. *Id.* at 268. Determining whether a fee arrangement is ethical and whether a fee award is reasonable under a fee shifting statute are not always the same inquiry. For that reason, when the prevailing party has a contingency agreement with its lawyers, the court is not required to use the contingency agreement as a basis for determining an award under the fee shifting statute. *See Crews v. Collins*, 140 Ariz. 80, 82 (App. 1984) ("Defendants' obligation is to pay reasonable attorney's fees . . . . The fee arrangement with plaintiff's counsel does not, per se, establish that the [contingency] fee . . . was reasonable. Evidence of reasonableness of the fee is necessary.").

¶31 At oral argument, Sunland relied on *In re Conservatorship of Fallers*, 181 Ariz. 227 (App. 1994), to argue that the test articulated in *Swartz* governed in contingency fee cases and that *China Doll* was therefore

inapplicable. But *Fallers* involved a guardian ad litem who challenged a contingency fee arrangement on behalf of an attorney's minor clients and, as with *Swartz*, addressed whether that contingency fee violated the rules of professional conduct. *Fallers*, 181 Ariz. at 228-29 (citing *Swartz* and Ariz. R. Sup. Ct. 42, ER 1.5). Sunland essentially argues that every award of attorneys' fees in a contingency-fee case must be the entire amount owed under the fee arrangement, so long as it does not violate ER 1.5. That is simply inaccurate.

¶32 In fact, although the superior court would not have been authorized to award fees in excess of those payable under Sunland's contingency fee agreement, *see Cont'l Townhouses E. Unit One Ass'n v. Brockbank*, 152 Ariz. 537, 545-46 (App. 1986) (holding that the court could, as a discretionary matter, "award *up to*" the percentage due under the contingency arrangement), that agreement did not necessarily establish that the requested fees were reasonable, *see Crews*, 140 Ariz. at 82. The superior court has broad discretionary power "to award and determine the amount of attorneys' fees under A.R.S. § 12-341.01." *Votex Corp. v. Denkewicz*, 235 Ariz. 551, 563, ¶ 39 (App. 2014). We reject Sunland's argument to the contrary and affirm the superior court's calculation of the fee award.

III. Fees and Costs on Appeal.

¶33 Sunland and Milky Way request their attorneys' fees and costs on appeal. *See* A.R.S. § 12-341.01. In our discretion, we grant Sunland its reasonable fees associated with responding to Milky Way's appeal, but not for prosecuting its cross-appeal. We deny the parties' requests for attorneys' fees in all other respects. As the substantially prevailing party, Sunland is entitled to its costs on appeal.

CONCLUSION

¶34 For the reasons above, we affirm the superior court in all respects. We grant Sunland its attorneys' fees related to responding to Milky Way's appeal and its costs on appeal, upon compliance with ARCAP 21.

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