



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



**SIRRAH ENTERPRISES LLC v. WAYNE AND JACQUELINE
WUNDERLICH**

240 Ariz. 163, 377 P.3d 360 (“Op.”)

CV-15-0058-PR

PARTIES:

Petitioner/Appellant/Plaintiff/Counterdefendant: Sirrah Enterprises, LLC

Respondents/Appellees/Defendants/Counterclaimants: Wayne and Jacqueline Wunderlich

FACTS:

In April 2006, the Wunderlichs contracted with Sirrah, a licensed contractor, to construct a basement and exterior walls for a house on the Wunderlichs’ property. Under the contract, the Wunderlichs were to pay Sirrah the actual cost of construction plus fifteen percent, which at the time of the contract Sirrah estimated would total \$68,582. The contract also specified that any amounts due to Sirrah “shall accrue interest at the rate of one and one-half percent per month from the date due until paid.” Finally, the attorneys’ fees provision of the contract said that “in the event either party . . . is required to retain the services of an attorney to enforce any term or provision of this agreement, the prevailing party shall be entitled to and the losing party shall pay all expenses and costs including reasonable attorneys’ fees incurred by the prevailing party.”

Sirrah began working on the Wunderlichs’ property later that month, and the Wunderlichs made payments as Sirrah completed the work. In early December, Sirrah submitted an invoice for \$26,908.47, but upon receiving that invoice, the Wunderlichs objected to the labor and materials that Sirrah’s concrete subcontractor provided. Sirrah first reduced the balance owed to \$22,259.33 and then to \$19,878.49, but the Wunderlichs still did not pay. In January 2007, Sirrah completed the work and submitted a final invoice for \$8,905.24. Again, the Wunderlichs did not pay.

Sirrah consequently sued the Wunderlichs, alleging, among other things, breach of contract for failure to pay and breach of the implied covenant of good faith and fair dealing for failing to fulfill their contractual obligations in a timely manner. Sirrah sought actual and compensatory damages to be proved at trial, “but in no event less than” \$28,783.73, prejudgment interest at the statutory rate of ten percent per year from the date the last invoice was issued, and attorneys’ fees and costs pursuant to the contract and A.R.S. § 12–341.01.

The Wunderlichs counter-claimed, alleging, among other things, breach of contract, breach of the contract’s implied warranty of workmanship and habitability, and breach of the implied covenant of good faith and fair dealing. Specifically, the Wunderlichs alleged that the walls Sirrah constructed were out of plumb and not square, that several batches of grout used on the project were less than 3,000 pounds per square inch as promised because Sirrah failed to

supervise its use, and Sirrah failed to follow industry standards and manufacturer requirements for the construction of the walls by failing to properly seal and support them. The Wunderlichs sought compensatory damages at an amount to be proved at trial plus pre- and post-judgment interest.

After seven years of discovery and pretrial motions, the parties tried the case before a jury. The jury found in Sirrah's favor on its breach of contract claim against the Wunderlichs, awarding \$31,374 in damages. The jury further found in Sirrah's favor on the Wunderlichs' claims for breach of contract and breach of the covenant of good faith and fair dealing. However, the jury found in the Wunderlichs' favor on their claim for breach of the implied warranty of workmanship and habitability, awarding them \$297,782 in damages. Of that award, \$214,579 was for the cost of demolition, repair, and reconstruction of Sirrah's work.

The Wunderlichs applied for attorneys' fees pursuant to A.R.S. § 12-341.01, arguing that their claim for breach of implied warranty arose out of contract, and claimed taxable costs pursuant to A.R.S. § 12-341. Sirrah objected, arguing that the Wunderlichs could not seek fees under A.R.S. § 12-341.01 because their contract had an attorneys' fees provision that took precedence over the statute. Sirrah also contended that the Wunderlichs could not seek fees under the contract because it allowed for fees only for successfully enforcing the contract, and the implied warranty claim was not based on the contract. Sirrah argued that it was the only party entitled to fees under the contract because it was the prevailing party on all attempts to enforce the contract.

The trial court disagreed. It ruled that the warranty of workmanship and habitability was implied by law in every home construction contract, so the Wunderlichs were entitled to attorneys' fees if they were the "successful party" under A.R.S. § 12-341.01 or the "prevailing party" under the contract. The court found that although the Wunderlichs breached the contract by not paying Sirrah, they were nevertheless the successful and prevailing party "under the totality of the circumstances" because the Wunderlichs proved—and a representative from Sirrah admitted—that the work Sirrah contracted to perform fell below standards in "nearly every aspect of the construction." The court also found that the Wunderlichs were the prevailing and successful party because the jury found in the Wunderlichs' favor on the implied warranty claim and the jury's verdict on that claim was "substantially more" than the jury's verdict in Sirrah's favor on the breach of contract claim. The trial court additionally awarded the Wunderlichs, as the prevailing party, their taxable costs pursuant to A.R.S. § 12-341 and the terms of the contract.

Based on these rulings, the trial court ordered the Wunderlichs to submit a proposed final judgment. The Wunderlichs did so, and included in that judgment an award of prejudgment interest owed to them at the legal rate pursuant to A.R.S. § 44-1201, but not to Sirrah. Sirrah objected, arguing that it, not the Wunderlichs, was entitled to prejudgment interest as a matter of right pursuant to the contract. Sirrah attached its own proposed judgment, which included prejudgment interest on its award accruing from the date the last invoice was due pursuant to the contract at a monthly rate of one and one-half percent. The court denied Sirrah's request for prejudgment interest, stating—without explanation—that the request was untimely. The court also stated that "the amount is not actually due because of the substantial judgment awarded against the plaintiff."

Sirrah timely appealed, alleging, *inter alia*, that the trial court erred by awarding the

Wunderlichs attorneys' fees pursuant to A.R.S. § 12-341.01 and the contract because the Wunderlichs did not prevail on any claim to enforce the contract.

In an opinion filed June 16, 2016, the court of appeals affirmed in part and reversed in part. The court held “that the trial court did not err by awarding the Wunderlichs attorneys’ fees because the implied warranty of workmanship and habitability was an implied term of the construction contract and the nature and size of the jury’s award for the breach of that warranty made the Wunderlichs the prevailing party in the dispute. We also hold, however, that the trial court erred in denying Sirrah prejudgment interest on its breach of contract claim because Sirrah timely requested interest and was entitled to it.” Op. ¶ 2.

ISSUE FOR WHICH REVIEW WAS GRANTED:

Relying on the lineage of cases establishing Arizona’s IWWH [implied warranty of workmanship and habitability], *Lofts* held that the warranty is imposed at law—without regard to the parties’ contractual relationship—by virtue of the act of construction itself. Therefore, did the Court of Appeals err in creating an exception to *Sullivan* in which the IWWH attaches to an express contract, converting the “implied-in-law” warranty which “sounds in” contract to an “implied-in-fact” term that “arises out of” contract, such that original purchasing homeowners who prevail on the claim may recover contractual attorney fees and costs while subsequent purchasing homeowners cannot?

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