NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DIVISION ONE
FILED: 7/18/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

MARKHAM CONTRACTING CO. INC., an Arizona corporation, Plaintiff/Appellee/Cross-Appellant, v. FIRST AMERICAN TITLE INSURANCE COMPANY, a California Corporation, Defendant/Appellant/Cross-Appellee.	1 CA-CV 12-0195 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-015602

The Honorable Jose S. Padilla, Judge

AFFIRMED IN PART, VACATED IN PART AND REMANDED

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And

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K E S S L E R, Judge

¶1 These appeals arise out of a mechanics' lien foreclosure action between the construction lender, New South Federal Savings Bank[1] ("New South") and a general contractor, Markham Contracting Company ("Markham"). The critical issue is one of fact: whether Markham performed work prior to June 20, 2005 (meaning it has priority) or on or after that date (meaning New South has priority). The superior court entered a final judgment granting Markham's mechanics' lien priority over New South's deed of trust and awarded Markham prejudgment interest and attorneys' fees. For the reasons stated below, we affirm the priority ruling and most of the attorneys' fees award, but vacate the prejudgment interest award and remand for adjustment consistent with this decision.

FACTUAL AND PROCEDURAL HISTORY[2]

¶2 The construction project at issue is the building of a townhouse development called the Lindsay Park Townhome Project ("Project"). In 2003, Rodney Morris, through his entity Lindsay Park Townhomes, LLC ("Townhomes"), contracted to buy a 21-acre

[1] Appellant First American Title Ins. Co. was New South's title insurer and was eventually substituted in for New South. Because First American stands in the shoes of New South, this decision refers to the appellant as New South.

[2] This Court views the facts in the light most favorable to upholding the superior court's ruling. *Sholes v. Fernando*, 228 Ariz. 455, 457, ¶ 2, 268 P.3d 1112, 1114 (App. 2011).

lot in Mesa for the Project. In 2004, Townhomes sought a bid from Markham, to do grading and paving work on the Project. Markham submitted its first bid in November 2004, and then submitted four revised bids in 2005. The July 2005 bid was incorporated into a contract dated June 28, 2005 and signed August 4, 2005.

¶3 Starting in March 2005, Markham performed construction on the Project. Markham undertook to "blue stake" and "pothole" the property to identify utility locations with paint on the property. Markham first requested Arizona Blue Stake, Inc. to mark utilities on March 18, 2005, and then requested subsequent visits every fourteen days pursuant to Arizona law. Markham did not have to pay Arizona Blue Stake for its services; rather Markham charged Morris for its own labor related to the blue staking process, which included mapping out the area for blue staking and sending out Markham employees to meet with and supervise Arizona Blue Stake employees. After the utilities were marked, Markham contacted a company called TBE in late March 2005 to dig the potholes on the property, and Markham supervised the digging. The potholes were completed on the property on March 29, 2005. Witnesses testified that the potholing was done pursuant to the bid, which was ultimately incorporated into the contract, but that Markham was paid for that work separately.

¶4 Although there was conflicting testimony presented at trial, there was evidence that Markham performed other construction activities during April, May, and in June, prior to June 20, 2005. In either March or April 2005, Markham arranged for the preparation of a barricade plan to be approved by the city and then installed by Markham. At least three witnesses testified that barricades were required before potholing could begin, which documents establish occurred in late March 2005. Although conflicting at times, evidence also indicated that the following activities occurred in April, May, or June: trash removal, installation of job trailers, pad clearing for the job trailers, installation of an access ramp, creation of a "V ditch" to prevent additional trash build-up, issuance of permits, and the installation of a temporary water system. Although one of Markham's project managers testified that no construction activities, except blue staking and potholing, occurred before June 20, 2005, he "ha[d] no reason to disagree with" the testimony of Markham's project estimator, who testified that the staking and potholing occurred prior to June 20, 2005. He also testified that he struggled to recall the specific times construction activities occurred. In addition, even though the original owner of the Project testified that no construction commenced before June 30, 2005, he testified that potholing occurred in late March 2005.

¶5 Townhomes decided to sell the Project, and in June 2005, Townhomes closed on the sale of the property with Lindsay Park Development, LLC ("Development"). Development obtained construction financing through New South, and New South recorded a deed of trust on the Project on June 30, 2005. In August 2005, Development's related entity, OWCP17, LLC (later Leadermark, LLC) ("OWCP17") signed a contract with Markham that was dated June 28, 2005 and incorporated Markham's July 2005 bid.

¶6 Although there was some testimony to the contrary, evidence established the construction work performed in March through June was "rolled into" Markham's June 28, 2005 contract with OWCP17. The June 28, 2005 contract referenced construction activities that occurred prior to the contract, including the March 2005 engineering plan, blue staking, and trash haul-off. Markham's head of project management testified that all of the work Markham performed as part of the Project was ultimately incorporated into the written executed contract with OWCP17. Several witnesses testified that it was not uncommon during that time for contractors to begin performing work before the written contract was signed. Even though the contract itself stated, "The date of commencement of the Work shall be the date of this Agreement [June 28, 2005] unless a different date is stated below," evidence established work commenced as early as March

2005. A witness for Markham testified that he didn't specify a different commencement date on the contract because his long-standing relationship with the client led him to believe it was irrelevant. There was also evidence that Markham's various bids, the last of which was incorporated into the June 28, 2005 contract, were "updated proposal[s]" that were similar in scope, and "pretty much the same."

¶7 On July 26, 2005, Markham asserted a lien against the Project by filing the preliminary twenty-day notice required by Arizona Revised Statutes ("A.R.S.") section 33-992.01 (2001).[3] After not being fully paid, Markham recorded and served a notice of lien on April 1, 2008, stating under oath that Markham "first supplied labor and materials on or about the 7th day of July, 2005." At trial, a witness for Markham testified that the notice erroneously stated the commencement date as July 7, 2005 because the person who created the notice mistakenly calculated commencement by looking only at the time cards of Markham's hourly employees rather than including the work performed by Markham's subcontractors or salaried personnel.

¶8 Development defaulted on New South's construction loan, and New South foreclosed its deed of trust and took title

[3] A person is entitled to claim a lien only for labor and materials furnished within the twenty days prior to the service of the notice. A.R.S. § 33-992.01(E). We cite the current version of the applicable statute when no revisions material to this decision have since occurred.

to the property at a trustee sale. Markham filed a complaint to foreclose on its mechanics' lien, claiming priority over New South's deed of trust. After a four-day trial, an advisory jury returned answers to seven interrogatories, including findings that 1) Markham's mechanics' lien had priority over New South's deed of trust; 2) Markham performed fifteen different construction activities prior to June 20, 2005, which were part of the Project and included in Markham's July 2005 bid; 3) the work Markham performed prior to June 20, 2005 was performed pursuant to the contract with OWCP17; and 4) OWCP17 affirmed the actions of Morris, the original owner. The superior court affirmed and adopted the findings of the jury, entered judgment in favor of Markham, and awarded Markham prejudgment interest at 18 percent per annum and attorneys' fees and costs.

¶9 Both New South timely appealed and Markham timely cross-appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1) (Supp. 2012).

DISCUSSION

¶10 New South argues the superior court erred by adopting the findings of the advisory jury when the evidence, including Markham's own binding admissions, contradicted the jury's findings. New South also argues that the court erred in granting Markham prejudgment interest and attorneys' fees. On cross-appeal, Markham argues the court erred in the post-

judgment interest rate and, alternatively, that post-judgment interest should have applied to the prejudgment interest award as well as all other monetary awards in the judgment.

I. Evidence supports the superior court's priority ruling.

A. Reasonable evidence supports the court's finding that labor commenced prior to June 20, 2005.

¶11 New South argues that the superior court erred in adopting the advisory jury's findings and ignored evidence which established that the construction activities performed by Markham occurred after June 20, 2005.

¶12 A.R.S. § 33-992 (2007) governs the priority of mechanics' liens. Subsection A provides:

> The liens provided for in this article . . . are preferred to all liens, mortgages or other encumbrances upon the property attaching subsequent to the time the labor was commenced or the materials were commenced to be furnished except any mortgage or deed of trust that is given as security for a loan made by a construction lender . . . if the mortgage or deed of trust is recorded within ten days after labor was commenced or the materials were commenced to be furnished.

Thus, Markham's mechanics' lien takes priority if construction commenced prior to June 20, 2005, ten days before New South recorded its deed of trust. The advisory jury found, and the court affirmed, that Markham performed the following activities prior to June 20, 2005: trash haul-off, potholing, blue staking, pad clearing, installing job trailers, installing an access ramp, digging a "V-ditch," clearing and "[g]rubbing," obtaining

permits, installing the "[p]re [w]et [s]ystem," setting up barricades, surveying the property, on-sight supervision, and installing a temporary power and water source.

¶13 Generally, when the evidence is heard by an advisory jury, "it is the findings and judgment of the court that are presumed to be correct rather than the jury's answers to the interrogatories." *Garden Lakes Cmty. Ass'n, Inc. v. Madigan*, 204 Ariz. 238, 240-41, ¶ 9, 62 P.3d 983, 985-86 (App. 2003); *see also* Ariz. R. Civ. P. 39(n) ("The answers shall be only advisory to the court."). In this case, although the superior court did not make its own specific findings, it explicitly "affirm[ed] and adopt[ed] the Jury's finding as the finding of the [c]ourt." Thus, we will affirm unless the advisory jury's findings of fact, as adopted by the court, are clearly erroneous and not supported by the evidence. *See Sholes v. Fernando*, 228 Ariz. 455, 458, ¶ 6, 268 P.3d 1112, 1115 (App. 2011); *Turley v. Adams*, 14 Ariz. App. 515, 518, 484 P.2d 668, 671 (1971). "To the extent the parties presented facts from which conflicting inferences could be drawn . . . it was for the trial court, not this [C]ourt, to weigh those facts." *Sholes*, 228 Ariz. at 458, ¶ 6, 268 P.3d at 1115 (citation and internal quotation marks omitted); *see also Kocher v. Ariz. Dep't of Rev.*, 206 Ariz. 480, 482, ¶ 9, 80 P.3d 287, 289 (App. 2003) ("A finding of fact is

not clearly erroneous if substantial evidence supports it, even if substantial conflicting evidence exists.”).

¶14 Furthermore, we presume the superior court made any additional findings that are necessary to sustain the judgment if “they are reasonably supported by the evidence and not in conflict with the court’s express findings.” *Sholes*, 228 Ariz. at 458, ¶ 6, 268 P.3d at 1115*; see also Coronado Co., v. Jacome’s Dep’t Store, Inc.,* 129 Ariz. 137, 139, 629 P.2d 553, 555 (App. 1981) (“Implied in every judgment, in addition to express findings made by the court, is any additional finding that is necessary to sustain the judgment, if reasonably supported by the evidence, and not in conflict with the express findings.”). Thus, this Court will sustain any presumptive findings if they are justified by any reasonable construction of the evidence.

¶15 We agree with Markham that evidence supports the court’s finding that Markham commenced construction prior to June 20, 2005. Although there was conflicting evidence regarding the commencement date, “the conflicts of the evidence are within the sole province of the trier of facts for determination. The trial court . . . is judge of the credibility of witnesses, the weight of evidence, and also the reasonable inference to be drawn from the evidence.” *Rogers v. Greer*, 70 Ariz. 264, 270, 219 P.2d 760, 763 (1950); *see also In*

re the General Adjudication of All Rights to Use Water in Gila River Sys. and Source, 198 Ariz. 330, 340, ¶ 25, 9 P.3d 1069, 1079 (2000) (stating that when parties present conflicting evidence and the record reflected that the superior court "made findings that, although disputed, [were] fully supported by the evidence," the appellate court does not re-weigh the evidence or second-guess the superior court's factual findings).

¶16 Here, there was sufficient evidence from which a reasonable person could determine that construction commenced prior to June 20, 2005. *See supra* ¶¶ 3-4. Although conflicting evidence was received about when the work commenced, both parties had the opportunity to vigorously examine and cross-examine witnesses, and it was not clearly erroneous for the court to accept Markham's theory of the evidence as more credible.

B. Documentary evidence and pleadings did not establish as a matter of law New South's lien priority.

¶17 New South argues that Markham's statements in its notice and claim of lien and its complaint that Markham first supplied labor and materials "on or about" July 7, 2005 are binding, and thus, New South was entitled to judgment as a matter of law. Markham stated under oath in its notice and claim of lien, "Claimant first supplied labor and materials on or about the 7th day of July, 2005." In its complaint, Markham

stated, "On or about July 7, 2005, Plaintiff . . . furnished labor and materials to the project according to the Agreement." New South cites *Morgan v. O'Malley Lumber Company*, 39 Ariz. 400, 405, 7 P.2d 252, 253 (1932), and *Allied Contract Buyers v. Lucero Contracting Company*, 13 Ariz. App. 315, 317, 476 P.2d 521, 524 (1970), to argue that a party is bound by its statements made in a notice and claim of lien. New South also argues that "[i]t is a fundamental rule of law that parties are bound by their judicial declarations." *La Paz County v. Yuma County*, 153 Ariz. 162, 168, 735 P.2d 772, 778 (1987).

¶18 In response, Markham argues that both the notice and claim of lien and the complaint only give approximate commencement dates because they include the language "on or about." Because of the flexibility of that language, Markham argues that the superior court had discretion to decide whether work performed prior to June 20, 2005 is within the approximate range of "on or about" July 7, 2005 in light of the evidence.

¶19 We first address the statements made in Markham's complaint. After Markham filed its complaint in July 2008, New South filed five motions for summary judgment against Markham, none of which argued Markham should be bound by the commencement date it alleged in its complaint. After the court had denied those motions, and after Markham had presented its case at trial, New South moved for judgment as a matter of law, arguing

in part and for the first time that Markham should be bound by the statements made in its complaint because the language "on or about" cannot be taken to mean more than a few days before July 7, 2005. The court noted the long-standing rule that a claimant is bound by statements made in his complaint, but also considered the "on or about" language contained in the complaint. In light of the fact that the mechanics' lien statute is remedial and should be construed liberally to protect laborers, *United Metro Materials, Inc. v. Pena Blanca Props., L.L.C.*, 197 Ariz. 479, 484, ¶ 26, 4 P.3d 1022, 1027 (App. 2000), the court found that it should be up to the jury to decide if the commencement date alleged in the complaint was "simple error," or if "on or about" was sufficient notice to the lien recipient. Furthermore, the court noted that if New South was clear that "on or about" could not possibly include activities in March, April, or May then New South should have filed a motion for summary judgment on that issue.

¶20 We agree with the superior court that the issue of whether "on or about July 7, 2005" could include activities in March, April, May, and prior to June 20, 2005 was an issue of fact for the jury to decide. In light of the evidence presented at trial, it was not clearly erroneous for the jury, and ultimately the court, to find that "on or about July 7, 2005" included activities prior to June 20, 2005. The phrase "on or

about" is defined as "[a]pproximately; at or around the time specified. This language is used in pleading to prevent a variance between the pleading and the proof . . . when there is any uncertainty about the exact date of a pivotal event." Black's Law Dictionary 1122 (8th ed. 2004). In *Gittner-Louviere Engineering v. Superior Court*, this Court interpreted the phrase to signify "approximate certainty, a date in close proximity to the one mentioned." 115 Ariz. 409, 412, 565 P.2d 915, 918 (App. 1977).

¶21 New South cites *Gittner-Louviere* to argue that as a matter of law "on or about" could not be construed to mean a large number of days. We disagree with New South's interpretation of *Gittner-Louviere*. In that case, we held that the evidence on the record, including under-oath testimony, did not support the conclusion that "on or about July 15, 1974" could include December 1974. *Id*. After considering other evidence of what could constitute "on or about," the *Gittner-Louviere* court found summary judgment to be appropriate under the specific facts of that case. *Id*. *Gittner-Louviere* did not

hold that in all circumstances "on or about" could never be construed to mean more than a day or two.[4]

¶22 For these reasons, the superior court did not err in concluding that the jury should determine whether the use of "on or about" was a mistake or could have been intended to include time before June 20, 2005. Although this question was not expressly referred to the jury, given that the jury found that work commenced before June 20, 2005, and the court adopted that finding, we presume that the court found that "on or about July 7, 2005" was intended to and did include a time before June 20, 2005. *See Coronado Co.*, 129 Ariz. at 139, 629 P.2d at 555 (stating that we presume the court made any additional findings necessary to sustain the judgment that do not conflict with the express findings and are supported by the evidence).

¶23 Furthermore, Markham is not bound as a matter of law to statements made in its twenty-day preliminary notice or its contract. Contrary to New South's argument, Markham was not required to give preliminary notice within twenty days after it commenced labor, nor should we interpret Markham's delay in giving notice until July 26, 2005 as dispositive evidence that

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[4] Nor are we persuaded by the out-of-state criminal cases cited by New South for a variety of reasons, including the different stakes and standard of proof involved and recognizing that a civil complaint in Arizona superior court requires only notice pleading. *See* Ariz. R. Civ. P. 8.

work commenced after June 20, 2005. Section 33-992.01(E) provides:

> If labor, professional services, materials, machinery, fixtures or tools are furnished to a jobsite by a person who elects not to give a preliminary twenty day notice as provided in subsection B of this section, that person is not precluded from giving a preliminary twenty day notice not later than twenty days after furnishing other labor . . . to the same jobsite. The person, however, is entitled to claim a lien only for such labor, professional services, materials, machinery fixtures or tools furnished within twenty days prior to the service of the notice and at any time thereafter.

Thus, even if Markham commenced construction prior to June 20, 2005, it was not precluded from giving its twenty-day preliminary notice as late as July 26, 2005; its lien, however, is limited only to labor and materials furnished within twenty days of July 26, 2005 and thereafter. Thus, although the date alleged on Markham's twenty-day notice is one piece of evidence for the jury to consider, it is not binding as a matter of law on the issue.

¶24 Finally, Markham is not bound by the commencement date stated in its contract with OWCP17. Determining the time at which labor commenced is not an issue of contract interpretation. Section 33-992(A) provides that a mechanics' lien takes priority to other liens that attach after "the time the labor was commenced." The priority of the lien is not tied to a date provided for in a contract. The contract was simply

one piece of evidence for the fact-finder to weigh, and this Court does not re-weigh the evidence presented at trial. *See In re General Adjudication*, 198 Ariz. at 340, ¶ 25, 9 P.3d at 1079.

C. The superior court did not abuse its discretion in excluding plaintiff's counsel's testimony.

¶25 New South argues that, especially in light of the "on or about" language used in Markham's notice of lien and complaint, it was error for the superior court to exclude the testimony of Markham's counsel ("Palecek"), the attorney who signed both documents, swearing she "knew of [her] own knowledge that the facts stated . . . [were] true and correct." New South argues that only she could have testified as to what was meant by the phrase "on or about." Markham argues that in light of the ethical rules prohibiting attorneys from testifying and because Palecek's testimony was unnecessary and related to an uncontested issue, the court did not abuse its discretion in excluding it.

¶26 Ethical Rule 3.7(a) provides:

> A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless . . . (1) the testimony relates to an uncontested issue; . . . or (3) disqualification of the lawyer would work substantial hardship on the client.

Ariz. R. Sup. Ct. 42, ER 3.7. "[I]t is generally considered a serious breach of professional etiquette and detrimental to the orderly administration of justice for an attorney to take the

stand in a case he is trying." *Cottonwood Estates, Inc. v. Paradise Builders, Inc.*, 128 Ariz. 99, 102, 624 P.2d 296, 299 (1981).

¶27 Palecek's testimony was not necessary, and the information New South sought through her testimony was easily obtained elsewhere. Markham does not dispute that both the complaint and notice of lien state construction commenced "on or about July 7, 2005." Moreover, to the extent New South was seeking additional information about the "actual" commencement date, it had the opportunity to and did depose, examine, and cross-examine Markham's officers and employees who were in a better position to know that information. In fact, New South solicited testimony at trial regarding how Palecek obtained the information necessary to draft the notice and complaint, and the testimony established that the information came from Markham. Any evidence obtained through Palecek's testimony would have been superfluous and cumulative. Thus, the court did not abuse its discretion in excluding Palecek's testimony.

D. The commencement of labor did not need to be visible or apparent to have priority.

¶28 New South argues that of those construction activities that could have arguably taken place prior to June 20, 2005, none constitute "commencement" under the statute because the activities were not visible or readily apparent to someone who

could have inspected the property pursuant to A.R.S. § 33-992(B).[5] New South's argument is unpersuasive for several reasons. First, subsection B is limited to "professional services," not the services provided by New South here:

> A notice and claim of lien for *professional services* shall not attach to the property for priority purposes until labor has commenced on the property or until materials have commenced to be furnished to the property *so that it is apparent to any person inspecting the property* that construction, alteration or repair of any building or other structure or improvement has commenced.

(Emphases added.)

¶29 To avoid this limitation, New South argues that subsection D somehow imports the requirements of subsection B into subsection A. Subsection D requires liens for professional services to "attach not before but at the same time, and shall have the same priority, as other liens provided for in this article." New South interprets this language to mean that all liens, for both professional services and for labor and materials, only take priority when the actual physical construction of an improvement is apparent on the property.

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[5] New South raised this issue for the first and only time in its reply in support of its second motion for summary judgment, typically meaning New South waived the issue. *State ex rel. Horne v. Campos*, 226 Ariz. 424, 435 n.15, ¶ 44, 250 P.3d 201, 212 n.15 (App. 2011). In our discretion, however, we address New South's argument. *See State v. Lopez*, 217 Ariz. 433, 438 n.4, ¶ 17, 175 P.3d 682, 687 n.4 (App. 2008) (stating that this Court may exercise discretion to address issue normally considered waived).

¶30 We review matters of statutory interpretation *de novo.* *Garden Lakes*, 204 Ariz. at 241, ¶ 10, 62 P.3d at 986; *Sholes*, 228 Ariz. at 458, ¶ 6, 268 P.3d at 1115. We do not read subsection B to apply to all liens, but rather only to liens for professional services. Section 33-1007 (2007) defines "professional services" as "architectural practice, engineering practice or land surveying practice as defined in [A.R.S.] § 32-101 [(Supp. 2012)]." Section 33-992(A) explicitly excludes liens for professional services: "The liens provided for in this article, *except as provided in subsection B of this section* . . . are preferred to all liens . . . attaching subsequent to the *time the labor was commenced or the materials were commenced to be furnished* . . . ." (Emphases added.) Subsection A does not include a requirement that the commencement of labor be visible or apparent.

¶31 In contrast, subsection B explicitly applies only to liens for professional services and plainly includes a requirement that the commencement be apparent. The fact that the legislature chose to include such a requirement for professional liens but not for other mechanics' liens "makes it plain that the legislature knew how to add that requirement and intentionally chose not to do so in some circumstances." *Sharpe v. Ariz. Health Care Cost Containment Sys.*, 220 Ariz. 488, 496, ¶ 25, 207 P.3d 741, 749 (App. 2009); *see also Luchanski v.*

Congrove, 193 Ariz. 176, 179, ¶ 14, 971 P.2d 636, 639 (App. 1998) ("When the legislature has specifically included a term in some places within a statute and excluded it in other places, courts will not read that term into the sections from which it was excluded."). Thus, subsection D does not import the requirements of subsection B into subsection A. Like subsection B, subsection D applies only to liens for professional services and ensures that professional service liens take the same priority as all other mechanics' liens; it does not provide the time for when a lien attaches.[6]

¶32 In any event, the record contains ample trial evidence that the pre-June 20 work was visible. Given the jury and superior court's findings that the work commenced before June 20 and the judgment in favor of Markham, we will presume the court implicitly found that the work was visible and apparent. *See Coronado Co.*, 129 Ariz. at 139, 629 P.2d at 555.

[6] New South relies on California and Utah case law to argue that commencement must be visible. These cases are not persuasive because they involve the commencement of architectural, design and planning services, but not actual physical construction. *See D'Orsay Int'l. Partners v. Superior Court*, 20 Cal.Rptr.3d 399, 400-01 (Cal. Ct. App. 2004); *Tracy Price Assocs. V. Hebard*, 266 Cal.App.2d 778, 780-81 (Cal. Ct. App. 1968); *Ketchum, Konkel, Barrett, Nickel & Austin v. Heritage Mountain Dev. Co.*, 784 P.2d 1217, 1219 (Utah Ct. App. 1989).

E. Evidence supports the superior court's finding that Markham's pre-June 20, 2005 construction was pursuant to the contract.

¶33 New South next argues that even if labor commenced prior to June 20, 2005, Markham cannot establish priority because none of the pre-June 20, 2005 construction activities took place pursuant to Markham's construction contract, which was finalized after June 20, 2005. The final, signed contract between Markham and OWCP17 states, "The date of commencement of the Work shall be the date of this Agreement," which was expressly dated June 28, 2005. New South cites A.R.S. § 33-992(E) to argue that construction completed before June 20, 2005 was done under a separate contract, and thus, has a different priority date.

¶34 In response, Markham argues that its lien is governed by subsection A, not subsection E, and alternatively, even if subsection E does apply, its lien preference would remain the same because 1) Arizona follows the "single project rule," which means labor performed under any contract for the same project relates back to the same date; and 2) even if Arizona did not follow the single project rule, all of Markham's work was performed under one contract.

¶35 Subsection E provides:

> If any improvement at the site is not provided for in any contract for the construction of any building or other structure, the improvement at the site is a

> separate work and the commencement of the improvement is not commencement of the construction of the building or other structure. The liens arising from work and labor done . . . for each improvement at the site shall have a separate priority from liens arising from work and labor done . . . for the construction of the building or other structure. A lien arising from work or labor done . . . for each improvement at the site attaches . . . at the time labor was commenced . . . pursuant to the contract between the owner and original contractor for that improvement to the site.

¶36 We need not decide here whether Markham's work was performed pursuant to separate contracts or whether an earlier contract relates to the July 2005 contract. The superior court found that Markham's work was performed pursuant to one contract, the July 28, 2005 contract. The court's findings are supported by reasonable evidence and are not clearly erroneous. There was evidence the construction work performed in March through June was "rolled into" Markham's June 28, 2005 contract

with OWCP17, all of which was performed pursuant to one contract. *See supra* ¶ 6.[7]

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[7] Alternatively, we agree with a recent decision of the United States Bankruptcy Court, District of Arizona with respect to the relative priority of a construction lender's lien rights and those of a mechanics' lien claimant in a situation where multiple general contracts exist that define different works or improvements. *See In re Mortgages Ltd.*, 482 B.R. 298, 305 (Bankr. D. Ariz. 2012) ("*Mortgages Ltd.*"). Like the lender here, the construction lender in *Mortgages Ltd.* recorded its deed of trust after construction was underway but before the general contractor had signed a contract with the owner. *Id.* at 301-02. Although the general contractor had signed the contract after the lender had recorded its deed of trust, the work the contractor had contracted to do was the "same 'work' or construction project" on which the previous contractors had begun working two years earlier. *Id.* at 302. The lender in *Mortgages Ltd.*, like New South, cited *Wylie v. Douglas Lumber Company*, 39 Ariz. 511, 8 P.2d 256 (1932), and *Wahl v. Southwest Savings & Loan Association*, 106 Ariz. 381, 476 P.2d 836 (1970), to support its claim that Arizona had adopted the "separate contracts" theory of lien priority. *Id.* at 303. The lender also argued, as New South does, that even if the work was the "same 'work' within the meaning of . . . [A.R.S.] § 33-992(A)," the mechanics' lien could not have a priority date earlier than that of the general contract, and that when there are successive contracts, each of them establishes a new, later priority date for all of the subsequent work. *Id.* at 302.

Mortgages Ltd., interpreting Arizona law, rejected the lender's argument and found that the language of subsection A suggests that there can only be one time labor commences, not multiple times depending on the dates of multiple contracts: "[W]hen the facts are that there is but one 'labor' being performed, the statutory language clearly indicates there can only be one 'time' that [] 'labor was commenced,' regardless of how many contracts governed the work." *Id*. at 303. *Mortgages Ltd.* interpreted subsection E to provide the same priority for all liens arising from the same kind of improvement: "[P]aragraph E adopts the same priority rule as paragraph A has always embodied, which is on a work by work or improvement by improvement basis, rather than on a contract by contract basis. If the work is, factually all the same improvement, then it will all have the same priority, regardless of how many site preparation general contracts govern that work." *Id*. at 307.

II. Markham is entitled to prejudgment interest at the statutory rate.

¶37 New South argues that the court erred in its award of prejudgment interest to Markham by 1) granting the award even though the claim was not liquidated, 2) erroneously applying the prompt pay interest rate rather than the general statutory interest rate, and 3) awarding interest for the sixteen months before New South was given notice of the lien. On cross-appeal, Markham argues that the superior court erred in awarding prejudgment interest at a rate of eighteen percent only until the date the judgment was entered and by failing to include the entire judgment in the post-judgment interest award.

A. Markham Was Entitled to Prejudgment Interest.

¶38 "Entitlement to an award of prejudgment interest is a matter of law reviewed de novo." *John C. Lincoln Hosp. & Health Corp. v. Maricopa County*, 208 Ariz. 532, 544, ¶ 39, 96 P.3d 530, 542 (App. 2004). If a claim is liquidated, an award of prejudgment interest "is a matter of right, not discretion." *Canal Ins. Co. v. Pizer*, 183 Ariz. 162, 164, 901 P.2d 1192, 1194 (App. 1995). "A claim is liquidated if the evidence makes it possible to calculate the amount with exactness, without reliance on opinion or discretion." *Id.* "Whether a claim is liquidated is a question of fact." *Able Distrib. Co. v. James Lampe*, 160 Ariz. 399, 406, 773 P.2d 504, 511 (App. 1989). "All

that is required is for a plaintiff to provide a basis for precise calculation that would make the amount of damages readily ascertainable by reference to an agreement between the parties or through simple computation." *Paul R. Peterson Const., Inc. v. Ariz. State Carpenters Health and Welfare Trust Fund*, 179 Ariz. 474, 485, 880 P.2d 694, 705 (App. 1994).

¶39 New South first argues that the claim in this case was not liquidated because the superior court was required to use its discretion in determining the reasonable value of the lien. New South relies on *Environmental Liners, Inc. v. Ryley, Carlock & Applewhite*, 187 Ariz. 379, 386, 930 P.2d 456, 463 (App. 1996), and *Cashway Concrete & Materials v. Sanner Contracting Company*, 158 Ariz. 81, 82, 761 P.2d 155, 156 (App. 1988), to argue that a materialman only has a lien for the *reasonable value* of the materials furnished. However, A.R.S. § 33-981(B) (2007) provides that an "owner shall be liable for the reasonable value of labor or materials furnished to *his agent*." (Emphasis added.) While a subcontractor's lien is limited to the reasonable value of labor and materials furnished, *Lenslite Co. v. Zocher*, 95 Ariz. 208, 214, 388 P.2d 421, 425 (1964), a general contractor, who is in privity with the owner of the property, is not limited to the reasonable value, but is entitled to a lien for the contract price, *id.* at 212, 388 P.2d at 424. *Environmental Liners, Inc*. clearly states that "a

subcontractor may have a lien only for the reasonable value of the materials furnished" under A.R.S. § 33-981. 187 Ariz. at 386, 930 P.2d at 463 (emphasis added) (internal quotation marks omitted). Markham was a contractor in privity with and performing services for the property owner and is entitled to a lien for the contract price.

¶40 Even if Markham was only entitled to the reasonable value of labor and materials, rather than the actual value, the requirement of a finding of reasonableness does not preclude a finding that a claim is liquidated. In *Cashway*, this Court found that appellant's claim was liquidated so as to support a prejudgment interest award even though the lien was reduced subject to a reasonableness standard. 158 Ariz. at 82, 761 P.2d at 156.

¶41 Here, Markham's notice and claim of lien stated the amount of the claim as $412,629.81. This amount was supported by the contract and invoices, which were admitted as exhibits at trial. New South does not challenge on appeal, nor did it below, the amount of principle owed. Thus, evidence supports the court's finding that Markham's claim is liquidated, and therefore, Markham is entitled to prejudgment interest.

B. Markham Is entitled to prejudgment interest at the statutory rate, not the rate under The Prompt Pay Act.

¶42 New South next argues that the superior court erroneously applied the eighteen percent interest rate provided for in A.R.S. § 32-1129.01 (Supp. 2012). New South contends that the prompt pay statute is inapplicable in a mechanics' lien case because the statute only obligates the *owner* of the property to make final payment to the contractor, and New South was simply financing the development, not the owner. Accordingly, it argues that the interest rate should have been that provided by A.R.S. § 44-1201(B) (Supp. 2012). In response, Markham argues that the term "owner" should be interpreted broadly to include New South, especially because New South became the owner of the property subject to Markham's lien. The court found that "New South stands in the shoes of the owner. Therefore, the prompt payment act . . . applies and the interest rate is one and one-half percent per month."

¶43 Section 32-1129.01(Q) provides:

> If an owner or a third party designated by an owner as the person responsible for . . . making final payment on a construction contract does not make a timely payment on amounts due pursuant to this section, the owner shall pay the contractor interest at the rate of one and one-half per cent a month . . . .

Section 32-1129(A)(4) (Supp. 2012) defines "Owner" as:

> any person, firm, partnership, corporation, association or other organization, or a combination of any of them, that causes a building, structure or

> improvement to be constructed . . . whether the interest or estate of the person is in fee, as vendee under a contract to purchase, as lessee or another interest or estate less than fee.

Markham urges this Court to interpret the definition of owner expansively to include New South because New South became an owner subject to Markham's lien after it took title at a trustee's sale, and because it provided the financing, without which the Project would not have moved forward.

¶44 We decline to interpret the definition of "Owner" in this section to include the beneficiary of a deed of trust who, other than providing financing, did not "cause[] a building, structure or improvement to be constructed . . . or . . . cause[] land to be excavated or otherwise developed or improved." *See* A.R.S. § 32-1129(A)(4). This Court's goal in interpreting a statute is to "discern and give effect to legislative intent." *Stonecreek Bldg. Co. v. Shure*, 216 Ariz. 36, 39, ¶ 13, 162 P.3d 675, 678 (App. 2007) (citation and internal quotation marks omitted). The Prompt Pay Act began as Senate Bill 1549, the purpose of which is to "[e]stablish[] time frames and procedures for the periodic payment of contractors . . . and permit[] work stoppage for failure of a contractor or subcontractor to receive timely payment." *Id.* (citing Rev. Fact Sheet for S.B. 1549, 44th Leg., 2d Reg. Sess. (Ariz. Feb. 16, 2000)). Thus, "the primary purpose of the [Prompt Pay] Act is

to establish a framework for ensuring timely payments from the owner to the contractor," *id.* at 39, ¶ 16, 162 P.3d at 678, and "to require an owner to identify and disapprove those items that need to be corrected early in the process so that contractors, subcontractors, and suppliers receive prompt payment for their work," *id.* at 40, ¶ 20, 162 P.3d at 679.

¶45 New South was never required to provide timely payments to Markham, nor was it ever in the position to identify or disapprove of items that needed to be corrected early in the process. New South was also never in the position to disapprove of a billing or estimate pursuant to any of the enumerated reasons listed in A.R.S. § 32-1129.01(D) or withhold an amount of payment pursuant to subsection E. The entity that was responsible for making timely payments to Markham and the entity that had certain rights to withhold payment pursuant to this section was OWCP17, and it is the relationship between OWCP17 and Markham that this Act is designed to govern. Markham may have been entitled to prejudgment interest under this section in its breach of contract claim against OWCP17, but not in its mechanics' lien foreclosure claim against New South.

¶46 Furthermore, rather than the "owner" of the Project, New South was the beneficiary of a deed of trust. A deed of trust beneficiary is defined as "the person named or otherwise designated in a trust deed as the person for whose benefit a

trust deed is given." A.R.S. § 33-801(1) (2007). Under A.R.S. § 33-805 (2007), a deed of trust "may be executed as security for the performance of a contract or contracts." Nothing in this section precludes more than one deed of trust to be executed on a property. Markham, without citing any authority, urges this Court to interpret A.R.S. § 32-1129(A)(4) as including New South as a deed of trust beneficiary because it had the right to take title to the property by virtue of its deed of trust. Under Markham's theory, however, all deed of trust beneficiaries would be "owners" under the prompt pay statute. There must be some bounds to the breadth of the meaning of "Owner" under A.R.S. § 32-1129(A)(4), otherwise it could potentially apply to all lienholders who have an interest in a property, including a general construction contractor like Markham.

¶47 "To arrive at the intention of the legislature, the court looks to the words, context, subject matter, effects and consequences, reason and spirit of the law." *City of Phoenix v. Superior Court*, 144 Ariz. 172, 175, 696 P.2d 724, 727 (App. 1985). "[P]rovisions of a statute [must] be read and construed in the context of related provisions and in light of its place in the statutory scheme." *Id.* at 176, 696 P.2d at 728. Noting the purpose of the Prompt Pay Act, we decline to interpret A.R.S. § 32-1129(A)(4) as including a deed of trust beneficiary,

and thus, Markham is not entitled to prejudgment interest at the rate provided for in A.R.S. § 32-1129.01(Q). We vacate the prejudgment interest award and remand to the superior court to apply the interest rate as defined in A.R.S. § 44-1201(B).

C. Markham's prejudgment interest award began accruing on April 1, 2008, when Markham recorded its notice and claim of lien.

¶48 New South argues the prejudgment interest award should not have begun to accrue as early as November 6, 2006 because New South did not have notice of Markham's lien until it filed its notice of lien on April 1, 2008. In response, Markham argues that it was entitled to prejudgment interest beginning in November 2006 because under the Prompt Pay Act, it was entitled to receive timely and prompt payments in 2006 and it was not paid promptly.[8]

¶49 Prejudgment interest should have begun to run when Markham filed its notice of lien on April 1, 2008. First, as discussed above, Markham is not entitled to prejudgment interest against New South pursuant to the Prompt Pay Act. While Markham was entitled to prompt payments beginning in November of 2006, OWCP17, the owner with whom Markham contracted, was required to make those timely payments, not New South.

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[8] Neither party argues the prejudgment interest should have begun to accrue as of the date Markham filed its complaint in superior court.

¶50 "It is the recognized general rule that prejudgment interest on liquidated claims cannot be awarded for any period prior to the initial demand for payment of the liquidated claims." *Fairway Builders, Inc. v. Malouf Towers Rental Co.*, 124 Ariz. 242, 264, 603 P.2d 513, 535 (App. 1979); *see also Scottsdale Ins. Co. v. Cendejas*, 220 Ariz. 281, 289, ¶ 37, 205 P.3d 1128, 1136 (App. 2009) ("Prejudgment interest on a liquidated claim accrues from the date of demand of a sum certain . . . [b]ut the amount of the claim must be capable of exact calculation on the date of accrual.").

¶51 There was no "demand" for payment until Markham filed its notice of lien. To secure a mechanics' lien, A.R.S. § 33-993(A) (2007) requires a mechanics' lien claimant to record a notice and claim of lien with the county recorder and serve a copy upon the owner. Section 33-812(A)(5) (Supp. 2012) requires the trustee of a deed of trust to apply the proceeds of a trustee's sale, to "junior lienholders or encumbrancers in order of their priority as they existed at the time of the sale." New South, as beneficiary of a deed of trust, would not have notice of Markham's mechanics' lien, which would have triggered New South's obligation to pay, until the lien was recorded. Thus, the prejudgment interest award should have been calculated to accrue beginning April 1, 2008, the date Markham recorded its

notice of lien. On remand, the court shall award prejudgment interest beginning April 1, 2008.

D. Markham is entitled to post-judgment interest on the entire judgment at the rate provided by A.R.S. § 44-1201.

¶52 On September 30, 2011, the superior court entered judgment in favor of Markham for $865,004.27, consisting of four components: (1) $312,619.29 in principal; (2) $276,650.01 in prejudgment interest accruing from November 30, 2006 at eighteen per cent per annum (simple); (3) $271,977.81 in attorneys' fees; and (4) $3,757.16 in taxable costs. The judgment awards Markham post-judgment interest on $588,354.26 (the amount of the entire judgment less the prejudgment interest component) at 4.25% per annum (the statutory rate pursuant to A.R.S. § 44-1201) from the date of entry of the judgment until paid. On cross-appeal, Markham argues the superior court erred when it did not use an eighteen percent post-judgment interest rate. Alternatively, Markham argues that if the statutory interest rate under A.R.S. § 44-1201(B) applies post-judgment, rather than the eighteen percent interest rate, then the court erred when it did not award post-judgment interest on the entire judgment, including the prejudgment interest component of the judgment.

¶53 For the reasons stated above as to prejudgment interest, Markham is not entitled to eighteen percent post-judgment interest. Thus, we affirm the superior court's

decision to award post-judgment interest at the rate required by A.R.S. § 44-1201(B). The remaining issue is whether the superior court erred by excluding post-judgment interest on the amount of prejudgment interest award.

¶54 The superior court entered judgment in favor of Markham for one sum: $865,004.27. By statute, as applicable here, "interest on any judgment shall be at" 4.25% per annum (simple). A.R.S. § 44-1201(B). The statute does not purport to exempt portions of a judgment from a post-judgment interest award but, rather, mandates the award of interest on "any judgment." *Id.* Thus, the express language of the statute does not suggest that a superior court should, or even properly could, carve out the components of a judgment in determining post-judgment interest. The question then becomes whether there is some other basis authorizing the court to do so.

¶55 The parties agree that Markham is not entitled to compound interest. *See Westberry v. Reynolds*, 134 Ariz. 29, 34, 653 P.2d 379, 384 (App. 1982) (finding A.R.S. § 44-1201 mandates simple, not compound, interest be used to calculate the interest on judgments); *Fairway Builders*, 124 Ariz. at 267, 603 P.2d at 538 (similar). New South argues that awarding interest on a judgment that includes as a component a prejudgment interest award constitutes impermissible compound interest. New South, however, cites to no Arizona case supporting that proposition.

Moreover, although no reported Arizona case expressly resolves the issue, several cases have affirmed judgments that included a prejudgment interest award as well as an award of post-judgment interest on the entire amount of the judgment. *See, e.g.*, *Berry v. 352 E. Virginia, L.L.C.*, 228 Ariz. 9, 12 ¶ 14, 261 P.3d 784, 787 (App. 2011) (considering judgment "which included prejudgment interest and 'legal interest' until the judgment was paid"); *Fairway Builders*, 124 Ariz. at 247, 267, 603 P.2d at 518, 538 (similar).

¶56 Although tacit in analysis, these cases reflect the fundamental differences between prejudgment and post-judgment interest. In Arizona, prejudgment interest is limited to liquidated claims and becomes a component of the judgment representing past economic loss. *See Aqua Mgmt., Inc. v. Abdeen*, 224 Ariz. 91, 95, ¶ 15, 227 P.3d 498, 502 (App. 2010); *see also Metzler v. BCI Coca-Cola Bottling Co. of L.A.*, 230 Ariz. 26, 28, ¶7, 279 P.3d 1188, 1190 (App. 2012) (noting "the term 'prejudgment' in 'prejudgment interest' necessarily implies a period ending at judgment"); *In re U.S. Currency in the Amount of $26,980.00*, 199 Ariz. 291, 299, ¶ 27, 18 P.3d 85, 93 (App. 2000) (noting prejudgment interest is compensation for the loss of use of the money owed). By contrast, post-judgment interest "is generally collateral to the underlying judgment or award and is merely an enforcement mechanism designed to encourage timely

satisfaction of the judgment." *Aqua Mgmt., Inc.*, 224 Ariz. at 95, ¶ 18, 227 P.3d at 502. Thus, the two forms of interest serve very different purposes.

¶57 The express language of A.R.S. § 44-1201(B), coupled with these fundamental differences, may explain why there is no reported Arizona appellate decision robustly discussing an award of post-judgment interest on a judgment, a component of which includes prejudgment interest. Cases from other jurisdictions, however, clearly and nearly uniformly reject New South's concern that such a post-judgment interest award would represent impermissible compound interest. *E.g., Air Separation, Inc. v. Underwriters at Lloyd's of London*, 45 F.3d 288, 290-91 (9th Cir. 1995) (collecting cases); *Nakoff v. Fairview Gen. Hosp.*, 694 N.E.2d 107, 108 (Ohio Ct. App. 1997) (holding that prejudgment interest is part of the debt owed and is merged into the judgment so that awarding post-judgment interest on prejudgment interest is not compounding interest); *City Coal Co. of Springfield, Inc. v. Noonan*, 677 N.E.2d 1141, 1143 (Mass. 1997) ("[T]he failure to calculate post-judgment interest on the entire judgment would fail to recognize fully the cost of the delay in receiving money to which the plaintiff was entitled."). *Contra Summa Corp. v. Trans World Airlines, Inc.*, 540 A.2d 403, 410 (Del. 1998) (coming to a contrary conclusion when

considering a judgment that included discretionary prejudgment interest).

¶58 In Arizona, A.R.S. § 44-1201(B) provides that interest must apply to the "judgment." It does not authorize a court to carve out of a judgment that makes a single monetary award made up of several components any prejudgment interest award. Awarding post-judgment interest on the entire judgment provides the enforcement mechanism designed to ensure prompt compliance with the judgment. On remand, the superior court is directed to award post-judgment interest on the entire judgment.

III. Attorneys' Fees

¶59 New South argues the superior court abused its discretion in the amount of attorneys' fees awarded to Markham because it included "*hundreds* of time entries that had nothing to do with the lien action against New South." Section 33-998(B) (2007) gives the superior court discretion to award the successful party in a mechanics' lien action reasonable attorneys' fees. We review the amount of a fee award for an abuse of discretion. *Modular Mining Sys., Inc. v. Jigsaw Techs., Inc.*, 221 Ariz. 515, 521, ¶ 21, 212 P.3d 853, 859 (App. 2009).

¶60 New South cites *Schweiger v. China Doll Restaurant*, 138 Ariz. 183, 189, 673 P.2d 927, 933 (App. 1983), to argue that Markham's fee application was insufficient as a matter of law

because it failed to segregate unrelated fees. In response, Markham argues the entries to which New South refers overlapped with and were intertwined with Markham's claim against New South. Furthermore, Markham claims it already subtracted more than $20,000.00 in fees from its application.

¶61 "Because of the trial court's proximity to the matter and its better familiarity with the parties, the suit, and the issues, an appellate court is usually reluctant to overturn its ruling on attorney[s'] fees . . . [and] will uphold the exercise of that discretion if the record contains a reasonable basis to do so." *City of Cottonwood v. James L. Fann Contracting, Inc.*, 179 Ariz. 185, 194-95, 877 P.2d 284, 293-94 (App. 1994). Although fees should not be awarded against a party for distinct claims that could have been litigated separately, *id.* at 195, 877 P.2d at 294, fees may be awarded when claims are "inextricably interwoven," *Modular Mining Sys.*, 221 Ariz. at 522, ¶ 23, 212 P.3d at 860.

¶62 In *City of Cottonwood*, the appellant claimed appellee's fee application was inadequate because it failed to distinguish between fees incurred for court proceedings and fees incurred for arbitration proceedings, which were not recoverable. 179 Ariz. at 195, 877 P.2d at 294. The court found appellee's application, which detailed the date, time, and nature of the work, was sufficient, and it was not an abuse of

discretion "to award fees in a matter intertwined with another matter for which it may not grant attorney[s'] fees." *Id.* Similarly here, Markham's fee application included detailed entries that described the date, time, and nature of the work. Although New South identified for the superior court a thirty-five page list of entries to which it objected, Markham responded in detail to that list explaining how each of those entries was related to the litigation or how credit was already given for that time. New South's objection below indentified fees that related to property owners in the development other than New South, but Markham responded to that objection by pointing out that New South was only being charged for its proportional amount of fees related to the New South lots, and Markham agreed to deduct fees related to lot owners against whom Markham was not successful. On appeal, New South continues to argue that the fees to which it objected below were unrelated to the litigation against New South. The superior court, however, already considered New South's objections and Markham's response and believed Markham only included New South's portion of fees and that the fees were related to the litigation. We do not find that the superior court abused its discretion in granting Markham's fee request with respect to this litigation. *See id.* (stating that this Court will uphold the exercise of the

superior court’s discretion in awarding attorneys’ fees “if the record contains a reasonable basis to do so”).

¶63 The superior court did err by awarding fees that Markham incurred in an entirely separate lawsuit. In its reply in support of its fee application, Markham identified $13,444.71 in fees and collection costs related to a breach of contract action against OWCP17 filed separately from this lawsuit. A claim asserted in a completely different lawsuit against a different defendant is not “inextricably interwoven” with the claim against New South, and thus, those fees are not recoverable against New South. *See id.* (stating that fees should not be awarded against a party for distinct claims that could have been litigated separately). Therefore, we vacate the fee award and remand to the superior court to deduct the fees related to Markham’s breach of contract action.

ATTORNEYS’ FEES ON APPEAL

¶64 Both Markham and New South request attorneys’ fees on appeal pursuant to A.R.S. § 33-998(B), which provides, “In any action to enforce a [mechanics’ lien], the court may award the successful party reasonable attorney fees.” Markham also requests fees pursuant to A.R.S. § 32-1120.01(S) (2008) which provides, “In any action . . . brought to collect payments or interest pursuant to the [Prompt Pay Act], the successful party shall be awarded costs and attorney fees in a reasonable

amount." As discussed above, the Prompt Pay Act governs the relationship between a contractor and an owner, not a contractor and a deed of trust beneficiary. *See supra* ¶¶ 42-47. Because the Prompt Pay Act is inapplicable to Markham's mechanics' lien foreclosure action, Markham is not entitled to costs and fees under A.R.S. § 32-1120.01(S). Because we affirm the priority ruling, however, Markham is the successful party and is entitled to attorneys' fees pursuant to A.R.S. § 33-998(B) upon timely compliance with ARCAP 21. Markham is also entitled to costs pursuant to A.R.S. § 12-341 (2003).

¶65 Markham additionally requests attorneys' fees and costs on its cross-appeal. Because New South was generally the successful party on Markham's cross-appeal, Markham is not entitled to its fees or costs. Although New South did not request costs on the cross-appeal, it is entitled to its costs pursuant to A.R.S. § 12-341 upon timely compliance with ARCAP 21.

CONCLUSION

¶66 For the foregoing reasons, we affirm the superior court's priority ruling. We vacate the prejudgment interest

award and vacate in part the attorneys' fee award and remand to the superior court for adjustment of those awards consistent with this decision.

/S/
DONN KESSLER, Judge

CONCURRING:

/S/
MAURICE PORTLEY, Presiding Judge

/S/
SAMUEL A. THUMMA, Judge