DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

LAW OFFICES OF ETHAN FREY, a professional limited liability company, Plaintiff/Counterdefendant/ Appellee, v. BRUCE PECK and JAN PECK, husband and wife; and DELNO HALL, a single man, Defendants/Counterclaimants/ Third Party Plaintiffs/ Appellants.	1 CA-CV 12-0302 1 CA-CV 12-0402 (Consolidated) DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure
BRUCE PECK and JAN PECK, husband And wife; and DELNO HALL, a Single man, Defendants/Counterclaimants/ Third Party Plaintiffs/ Appellants, v. DAVID RODGERS and JANE DOE RODGERS, husband and wife; LAW OFFICES OF DAVID RODGERS, a professional limited liability company and LAW OFFICES OF FREY AND MCCUE, a professional Limited liability company, Third Party Defendants/ Appellees.	

Appeal from the Superior Court in Maricopa County

Cause No. CV2005-015306

The Honorable Larry Grant, Judge

AFFIRMED IN PART AND VACATED IN PART

Hagens Berman Sobol Shapiro LLP — Phoenix
by Robert B. Carey
Don Andrew St. John
Attorneys for Third-Party Plaintiffs/Appellants
Bruce Peck, Jan Peck and Delno Hall

Dickinson Wright/Mariscal Weeks PLLC — Phoenix
by Timothy J. Thomason
Anne L. Tiffen
Attorneys for Plaintiff/Counterdefendants/Appellees
Law Offices of Ethan Frey, PLLC
Ethan and Jane Doe Frey and Law Offices of Frey & McCue, PLLC

Beus Gilbert PLLC — Phoenix
by Robert B. Hoffman
Lee M. Andelin
Attorneys for Counterdefendants/Third-Party Defendants/Appellees
David Rogers and Law Offices of David Rodgers, PLLC

T H U M M A, Judge

¶1 This matter involves the second and third appeals by Delno Hall and Bruce and Jan Peck (collectively, Appellants) from a February 14, 2011 summary judgment ruling. Appellants argue the superior court erred by granting summary judgment against them on causes of action against their former attorneys Ethan and Jane Doe Frey (Frey), the Law Offices of Ethan Frey, PLLC and the Law Offices of Frey & McCue, PLLC (collectively,

Frey Entities), David Rodgers (Rodgers) and the Law Offices of David Rodgers, PLLC (collectively, Appellees).

¶2 The prior appeal affirmed summary judgment on Appellants' claims against one of Rogers' former law firms because Appellants cannot establish the "fact" of damages, a defect that infects this appeal with equal force. *See Peck v. Gammage & Burnham*, 1 CA-CV 11-0576, 2012 WL 3239131 (Ariz. App. Aug. 9, 2012) (mem. decision). Because Appellants are precluded from relitigating their inability to prove damages, and because the superior court did not err in awarding the Frey Entities their attorneys' fees, the judgment in favor of the Frey Entities is affirmed. Because Rodgers and his law offices have not shown any authority supporting the award of attorneys' fees in their favor, that portion of the judgment in favor of Rodgers and his law offices is vacated.

FACTS AND PROCEDURAL HISTORY[1]

¶3 The disputes in this case arise out of a lawsuit filed by Jan Peck against Medical Service Card Company (MSC) more than a decade ago. After Jan provided services to MSC pursuant to a contract, MSC did not pay the agreed-upon sums. *Peck*, 2012 WL

[1] In reviewing a grant of summary judgment, this court views the evidence in the light most favorable to Appellants and draws all justifiable inferences in their favor. *See Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, 116, ¶ 17, 180 P.3d 977, 981 (App. 2008) (citations omitted). Additional factual background is set forth in *Peck*, 2012 WL 3239131.

3239131 at *1, ¶ 2. In 2001, the Pecks assigned to Hall their claims against MSC; Hall signed a contingency fee agreement with attorney Frey stating Frey would "seek legal services from" Rodgers. In July 2001, Frey filed a complaint against MSC, naming Hall as the sole plaintiff. *Id*. at *1, ¶ 6; *see also id*. at *1, ¶ 7 (noting that, in January 2002, Pecks and Hall signed another "contingency fee agreement with Frey for representation" regarding Pecks' claims against MSC).

¶4 In February 2002, Appellants accepted MSC's offer to settle the dispute for payment of $4.5 million to Appellants. *Id*. at *1, ¶ 8. Almost immediately, that agreement fell apart and, by March 2002, "all parties knew the settlement was dead." *Id*. As a result, Frey and Rodgers filed a second suit against MSC on behalf of Appellants in June 2002. *Id*. at *2, ¶ 9. In November 2002, Appellants terminated Frey (and apparently Rodgers) and hired new counsel, who represented Appellants for the remainder of the second case against MSC. *Id*. at *2, ¶ 10.

¶5 Appellants' new counsel prosecuted the second case for more than two years and obtained a favorable jury verdict on liability for Appellants. *Id*. In April 2005, prior to a damages trial, MSC threatened bankruptcy and the parties reached another settlement agreement; "[t]he settlement amount is protected by a confidentiality agreement and order, but it significantly exceeds the previously-offered sum of $4.5 million." *Id*.

¶6 A fee dispute arose between Appellants and Frey and "Appellants refused to pay Frey or to arbitrate their fee dispute." *Id.* at *2, ¶ 11. Appellee Law Offices of Ethan Frey then sued Appellants to compel arbitration of the fee dispute and sought an award of attorneys' fees pursuant to Arizona Revised Statutes (A.R.S.) section 12-341.01(A).[2] *Id*. at *2, ¶ 11. In response, Appellants filed (1) a respondeat superior counterclaim against the Law Offices of Ethan Frey, and a third party claim against the Law Offices of Frey and McCue, PLLC, alleging vicarious liability for Frey's actions; (2) a respondeat superior third party claim against the Law Offices of David Rodgers, PLLC, alleging vicarious liability for Rodgers' actions; and (3) legal malpractice, breach of contract, breach of the covenant of good faith and fair dealing and misrepresentation third party claims against Frey and Rodgers.[3] In their pleadings, Appellants sought attorneys' fees pursuant to A.R.S. § 12-341.01. In their answer, Rodgers and his law offices also sought fees pursuant to A.R.S. § 12-341.01.

[2] Absent material revisions after the relevant dates, statutes cited refer to the current version unless otherwise indicated.

[3] Appellants filed similar claims against two law firms where Rodgers had worked. One of those firms was dismissed while the other obtained summary judgment in its favor, which was affirmed on appeal. *See Peck*, 2012 WL 3239131 at *1, *4, ¶¶ 1, 25.

¶7 The superior court granted the Law Offices of Ethan Frey's motion to compel arbitration on the fee dispute. The arbitrator awarded the Law Offices of Ethan Frey $185,783 in attorneys' fees for services performed on behalf of Appellants against MSC and the superior court affirmed that award. In opposing entry of an Arizona Rule of Civil Procedure (Rule) 54(b) judgment on that contract claim award, Appellants argued that each of the "unadjudicated claims arises out of or is related to the same fee agreement and conduct the arbitration award is based upon." The superior court denied the request for a Rule 54(b) judgment.

¶8 Appellants advanced two damage theories for their claims, arguing that "but for" the improper acts by Frey and Rodgers: (1) the case against MSC would have gone to trial in 2003 instead of 2005, therefore causing Appellants to incur "lost opportunity costs" by delaying the date of settlement by two years and (2) MSC was in a better financial position in 2003 than in 2005 and therefore would have paid a larger amount to settle the matter in 2003. Appellees and one of Rodgers' former law firms moved for summary judgment, arguing that Appellants could not establish causation or damages.

¶9 Appellants countered with expert evidence from financial expert Dwight Duncan regarding the "'lost opportunity cost[s]'" resulting from the allegation of a delayed settlement

and MSC's relative financial strength in 2002 and 2004 and Duncan's "opinion that MSC was financially able to pay more in 2003 than in 2005." *Id*. at *4, ¶¶ 19-22. The superior court granted summary judgment against Appellants, finding that their theory of liability "has not been recognized in" Arizona and the court was "not inclined to extend the state of the law in Arizona to include" such a theory.

¶10 The Frey Entities, and Rodgers and his law offices, then sought an award of attorneys' fees. The Frey Entities argued fees were appropriate under A.R.S. § 12-341.01(A) because the claim to compel fee arbitration arose out of the contractual fee agreement, and the counterclaims were necessarily interrelated. Rodgers and his law offices sought fees as sanctions pursuant to A.R.S. §§ 12-341.01(C) (2011) and -349, but explicitly disavowed reliance on A.R.S. § 12-341.01(A). In response, Appellants argued a fee award was inappropriate because the contract claim and Appellants' claims were not "inextricably intertwined;" that under *Barmat v. John and Jane Doe Partners A-D*, 155 Ariz. 519, 747 P.2d 1218 (1987), fees for legal malpractice actions were not recoverable under A.R.S. § 12-341.01(A) and that Appellants should not be sanctioned.

¶11 The superior court awarded fees pursuant to A.R.S. § 12-341.01(A), finding that the matter arose out of contract, but did not impose sanctions. The court awarded the Frey Entities

$82,000, representing reasonable attorneys' fees incurred in pursuing the claim to compel arbitration and defending against Appellants' claims. The court awarded Rodgers and his law offices $184,657.50, representing reasonable attorneys' fees in defending against Appellants' claims.

¶12 Following further motion practice and the entry of resulting judgments, Appellants timely appealed.[4] This court has jurisdiction over these consolidated appeals pursuant to Article 6, Section 9 of the Arizona Constitution and A.R.S. § 12-2101(A)(1).

DISCUSSION

I. Standard of Review

¶13 On appeal, this court considers issue preclusion and the application of A.R.S. § 12-341.01(A) de novo as questions of law. *See Corbett v. ManorCare of Am., Inc.*, 213 Ariz. 618, 623, ¶ 10, 146 P.3d 1027, 1032 (App. 2006). The determination of whether a party is a "successful party," and thereby eligible for an award of attorneys' fees pursuant to A.R.S. § 12-341.01(A), is reviewed for an abuse of discretion; this court will not disturb an attorneys' fees award supported by "any

[4] This court construes Appellants' notice of appeal as challenging the judgment in favor of all of the Frey Entities (not just the Law Offices of Ethan Frey), particularly because that judgment collectively resolves the matter as to, and awards fees to, all of the Frey Entities. The court also notes that, after oral argument on appeal, Frey joined in the answering brief filed by Rodgers and his law offices.

reasonable basis." *Fulton Homes Corp. v. BBP Concrete*, 214 Ariz. 566, 569, ¶ 9, 155 P.3d 1090, 1093 (App. 2007) (citations omitted).

II. Appellants Are Precluded From Relitigating Whether They Were Damaged.

¶14 Appellees first argue that collateral estoppel/issue preclusion bars Appellants' claims because this court has previously rejected Appellants' appeal from the *exact same superior court ruling. See Peck*, 2012 WL 3239131 at *2, ¶ 13. Arizona has applied the issue preclusion standard set forth in the Restatement (Second) of Judgments (1982). *See Clusiau v. Clusiau Enters., Inc.*, 225 Ariz. 247, 250, ¶ 10, 236 P.3d 1194, 1197 (App. 2010). "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." Restatement (Second) of Judgments § 27 (1982). As applied, there is no "valid and final judgment" from a prior action and no "subsequent action." Appellees have cited no authority applying issue preclusion to a judgment *in the same action*. Accordingly, and given the black letter of Restatement (Second) of Judgments § 27, Appellees have not shown that issue preclusion bars Appellants' claims.

¶15 Appellees next argue the law of the case doctrine bars Appellants' claims because this court previously rejected those claims. *See Peck*, 2012 WL 3239131 at *2, ¶ 13. The law of the case is a "judicial policy of refusing to reopen questions previously decided in the same case by the same court or a higher appellate court." *Powell-Cerkoney v. TCR-Montana Ranch Joint Venture, II*, 176 Ariz. 275, 278, 860 P.2d 1328, 1331 (App. 1993). The doctrine "is well established as controlling." *Sibley v. Jeffreys*, 81 Ariz. 272, 276, 305 P.3d 427, 429 (1956) (citing cases). Although the doctrine is stated in different ways, as described by the Arizona Supreme Court more than 80 years ago:

> "It is a rule of general application that the decision of an appellate court in a case is the law of that case on the points presented throughout all the subsequent proceeding in the case in both the trial and the appellate courts, and no question necessarily involved and decided on that appeal will be considered on a second appeal or writ of error in the same case, provided the facts and issues are substantially the same as those on which the first decision rested, and, according to some authorities, provided the decision is on the merits. This doctrine is not one whose extension is looked upon with favor, and it is adhered to in the single case in which it arises and is not carried into other cases as precedent."

Commercial Credit Co. v. Street, 37 Ariz. 204, 207, 291 P. 1003, 1004 (1930) (quoting 4 C.J.S. § 3075). The doctrine reflects the

> fundamental precept of common-law adjudication . . . that an issue once determined by a competent court is

> conclusive. . . . "To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions."

Arizona v. California, 460 U.S. 605, 619 (1983) (citing cases; quoting *Montana v. United States*, 440 U.S. 147, 153-54 (1979)).

¶16 As applied, in this same case and on this same record, Appellants previously litigated whether they could show compensable damages arising out of the alleged breaches by Appellees; they had a full and fair opportunity to litigate those issues; they lost on the merits; they appealed and lost on appeal on the merits and the damages issue was essential to that decision. *See Peck*, 2012 WL 3239131 at *2, ¶ 13. In that prior appeal, Appellants argued that they hired "'an unlicensed, inexperienced lawyer'"

> and that hiring Rodgers "under false pretenses" was the "but-for cause of their malpractice damages." Appellants contended they were damaged because they were "forced" to settle in 2005 for less than they could have obtained "if the case had gone to trial with a competent lawyer in 2003." Appellants further claimed that if their case had been resolved "at the beginning of 2003," MSC would have "had the ability to pay far more."

Id. at *3, ¶ 17. Appellants' damages arguments were "predicated on the opinion of financial expert Dwight Duncan" and his

assumptions that but for Appellees' alleged improper conduct, the lawsuit would have been resolved sooner, resulting in "lost opportunity cost[s]," and Appellants would have obtained a larger settlement in earlier years because MSC was in a stronger financial position earlier in the litigation. *Id*. at *4, ¶ 19.

¶17 As a few examples demonstrate, in this consolidated appeal, Appellants make the same arguments, based on the same expert's opinion and their same theories of lost time value of money and ability to pay were rejected in the prior appeal:

Appellants' Argument In Prior Appeal.	**Appellants' Argument In This Consolidated Appeal.**
According to Appellants' expert Dwight Duncan, "the delay in the case cost [Appellants] millions of dollars, which is the time-value of money from the period when the first case would have resolved until the time . . . the second case was resolved."	According to Appellant's expert Dwight Duncan, "the delay in the case cost [Appellants] millions of dollars in the time-value of money from the period when the first case should have gone to trial until the time the second case went to trial."
Appellants argued that Duncan examined "'the position and outlook for both the industry and MSC as of mid to late 2002 as compared to mid to late 2004 to ascertain whether MSC was in a better position to settle and fund a larger settlement than was actually achieved.' Duncan concluded MSC 'was clearly in a better position to settle and fund a structured settlement' in January 2003 than in April 2005." *Id.* at *4, ¶ 19.	Appellants argue they "presented evidence [that] suggested MSC was actually stronger in 2005 than it had been in 2003, and had a better ability in 2005 to pay a large settlement" and that "Duncan concluded '[t]herefore, . . . MSC was clearly in a better position to settle and fund a structured settlement at the But-For Settlement Date [early 2003].'"

¶18 The prior appeal squarely rejected those arguments, holding that Appellants' offer of "an economist's opinion that MSC was financially able to pay more in 2003 than in 2005" was insufficient to "establish the 'fact' of damages" because "[a] party's ability to pay is not synonymous with its willingness to pay." *Id*. at *4, ¶ 22. "Other than speculation, nothing in the record supports [the] critical aspect of proof as to the 'fact' of damages." *Id.* "[E]ven assuming Appellants could prove that MSC was better off financially in January 2003 than it was in April 2005, [Appellants] offered no evidence that MSC would have paid a larger settlement sum in 2003." *Id*. at *5, ¶ 24.

¶19 Appellants' arguments, and opinions and evidence offered, are identical in both the prior appeal and this consolidated appeal. This court has already held that "Appellants cannot establish the 'fact' of damages simply by offering an economist's opinion that MSC was financially able to pay more in 2003 than in 2005;" and that "[a] party's ability to pay is not synonymous with its willingness to pay. Other than speculation, nothing in the record supports this critical aspect of proof as to the 'fact' of damages." *Id.* at *4, ¶ 22.

¶20 Because Appellants have already fully litigated whether they could show compensable damages arising out of the alleged breaches by Frey and Rodgers in this same case and on this same record, because they lost on the merits before the

superior court and then lost on appeal and because the damages issue was essential to that decision, Appellants' claims are barred by the law of this case set forth in *Peck*, 2012 WL 3239131.[5]

III. Attorneys' Fees

¶21 Finding the Frey Entities, Rodgers and his law offices were successful parties on claims arising out of contract, the superior court awarded them reasonable attorneys' fees incurred in this case (including defending against Appellants' claims) pursuant to A.R.S. § 12-341.01(A). Appellants challenge this award arguing (1) the Law Offices of Ethan Frey was not a successful party and (2) the malpractice claims do not arise out of contract pursuant to A.R.S. § 12-341.01(A).

A. The Superior Court Properly Found The Law Offices of Ethan Frey Was A Successful Party.

¶22 Appellants claim that the Law Offices of Ethan Frey was not a successful party eligible for a fee award under A.R.S. § 12-341.01(A) because his arbitration award was substantially less than the amount claimed. The successful party determination is within the sole discretion of the superior court, and will not be reversed if there is any reasonable basis for the determination. *See Kaman Aerospace Corp. v. Ariz. Bd. of*

[5] Even apart from the law of the case, Appellants' arguments fail given the analysis set forth in *Peck*, 2012 WL 3239131, which is expressly adopted here. *See also Thompson v. Halvonik,* 43 Cal.Rptr.2d 142 (Cal. App. 1995).

Regents, 217 Ariz. 148, 157, ¶ 35, 171 P.3d 599, 608 (App. 2007). The record is viewed in the light most favorable to upholding the determination, given that the superior court is in a better position to determine which party has prevailed. *Berry v. 352 E. Virginia, L.L.C.,* 228 Ariz. 9, 13, ¶¶ 21–22, 261 P.3d 784, 788 (App. 2011). Although recognizing that the recovery by the Law Offices of Ethan Frey was less than the value of the original claim, Appellants have not shown that the superior court abused its discretion in finding that the Law Offices of Ethan Frey was a successful party eligible for a fee award under A.R.S. § 12-341.01(A).

B. The Superior Court Properly Found A.R.S. § 12-341.01(A) Applies To The Frey Entities.

¶23 Appellants are correct that *Peck*, 2012 WL 3239131, did not address the applicability of A.R.S. § 12-341.01(A). Appellants also correctly cite *Barmat v. John and Jane Doe Partners A-D*, 155 Ariz. 519, 747 P.2d 1218 (1987), for the proposition that generally A.R.S. § 12-341.01(A) does not apply to legal malpractice claims alone. This case, however, started as a contract case when the Law Offices of Ethan Frey sought to compel arbitration with Appellants as agreed to in their fee agreement. As such, this case involved a contract claim *against* Appellants, not a legal malpractice claim brought *by* Appellants.

¶24 Appellants' claims against the Frey Entities alleged respondeat superior, misrepresentation and malpractice claims as well as breach of contract and good faith/fair dealing claims, arising out of that same fee agreement and based on the same allegations. In their pleadings, for all such claims, Appellants sought "an award of reasonable attorneys' fees pursuant to A.R.S. § 12-341.01" against Appellees and had done so in prior pleadings.

¶25 In opposing a Rule 54(b) judgment requested by the Law Offices of Ethan Frey on the arbitration award, Appellants argued that each of the relevant "unadjudicated claims arises out of or is related to the same fee agreement and conduct the arbitration award is based upon." In declining to issue a Rule 54(b) judgment, the superior court agreed. In later addressing the Frey Entities' request for fees pursuant to A.R.S. § 12-341.01(A), the superior court found that the core of this case "is a fee dispute case. This is a contract dispute, it's not malpractice."

¶26 The pleadings and positions of these parties demonstrate that the disputes between the Frey Entities and Appellants arise out of contract. A.R.S. § 12-341.01(A). Although Appellants asserted claims other than breach of contract (including malpractice), the claims against the Frey Entities were inextricably interwoven with the contract claims.

See Modular Mining Sys., Inc. v. Jigsaw Techs., Inc., 221 Ariz. 515, 521-22, ¶ 22, 212 P.3d 853, 859-60 (App. 2009) (finding superior court properly awarded attorneys' fees pursuant to A.R.S. § 12-341.01(A) where "fees were 'incurred in litigating interwoven and overlapping contract and tort claims'"). Accordingly, the superior court properly found that the Frey Entities were eligible for an award of attorneys' fees pursuant to A.R.S. § 12-341.01(A). *See, e.g., id.; Campbell v. Westdahl,* 148 Ariz. 432, 441, 715 P.2d 288, 297 (App. 1985) ("Attorney's fees may be awarded under [§ 12–341.01] for tort claims that are intertwined with contract claims."); *Schweiger v. China Doll Rest., Inc.,* 138 Ariz. 183, 189, 673 P.2d 927, 933 (App. 1983) (similar).[6]

C. Rodgers And His Law Offices Were Not Eligible For An Award Of Attorneys' Fees.

¶27 In the superior court, Rodgers and his law offices sought attorneys' fees as sanctions pursuant to A.R.S. §§ 12-341.01(C) (2011)[7] and -349. Although the superior court awarded

[6] Appellants do not challenge the amount of fees awarded but limit their challenge to whether the superior court properly awarded the Frey Entities any fees under A.R.S. § 12-341.01.

[7] "The court shall award reasonable attorney fees in any contested action upon clear and convincing evidence that the claim or defense constitutes harassment, is groundless and is not made in good faith. In making the award, the court may consider any evidence it deems appropriate and shall receive this evidence during a trial on the merits of the cause, or separately, regarding the amount of fees it deems in the best

attorneys' fees to Rodgers and his law offices, the court expressly stated they were "not entitled to an award of attorney's fees pursuant to A.R.S. § 12-349." Similarly, the court did not make the findings that would be required for an award of fees under A.R.S. § 12-341.01(C) (2011). *See, e.g.*, *Bennett v. Baxter Grp., Inc.*, 223 Ariz. 414, 421, ¶ 28, 224 P.3d 230, 237 (App. 2010) (noting "the trial court must make appropriate findings of fact and conclusions of law" in imposing sanctions under A.R.S. §§ 12-341.01(C) (2011) and -349). Accordingly, the award of fees is proper, if at all, if authorized by A.R.S. § 12-341.01(A).

¶28 Rodgers and his law offices never sought fees pursuant to A.R.S. § 12-341.01(A) and, in fact, expressly disavowed any intention to do so. Indeed, counsel told the superior court that Rodgers and his law offices "did not [] move for fees under the contract theory . . . so any [] arguments pertaining to [A.R.S. § 12-341.01(A)] are inapplicable to Rodgers" and his law offices. On this basis alone, any attempt on appeal to justify the award of fees to Rodgers and his law offices under A.R.S. § 12-341.01(A) is dubious at best. *See Ayres v. Red Cloud Mills, Ltd.*, 167 Ariz. 474, 480, n.6, 808 P.2d 1226, 1232 (App. 1990)

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interest of the litigating parties." Effective January 1, 2013, the Legislature made substantial changes to A.R.S. § 12-341.01(C), which do not apply here. *See* 2012 Ariz. Sess. Laws ch. 305.

(declining to consider claim for attorneys' fees under statutory authority that was not asserted in trial court); *see also Sobol v. Marsh*, 212 Ariz. 301, 303, ¶ 7, 130 P.3d 1000, 1002 (App. 2006) ("As a general rule, a party cannot argue on appeal legal issues and arguments that have not been specifically presented to the trial court.").

¶29 Waiver aside, Rodgers and his law offices are not eligible for an award of fees under A.R.S. § 12-341.01(A). *Barmat* held "that A.R.S. § 12-340.01(A) is not applicable to" malpractice claims, because absent "some special contractual agreement or undertaking" or being inextricably interwoven with claims clearly subject to the statute, such a claim "does not 'arise' from contract, but rather from tort." 155 Ariz. at 523, 524, 747 P.2d at 1222, 1223. There was no special contractual agreement or undertaking between Appellants and Rodgers and his law offices that would take the arrangement outside of the prohibition in *Barmat*. Moreover, unlike the dispute between the Frey Entities and Appellants, Rodgers and his law offices (1) made no contract claim (or any other claim for that matter) against Appellants; and (2) are parties in this case solely based on Appellants' malpractice and related claims against

them.[8] Because Rodgers and his law offices were not eligible for an award of fees pursuant to A.R.S. § 12-341.01(A), and because they have shown no other authority that would authorize the award of fees, that award is vacated.

CONCLUSION

¶30 Because Appellants are precluded from relitigating their inability to prove damages, and because the superior court did not err in awarding the Frey Entities their attorneys' fees, the judgment in favor of the Frey Entities is affirmed. Because Rodgers and his law offices have not shown any authority supporting the award of attorneys' fees in their favor, the portion of the judgment in favor of Rodgers and his law offices is vacated.

¶31 The Frey Entities request an award of attorneys' fees on appeal under A.R.S. § 12-341.01. In exercising the court's discretion, the Frey Entities are awarded their reasonable attorneys' fees incurred on appeal upon their compliance with ARCAP 21. The request by Rodgers and his law offices for an award attorneys' fees on appeal pursuant to A.R.S. § 12-349 is denied. The Frey Entities, as prevailing parties in CV 12-0302, are awarded their costs on appeal upon their compliance with ARCAP 21. Appellants, as prevailing parties in CV 12-0402, are

[8] Appellants' breach of contract, good faith and fair dealing, misrepresentation and respondeat superior claims all turn on and build upon the malpractice allegations against Rodgers.

awarded their costs on appeal in that matter upon their compliance with ARCAP 21.

/S/_____
SAMUEL A. THUMMA, Judge

CONCURRING:

/S/_____
MAURICE PORTLEY, Presiding Judge

/S/_____
DONN KESSLER, Judge