

**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.*

**FILED BY CLERK**

**AUG 15 2012**

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

KATRINA A. DOMINGUEZ,	)	
	)	
Plaintiff/Appellee,	)	2 CA-CV 2012-0014
	)	DEPARTMENT A
v.	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
MERITAGE HOMES ARIZONA, INC.,	)	Rule 28, Rules of Civil
an Arizona corporation,	)	Appellate Procedure
	)	
Defendant/Appellant.	)	
_____	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20087625

Honorable Stephen C. Villarreal, Judge

REVERSED AND REMANDED

---

Law Offices of Drue A. Morgan-Birch, P.C.  
By Drue A. Morgan-Birch

Tucson  
Attorney for Plaintiff/Appellee

Wilenchik & Bartness, P.C.  
By Dennis I. Wilenchik and Lawrence J. Felder

Phoenix  
Attorneys for Defendant/Appellant

---

E C K E R S T R O M, Presiding Judge.

¶1 Defendant/appellant Meritage Homes Arizona, Inc., appeals from the trial court's ruling denying its request for attorney fees as the prevailing party in a lawsuit

brought against it by plaintiff/appellee Katrina Dominguez. Meritage argues that because it was entitled to fees under the contract between the parties, the court had no discretion to deny its request without finding the fees were unreasonable.<sup>1</sup> Because Meritage is correct, the court erred in declining to award attorney fees, and we reverse its ruling. However, we remand the case for the court to determine whether the attorney fees Meritage has requested are “reasonable,” as required by the terms of the contract.

¶2 Dominguez purchased a home constructed by Meritage in 2004. In 2008, she filed a complaint against Meritage for breach of contract and breach of the express and implied warranty for failing to construct the home “in a safe and workmanlike manner consistent with the standard in the industry in Pima County for homes,” failing to “properly grade the site and provide for satisfactory drainage of the property,” and “failing to remedy the moisture and mold problem in accordance with its express warranties.” Dominguez’s complaint contained related claims for fraud, negligence, negligent misrepresentation, consumer fraud, breach of the implied covenant of good faith and fair dealing, and “emotional distress and aggravation.” And, in the last count of her complaint, she asked for the remedy of rescission. In February 2010, Dominguez and Meritage stipulated to the dismissal of the claims for fraud, negligent misrepresentation, negligence, and consumer fraud, and the court dismissed those claims. Meritage moved for summary judgment on the remaining claims, and the court granted judgment in its

---

<sup>1</sup>The purchase agreement fee provision states that “[i]n the event M[eritage] retains the services of one or more attorneys to enforce its rights or remedies under this Agreement and whether or not a lawsuit is filed, M[eritage] shall be entitled to recover from Buyer all reasonable legal fees and all other costs, including court costs, incurred by M[eritage] in connection therewith.”

favor. Pursuant to the court's order, Meritage filed a proposed final judgment, an application for fees with a supporting affidavit, and a statement of costs.

¶3 The trial court found Meritage was “entitled to attorney’s fees under the contract between the parties and A.R.S. § 12-341.01.” It also found Meritage was “the prevailing party as summary judgment was granted in its favor.” However, the court stated it had “also considered the discretionary factors for an award of attorney’s fees as required under Arizona law” and awarded \$6,818.75 in costs but no fees. This appeal followed the court’s entry of a final judgment.<sup>2</sup> We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

¶4 Meritage argues the trial court erred when it denied Meritage’s application for attorney fees. We review de novo the legal question of whether the court had discretion under § 12-341.01(A) to deny a fee award in spite of a mandatory fee provision in the parties’ contract. *See Charles I. Friedman, P.C. v. Microsoft Corp.*, 213 Ariz. 344, ¶ 17, 141 P.3d 824, 830 (App. 2006).

¶5 The purchase agreement fee provision states that “[i]n the event M[eritage] retains the services of one or more attorneys to enforce its rights or remedies under this

---

<sup>2</sup>Although the notice of appeal refers to the court’s November 18 minute entry order, we note the court also signed the final judgment on the same date. The record shows Meritage intended to appeal from the final judgment, and Dominguez has not contended she suffered prejudice or was misled by the notice. *See Hill v. City of Phx.*, 193 Ariz. 570, ¶ 10, 975 P.2d 700, 702-03 (1999) (notice of appeal sufficient despite defect when record discloses intent to appeal judgment, and defect neither misled nor prejudiced opposing party); *see also Hanen v. Wills*, 102 Ariz. 6, 9-10, 423 P.2d 95, 98-99 (1967) (stating timely notice of appeal in relation to valid judgment “will not be found insufficient merely because the date given as that of the order or judgment appealed from is the date of an earlier rendering of the same judgment by minute entry order”).

Agreement and whether or not a lawsuit is filed, M[eritage] shall be entitled to recover from Buyer all reasonable legal fees and all other costs, including court costs, incurred by M[eritage] in connection therewith.”<sup>3</sup> The trial court relied on *Associated Indemnity Corp. v. Warner*, 143 Ariz. 567, 694 P.2d 1181 (1985), in finding it had discretion to deny Meritage’s application for attorney fees. However, the court in *Associated Indemnity* was only addressing fees awarded under § 12-341.01(A), and therefore the case is inapplicable to a situation where fees are mandated by a contract. *See Associated Indem.*, 143 Ariz. at 568-69, 694 P.2d at 1182-83. Moreover, § 12-341.01(A) expressly provides that it “shall in no manner be construed as altering, prohibiting or restricting present or future contracts or statutes that may provide for attorney fees.”

¶6 Dominguez has rebutted none of the authority provided by Meritage that states a court must award attorney fees provided for by the contract between the parties. *E.g., Bennett v. Appaloosa Horse Club*, 201 Ariz. 372, ¶ 26, 35 P.3d 426, 432 (App. 2001) (“The awarding of attorneys’ fees to a prevailing party pursuant to a contract between the parties is mandatory.”); *Lisa v. Strom*, 183 Ariz. 415, 418 n.2, 904 P.2d 1239, 1242 n.2 (App. 1995) (“[W]hen a contract has an attorney’s fees provision it controls to the exclusion of the statute.”); *Chase Bank of Ariz. v. Acosta*, 179 Ariz. 563, 575, 880 P.2d 1109, 1121 (App. 1994) (“Unlike fees awarded under A.R.S. § 12-341.01(A), the court lacks discretion to refuse to award fees under [a] contractual provision.”). Indeed, this court recently affirmed that well-established principle,

---

<sup>3</sup>Dominguez actually entered into a contract with Monterey Homes Arizona, Inc., which merged with Meritage in 2005.

expressly rejecting the rule followed in some states that a trial court has discretion to refuse to award fees under a mandatory fee provision in a contract. *Murphy Farrell Dev., LLLP v. Sourant*, 229 Ariz. 124, ¶ 32 & n.10, 272 P.3d 355, 364 & n.10 (App. 2012). And even though the fee provision in the parties' contract was unilateral, that is, it was in favor of Meritage only, this does not negate the fact that the fee provision was applicable to an award of fees to Meritage. *See Pioneer Roofing Co. v. Mardian Constr. Co.*, 152 Ariz. 455, 471, 733 P.2d 652, 668 (App. 1986) (“Where a contract has a unilateral provision permitting one party to recover attorneys’ fees under certain circumstances, § 12-341.01(A) requires that the contract provision be applied when the party seeking recovery of fees is the one allowed recovery under the unilateral contract provision.”).

¶7 Dominguez argues in passing that the purchase agreement is an adhesion contract, and thus the attorney fee provision should not be enforced. But she only vaguely made this argument below, and even if that were enough to preserve the argument for appeal, she has not developed the argument sufficiently here for us to address it properly. *See* Ariz. R. Civ. App. P. 13(a)(6) (requiring appellant to develop argument in opening brief for each contention raised); *State Farm Mut. Auto. Ins. Co. v. Novak*, 167 Ariz. 363, 370, 807 P.2d 531, 538 (App. 1990) (failure to develop argument properly results in waiver on appeal).

¶8 Dominguez also contends the express warranty agreement governs over the purchase contract, and the warranty contains a provision requiring each party to pay its own fees and costs. But the warranty provision at issue expressly applies to arbitration only; it provides that “[e]ach party shall bear its own attorneys fees and costs (including

expert costs) for the arbitration.” She did not include the entire warranty agreement in her opposition to the application for fees, but it appears to provide for arbitration in the event of a dispute over construction defects such as this one. Yet neither party sought arbitration below, and Dominguez makes no argument the fee provision in the purchase agreement is invalidated because the claims were litigated rather than arbitrated.

¶9 Nor does she argue the warranty provision also should apply to litigation other than to contend “[n]o provision is made if a Complaint is brought in Court.” But “[a] clear and unambiguous contract must be interpreted according to its terms.” *Isaak v. Mass. Indem. Life Ins. Co.*, 127 Ariz. 581, 584, 623 P.2d 11, 14 (1981). And, it is not within our power “to alter, revise, modify, extend, rewrite or remake [such] an agreement.” *Goodman v. Newzona Inv. Co.*, 101 Ariz. 470, 472, 421 P.2d 318, 320 (1966). Dominguez has not argued the warranty agreement is ambiguous, and we conclude it is not. The fee provision in the warranty agreement unambiguously applies only to arbitration. Thus, we must apply the language as written, and we conclude the trial court did not err in finding the provision in the purchase contract applies rather than the one in the warranty agreement.

¶10 However, we note that the attorney fee provision in the purchase agreement only applies to “enforce [the] rights or remedies [of Meritage] under this Agreement.” Because Meritage was defending itself against Dominguez’s lawsuit, which included claims that do not involve the enforcement of Meritage’s rights or remedies under the contract, the attorney fee provision does not apply to the entirety of the fees Meritage allegedly incurred. Nonetheless, the record supports that, at the least, the provision

applies to Meritage’s defense of Dominguez’s claim that the contract should be rescinded. To the extent the attorney fee provision in the contract does not apply to the other claims, the court correctly concluded the fees are governed by § 12-341.01(A), and the court properly exercised its discretion in denying the fee request as to those claims the statute covered.

¶11 For the foregoing reasons, the order is reversed and the case is remanded to the trial court for further proceedings to determine the reasonableness of the fees Meritage has requested and to what extent they were incurred “enforc[ing] its rights or remedies” under the contract. Meritage has requested its attorney fees and costs incurred on appeal pursuant to Rule 21, Ariz. R. Civ. App. P. But that rule does not provide a substantive basis for a fee award, and we therefore decline its request for fees. *See Assyia v. State Farm Mut. Auto. Ins. Co.*, 229 Ariz. 216, ¶ 34, 273 P.3d 668, 676 (App. 2012); *see also Roubos v. Miller*, 214 Ariz. 416, ¶ 21, 153 P.3d 1045, 1049 (2007) (party requesting fees must state statutory or contractual basis for award). Although we decline Meritage’s request for fees, we award its costs as the prevailing party on appeal upon its compliance with Rule 21(a). *See Assyia*, 229 Ariz. 416, ¶ 34, 273 P.3d at 676; *Ezell v. Quon*, 224 Ariz. 532, ¶ 34, 233 P.3d 645, 653 (App. 2010).

/s/ Peter J. Eckerstrom  
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard  
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.  
J. WILLIAM BRAMMER, JR., Judge