DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

SCOTT SMITH, an individual, Plaintiff/Appellant, v. CLOUSE CONSTRUCTION COMPANY, LLC, an Arizona limited liability company; JASON CLOUSE and JENNIFER CLOUSE, husband and wife, Defendants/Appellees.	No. 1 CA-CV 11-0482 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-028216

The Honorable Hugh E. Hegyi, Judge

AFFIRMED IN PART; VACATED IN PART; REMANDED

Beus Gilbert P.L.L.C. Scottsdale
By Franklyn D. Jeans
Cory L. Broadbent
Attorneys for Plaintiff/Appellant

Schern Richardson P.L.C. Mesa
By Michael Andrew Schern
Mark A. Hanson
Attorneys for Defendants/Appellees

D O W N I E, Judge

¶1 Scott Smith appeals the dismissal of his civil claims against Clouse Construction Company, L.L.C., Jason Clouse, and Jennifer Clouse (collectively, "Clouse"). Smith also appeals the superior court's award of attorneys' fees to Clouse. We affirm the dismissal order but vacate the fee award as premature.

FACTS AND PROCEDURAL HISTORY

¶2 Harry and Alice Haase signed a contract with Clouse Construction Company (the "Construction Contract") for the construction of a residence. Jason Clouse was the general contractor. Jennifer Clouse served as the real estate agent. Smith later purchased the residence from the Haases.

¶3 In December 2008, Smith sued Clouse and several other defendants who are not parties to this appeal. He asserted ten counts against Clouse: negligence, negligence per se, breach of the implied warranty of habitability, breach of contract, breach of the covenant of good faith and fair dealing, breach of fiduciary duty, alter ego, fraud, negligent misrepresentation, and punitive damages. Smith also alleged he was a third-party beneficiary of the Construction Contract.

¶4 Clouse filed an answer in April 2009. Clouse alleged therein that the Construction Contract contained an alternative dispute resolution provision ("ADR clause") that applied to

Smith's claims. Clouse asserted that the superior court lacked jurisdiction due to the ADR clause.

¶5 In August 2009, Clouse filed a motion to dismiss, contending Smith had not complied with the Purchaser Dwelling Act ("PDA"), which deprived the superior court of subject matter jurisdiction.[1] Clouse also argued that Smith's negligence claims were barred by the economic loss doctrine. The superior court concluded the PDA's "pre-filing requirements were intended to be and are a jurisdictional prerequisite to Plaintiff's lawsuit." It dismissed all counts against Clouse except the "common law fraud" claim.

¶6 Smith thereafter complied with the PDA and sought leave to file a second amended complaint to, *inter alia*, re-assert his claims against Clouse. The court granted Smith's motion. Smith filed an amended complaint on July 29, 2010, once

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[1] In pertinent part, the PDA requires:

> At least ninety days before filing a dwelling action, the purchaser shall give written notice . . . specifying in reasonable detail the basis of the dwelling action. . . .
>
> After receipt of the notice . . . the seller may inspect the dwelling to determine the nature and cause of the alleged defects and the nature and extent of any repairs or replacements necessary to remedy the alleged defects.

Ariz. Rev. Stat. ("A.R.S.") § 12-1363 (A), (B).

again alleging he was a third-party beneficiary of the Construction Contract. On August 20, 2010, Clouse moved to dismiss based on the ADR clause, which he contended divested the superior court of subject matter jurisdiction. The court agreed and granted Clouse's motion.

¶7 Clouse filed an application for attorneys' fees based on Arizona Revised Statutes ("A.R.S.") section 12-341.01 and a fee provision in the Construction Contract. Smith opposed the application, arguing Clouse had not yet prevailed on the merits. On May 28, 2011, the superior court signed a "Partial Judgment as to Clouse Defendants Only," which contained a determination of finality pursuant to Rule 54(b), Arizona Rules of Civil Procedure ("Rule"), and awarded Clouse $23,491 in fees ("May Judgment").

¶8 On June 2, 2011, Smith moved for reconsideration of the fee award. Among other things, Smith pointed out that the May Judgment incorrectly stated he had not opposed Clouse's fee application. The next day, the superior court filed a minute entry dated May 31, 2011, denying Clouse's fee application as "premature without prejudice to requesting an award of fees as part of an arbitration proceeding or upon the resolution of all claims between the parties." Smith supplemented his motion for reconsideration, asking the court to enter an amended judgment

reflecting the denial of fees. Meanwhile, Smith filed a timely notice of appeal from the May Judgment.

¶9 In a minute entry filed November 8, 2011, the superior court granted Smith's motion for reconsideration. The court acknowledged it had failed to consider Smith's opposition to the fee application and stated:

> [H]aving reconsidered its award of attorney's fees and having considered the factors articulated in Fulton Homes Corp. v. BBP Concrete, 214 Ariz. 566, 155 P.3d 1090 (App. 2007),
>
> **IT IS ORDERED** granting the Application in part and awarding the Clouse Defendants their attorney's fees in the amount of $8,000.
>
> **IT IS FURTHER ORDERED** vacating the Court's May 28, 2011 Judgment in its entirety and ordering that Plaintiff submit a form of judgment within 10 days from the entry (filing date) of this minute entry that makes only this change to the form of judgment entered by the Court on May 28, 2011 . . . .

Smith lodged a form of judgment, but it was never signed.

¶10 On December 23, 2011, a motions panel of this Court determined that due to the appeal from the May Judgment, the superior court lacked jurisdiction to vacate that judgment or to rule on Smith's motion for reconsideration. The panel suspended the appeal and revested jurisdiction in the superior court to permit entry of a new judgment. The superior court thereafter

entered an amended judgment containing Rule 54(b) language that: (1) vacated the May Judgment; (2) awarded Clouse $8000 in attorneys' fees; and (3) entered judgment in favor of the "Clouse Defendants Only." Smith timely appealed from that judgment. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

DISCUSSION

I. ADR Clause

¶11 The ADR clause in the Construction Contract states, in relevant part:

> **Disputes**
>
> Should any dispute arise relative to the performance of this contract that the parties cannot resolve, the dispute shall be referred to a single arbitrator acceptable to the Builder and Owner. If the Builder and the Owner cannot agree upon an arbitrator, the dispute shall be referred to the American Arbitration Association for resolution.
>
> Dispute Resolution Procedures: Owner and Builder desire to resolve any dispute between them as quickly, inexpensively, and efficiently as possible, avoiding the expense and delay of court proceedings. This applies to every potential dispute between the parties, consequently, the parties agree to the following sequence of procedures to resolve such disputes . . . .

¶12 As he did below, Smith argues on appeal that Clouse waived the right to compel arbitration. The superior court rejected Smith's contention, stating:

> [T]he Court does not find Defendants have waived this defense. Plaintiff has cast a broad net in attempting to impose liability in this matter and has raised unusual, and possibly novel, claims against Defendants not normally haled to account in such matters. Under the circumstances, the Court finds no fault with Defendants for not loosing all the arrows in their quivers at one time and relying, in the first instance, on their claims with regard to the [PDA].

¶13 A party may waive the right to enforce an arbitration agreement. *Forest City Dillon, Inc. v. Superior Court (Carruth)*, 138 Ariz. 410, 412, 675 P.2d 297, 299 (App. 1984). "Whether conduct amounts to waiver of the right to arbitrate is a question of law we review de novo." *In re Estate of Cortez*, 226 Ariz. 207, 210, ¶ 3, 245 P.3d 892, 895 (App. 2010).

¶14 Smith has the burden of proving waiver. "Public policy favors arbitration and thus, the burden is heavy on the party seeking to prove waiver of an agreement to arbitrate." *Id.* "Waiver" is defined as an "express, voluntary, intentional relinquishment of a known right or conduct so inconsistent with an intent to assert the right that an intentional relinquishment can be inferred." *City of Cottonwood v. James L. Fann Contracting, Inc.*, 179 Ariz. 185, 191, 877 P.2d 284, 290 (App. 1994). Waiver may be established by demonstrating conduct inconsistent with invoking arbitration. "Inconsistency usually is found when one party engages in conduct preventing arbitration, proceeds at all times in disregard of arbitration,

expressly agrees to waive arbitration, or unreasonably delays requesting arbitration." *In re Noel R. Shahan Irrevocable & Inter Vivos Trust*, 188 Ariz. 74, 77-78, 932 P.2d 1345, 1348-49 (App. 1996).

¶15 Although Clouse's answer alleged the superior court lacked subject matter jurisdiction due to the ADR clause, Clouse did not promptly seek dismissal on that basis. Instead, Clouse first moved to dismiss based on the PDA and the economic loss doctrine. Clouse could have asserted the ADR clause as an additional basis for dismissal.

¶16 Once Clouse was brought back into the litigation, it promptly moved to dismiss based on the ADR clause. Additionally, Clouse attested to earlier informal efforts to initiate ADR, stating:

> This Motion is not made idly. Even prior to filing of the Second Amended Complaint, Clouse's counsel reached out to Smith's counsel and reminded counsel of the ADR provision . . . . Clouse's efforts to resolve the matter informally were rebuffed.

Smith did not dispute this assertion.

¶17 "An allegation of repudiation based on unreasonable delay must be supported by clear evidence of 1) prejudice suffered by the other party and 2) a demand for arbitration so egregiously untimely and inconsistent with an intent to assert the right to arbitrate that an intentional relinquishment can be

inferred." *Cottonwood*, 179 Ariz. at 192, 877 P.2d at 291. Contrary to Smith's characterization of the record, we are not faced here with a two-year delay in demanding arbitration. Clouse was effectively out of the litigation with Smith for almost ten months after nine of the ten counts against it were dismissed. Nothing in the record suggests that between the time of the dismissal order and the filing of the second amended complaint, Clouse substantively litigated the lone claim remaining or engaged in conduct otherwise inconsistent with re-asserting the ADR requirement.

¶18 In *Cortez*, upon which Smith relies, the court deemed it significant that the defendants did not assert an ADR defense in their answer. 226 Ariz. at 211, ¶ 6, 245 P.3d at 896 ("[a]n assertion that arbitration is mandatory is an affirmative defense" that is waived if not made in the answer). Additionally, the defendants did not seek to compel arbitration until after participating "substantially in the litigation" by demanding a jury trial, conducting discovery, and appearing at a hearing. *Id.* By the time they requested arbitration, the case had already been set for trial. *Id.* at 212, ¶ 12, 245 P.3d at 897. These facts are materially different from the case at bar.

¶19 Even assuming *arguendo* that Clouse unreasonably delayed in demanding arbitration, Smith has not carried his burden of proving corresponding prejudice. In opposing Clouse's

motion to dismiss, Smith described the purported prejudice as follows:

> Plaintiff relied on the Clouse Defendants [sic] actions in litigating this matter and has expended significant legal and judicial resources bringing this action to this point. As part of his efforts, Plaintiff retained experts to issue preliminary opinions, litigated matters with the Arizona Court of Appeals and Arizona Supreme Court, briefed and filed three (3) separate Complaints, produced and reviewed substantial discovery, and otherwise litigated this matter for almost two years.

¶20 Smith's allegations of prejudice are broad and conclusory. They lack factual specificity or context. They do not distinguish between litigation relating to other defendants and actions necessary to prosecute the claims against Clouse. Smith's original complaint named as defendants Clouse, Maricopa County, Dominion Real Estate, SOS Home Services, M&S Development Corporation, Charles and Jane Doe Martin, Tom Nichols Excavating, Morris & Biemond Investments, Desert Land Engineering, Teodorico and Jane Doe Gutierrez, and Harry and Alice Haase. The first amended complaint added the Flood Control District of Maricopa County, Maricopa County Planning and Development Department, Maricopa County Environmental Services, and Jenny and John Doe Vitale.

¶21 Some of the governmental defendants sought special action relief, which Smith cites as an example of prejudice.

But an earlier ADR demand by Clouse would not have affected these proceedings, which did not involve Clouse. Moreover, Smith has not explained how or why expenses and efforts relating to expert witnesses and PDA compliance could have been avoided by an earlier ADR demand. Based on the record before it, the superior court could properly conclude that Smith did not prove the prejudice necessary to establish waiver of the right to arbitrate. *See Ariz. Bd. of Regents v. State ex rel. Ariz. Pub. Safety Ret. Fund Manager Adm'r*, 160 Ariz. 150, 154, 771 P.2d 880, 884 (App. 1989) (citations omitted) (appellate court will affirm trial court if it was correct for any reason).

¶22 Smith has consistently alleged that he is a third-party beneficiary of the Construction Contract. The superior court therefore properly relied on *Jeanes v. Arrow Ins. Co.*, 16 Ariz. App. 589, 592, 494 P.2d 1334, 1337 (1972), which holds that a third-party beneficiary to a contract is subject to and bound by an arbitration provision contained in that contract. "The rights . . . involved were created by that contract, and in order to accept benefits under the contract [Appellant] must accept and abide by the terms of the contract." *Id.* So too, Smith may not avoid the ADR requirement in the Construction Contract to which he claims third-party beneficiary status.

¶23 Smith contends for the first time on appeal that not all of his claims fall within the scope of the ADR clause. He did not, however, make this argument in the superior court. We therefore decline to address it. *See Cullum v. Cullum*, 215 Ariz. 352, 355 n.5, ¶ 14, 160 P.3d 231, 234 n.5 (App. 2007) (as a general rule, a party may not argue on appeal legal issues not raised below); *Richter v. Dairy Queen of S. Ariz., Inc.*, 131 Ariz. 595, 596, 643 P.2d 508, 509 (App. 1982) (appellate court will not consider issues and theories not presented to the court below).

II. Attorneys' Fees

¶24 Clouse requested an award of attorneys' fees in the superior court based on A.R.S § 12-341.01 and a fee provision in the Construction Contract. Smith challenges the ensuing award "because no ultimate prevailing party has been established."

¶25 The superior court did not state the basis for its award. We confine our review to the Construction Contract's fee provision. When parties "have provided in the contract the conditions under which attorney's fees may be recovered, A.R.S. § 12-341.01 is not to be considered." *Connor v. Cal-Az Props., Inc.*, 137 Ariz. 53, 55, 668 P.2d 896, 898 (App. 1983) (internal quotation marks omitted).

¶26 The fee provision in the Construction Contract appears in the "Disputes" section and applies, by its own terms, to

"dispute[s] aris[ing] relative to the performance of this contract."[2] This contract language supports Smith's contention that resolution on the merits is a condition precedent for a fee award.[3] No such resolution has occurred. We therefore vacate the superior court's fee award as premature. We deny Clouse's request for fees incurred on appeal on the same basis. Because both parties have partially prevailed on appeal, we decline to award appellate costs to either side.

CONCLUSION

¶27 We affirm the dismissal of Smith's claims against

[2] The fee provision reads: "All attorney fees that shall be incurred in the resolution of disputes shall be the responsibility of the party not prevailing in the dispute."

[3] Smith's citation to an unpublished memorandum decision of this Court violates ARCAP 28(c). Because the contract requires resolution on the merits, we need not address whether a dismissal without prejudice gives rise to a fee award under A.R.S. § 12-341.01. *See, e.g., Kool Radiators, Inc. v. Evans*, 229 Ariz. 532, 278 P.3d 310 (App. 2012); *McMurray v. Dream Catcher USA, Inc.*, 220 Ariz. 71, 202 P.3d 536 (App. 2009); *Britt v. Steffen*, 220 Ariz. 265, 205 P.3d 357 (App. 2008); *U.S. Insulation, Inc. v. Hilro Constr. Co.*, 146 Ariz. 250, 705 P.2d 490 (App. 1985).

Clouse, vacate the award of attorneys' fees, and remand to the superior court for further proceedings consistent with this decision.

/s/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
ANN A. SCOTT TIMMER, Presiding Judge

/s/
PATRICIA K. NORRIS, Judge