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

ARCHICON, L.C., an Arizona limited liability company,	1 CA-CV 12-0232
Plaintiff/Appellee CounterDefendant,	DEPARTMENT B
v.	**MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)
TPI PROPERTIES, LLC, an Arizona limited liability company,	
Defendant/Appellant CounterClaimant.	

Appeal from the Superior Court in Maricopa County

Cause No. CV2007-002844

The Honorable Arthur T. Anderson, Judge

AFFIRMED IN PART; REMANDED IN PART

Hoopes Adams & Alexander, PLC — Chandler
By John R. Hoopes
Patricia Alexander
Attorneys for Defendant/Appellant

G O U L D, Judge

¶1 In this appeal we examine the enforceability of a mechanics' lien. For the following reasons, we find the mechanics' lien enforceable, and affirm.

Facts and Procedural Background

¶2 Technology Providers, Inc. ("Technology") desired to build a company building on a piece of vacant, unimproved property it owned in Chandler, Arizona. It formed an LLC to accomplish this purpose, TPI Properties, LLC ("TPI"), and transferred the property to the LLC. Technology contracted with Exclusive Development, Inc. ("EDI") to construct a building on the land. EDI subcontracted with Archicon, an architectural firm, to provide architectural services for the project in exchange for $69,000 plus additional costs and expenses. Archicon began work on the project. After Archicon had done substantial work toward the project, it stopped work because its invoices were not being paid.

¶3 On September 5, 2006, Archicon filed a Notice and Claim of Professional Services' Lien on the property owned by TPI in the amount of $54,687.69. It had served a preliminary 20-day lien notice on Technology and EDI on May 23, 2005.

¶4 Archicon later filed a complaint against Technology and TPI to foreclose on its lien. Technology and TPI moved for summary judgment, arguing that the lien was invalid because (1) Archicon's professional registration had expired on March 2003 and (2) Archicon's work had not enhanced the value of the land and the vacant land contained no building, structure, or improvement. The trial court denied this motion, explaining that

it interpreted Arizona case law to mean that substantial compliance with the registration requirements was sufficient and that factual issues precluded the resolution of the second issue.

¶5 Archicon moved for partial summary judgment regarding Archicon's substantial compliance with the registration, which the court granted without comment on October 25, 2010.

¶6 After a bench trial on the remaining issues, the court ruled in Archicon's favor, and entered judgment on July 20, 2011. TPI originally filed a notice of appeal on July 29, 2011, but the appeal was dismissed because the judgment did not contain a determination of finality pursuant to Arizona Rule of Civil Procedure 54(b). An amended judgment was filed on February 22, 2012. The judgment awarded $176,744.69 (consisting of the value of the mechanics' lien, $54,331.69; attorneys' fees, $120,000.00; and costs, $2,413.00) plus interest.

¶7 TPI timely appeals the amended judgment. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1) (West 2012).[1]

[1] Archicon failed to file an answering brief. Although we could consider this a confession of error, *see* ARCAP 15(c), in the exercise of our discretion, we decline to do so. *Thompson v. Thompson*, 217 Ariz. 524, 526 n.1, ¶ 6, 176 P.3d 722, 724 (App. 2008).

Discussion

¶8 We review the record "in a light most favorable to sustaining the trial court's ruling." *Swichtenberg v. Brimer*, 171 Ariz. 77, 82, 828 P.2d 1218, 1223 (App. 1991). When reviewing a trial court's findings of fact from a bench trial, "[w]e will not set aside the [trial] court's findings of fact unless clearly erroneous, giving due regard to the opportunity of the court to judge the credibility of witnesses." *In re Estate of Zaritsky*, 198 Ariz. 599, 601, ¶ 5, 12 P.3d 1203, 1205 (App. 2000). "A finding of fact is not clearly erroneous if substantial evidence supports it, even if substantial conflicting evidence exists." *Kocher v. Dep't of Revenue of State of Ariz.*, 206 Ariz. 480, 482, ¶ 9, 80 P.3d 287, 289 (App. 2003).

¶9 Moreover, "[i]n applying the clearly erroneous standard to factual findings, we will 'defer to any factual findings explicitly or implicitly made, affirming them so long as they are supported by reasonable evidence.'" *Id.* (quoting *Twin City Fire Ins. Co. v. Burke*, 204 Ariz. 251, 253–54, ¶ 10, 63 P.3d 282, 284–85 (2003)); *see also Coronado Co. Inc. 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, we will sustain

presumptive findings if they are justified by any reasonable construction of the evidence. *Able Distrib. Co., Inc. v. James Lampe, Gen. Contractor*, 160 Ariz. 399, 402, 773 P.2d 504, 507 (App. 1989). However, we review the trial court's legal conclusions *de novo*. *In re Estate of Travers*, 192 Ariz. 333, 334, ¶ 11, 965 P.2d 67, 68 (App. 1998).

¶10 TPI argues that Archicon's mechanics' lien was unenforceable because (1) Archicon was not registered, (2) Archicon did not have a contract with TPI or a contractor who had a contract with TPI, (3) vacant land is not subject to a mechanics' lien, and (4) Archicon's work did not add value to TPI's property. TPI also argues that (5) the court improperly awarded compensation to Archicon when Archicon's work had never been furnished to TPI, (6) that the court abused its discretion in considering Archicon's redacted fee application, and (7) that Archicon is liable for knowingly causing to be recorded a false lien. We consider each issue in turn.

I. Registration

¶11 According to A.R.S. § 33-981(E), "[a] person who furnishes professional services but who does not hold a valid certificate of registration issued pursuant to title 32, chapter 1 shall not have the lien rights provided for in this section." TPI argues that Archicon was required to strictly comply with Arizona's registration statute (A.R.S. § 33-981(E)), and that its

failure to maintain its registration is fatal to the enforcement of its mechanics' lien.

¶12 To determine whether any given statute requires strict or merely substantial compliance, we must first decide which rule best promotes the statute's legislative purpose. *See Aesthetic Prop. Maint., Inc. v. Capitol Indem. Corp.*, 183 Ariz. 74, 77-78, 900 P.2d 1210, 1213-14 (1995) ("[W]hether substantial or strict compliance is required is largely a question of which test best promotes legislative purpose.") (citing A.R.S. § 1-211(B) ("Statutes should be liberally construed to effect their objects and to promote justice.")). This is an issue of law, and as such, reviewed *de novo*.

¶13 The general purpose of Arizona's lien statutes is to "safeguard[] materialmen and laborers who enhance the value of another's property . . . by providing them with a lien on the property for the amount of the materials or labor furnished, as well as giving them the ability to enforce these rights and pursue remedies directly against the owner of the property." *United Metro Materials, Inc. v. Pena Blanca Props., LLC*, 197 Ariz. 479, 484, ¶ 26, 4 P.3d 1022, 1027 (App. 2000) (citations omitted). To determine the specific purpose of the registration requirement in § 33-981(E),[2] we refer to § 32-101, which explains

[2] "A person who furnishes professional services but who does not hold a valid certificate of registration issued

that "[t]he purpose of this chapter [listing the registration requirements for architects] is to provide for the safety, health and welfare of the public through the promulgation and enforcement of standards of qualification for those individuals registered or certified and seeking registration or certification pursuant to this chapter." The registration requirement thus appears to have been designed to protect the public against individuals who were unqualified to perform the services that were rendered.

¶14 We note that this purpose is very similar to the purpose of the statute that was at issue in *Aesthetic*, A.R.S. § 32-1153, "to protect the public from unscrupulous, unqualified, and financially irresponsible contractors." *Aesthetic*, 183 Ariz. at 77, 900 P.2d at 1213. Our supreme court found substantial compliance sufficient to achieve the statutory purpose of § 32-1153. *Id.* at 78, 900 P.2d at 1214. Given the similarity between the purposes of the two statutes, it appears that substantial compliance would likewise adequately achieve the statutory purposes of § 33-981(E). We find TPI's attempts to distinguish the statutory purposes unpersuasive; the statutory language pertaining to professional services in A.R.S. § 33-981(E) is

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pursuant to title 32, chapter 1 [§ 32-101 *et seq.*] shall not have the lien rights provided for in this section."

nearly identical to the language pertaining to contractors in A.R.S. § 33-981(C).[3]

¶15 Having found that substantial compliance with § 33-981(E) is sufficient to achieve its purpose, we next determine whether Archicon substantially complied with the statute. To answer this question, we consider the factors developed in *Aesthetic*.

¶16 First, we must consider whether suspension of the license was by operation of law or for cause and whether the Registrar's failure contributed to noncompliance. *Aesthetic*, 183 Ariz. at 78, 900 P.2d at 1214. In doing so, we defer to the facts implicitly found by the trial court when it concluded Archicon "was at all times properly registered with the Arizona State Board of Technical Registration . . . pursuant to A.R.S. § 32-101 et seq." *See Coronado*, 129 Ariz. at 139, 629 P.2d at 555 ("If the judgment can be sustained on any theory framed by the pleadings and supported by the evidence, we must affirm.")

¶17 An affidavit submitted by Archicon in support of its motion for summary judgment explained that prior to 2001, architectural firms did not have to renew or file new applications for their firm's license with the Board. Prior to

[3] A.R.S. § 33-981(C) provides that "A person who is required to be licensed as a contractor but who does not hold a valid license as such contractor issued pursuant to title 32, Chapter 10 shall not have the lien rights provided for in this section."

2001, once the architectural firm obtained its license and paid the initial fee, no other actions were required unless there was a change of address or of a principal architect. In 2001, new legislation was enacted that required architectural firms to file a new application each year with an annual application fee. The Board notified the architectural firms of the new requirement through the Board's newsletter. However, the Board did not send out any other mailings to the architectural firms informing them of this new requirement.

¶18 Thus, during the first year of the statutory change, many firms failed to pay the new fee or file anything to maintain their registration. As a result, in November and December of 2005, the Board started to mail out annual firm registration application notices to architectural firms notifying them of the annual firm application and registration fee. Archicon, however, did not receive the notice in 2005 or 2006 and thus did not realize that it had failed to pay the registration fee or to register. Archicon had notified the Board of its change of address when it sent in a notification of change of address for one of its architects. However, the Board failed to change the firm's address when it changed the architect's address, and this failure contributed to Archicon's lapse.

¶19 Given that Archicon's non-registration was caused by operation of law (and was not for cause), this factor supports

the presumptive finding of the trial court that Archicon substantially complied with the statute, especially when the Board's failure to update the firm's address is taken into consideration.

¶20 Next, we consider whether the architect/contractor was financially responsible while its license was suspended by doing things such as maintaining liability and workman's compensation insurance. *Aesthetic*, 183 Ariz. at 78, 900 P.2d at 1214. Archicon maintained professional liability insurance for the years 2006 through 2008 with coverage for $2,000,000 aggregate and $1,000,000 per incident. It also maintained an umbrella insurance policy that provided $2,000,000 in coverage for 2007 and 2008. It also maintained workman's compensation insurance for years 2006 through 2009 in the amount of $1,000,000. Archicon's Managing Architect, Jere Planck, testified in an affidavit that Archicon exceeded the amount of insurance normally procured by similarly sized architectural firms. Based on this evidence, the trial court's presumptive finding of substantial compliance is likewise supported by this factor.

¶21 The next factor asks whether the contractor knowingly ignored the registration requirements. *Id.* at 78, 900 P.2d at 1214. Knowingly ignoring such requirements is fatal to a claim of substantial compliance. *Id.* Here, as explained above, the lapse was due to rule changes by the Board that were not

communicated to Archicon or that Archicon failed to catch in a newsletter; essentially, administrative error resulted in the lapse. Archicon did not discover the registration requirement until June 15, 2007, when Archicon's director, Jeff Koski, was checking on the status of another firm on the Board's website and decided to also check the status and contact information for Archicon. He determined that Archicon's registration had lapsed and that the wrong address was being displayed. Within fourteen days of his discovery, Archicon paid its registration fee in the amount of $20 and requested an address change with the board on June 27, 2007. Although Mr. Planck went personally to the Board to pay all fines, penalties, interest and past registration fees, he was informed by the Assistant Director and Investigations Manager for the Board that doing so was not required and that all he had to do was pay the current registration fee of $20. The Assistant Director also explained that the Board had no way of accepting interest, penalties, fines or past registration fees. Given that Archicon's failure to register does not appear to have been knowing, this factor also supports the trial court's presumptive finding of substantial compliance.

¶22 The next factor asks whether the architect/contractor, immediately upon learning of the license suspension or other statutory noncompliance, applied to reactivate the license or remedy the statutory violation. *Aesthetic*, 183 Ariz. at 78, 900

P.2d at 1214. Here, it appears that Archicon did so within fourteen days, which implicitly supports the trial court's presumptive finding of substantial compliance.

¶23 The final factor is whether the lienholder's failure to comply with the registration statute prejudiced the party the statute seeks to protect. *Id.* at 78, 900 P.2d at 1214. We must therefore determine whether Archicon's failure to register prejudiced "the safety, health and welfare of the public." *See* A.R.S. § 32-101 (describing the purpose of the registration requirements referenced in A.R.S. § 33-981(E)). The safety, health, and welfare of the public do not appear to have been affected by Archicon's failure to register. TPI does not argue that Archicon's plans were defective or that they would have harmed the public if they had been implemented. According to affidavits filed below, *Arizona Business Magazine* ranked Archicon as the third best architectural firm in Arizona in 2006 and the fifth best in 2007 and 2008. The same magazine ranked Archicon as the eighth best interior design firm in Arizona in 2006 and 2007, and the sixth best in 2008. The *Phoenix Business Journal* ranked Archicon as the fourteenth best architectural firm in 2006 and the thirteenth best in 2007. It also ranked Archicon eighteenth in 2006 and seventeenth in 2007 in the best interior design firms category. In addition, the principal architect on the project, Mr. Planck, was always licensed by the Board and

fully insured when the contract was entered into and the work was completed. These facts support the trial court's presumptive finding that the public's health, safety, and welfare were not prejudiced by Archicon's failure to register.

¶24 Given that all the *Aesthetic* factors support the trial court's presumptive finding of substantial compliance, we reject Appellant's arguments regarding registration and find that Archicon substantially complied with the registration requirement.

¶25 Contrary to TPI's arguments we do not find *Sanders v. Foley,* 190 Ariz. 182, 945 P.2d 1313 (App. 1997), applicable here. In *Sanders*, we discussed the difference between a residential contracting license and a general commercial contracting license. Because residential contractors had to furnish an additional bond or cash deposit of $100,000 to cover actual damages suffered by residential real property owners, but nonresidential contractors had no similar obligations, we concluded that "a general commercial contracting license does not authorize residential contracting." *Sanders*, 190 Ariz. at 188, 945 P.2d at 1319. We also found that an individual who performed such work was not permitted to file a mechanics' lien on the property. *Id.*

¶26 The obvious difference between *Sanders* and this case is that here, there was no individual performing work for which the individual was not licensed (and arguably, not qualified). The

individual architect who performed the work was properly licensed at all times. Thus, the implicit danger to the public's health, safety, and welfare of having an unqualified individual perform faulty work is not present.

¶27 We likewise reject Appellant's reliance on *Schlict v. Curtin*, 117 Ariz. 30, 570 P.2d 801 (App. 1977), which involved a general contractor who lacked the special licensing credential to perform masonry work. Although the contractor later obtained the specialized masonry license after the work was completed, we ruled that the contractor was barred from enforcing the mechanics' lien. *Id.*, 117 Ariz. at 30, 570 P.2d at 801. Like *Sanders*, *Schlict* is inapplicable because the individual who performed the work at Archicon *was* properly licensed.

¶28 We must affirm the trial court's presumptive findings if there is any evidence to support them. *See Able Distrib.*, 160 Ariz. at 402, 773 P.2d at 507 (explaining that we will sustain presumptive findings if they are justified by any reasonable construction of the evidence). Here, the affidavits submitted in support of Archicon's motion for partial summary judgment support the trial court's presumptive finding that Archicon substantially complied with the registration statute and that such compliance was sufficient to meet the requirements of A.R.S. § 33-981(E). Accordingly, we affirm the trial court's finding that Archicon

was properly registered with the Arizona State Board of Technical Registration pursuant to A.R.S. § 32-101.

II. Lack of a Contract

¶29 TPI next argues the trial court erred by allowing Archicon to enforce its lien when it had earlier found that "technically, Archicon had no agreement with either TPI [Technology], TPI Properties, L.L.C., or with an architect, engineer or contractor who had an agreement with TPI Properties, L.L.C." TPI relies on A.R.S. § 33-981(F), which provides that

> [a] person who furnishes professional services is entitled to enforce the lien rights provided for in this section only if such person has an agreement with the owner of the property or with an architect, an engineer or a contractor who has an agreement with the owner of the property.

¶30 Here, Archicon had a contract with EDI, and EDI had a contract with Technology, the original owner of the property. This contract was entered into on March 7, 2005, when, according to public records, Technology was still the owner of the property. While Technology maintained that it transferred the property to TPI Properties, L.L.C., prior to March 7, 2005, the conveyance was not recorded until March 24, 2005, as both Technology and TPI acknowledged in the joint pretrial statement. Thus, Archicon had a contract with EDI, who at one time had a contract with the owner of the property, Technology, until Technology transferred the property to TPI Properties, LLC.

¶31 We find *Fagerlie v. Markham Contracting Co., Inc.*, 227 Ariz. 367, 258 P.3d 185 (App. 2011), analogous. In *Fagerlie*, the original owner of various lots sold the lots after having contracted with Markham to perform services to the lots. The subsequent lot owners argued that they were not subject to Markham's lien. We relied on agency principles to find that the original owner was the agent for the subsequent lot owners for purposes of the lien statutes. 227 Ariz. at 371, ¶¶ 14-15, 258 P.3d 189. We interpreted the agency definitions contained in Arizona's lien statutes very broadly, explaining that they include "a person 'having charge or control' of the construction," or "'improvement of work on any such lot or parcel of land.'" *Id.* at 372, ¶ 17, 258 P.3d at 190. Accordingly, the court found that the original owner "was the lot owner's agent for lien purposes" because the original owner's sales contract with the lot owners "effectively placed it in control of the improvement project when it hired Markham to perform." *Id.* The court further explained that actual agency was irrelevant because Arizona's lien statutes make the contractor a statutory agent for the sole purpose of securing the rights of the workman. *Id.* ¶ 18.

¶32 Applying the same broad statutory definitions of agency to our case, we conclude that Technology was an agent of TPI when it contracted with EDI (who subsequently contracted with

Archicon). Accordingly, contrary to TPI's arguments, there is no violation of A.R.S. § 33-981(F) because Archicon has a contract with an individual who has a contract with the owner of the property via the extended agency relationships as defined by A.R.S. §§ 33-981(B) and 983(B). *See Paul C. Helmick Corp. v. Lucky Chance Min. Co., Inc.*, 127 Ariz. 82, 86, 618 P.2d 252, 256 (App. 1980) (explaining that "[t]he statutory right to a lien does not depend upon privity of contract between supplier and owner."); *Fagerlie*, 227 Ariz. at 372, ¶ 18, 258 P.3d 185 ("This 'statutory agency fiction' was created 'to allow [a] subcontractor or material supplier to pursue his remedies directly against the owner' when privity is lacking.") (quoting *Stratton v. Inspiration Consol. Copper Co.*, 140 Ariz. 528, 531, 683 P.2d 327, 330 (App. 1984). We find no error.

III. Vacant Land

¶33 TPI next argues that vacant land cannot be subject to a mechanics' lien based on A.R.S. § 33-981(A), which provides that

> every person who labors or furnishes professional services in the construction, alteration or repair of any building, or other structure or improvement, shall have a lien on such *building, structure or improvement* for the . . . professional services . . . furnished, whether the work was done or the articles were furnished at the instance of the owner of the building, structure or improvement, or his agent.

(Emphasis added.)

¶34 However, TPI overlooks A.R.S. § 33-991(B), which states

> [i]f the land on which an improvement is made or labor or professional services have been performed lies within the limits of a recorded map or plat of a townsite, an incorporated city or town, or a subdivision, the *lien shall extend to and include* only *the particular lot or lots upon which the improvement is made* and the labor has been performed.

(Emphasis added.) Under the express terms of this statute, a lien for professional services may extend to the land that has been "improved" by such services.

¶35 Thus, in discussing A.R.S. § 33-981(A) and A.R.S. § 33-991, albeit in a slightly different context, our supreme court explained that "Arizona's mechanics' liens apply to the building improvement under § 33-981, and extend to the land under § 33-991." *Hayward Lumber & Inv. Co. v. Graham*, 104 Ariz. 103, 449 P.2d 31 (Ariz. 1968). After extensive analysis, our supreme court concluded that "[a]s has been shown, the statutes of California, Oregon, and Arizona all contemplate a lien upon improvements which extends to the land upon which the improvements are located." *Id.*, 104 Ariz. at 110, 449 P.2d at 38; *see also Wang Elec., Inc. v. Smoke Tree Resort, LLC*, 230 Ariz. 314, 325, ¶ 36, 283 P.3d 45, 56 (App. 2012) (explaining, in the context of discussing whether a lien against a lessee applies to the land on which the improvements are made, that "A.R.S. § 33-991(A) and (B), which provide such liens [liens on any

building, or other structure or improvement] extend to the real property underlying the improvements.").

¶36 Another, related statutory section, A.R.S. § 33-983(A), provides an alternative basis for holding that a mechanics' lien may be enforced against a lot or parcels of land:

> A person who furnishes professional services or material or labors upon a lot in an incorporated city or town, or any parcel of land not exceeding one hundred sixty acres in the aggregate, or fills in or otherwise improves the lot or such parcel of land, or a street, alley or proposed street or alley, within, in front of or adjoining the lot or parcel of land at the instance of the owner of the lot or parcel of land, *shall have a lien on the lot* or parcel of contiguous land not exceeding one hundred sixty acres in the aggregate, and the buildings, structures and improvements on the lot for professional services or material furnished and labor performed.

(Emphasis added.) Section 33-983 was designed to permit the enforcement of mechanics' liens when no building, structure, or tangible improvement exists on the land. *See Adams Tree Serv., Inc. v. Transamerica Title Ins. Co.*, 20 Ariz. App. 214, 216-217, 511 P.2d 658, 660-661 (1973) (analyzing whether a subcontractor could lien lots that were not improved and explaining that § 33-983 "applies whenever labor or materials are supplied to something other than a structure or a building"). Thus, A.R.S. § 33-983 would still permit the mechanics' lien on a vacant lot.

IV. Added Value

¶37 TPI next argues that Archicon's pre-construction work did not add value to TPI Properties' realty. TPI's argument implicitly relies on A.R.S. § 33-992(C), which provides that "[i]f no labor commences on a property or no materials are furnished to the property, a registered professional may record and foreclose on a lien at any time after the registered professional's work has commenced *if the registered professional's work has added value to the property*." (Emphasis added.)

¶38 The trial court rejected this argument, explaining that Jere Planck and Michael Parker testified regarding the value Archicon's work added to the property, including site development, city approvals, and entitlements that run with the property. Because this is a finding of fact, we defer to the trial court's ruling if there is any evidence to support it. *See Zaritsky*, 198 Ariz. at 601, ¶ 5, 12 P.3d at 1205.

¶39 Jere Planck testified that entitlement work done by his firm "significantly affects the value of the property. . . . [b]ecause they take a blank piece of dirt that has no vision," and detail "the exact size, the exact yield of the property, everything." The "entitlement work" done by Archicon with regard to this project included the site plan, the building's position on the site plan, the dumpster location, all the parking, the

fire lane, the fire lane locations, the building footprint, the exterior of the building, the colors of the building, the materials used in the building, the landscape, landscape materials, and plant materials, according to Mr. Planck. Based on this testimony, the trial court could have reasonably inferred that the property's value was increased by the entitlement work done by Archicon.

¶40 Contrary to TPI's arguments, Mr. Planck's testimony was not barred by Rule of Evidence 602 based on lack of foundation because he gave evidence "sufficient to support a finding that [he] had personal knowledge of the matter." He stated that he had been engaged in the architectural and development business for twenty-nine years and that he had developed an immense number of real estate projects ("We've done thousands and thousands of projects."). He also testified that he observed the effect of entitlements on the value of the real estate "all the time."

¶41 While Mr. Planck did admit during cross-examination that the plans might increase the cost of the property if a buyer elected to reject them, this testimony did not mean the work had no value. The fact that TPI commissioned the work (through EDI) demonstrates that the work was valuable to TPI. Whether or not the work would be valuable (or "add value") to any other property owner is irrelevant.

¶42 The trial court also relied on the testimony of Mike Parker, TPI Properties' listing agent, to conclude that the plans added value to the property. When asked whether a preliminary building plan approved by the City of Chandler would add any value to the property, Mr. Parker initially said no, but later admitted that "it would be a value to Mr. Cruz in the event he was going to build exactly what he wanted to build." He agreed that if the site plan were built for the specific use intended, the site plan would be "a value," but stated "[i]f it's not going to be built, then it's of no use to anybody."

¶43 Archicon had no control over whether TPI chose to implement its architectural plans. Allowing TPI to unilaterally choose not to use the architectural plans in order to render them valueless undermines the purpose of the statute by leaving Archicon unprotected from nonpayment for its services. *See United Metro*, 197 Ariz. at 484, ¶ 26, 4 P.3d at 1027. Moreover, the testimony of both Parker and Cruz supports the trial court's finding that the plans added value to the property because they could have been used to construct the office/warehouse building on the property. *See Kocher*, 206 Ariz. at 482, ¶ 9, 80 P.3d at 289 (explaining that we defer to the trial court's factual findings if there is any reasonable evidence to support them).

V. Delivery of the Plans to TPI

¶44 TPI next argues that Archicon cannot enforce a lien based on its unpaid work when Archicon did not deliver the unpaid work to TPI. However, TPI does not furnish any citations to the record to support this assertion, nor does it appear to have raised this argument below. *See* ARCAP 13(a)(6) (requiring the opening brief to contain "citations to the parts of the record relied on" for each contention raised on appeal). *Spillos v. Green*, 137 Ariz. 443, 447, 671 P.2d 421, 425 (App. 1983) ("We have no obligation to search the record for error."). We therefore find this argument waived. *See Richter v. Dairy Queen of S. Ariz., Inc.*, 131 Ariz. 595, 596, 643 P.2d 508, 509 (App. 1982) ("an appellate court cannot consider issues and theories not presented to the court below").

VI. The Redacted Fee Application

¶45 Next, TPI contends that the trial court abused its discretion when it considered Archicon's redacted fee application. After Archicon prevailed on the merits below (excluding its unjust enrichment claim), it submitted an application for attorneys' fees and costs based on A.R.S. §§ 33-998(B) and 44-1201(A).[4] As part of its application, it submitted

[4] Section 33-998(B) provides that "[i]n any action to enforce a lien granted under this article, the court may award the successful party reasonable attorney fees." Section 44-

redacted invoices in order to avoid disclosing privileged information regarding trial preparation and strategy that were included in its time records. The redacted invoices still showed the date of each time entry, the timekeeper involved, the amount of time involved, and a general description of how the time was spent (i.e., "Examine issues re: [redaction]"). Archicon also submitted an unredacted version of the invoices for the court's in-camera review as Exhibit K.

¶46 TPI moved to strike the unredacted invoices, arguing that Exhibit K should not be considered because it prevented TPI from being able to make specific objections to the reasonableness of the fees requested. The trial court denied the motion to strike and granted Archicon a portion of its requested fees.[5]

1201(A) provides the statutory interest rate is ten percent per annum unless the parties agree otherwise in writing.

[5] Archicon had requested attorneys' fees in the amount of $162,212.58. The court ultimately awarded Archicon $120,000.00 in attorneys' fees against TPI Properties, LLC. In making its award, the court explained that "[i]n assessing the reasonableness of the fees sought, the court has looked at each page of Archicon's un-redacted time entries. In addition to the acknowledged errors (i.e., wrong client, wrong matter), the court found several discrepancies and problems. See, e.g., 11/17/10-11/18-10, 7.8 hours, research on statute of limitations for federal copyright claim." As to this entry, the court found "that although Archicon may or may not have a copyright for the use of its plans, this has nothing to do with Archicon's state court mechanics' lien claim." The court also noted that it was "troubled by minor items that raise the court's skepticism over

¶47 To award attorneys' fees, a trial court must be able to assess the reasonableness of the time incurred. *See Schweiger v. China Doll Rest., Inc.*, 138 Ariz. 183, 188, 673 P.2d 927, 932 (App. 1983) ("In order for the court to make a determination that the hours claimed are justified, the fee application must be in sufficient detail to enable the court to assess the reasonableness of the time incurred."). It is axiomatic to due process that the opposing party must also be able to assess the reasonableness of the time incurred in order to protect itself from time entries that bill an inordinate amount of time or that bill for time spent on unsuccessful issues or noncompensable claims. *Id.; see also Nolan v. Starlight Pines Homeowners Ass'n*, 216 Ariz. 482, 491, ¶ 39, 167 P.3d 1277, 1286 (App. 2007) (requiring a party opposing a fee application to "present specific objections to the reasonableness of the fees requested").

¶48 Allowing Archicon to obtain attorneys' fees while maintaining that a portion of the fee descriptions were privileged improperly allowed Archicon to use the attorney-client privilege as both a "sword" and a "shield." *See Throop v. F.E. Young & Co.*, 94 Ariz. 146, 158, 382 P.2d 560, 568 (1963) (explaining that the attorney-client privilege "is not to be

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less minor items" and that "[n]either party made the court's job particularly easy."

both a sword and a shield") (citing 8 John H. Wigmore, *Evidence in Trials at Common Law* § 2388, at 855 (J. McNaughton rev. ed. 1961)). "A party is not allowed to assert the privilege when doing so 'places the claimant in such a position, with reference to the evidence, that it would be unfair and inconsistent to permit the retention of the privilege' . . . ." *Mendoza v. McDonald's Corp.*, 222 Ariz. 139, 155, ¶ 52, 213 P.3d 288, 304 (App. 2009) (quoting *State Farm Mut. Auto Ins. Co. v. Lee*, 199 Ariz. 52, 56, ¶ 9, 13 P.3d 1169, 1173 (2000)).

¶49 Stated another way, a litigating party cannot use the privilege to block inquiry into an issue that the party itself has raised. *See Flores v. Cooper Tire and Rubber Co.*, 218 Ariz. 52, 58, ¶ 29, 178 P.3d 1176, 1182 (App. 2008).

¶50 As the prevailing party, Archicon was entitled to seek attorneys' fees; however, it could not simultaneously claim that the descriptions of the fees were privileged to TPI's detriment. Without a full description of the fees incurred, TPI was left without any meaningful way of arguing that the time spent on various matters was unreasonable. It was unfair to seek payment for all the fees but to allow only the court to see the descriptions of all of the work.

¶51 While the trial court was correct in pointing out that we have occasionally permitted a trial court to review a fee agreement *in camera*, we have never permitted a party to seek

fees while simultaneously asserting that its itemized description of the fees was privileged. *See Sparks v. Republic Nat. Life Ins. Co.*, 132 Ariz. 529, 544, 647 P.2d 1127, 1142 (1982) (permitting the *in camera* review of a fee contract to ensure the amount awarded did not exceed the amount to which the parties had agreed); *Solimeno v. Yonan*, 224 Ariz. 74, 83, ¶ 40, 227 P.3d 481, 490 (App. 2010) (permitting *in camera* review of a fee agreement to determine the hourly rate agreed upon by the client and the lawyer). Allowing the trial court to see the rate agreed-upon by the prevailing party and its lawyer is materially different from allowing the trial court to review hundreds of unredacted time descriptions to which the opposing party does not have access. Accordingly, we vacate the fee award to Archicon and remand to the superior court for it to redetermine the amount of attorneys' fees it should award to Archicon pursuant to A.R.S. §§ 33-998(B) and 44-1201(A).

VI. A.R.S. § 33-410

¶52 Finally, TPI argues that Archicon knew or should have known that it had recorded an invalid lien against TPI's property and that Archicon is therefore liable pursuant to A.R.S. § 33-420. This section prohibits knowingly filing a lien that is forged, groundless, contains a material misstatement or false

claim or is otherwise invalid. A.R.S. § 33-420(C).[6] However, given that we have already determined that the trial court properly allowed Archicon to enforce its lien, we reject this argument.

[6] The full text of A.R.S. § 33-420(C) is as follows:

> A person who is named in a document which purports to create an interest in, or a lien or encumbrance against, real property and who knows that the document is forged, groundless, contains a material misstatement or false claim or is otherwise invalid shall be liable to the owner or title holder for the sum of not less than one thousand dollars, or for treble actual damages, whichever is greater, and reasonable attorney fees and costs as provided in this section, if he wilfully refuses to release or correct such document of record within twenty days from the date of a written request from the owner or beneficial title holder of the real property.

Conclusion

¶53 For the foregoing reasons, we vacate that portion of the superior court's judgment awarding fees to Archicon and remand to the superior court for it to redetermine the amount of attorneys' fees it should award to Archicon; we affirm the remainder of the judgment.

/S/_____
ANDREW W. GOULD, Judge

CONCURRING:

/S/_____
PATRICIA K. NORRIS, Presiding Judge

/S/_____
RANDALL M. HOWE, Judge