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

HCBECK, LTD a Texas limited partnership, Plaintiff/Appellant/ Cross-Appellee, v. PCCP CS FORUM PORTALES PHASE II, LLC, a Delaware limited liability company, Defendant/Appellee/ Cross-Appellant.	1 CA-CV 12-0353 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2007-023228

The Honorable John Christian Rea, Judge

REVERSED & REMANDED IN PART; AFFIRMED IN PART

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G O U L D, Judge

¶1 HCBeck Ltd. ("Beck") appeals the judgment and award of attorneys' fees in favor of PCCP CS Forum Portales Phase II, L.L.C. ("Forum Portales") after a bench trial. Forum Portales cross-appeals the denial of its motion for partial summary judgment regarding the start date of the contract period and the post-judgment order reducing the statutory interest rate. We affirm the judgment, except for the amount of liquidated damages. We reverse the summary judgment ruling regarding the contract period start date and remand to allow the superior court to consider evidence on that factual issue.

FACTUAL AND PROCEDURAL HISTORY

¶2 In July 2005, Beck and Forum Portales entered into a contract under which Beck agreed to construct the shell structure of an office building and underground parking garage for $24,791,784.00. In March 2007, Beck sought final payment. Forum Portales withheld $630,500 from the final payment to replace and repair defective work, including flooring, a trench drain, and garage gutters, and for liquidated damages.

¶3 The contract required Beck to "achieve Substantial Completion of the entire Work not later than 57 weeks from issuance of building permit, subject to adjustments of this Contract Time as provided in the Contract Documents." The

contract included a liquidated damages provision that applied if Beck failed to complete the work "within sixty-one (61) weeks from issuance of building permit plus any authorized extensions of time[.]"

¶4 It is undisputed that there was one authorized 31-day extension. However, the parties disputed which building permit triggered the contract period and when substantial completion occurred. They filed cross-motions for summary judgment on the liquidated damages issue. The superior court ruled that it was undisputed that the shell building permit started the contract period on November 8, 2005, but found disputed questions of fact existed regarding the date substantial completion occurred.

¶5 Beck claims Forum Portales breached the contract by withholding part of the final payment and also sought to foreclose its mechanic's lien. Forum Portales argued that Beck breached the contract by failing to repair defective flooring and a faulty HVAC system, trench drain, and the gutter system in the parking garage. Forum Portales claimed it was entitled to withhold the costs for replacing and repairing the defective work and sought liquidated damages for Beck's failure to achieve substantial completion within the contract period.

¶6 The superior court found that Beck did not achieve substantial completion until May 1, 2007, when the architect

certified substantial completion. The superior court awarded Beck $16,303.98 on its contract claim, but found Forum Portales was entitled to withhold $290,196.02 in remediation damages and $324,000 in liquidated damages. The court denied Beck's mechanic's lien claim. The court also awarded Forum Portales $576,682.62 in attorneys' fees as the prevailing party. After denying Beck's motion for a new trial, the court awarded Forum Portales an additional $54,527.69 in attorneys' fees.

¶7 Beck filed a timely notice of appeal and then a motion for relief from judgment, asking the court to apply the current statutory interest rate of 4.25% instead of 10%. This court suspended the appeal to allow the superior court to address this issue. The superior court granted relief and entered an amended judgment with the lower interest rate. Forum Portales filed a timely cross-appeal from the pre-trial summary judgment ruling on the contract period start date and the order amending the post-judgment interest rate.

¶8 We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1), (5)(a) (Supp. 2012).

DISCUSSION

I. Liquidated Damages

¶9 The parties filed cross-motions for summary judgment regarding Forum Portales' claim for liquidated damages. Beck's

position was that the contract term began when the shell building permit was issued on November 8, 2005, and that substantial completion occurred on January 31, 2007, when the City issued the certificate of shell building. According to Beck's dates, substantial completion occurred within the 61-week contract period; thus the liquidated damages provision was not triggered. *See* Contract § 4.3.

¶10 Forum Portales argued that the contract period began when the at risk foundation building permit was issued on September 19, 2005. Forum Portales contends that substantial completion occurred when the architect issued the certificate of substantial completion on May 1, 2007.

¶11 As noted above, the superior court found it was undisputed that the start date began when the shell building permit was issued rather than the earlier date when the at risk foundation permit was issued. However, the court found disputed issues of fact necessitated a trial on the date of substantial completion.

A. Contract Period Start Date

¶12 On cross-appeal, Forum Portales argues the superior court erred in finding that the contract period began when the shell building permit was issued instead of the earlier at risk foundation permit. Forum Portales contends this was a disputed

factual issue that should have been decided at trial. Summary judgment is not appropriate if there are factual disputes or where the court must "choose among competing inferences." *Taser Int'l, Inc. v. Ward,* 224 Ariz. 389, 393, ¶ 12, 231 P.3d 921, 925 (App. 2010). We review the grant of summary judgment *de novo*. *L.F. v. Donahue,* 186 Ariz. 409, 411, 923 P.2d 875, 877 (App. 1996).

¶13 Forum Portales argues that its interpretation of the contract language regarding the start period was reasonable, so interpretation of the contract terms was a factual question that should have gone to trial. "Whether contract language is reasonably susceptible to more than one interpretation so that extrinsic evidence is admissible is a question of law for the court." *Taylor v. State Farm Mut. Auto. Ins. Co.,* 175 Ariz. 148, 158-59, 854 P.2d 1134, 1144-45 (1993). If the language is susceptible to more than one interpretation, the matter should be submitted to the jury. *Id.* at 159, 854 P.2d at 1145.

¶14 The contract states that Beck shall "achieve Substantial Completion of the entire Work not later than 57 weeks *from issuance of building permit*, subject to adjustments . . . ." (Emphasis added.) The liquidated damages provision of the contract applies "if the Project fails to reach Substantial Completion within sixty-one (61) weeks *from issuance of building*

permit plus any authorized extension of time . . . ." (Emphasis added.) The contract does not define the term "building permit."

¶15 Beck was required to obtain more than one type of building permit. The at risk foundation building permit was issued on September 19, 2005. The shell building permit was issued on November 8, 2005.

¶16 In support of its argument that "building permit" refers to the at risk foundation permit, Forum Portales relies on the "Qualifications" to the contract, written by Beck, which state that "[t]he project completion date is based off a 57 week schedule *after receipt of the at risk building foundations permit* with the building permit following 4 weeks later."[1] (Emphasis added.) This provision in the Qualifications states that the 57-week period begins with the at risk foundation permit and does not indicate that the 57-week period *restarts* with the issuance of the shell building permit. The reference to the building permit following in four weeks corresponds to the 61-week (57 + 4) period allowed before the liquidated damages provision kicks in. Additionally, the construction schedule, also prepared by Beck, shows 57-weeks from the at risk foundation permit to the finish date.

[1] The Contract Qualifications are part of the Contract itself and not extrinsic evidence. *See* Contract § 1.1.

¶17 Beck argues that the contract period started with the shell building permit because the purpose of the contract was to construct a shell building and it could not complete this goal with only a foundation permit. Beck contends a shell building permit was required to begin construction of the actual structure, so the shell permit triggered the contact period. Beck also argues the provision in the contract detailing the contract period does not refer to a "foundation" permit, only a building permit. *See* Contract § 4.2. Additionally, Beck contends the Qualifications and construction schedule distinguish between the foundation permit and the building permit, demonstrating that the parties did not intend that the foundation permit mark the start of the construction period. Beck contends the construction schedule in Contract Exhibit D was merely preliminary and had no relation to the actual schedule.

¶18 Although Beck's arguments support its interpretation of the contract language, both parties offered reasonable interpretations of the contract language. Because the meaning of "building permit" is undefined, and two reasonable interpretations exist, the matter should have gone to trial. *Taylor, id.* at 159, 854 P.2d at 1145. The superior court erred in granting summary judgment in favor of Beck on the contract

period start date.[2] We remand to allow the superior court to conduct further proceedings regarding the start date of the construction period.

B. Substantial Completion Date

¶19 After a trial, the superior court found that substantial completion occurred when the architect issued the certificate of substantial completion on May 1, 2007. Beck argues that substantial completion occurred by early February, after the city issued a certificate of shell building and tenants were moving into the building. Beck maintains Forum Portales unreasonably withheld the certificate of substantial completion. On appeal, we will not disturb the superior court's factual findings unless they are clearly erroneous. *Farmers Ins. Co. of Ariz. v. Young,* 195 Ariz. 22, 28, ¶ 19, 985 P.2d 507, 513 (App. 1998).

¶20 The contract states:

> Substantial Completion of the Work will be deemed to have been achieved when Substantial Completion has been certified in writing by the Architect, and approved by Owner, such approval by Owner shall not be unreasonably withheld. As a condition to obtaining the Architect's certification of

[2] In reaching this conclusion, we did not consider the testimony Forum Portales proffered at trial. The superior court correctly ruled that this testimony was available to Forum Portales when it moved for summary judgment and, therefore, not properly raised during trial in Forum Portales' oral motion to reconsider the grant of summary judgment.

> Substantial Completion, the Contractor must submit to the Owner and Architect a request for Substantial Completion inspection, a list of items to be completed as of such date (i.e., list of punch list items) and an estimated time to final completion of all punch list items.

The general conditions of the contract define "Substantial Completion" as

> the stage in the progress of the Work when the Work or designated portions thereof is complete in accordance with the Contract Documents, except for minor corrective items commonly referred to in the construction industry as "punch list" items, so the Owner can occupy or utilize the Work for its intended use, and a certificate of occupancy or other governmental approval required as a condition to occupancy has been issued therefor by the appropriate governmental agency.

¶21 Thus, to achieve substantial completion three things had to occur: (1) the issuance of the certificate of shell building; (2) the work was complete, "except for minor corrective items commonly referred to in the construction industry as 'punch list' items[;]" and (3) Forum Portales could use the building for its intended use. Both parties cite cases discussing the meaning of substantial completion. However, the contract definition is controlling. *See O & M Constr., Inc v. State of La., Div. of Admin.*, 576 So.2d 1030, 1035 (La. App. 1991). Thus, we need not discuss the definition of substantial completion in the caselaw. *See Mining Inv. Group, LLC v.*

Roberts, 217 Ariz. 635, 639, ¶¶ 16-17, 177 P.3d 1207, 1211 (App. 2008) (declining to consider Restatement (Second) of Contracts definition of material breach because parties' contract expressly defined that term). Furthermore, the determination as to whether a contractor has achieved substantial completion is a question of fact. *Thoen v. United States*, 765 F.2d 1110, 1115 (Fed. Cir. 1985).

¶22 Beck contends that the existence of unfinished items on the punch list did not preclude substantial completion. Final completion was not required to show substantial completion and the contract definition of substantial completion contemplated that there would be a punch list of "minor corrective" items still to be completed. *See* Contract § 4.2 & General Conditions § 9.8.1.

¶23 The underlying assumption of Beck's argument is that any item contained on the punch list was a minor corrective item. However, the record does not support Beck's assumption because many of the items contained on the punch list were major corrective items. For example, the punch list included items such as the cracked flooring on the first floor; problems with a part of the HVAC system; and the leaking gutters in the parking garage which had still not been repaired as of April 2007. Thus, whether the items were listed on the punch list is not the

definitive question; the true question is whether they were major or minor corrective items.

¶24 Beck argues that the February punch list items could not be used as a basis for withholding the certificate of substantial completion because some of these same unfinished punch list items remained unfinished on May 1, 2007, when the architect issued the certificate of substantial completion. As a result, Beck contends that no significant corrective work occurred between February 2007 and May 1, 2007 and, therefore, the delay was unreasonable.

¶25 However, the record shows that major corrective work did occur on some of the punch list items between February 2007 and May 1, 2007. Forum Portales presented evidence that the defective HVAC and the safety hazards created by the leaking garage gutters prevented the architect from issuing the certificate of substantial completion prior to May 1. Beck's operations manager conceded that an inoperative HVAC system was a significant item that could prevent substantial completion. The HVAC continued to malfunction between January 31 and May 1, 2007, but most of the major HVAC issues were resolved by May 1. Because the HVAC problem that remained as of May 1 was close to

resolution, it did not hold up the certificate of substantial completion.[3]

¶26 The architect testified that the gutter in the parking garage leaked near an electrical panel, creating a serious safety issue due to the potential for electrocution or an electrical short. Beck again conceded this type of problem could preclude substantial completion. The leaking gutter issue was ultimately resolved by relocating the electrical panel, which occurred sometime in the spring of 2007, *e.g.*, before the certificate of substantial completion was issued on May 1.

¶27 Beck argues the gutter leak was not a major "life-safety" issue that would preclude substantial completion. Beck's focus on the use of the technical term "life-safety" in relation to this issue is misplaced. A reasonable view of the evidence is that the proximity of the leak to an electrical panel was a significant safety issue that, in the architect's view, hindered substantial completion.

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[3] Beck argues the HVAC issue was not raised prior to trial as a reason for precluding substantial completion. Beck did not object at trial when Forum Portales raised the HVAC as a basis for withholding the certificate of substantial completion. Additionally, this issue is raised for the first time on appeal in Beck's reply brief. *See State v. Cannon*, 148 Ariz. 72, 79, 713 P.2d 273, 280 (1985) (appellate court may disregard issues raised for the first time in a reply brief). Therefore, we will not address this issue.

¶28 In support of its position that substantial completion occurred when the certificate of shell was issued, Beck cites the opinion of an outside consultant Forum Portales hired that reached that conclusion. However, Forum Portales presented substantial evidence disputing the opinion of this expert. The weight to give this disputed factual issue was a matter for the superior court to resolve, sitting as the finder of fact. *See Gutierrez v. Gutierrez*, 193 Ariz. 343, 347, ¶ 13, 972 P.2d 676, 680 (App. 1998).

¶29 Beck argues the trial court improperly considered Forum Portales' lease with its anchor tenant and the potential liquidated damages Forum Portales might incur if that tenant could not move in as scheduled. We disagree. The evidence of the anchor tenant's lease only supported Forum Portales' claim that it did not have beneficial use of the building if it could not have its anchor tenant on the premises on time. The trial court did not consider the lease between Forum Portales and its anchor tenant for purposes of determining damages. The court applied only the liquidated damages clause and did not consider any other damages in relation to Beck's untimely completion.

¶30 There was sufficient evidence to support the superior court's finding that substantial completion did not occur prior

to the date the architect issued the certificate of substantial completion.

II. Breach of Contract

¶31 The trial court found Beck materially breached the contract based on Beck's failure to install the flooring, trench drain, and gutter system pursuant to specifications, and by failing to promptly cure this breach. We will affirm the superior court's findings of fact absent clear error and with "'due regard to the opportunity of the trial court to view evidence and weigh the credibility of witnesses.'" *Farmers Ins. Co. of Ariz. v. Young,* 195 Ariz. 22, 28, ¶ 19, 985 P.2d 507, 513 (App. 1998) (*quoting Lee Dev. Co. v. Papp,* 166 Ariz. 471, 475-76, 803 P.2d 464, 468-69 (App. 1990)).

¶32 Beck argues it could not have materially breached the contract after substantial completion and therefore, Forum Portales improperly withheld the cost of repairs. The authority Beck relies on does not apply here because the contract required Beck to repair or replace any defective work at its own cost whether the defect was discovered before *or after completion* of the work. *See* General Conditions §§ 3.5.1 and 12.2.1. If Beck failed to correct the defective work, the contract authorized Forum Portales to correct it and offset the expense against payments owed to Beck. *Id.* §§ 12.2.4 and 2.4.1.

¶33 Beck argues the court erred in concluding it breached the contract by failing to install the flooring in strict accordance with the plans and specifications because vertical cracks would have occurred even if it had strictly followed the plans and specifications. Beck's flooring expert and the flooring subcontractor testified that nothing can prevent vertical movement and cracking. However, Forum Portales' expert testified that the vertical movement was a result of the concrete slab curling or shrinking due to the lack of a slip sheet[4] and not because of structural movement. Additionally, there is conflicting evidence regarding Beck's assertion that the original architectural plans are responsible for the structural crack, and "[w]e will defer to the trial court's determination of witness' credibility and the weight" given to the conflicting evidence on this issue. *Gutierrez,* 193 Ariz. at 347, ¶ 13, 972 P.2d at 680.

¶34 The evidence showed that the flooring installation did not follow the plans and specifications. It was undisputed that no slip sheet or expansion joints were initially installed as required by the plans and specifications. There was evidence to support the superior court's conclusion that the failure to

[4] The parties used the terms slip sheet, cleavage membrane, and anti-fracture membrane interchangeably.

install the flooring in strict accordance with the plans and specifications caused the original cracking.

¶35 Beck then failed to meet its contractual obligation to promptly repair the defective work. *See* General Conditions § 12.2.4. Beck and its flooring subcontractor spent several months negotiating responsibility for repairing the defective installation and did not propose a work schedule for the repairs until several months after the initial crack was uncovered. The parties ultimately agreed to replace the damaged sections of the flooring, with the understanding that if the replacement tiles did not match, the flooring subcontractor would replace the entire floor.

¶36 Immediately after the first section of flooring had been repaired, the architect and Forum Portales rejected the work due to a difference in sheen and elevation and requested a proposed solution from Beck. Despite the prior agreement to replace the entire floor if the tile did not match, Beck sought to continue the partial repair, contending that stripping and resealing the entire floor would remedy this issue. Forum Portales notified Beck that it would only accept a complete replacement of the floor. Beck refused to perform any remedy other than to continue replacing only the cracked sections. Beck also failed to replace the admittedly defective

wainscoting. Forum Portales eventually terminated the contract and notified Beck it would replace all flooring, including the wainscoting, at Beck's expense. This evidence, although contested, is sufficient to establish that Beck materially breached its obligation to promptly repair the defective work. *See Gutierrez, id.*[5]

¶37 Beck contends the failure to repair the flooring, failure to install the trench drain properly, and the improper fabrication and installation of the gutter system were not material because the cost to repair the defective items was only two percent of the total contract price. Forum Portales argues that the defective flooring was material given its prominent location. Whether a breach is material is a question of fact. *See Foundation Dev. Corp. v. Loehmann's, Inc.*, 163 Ariz. 438, 446-47, 788 P.2d 1189, 1197-98 (1990) (describing factors to be considered by trier of fact in determining materiality of breach). Arizona courts apply the framework from the Restatement (Second) of Contracts § 241 (1981) in determining whether a breach is material. *Id.* This framework is fact-specific; therefore, we will defer to the superior court's

[5] Beck also contends the General Conditions only gave Forum Portales one-year to have the defects corrected, but Forum Portales did not repair the flooring until 2010. This argument was not raised until Beck's reply brief on appeal. Thus, it is untimely. *See Cannon*, 148 Ariz. at 79, 713 P.2d at 280.

factual determination that the breach was material. *See Farmers Ins. Co.*, 195 Ariz. at 28, ¶ 19, 985 P.2d at 513. Although the cost to repair the defective flooring was a small percentage of the overall contract amount, the evidence supports the conclusion that the extent and location of the defective work as well as the time spent to correct the defect was significant and, therefore, material.

III. Amount of Remediation Damages

¶38 Beck claims awarding the entire replacement cost for the flooring constituted economic waste. "[E]conomic waste exists only when the cost of repair measure of damages would result in [u]nreasonable duplication of effort." *Fairway Builders, Inc. v. Malouf Towers Rental Co., Inc.*, 124 Ariz. 242, 253-54, 603 P.2d 513, 524-25 (App. 1979) (citation omitted). The party asserting that the cost of repair damages would result in economic waste has the burden of proof. *Id.* at 254, 603 P.2d at 525.

¶39 As in *Fairway*, there was evidence here that the defective flooring could not be satisfactorily repaired without entirely replacing the floor. *Id.* The repaired flooring still cracked even with the installation of a slip sheet in the repaired areas. Additionally, a total replacement is not economic waste where any partial repair of the flooring "would

result in a different appearance than called for in the contract." *Id.* The architect rejected the replacement tiles because of a difference in appearance and level. Although Beck proposed stripping the entire floor and resealing the tile to address the concern with the difference in sheen, this would not remedy the difference in level. The architect's opinion was that in light of the installation problems on the first floor, the de-bonding of tiles on floors two and three, and the potential for a difference in the appearance in the tile on the different floors, it was reasonable to replace the flooring on floors two and three as well.[6] Because Beck failed to establish that the award of repair costs constituted economic waste, we need not address the arguments regarding the loss in value to Forum Portales of having a class A office building with a defective lobby floor. *See Id.*, at 253, 603 P.2d at 524 (holding where cost of repair damages constitutes economic waste, appropriate measure of damages is the difference in value).

[6] Forum Portales also offered a notice of claim Beck filed with its insurer in which Beck stated that it had rejected the original tile installation on all three floors as defective. Beck argues this evidence was irrelevant because it was only a notice of claim and never filed with its insurer. We will not reweigh the evidence on appeal or disturb the factual findings absent clear error. *See Farmers Ins. Co., id.*

¶40 Beck contends that remediation damages improperly included the cost to redesign and reinstall the entire lobby floor. However, the architect testified that the flooring reinstallation followed the original specifications and adding a cement slab and rebar would not have been necessary in the original plans.

¶41 The evidence regarding the need to replace the flooring on the entire first floor and floors two and three was conflicting. However, there is evidence supporting the superior court's conclusion that replacing all three floors was reasonable. The amount Forum Portales withheld from Beck for this issue was $432,500. The court awarded $248,930 for the cost of repairing all the flooring. The initial bid for this work was approximately $211,000. The award was not unreasonable.

¶42 Beck also disputes the amount awarded for repair of the trench drain because Forum Portales' architect testified that the defective installation of the trench drain existed when he did his inspection. The contract obligated Beck to repair or replace any defective work at its own expense regardless of whether the defect was discovered before or after completion. *See* General Conditions §§ 3.5.1. & 12.2.1. Therefore, Beck was

not relieved of this obligation because the architect did not notice the defect upon final inspection.

¶43 Beck challenges the cost of the redesigned gutter system because, like the redesign of the flooring, Beck contends the cost to conform to the redesigned specifications was greater than the cost to conform to the original contract specifications. Beck also challenges the inclusion of the cost of the redesign in the damage award. Forum Portales presented evidence that a redesign was necessary and fixed the problem. Furthermore, awarding the cost to redesign the gutter system was not improper because Beck did not establish how much of the $5,061 cost was for the redesign as opposed to the cost to perform the work. Therefore, we affirm the award of these costs to Forum Portales.

IV. Beck's Lien Claims

¶44 The superior court concluded that Beck failed to establish a basis for foreclosing its mechanic's lien or that it satisfied the statutory requirements for a valid lien. Because we have upheld the award of damages for breach of contract and a portion of the liquidated damages, Beck has no judgment in need of lien protection.

V. Attorneys' Fees at Trial

¶45 The superior court awarded Forum Portales a total of $644,448.22 in fees and costs in the trial proceedings. Beck argues some of those fees were unreasonable and that it was entitled to $4,438.50 in fees for prevailing on a motion for partial summary judgment regarding its status as a licensed contractor. We review the amount of attorneys' fees awarded for an abuse of discretion and "will not disturb the trial court's judgment on appeal if there is any reasonable basis for the amount awarded." *ABC Supply, Inc. v. Edwards,* 191 Ariz. 48, 52, 952 P.2d 286, 290 (App. 1996).

¶46 Beck challenges the award of fees to Forum Portales for three unsuccessful motions. Although these three motions were unsuccessful, the superior court may award fees for such motions where the "party has accomplished the result sought in litigation[.]" *Schweiger v. China Doll Restaurant, Inc.,* 138 Ariz. 183, 189, 673 P.2d 927, 933 (App. 1983). It is not an abuse of discretion to award fees for unsuccessful legal theories if, at the time, "a reasonable and prudent lawyer" would have advanced the theory to protect his client's interests. *Id.* at 188, 673 P.2d at 932. "[T]here is no precise rule or formula for" deciding whether and by how much to reduce the prevailing party's fees for its unsuccessful legal theories.

Id. at 189, 673 P.2d at 933. This is a factual question to be determined by the superior court. The motions at issue are not so distinct from Forum Portales' overall success that we can say the superior court abused its discretion by including these fees.

¶47 Beck also argues the court improperly included fees for a defense attorney to attend the trial but not participate. However, Forum Portales wrote off $46,619 for fees relating to this attorney and explained that care was taken not to bill for duplicative work involving this attorney. Given that the trial court was in the best position to value this attorney's contribution to the legal work at trial, we defer to the trial court's resolution of this factual issue in favor of Forum Portales. *See ABC Supply, Inc.*, 191 Ariz. at 52, 952 P.2d at 290.

¶48 Beck next argues the superior court erred in failing to award Beck fees related to its successful motion for partial summary judgment regarding its valid contractor's license. In ruling on that motion, the court "d[id] not imply any future ruling on any request for attorneys' fees." The court never re-examined Beck's request for attorneys' fees.

¶49 Beck did not request these fees until it objected to the form of judgment and to Forum Portales' application for

attorneys' fees. We presume that because Beck raised this argument in these post-judgment pleadings, the superior court considered and denied Beck's request. *See Jeffries v. First Fed. Sav. & Loan Ass'n of Phoenix*, 15 Ariz. App. 507, 510, 489 P.2d 1209, 1212 (1971) (holding that in the absence of a finding of fact, we presume the superior court made the findings necessary to support its judgment).

¶50 Forum Portales offered to voluntarily dismiss its counterclaim regarding the licensing issue, but Beck filed its motion for partial summary judgment anyway. This supports the superior court's decision to deny any award of attorneys' fees to Beck.

¶51 For these reasons, we affirm the award of attorneys' fees to Forum Portales.

VI. Cross-Appeal Regarding Post-Judgment Interest Rate

¶52 The final judgments included post-judgment interest at the rate of 10% per year. Beck filed a motion for relief from the judgments pursuant to Arizona Rule of Civil Procedure 60(c)(1) and (6),[7] arguing that the appropriate statutory interest rate was 4.25% instead of 10%. *See* A.R.S. § 44-1201(B) (Supp. 2012). The superior court granted the motion, and

[7] Beck has not defended the motion on the basis of Rule 60(c)(6) on appeal. Therefore, we do not address that subsection of Rule 60(c).

modified the post-judgment interest rate to 4.25% per year. We review the grant of a motion for relief from judgment for an abuse of discretion. *See Tovrea v. Nolan,* 178 Ariz. 485, 490-91, 875 P.2d 144, 149-50 (App. 1993).

¶53 Forum Portales argues that Beck's motion was untimely because it was filed more than six months after the October 5, 2011 final judgment. A Rule 60(c) motion seeking relief based on mistake or inadvertence must be filed within six months of the final judgment. The October 5, 2011 judgment was not final because, within six months from that date, Beck filed a motion for new trial and Forum Portales filed a motion requesting an award of supplemental attorneys' fees. The existence of these outstanding motions rendered the October 5, 2011 judgment non-final. Pursuant to Rule 54(b), an order adjudicating fewer than all claims "shall not terminate the action as to any of the claims or parties and the order . . . is subject to revision at any time before the entry of judgment adjudicating all the claims." Furthermore, "a claim for attorneys' fees may be considered a separate claim from the related judgment." Ariz. R. Civ. P. 54(b).

¶54 The October 5, 2011 judgment became subject to reopening upon the filing of the timely motion for new trial and request for additional attorneys' fees. *See* Ariz. R. Civ. P.

59(b) (a motion for new trial permits a court to reopen a judgment and direct the entry of a new judgment); *Fields v. Oates*, 230 Ariz. 411, 417, ¶ 25, 286 P.3d 160, 166 (App. 2012) (explaining that "[w]hen a claim for attorneys' fees is the only outstanding issue, entry of a signed order resolving that issue establishes the date of entry of final judgment for purposes of appeal"). This interpretation is consistent with the purpose of Rule 54(b) which is to avoid piecemeal appeals on multiple claims. *Terrazas v. Superior Court (C.I.T. Corp.)*, 112 Ariz. 434, 435-36, 543 P.2d 120, 121-22 (1975). The final judgment was entered on April 27, 2012; therefore, Beck's Rule 60(c) motion was timely.

¶55 Forum Portales also argues the superior court erred in holding that it waived its claim to the 12% contract interest rate by failing to include that rate in the forms of judgment it filed with the court. Forum Portales contends it could not waive application of the contractual interest rate because it did not know of Beck's objection to the 10% interest rate until Beck filed its Rule 60(c) motion. Forum Portales submitted a proposed form of judgment sometime in early July 2011 and a second proposed judgment after the court denied Beck's motion for new trial. Although Forum Portales' proposed judgments are not in the record on appeal, we presume, based on the superior

court's waiver analysis, that the proposed judgments included the 10% statutory interest rate instead of the 12% contractual rate. Forum Portales did not seek the higher contractual interest until it responded to Beck's Rule 60(c) motion.

¶56 Even if Forum Portales' response to Beck's Rule 60(c) motion is treated as a cross-motion for relief from judgment, Forum Portales did not explain how its decision to request the statutory interest rate instead of the contractual interest rate constituted "mistake, inadvertence, surprise or excusable neglect." "The standard for determining whether conduct is 'excusable' is whether the neglect or inadvertence is such as might be the act of a reasonably prudent person under the same circumstances." *City of Phoenix v. Geyler,* 144 Ariz. 323, 331, 697 P.2d 1073, 1081 (1985). Forum Portales submitted two separate proposed judgments. The original judgment cited the contract as the basis for the award of attorneys' fees. Clearly, the language regarding the contractual interest rate was readily apparent to Forum Portales at that time, but not included in the proposed judgment. We conclude the superior court did not abuse its discretion in holding that Forum Portales waived its claim to the application of the contractual rate and allowing Beck's challenge.

REQUEST FOR ATTORNEYS' FEES ON APPEAL

¶57 Both parties request an award of attorneys' fees on appeal pursuant to the contract and A.R.S. § 12-341.01(A). Forum Portales prevailed on all issues on appeal and one of two issues on cross-appeal. Pursuant to the contract, General Conditions § 13.10.1, we award Forum Portales its reasonable appellate attorneys' fees upon compliance with ARCAP 21(a).

CONCLUSION

¶58 We affirm the judgment in favor of Forum Portales with the exception of the amount of liquidated damages. The superior court erred in granting summary judgment as to the start date of the contract period. Therefore, we reverse the liquidated damages award and remand to allow evidence regarding the start date of the contract period, which may or may not affect the overall amount of liquidated damages awarded. In all other respects, we affirm the superior court's judgment.

/S/
ANDREW W. GOULD, Presiding Judge

CONCURRING:

/S/
MARGARET H. DOWNIE, Judge

/S/
PATRICIA A. OROZCO, Judge