IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

SHOEMAKE/RODRIGUEZ-ESTANCIA DE PRESCOTT LOT 23 LLC, et al., *Plaintiffs/Appellants/Cross-Appellees*,

v.

ESTANCIA DE PRESCOTT LLC, et al.,
Defendants/Appellees/Cross-Appellants.

No. 1 CA-CV 19-0182
FILED 08-27-2020

Appeal from the Superior Court in Maricopa County
No. CV2010-019374 and CV2011-010908
CONSOLIDATED
The Honorable Daniel G. Martin, Judge

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

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MEMORANDUM DECISION

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge Paul J. McMurdie and Judge Jennifer B. Campbell joined.

C A T T A N I, Judge:

¶1 Appellants—a group of 17 LLCs that invested in residential properties in Prescott—challenge the Maricopa County Superior Court's grant of summary judgment in favor of Estancia Del Prescott, LLC and its members, Darcy Howard and Ronald Hutter (collectively, the "Estancia Parties"). The Estancia Parties cross-appeal, challenging the superior court's denial of their request for attorney's fees. For reasons that follow, we reverse the superior court's grant of summary judgment. We affirm the court's ruling that Appellants' claims do not arise out of contract and that fees thus are not awardable under A.R.S. § 12-341.01.

FACTS AND PROCEDURAL BACKGROUND[1]

¶2 Larry Shoemake, a former investment advisor, persuaded investors to purchase residential lots in Prescott sold by Estancia. Shoemake was aware of the investment opportunity because of his friendship with Hutter. The investors paid cash for the lots and formed individual LLCs with Shoemake to hold title to the properties, with Shoemake having the responsibility to manage the properties.

¶3 Shoemake also reached a separate purchase agreement with Estancia permitting him to personally buy an additional lot for every lot acquired by an investor LLC. Under this agreement, Shoemake purchased 15 lots using seller-carryback finance agreements secured by a deed of trust on each lot.

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[1] Given the procedural complexity of this case, we limit the discussion of facts to those necessary to resolve the issues on appeal. For a more detailed discussion of the background of this case, which includes prior litigation in Yavapai County Superior Court involving the Estancia Parties and 13 of the Appellants, see *Shoemake v. Estancia* (*Shoemake I*), 1 CA-CV 14-0162, 1 CA-CV 14-0527, 2016 WL 615986, at *1–3, ¶¶ 2–16 (Ariz. App. Feb. 16, 2016) (mem. decision).

¶4 After Estancia experienced cash flow problems because of bank debt and a substantial tax expense related to the carryback lots, Hutter asked Shoemake to pay off the balance of his debt on the carryback lots. Because Shoemake was unable to secure a bank loan, Hutter introduced Shoemake to Mike Macera, whose private lending company, PHML, agreed to loan Shoemake money secured by the Estancia lots.

¶5 Shortly thereafter, without the individual investors' knowledge, Shoemake executed a series of deeds conveying title to the investor LLCs' properties to himself. He then used the properties as collateral for the PHML loan, and after PHML distributed the funds, Shoemake re-conveyed the now-encumbered properties to the investor LLCs. It was not until 2008, after Shoemake defaulted on the PHML loan, that he informed several investors about the PHML loan, his default on the loan, and PHML's intent to begin trustee's sales as a result. Two lawsuits followed.

¶6 In 2008, 13 of the 17 Appellants (the "Yavapai Plaintiffs") sued Estancia in Yavapai County Superior Court (the "Yavapai Case"), alleging several claims, including aiding and abetting a breach of fiduciary duty. The remaining four Appellants (the "Balboa LLCs") were not parties to the Yavapai Case. In 2010, the Yavapai Plaintiffs moved to amend their complaint to include Hutter, Howard, and additional defendants and claims. After the superior court denied the motion, the Yavapai Plaintiffs and the Balboa LLCs filed suit in Maricopa County Superior Court (the "Maricopa Case"), asserting several additional claims. All Appellants later moved to consolidate the Yavapai and Maricopa Cases. Estancia opposed consolidation, and the Yavapai County Superior Court denied the motion.

¶7 The Yavapai Plaintiffs' aiding and abetting claim proceeded to trial and resulted in a jury verdict in Estancia's favor. Estancia then moved for partial summary judgment in the Maricopa Case, asserting that the claims raised were barred by claim preclusion because of the resolution of the Yavapai Case. The Maricopa County Superior Court granted the motion, and in later-consolidated appeals, Appellants challenged the jury verdict in the Yavapai Case and the summary judgment ruling in the Maricopa Case. [2]

[2] Shoemake was also named as a defendant in superior court, but he never appeared. He later filed for bankruptcy and obtained a discharge. He is not a party to this appeal.

¶8 In *Shoemake I*, this court affirmed the Yavapai Case jury verdict but reversed the Maricopa Case summary judgment ruling. 1 CA-CV 14-0162, 1 CA-CV 14-0527, at *11, ¶ 59. This court held that because Estancia opposed the motion to consolidate the Yavapai and Maricopa Cases, it could not assert claim preclusion as to the Balboa LLCs, who were only parties to the Maricopa Case. *Id.* at *9, ¶¶ 47–49. Regarding the other Yavapai Plaintiffs, this court held that several of the claims in the Maricopa Case, including unjust enrichment (restitution) and inducing a breach of fiduciary duty, were not the same as those litigated in the Yavapai Case and therefore were not precluded. We remanded the case to the Maricopa County Superior Court for further proceedings on those claims. *Id.* at *10, ¶ 52.

¶9 On remand, the superior court ultimately granted summary judgment in favor of the Estancia Parties on Appellants' remaining claims for unjust enrichment and inducing a breach of fiduciary duty. The superior court concluded that the Estancia Parties were not unjustly enriched by receiving the proceeds of the PHML loan because, among other reasons, Shoemake owed Estancia the funds under a contract and Estancia gave value in exchange for the funds by releasing its liens on the properties Shoemake purchased. The court further concluded that a claim for inducing a breach of a fiduciary duty is not cognizable in Arizona. The Estancia Parties then moved for attorney's fees, which the court denied. The parties appealed and cross-appealed, and we have jurisdiction under A.R.S. § 12-2101(A)(1).

DISCUSSION

¶10 Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(a); *Orme Sch. v. Reeves*, 166 Ariz. 301, 305 (1990). Viewing the facts in the light most favorable to the non-prevailing party, we determine de novo whether genuine issues of material fact exist and whether the superior court correctly applied the law. *Wells Fargo Bank, N.A. v. Allen*, 231 Ariz. 209, 213, ¶ 14 (App. 2012); *Diaz v. Phx. Lubrication Serv., Inc.*, 224 Ariz. 335, 338, ¶ 10 (App. 2010).

I. Unjust Enrichment.

¶11 Appellants challenge the superior court's summary judgment ruling on their unjust enrichment claim. Unjust enrichment is an equitable remedy, and we review its availability de novo. *Loiselle v. Cosas Mgmt. Grp., LLC*, 224 Ariz. 207, 210, ¶¶ 8–9 (App. 2010). Because we conclude that there

are genuine issues of material fact regarding this claim, we reverse the superior court's grant of summary judgment.

¶12 "Unjust enrichment occurs when one party has and retains money or benefits that in justice and equity belong to another." *Id.* at ¶ 9 (citation omitted). To claim unjust enrichment, "a plaintiff must show (1) an enrichment, (2) an impoverishment, (3) a connection between the enrichment and impoverishment, (4) the absence of justification for the enrichment and impoverishment, and (5) the absence of a remedy at law." *Span v. Maricopa Cty. Treasurer*, 246 Ariz. 222, 227, ¶ 15 (App. 2019).

¶13 The Estancia Parties moved for summary judgment on the issue of unjust enrichment twice. The superior court initially "agree[d] with [Appellants] that under *Loiselle v. Cosas Management Group, LLC* and *John A. Artukovich & Sons, Inc. v. Reliance Truck Co.* and the record presented, there is at minimum a genuine issue of material fact as to whether the Estancia Parties were unjustly enriched." (Citations omitted.)

¶14 When the Estancia Parties moved for summary judgment a second time, Appellants objected and cross-moved for summary judgment on the same claim. This time, the superior court granted summary judgment in favor of Estancia:

> Unjust enrichment has several elements of proof. The necessary elements do not exist. The Estancia Parties were not unjustly enriched because: (i) they received that which they were owed; (ii) the parties controlling whether Estancia was paid off on the 15 Seller Carrybacks were Shoemake and the Lender (not Estancia); [and] (iii) Estancia gave substantial benefit for the money it received – the release of the 15 liens on 15 parcels of land.
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> . . . .
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> What distinguishes the payoff of the 15 Carrybacks from every case cited by [Appellants] is that none of those cases involved a situation where: (i) the recipient of the benefit held a first-position lien on land that was never owned free and clear by the suing plaintiff; (ii) the recipient was entitled to have the debt (promissory notes secured by deeds of trust) paid; (iii) the recipient gave value for the payment (release of liens); (iv) the recipient had no control over the transaction resulting in the payment; and, (v) the recipient did not aid or abet, and neither shared a purpose with the bad guy

> (Shoemake) nor intended to commit, encourage or facilitate his conduct. Shoemake is the miscreant; the Lender was also a reprobate. The Estancia Parties did not impose the conditions for the loan; [Appellants] have wholly failed to show that the Estancia Parties' conduct was "unjust."

¶15 Appellants argue on appeal that the superior court applied an incorrect standard by improperly requiring Appellants to prove that the Estancia Parties engaged in misconduct. The Estancia Parties respond that the superior court did not require misconduct, but instead correctly concluded that although the Estancia Parties were enriched, the enrichment was not unjust. Because we determine (on de novo review) that there are fact questions that must be resolved before deciding the merits of Appellants' claims, we need not assess whether the superior court applied an incorrect standard.

¶16 The parties frame their arguments on the merits as conclusions of law, but the outcome of this case turns on disputed issues of fact. Although both sides urged the court to grant summary judgment, there was not an agreed-upon or otherwise undisputed universe of facts from which to do so. *See Orme Sch.*, 166 Ariz. at 309–10 (recognizing that weighing evidence, assessing credibility, and resolving other fact issues remain questions for the jury at trial, not for the court on summary judgment) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). And Appellants objected to the Estancia Parties' motion for summary judgment not only as a matter of law but also because of facts Appellants asserted compelled summary judgment in their favor.

¶17 The factual disagreements were particularly significant to the application of *Loiselle* to this case. In *Loiselle*, this court held that a plaintiff may be entitled to restitution "even though [the defendant] did not act tortiously or wrongfully in receiving the money." 224 Ariz. at 211, ¶ 13. Here, the superior court distinguished *Loiselle* in part by noting that, unlike the defendants in that case, the Estancia Parties had given something of value (the release of liens on the properties Shoemake had purchased) in exchange for the monies received. But whether the liens had value at all was disputed: although the Estancia Parties claimed to have given value by releasing liens, Appellants asserted that the released liens in fact had little or no value because they were subordinate to liens in favor of the bank that had loaned Estancia money. Given this factual dispute, the superior court lacked grounds (at least on summary judgment) to distinguish *Loiselle* on this basis.

¶18 Similarly, Appellants asserted that the Estancia Parties acted "unjustly" by encouraging and helping to facilitate the loan transaction between Shoemake and PHML. Recovery for unjust enrichment turns on considerations regarding what is "in good conscience" and involves a fact-driven analysis. *See Wang Elec., Inc. v. Smoke Tree Resort, LLC*, 230 Ariz. 314, 318, ¶ 10 (App. 2012); *see also Flooring Sys., Inc. v. Radisson Grp., Inc.*, 160 Ariz. 224, 227 (1989). Although misconduct is not a requirement of unjust enrichment, whether a party engaged in misconduct is significant in determining whether the retention of a benefit lacks justification. *See* Restatement (Third) of Restitution and Unjust Enrichment § 3 (2011) ("A person is not permitted to profit by his own wrong."). Here, the superior court essentially concluded that the Estancia Parties did not engage in misconduct. But the parties disputed the propriety of the Estancia Parties' conduct. Without a foundation of undisputed facts on which to ground its conclusion, the court lacked a basis to make such a determination as a matter of law.

¶19 The superior court, relying on the jury verdict in the Yavapai Case and this court's ruling affirming the denial of relief on Appellants' claim that the jurors in the Yavapai Case were incorrectly instructed, concluded that the Estancia Parties "did not aid and abet" Shoemake, nor did they "encourage or facilitate" Shoemake's conduct. But the jury verdict in the Yavapai Case was a general verdict asking the jury to decide not only whether Estancia aided or facilitated Shoemake's conduct, but also whether the Yavapai Plaintiffs were damaged by any alleged conduct by Estancia. At the time the jury was asked to make that determination, PHML had already released the liens on Appellants' properties. Accordingly, the jury verdict may have been based on the jurors' belief that Appellants did not prove damages, and the verdict does not necessarily establish an absence of conduct that could be viewed as the Estancia Parties aiding and abetting, or encouraging and facilitating Shoemake's improper actions. Although there are facts in the record that would support a finding that the Estancia Parties were unaware of and did not encourage improper conduct by Shoemake (including Shoemake's testimony that he did not tell the Estancia Parties he had encumbered Appellants' properties without their permission), these facts were not undisputed. Accordingly, we are unable to affirm summary judgment on this basis.[3]

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[3] The Estancia Parties also assert that this court's statement in *Shoemake I* that "[t]he jury's verdict [in the Yavapai Case] necessarily means [Estancia] neither shared a purpose with Shoemake nor intended to

II. Inducing a Breach of Fiduciary Duty.

¶20 Next, Appellants argue that the superior court erred by concluding that their inducement of a breach of fiduciary duty claims (Counts 6 and 7 of their third amended complaint) failed as a matter of law. Acknowledging that no Arizona appellate court has yet recognized such a claim, Appellants urge this court to do so now.

¶21 Absent controlling authority to the contrary, we generally look to the Restatement for guidance. *See In re Sky Harbor Hotel Props., LLC*, 246 Ariz. 531, 533, ¶ 6 (2019). The Restatement (Second) of Agency § 312 (1958) provides that "[a] person who, without being privileged to do so, intentionally causes or assists an agent to violate a duty to his principal is subject to liability to the principal." Here, Appellants assert that Shoemake owed them a fiduciary duty as their manager, the Estancia Parties knowingly induced Shoemake to breach that duty, and Arizona law should afford them a remedy.

¶22 Section 312 of the Restatement is consistent with Arizona public policy. Our courts have long recognized the importance of the fiduciary relationship and accompanying responsibilities. *See Jacobs v. George*, 2 Ariz. 93, 98 (1886) ("It is well settled, and a salutary rule, that a person who undertakes to act for another in any matter shall not, in the same matter, act for himself.") (citation omitted). To preserve this relationship and compensate an aggrieved party, Arizona courts have also long recognized a tort claim for breaching a fiduciary duty. *See Haymes v. Rogers*, 70 Ariz. 408, 411 (1950) (citing Restatement (First) of Agency § 469 (1933) and holding that a breaching fiduciary forfeits a right to compensation). Further, a plaintiff may bring a claim against a third party for aiding and abetting a breach of a fiduciary's duties, as occurred in the Yavapai Case. *See Gomez v. Hensley*, 145 Ariz. 176, 178 (App. 1984) (citing Restatement (Second) of Torts § 876 (1979)).

¶23 Aside from tort claims, Arizona law allows for a breach of contract claim when a party breaches a fiduciary duty that is created and governed by a contract. *See Urias v. PCS Health Sys., Inc.*, 211 Ariz. 81, 84,

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commit, encourage or facilitate his conduct," 1 CA-CV 14-0162, 1 CA-CV 14-0527, at *6, ¶ 33, establishes that Appellants "are unable to show anything unjust about Estancia's receipt of payment." But that statement was not essential to the court's resolution of the issue on appeal and was made in the context of assessing whether an incorrect jury instruction prejudiced Appellants' case. *See id.* at ¶¶ 31–33.

87, ¶¶ 15, 32 (App. 2005). And if a third party induces a breach of such a contract, the common law affords the aggrieved party a tort cause of action against the inducer. *See Middleton v. Wallichs Music & Ent. Co.*, 24 Ariz. App. 180, 182–83 (App. 1975).

¶24 Against the backdrop of this common-law scheme, a claim for inducing a breach of a fiduciary duty is consistent with longstanding Arizona policy favoring the preservation of the fiduciary relationship. But a claim already exists to address the conduct at issue—a claim for aiding and abetting a breach of fiduciary duty, which was asserted in the Yavapai Case. Accordingly, an independent claim for inducing a breach of a fiduciary duty is unnecessary; if a person successfully induces another to breach a fiduciary duty, they have also necessarily aided and abetted a breach of that fiduciary duty.

¶25 Appellants' arguments to the contrary are unpersuasive. Appellants first assert that a separate claim for inducing a breach of fiduciary duty should be recognized because it is closely analogous to inducing a breach of contract. Under Arizona law, a claim for inducing a breach of contract requires (1) the existence of a contract; (2) the defendant's knowledge that the contract exists; (3) a breach of the contract induced by the defendant; (4) the absence of privilege or justification; and (5) damages. *Id.* Appellants propose simply substituting "fiduciary relationship" for "contract" in these elements. But the already-available claim for aiding and abetting a breach of fiduciary duty is substantially similar, requiring (1) a fiduciary breached a duty causing injury to the plaintiff, (2) the defendant knew the fiduciary breached a duty, (3) the defendant substantially assisted or encouraged the fiduciary in the breach, and (4) a causal relationship exists between the assistance and the breach. *See Cal X-Tra v. W.V.S.V. Holdings, L.L.C.*, 229 Ariz. 377, 406, ¶ 97 (App. 2012); *Sec. Title Agency, Inc. v. Pope*, 219 Ariz. 480, 491, ¶ 44 (App. 2008). Given the substantial similarity between the two claims, there are no gaps in the common law that would be filled by recognizing inducing a breach of fiduciary duty as distinct from aiding and abetting.

¶26 Appellants also argue that "[p]ractically speaking, 'inducing' a party to breach a fiduciary duty to a third party generally occurs before the actual breach," while "[a]iding and abetting constitutes more active involvement . . . in carrying out the actions constituting the breach." At best, this distinction demonstrates that not all cases of aiding and abetting involve inducing a breach of fiduciary duty. But the inverse does not follow. Appellants fail to explain why, under their reasoning, all cases of inducement do not fall under the umbrella of aiding and abetting.

¶27 Appellants next point to Illinois case law, which recognizes both inducing and aiding and abetting a breach of fiduciary duty claims. The elements of Illinois's claims meaningfully differ only in one regard: a claim for aiding and abetting requires a showing that the plaintiff sustained an injury, whereas a claim for inducing requires a showing that the defendant received a benefit. *Compare Time Savers, Inc. v. LaSalle Bank, N.A.*, 863 N.E.2d 1156, 1168 (Ill. App. Ct. 2007) (aiding and abetting), *with Paul H. Schwendener, Inc. v. Jupiter Elec. Co.*, 829 N.E.2d 818, 827 (Ill. App. Ct. 2005) (inducing). Although Appellants note this distinction, they do not suggest that we adopt such a distinction in their proposed rule, and we decline to do so.

¶28 Other states, like New York, recognize both claims, but the elements of both are identical. *Compare Ginsburg Dev. Cos., LLC v. Carbone*, 22 N.Y.S.3d 485, 489–90 (N.Y. App. Div. 2015) (aiding and abetting), *with Southmark/Envicon Cap. Corp. v. United Airlines, Inc.*, 505 N.Y.S.2d 491, 493 (Sup. Ct. 1986), *aff'd*, 514 N.Y.S.2d (1987) (inducing). But there is no need to recognize a new claim in name only. *See Shetter v. Rochelle*, 2 Ariz. App. 358, 366 (App. 1965), *modified*, 2 Ariz. App. 607 (App. 1966) (noting that "this court does not believe that a label placed upon a cause of action has any great significance"). Instead, we agree with the Georgia Court of Appeals that "[r]egardless of whether denominated 'aiding and abetting a breach of fiduciary duty,' 'procuring a breach of fiduciary duty,' or 'tortious interference with a fiduciary relationship,'" the cause of action rises and falls on the same elements, and there is therefore no reason to treat the claims as distinct. *See Insight Tech., Inc. v. FreightCheck, LLC*, 633 S.E.2d 373, 379 (Ga. Ct. App. 2006). Accordingly, we decline to recognize inducing a beach of a fiduciary duty as distinct from aiding and abetting.

¶29 Consistent with our decision in *Shoemake I*, because Estancia prevailed on the Yavapai Plaintiffs' aiding and abetting claim in the Yavapai Case, and because the Hutter and Howard are in privity with Estancia, the Yavapai Plaintiffs are precluded from bringing the claim outlined in Count 7 of the third amended complaint against the Estancia Parties. *See* 1 CA-CV 14-0162, 1 CA-CV 14-0527, at *10, ¶¶ 51–52. Accordingly, we affirm the superior court's grant of summary judgment as it pertains to the Yavapai Plaintiffs.[4]

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[4] We recognize that *Shoemake I* stated that inducement of a breach of fiduciary duty was "not previously litigated" against Estancia in the Yavapai Case. 1 CA-CV 14-0162, 1 CA-CV 14-0527, at *10, ¶ 52. However,

¶30 Because the Balboa LLCs were not parties to the Yavapai Case, their claims are not barred by claim preclusion. *See Shoemake I*, 1 CA-CV 14-0162, 1 CA-CV 14-0527, at *9, ¶ 49. The Estancia Parties nonetheless assert that the Balboa LLCs' claims fail as a matter of law because they failed to plead an absence of privilege. However, the Balboa LLCs were not required to do so. *See Chanay v. Chittenden,* 115 Ariz. 32, 37–38 (1977); *see also Nayab v. Capital One Bank (USA), N.A.*, 942 F.3d 480, 495 (9th Cir. 2019) ("[P]lacing the burden on the plaintiff would be unfair, as it would require the plaintiff to plead a negative fact that would generally be peculiarly within the knowledge of the defendant.").

¶31 Accordingly, we reverse the superior court's grant of summary judgment on Count 6 and Count 7 relating to the Balboa LLCs and remand for further proceedings.

III. Attorney's Fees.

¶32 The Estancia Parties assert that the court erred by denying their request for attorney's fees. Estancia argues that the superior court misapplied the legal standard for awarding attorney's fees under A.R.S. § 12-341.01 and erred by failing to award fees under A.R.S. § 12-349. We rejected this argument in *Shoemake I*, 1 CA-CV 14-0162, 1 CA-CV 14-0527, at *7–8, ¶¶ 39–40, and we reject it here as well.

¶33 We review a denial of attorney's fees under § 12-341.01(A) for an abuse of discretion but review the interpretation of the statute de novo. *Hannosh v. Segal*, 235 Ariz. 108, 115, ¶ 22 (App. 2014).

¶34 Section 12-341.01(A) permits a court to award the prevailing party attorney's fees in an action "arising out of a contract." In determining whether a tort claim arises out of contract, "the court should look to the fundamental nature of the action." *Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc.*, 198 Ariz. 10, 15, ¶ 27 (App. 2000). In *Shoemake I*, we reversed the superior court's award of attorney's fees under § 12-341.01(A), noting that the "[Appellants] did not raise any contract related claims" in the Yavapai or Maricopa Cases. 1 CA-CV 14-0162, 1 CA-CV 14-0527, at *10, ¶ 55. That decision is the law of this case, and we decline the Estancia Parties'

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the issue of whether we should recognize the claim was not briefed or argued to the court, and *Shoemake I* did not resolve that issue. *See Stauffer v. Premier Serv. Mortg., LLC*, 240 Ariz. 575, 579, ¶ 15 (App. 2016) ("[I]f the issue was not resolved in the first ruling, . . . the [law of the case] doctrine does not apply.").

invitation to reconsider the issue. *See State v. Kiles*, 222 Ariz. 25, 36, ¶ 53 (2009) ("[T]he decision of an appellate court in a case is the law of that case on the points presented throughout all the subsequent proceedings in the case in both the trial and the appellate courts . . . .") (citation omitted).

¶35 The Estancia Parties also argue that Appellants' unjust enrichment claim was not raised in the prior Yavapai or Maricopa Cases and is accordingly outside the scope of *Shoemake I*. Even assuming this is true, the unjust enrichment claim arises from the same universe of facts as the other claims the Appellants previously brought. And similarly, the existence of contracts on the periphery of the claim that the Estancia Parties highlight—such as the joint prosecution agreement between Appellants and PHML and the deeds of trust—do not demonstrate that the action "arises under contract." *See Ramsey Air Meds, L.L.C.*, 198 Ariz. at 15, ¶ 27 ("The existence of a contract that merely puts the parties within tortious striking range of each other does not convert ensuing torts into contract claims.").

¶36 The Estancia Parties' arguments related to fees under A.R.S. § 12-349 similarly fail. Because we are reversing in part and remanding, the attorney's fees issue is arguably moot. But because it is likely to arise again on remand, we address it to provide guidance to the parties and the superior court. *See Nayeri v. Mohave County*, 247 Ariz. 490, 494, ¶ 15 (App. 2019).

¶37 As relevant here, § 12-349(A)(1) and (3) provide that "the court shall assess reasonable attorney fees . . . if [an] attorney or party" "[b]rings or defends a claim without substantial justification" or "[u]nreasonably expands or delays the proceeding."

¶38 In *Shoemake I*, we concluded that "nothing in the record establishes that [Appellants] engaged in abusive discovery tactics or brought their claims in [the Maricopa Case] without substantial justification, to harass [the Estancia Parties], or to unreasonably expand or delay proceedings." 1 CA-CV 14-0162, 1 CA-CV 14-0527, at *11, ¶ 58. To the extent the conduct the Estancia Parties now complain of relates to conduct that occurred before *Shoemake I*, the arguments are barred by the law of the case. *See Kiles*, 222 Ariz. at 36, ¶ 53.

¶39 As to conduct that occurred after *Shoemake I*, "[w]e view the evidence in a manner most favorable to sustaining" the superior court and will affirm unless the court's decision to deny fees was clearly erroneous. *See Phx. Newspapers, Inc. v. Dep't of Corr., State of Ariz.*, 188 Ariz. 237, 243

(App. 1997). And the record before us supports the conclusion that Appellants did not bring claims without substantial justification or to expand or delay the litigation unreasonably. Accordingly, on this record, the Estancia Parties did not establish that the superior court erred by denying their request for attorney's fees.

CONCLUSION

¶40 For the foregoing reasons, the judgment of the superior court is affirmed in part, reversed in part, and remanded for further proceedings consistent with this decision. The Estancia Parties request attorney's fees on appeal under A.R.S. §§ 12-341.01 and -349. Because this action does not arise out of contract, we decline to award fees under § 12-341.01, and the record does not warrant an award of fees under § 12-349. Given the mixed result of this appeal, each party shall bear its own costs.

AMY M. WOOD • Clerk of the Court
FILED: JT