IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

A MINER CONTRACTING INC., et al.,
Plaintiff/Appellant/Cross-Appellee,

v.

SAFECO INSURANCE COMPANY OF AMERICA,
Defendant/Appellee/Cross-Appellant.

ALAN R. MINER, et al., *Plaintiffs/Appellees,*

v.

SAFECO INSURANCE COMPANY OF AMERICA,
Defendant/Appellant.

Nos. 1 CA-CV 20-0205, 1 CA-CV 20-0463
(Consolidated)
FILED 9-30-2021

Appeal from the Superior Court in Maricopa County
No. CV2005-009781, CV2005-019434,
CV2006-007290, CV2007-000895, CV2008-001105
(Consolidated)
The Honorable James D. Smith, Judge
The Honorable Lindsay P. Abramson, Judge *Pro Tempore*

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Judge Samuel A. Thumma delivered the decision of the Court, in which Chief Judge Kent E. Cattani and Judge Jennifer M. Perkins joined.

T H U M M A, Judge:

¶1 These consolidated appeals are the most recent appellate iteration of consolidated superior court cases first filed in 2005. The original dispute related to a $4.3 million construction contract awarded by the Toho Tolani County Improvement District in 2003 to plaintiff A. Miner Contracting, Inc. (AMC) to build roadway improvements and related work in Kachina Village, Arizona.

¶2 In 2013, this court resolved the dispute between AMC and the District, affirming a grant of summary judgment that AMC had defaulted on its obligations to the District under the construction contract. *A. Miner Contracting, Inc. v. Toho-Tolani Cnty. Imp. Dist.*, 233 Ariz. 249, 251 ¶ 1 (App.

2013) (*Miner I*). That decision relieved the District of its obligation to repay AMC's surety, Safeco Insurance Company of America (Safeco), for completing work AMC had abandoned.

¶3 In the lawsuit resulting in this appeal, Safeco asserted an indemnity claim against Alan R. and Elizabeth L. Miner and AMC (collectively, Miner). AMC responded by asserting contract-based counterclaims. After a March 2019 trial, the jury returned verdicts resulting in a net damage award to AMC.

¶4 Miner appeals the resulting judgment against it, while Safeco cross-appeals from the verdict finding Safeco breached the implied covenant of good faith and fair dealing. Safeco also appeals from a judgment quashing its writ of garnishment and an attorneys' fee judgment in the garnishment proceedings. Because the parties have shown no reversible error, the judgments are affirmed.

FACTS AND PROCEDURAL HISTORY

¶5 In November 2003, the District awarded AMC the construction contract. Before beginning work, AMC had to procure payment and performance bonds. *See generally* A.R.S. §§ 48-925; 34-222 (2021).[1] AMC did so through a General Agreement of Indemnity (GAI), in which Safeco agreed to assume AMC's obligations to the District if AMC failed to perform as promised. Alan Miner signed the GAI individually and on behalf of AMC. The following declaration was inserted after Mr. Miner's signatures: "The indemnity of the undersigned is limited solely to the Interest that they may have, now or in the future, in the real property located at 1071 Commerce Drive, Prescott, Arizona." Elizabeth Miner, Alan's wife, signed the GAI after that declaration.

¶6 The GAI provided that Safeco would be indemnified for "[a]ll loss, costs and expenses . . . including court costs [and] reasonable attorney fees . . . incurred by" Safeco if the District declared AMC in default. The GAI authorized Safeco to demand collateral from both AMC and the Miners in the event of AMC's default and to file UCC-1 financing statements to secure that collateral. It also expressly granted Safeco the exclusive right to "determine in good faith" whether to pay any claims against its bonds, adding such determinations "shall be final and conclusive upon" Miner.

[1] Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

¶7 Various disputes arose during the project. In June 2005, AMC stopped work and sued the District. The District counterclaimed, declared AMC in default and called on Safeco to complete the project in AMC's stead.

¶8 Safeco assumed Miner's construction obligations in a takeover agreement with the District. The District then paid Safeco about $720,000 of the remaining contract balance, withholding $1.1 million as an estimate of its damages caused by AMC's default. Safeco retained Combs Construction Company to complete AMC's work, at an additional cost to Safeco of about $3 million. Combs completed the work, satisfying Safeco's obligations under the takeover agreement.

¶9 After *Miner I*, Safeco invoked the GAI and pressed an indemnity claim against Miner for the money it had paid Combs. In response, Miner asserted two counterclaims: breach of the express terms of the GAI and breach of the implied covenant of good faith and fair dealing, seeking as damages lost bonding capacity and payment owed for work performed.

¶10 At a March 2019 trial, the jury returned verdicts for Safeco on its indemnity claim, awarding Safeco $2,087,907, and for Miner on its implied covenant claim, awarding Miner $1,062,030. The jury found for Safeco on Miner's counterclaim for breach of the express terms of the GAI. After offsetting the awards, awarding Safeco its attorneys' fees and costs and awarding prejudgment interest, the final judgment for Safeco totaled more than $5.3 million. Safeco's attempts to collect on the judgment led to later judgments quashing its writ of garnishment and awarding the Miners attorneys' fees.

¶11 In this consolidated appeal, this court has jurisdiction over Miner's timely appeal and Safeco's timely cross-appeal from the underlying judgment, and Safeco's timely appeal from the garnishment judgments, pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) and -2101(A)(1).

DISCUSSION

I. Miner's Appeal.

¶12 Miner argues the superior court erred by denying its motion for entry of judgment on alleged damages from Safeco's UCC-1 filings and denying its motion for remittitur or new trial. This court reviews both issues for an abuse of discretion. *GM Dev. Corp. v. Cmty. Am. Mortg. Corp.*, 165 Ariz. 1, 9 (App. 1990) (motion for entry of judgment); *Monaco v. HealthPartners of S. Ariz.*, 196 Ariz. 299, 304 ¶ 13 (App. 1999) (motion for remittitur or new trial).

A. The Court Properly Denied Miner's Motion for Entry of Judgment.

¶13 After the District declared AMC in default, Safeco filed two UCC-1 financing statements with the Arizona Secretary of State, encumbering Miner's assets. In 2006, Miner moved to quash the UCC-1s, claiming they exceeded the scope of the GAI and seeking at least $1.4 million in damages under A.R.S. § 47-9625(B) and a penalty under A.R.S. § 47-9509(A). After considering briefing by the parties, in August 2006, the court issued a minute entry stating that "[f]or reasons set forth in [Miner's] Motion and Reply, **IT IS ORDERED** granting [Miner's] . . . motion."

¶14 Nearly two years later, in July 2008, Miner requested an evidentiary hearing "to determine [the] damages awarded to it" in the 2006 minute entry. No such hearing was ever set or held. The issue was raised again after the March 2019 trial, when Miner moved for entry of judgment on the 2006 minute entry. In denying Miner's motion, the court concluded the 2006 minute entry awarded no damages. The court also stated that any such award made without an evidentiary hearing would "test fundamental notions of due process" and noted the jury had rejected Miner's request for the damages that it claimed were owed under the 2006 minute entry. On appeal, Miner argues (1) the 2006 minute entry was "res judicata;" (2) denial of the post-trial motion for entry of judgment was an impermissible "horizontal appeal" and (3) Miner's damage claims should not have been submitted to the jury.

¶15 Miner's first two arguments misconstrue the relevant law. Because the 2006 minute entry was never reduced to a final judgment, it was interlocutory and could be "revised at any time." Ariz. R. Civ. P. 54(b). Thus, the 2006 minute entry was not a judgment, meaning res judicata does not apply. *See Hall v. Lalli*, 194 Ariz. 54, 57 ¶ 7 (1999) ("res judicata will preclude a claim when a former *judgment* on the merits was rendered")

(emphasis added). Nor was the denial of Miner's motion for entry of judgment an impermissible "horizontal appeal." Among other things, the 2006 minute entry "did not actually decide the issue" of Miner's damages, a prerequisite to applying any horizontal appeal limitation. *See Powell-Cerkoney v. TCR-Mont. Ranch Joint Venture, II*, 176 Ariz. 275, 279 (App. 1993).

¶16 Miner has also shown no error in the court's submission of its claims for damages to the jury. Miner's primary argument appears to be that there was no jury trial right on its claim because it arose out of statute. Miner relies on the proposition that the Arizona Constitution's "jury trial provision merely preserves a right to jury trial if such a right existed at common law; it does not create a right where none existed before." *Smith v. Ariz. Clean Elections Comm'n*, 212 Ariz. 407, 416 ¶ 43 (2006). That principle, however, does not mean that there is no right to a jury trial on claims that arise out of statute. Rather, *Smith* reaffirmed the proposition that the right to a jury trial under Arizona's Constitution "has never extended to civil cases that turn on uncontested facts." *Id*. Here, however, disputed material facts surrounded Miner's claim for damages as a result of the UCC-1 filings. Moreover, this was not a situation in which the applicable UCC provision, A.R.S. § 47-9625(B) ("a person is liable for damages in the amount of any loss caused by a failure to comply with this chapter"), directed the court (not the jury) to determine damages, *see* Margaret L. Moses, *The Jury-Trial Right in the UCC: On a Slippery Slope*, 54 SMU L. Rev. 561, 566–78 (2001).

¶17 Miner asserts its damages claim based on the UCC-1 filings was "uncontested" because "[n]o request was made for an evidentiary hearing to address the damages claim or make any assertion that the damages were improperly calculated or unsupported." Miner itself, however, requested just such an evidentiary hearing in 2008. Moreover, Safeco's response to that 2008 request sought "additional discovery specifically for issues to be tried at the evidentiary hearing." At no point did Safeco concede the facts underlying Miner's damages claim. Miner has not shown that it was error for the court to submit that claim to the jury and has shown no error in the denial of its motion for entry of judgment.

B. The Court Properly Denied Miner's Motion for Remittitur or New Trial.

¶18 After the jury returned the verdicts, Miner challenged the final jury instructions in a motion for remittitur or, in the alternative, for a new trial. Miner argues the denial of that motion was reversible error because the court improperly instructed the jury on Safeco's duties under the GAI (including express obligations to make determinations in good faith), which Miner also claims erroneously "compelled" the jury to award Safeco damages. Jury instructions are reviewed as a whole to determine whether the challenged instructions "misled the jury as to the proper rules of law." *Kuhnke v. Textron, Inc.*, 140 Ariz. 587, 592 (App. 1984). Any claimed instructional error does not justify reversal "unless there is substantial doubt as to whether the jury was properly guided in its deliberations." *Thompson v. Better-Bilt Aluminum Prods. Co.*, 187 Ariz. 121, 126 (App. 1996).

¶19 Contrary to Miner's arguments, the final jury instructions properly addressed Safeco's obligations under the GAI, including the express obligation to make determinations in good faith. Drawing on American Bar Association model jury instructions for surety cases, the superior court instructed the jury that Safeco was only entitled to reimbursement for "losses and expenses that Safeco sustained in good faith because of Safeco issuing the bonds on behalf of AMC." The jury instructions also included a detailed definition of "in good faith" as expressly stated in the GAI. That definition provided that "Safeco sustained loss in good faith if it made payments under the belief that it was liable for the amounts paid, or that it was necessary or expedient to make such payments, whether or not it actually was." The instruction also provided that a finding that Safeco did not act in good faith could only be based on a determination that "Safeco did something more than exercised bad judgment, acted negligently, or acted with insufficient zeal. Rather, [the jury] must find that Safeco acted fraudulently, with a dishonest purpose, with an improper motive, or with conscious wrongdoing."

¶20 Miner's good faith claim against Safeco was for breach of the express terms of an indemnity contract, not for alleged bad faith for breaching the implied covenant of good faith and fair dealing. In the indemnity context,

> [T]he rule is that it is not necessary for the indemnitee under such provisions to show the necessity of the payment, or the reasonableness of the amount. If the money was actually paid,

> the only way in which it can be attacked by the indemnitor is through a plea and proof of bad faith in the payment.

See J.D. Halstead Lumber Co. v. Hartford Acc & Indem. Co., 38 Ariz. 228, 237 (1931) (citations omitted); *accord Guarantee Co. of N.A. USA v. Falcone Brothers & Assocs., Inc.*, 847 Fed. Appx. 398, 400 (9th Cir. Feb. 22, 2021) ("Under Arizona law, if a surety incurs an expense, 'the only way in which it can be attacked by the indemnitor is through a plea and proof of bad faith in the payment.'") (quoting *J.D. Halstead*); *Employers Mut. Cas. Co. v. B5 Inc.*, 2015 WL 7451150, at *3 (D. Ariz. Nov. 23, 2015) (unpublished; similar).

¶21 Thus, Miner's reliance — particularly at oral argument before this court — on *Dodge v. Fidelity Deposit Co. of Md.*, 161 Ariz. 344 (1989) is misplaced. *Dodge* held that a surety on a contractor's performance bond can be liable in *tort* based on a violation of the implied covenant of good faith and fair dealing. *Id.* at 345 ("The question before this court is one of first impression in Arizona: Can a surety on a contractor's performance bond be liable for the *tort* of bad faith" based on the implied covenant of good faith and fair dealing? "We answer the question in the affirmative.") (emphasis added). But that is a different claim than one for an alleged breach of the express terms of an indemnity contract, which — as described above — requires proof of bad faith. Moreover, Miner prevailed on its separate counterclaim alleging breach of the GAI's implied covenant of good faith and fair dealing.

¶22 Miner claims the superior court improperly rejected two competing non-uniform jury instructions that Miner requested. But read as a whole, the instructions given required the jury to find that Safeco's claimed damages were "sustained in good faith" — as outlined above — before awarding Safeco damages. The instructions given properly addressed the express obligation of good faith in the surety context, which requires proof of bad faith, and Miner provided no Arizona authority requiring different instructions.

¶23 One of Miner's proposed instructions stated "[a] surety's failure to act in good faith toward its principal may result in the surety's loss of its indemnity right," a concept properly addressed in the instructions given. Miner's other proposed instruction was a long paragraph addressing several different issues. It discussed the burden of proof, which was properly addressed in the instructions given. It also would have instructed the jury that: (1) it "must consider" whether Safeco "reasonably and thoroughly investigated the claim;" (2) a "failure to investigate" for

specified reasons may constitute bad faith; (3) the "failure to conduct an adequate investigation . . . when accompanied by other evidence, reflecting an improper motive, properly may be considered as evidence of the surety's bad faith" and (4) "[w]here a self-interested settlement is accompanied by an improper motive, courts have held that bad faith can preclude indemnification." The superior court properly could reject such a proposed instruction based on phrasing alone. *Cf.* 75A AM. JUR. TRIAL § 1191 (2021) ("Courts have substantial discretion with respect to the precise wording of jury instructions, so long as the final result, read as a whole, completely and correctly states the law."). Miner also provided no Arizona authority supporting such an instruction.

¶24 The instructions given accurately reflected Safeco's good-faith obligations expressed in the GAI under Arizona law. Thus, Miner has shown no error in the jury instructions given addressing Safeco's duty of good faith expressed in the GAI or in the failure to give Miner's proposed instructions.

¶25 Miner also asserts the final jury instructions produced "contradictory" verdicts based on findings that both Safeco and Miner breached the GAI. But, as the superior court noted in denying Miner's motion for remittitur or new trial, Miner waived this argument by failing to raise it before the jury was discharged. *See* Ariz. R. Civ. P. 49(f)(1); *Trustmark Ins. Co. v. Bank One, Ariz., NA*, 202 Ariz. 535, 543 ¶ 39 (App. 2002). In addition, no party requested special jury verdict forms or interrogatories. *See* Ariz. R. Civ. P. 49(a)–(b). Thus, Miner's speculation about what the verdicts represent is unavailing. *Cf. King & Johnson Rental Equip. Co. v. Superior Court*, 123 Ariz. 256, 257 (1979) (noting general verdict implies findings in favor of prevailing parties on every fact essential to support the claim); *Citizens Utils. Co. v. Firemen's Ins. Co.*, 73 Ariz. 299, 303 (1952) ("When we do not know on what basis the jury reached its verdict, if there is any evidence to support a theory which will sustain same it must be affirmed on appeal."). Miner's argument also conflates the express terms of the GAI (which provided that Safeco's good-faith determinations in making payments "shall be final and conclusive" on Miner) with the implied covenant of good faith and fair dealing, ignoring that Arizona law precludes the latter from contradicting the former. *See Bike Fashion Corp. v. Kramer*, 202 Ariz. 420, 423 ¶ 14 (App. 2002) ("The general rule is that an implied covenant of good faith and fair dealing cannot directly contradict an express contract term.") (citations omitted). For these reasons, the court properly denied Miner's motion for remittitur or new trial.

C. The Court Properly Denied Miner's Request for Attorneys' Fees.

¶26 Miner requested attorneys' fees under A.R.S. § 12-341.01, which allows for the discretionary award of reasonable fees to the successful party in an action arising out of contract. The superior court denied the request, reasoning that Safeco, not Miner, was the successful party, as the jury awarded Miner about 14 percent of its claimed damages but awarded Safeco its claimed damages in full. Miner notes the fee awards would need to be reconsidered if Miner's appeal succeeds. But because Miner's appeal is unsuccessful, no such reconsideration is warranted. Nor has Miner shown the court otherwise erred in awarding fees.

II. Safeco's Cross-Appeal.

¶27 Safeco argues the superior court erroneously denied its motions for judgment as a matter of law and erred in the form of judgment it entered, issues this court reviews de novo. *See ABCDW LLC v. Banning*, 241 Ariz. 427, 433 ¶ 16 (App. 2016); *Rohan Mgmt., Inc. v. Jantzen*, 246 Ariz. 168, 171–72 ¶ 8 (App. 2019).

A. Safeco Waived its Argument that It Was Entitled to Judgment as a Matter of Law.

¶28 As reflected in the superior court's minute entry, after Miner rested in its case-in-chief, Safeco orally moved for judgment as a matter of law (JMOL) under Rule 50(a). Because the motion was oral, no filing reflects the arguments asserted. Moreover, the record on appeal includes no transcript of Safeco's oral motion and the parties' arguments. And the resulting minute entries deferring ruling on the motion until after the jury verdicts reflect that the superior court heard argument on Safeco's motion, but do not specify the arguments raised. As a result, the record does not show the grounds or arguments asserted by Safeco in its pre-verdict JMOL motion. Thus, Safeco has not shown — and cannot show — that the court erred in addressing its Rule 50(a) motion. For this reason, Safeco's arguments relating to its pre-verdict JMOL motion are waived. *Cullison v. City of Peoria*, 120 Ariz. 165, 168 n.2 (1978) ("Where an incomplete record is presented to an appellate court, the missing portions of that record are to be presumed to support the action of the trial court"). That means the issues raised in Safeco's post-verdict JMOL motion also are waived. *See, e.g.*, Ariz. R. Civ. P. 50(b) (allowing a party to "renew[]," in a post-trial Rule 50(b) motion, arguments first asserted in a Rule 50(a) motion made "before the case is submitted to the jury"); ARCAP 11(c)(1)(A) (requiring the appellant

to provide transcripts of superior court proceedings "not already in the official record that the appellant deems necessary for proper consideration of the issues on appeal"); *Van Dever v. Sears, Roebuck & Co.*, 129 Ariz. 150, 152 (App. 1981) (objections made for the first time after a verdict is rendered are not preserved for appeal).

B. Even if Not Waived, Neither Argument Safeco Asserted In Its Written Post-Verdict JMOL Motion Requires Reversal.

¶29 Safeco's written post-verdict JMOL motion argued that Miner failed to: (1) provide sufficient evidence proving Safeco breached the implied covenant of good faith and fair dealing; and (2) prove Safeco caused its losses. Even if Safeco had not waived these arguments by failing to properly preserve them pre-verdict, neither argument establishes that the superior court erred in denying its post-verdict JMOL motion.

¶30 Safeco asserted that, to establish a breach of the implied covenant of good faith and fair dealing, Miner needed to present evidence that Safeco exercised a contractual right for "a reason beyond the risks" Miner assumed, or that Safeco acted contrary to Miner's "justified expectations." *See Wells Fargo Bank v. Arizona Laborers, Teamsters & Cement Masons Loc. No. 395 Pension Trust*, 201 Ariz. 474, 492 ¶ 67 (2002) (citations omitted). But in resolving pretrial motions, the superior court recounted Miner's allegations that, by entering into the takeover agreement, Safeco compromised Miner's rights, accepted a bid to complete the work from Combs that was higher than the original bid from Miner, instructed Combs to perform work not included in the Miner contract and failed to mitigate Miner's damages. Although the trial evidence was conflicting, it supported these claims, meaning the superior court did not err in denying Safeco's post-verdict JMOL motion on that ground.

¶31 Safeco's argument about causation similarly fails. To the extent that Safeco bases its argument on an assertion that the verdict for Miner was for "work performed" damages, there was no special interrogatory asking the jury to specify the basis for the verdict. The general verdict the jury returned does not support Safeco's claim of error. *See Dunlap v. Jimmy GMC*, 136 Ariz. 338, 341 (App. 1983) ("a general verdict will be upheld when several counts, issues or theories are submitted to the jury if evidence on one count, issue or theory is sufficient to sustain the verdict") (citing *Reese v. Cradit*, 12 Ariz. App. 233, 238 (1970)). Moreover, Miner's expert testified that the damages caused by Safeco included the lost funds attributed to Safeco's decision not to use Miner to complete the work.

Accordingly, on this record, Safeco has not shown that Miner failed to prove Safeco caused Miner's claimed damages.

C. The Judgment Entered Properly Reflected the Limiting Language of the GAI.

¶32 Both parties submitted competing proposed forms of judgment. Safeco's proposal (mirroring the verdict) was "against A. Miner Contracting, Alan R. Miner and Elizabeth L. Miner," while Miner's proposal (mirroring the terms of the GAI) was "against A. Miner Contracting, Inc; against the sole and separate property of Alan R. Miner; and against the sole and separate property of Elizabeth L. Miner, limited to her interest in the real proper[ty] located at 1071 Commerce Drive, Prescott, Arizona." In substance, the court adopted Miner's proposal, entering judgment

> [i]n favor of [Safeco] and against A. Miner Contracting, Inc., Alan R. Miner and Elizabeth L. Miner (but only as to Elizabeth L. Miner's interest in real property commonly known as 1071 Commerce Drive in Prescott, Arizona) . . . .

Safeco argues the judgment erroneously failed to reflect the jury verdict, noting Miner did not object to the verdict form used.

¶33 The interpretation of the GAI (on which Miner's liability is based) is a question of law for the court, not one of fact for the jury. *See Roe v. Austin*, 246 Ariz. 21, 26 ¶ 16 (App. 2018). Safeco has not shown that the form of verdict could trump the provisions of the GAI when settling the judgment. Nor has Safeco shown that Miner had to present evidence at trial in anticipation of the parties' competing proposed forms of judgment.

¶34 The judgment entered properly reflects the limiting language of the GAI. Alan Miner signed the GAI individually and on behalf of AMC while Elizabeth Miner signed the GAI "individually;" the qualifying language above Elizabeth's signature limited her indemnity "solely to the interest that [she] may have, now or in the future, in the real property located at 1071 Commerce Drive, Prescott, Arizona." Elizabeth did not, as Safeco suggests, jointly sign with her husband Alan, without reservation, as would be required to bind the community. *See* A.R.S. § 25-214(C)(2) (requiring "joinder" of both spouses to bind the community for "[a]ny transaction of guaranty"). It is the substance of the GAI, including the limitations set forth in that document, that defines the scope of the guaranty, not merely the fact that both Alan and Elizabeth signed it. *See All-*

Way Leasing, Inc v. Kelly, 182 Ariz. 213, 216 (App. 1994) (explaining that "consent" of both spouses to be bound is a prerequisite to a finding of joinder of both spouses to bind the community). This is particularly true because the GAI, as a guaranty, is "strictly construed to limit the liability of the guarantor." *Westcor Co. Ltd. P'ship v. Pickering*, 164 Ariz. 521, 523 (App. 1990). On its face, the GAI did not bind the marital community of Alan and Elizabeth. Thus, Safeco has shown no error in the judgment entered.

III. Safeco's Appeals from the Garnishment Proceedings.

¶35 Safeco began to collect on its judgment while the parties' appeals were pending and obtained a writ of garnishment against two bank accounts jointly held by Alan and Elizabeth. The couple objected, arguing that because the judgment applied to Elizabeth "only as to Elizabeth L. Miner's interest in real property commonly known as 1071 Commerce Drive in Prescott, Arizona," it could not be used to reach the couple's community assets other than the Commerce Drive property. Safeco opposed the objection, also arguing in the alternative that half of the jointly held bank accounts could be garnished as Alan's sole and separate property. After hearings in April and May 2020, the court sustained the objections, quashed the writ of garnishment and awarded the couple attorneys' fees pursuant to A.R.S. § 12-1580(E).

¶36 On appeal from the resulting garnishment judgments, Safeco argues the court erred by (1) refusing to follow the couple's purported premarital agreement, (2) determining the GAI did not extend to the couple's community property and (3) awarding the couple attorneys' fees.

A. The Court Did Not Err by Characterizing the Jointly Held Accounts as Community Property.

¶37 In support of the objections to the writ of garnishment, Alan provided an affidavit stating, in part, that he and Elizabeth "have never entered into any agreement calling for any property created or obtained subsequent to our marriage to be characterized as the sole and separate property of either spouse." During the first hearing on the objections, Safeco tried to impeach Alan by introducing two unauthenticated emails from AMC's bonding agent, David McKee, alluding to the existence of a premarital agreement between Alan and Elizabeth. At a second hearing, Safeco tried to question the couple about the existence and substance of any premarital agreement. The court rejected Safeco's attempts.

¶38 Safeco argues the superior court erred by refusing to hear testimony or permit discovery on whether the assets it sought to garnish

had been transformed from community to separate property by any premarital agreement. Rulings on evidentiary- and discovery-related issues are reviewed for an abuse of discretion. *In re Estate of Thurston*, 199 Ariz. 215, 221 ¶ 29 (App. 2000); *Cohen v. Barnard, Vogler & Co.*, 199 Ariz. 16, 20 ¶22 (App. 2000). While the characterization of property is reviewed de novo, this court "'defer[s] to the trial court's determination of witnesses' credibility and the weight to give conflicting evidence.'" *In re Marriage of Foster*, 240 Ariz. 99, 101 ¶ 5 (App. 2016) (citations omitted). A finding based on conflicting evidence will be reversed only if clearly erroneous. *Iacouzze v. Iacouzze*, 137 Ariz. 605, 607 (App. 1983).

¶39 A judgment creditor "may obtain discovery from any person — including the judgment debtor — as provided in [the Arizona Rules of Civil Procedure] and other applicable law." Ariz. R. Civ. P. 69(c)(1). Such discovery, however, is not self-effectuating and must be requested. *See* 2A Ariz. Legal Forms, Civ. P. R. 69 Form 10 (2020) ("Motion—To permit post-judgment discovery"). Safeco did not file a motion or seek an order to take any such discovery. In fact, Safeco did not seek to take any depositions, issue any subpoenas, request any documents or seek any discovery or disclosure relating to the existence or substance of any purported premarital agreement. Similarly, although it had copies of the McKee emails for a significant period of time, Safeco did not seek to authenticate them, did not seek to depose or call McKee as a witness and did not seek or obtain a sworn statement from him about the emails.

¶40 Having failed to undertake such efforts before the garnishment hearings, the time for Safeco to obtain discovery had passed. This is particularly true for the second hearing in May 2020, when the court denied Safeco's request to question the couple. Accordingly, Safeco has not shown that the court abused its discretion in refusing to permit discovery or hear testimony about any purported premarital agreement.

¶41 On the merits, a party challenging the "strong" presumption that property acquired during the marriage is community property "'has the burden of establishing the separate character of the property by clear and convincing evidence.'" *Foster*, 240 Ariz. at 101 ¶ 9 (citations omitted). Safeco failed to meet this burden. The McKee emails were not authenticated. Moreover, although suggesting a premarital agreement might exist, the emails did not discuss the scope or substance of any such agreement. Nor did the emails discuss whether any such agreement purported to alter the character of property acquired during the couple's marriage. Thus, even if they had been authenticated and admitted, the emails did not contradict Alan Miner's affidavit. Nor has Safeco supported

its assertion that the court was required to sua sponte "confirm if the [couple] entered into a premarital agreement." Thus, Safeco has not shown the court erred in finding that Safeco failed to rebut, by clear and convincing evidence, the strong presumption that the accounts it sought to garnish were community property.

B. Safeco Has Not Shown the Court Erred in Finding the Judgment Did Not Extend to the Couple's Community Assets.

¶42 In challenging the rulings in the garnishment proceedings, Safeco argues the superior court "err[ed] in ruling that A.R.S. § 25-214(C)(2) precluded enforcing the Judgment against community assets." Because Safeco failed to raise that issue in its cross-appeal of the underlying judgment reflecting the jury verdicts, it is unclear whether it can do so in appealing from the garnishment proceedings. *See Duncan v. Progressive Preferred Ins. Co. ex rel. Estate of Pop*, 228 Ariz. 3, 7 ¶ 13 (App. 2011) ("[U]nless a judgment is void because the court lacked jurisdiction over the subject matter, over the parties, or to render the particular judgment, the judgment cannot be collaterally attacked even if it is 'erroneous or wrong, so that it could be reversed on appeal or set aside on direct attack.'") (citations omitted); *PLM Tax Certificate Program 1991–92, L.P. v. Schweikert*, 216 Ariz. 47, 50 ¶ 16 (App. 2007) ("Issues that should have been raised in a first appeal cannot be raised or considered in a second appeal."). Indeed, in the garnishment proceedings, the court rejected Safeco's attempt to relitigate the underlying judgment, stating: "The Court does not need to go into those issues. If you want to go back and . . . file motions with the trial judge about the form of judgment you can do that." Moreover, as discussed above, the underlying judgment properly reflected the GAI's limiting language.

¶43 Safeco next argues the superior court erred by "concluding that the Judgment is not enforceable against Mr. Miner's interest in the couple's community property." Arizona, however, has not recognized an exception to the rule that a creditor is prohibited from garnishing community assets to satisfy a judgment against only one spouse where (as here) the couple married before the judgment was entered and remained married during the attempted garnishment. *See, e.g.*, *State ex rel. Indus. Comm'n of Ariz. v. Wright*, 202 Ariz. 255, 257 ¶ 6 (App. 2002) ("a creditor cannot reach marital community property to satisfy a separate obligation incurred by either spouse after marriage"); *Zork Hardware Co. v. Gottlieb*, 170 Ariz. 5, 6 (App. 1991) (similar; citing *Consolidated Roofing & Supply Co. v. Grimm*, 140 Ariz. 452 (App. 1984)). Safeco has provided no authority or basis to depart from this longstanding rule. Moreover, none of the various

analogies it offers — to the law of intestacy and bankruptcy, the disposition of premarital debt and judgments recorded after divorce — are applicable or persuasive. To the contrary, Safeco's attempt to divide a couple's community assets to be garnished for a judgment against a single spouse during the marriage runs contrary to the statutory directive in A.R.S. § 25-214. *See Geronimo Hotel & Lodge v. Putzi*, 151 Ariz. 477, 480 (1986) ("A.R.S. § 25-214 was intended to protect both spouses' interest in their common property"). Thus, Safeco has failed to show that it should have been allowed to enforce the judgment against Alan's half of the couple's community property.

C. The Court Properly Awarded Attorneys' Fees.

¶44 Safeco challenges an award of $21,238 in attorneys' fees to the Miners under A.R.S. § 12-1580(E) on procedural and substantive grounds. First, Safeco argues it was error to award fees after the court had entered a judgment quashing Safeco's writ of garnishment.[2] Safeco argues the award of fees in a subsequent judgment "finds no support in the Rules," which it suggests means "a Judgment without an award of fees means no fees are awarded." As a result, Safeco reasons, the court erred in denying its motion to vacate the Miners' fee judgment. The denial of a motion to vacate a judgment is reviewed for an abuse of discretion and will be affirmed "'if it is correct for any reason.'" *Delbridge v. Salt River Project Agr. Imp. & Power Dist.*, 182 Ariz. 46, 53–54 (App. 1994) (citations omitted).

¶45 Safeco's argument ignores the fact that the judgment quashing Safeco's writ of garnishment was entered pursuant to Rule 54(b). By definition, the Rule 54(b) judgment was not "as to all claims and parties." Ariz. R. Civ. P. 54(c). Instead, the Rule 54(b) judgment contemplated that something (here, the fees issue) had not yet been resolved.

¶46 Similarly, Safeco's argument does not address Rule 54(g), which authorizes a motion for fees to be filed within 20 days after the lodging of a proposed Rule 54(b) form of judgment. Ariz. R. Civ. P. 54(g)(3)(A)(i). The Miners applied for fees 14 days after Safeco lodged a proposed Rule 54(b) form of judgment, meaning the request was timely. Safeco's argument likewise does not acknowledge that Rule 54

[2] Although also suggesting an amended judgment was improper, Safeco has waived any challenge by failing to provide supporting legal authority. *Accord* ARCAP 13(a)(7).

contemplates the filing of a fee application *after* entry of a Rule 54(b) judgment.

> [A] claim for attorneys' fees may be considered a separate claim from a judgment on the merits, and a party may immediately appeal a judgment on the merits even when an attorneys' fees issue is still pending *if the court certifies the judgment as final pursuant to Rule 54(b).*

Fields v. Oates, 230 Ariz. 411, 414 ¶ 10 (App. 2012) (citations and internal quotations omitted). Similarly, Safeco's reliance on the prohibitions in Rule 54(h)(1) ignores the following prefatory language: "[e]xcept as otherwise allowed by this rule." Ariz. R. Civ. P. 54(h)(1). Safeco has therefore shown no procedural error in the entry of a judgment awarding fees after the entry of partial final judgment quashing Safeco's writ of garnishment.

¶47 Safeco's challenge to the merits of the fee award is reviewed for an abuse of discretion. *See Sanborn v. Brooker & Wake Prop. Mgmt. Inc.*, 178 Ariz. 425, 430 (App. 1994). Safeco concedes the fee award is governed by A.R.S. § 12-1580(E) (authorizing fees in garnishment proceedings), not A.R.S. § 12-341.01 (authorizing fees in "any contested action arising out of a contract"). Nevertheless, Safeco claims that the factors identified in *Assoc. Indem. Corp. v. Warner*, 143 Ariz. 567, 570 (1985), and used to evaluate fees under A.R.S. § 12-341.01, also apply to evaluate "a discretionary fee award under § 12-1580(E)." Safeco provides no authority supporting its argument, and the court has found none.

¶48 The *Warner* factors follow the directive in A.R.S. § 12-341.01(B) that a fee award "should be made to mitigate the burden of the expense of litigation to establish a just claim or a just defense." *Warner*, 143 Ariz. at 569. Section 12-1580(E), however, contains no similar directive. Moreover, garnishment proceedings are statutory, *Patrick v. Assoc. Drygoods Corp.*, 20 Ariz. App. 6, 8 (1973), and the available remedies in garnishment proceedings (including fee awards) are delineated by statute, *see Hull v. DaimlerChrysler Corp.*, 209 Ariz. 256, 257 ¶ 8 (App. 2004); *In re Jaramillo*, 229 Ariz. 581, 584 ¶ 11 (App. 2012). By contrast, A.R.S. § 12-341.01 does not apply to "'purely statutory causes of action.'" *Keystone Floor & More, LLC v. Ariz. Registrar of Contractors*, 223 Ariz. 27, 30 ¶ 11 (App. 2009) (citation omitted). For these reasons, this court declines Safeco's invitation to graft the *Warner* factors onto Section 12-1580(E) fee award requirements.

¶49 Safeco also challenges the Miners' fee award as unreasonably high, citing "redacted descriptions" and "broad summaries" in the fee application and speculating that the Miners "shifted the fees" for new counsel "to get up to speed." Safeco, however, has not shown that the Miners' fee application lacked "sufficient detail to enable the court to assess the reasonableness of the time incurred." *Schweiger v. China Doll Restaurant*, 138 Ariz. 183, 188 (App. 1983). Nor has Safeco shown that the court abused its discretion in making the specific fee award. For these reasons, the fees awarded to the Miners in the garnishment proceeding are affirmed.

IV. Attorneys' Fees on Miners' Appeal and Safeco's Cross-Appeal.

¶50 Miner and Safeco seek an award of attorneys' fees under A.R.S. § 12-341.01, while Safeco also seeks an award of fees under the GAI. Given the resolution of Miner's appeal and Safeco's cross-appeal, these competing requests for fees incurred on appeal are denied. Safeco is, however, awarded its taxable costs incurred in the appeal and cross-appeal, contingent on its compliance with ARCAP 21.

V. Attorneys' Fees in the Appeals from the Garnishment Proceedings.

¶51 In the appeals from the garnishment proceedings, Miner and Safeco both seek an award of attorneys' fees pursuant to A.R.S. § 12-1580(E). Safeco alternatively seeks fees under A.R.S. § 12-349 and the GAI. In a garnishment proceeding, "[t]he prevailing party may be awarded costs and attorney fees in a reasonable amount determined by the court." A.R.S. § 12-1580(E). As the prevailing party in the garnishment proceedings, Miner is awarded reasonable attorneys' fees incurred in the appeals from the garnishment judgments, as well as taxable costs on appeal, contingent upon compliance with ARCAP 21. Safeco's request for fees in the appeals from the garnishment proceedings is denied.

CONCLUSION

¶52 The judgments in this consolidated appeal are affirmed.

COURT OF APPEALS
STATE OF ARIZONA

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