

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

AMANDA VALDEZ AGUAYO,
Plaintiff/Appellant,

v.

RODOLFO VALENZUELA,
Defendant/Appellee.

Nos. 2 CA-CV 2015-0047 and 2 CA-CV 2015-0140 (Consolidated)
Filed June 29, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
Nos. C20136660 and D20120903
The Honorable D. Douglas Metcalf, Judge
The Honorable James Marner, Judge

AFFIRMED

COUNSEL

Aboud & Aboud, P.C., Tucson
By Michael J. Aboud and John Eli Aboud
Counsel for Plaintiff/Appellant

Kristi Bang-Simon, Tucson
Counsel for Defendant/Appellee

AGUAYO v. VALENZUELA
Decision of the Court

MEMORANDUM DECISION

Judge Staring authored the decision of the Court, in which Presiding Judge Howard and Judge Espinosa concurred.

STARING, Judge:

¶1 These consolidated appeals, in which the parties are former spouses, involve the recoverability of attorney fees incurred in both a dissolution action and a separate contract action between the parties. For the reasons discussed below, we affirm the rulings of both trial courts.

Factual and Procedural Background

¶2 The parties married in March 2008. During the marriage, appellee Rodolfo Valenzuela borrowed money from appellant Amanda Valdez Aguayo and issued her a promissory note for \$65,000.00. The note contains the following attorney fees provision: “Upon any default, [Rodolfo] agrees to pay a reasonable attorney’s fee for any and all services of an attorney, whether in or out of court, and for appeal and post-judgment collection legal services.”

¶3 In March 2012, Rodolfo petitioned for dissolution of the marriage. Amanda initially counterclaimed in the dissolution action in an effort to collect on the promissory note, but later moved to dismiss that claim without prejudice, over Rodolfo’s objection, asserting the court in the dissolution action lacked jurisdiction over the counterclaim. The court in the dissolution action subsequently granted the dismissal without prejudice, concluding Amanda’s action to enforce the note was one at law, for which she would be entitled to a jury trial, which could not occur in the dissolution action due to its equitable nature. Amanda subsequently filed a separate contract action to collect on the note, and in November 2014 a jury found in her favor.

AGUAYO v. VALENZUELA
Decision of the Court

¶4 In January 2015, pursuant to the attorney fees provision in the note, permitting recovery “for any and all services of an attorney, whether in or out of court,” the trial court in the contract action awarded Amanda \$14,847.00 in attorney fees. This amount reflected all of the fees she had incurred in the contract action. The court, however, denied Amanda’s request for an additional \$19,535.00 in fees the court found had been incurred attempting to enforce the note in the dissolution action.

¶5 The dissolution action was tried before a different judge in March 2015.¹ The judge in that case considered Amanda’s request for attorney fees under the fee shifting statute applicable in dissolution proceedings, A.R.S. § 25-324(A), which provides that the court, “after considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings, may order a party to pay a reasonable amount to the other party for the costs and expenses of maintaining or defending [the] proceeding.” The dissolution court acknowledged the “substantial disparity” in the parties’ financial resources, but awarded no attorney fees because it found Amanda acted “unreasonably and did unnecessarily prolong and complicate” the litigation.

¶6 Amanda appealed the judgments in both cases. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

¶7 We review for abuse of discretion the amount of an attorney fees award pursuant to a mandatory contract provision. *Chase Bank of Ariz. v. Acosta*, 179 Ariz. 563, 574-75, 880 P.2d 1109, 1120-21 (App. 1994). We review de novo a family court’s statutory interpretation of § 25-324 affecting its decision to award or deny attorney fees; that decision, and the determination of the amount, are reviewed for abuse of discretion. See *Thompson v. Corry*, 231 Ariz. 161, ¶ 4, 291 P.3d 358, 360 (App. 2012); *Magee v. Magee*, 206 Ariz. 589, ¶ 6, 81 P.3d 1048, 1049 (App. 2004).

¹The original dissolution judge, who had dismissed Amanda’s counterclaim without prejudice, had rotated to another assignment by the time of the March 2015 trial.

Attorney Fees at the Trial Court

Contract Action Court's Denial of Fees Incurred in Dissolution Proceeding

¶8 Amanda appeals the decision of the trial court in the contract action to deny an award of attorney fees she had incurred while attempting to enforce the promissory note in the dissolution action, deferring consideration of the denied fees to the court in the dissolution action.²

¶9 In the January 2015 ruling, the court concluded, "Plaintiff is entitled to recover all the attorneys' fees she incurs in enforcing her rights to payment under the promissory note." But the court also cited *Edsall v. Superior Court*, 143 Ariz. 240, 693 P.2d 895 (1984), as precluding the parties to a dissolution action from contractually negating the attorney fees mechanism provided by § 25-324(A). The court concluded Amanda "cannot recover her attorneys' fees under the promissory note while litigating the promissory note in the marriage dissolution action."

¶10 In *Edsall*, our supreme court held that a prevailing-party attorney fees provision contained in the parties' separation agreement "[did] not control the trial court's discretion to grant or deny attorney[] fees to either party in a domestic relations case," and that § 25-324 governed the issue. *Id.* at 247, 693 P.2d at 902. The *Edsall* court concluded: "We thus find that A.R.S. § 25-324 overrides the provision in the property settlement agreement awarding attorney[] fees solely on the basis that one is the prevailing party." *Id.* at 249, 693 P.2d at 904.

¶11 Amanda contends *Edsall* is "no longer good law," having been "superceded" by *LaPrade v. LaPrade*, 189 Ariz. 243, 941 P.2d 1268 (1997), which concerned jurisdiction to enforce post-decree-of-dissolution modifications to an agreement made

²On appeal, both parties take the position the trial court in the contract action deferred consideration of the denied fees to the dissolution court. Although the trial court's order is not explicit on this point, taken as a whole, it supports the parties' interpretation.

AGUAYO v. VALENZUELA
Decision of the Court

pre-decree. In *LaPrade*, the court held parties may modify and separately enforce “independent contracts” regardless of whether they are enforceable through a decree, but a merged agreement can only be enforced or modified through the decree. *Id.* at 246-47, 941 P.2d at 1271-72.³

¶12 *LaPrade*, however, neither “superceded” nor overruled *Edsall*, and has no application to the present dispute. It did not address the parties’ ability to recover attorney fees in a separate contract action, pursuant to an attorney fees provision contained in the contract, for work performed by attorneys in the parties’ dissolution action. Neither did *LaPrade* alter the principle that, when determining attorney fees in a dissolution action, “A.R.S. § 25-324 overrides” the parties’ attorney fees provision. *Edsall*, 143 Ariz. at 249, 693 P.2d at 904. Moreover, the present case does not involve a dispute concerning whether Rodolfo’s obligations under the note were merged or incorporated into the decree; there is no indication of either.

¶13 Because *Edsall* remains good law, we conclude the trial court in the contract action did not err by relying on it to decline awarding Amanda the attorney fees she incurred seeking to enforce the note in the dissolution action. Neither did the court err by leaving the question of attorney fees incurred in the dissolution action for the court hearing that matter.

Fees Incurred in Bankruptcy Court

¶14 We also find no error in the trial court’s failure to award fees earned by attorney Steven Cox for representation of Amanda in connection with Rodolfo’s bankruptcy proceeding. Amanda’s initial request for attorney fees did not include Cox’s fees. Although a copy of the bill was attached as an exhibit to Amanda’s reply in support of her fees application, the fees themselves were mentioned

³An agreement which is merely incorporated – i.e., identified “so as to render its validity *res judicata*” – may be enforced only in a civil contract action. *Id.* at 247, 941 P.2d at 1272, quoting *Ruhsam v. Ruhsam*, 110 Ariz. 426, 426, 520 P.2d 298, 298 (1974).

AGUAYO v. VALENZUELA
Decision of the Court

only briefly. And, even if Amanda did not receive Cox's bill until after she filed her application, she made no formal request to supplement her original fees motion. Such a request would have provided Rodolfo and the trial court the opportunity to fairly consider Cox's fees. Accordingly, we conclude Amanda waived the ability to recover those fees by failing to address them in her original motion for fees or in supplemental briefing. *See MidFirst Bank v. Chase*, 230 Ariz. 366, n.4, 284 P.3d 877, 880 n.4 (App. 2012) (argument to trial court waived when first raised in reply memorandum).

Denial of Fees in Dissolution Action

¶15 Amanda contends the dissolution court abused its discretion by not conducting a separate hearing or taking any evidence to determine the reasonableness of the parties' positions before denying all attorney fees under § 25-324(A). She contends she is entitled to seek, in the dissolution action, fees for both the dissolution issues and for enforcement of the promissory note to the extent those fees are not subject to the consideration of the court in the contract action.

¶16 Section 25-324(A) provides that a dissolution trial court "after considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings, may order a party to pay a reasonable amount to the other party for the costs and expenses" incurred in a dissolution proceeding. Nothing in the statute mandates a hearing when attorney fees are denied, though the party from whom fees are sought may be entitled to a hearing and a showing of "the reasonableness or advisability" of a fee award. *Russo v. Russo*, 80 Ariz. 365, 367-68, 298 P.2d 174, 175 (1956). The court has discretion to deny an award despite findings of both financial disparity and the adoption of reasonable positions. *Myrick v. Maloney*, 235 Ariz. 491, ¶ 9, 333 P.3d 818, 821 (App. 2014).

¶17 Amanda offers no authority requiring an evidentiary hearing, but instead claims the trial court "had no evidence whatsoever" about the reasonableness of the parties' litigation positions. She further claims "counsel informed the judge they purposely would not present evidence on the attorney fees during

AGUAYO v. VALENZUELA
Decision of the Court

the trial . . . but would defer that to a later hearing which [the court] never allowed.”

¶18 Amanda’s only attempt to document any such agreement is her citation to a provision from her closing memorandum to the dissolution court, which merely suggested that the court schedule a separate hearing on the matter. Also, we find unconvincing the argument that the failure of her attorney to present evidence can only be explained by the existence of a stipulation to address the issue of attorney fees in a separate hearing. We conclude Amanda has failed to satisfy her burden of demonstrating the court committed error by not scheduling a hearing. *See Myrick*, 235 Ariz. 491, ¶ 12, 333 P.3d at 822.

¶19 In its ruling, the dissolution court cited Amanda’s unsubstantiated allegation of fraud against Rodolfo, “stalling tactics” that included multiple continuances of the trial totaling over one year, which in turn included multiple continuances sought in part on the basis of needing “property and business valuations” that were “essentially abandoned thereafter and not raised at trial.” We conclude the record indicates a sufficient basis for the trial court’s determination that Amanda adopted unreasonable positions and thereby did not merit a discretionary award of attorney fees.

¶20 We decline to consider Amanda’s argument, raised for the first time in her reply brief, concerning the relative weight to be given to the factors under § 25-324(A). *See State v. Watson*, 198 Ariz. 48, ¶ 4, 6 P.3d 752, 755 (App. 2000) (waiver of argument omitted from opening brief).

Attorney Fees on Appeal

¶21 Both parties have requested an award of attorney fees on appeal. *See Ariz. R. Civ. App. P. 21*. Amanda’s request cites § 25-324(A) and the fees provision in the promissory note. In light of our decision affirming the judgment of the contract court, which awarded Amanda all the fees she incurred in the contract action, the only fees ultimately at issue in this appeal were those incurred while litigating in the dissolution court. Amanda’s request for fees on appeal is thus subject to the discretionary standards of § 25-324(A),

AGUAYO v. VALENZUELA
Decision of the Court

not the fees provision in the promissory note. In our discretion, we decline Amanda's request for the reasons expressed by the court in the dissolution action below.

¶22 Rodolfo requests his fees on appeal pursuant to Ariz. R. Civ. App. P. 25, claiming Amanda's appeal was frivolous. An award on this basis is not appropriate when a case presents legal issues "about which reasonable minds could differ." *City of Phoenix v. Bellamy*, 153 Ariz. 363, 367-68, 736 P.2d 1175, 1179-80 (App. 1987). A finding that an appeal was frivolous requires more than the presentation of "novel theories" or positions that ultimately prove unsuccessful. *Johnson v. Brimlow*, 164 Ariz. 218, 222, 791 P.2d 1101, 1105 (App. 1990). In this case, both parties presented legal positions about which reasonable minds could differ. We thus deny Rodolfo's request for an award of fees on appeal.

Disposition

¶23 For the above reasons, we affirm the decisions of the trial courts in the contract and dissolution actions.