IN THE

# ARIZONA COURT OF APPEALS

DIVISION TWO

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AZSWISS, INCORPORATED, AN ARIZONA CORPORATION,
AS ASSIGNEE FOR BLUE WAVE FOUNDATION
AND SK FINANCE, SA,
*Plaintiff/Appellant*,

*v.*

WHETSTONE PARTNERS, LLP,
AN ARIZONA LIMITED LIABILITY PARTNERSHIP,
*Defendant/Appellee*.

No. 2 CA-CV 2016-0212
Filed May 11, 2017

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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NOT FOR PUBLICATION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).

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Appeal from the Superior Court in Pima County
No. C20144984
The Honorable Sarah R. Simmons, Judge

**AFFIRMED**

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COUNSEL

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*Counsel for Plaintiff/Appellant*

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By Mark Rubin
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**MEMORANDUM DECISION**

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Howard[1] concurred.

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V Á S Q U E Z, Presiding Judge:

**¶1** AZSwiss, Incorporated appeals from the trial court's award of attorney fees to appellee Whetstone Partners, LLP, as a sanction under A.R.S. § 12-349, upon the dismissal of AZSwiss's claims against Whetstone Partners. AZSwiss argues the court erred by failing to properly apportion the attorney fees and by reducing the award to a final judgment. For the following reasons, we affirm.

**Factual and Procedural Background**

**¶2** We view the facts in the light most favorable to affirming the award. *Bennett v. Baxter Grp., Inc.*, 223 Ariz. 414, ¶ 31, 224 P.3d 230, 238 (App. 2010). This lawsuit arose from a real estate purchase agreement involving more than 13,000 acres known as Whetstone Ranch. The purchasers' title to Whetstone Ranch "was vested in numerous limited liability companies and/or partnerships initially formed and overseen by Ernest L. Graves and Urs Schneiter." According to AZSwiss, Schneiter, as agent for various investors, subsequently loaned Graves "individually" a total of $3.2 million for Whetstone Partners to develop the property. AZSwiss, assignee of the lenders' interests in the loans, claimed that the loans were never repaid. Graves and the partnerships holding title to the property separately filed for bankruptcy in July 2012. A portion of the Whetstone Ranch property subsequently was sold at a trustee's

[1]The Hon. Joseph W. Howard, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

sale after Graves allegedly defaulted on a $5 million loan secured by "some or all" of the property. The remainder was sold for approximately $24 million.

**¶3** In September 2014, AZSwiss initiated this action against Ernest and Mary Graves (collectively, Graves), Whetstone Development Company, and Whetstone Partners (the note case). The six-count complaint included a breach-of-contract claim involving two promissory notes evincing the $3.2 million in loans made to Ernest Graves for development of Whetstone Ranch and an unjust-enrichment claim against all three named defendants. AZSwiss also requested a preliminary injunction to enjoin the defendants from "transferring, assigning, spending or otherwise dissipating the proceeds of the sale by being ordered to deposit the sum of $3.2 million into an interest bearing Court controlled account." In its prayer for relief, AZSwiss sought "judgment against Defendants," including attorney fees pursuant to A.R.S. § 12-341.01, which applies to "any contested action arising out of a contract."[2]

**¶4** The following month, the trial court denied AZSwiss's request for a preliminary injunction. Shortly thereafter, AZSwiss initiated a second lawsuit, alleging derivative claims, against Whetstone Partners, Graves, and Kino V, LLC (the derivative case). Based upon the parties' stipulation, the court consolidated the two cases. In January 2015, AZSwiss filed its first amended complaint in the note case. That complaint removed Whetstone Development Company as a defendant but added a count for breach of the implied duty of good faith and fair dealing against the remaining defendants.[3]

**¶5** Nearly a year and a half later, in June 2016, AZSwiss requested leave to file a second amended complaint in the note

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[2]In its answer, Whetstone Partners also requested attorney fees pursuant to §§ 12-341.01 and 12-349.

[3]The trial court awarded Whetstone Development Company $3,552 in attorney fees and costs pursuant to § 12-341.01 upon its dismissal from the case.

case.[4] Among other things, the proposed complaint removed Whetstone Partners as a defendant. AZSwiss argued that the changes were the "result of continuing discovery where additional facts and causes of action ha[d] come to light." Whetstone Partners, along with Graves and Kino V, opposed the request, arguing that AZSwiss had "simply changed the allegations [in the first amended complaint] to keep the litigation going" after realizing its "current theories may not survive a dispositive motion." They similarly maintained that this amendment was AZSwiss's "latest attempt to keep the lawsuit alive."

**¶6** At a hearing later that month, the trial court granted AZSwiss's motion for leave to file a second amended complaint. However, the court also ordered that "Whetstone Partners may file an Affidavit of Attorney's Fees and cost[s] . . . in light of the amended complaint[] dismissing Whetstone Partners as a Defendant." The court directed that the affidavit comply with *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 673 P.2d 927 (App. 1983).

**¶7** In August 2016, Whetstone Partners filed a motion for attorney fees and costs totaling $55,781.32. It pointed out that, "while the promissory note and [derivative] claims are discrete, they share a body of facts, documents and witnesses." It also asserted that all the defendants' attorneys had worked together to minimize duplication throughout both cases and that "[t]here [was] no ready way to segregate fees attributable to Whetstone Partners and the fact that it no longer face[d] a claim on the two promissory notes." Relying on *Hensley v. Eckerhart*, 461 U.S. 424 (1983), Whetstone Partners maintained that an "allocation approach" would result in a reasonable fee. Accordingly, it requested an award of all the fees billed by its own attorney for the litigation of both cases through June 2016. It reasoned if its counsel had "been handling this litigation alone, [rather than combining efforts with the co-defendants' counsel,] his fees would have been substantially higher, and the amount which could be allocated to the promissory note

[4]At the same time, AZSwiss also sought to file a first amended complaint in the derivative case.

part of the case [for Whetstone Partners] would likely" exceed the amount requested.

**¶8** AZSwiss opposed the motion, arguing that "there [was] no legal basis to award attorney's fees" under § 12-341.01 because the "sole claims" against Whetstone Partners did not arise from contract. AZSwiss additionally asserted that, because only one of the six claims in the complaint for the note case involved Whetstone Partners, the court should award "one-sixth of fees." In a separate motion, AZSwiss also objected to Whetstone Partners' proposed form of judgment because it included language pursuant to Rule 54(b), Ariz. R. Civ. P., indicating that it was final. In reply, Whetstone Partners maintained § 12-341.01 provided a basis for the award because it was sued, in part, based on the promissory notes, which also included an attorney-fees provision. As to the form of judgment, Whetstone Partners argued that Rule 54(b) language was appropriate because it was no longer a party to the note case and "there [was] no reason not to resolve the attorney fee issue now, fully and finally."

**¶9** At a hearing in September 2016, the trial court began by stating, "I will tell . . . both of you, right now, I think, under [§] 12-349, I have the authority to issue . . . the award of attorney's fees. I think I probably have the [inherent] power."[5] Then, speaking directly to AZSwiss, the court explained:

> I will tell you, you brought Whetstone Partners in it. You required them to remain in the action for over two years before you changed your theory and dismissed them, and that's why I think they're entitled to attorney's fees. And I think, frankly, they were efficient by sharing work with the

[5] Section 12-349(A) requires a court to "assess reasonable attorney fees" if a party (1) "[b]rings or defends a claim without substantial justification," (2) "[b]rings or defends a claim solely or primarily for delay or harassment," (3) "[u]nreasonably expands or delays the proceeding," or (4) "[e]ngages in abuse of discovery."

> other defendants and that you would have had to be paying more attorney's fees if it weren't for that fact.

After hearing argument, the court granted Whetstone Partners' request and entered a final judgment pursuant to Rule 54(b). This appeal followed.

**Rule 54(b)**

**¶10** AZSwiss argues that the trial court erred by making the award of attorney fees final pursuant to Rule 54(b) and, therefore, appealable.[6] This court "must dismiss an appeal over which we lack jurisdiction." *Baker v. Bradley*, 231 Ariz. 475, ¶ 8, 296 P.3d 1011, 1014-15 (App. 2013). Although we review de novo whether a judgment is final, *Madrid v. Avalon Care Ctr.-Chandler, L.L.C.*, 236 Ariz. 221, ¶ 3, 338 P.3d 328, 330 (App. 2014), trial courts have broad discretion in certifying a judgment under Rule 54(b), and we will not disturb that decision absent an abuse of discretion, *Sw. Gas Corp. v. Irwin ex rel. Cty. of Cochise*, 229 Ariz. 198, ¶ 7, 273 P.3d 650, 653 (App. 2012); *see also Kim v. Mansoori*, 214 Ariz. 457, ¶ 6, 153 P.3d 1086, 1088 (App. 2007).

**¶11** "Generally, this court's jurisdiction is limited to appeals from final judgments which dispose of all claims and parties." *Baker*, 231 Ariz. 475, ¶ 9, 296 P.3d at 1015. However, Rule 54(b) allows a trial court to certify a judgment as final if it disposes of "one or more, but fewer than all, claims or parties" and the court determines "there is no just reason for delay." It "is a compromise between the rule against deciding appeals in a piecemeal fashion and the desirability of having a final judgment in some situations with multiple claims or parties." *Davis v. Cessna Aircraft Corp.*, 168 Ariz. 301, 304, 812 P.2d 1119, 1122 (App. 1991); *see also Cont'l Cas. v. Superior Court*, 130 Ariz. 189, 192, 635 P.2d 174, 177 (1981)

[6]Rule 54 was amended effective January 1, 2017. Ariz. Sup. Ct. Order R-16-0010 (Sept. 2, 2016). Because no changes material to this decision were made, we cite the current version of the rule here.

("Rule 54(b) was primarily designed to promote judicial economy . . . .").

**¶12** "Certification under Rule 54(b), however, 'does not give this court jurisdiction to decide an appeal if the judgment in fact is not final, i.e., did not dispose of at least one separate claim of a multi-claim action.'" *Grand v. Nacchio*, 214 Ariz. 9, ¶ 17, 147 P.3d 763, 770 (App. 2006), *quoting Davis*, 168 Ariz. at 304, 812 P.2d at 1122. "[A] claim is separable from others remaining to be adjudicated when the nature of the claim already determined is such that no appellate court would have to decide the same issues more than once even if there are subsequent appeals." *Id.*, *quoting Cont'l Cas.*, 130 Ariz. at 191, 635 P.2d at 176.

**¶13** These same principles apply in consolidated cases even though consolidation does not "effect a merger of the cases consolidated." *Torosian v. Paulos*, 82 Ariz. 304, 315, 313 P.2d 382, 390 (1957). The trial court is "best able to assess the original purpose of the consolidation and whether an interim appeal would frustrate that purpose." *Huene v. United States*, 743 F.2d 703, 705 (9th Cir. 1984) (judgment that does not dispose of all claims among the parties in a consolidated action not appealable absent Rule 54(b) language). Here, the award of attorney fees and costs fully resolved Whetstone Partners' role and all the claims against it in the note case after Whetstone Partners had been dismissed as a defendant. Although the derivative case was still pending against Whetstone Partners, certifying this particular part of the consolidated case as final would not require this court to decide the issue of attorney fees arising from the note action on appeal twice. *See Grand*, 214 Ariz. 9, ¶ 17, 147 P.3d at 770.

**¶14** Relying on *Southern California Edison Co. v. Peabody Western Coal Co.*, 194 Ariz. 47, ¶ 19, 977 P.2d 769, 775 (1999), AZSwiss nevertheless argues that trial courts should only use Rule 54(b) certification in the rare case where injustice would result from a delayed final judgment. AZSwiss reasons that "there was no injustice to avert by an immediate appeal" in this case because it had removed Whetstone Partners as a defendant in the second amended complaint. But that is precisely why the trial court did not abuse its discretion by including Rule 54(b) certification here.

**¶15** Given that AZSwiss had dismissed Whetstone Partners as a defendant, the only issue remaining to be appealed between these two parties with respect to the claims in the note case was the award of attorney fees. If the trial court had refused to certify the award as final pursuant to Rule 54(b), Whetstone Partners would have been left in appellate limbo for an unforeseeable amount of time. Accordingly, the court did not err, *see Madrid*, 236 Ariz. 221, ¶ 3, 338 P.3d at 330; *Sw. Gas Corp.*, 229 Ariz. 198, ¶ 7, 273 P.3d at 653; *Kim*, 214 Ariz. 457, ¶ 6, 153 P.3d at 1088, and we have jurisdiction over this appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

**Waiver**

**¶16** Turning to the propriety of the attorney-fees award, AZSwiss urges this court to "exercise its discretion and consider . . . [six] arguments that [it] was not offered the opportunity to raise before the trial court." *See Englert v. Carondelet Health Network*, 199 Ariz. 21, ¶ 13, 13 P.3d 763, 768-69 (App. 2000) (this court generally does not consider issues, even constitutional ones, raised on appeal for first time). The arguments include whether the trial court erred in awarding attorney fees under § 12-349 because (1) AZSwiss was "in compliance with the discovery dates in their Scheduling Order," (2) the court had previously found AZSwiss "had not unduly delayed in filing its Motion to Amend the pleadings," (3) due process required the court "to offer [AZSwiss] time to brief its opposition to the . . . sua sponte award," (4) the court lacked the inherent authority to enter the award, (5) "the record lacks substantial evidence to support" the award, and (6) the court failed "to make the findings required by A.R.S. § 12-350."

**¶17** But contrary to its argument on appeal, AZSwiss had the opportunity to raise these issues below. The trial court gave AZSwiss notice at the start of the September 2016 hearing that it was considering an award of attorney fees under § 12-349 and that it had the inherent authority to do so. *See Precision Components, Inc. v. Harrison, Harper, Christian & Dichter, P.C.*, 179 Ariz. 552, 555-56, 880 P.2d 1098, 1101-02 (App. 1993) (proper notice and opportunity to be heard where court explained at hearing why imposing sanctions and permitted appellant to argue against imposition). Then, when given

an opportunity to respond, AZSwiss stated, in part, "Well, I guess the Court's decided, under [§] 12-349, you are going to award the attorney's fees, and if you are, you are." Although it appears AZSwiss largely capitulated, nothing in the record indicates the court prevented it from arguing its position or requesting another hearing or additional time to file a written response or another hearing.[7] *See id.* (appellant had opportunity to be heard where court did not prevent appellant from presenting argument or requesting additional hearing). AZSwiss therefore had the opportunity to raise these arguments but did not do so.[8]

**¶18** Relying on *Evenstad v. State*, 178 Ariz. 578, 875 P.2d 811 (App. 1993), AZSwiss nevertheless maintains that this court should not deem these "legal issues" waived because they "involve the interpretation and application of statutes and rules." *Evenstad* is distinguishable. There, the argument raised for the first time on appeal and which this court addressed was whether one of the parties had absolute immunity. *Evenstad*, 178 Ariz. at 582, 875 P.2d at 815. It was a pure question of law that allowed this court to affirm the trial court's entry of summary judgment and, thus, fully dispose of the action. *Id.* at 587, 875 P.2d at 820; *see also City of Phoenix v. Geyler*, 144 Ariz. 323, 330, 697 P.2d 1073, 1080 (1985) (appellate court obligated "to affirm where any reasonable view of the facts and law might support the judgment of the trial court"). That is not the case here, where AZSwiss raises issues of both law and fact and urges us to reverse the award of attorney fees.

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[7]In its reply to AZSwiss's response to the motion for attorney fees, Whetstone Partners stated it had no objection to AZSwiss filing a sur-reply. However, no sur-reply or request to file a sur-reply appears in the record.

[8]For these reasons, even if we were to reach the merits of the due-process argument, we conclude that AZSwiss was afforded the proper protections. *See Emmett McLoughlin Realty, Inc. v. Pima County*, 212 Ariz. 351, ¶ 17, 132 P.3d 290, 294 (App. 2006) (due process requires adequate notice and opportunity to be heard at meaningful time and in meaningful manner).

**¶19** "Because a trial court and opposing counsel should be afforded the opportunity to correct any asserted defects before error may be raised on appeal, absent extraordinary circumstances, errors not raised in the trial court cannot be raised on appeal." *Trantor v. Fredrikson*, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994). No extraordinary circumstances exist here. We therefore deem these arguments waived and do not address them further. *See Englert*, 199 Ariz. 21, ¶ 13, 13 P.3d at 768-69; *cf. Trantor*, 179 Ariz. at 300-01, 878 P.2d at 658-59 (failure to request findings of fact under § 12-350 waives issue on appeal); *Precision Components*, 179 Ariz. at 555-56, 880 P.2d at 1101-02 (failure to raise due-process argument below waives appellate review).

**Apportionment**

**¶20** We thus turn to the sole argument with respect to attorney fees that AZSwiss raised below and reurges on appeal: Did the trial court err by awarding Whetstone Partners attorney fees "without apportioning the fees to the amount of time spent on only the one [count] asserted against Whetstone Partners" in the note case.[9] Although the applicability of § 12-349 is a question of law that we review de novo, *Bennett*, 223 Ariz. 414, ¶ 26, 224 P.3d at 237, the question presented here turns on the amount of attorney fees, which "is a matter peculiarly within the discretion of the trial court," *Harris v. Reserve Life Ins. Co.*, 158 Ariz. 380, 384, 762 P.2d 1334, 1338 (App.

[9] Although AZSwiss suggests in passing that "fees should [have been] awarded solely for the time Whetstone Partners' counsel spent opposing Defendants' first Motion for Summary Judgment" rather than "from the inception of the lawsuit," AZSwiss does not argue that the trial court failed to apportion the award between the note case and the derivative case. We therefore do not address this issue. *See* Ariz. R. Civ. App. P. 13(a)(7) (argument must contain appellant's contentions as to "each issue presented for review, with supporting reasons for each contention, and with citations of legal authorities and appropriate references to the portions of the record"); *Polanco v. Indus. Comm'n*, 214 Ariz. 489, n.2, 154 P.3d 391, 393 n.2 (App. 2007) (appellant's failure to develop and support argument waives issue on appeal).

1988). We therefore review for an abuse of discretion. *See Hormel v. Maricopa County*, 224 Ariz. 454, ¶ 27, 232 P.3d 768, 775 (App. 2010).

**¶21** AZSwiss maintains the trial court should have awarded Whetston Partners one-sixth of the attorney fees requested because the claim for unjust enrichment was the only claim against Whetstone Partners and it "was separate and distinct from the additional five causes of action against Graves" in the note case.[10] In support of its argument, AZSwiss relies on the following language from *China Doll*: "Where claims could have been litigated separately, fees should not be awarded for those unsuccessful separate and distinct claims which are unrelated to the claim upon which the plaintiff prevailed." 138 Ariz. at 189, 673 P.2d at 933.

**¶22** However, the court in *China Doll* went on to say, "On the other hand, one claim for relief may involve related legal theories. 'Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis.'" *Id.*, *quoting Hensley*, 461 U.S. at 435. The court thus concluded, "[W]here a party has accomplished the result sought in the litigation, fees should be awarded for time spent even on unsuccessful legal theories." *Id.* Here, Whetstone Partners argued that the defendants' attorneys worked together to minimize costs and duplication. Separating only those fees attributable to Whetstone Partners, as opposed to the other defendants and all six claims, undoubtedly would have been difficult and, as Whetstone Partners argued and the trial court found, may have required AZSwiss to pay even more in attorney fees. In addition, through its ultimate dismissal, Whetstone Partners fully prevailed in the note case. We thus fail to see how *China Doll* supports AZSwiss's apportionment theory.

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[10]In response, Whetstone Partners contends that it was also a defendant to the claim for breach of the implied duty of good faith and fair dealing. We agree that the first amended complaint alleged this count against the "Defendants" collectively. However, even if we assume unjust enrichment was the only claim against Whetstone Partners in the note case, we disagree with AZSwiss's apportionment theory for the reasons discussed below.

**¶23** AZSwiss has pointed us to no other authority—and we are aware of none—stating or even suggesting that the award in this case had to be proportional to the number of claims against Whetstone Partners.[11] Such a reduction is arbitrary, and the trial court had the discretion to reject it. *See Harris*, 158 Ariz. at 383, 762 P.2d at 1337 (trial court "has a more immediate grasp of all the facts of the case, an opportunity to see the parties, lawyers and witnesses, and . . . can better assess the impact of what occurs before [it]"), *quoting State v. Chapple*, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n.18 (1983).

**¶24** AZSwiss also challenges the applicability of *Hensley*, which Whetstone Partners relied on below in its motion for attorney fees. In that civil-rights case involving 42 U.S.C. § 1988, the Supreme Court held that "the extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees," explaining that "[w]here a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised." *Hensley*, 461 U.S. at 440. Although the reasoning seems broad enough to apply in this case, the trial court did not indicate it was relying on *Hensley*.

**¶25** Instead, the trial court expressly relied on § 12-349 and its inherent authority to impose sanctions. We agree with that determination. A trial court has the inherent authority to sanction a party, *see Green v. Lisa Frank, Inc.*, 221 Ariz. 138, ¶ 37, 211 P.3d 16, 30 (App. 2009), and § 12-349 provides an additional basis for doing so, *see Phx. Newspapers, Inc. v. Dep't of Corrs.*, 188 Ariz. 237, 244, 934 P.2d 801, 808 (App. 1997) (with § 12-349, legislature intended to reduce frivolous litigation by increasing threat of fee sanctions). Moreover, courts have "wide latitude" when imposing sanctions, *Berry v. 352 E. Virginia, L.L.C.*, 228 Ariz. 9, ¶ 31, 261 P.3d 784, 790 (App. 2011), which is consistent with the broad language of § 12-349, providing

[11]Notably, although only the unjust-enrichment count in the note case was expressly directed at Whetstone Partners, the prayer for relief in the complaint did not limit the request for attorney fees pursuant to § 12-341.01 to a particular count or counts.

for "reasonable" attorney fees, *see Harris*, 158 Ariz. at 384, 762 P.2d at 1338 ("[W]hat is reasonable varies with the circumstances . . . ."); *cf. Democratic Party of Pima Cty. v. Ford*, 228 Ariz. 545, ¶ 9, 269 P.3d 721, 724 (App. 2012) (statute's broad language provides court with wide latitude in awarding attorney fees).

**¶26** AZSwiss initiated this complex, multi-million-dollar lawsuit by filing the note case in September 2014. Shortly after the trial court denied its request for a preliminary injunction, AZSwiss filed the derivative case. A few months later, AZSwiss amended the complaint in the note case, removing one defendant and adding another count. In June 2016, after twenty-one months of litigation, AZSwiss moved to amend the complaint in the note case again, this time to remove Whetstone Partners as a defendant, something it characterized as a "housekeeping matter." When Whetstone Partners filed its motion for attorney fees, counsel for Graves and Kino V had billed over $250,000 in fees and costs combined. Accordingly, we cannot say the court abused its discretion. *See Harris*, 158 Ariz. at 384, 762 P.2d at 1338.

## Disposition

**¶27** For the foregoing reasons, we affirm. Whetstone Partners has requested its attorney fees on appeal pursuant to § 12-341.01. Because we agree with Whetstone Partners that "the unjust enrichment claim did arise out of contract," in our discretion we grant its request for reasonable attorney fees and costs upon compliance with Rule 21, Ariz. R. Civ. App. P. *See Schwab Sales, Inc. v. GN Constr. Co.*, 196 Ariz. 33, ¶¶ 12-13, 992 P.2d 1128, 1132 (App. 1998) (unjust-enrichment claim arose from contract, even where one litigant not party thereto).