IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

IN RE THE ESTATE OF SUSAN RUTH CHALKER, DECEASED.

LEONARD KARP AND ANNETTE EVERLOVE,
Petitioners/Appellants,

v.

DAVID CHALKER, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SUSAN RUTH CHALKER,
Respondent/Appellee.

No. 2 CA-CV 2020-0013
Filed September 23, 2020

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NOT FOR PUBLICATION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
No. PB20050931
The Honorable Kenneth Lee, Judge

VACATED AND REMANDED

COUNSEL

Waterfall, Economidis, Caldwell, Hanshaw & Villamana P.C., Tucson
By Corey B. Larson
Counsel for Petitioners/Appellants

Rusing Lopez & Lizardi P.L.L.C., Tucson
By Michael J. Rusing and Rebecca K. O'Brien
Counsel for Respondent/Appellee

MEMORANDUM DECISION

Presiding Judge Eppich authored the decision of the Court in which Judge Espinosa and Judge Eckerstrom concurred.

E P P I C H, Presiding Judge:

¶1 Leonard Karp and Annette Everlove appeal the trial court's judgment amending an award of funds from the estate of Susan Chalker for legal services they provided Chalker in her divorce. They contend that the court miscalculated the award, in part because it failed to adhere to this court's instructions to amend the award, issued in our previous opinion in the matter. *See In re Estate of Chalker*, 245 Ariz. 410, ¶¶ 20-21 (App. 2018). They maintain that the court (1) failed to properly award prejudgment interest as mandated by our opinion; (2) failed to reexamine the propriety of an offsetting attorney fee award to the estate in light of that mandated change; (3) applied an incorrect post-judgment interest rate; (4) misapplied the parties' stipulation regarding prejudgment interest on costs; and (5) misapplied the estate's partial payment to principal rather than interest. Because we conclude that the trial court miscalculated prejudgment interest, we vacate the judgment and remand for entry of a corrected judgment.

Factual and Procedural Background

¶2 Karp and Everlove represented Susan Chalker in her divorce from Robert Catz. The dissolution decree, entered in 1995, awarded Chalker, among other things, three Fidelity investment accounts held by Catz at the time Chalker filed her petition. However, Fidelity declined to transfer the accounts to Chalker because Catz had transferred them to his sons before the decree was entered, and Catz and his sons had filed several lawsuits in federal district court, challenging the validity of the decree and seeking to retain ownership and control of the accounts.

¶3 Protracted litigation continued, and by early 1999, Chalker owed Karp and Everlove approximately $273,000 in legal fees. She agreed to an amendment of her fee agreement with Karp and Everlove to provide that if the Fidelity accounts were recovered, she would pay them half of the recovered funds to satisfy the fee obligation.

¶4 The federal litigation over the Fidelity accounts still had not been resolved when Chalker died in 2005. Karp and Everlove filed claims in superior court against her estate for half of any funds recovered from the Fidelity accounts, plus costs. The estate indicated it intended to dispute Karp's and Everlove's claims, but the parties agreed not to litigate the dispute until the Catzes' federal claims to the accounts were resolved.

¶5 The last federal claim was dismissed in 2013. Fidelity finally transferred the accounts to the estate in 2014, and the estate liquidated them, yielding over $1.2 million. Karp and Everlove then pursued their claims against the estate for half of those funds in Pima County Superior Court. After a bench trial, the court ruled in March 2016 that Karp and Everlove were not entitled to those funds because they themselves had not recovered the Fidelity accounts. The court also found that the fee agreement providing for payment from the Fidelity accounts superseded Karp and Everlove's original fee agreement with Chalker, but ruled that they were nonetheless entitled to the reasonable value of their legal services based on quantum meruit. The court ruled that Karp and Everlove were not entitled to prejudgment interest on the quantum meruit awards. In December 2016, the court entered final judgment, awarding Karp $94,463 and Everlove $101,608 in attorney fees, and Karp and Everlove $42,438.59 in costs and $35,545.44 in prejudgment interest on those costs, plus $1,383.30 in taxable costs. The court offset that amount by $42,438.59, the principal amount of costs, which the estate had already paid to Karp and Everlove. And because the court determined that the estate was the prevailing party in the dispute over the claims, it awarded the estate $190,000 in attorney fees and offset that amount against Karp's and Everlove's awards, yielding a final judgment of $42,999.74.

¶6 Karp and Everlove appealed and the estate cross-appealed the December 2016 judgment. In this court's September 2018 opinion, we concluded that the trial court had erred in failing to add prejudgment interest to Karp's and Everlove's quantum meruit awards, stating that their claims for fees "began bearing interest as of February 2, 2006." *Chalker*, 245 Ariz. 410, ¶ 20. We remanded this matter to the trial court "for proceedings consistent with [our] opinion" "on the limited issue of interest on [Karp's and Everlove's] awards in quantum meruit." *Id.* ¶¶ 20-21. We contemporaneously issued a memorandum decision affirming the trial court on other issues. *See In re Estate of Chalker*, No. 1 CA-CV 17-0109, ¶¶ 1, 57 (Ariz. App. Sept. 20, 2018) (mem. decision).

¶7 On remand, the trial court found that the $190,000 attorney fee award to the estate "was not an issue on appeal" and left it undisturbed.

It altered the December 2016 judgment by awarding ten percent prejudgment interest, beginning February 2, 2006, on $6,071—the quantum meruit awards minus the $190,000 fee award to the estate. It also added $372 in taxable costs to the previous judgment, and entered final judgment of $51,668.78. Karp and Everlove filed a motion for a new trial, which was denied. They timely appealed.

Jurisdiction

¶8 The estate argues that we lack jurisdiction over Karp and Everlove's appeal, maintaining that the trial court's judgment on remand was pursuant to our specific mandate in the previous appeal, and contending that Karp and Everlove's only avenue of obtaining appellate review in that circumstance was by special action, not direct appeal. "[T]he appropriate method of seeking review of a trial court's judgment on remand entered pursuant to specific directions of an appellate court is through special action." *Scates v. Ariz. Corp. Comm'n*, 124 Ariz. 73, 76 (App. 1979). But this limitation on review applies only if completing the mandated act is a "mere ministerial act." *See id.* at 75. For example in *Scates*, we dismissed an appeal from an order entered upon remand by this court setting aside the initial judgment, following a specific direction from this court to do so in the previous appeal. *Id.* at 75-76.

¶9 Here, this court's instruction contemplated "proceedings" on remand on the issue of prejudgment interest on the quantum meruit awards, suggesting further litigation to determine the amount, as opposed to a ministerial act of calculating the amount of judgment from settled facts and figures. *See Chalker*, 245 Ariz. 410, ¶¶ 20-21. Indeed, on remand the trial court did not—and could not—simply calculate the amended judgment from facts and figures supplied in our opinion. For example, we did not determine the proper rate of prejudgment interest, and on remand the trial court appropriately considered arguments from the parties about the proper interest rate to apply.

¶10 We conclude that our instructions in our previous opinion were not so specific as to render compliance with our mandate merely a ministerial act. We therefore have jurisdiction under A.R.S. § 12-2101(A)(1).

Prejudgment Interest

¶11 Karp and Everlove contend that the trial court failed to properly award them prejudgment interest on the quantum meruit awards as mandated by our opinion. "On remand, a trial court must 'strictly follow' the mandate of an appellate decision." *Bogard v. Cannon & Wendt*

Elec. Co., 221 Ariz. 325, ¶ 30 (App. 2009). "We review de novo whether the trial court followed the appellate court's mandate." *Id.* We also review de novo the application of statutory interest to claims. *See Ariz. State Univ. Bd. of Regents v. Ariz. State Ret. Sys.*, 242 Ariz. 387, ¶¶ 5-7 (App. 2017) (hereafter *ASU Bd. of Regents*).

¶12 Consistent with our directions, the trial court awarded prejudgment interest commencing February 2, 2006. But it did not assess interest on the full amount of the quantum meruit awards; instead, it offset the quantum meruit awards by the $190,000 fee award to the estate, then applied interest to the difference. This calculation effectively awarded the estate prejudgment interest from February 2, 2006 on the $190,000 award, without any basis for such an award. As a result, the calculation erroneously deprived Karp and Everlove of most of the interest that had accrued on their claims. To properly calculate the judgment, the court should have applied prejudgment interest to the quantum meruit awards before subtracting the $190,000 awarded to the estate.

¶13 The estate maintains that the trial court erred in applying ten percent prejudgment interest, arguing that a lesser rate should have been applied. It asks that if we modify the judgment we correct this purported error. Because the estate did not cross-appeal the court's judgment, however, we decline to address this issue. *See* Ariz. R. Civ. App. P. 13(b)(2) ("An appellate court . . . may modify a judgment to enlarge the rights of the appellee or reduce the rights of the appellant only if the appellee has filed a notice of cross-appeal."). For the same reason, we do not address the estate's argument that prejudgment interest on the quantum meruit awards began to accrue in 2015, not 2006, a claim which in any event would seem to conflict with our previous holding that prejudgment interest began to accrue on February 2, 2006. *See Chalker*, 245 Ariz. 410, ¶ 20.

Award of Fees to the Estate

¶14 Karp and Everlove argue that the trial court erred in finding that our opinion did not require reexamination of the attorney fee award to the estate. They contend that they challenged the fee award to the estate in the previous appeal, and that we left the issue open by not squarely addressing it in our opinion or memorandum decision. They maintain that the trial court erroneously accepted the estate's position that they had failed to challenge the fee award in the previous appeal, and improperly applied the "law of the case" doctrine by concluding that it lacked authority to revisit the fee award because we had not explicitly overturned it. Finally, they contend that if the court had reexamined which party was successful

in light of the proper amendments to the judgment, it would have been compelled to conclude that they, not the estate, were the successful party, and accordingly would have omitted the fee award to the estate and included fee awards to them.

¶15 Karp and Everlove's opening brief in the previous appeal briefly mentioned the fee award to the estate in a single paragraph in its statement of facts. But although it framed the facts in argumentative terms—stating that if the court had included interest on its award as required, they "would have beaten their prior written offers of settlement," there is no explicit claim that this rendered the award erroneous. The issue statements and arguments in that brief lack any challenge to the award of fees to the estate, much less supporting citation to authority. Nowhere in the brief do Karp and Everlove request that the estate's fee award be overturned.

¶16 "Issues not clearly raised and argued in a party's appellate brief constitute waiver of error on review." *Jones v. Burk*, 164 Ariz. 595, 597 (App. 1990); *see also Sholes v. Fernando*, 228 Ariz. 455, n.1 (App. 2011) (issues mentioned but not sufficiently argued waived on appeal). Generally, we "will not consider on second appeal a matter which could and should have been raised on first appeal." *Thompson v. Better-Bilt Aluminum Prod. Co.*, 187 Ariz. 121, 126 (App. 1996). Here, any issue over the propriety of the fee award to the estate should have been raised in the previous appeal. Karp and Everlove's failure to clearly do so waived the issue. We therefore decline to consider the issue here.

Post-Judgment Interest Rate

¶17 Karp and Everlove contend that the trial court erred in applying a lower post-judgment interest rate than the prejudgment interest rate because Chalker had agreed to pay ten percent interest on overdue unpaid amounts. Alternatively, they argue that even if that contract rate does not apply, they were entitled to ten percent post-judgment interest under A.R.S. § 44-1201(A). We again review application of statutory interest de novo. *See ASU Bd. of Regents*, 242 Ariz. 387, ¶¶ 5-7.

¶18 Under § 44-1201(B), the default interest rate on "any judgment" is "the lesser of ten per cent per annum or . . . one per cent plus the prime rate," unless otherwise "specifically provided for in [a] statute" or "a different rate is contracted for in writing." If a judgment is "based on a written agreement evidencing a loan, indebtedness or obligation that

bears a [lawful] rate of interest," it must apply that rate of interest. § 44-1201(A).

¶19 The provisions in § 44-1201(A) and (B) that apply a contract interest rate do not apply here. In its March 2016 ruling, the trial court found that Chalker's original agreement to pay Karp and Everlove ten percent interest on overdue amounts had been superseded by the parties' later agreement regarding the Fidelity accounts. The court's quantum meruit awards were not based on that superseded agreement; those awards were based on the court's determination of the reasonable value of their legal services. Because the awards were not based on the contract that provided the claimed interest rate, the contract does not dictate the interest rate.

¶20 Karp and Everlove contend that even if the contract rate does not apply, the ten percent statutory rate for "any loan, indebtedness or other obligation" under § 44-1201(A) applies here because the quantum meruit awards are each an "indebtedness." "'Quantum meruit' is the measure of damages imposed when a party prevails on the equitable claim of unjust enrichment." *W. Corr. Grp., Inc. v. Tierney*, 208 Ariz. 583, ¶ 27 (App. 2004). Quantum meruit is available when "services are performed under an unenforceable contract or when they are rendered in the absence of a contract." *Id.* Put differently, quantum meruit awards arise in circumstances where a party performs services for another but there is no existing obligation for the other party to pay. Whatever an indebtedness may be, it is clearly a form of obligation. *See* § 44-1201(A) (providing for interest on a "loan, indebtedness or *other* obligation" (emphasis added)). Thus, a judgment based on a quantum meruit award is not based on an indebtedness.

¶21 Consequently, Karp and Everlove are not entitled to ten percent post-judgment interest under § 44-1201(A). Although Karp and Everlove argue otherwise by pointing out that "the literal definition of quantum meruit is 'as much as he has deserved,'" they do not explain why they deserve ten percent interest. Indeed, "[r]ecovery under *quantum meruit* is based on the value of services rendered," *Landi v. Arkules*, 172 Ariz. 126, 135 (App. 1992), not necessarily what the service provider has bargained for. The purpose of the quantum meruit awards—to prevent Chalker's estate from being unjustly enriched by the services Karp and Everlove had provided—was satisfied by the trial court's awards based on its determination of the reasonable value of Karp's and Everlove's services. No provision for post-judgment interest beyond what Karp and Everlove

would ordinarily be lawfully entitled to is necessary to prevent the estate from being unjustly enriched.

¶22 Because Karp and Everlove are not entitled to ten percent post-judgment interest at their contract rate or under § 44-1201(A), the default interest rate for judgments under § 44-1201(B) applies. The post-judgment interest rate is therefore the prime rate as defined in § 44-1201(B) plus one percent.

Post-Judgment Interest on Costs; Application of Partial Payments

¶23 In 2016, after the trial court's initial ruling, the parties stipulated to amend the ruling to reflect that "no prejudgment [interest] accrues [on costs] after" May 26, 2016, the date the estate paid in full the principal amount of costs the court had awarded to Karp and Everlove. The trial court amended the award accordingly, and its December 2016 judgment awarded $35,545.44 in prejudgment interest on the costs. On appeal of that judgment, we did not alter, or instruct the trial court to alter, the judgment with respect to that amount.

¶24 On remand, the trial court did not alter that amount. It awarded ten percent prejudgment interest on the $6,071 attorney fee award from February 2, 2006, to October 4, 2019, the date of judgment on remand, and imposed a 6.25 percent post-judgment interest rate on the entire judgment.

¶25 Karp and Everlove contend that on remand, the trial court misapplied the stipulation, and that post-judgment interest on the cost award should have begun to accrue again on September 8, 2016, the date of the trial court's initial judgment in the matter. But the trial court's judgment on remand correctly follows the stipulation by not awarding prejudgment interest on the costs beyond May 26, 2016; Karp and Everlove offer no authority for their implicit position that post-judgment interest on that award must begin on the date of the initial judgment—a position that seems far from obvious in the circumstances here, where that initial judgment was erroneous and has since been substantially amended in subsequent judgments. Moreover, we note that the previously appealed December 2016 judgment does not impose interest on costs after September 8, 2016. Karp and Everlove offer no explanation why this issue could not have been raised in the previous appeal of that judgment, or how it was not resolved by our previous decisions limiting the scope of remaining issues on remand. The issue therefore was either waived in or resolved by the previous appeal, *see Thompson*, 187 Ariz. at 126; *Bogard*, 221 Ariz. 325, ¶ 30,

or it is waived here for failure to sufficiently support the argument, *see Sholes*, 228 Ariz. 455, n.1. We therefore do not disturb the trial court's implicit decision to end prejudgment interest and begin post-judgment interest upon entry of the corrected judgment.

¶26 Similarly, we decline to address Karp and Everlove's contention that the trial court improperly applied the estate's costs payment to principal rather than interest. The previously appealed December 2016 judgment did not apply the partial payment in the way that Karp and Everlove now advocate; it simply subtracted the payment from the total amount of the award. This therefore is also a matter that could have been raised and resolved in the previous appeal, but was not; nor does it fall within the scope of issues to be resolved on remand. It is therefore waived and precluded. *See Thompson*, 187 Ariz. at 126; *Bogard*, 221 Ariz. 325, ¶ 30.

Disposition

¶27 We vacate the trial court's October 4, 2019 judgment, and remand for entry of judgment consistent with this decision and our previous opinion in the matter. Specifically, the judgment is to recalculate the attorney fee portion of the award as follows:

> Attorney fees of $196,071, plus ten percent on that amount accruing from February 2, 2006, to present in the sum of $_____, minus the $190,000 attorney fee award to the estate.

The judgment should include $35,545.44 in prejudgment interest on costs and $1,755 in subsequent taxable costs, as reflected in the October 4, 2019 judgment. Any additional recoverable costs arising since that judgment may be added. The total amount of judgment should be recalculated accordingly. The post-judgment interest rate may be adjusted if necessary to reflect the correct rate under § 44-1201(B) on the date judgment is entered.