

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

SK BUILDERS, INC., AN ARIZONA CORPORATION,
Plaintiff/Appellant,

v.

MICHAEL SMITH AND SANDI SMITH, HUSBAND AND WIFE,
Defendants/Appellees.

No. 2 CA-CV 2020-0029
Filed December 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NOT FOR PUBLICATION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. C20130545
The Honorable D. Douglas Metcalf, Judge

AFFIRMED

COUNSEL

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

The Law Office of Charles M. Giles, Tucson
By Charles M. Giles
Counsel for Defendants/Appellees

MEMORANDUM DECISION

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

ECKERSTROM, Judge:

¶1 SK Builders appeals from the trial court’s award of attorney fees in favor of Michael Smith and Sandi Smith in an underlying contract dispute. Specifically, SK Builders argues the court erred in ordering it to pay the Smiths’ attorney fees when the terms of a May 2017 “settlement agreement expressly settled and released any such claim for fees.” In the alternative, SK Builders challenges the amount of fees awarded. For the reasons that follow, we affirm.

Factual and Procedural Background

¶2 The underlying cause of action began in 2013 when SK Builders sued the Smiths to collect outstanding payment on a contract for a residential construction. *SK Builders, Inc. v. Smith*, 246 Ariz. 196, ¶¶ 2, 7 (App. 2019) [hereinafter *SK Builders I*], *superseded by statute*, 2019 Ariz. Sess. Laws, ch. 145, § 43, *review denied*, CV-19-0070-PR (Sep. 24, 2019). The Smiths counterclaimed and filed a third-party complaint against SK’s owner as well as various subcontractor, architect, and project engineer defendants. *Id.* ¶ 7. The trial court entered summary judgment against the Smiths on their claims against one concrete company subcontractor. *Id.* ¶ 8. Before trial, the remaining parties settled all claims except for SK Builders’ claims against the Smiths. *Id.* ¶ 7. After a four-day bench trial, the court ruled against the Smiths on one of those claims—SK Builders’ claim that the Smiths had violated the Prompt Pay Act, A.R.S. §§ 32-1181 to 32-1188.¹ *Id.* ¶ 9. It ruled against SK Builders on its breach of contract claim. *Id.* The court also awarded SK Builders \$60,000 in attorney fees, an amount that was later reduced to \$50,000. *Id.*

¶3 On appeal, this court reversed the trial court’s ruling on the Prompt Pay Act claim, resulting in SK Builders not prevailing on any claim. *Id.* ¶¶ 19-20. Thus, we reversed the award of attorney fees in favor of SK Builders. *Id.* ¶ 27. We remanded for the trial court to determine the

¹Former A.R.S. §§ 32-1129 to 32-1129.07.

SK BUILDERS v. SMITH
Decision of the Court

“reasonable attorney fees” due the Smiths, as provided by A.R.S. § 12-341.01(A) and the Prompt Pay Act.² *Id.* ¶¶ 26-27.

¶4 On remand, the trial court held that SK Builders had waived any argument that a prior settlement agreement barred the Smiths from collecting fees. Specifically, the court reasoned that SK Builders had waived that argument by not raising it during the Smiths’ initial appeal. It also held that, even were the argument not waived, the settlement agreement would not bar the Smiths’ recovery of fees because it expressly excluded “the Smiths[’] ‘defenses’ in this case,” namely “that they did not breach either the Prompt Pay Act or their contract with SK Builders.”

¶5 The trial court then awarded the Smiths \$363,367.60 in attorney fees. This amount reflected a twenty percent reduction from the requested \$454,209.50 to reflect that the Smiths’ attorney and his assistant spent some time – which he “could have more particularly set out in his billing records” – asserting losing claims against third parties related to a single subcontractor in the underlying litigation. SK Builders now appeals from that fees determination. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Discussion

¶6 SK Builders argues the trial court erred in finding it had waived the argument that an earlier settlement agreement resolving the Smiths’ counterclaims prevented the Smiths from collecting attorney fees. But SK Builders relinquished its opportunity to assert this argument when it failed to do so after the Smiths requested fees during the first appeal to this court.³ Generally, “we will not consider on second appeal a matter

²Before our supreme court ruled on SK Builders’ petition for review, the Arizona legislature modified the Prompt Pay Act, expressly finding this court’s decision was inconsistent with the intent underlying the statute. *See* 2019 Ariz. Sess. Laws, ch. 145, §§ 43, 49 (Apr. 29, 2019). However, our supreme court declined to review this court’s decision; thus, our opinion in *SK Builders I* stands. *See Tucson Gas & Elec. Co. v. Superior Court*, 9 Ariz. App. 210, 212 (1969) (“Generally, the final decision of an intermediate appellate court, when not reviewed or otherwise set aside by an appellate court of higher authority, has the same finality as a decision of the highest court.”).

³We take judicial notice of the record in the first appeal. *See In re Sabino R.*, 198 Ariz. 424, ¶ 4 (App. 2000) (trial court may judicially notice its

SK BUILDERS v. SMITH
Decision of the Court

which could and should have been raised on first appeal.” *Thompson v. Better-Bilt Aluminum Prods. Co.*, 187 Ariz. 121, 126 (App. 1996). Appellate courts typically apply the waiver doctrine to preclude a party from raising an argument on appeal for the first time, having failed to raise it before the trial court. *See, e.g., Trantor v. Fredrikson*, 179 Ariz. 299, 300-01 (1994). This policy, which avoids piecemeal legislation, applies just as forcefully in the present context. *See Hurst v. Hurst*, 1 Ariz. App. 227, 229 (1965); *see also PLM Tax Certificate Program, 1991-92, L.P. v. Schweikert*, 216 Ariz. 47, ¶ 16 (App. 2007) (denying consideration of issue that party “could have raised” as appellee on first appeal, “but apparently did not do so”).

¶7 SK Builders had an opportunity to raise its argument regarding the prior settlement agreement during the pendency of the first appeal, either in its answering brief as an objection to the Smiths’ original request for fees, in its motion for reconsideration, or in its objection to the Smiths’ request for fees on appeal, as provided by Rule 21(b)(4), Ariz. R. Civ. App. P. The proper time to raise this issue would have been during the first appeal, particularly when it became clear that the trial court would be required to consider the issue of fees due the Smiths.

¶8 Further, as the trial court reasoned, our mandate directed it only to “conduct such proceedings as required to comply with” our order to “determine the Smiths’ reasonable attorney fees at trial,” *SK Builders I*, 246 Ariz. 196, ¶ 32. “[T]he trial court is absolutely bound by the decision and mandate of an appellate court and . . . it is not within the jurisdiction of the trial court to review the appellate court’s determination.” *Toorea v. Superior Court*, 101 Ariz. 295, 297 (1966). For all of these reasons, we agree with the trial court that SK Builders waived its argument that a settlement agreement precluded the Smiths’ recovery of fees by failing to timely raise the issue during the first appeal.

¶9 And even had SK Builders not waived its argument, we agree with the trial court that the settlement agreement did not bar the Smiths from collecting fees. We review *de novo* issues of contract interpretation. *Miller v. Hehlen*, 209 Ariz. 462, ¶ 5 (App. 2005). We read a settlement agreement as a whole, seeking to “harmonize all parts of the contract, and conflicting provisions will be reconciled by a reasonable interpretation in

own files and appellate court may take judicial notice of “anything of which the trial court could take notice”).

SK BUILDERS v. SMITH
Decision of the Court

view of the entire instrument.” *Brisco v. Meritplan Ins. Co.*, 132 Ariz. 72, 75 (App. 1982).

¶10 The agreement at issue here purported to “resolve the Lawsuit and any and all of the issues related in any way to the [house] . . . except for the direct claims of SK Builders, Inc. against Michael and Sandi Smith for payment and the Smiths’ Defenses to those claims.” With regard to attorney fees, the agreement released SK Builders from claims related to “the Lawsuit,” the house, and any related matter, “including claims for attorneys’ fees and costs.” But it went on in the next paragraph to provide that the Smiths

release and discharge all claims of every kind whatsoever including without limitation claims for . . . attorneys’ fees . . . which [the Smiths] . . . asserted or could assert against SK Builders . . . based upon, arising out of, or related to the Dispute and the Property, except to the extent, as permitted by the Court, the Smiths may be permitted to assert defenses to claims asserted by SK Builders . . . which remain pending in Pima County Case # C20130545.

¶11 When “the terms of a contract are clear and unambiguous,” we give effect to the contract “as written.” *Skydive Ariz., Inc. v. Hogue*, 238 Ariz. 357, ¶ 40 (App. 2015). Here, the settlement agreement begins by expressly removing “the direct claims of SK Builders” and the Smiths’ defenses to those claims from the stated purpose of the settlement. The paragraph releasing the Smiths’ claims against SK Builders does not conflict with that stated purpose. Rather, it releases SK Builders from claims the Smiths might bring against it, including attorney fees, *except* to the extent the Smiths could assert defenses to SK Builders’ original claims against them. Interpreting the paragraph in this manner comports with the intention expressed in the agreement’s opening paragraph to resolve claims *other than* the claims at issue here.

¶12 We also disagree with SK Builders that this interpretation “makes the release of a claim for fees meaningless.” At a minimum, the language releasing SK Builders from attorney fees prevented the Smiths from seeking future fees stemming from new problems that may arise from the home. As the trial court reasoned, the settlement agreement expressly “carved out the Smiths’ right to recover their attorneys’ fees as the successful party” on SK Builders’ original claims. The prevailing parties in

SK BUILDERS v. SMITH
Decision of the Court

Prompt Pay Act actions are entitled to reasonable fees as a matter of law. § 32-1182(S). Likewise, a prevailing party may recover fees incurred in an action alleging breach of contract. § 12-341.01(A). The effect of excluding these causes of action from the settlement agreement and allowing them to proceed to trial was that the Smiths retained their full entitlement under the law to defend against those claims, including the right to seek attorney fees when they prevailed in their defense.⁴

Amount of Fees Awarded

¶13 SK Builders also argues the trial court erred in concluding the Smiths adequately supported their requested attorney fees. Specifically, SK Builders claims the Smiths employed “impermissible block billing” and failed to differentiate the fees going toward their defense of SK Builders’ claims from those going toward the Smiths’ counterclaims against other parties involved in the litigation.

¶14 We review for abuse of discretion a trial court’s ruling on attorney fees. *See Motzer v. Escalante*, 228 Ariz. 295, ¶ 4 (App. 2011). A trial court “has broad discretion to award attorneys’ fees under A.R.S. § 12-341.01.” *Robert E. Mann Constr. Co. v. Liebert Corp.*, 204 Ariz. 129, ¶ 13 (App. 2003).

¶15 Section 12-341.01 provides that a trial court may award reasonable attorney fees to a successful party in a “contested action arising out of a contract” in order to “mitigate the burden of the expense of litigation to establish a just claim or a just defense.” *See also Rudinsky v. Harris*, 231 Ariz. 95, ¶ 26 (App. 2012). Under § 12-341.01, a court may properly award fees collected in pursuit of claims that do not provide for attorney fees, so long as those claims are “interwoven” with claims arising out of a contract. *See ML Servicing Co. v. Coles*, 235 Ariz. 562, ¶ 30 (App. 2014) (court may award fees “even on contract claims that are interwoven with tort claims”).

¶16 To establish the reasonableness of an attorney fee request, a prevailing party must submit a detailed time entry and a supporting affidavit consistent with *Schweiger v. China Doll Rest., Inc.*, 138 Ariz. 183, 187-89 (App. 1983). Once a party seeking fees has complied with the *China*

⁴Because we agree with the trial court that the settlement agreement unambiguously carves out the claims at issue here, we disagree with SK Builders’ argument that the Smiths needed to offer evidence to support that interpretation.

SK BUILDERS v. SMITH
Decision of the Court

Doll requirements, the burden shifts to the party opposing fees to demonstrate that “particular entries were inappropriate or unreasonable.” *Rudinsky*, 231 Ariz. 95, ¶ 33.

¶17 Here, the Smiths provided a detailed time entry and a supporting affidavit. As the trial court noted, it was unable to “sort out which tasks of the attorney were devoted to which claims in the litigation” because the log did not particularize which hours were devoted to specific claims or opposing parties. However, as the court reasoned, “all of the claims” in the litigation, including the Smiths’ compulsory counterclaim and its third-party claims, “relate[d] to determining who was at fault for the defects in the construction” of the house, the “central issue in the litigation.” This central issue arose out of SK Builders’ original claims of breach of contract and violation of the Prompt Pay Act, another claim sounding in contract. See § 13-1182(A) (setting forth requirements for payments made toward satisfying a construction contract). In other words, the Smiths’ counter- and third-party claims were interwoven with the foundational contract claims SK Builders brought against the Smiths. Thus, the court did not abuse its discretion when it awarded the Smiths their fees for the entirety of the litigation.

¶18 SK Builders complains that the Smiths’ fee request was somehow unreasonable because the trial court noted the time entries were not particularized. However, as we discuss above, these claims were so interwoven that it was not error for the court to award them in full. And, in any event, the court reduced the fee award by twenty percent to reflect the fact that the attorney’s affidavit and time sheet did not particularize which hours were devoted to which claims, including those on which the Smiths did not prevail.⁵ We find no abuse of discretion in the trial court’s attorney fee award.

⁵SK Builders also complains the fee award was unreasonable because the Smiths “were already compensated for their fee claim against” the other parties in the litigation, and thus the fee award effectively gave the Smiths “double recovery.” But SK Builders does not point to anything in the record to support its claim that the other settlement agreements contained attorney fees. Its citations to various stipulations to dismiss third parties, each of which states that each party shall bear its own costs and fees, does not support such a claim.

SK BUILDERS v. SMITH
Decision of the Court

Attorney Fees and Costs

¶19 Both parties have requested their attorney fees on appeal. The Smiths request attorney fees pursuant to Rule 21(a), Ariz. R. Civ. App. P., A.R.S. §§ 32-1182(S),⁶ and 12-341.01. Because they are the prevailing party, we award the Smiths their reasonable attorney fees on appeal, as required by § 32-1182(S). The Smiths are also entitled to recover their costs on appeal under A.R.S. § 12-341, upon their compliance with Rule 21(b). We deny SK Builders' request.

Disposition

¶20 For the foregoing reasons, we affirm the trial court's ruling.

⁶Formerly A.R.S. § 32-1129.01(S).