IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

PULICE CONSTRUCTION, INC.,
AN ARIZONA CORPORATION,
Plaintiff/Appellant/Cross-Appellee,

v.

CITY OF TUCSON,
Defendant/Appellee/Cross-Appellant.

No. 2 CA-CV 2020-0165
Filed October 19, 2021

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NOT FOR PUBLICATION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. C20194263
The Honorable Brenden J. Griffin, Judge

AFFIRMED

COUNSEL

FR Law Group PLLC, Phoenix
By Troy B. Froderman, Scott C. Ryan, and John F. Barwell
Counsel for Plaintiff/Appellant/Cross-Appellee

Waterfall, Economidis, Caldwell, Hanshaw & Villamana P.C., Tucson
By Corey B. Larson and Sabrina Lochner
Counsel for Defendant/Appellee/Cross-Appellant

MEMORANDUM DECISION

Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Espinosa and Vice Chief Judge Staring concurred.

E C K E R S T R O M, Judge:

¶1 Pulice Construction appeals from the trial court's grant of summary judgment in favor of the City of Tucson in a dispute arising from a construction contract to build two bridges and accompanying road improvements. Pulice argues the court erred in determining it had failed to give contractually required notice or to file a timely claim seeking additional compensation for alleged costs due to construction delays. According to Pulice, those costs resulted from unanticipated rail traffic on the railroad crossing underneath the construction site. The City has cross-appealed, asserting the court erroneously declined to award the City its costs and attorney fees. As we explain below, we affirm both of the challenged rulings.

Factual and Procedural Background

¶2 We view the evidence and all reasonable inferences in the light most favorable to the party against whom judgment was entered. *Cincinnati Indem. Co. v. Sw. Line Constructors Joint Apprenticeship & Training Program*, 244 Ariz. 546, ¶ 5 (App. 2018). In January 2017, after a public bidding process, the City awarded Pulice a contract to demolish a bridge and replace it with two new bridges over a length of Union Pacific Railroad (UPR) tracks, as well as to complete accompanying road improvements. At $11,347,444.75, Pulice's was the lowest bid for the project. The parties entered into a contract containing terms of the 2015 Pima Association of Governments Standard Specifications (PAG Specifications).

¶3 Because multiple bidding contractors had requested an estimate of rail traffic, the City issued Amendment No. 3 to the contract during the bidding process. That amendment directed prospective contractors to a portion of the Federal Railroad Administration (FRA) website that purportedly estimated rail traffic at the crossing in question. After accessing the FRA website, Pulice apparently believed that, on average, approximately one train passed through the intersection each week.

¶4 Shortly after being awarded the contract, however, Pulice learned that substantially more trains passed through the construction site than it had believed when formulating its bid. Pulice had actual knowledge the rail traffic would be substantially higher than it originally expected by no later than March 2017. Pulice notified the City that the initial estimate of one train crossing per week was incorrect "immediately" after it learned of the discrepancy, by no later than May 2017. However, Pulice did not present the City with any written claim for its amended costs based on increased rail traffic until late 2018. At that point, the construction in the project area had been completed.

¶5 In October 2018, Pulice alerted the City that it would be making a claim for additional compensation due to increased rail traffic. On March 18, 2019, after a series of letters, Pulice submitted what it refers to as its "contractually-required written notice of claim."[1] Pulice requested an additional $5,364,383.61 in compensation—a forty-seven percent increase over its initial bid. The City denied the claim. Pulice eventually filed a complaint alleging breach of contract, unjust enrichment, and breach of the covenant of good faith and fair dealing, and requesting declaratory relief in the form of reformation.

¶6 The City moved for summary judgment. It argued Pulice's failure to provide written notice, as required by § 104-4 of the parties' contract, until after "the work at the Project within the [UPR] right-of-way was already completed" prejudiced the City. It maintained that without proper documentation, it could not track or mitigate Pulice's alleged increased costs due to the rail traffic delays. Pulice did not contest that it had failed to give written notice until after completion of the work. Rather, it contended the City had received actual notice of the claim and had waived its right to notice through its conduct.

¶7 At the conclusion of a one-day hearing, the trial court entered summary judgment in favor of the City.[2] The court concluded that Pulice's

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[1]That notice cites § 104-4 of the contract and does not cite § 105-18.01. However, Pulice followed up with a "secondary notice of claim," explaining that the earlier "letter also satisfied the requirement set forth in PAG 105-18."

[2]The City filed a third-party complaint against UPR, alleging UPR was liable for any damages the City incurred in the underlying lawsuit. After the trial court granted the City's motion for summary judgment, it

claim accrued in February or March of 2017, at which point Pulice "knew, or should have known," that it would incur damages from the volume of rail traffic. The court reasoned that, although the record was "pretty clear" that Pulice had put the City on notice that the volume of rail traffic was higher than it originally anticipated, no "reasonable jury could conclude that an actual claim was made." And it concluded that the City had not waived the contract's written notice requirement by its conduct. Later, after additional briefing, the court determined its entry of summary judgment disposed of Pulice's reformation claim.

¶8 Pulice appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

Discussion

¶9 We view de novo a trial court's decision to grant summary judgment. *Cincinnati Indem. Co.*, 244 Ariz. 546, ¶ 5. Summary judgment is proper when "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). We review de novo the terms of a contract. *See Miller v. Hehlen*, 209 Ariz. 462, ¶ 5 (App. 2005). We interpret a contract's meaning by "reading the instrument as a whole, and not by construing different sections of the contract separately." *Tech. Constr., Inc. v. City of Kingman*, 229 Ariz. 564, ¶ 10 (App. 2012). "[W]e will, if possible, interpret a contract in such a way as to reconcile and give meaning to all its terms, if reconciliation can be accomplished by any reasonable interpretation." *Id.* (quoting *Gfeller v. Scottsdale Vista N. Townhomes Ass'n*, 193 Ariz. 52, ¶ 13 (App. 1998)). And, we "look to the plain meaning of the words as viewed in the context of the contract as a whole." *United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 259 (App. 1983).

Applicable Contractual Provision

¶10 The core of this appeal is whether the trial court correctly determined that Pulice had failed to provide sufficient notice of its claim for increased payment under either of two contractual provisions, §§ 104-4 and 105-18.01 of the PAG Specifications, barring its claim under the contract. Pulice contends that only § 105-18.01 applies to this dispute and that even if § 104-4 did apply, the City "waived [written notice requirements] or is otherwise estopped from requiring compliance with them." The City

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stayed the City's third-party complaint against UPR, pending resolution of this appeal.

counters that § 104-4 applies, but it maintains that either contractual provision "require[s], as an absolute pre-requisite to the preservation of a claim, that there be written notice prior to commencing work for which additional compensation would be sought." We conclude that regardless of which contractual provision applies, Pulice neglected to give timely required notice of its claim for additional compensation.

¶11 Section 104-4, entitled "Notification," states that "any time the contractor believes that the action of the Agency, lack of action by the Agency, or for some other reason will result in or necessitate the revision of the contract, the Engineer must be notified immediately." That notification must be made "[i]f within three working days the identified issue has not been resolved," at which point the contractor "shall provide a written notice" of the issue, which then triggers action by the project's Engineer.[3] If an identified issue cannot be "quickly resolved," § 104-4 instructs the contractor to provide a second written notice containing detailed information about the issue, including estimates of additional "[p]ay item(s) that . . . may be affected by the issue," "[l]abor or materials, or both, that will be added . . . or wasted by the problem," and "[a]djustments to contract amount(s) . . . and contract time estimated due to the issue."

¶12 Pulice does not appear to maintain that it strictly complied with the "formal written notice requirements under PAG Specs § 104-4." And, the record clearly supports the trial court's conclusion that Pulice's lack of timely written notice barred any recovery under that provision. Specifically, Pulice failed to provide the City with any written notice that it would require additional compensation or time resulting from "general" rail traffic delays until late 2018, more than a year after it learned of the discrepancy between anticipated and actual rail traffic at the construction site. Thus, to the extent Pulice challenges the trial court's determination that the contractor did not strictly comply with § 104-4, the court did not err.

¶13 However, Pulice argues the trial court erred in applying § 104-4 to this dispute because, it maintains, § 105-18.01 is the controlling

[3]Once a contractor submits written notice of an issue, § 104-4 directs the Engineer to proceed according to PAG Specifications § 104-2, which, among other things, outlines potential physical conditions that may require contract alteration and directs that a contractor "shall not proceed with work for which an alteration to the contract is required without prior written approval from the Engineer."

provision. That section, entitled "Notice of Claims" and contained in a more general "Claims" section, expressly aims to bring "claims for additional compensation and any difference between the parties arising under and by virtue of the contract" to the Engineer's attention "at the earliest possible time" to "increase the possibility for such matters to be resolved or for appropriate action to be taken promptly." It directs that the contractor "shall" call to the Engineer's immediate attention "any basis for additional compensation or time extension" so the Engineer may make "the earliest possible decision, instruction, notice or action." This call to attention is not specifically required to be made in writing. But § 105-18.01 further provides that a contractor who "disagree[s] with any decision, order, instruction, notice, act or omission of the Engineer" in response to the initial call to attention may submit a written notice of claim within three working days after learning of such disagreement. And, it requires a contractor to provide such written notice of claim before starting the work on which the claim is based. If such notice is not given, the contractor "waive[s] any claim for additional compensation."

¶14 Pulice places great weight on the language in § 105-18.01 directing that, "[s]hould the contractor *disagree* with any decision, order, instruction, notice, act or omission of the Engineer . . . the contractor may submit a Notice of Claim." (Emphasis added.) But, as noted, the express purpose of that subsection of the contract is "that claims for additional compensation and any difference between the parties arising under" the contract "be brought to the attention of the Engineer . . . at the earliest possible time . . . so as to increase the possibility for such matters to be resolved or for appropriate action to be taken promptly."

¶15 We reject Pulice's position that it was permissible to substantially complete the construction project without informing the City it would be seeking additional compensation due to general rail traffic delays. To do so would thwart the stated purpose of this section to resolve such claims as soon as possible. Furthermore, such an interpretation fails to give meaning to the subsection's directive that to avoid waiving additional compensation for a claim, a contractor must give notice of its claim before beginning "the work on which the contractor bases the claim." *See Tech. Constr., Inc.*, 229 Ariz. 564, ¶ 10. Therefore, construing "the plain meaning of the words as viewed in the context of the contract as a whole," *United Cal. Bank*, 140 Ariz. at 259, and giving all terms therein "reasonable, lawful and effective meaning," *Hall v. Schulte*, 172 Ariz. 279, 283 (App. 1992), we conclude that § 105-18.01 required Pulice to give the City notice it would seek additional compensation due to general rail traffic delays "at

the earliest possible time," and certainly before the completion of the affected work.[4]

¶16 Pulice has not shown that it gave such notice. Pulice immediately informed the City of the discrepancy between the originally estimated rail traffic and the actual traffic.[5] But, that did not constitute notice that Pulice would seek additional compensation as a result of that traffic. And, contrary to Pulice's suggestion that the City anticipated a late-project claim for general rail traffic delays, the record reflects that Pulice still planned to finish the work within its original window for completing the project. Similarly, the City Engineer testified that he construed Pulice's references to the train traffic in the first half of 2017 as asides, rather than as notice that the contractor would eventually seek additional compensation. Even Pulice's project manager agreed that, after learning of the actual rail traffic, he believed the traffic was a risk Pulice had assumed as part of its contract, that Pulice had not misbid the project, and that the contract price was reasonable. Finally, although that project manager claimed he "gave notice" to the City as early as May 2017, neither party characterized this statement as a claim that Pulice would be requesting additional compensation due to the delays. Rather, Pulice submitted its first written request for a change order in December 2018, and its first notice of claim on March 18, 2019, three days after the City rejected the change order request.

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[4]Even if § 104-4 does not directly govern this dispute, it similarly requires contractors to provide notice "immediately" if they suspect the contract will need alteration for any reason. Like § 105-18.01, § 104-2.01 directs that a contractor "shall not proceed with work for which an alteration to the contract is required without prior written approval from the Engineer." And, likewise, § 104-4(C) directs that a contractor's failure to comply with "the requirements of this Subsection constitutes a waiver of entitlement to additional compensation or a time extension." Thus, § 104 also supports our understanding that the contract, as a whole, requires early notice of any claim for additional compensation.

[5]For example, in March 2017, Pulice's project manager requested an updated train schedule to allow it to work around the unexpectedly dense rail traffic during its work on the bridge demolition and girder placement. And in May 2017, Pulice's project manager verbally informed the City that the original bidding documents reflected an incorrect number of trains passing through the construction site.

¶17 As the trial court reasoned, there was "nothing that the City was supposed to do because no claim had been made" until October 2018. Pulice bore the burden of requesting additional compensation. It failed to do so. Pulice's mere statement the rail traffic was higher than it originally believed was insufficient to put the City on notice that it needed to take affirmative action to avoid a last-minute, unspecified surcharge. Section 105-18.01's requirement—that a contractor provide clear notice it will seek additional compensation—was designed to prevent the scenario that occurred here, in which the City was presented with a surprise bill for completed work. To interpret § 105-18.01 differently would fail to give effect to its language. That language expressly directs contractors to immediately notify project owners that they intend to seek additional compensation and forecloses them from expecting additional compensation for work undertaken in the absence of that notice.[6] Pulice's decision to wait over a year—and after the completion of the work affected by rail traffic—contravened the plain intent of § 105-18.01 to allow the parties to settle their claims for additional compensation before the assumption of work.

Strict Application of Contractual Terms

¶18 Pulice also argues it should not be subject to strict application of the contractual notice provision because our jurisprudence does not so require. However, we agree with the trial court that Pulice misapplies the law as set forth by *New Pueblo Constructors, Inc. v. State*, 144 Ariz. 95 (1985). That case concluded that strict enforcement of notice requirements is inappropriate "where the government is aware of the changed conditions and of the claim for compensation and where no prejudice is shown by the lack of formal notice." *New Pueblo*, 144 Ariz. at 101. However, if the

[6]Pulice argues there is a conflict in § 105-18.01's directive that a contractor must continue work on a pending claim, and that we should thus construe that section in its favor despite the fact that it completed the project before filing a notice of claim. However, we see no such conflict. Section 105-18.01 requires a contractor to give written notice of a claim for additional compensation before beginning work "on which the contractor bases the claim." This requirement does not conflict with the section's later provision that "[u]nless otherwise agreed to in writing, the contractor shall continue with and carry on the project work and progress during the pendency of any claim." In other words, the contract can consistently require notice prior to beginning work while also requiring a contractor to carry on work after giving notice.

government demonstrates prejudice from the lack of formal notice, "[t]he decision will go the other way." *Id.*; *see also Liberty Mut. Fire Ins. Co. v. Mandile*, 192 Ariz. 216, 223 (App. 1997) (noting that insured's failure to provide contractual notice does not relieve insurer of liability absent showing of actual prejudice resulting from lack of notice). Prejudice is shown when, for example, a project owner is deprived of the opportunity to "compile records of the contractor's costs" or to "consider alternate methods of construction that may cut costs." *New Pueblo*, 144 Ariz. at 101.

¶19 As the City claims, it was deprived of exactly these opportunities to mitigate the costs incurred as a result of the unanticipated rail traffic. For example, Pulice deprived the City of the opportunity to track or mitigate any claimed delays due to general rail traffic. In fact, Pulice itself only began to track these delays in August 2018, then extrapolated backward to calculate its estimated total costs. Furthermore, although Pulice presented evidence that the City was aware of the disparity between anticipated and actual rail traffic, as discussed above, it presented no evidence the City actually knew Pulice intended to make a future claim for compensation resulting from that disparity. This is distinguishable from the facts in *New Pueblo*, where there existed "abundant evidence" that the state "had actual notice of the changed conditions and [the contractor's] claims for compensation." 144 Ariz. at 101. For all of these reasons, the trial court did not err in concluding the contractual notice requirements could be strictly enforced in this case.[7]

Accrual of Claims

¶20 Pulice next contends the trial court erred "in determining, as a matter of law, that [its] claim for delays caused by train traffic accrued in February or March of 2017." Pulice argues its claim did not accrue until March 2019, when the City denied its change order request, because it did not know it was injured until that denial. It is unclear from the transcript

[7]In its opening brief, Pulice argues it provided evidence sufficient to raise "a jury question regarding whether the City had actual notice of the increased train traffic issue." But *New Pueblo* instructs that even with actual notice of both a delay and a claim for compensation, a showing of prejudice will lead courts to strictly enforce formal notice requirements. *See* 144 Ariz. at 101. Because the City showed such prejudice, it was appropriate for the trial court to strictly enforce the notice requirements even if Pulice provided evidence from which a jury could infer the City had actual notice of the claim.

of the summary judgment hearing whether the court's accrual ruling rested on Pulice's compliance with A.R.S. § 12-821.01. However, because the parties fully briefed the issue of accrual under § 12-821.01 on appeal, we address it as applied to the statute.

¶21 Although "when an action accrues generally must be resolved by the trier of fact," a court may determine the date of accrual "when there is no genuine dispute as to facts showing the plaintiff knew or should have known the basis for the claim." *Humphrey v. State*, 249 Ariz. 57, ¶¶ 24-25 (App. 2020). A plaintiff's failure to comply with the notice provision of § 12-821.01 bars any claim against a public entity. *See Donovan v. Yavapai Cnty. Cmty. Coll. Dist.*, 244 Ariz. 608, ¶ 7 (App. 2018) ("notice of claim that satisfies A.R.S. § 12-821.01 is a necessary prerequisite to filing a lawsuit against a public entity"); *see also Martineau v. Maricopa County*, 207 Ariz. 332, ¶¶ 10, 17 (App. 2004) (failure to strictly comply with notice requirements of § 12-821.01 bars action).

¶22 To the extent Pulice argues its injury stems from the disparity between anticipated and actual rail traffic, the evidence soundly supports the trial court's conclusion that Pulice—by its own admission—knew of this injury in the first half of 2017. *See Humphrey*, 249 Ariz. 57, ¶ 25. Thus, with respect to a claim based solely on breach of contract resulting from the City's failure to accurately report rail traffic, that claim accrued no later than March 2017, at which point the requirements for filing a notice of claim as provided by § 12-821.01 applied.

¶23 However, Pulice also argues it was damaged by "the City's refusal to accept Pulice's change orders related to the train crossings." Hypothetically, even if Pulice did not know it was injured until March 2019, our conclusion would not be altered. Even if Pulice preserved its right to make a claim under the public notice statute, it nevertheless failed to preserve its right to additional compensation under the contract by completing the contracted work before requesting additional compensation for that work. *See Metal Mfg., Inc. v. J.R. Porter Const., Inc.*, 141 Ariz. 412, 414 (App. 1984) (declining to apply statute where doing so would violate valid contract between parties).

Waiver or Estoppel of Contractual Notice Requirement

¶24 Pulice also argues that even if the formal written notice requirement of § 104-4 applies, the City waived the benefit of that requirement, or alternatively should be estopped from enforcing it, as a result of its conduct during the contract term. A party "may waive any

provision of a contract made for his benefit." *Concannon v. Yewell*, 16 Ariz. App. 320, 321 (1972). Waiver may be inferred by a pattern of conduct. *See Russo v. Barger*, 239 Ariz. 100, ¶ 12 (App. 2016). "A litigant asserting waiver by conduct must establish acts by the opposing party that are clearly inconsistent with an intention to assert the right in question." *Id.*

¶25 The parties cite no case law directly addressing the conjecture that later conduct may constitute earlier waiver of a contractual right. In support of this argument, Pulice identifies eleven approved change orders, in particular two involving work on bridge demolition and girder placement that were directly affected by rail traffic. However, as the trial court reasoned, each of these change orders occurred well after Pulice discovered the rail traffic discrepancy. Thus, Pulice's argument rests on the premise that a party may waive its contractual right to notice through conduct occurring after the notice was due.

¶26 Assuming now, for the purpose of addressing Pulice's argument, that § 104-4 governs this dispute, Pulice has not established the City's actions were "clearly inconsistent" with its intention to assert its right to receive notice of Pulice's claim for additional compensation. *Russo*, 239 Ariz. 100, ¶ 12. As observed above, Pulice did not provide the City with any notice it would seek additional compensation related to general rail traffic delays until late 2018, even though it was aware of the condition at the outset of the project, some fifteen months before. Thus, even assuming the project's eleven change orders establish the City never required strict compliance with § 104-4's written notice requirements, *see Cincinnati Indem. Co.*, 244 Ariz. 546, ¶ 5, we cannot reasonably infer the City thereby waived its right to receive any notice that Pulice would seek additional compensation.

¶27 To the contrary, the record demonstrates the parties routinely negotiated and resolved other change order requests before Pulice undertook work, even work affected by rail traffic. Notably, the parties agreed on change orders 7 and 8, both of which were specifically attributed to rail-traffic-related delays in demolishing the former bridge and placing the new bridge girders. Representatives for both parties testified that price negotiations with respect to these change orders were completed prior to the beginning of the relevant work. And Pulice's project manager testified that "all additional costs to the City on this contract as far as change orders" were reflected in the parties' supplemental agreements.

¶28 Pulice's estoppel argument similarly suffers from a chronology problem. Courts may estop a party from "assert[ing] a position

inconsistent with his former acts to the prejudice of others who have relied thereon." *IB Prop. Holdings, LLC v. Rancho Del Mar Apartments Ltd. P'ship*, 228 Ariz. 61, ¶ 23 (App. 2011). The condition of unexpectedly high rail traffic arose at the outset of the project, well before any other condition occurred that triggered Pulice's formal change order requests. Thus, Pulice cannot reasonably argue it relied on the City's prior conduct when it failed to make its claim as soon as it learned of the rail traffic. Pulice points to no conduct prior to this claim that could create a reasonable expectation that the City would not require notice of a claim.

¶29 Pulice further maintains the issue of waiver was a question of fact for a jury to decide, rather than for the trial court to determine at the summary judgment stage. *See City of Phoenix v. Fields*, 219 Ariz. 568, ¶ 33 (2009). But, as a matter of law, the City's post-hoc conduct regarding the later change orders is irrelevant to whether its prior conduct constituted waiver.

Pulice's Reformation & Mutual Mistake Claims

¶30 Pulice also argues the trial court erred by entering summary judgment on its claim of reformation, which was premised on the parties' mutual mistake regarding the number of trains passing through the construction site. After the court announced its grant of summary judgment in favor of the City, Pulice argued that this claim was not part of the City's motion for summary judgment.[8] The court ordered supplemental briefing and subsequently entered a ruling concluding that the judgment encompassed all of Pulice's claims. The court reasoned Pulice's reformation claim was not viable for several reasons: the claim was barred by the contract's notice and claim provisions, the parties did not have a prior agreement before entering into the contract, and Pulice affirmed the original contract by continuing work after discovering the parties' mutual mistake.

¶31 We agree with the trial court's reasoning. As a claim against a public entity, Pulice's claim for reformation is "brought pursuant to the

[8]Pulice urges its reformation claim was not addressed in the City's motion for summary judgment. However, as the City notes, its summary judgment motion at least obliquely addressed Pulice's claim for declaratory relief. And, the evidence necessary for the trial court to rule on the claim did not differ from the other evidence presented during summary judgment proceedings. Therefore, the trial court did not err in addressing the claim.

law regulating claims against public entities." *Long v. City of Glendale*, 208 Ariz. 319, ¶ 16 (App. 2004). Section 12-821.01 states that "a cause of action accrues when the damaged party realizes he or she has been damaged and knows or reasonably should know the cause . . . or condition that caused or contributed to the damage." And as we discussed above, Pulice's claims grounded in the mistaken calculation of rail traffic accrued in March 2017, the point by which Pulice had certainly discovered the facts constituting the mistake. *See Long*, 208 Ariz. 319, ¶ 17. Under these circumstances, it would be inappropriate to design an equitable remedy when Pulice simply failed to timely pursue remedies that were available under the contract. *See Isaak v. Mass. Indem. Life Ins. Co.*, 127 Ariz. 581, 584 (1981) ("Reformation is the remedy designed to correct a written instrument which fails to express the terms agreed upon by the parties; it is not intended to enforce the terms of an agreement the parties never made.").

¶32 Furthermore, as the trial court reasoned, Pulice "affirmed the contract by working under it and accepting its benefits," even though the contract contained built-in procedures for modifying the terms based on changed or unpredictable circumstances. *Cf. Jerger v. Rubin*, 106 Ariz. 114, 117 (1970) (distinguishing *Mackey v. Philzona Petrol. Co.*, 93 Ariz. 87 (1963), reasoning that one who acts in affirmation of an agreement, after knowledge of event giving rise to right to rescind that agreement, loses right to rescind). In fact, Pulice twice ratified the contract by seeking modification for the same material condition (the volume of rail traffic) and by continuing to perform under the contract without seeking further additional compensation for rail traffic delays until after the work had been completed.

Cross-Appeal

¶33 On cross-appeal, the City asserts the trial court erred in denying it attorney fees and costs. It acknowledges that the parties' contract expressly provided each party would bear its own litigation costs and fees. It contends, however, that Pulice "open[ed] the door" to liability for fees under A.R.S. § 12-341.01 by requesting fees and by failing to specifically raise the contractual provision in its pleadings. We review issues of contract interpretation and statutory application de novo. *Am. Power Prods., Inc. v. CSK Auto, Inc.*, 242 Ariz. 364, ¶ 12 (2017).

¶34 Although the City describes this as an issue of first impression, settled Arizona law provides that pursuant to § 12-341.01, a trial court may, in its discretion, award a party attorney fees in an action arising out of a contract dispute only if the award of such fees does not

"effectively conflict[] with an express contractual provision governing recovery of attorney's fees." *Am. Power Prods.*, 242 Ariz. 364, ¶ 14 (quoting *Jordan v. Burgbacher*, 180 Ariz. 221, 229 (App. 1994)). When, as here, a contractual provision expressly prohibits parties from collecting attorney fees, § 12-341.01 does not apply and a court does not have discretion to award attorney fees under that statute. *See id.* We decline the City's invitation to upset our settled jurisprudence to find otherwise.

¶35 To the extent the City suggests that *Berry v. 352 E. Virginia, L.L.C.*, 228 Ariz. 9 (App. 2011), compels us to find that Pulice waived the contractual fees provision by not specifically pleading the provision as a defense against fees, we agree with the trial court that this argument turns *Berry* on its head. In *Berry*, this court reasoned a party waived attorney fees as provided for by a contract by failing to expressly plead and prove that the provision existed. *Id.* ¶ 17. That case relied on jurisprudence holding that a party must specifically cite its basis for requesting attorney fees under a contract. *Id.* As the trial court reasoned, this pleading requirement exists to "put the other side on notice about the potential for such an award," but "[t]here is no similar requirement to put the other side on notice that the normal default presumption applies that each side will bear its own attorney's fees." *See Marcus v. Fox*, 150 Ariz. 333, 334 (1986) (traditional "American Rule" requires each party to bear own attorney fees).

Fees and Costs on Appeal

¶36 The City also asserts it should be entitled to collect its fees and costs on appeal, even though we have rejected its argument on cross-appeal, because it contends the contractual clause that each party bear its own fees applies only to "litigation," a term that the City suggests somehow excludes the appellate process. We agree with Pulice that "appeals are undoubtedly 'litigation.'" *See Cannon v. Hirsch Law Off., P.C.*, 222 Ariz. 171, ¶¶ 19-20 (App. 2009) (quoting Black's Law Dictionary to define "litigation" as encompassing all adversarial proceedings within a judicial controversy). We therefore deny the City's request for attorney fees on appeal because, as described above, those fees are precluded by the terms of the parties' contract.

¶37 The City also requests its costs on appeal. However, the City has not prevailed on its claims on cross-appeal, and Pulice has not prevailed on its claims on appeal. Because neither party has prevailed on its respective claims, in our discretion, we deny both parties their costs on appeal. *See* A.R.S. § 12-341 ("The successful party to a civil action shall recover from his adversary all costs expended or incurred therein unless

otherwise provided by law."); *cf. McMurray v. Dream Catcher USA, Inc.*, 220 Ariz. 71, ¶ 13 (App. 2009).

Disposition

¶38 For the foregoing reasons, we affirm the trial court's grant of summary judgment. We further affirm the court's denial of attorney fees to either party.