

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

---

WILLIAM J. RISNER AND KENNETH K. GRAHAM, INDIVIDUALLY AND AS CO-  
PARTNERS DOING BUSINESS UNDER THE NAME OF RISNER AND GRAHAM,  
ATTORNEYS AT LAW,  
*Plaintiffs/Appellees,*

*v.*

BEN ALEV,  
*Defendant/Appellant.*

No. 2 CA-CV 2021-0122  
Filed August 1, 2022

---

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NOT FOR PUBLICATION  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. C20193145  
The Honorable D. Douglas Metcalf, Judge

**AFFIRMED**

---

COUNSEL

Khalidi Law Firm PLLC, Tucson  
By Thabet N. Khalidi  
*Counsel for Plaintiffs/Appellees*

Greenbriar Law PLC, Phoenix  
By Walid A. Zarifi  
*Counsel for Defendant/Appellant*

**MEMORANDUM DECISION**

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

---

BREARCLIFFE, Judge:

¶1 Appellant Ben Alev appeals the trial court’s grant of summary judgment in favor of appellees William Risner and Kenneth Graham (collectively “Risner”). Alev claims that the court erred in determining that he is the sole obligor for Risner’s fees incurred in representing Alev’s son, Tyler. For the reasons that follow, we affirm.

**Factual and Procedural Background**

¶2 “On appeal from a summary judgment, we view the facts in the light most favorable to the party against whom judgment was entered and draw all justifiable inferences in its favor.” *Modular Mining Sys., Inc. v. Jigsaw Tech., Inc.*, 221 Ariz. 515, ¶ 2 (App. 2009). The following facts are undisputed. In 2016, Alev was seeking a lawyer to represent Tyler, who was in college at the time. Alev and Tyler consulted with Risner about a potential defamation case against a campus fraternity. Risner then sent an engagement letter to Alev memorializing their discussion about the terms of representation. Risner signed the letter, but Alev did not. In its entirety, the letter stated:

Dear Ben:

Please forward this note to Tyler.

I have prepared to provide legal assistance and advice to your son Tyler concerning the events related to Sigma Chi. I request a non-refundable retainer of \$1,500.00. I will bill you each month at the rate of \$350 per hour.

The process as I see it is for me to discuss factual and legal issues with Tyler. He is the client and you are the person responsible for paying his fees.

RISNER v. ALEV  
Decision of the Court

At this point I have not agreed on a specific course of action. I will attempt to understand the issues and Tyler's goals and discuss options with him. It will be Tyler's decision as to attorney-client issues of which discussions are protected and which I may discuss with you.

Sincerely,

/s/ William J. Risner

¶3 Alev then paid the retainer and, during the next three years of representation, fifteen of the seventeen billing statements that Risner sent him. Each billing statement was sent directly to Alev. The last two billing statements were sent to Alev in November 2018 and February 2019. In March 2019, after Alev had not paid the last two statements, Risner sent two letters to Alev demanding payment. In April 2019, Risner was asked to withdraw as counsel for Tyler. Risner sent another letter to Alev and Tyler in April 2019 stating: "The deal between us was for [Alev] to pay my fees when billed."

¶4 In June 2019, Risner filed a complaint against Alev claiming breach of contract and breach of the implied covenant of good faith and fair dealing. Risner claimed that Alev had breached the contract—the engagement letter—by refusing to pay him. He later amended his complaint to include a claim of open account/account stated, asserting he was entitled to payment of the account stated in the invoices. In his answer to the complaint, Alev claimed that he was under no legal obligation to pay Risner's legal fees. Following Alev's answer and exchange of disclosure statements, Risner moved for summary judgment. In his motion, Risner claimed that the engagement letter had clearly stated that Alev was responsible for paying Risner's fees and that the course of performance had confirmed Alev was the sole obligor. Alev responded that, because he was only a guarantor of the agreement and because he did not sign the letter, the representation letter violated the statute of frauds. *See* A.R.S. § 44-101(2). He further claimed that the letter could not bind his marital community because his wife did not sign it. *See* A.R.S. § 25-214(C)(2). Finally, Alev asserted that Risner had failed to state a claim upon which relief can be granted as to the account stated and open account claims.

¶5 After a hearing on the motion, the trial court granted Risner's motion for summary judgment and ultimately entered a final judgment pursuant to Rule 54(c), Ariz. R. Civ. P. The court found "that the Defendant

RISNER v. ALEV  
Decision of the Court

is directly liable to Plaintiff under the Engagement Letter. The Defendant is not a guarantor guaranteeing the liability of his son's debt. The son is not directly liable under the plain terms of the contract, the contents of which are not disputed." Alev then moved for a new trial, which the court denied. Alev filed a timely notice of appeal.<sup>1</sup> We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

**Analysis**

¶6 On appeal, Alev first argues that "[t]he engagement agreement is insufficient to obligate Alev to pay Tyler's legal fees" under Arizona's ethical rules, specifically Ethical Rule 1.8, Ariz. R. Sup. Ct. He also argues that the letter violates the statute of frauds, § 44-101(2), and that his marital community is not bound because his wife did not sign the letter as required in § 25-214(C)(2).

¶7 "We review a superior court's 'grant of summary judgment on the basis of the record made in [that] court, but we determine de novo whether the entry of [summary] judgment was proper.'" *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, n.3 (App. 2008) (alterations in *Thruston*) (quoting *Schwab v. Ames Constr.*, 207 Ariz. 56, ¶ 17 (App. 2004)). A court shall grant summary judgment "if the moving party shows that 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).

¶8 As to Alev's argument that the engagement letter was insufficient under Arizona's ethical rules to obligate Alev to pay the fees, Risner asserts that Alev did not argue this below and thus this argument is waived. We agree. Alev claims that he preserved this argument in his answer to Risner's first amended complaint. He does not, however, point to where or how he asserted this argument in his answer. In his answer to Risner's first amended complaint, Alev asserted a general "failure to

---

<sup>1</sup>In his notice of appeal, Alev states that he is appealing the summary judgment entered on May 7, 2021 and the final judgment entered on August 9, 2021. The order entered on August 9, 2021 is the order denying his motion for a new trial. *See* Ariz. R. Civ. App. P. 9(e)(1)(D) (time to file notice of appeal begins to run from entry of signed order disposing of motion for new trial). Alev, however, makes no argument in his opening brief as to this order, and we thus do not address it. We understand Alev to be appealing the court's June 10, 2021 judgment in favor of Risner. *See Hanen v. Willis*, 102 Ariz. 6, 10 (1967) (notice of appeal sufficient so long as it does not mislead or prejudice appellees).

RISNER v. ALEV  
Decision of the Court

comply with Rule 42 of the Rules of the Arizona Supreme Court” and the affirmative defense of breach of the covenant of good faith and fair dealing. We presume this is how he believes the argument was raised, but we cannot agree that this was sufficient. An argument must be made below to allow the trial court to address the issue on its merits. *See Cont’l Lighting & Contracting, Inc. v. Premier Grading & Utils., LLC*, 227 Ariz. 382, ¶ 12 (App. 2011). If it is not, the argument is waived. *Id.* An argument cannot merely be hinted at during the litigation. Alev did not mention Rule 1.8 or even the ethical rules generally in his response to Risner’s motion for summary judgment, and, thus, the trial court did not have the opportunity to address the argument on its merits. Because Alev did not make this argument below, the argument was not preserved, and we will not address it.

¶9 We further find no merit to Alev’s other arguments. Both arguments, pertaining to the statute of frauds and the binding of the marital community, rest on his theory that he is merely a guarantor of the debt provided for in the engagement letter. *See* § 44-101(2) (signature of guarantor is required); § 25-214(C)(2) (joinder of both spouses is required in transaction of guaranty). The engagement letter, however, clearly states that Alev is primarily responsible for paying the legal fees incurred in Risner’s representation of Tyler. Indeed, the letter addressed to Alev states: “[Tyler] is the client and you are the person responsible for paying his fees.” *See Standard Constr. Co. v. State*, 249 Ariz. 559, ¶ 5 (App. 2020) (we apply the plain contractual language when it is unambiguous). Because we find that Alev is directly liable, we conclude that neither § 44-101(2) nor § 25-214(C)(2) bar these claims. The trial court properly granted summary judgment.

**Attorney Fees and Costs**

¶10 Risner and Alev each request attorney fees and costs pursuant to Rule 21(a), Ariz. R. Civ. App. P., and A.R.S. § 12-341.01 because this action arises out of a contract—the engagement letter. Alev also requests costs pursuant to A.R.S. § 12-341. Because Risner is the prevailing party on appeal, he is entitled to attorney fees and costs upon his compliance with Rule 21.

¶11 Risner also requests fees and sanctions pursuant to A.R.S. § 12-349, A.R.S. § 12-2106, and Rule 25, Ariz. R. Civ. App. P. Although we could certainly grant the request under these circumstances, we exercise our discretion and deny the request for sanctions. *See Villa de Jardines Ass’n v. Flagstar Bank, FSB*, 227 Ariz. 91, ¶ 26 (App. 2011) (“We impose sanctions

RISNER v. ALEV  
Decision of the Court

under Rule 25 only ‘with great reservation.’” (quoting *Ariz. Tax Rsch Ass’n v. Dep’t of Revenue*, 163 Ariz. 255, 258 (1989)).

**Disposition**

¶12 For the foregoing reasons, we affirm.