IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

MICHAEL AND SANDI SMITH, HUSBAND AND WIFE,
Plaintiffs/Appellants,

v.

D.C. CONCRETE COMPANY, INC., AN ARIZONA CORPORATION; DAVID A. CONNOR; GREGORY J. CONNOR; REBECCA J. CONNOR; AND NGM INSURANCE COMPANY, A FOREIGN CORPORATION,
Defendants/Appellees.

No. 2 CA-CV 2021-0135
Filed May 17, 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NOT FOR PUBLICATION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. C20195327
The Honorable Gary J. Cohen, Judge

AFFIRMED

COUNSEL

Michael W. Smith and Sandi K. Smith, Houston, Texas
In Propria Personae

Rai Duer Huff P.C., Phoenix
By Rina Rai, Tom Duer, and Brock Kaminski
Counsel for Defendants/Appellees D.C. Concrete Co., David A. Connor, Gregory J. Connor, and Rebecca J. Connor

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MEMORANDUM DECISION

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

E P P I C H, Presiding Judge:

¶1 Michael and Sandi Smith appeal from the trial court's entry of summary judgment on their claims of fraud, fraud on the court, and tort of another in favor of David A. Connor, Gregory J. Connor, Rebecca J. Connor, and D.C. Concrete Company Inc. (collectively "D.C. Concrete"). For the following reasons, we affirm.

Factual and Procedural Background

¶2 The history underlying this litigation has been well summarized in two recent memorandum decisions from this court, *Smith v. Rai & Barone, P.C.*, No. 2 CA-CV 2021-0110 (Ariz. App. Apr. 18, 2022) (mem. decision) and *Smith v. D.C. Concrete Co.*, No. 2 CA-CV 2021-0093 (Ariz. App. Jan. 28, 2022) (mem. decision). We reiterate here the facts relevant to this appeal.

¶3 In 2013, SK Builders, a residential general contractor, sued the Smiths. The Smiths subsequently brought a third-party complaint against D.C. Concrete, a subcontractor, for breach of contract and fraudulent misrepresentation. In 2017, the trial court granted summary judgment in favor of D.C. Concrete on the Smiths' claims. The court awarded D.C. Concrete its attorney fees, costs, and sanctions.

¶4 The Smiths then objected to D.C. Concrete's application for fees and costs as "deceptive," claiming that D.C. Concrete had,

> (a) failed to disclose an amended reservation of rights letter showing that its insurer, NGM Insurance Company ("NGM"), would provide a defense for the Smiths' claims against [D.C. Concrete]; (b) failed to disclose any fee agreement between itself and [Rai & Barone

> P.C. ("RBPC")],[1] or between NGM and [RBPC]; (c) never actually paid [RBPC], who had been paid by NGM; (d) redacted the attorney billing entries submitted to the trial court; and (e) requested recovery of fees and costs incurred in RBPC's defense of a different (ultimately settled) claim against a different defendant.

Smith, No. 2 CA-CV 2021-0110, ¶ 4. Over these objections, the trial court awarded $259,092.70 in attorney fees, $5,299.34 in costs, and $30,564.94 in sanctions.

¶5 The Smiths appealed that award. *See SK Builders, Inc. v. Smith*, 246 Ariz. 196, ¶¶ 8, 28-30 (App. 2019), *review denied* (Ariz. Sept. 24, 2019). They argued the trial court erred in concluding the breach of contract and fraudulent misrepresentation claims were irreconcilably intertwined such that fees were proper for both. *Id.* ¶¶ 28-30. We concluded the court did not err in its award of fees to D.C. Concrete. *Id.* ¶ 30.

¶6 In October 2019, the Smiths brought the action underlying this appeal against D.C. Concrete for fraud, fraud on the court, and tort of another. They sought punitive damages, attorney fees and costs, and a setting aside of the 2017 judgment. As we have previously observed, the Smiths' 2019 complaint raised the same allegations they had unsuccessfully raised in 2013 in their objection to D.C. Concrete's application for fees and costs. *Smith*, No. 2 CA-CV 2021-0110, ¶ 7.

¶7 D.C. Concrete moved for summary judgment on the 2019 complaint. The trial court granted the motion. It determined the Smiths' claims were barred by preclusion doctrines and the prohibition against horizontal appeals, noting that they "could have, and in fact did, raise this argument, albeit unsuccessfully, in [their] objection to [D.C. Concrete]'s application for attorney's fees in [the 2013 case], as well as in [their] subsequent appeal of that matter. In other words, the Smiths already unsuccessfully litigated this issue," which "cannot properly be re-litigated here in this new lawsuit."

¶8 The trial court further found there was insufficient evidence to support the Smiths' claims. It ultimately observed that the case was

[1]Rai & Barone P.C., now known as Rai Duer Huff P.C., is the law firm who has represented D.C. Concrete throughout these proceedings.

"simply about the Smiths trying to get a second bite at the attorney's fees apple they lost in the trial court and the court of appeals in [the 2013 case]" and concluded that "[t]he law simply does not allow for this under the undisputed facts here." The court awarded D.C. Concrete attorney fees and warned the Smiths that "[i]f they bring another lawsuit arising from the outcome in [the 2013 case], and that case is determined, as this one has, to be devoid of legal merit, the [Smiths] and/or their counsel will be subject to serious sanction above and beyond the award of attorney's fees and costs." This appeal followed, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Discussion

¶9 Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(a). We review a grant of summary judgment de novo, viewing the facts and reasonable inferences therefrom in the light most favorable to the party opposing the motion. *Hourani v. Benson Hosp.*, 211 Ariz. 427, ¶ 13 (App. 2005).

¶10 On appeal, the Smiths contend the trial court erred in granting D.C. Concrete's motion for summary judgment, asserting various arguments that go to the merits of their claims. But the court's judgment was proper because the issues the Smiths raised in their complaint were precluded as a matter of law.[2] *See Federico v. Maric*, 224 Ariz. 34, ¶ 7 (App. 2010) (we will affirm grant of summary judgment if correct for any reason). Issue preclusion, otherwise known as collateral estoppel, applies when an issue or fact essential to a prior judgment "was actually litigated in a previous suit, a final judgment was entered, and the party against whom the doctrine is to be invoked had a full opportunity to litigate the matter and actually did litigate it."[3] *Bridgestone/Firestone N. Am. Tire, L.L.C. v.*

[2]Given our disposition, we need not reach the other arguments the Smiths raise on appeal. *See Tumacacori Mission Land Dev., Ltd. v. Union Pac. R.R. Co.*, 231 Ariz. 517, n.1 (App. 2013) (issue not affecting disposition need not be resolved).

[3]We need not reach the trial court's conclusion that the Smiths' claims were also barred by claim preclusion and the prohibition against horizontal appeals. Although these doctrines may very well be applicable to this case, *cf. Crosby-Garbotz v. Fell*, 246 Ariz. 54, ¶ 19 (2019) (claim preclusion); *Mozes v. Daru*, 4 Ariz. App. 385, 389 (1966) (horizontal appeals),

Naranjo, 206 Ariz. 447, ¶ 19 (App. 2003) (quoting *F.D.I.C. v. Adams*, 187 Ariz. 585, 593 (App. 1996)). "When an issue is properly raised by the pleadings or otherwise, and is submitted for determination, and is determined, the issue is actually litigated." *Chaney Bldg. Co. v. City of Tucson*, 148 Ariz. 571, 573 (1986).

¶11 Although the Smiths have asserted new causes of action in this case, as demonstrated above, the facts and issues underlying the 2019 petition are the same facts and issues raised in opposition to D.C. Concrete's attorney fee application in the 2013 case. Those facts and issues were essential to the final attorney fee judgment entered in 2017, and the Smiths had a full opportunity to, and actually did, litigate the issues before the trial court. *See Bridgestone/Firestone*, 206 Ariz. 447, ¶ 19. The Smiths then challenged that ruling on appeal, and we affirmed it. *SK Builders, Inc.*, 246 Ariz. 196, ¶¶ 8, 28-30. Thus, we agree with the court that the Smiths' unsuccessful litigation "cannot properly be re-litigated here in this new lawsuit." The court did not err in granting summary judgment.[4]

Attorney Fees on Appeal

¶12 D.C. Concrete requests attorney fees and costs on appeal, asserting that this matter relates "solely to the Smiths' actions at avoiding collection on the affirmed judgment in the 2013 Case—which arose out of contract." *See* A.R.S. §§ 12-341, 12-341.01. We agree. Moreover, after being

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issue preclusion is dispositive here. *See Tumacacori Mission Land Dev., Ltd.*, 231 Ariz. 517, n.1.

[4] The Smiths assert a finding of issue preclusion was improper because (1) D.C. Concrete did not assert it as an affirmative defense in its first responsive pleading, and (2) the ruling was premature as discovery was incomplete. Both of these arguments fail. D.C. Concrete moved to amend its answer to account for the affirmative defense of issue preclusion, and it was within the trial court's discretion to grant the amendment. *See Sirek v. Fairfield Snowbowl, Inc.*, 166 Ariz. 183, 185-86 (App. 1990); *see also* Ariz. R. Civ. P. 15(a)(2) ("[l]eave to amend must be freely given when justice requires"). And the Smiths waived any argument that the court's ruling was premature by failing to file an affidavit in compliance with Rule 56(d), Ariz. R. Civ. P. *See Heuisler v. Phx. Newspapers, Inc.*, 168 Ariz. 278, 281-82 (App. 1991) (by failing to file a Rule 56 affidavit, plaintiff "in effect conceded that he had sufficient facts to withstand the motion for summary judgment").

warned by the trial court that the underlying suit was meritless, the Smiths pursued this frivolous appeal—the resolution of which imposed an unnecessary burden on D.C. Concrete and this court.[5] Thus, as a sanction, and to "discourage similar conduct in the future," Ariz. R. Civ. App. P. 25, we award D.C. Concrete its reasonable attorney fees and costs upon compliance with Rule 21, Ariz. R. Civ. App. P.

Disposition

¶13 For the foregoing reasons, we affirm the trial court's grant of summary judgment and award D.C. Concrete its attorney fees and costs on appeal.

[5]As noted in D.C. Concrete's answering brief, in our decision in *Smith*, No. 2 CA-CV 2021-0093, ¶ 28, we concluded, "It is clear to this court that the Smiths' repeated and redundant efforts to block D.C. Concrete from identifying the Smiths' assets and collecting its judgment against them is facially gamesmanship. The Smiths' argument here, often without legal citation whatsoever, is but the continuation of their taxing of judicial resources merely for the purpose of delay and harassment."