

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

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KAREN & HOLLIS E. CROWE, III, *Plaintiffs/Appellees*,

*v.*

ERIC V. GIERST & DONNA GIERST, *Defendants/Appellants*.

No. 1 CA-CV 23-0766

FILED 03-27-2025

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Appeal from the Superior Court in Navajo County

No. S0900CV201700168

The Honorable Melinda K. Hardy, Judge

**AFFIRMED IN PART, VACATED IN PART, AND REMANDED**

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COUNSEL

Alexander R. Arpad, Phoenix  
*Counsel for Plaintiff/Appellees*

Bluff & Associates, Phoenix  
By Guy W. Bluff, Bruce A. Smidt  
*Counsel for Defendant/Appellants*

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**OPINION**

Presiding Judge Kent E. Cattani delivered the opinion of the Court, in which Judge Samuel A. Thumma and Judge Angela K. Paton joined.

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C A T T A N I, Judge:

¶1 Eric and Donna Gierst appeal the superior court’s denial of their request for an award of attorney’s fees and taxable costs expended in their litigation against Karen and Hollis Crowe III.<sup>1</sup> For reasons that follow, we affirm the superior court’s denial of a post-trial award of attorney’s fees because the Giersts presented their claim for fees to the jury (albeit improperly) as an element of damages. We vacate, however, the superior court’s denial of taxable costs and remand for the court to exercise its discretion to determine the successful party (if any) and enter a costs award on that basis.

**FACTS AND PROCEDURAL BACKGROUND**

¶2 This case is the latest of several rounds of litigation between neighboring landowners regarding an easement providing access for one parcel (owned by the Crowes) by crossing the other (owned by the Giersts). Litigation concluding in 2016 resulted in a settlement agreement (the “Agreement”) defining the scope, location, and permissible uses of the Crowes’ easement and resolving other points of contention between the parties. The Agreement included a fee-shifting provision: “In the event that a lawsuit is filed arising out of the alleged breach of any agreement or obligation contained in this Agreement, and a breach is established, the party prevailing by an adjudication on the merits shall be entitled to recover reasonable attorneys’ fees and costs.”

¶3 The parties’ easement-related dispute rekindled months after they signed the Agreement, leading to the present litigation. Ultimately, the Crowes asserted claims for breach of the express terms of the Agreement, breach of the implied covenant of good faith and fair dealing, trespass, and private nuisance. The Giersts counterclaimed for breach of the implied covenant of good faith and fair dealing, trespass, and conversion. Both sides sought compensatory and punitive damages, and both sides requested attorney’s fees under the Agreement’s fee-shifting provision and A.R.S. § 12-341.01.

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<sup>1</sup> After original plaintiff/counterdefendant Hollis Crowe II passed away, Karen Crowe and Hollis Crowe III were substituted as parties in their capacity as the co-personal representatives of his estate. Karen Crowe (the decedent’s wife) remains a counterdefendant in her personal capacity as well.

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¶4 A jury returned mixed verdicts after a nine-day trial. The jury found in favor of the Crowes on their claim for breach of contract but awarded no damages, found that punitive damages were warranted but again awarded nothing, and returned defense verdicts on the Crowes' other claims. The jury found for the Giersts on their claims for good faith and fair dealing (for \$12,800) and trespass (for \$5,000) and awarded \$7,200 in punitive damages, but found no liability for conversion.

¶5 After trial, both sides claimed victory and filed applications for attorney's fees (citing the Agreement's fee-shifting provision as well as A.R.S. § 12-341.01) and statements of costs. The superior court denied the Crowes' fee request, reasoning that they had not prevailed given the jury's decision to award them no damages. As to the Giersts' claim, the court observed that the Giersts had presented their claim for attorney's fees to the jury at trial as a category of compensatory damages. Reasoning that the jury had considered and included attorney's fees as damages, the court denied the Giersts' post-trial request for an additional award. The court ordered each side to bear its own fees and costs and entered its ruling as a final, appealable judgment.

¶6 The Giersts timely appealed from the denial of attorney's fees and costs. The Crowes timely filed a cross-appeal, but they later chose not to pursue it. We have jurisdiction under A.R.S. § 12-2101(A)(1).

## DISCUSSION

¶7 The Giersts assert that the superior court erred by denying their post-trial request for an award of attorney's fees and costs. We review for an abuse of discretion the superior court's decision to award (or deny) attorney's fees or costs, including the court's determination of the "prevailing" or "successful" party for these purposes. *Am. Power Prods., Inc. v. CSK Auto, Inc.*, 242 Ariz. 364, 367, ¶ 12 (2017) (attorney's fees under A.R.S. § 12-341.01 and contractual terms); *Nataros v. Fine Arts Gallery of Scottsdale, Inc.*, 126 Ariz. 44, 49 (App. 1980) (costs under A.R.S. § 12-341); see also A.R.S. §§ 12-341 (mandatory costs award to "successful party"), -341.01(A) (discretionary award of "reasonable attorney's fees" to the "successful party" in a "contested action arising out of a contract"). We review de novo matters of "statutory application and contract interpretation." *Am. Power Prods.*, 242 Ariz. at 367, ¶ 12; see also *Murphy Farrell Dev., LLLP v. Sourant*, 229 Ariz. 124, 133, ¶¶ 31-32 (App. 2012).

**I. Attorney's Fees.**

¶8 At trial, the Giersts presented evidence of the attorney's fees they had incurred in this litigation and asked the jury to include those amounts as an element of damages. Donna Gierst testified on direct examination that they had already paid \$98,750 in fees, had been billed for another \$24,000, and anticipated incurring an additional \$40,000 before the case ended, for a total of \$162,750. The record reflects a short bench conference near the beginning of this testimony at the Crowes' request but does not disclose the substance of the discussion. In closing argument, the Giersts asked the jury to award \$195,700 in damages for the breach of the implied covenant of good faith and fair dealing, representing \$162,750 in attorney's fees and an additional \$33,000 in other damages. The jury found in the Giersts' favor on that claim but awarded them only \$12,800 in damages.

¶9 The Giersts do not dispute that they presented evidence of their fees to support damages as an element of their good faith and fair dealing claim and then asked the jury to determine and award as damages all attorney's fees they incurred in this litigation. Nor do they dispute that they may recover the fees expended only once. They nevertheless contend that (1) they were entitled to present a post-trial fee-shifting request to the superior court because their request to the jury was a wholly independent claim, and (2) the court could simply offset any jury-awarded fees from the total amount the court found proper to award under the fee-shifting provisions of the Agreement or § 12-341.01. Not so.

¶10 The two different forms of the Giersts' fee request – fees-as-damages or fee-shifting (under the Agreement or under § 12-341.01) – are not independent claims but rather different, alternative theories to support a single potential recovery of the fees incurred in this litigation. *Cf. Maleki v. Desert Palms Pro. Props., L.L.C.*, 222 Ariz. 327, 334, ¶ 33 (App. 2009) (fees under § 12-341.01 and fees as damages as alternative bases for single recovery); *Musa v. Adrian*, 130 Ariz. 311, 313 (1981) (multiple theories that are mutually exclusive or that support only a single recovery represent only a single claim for relief). Here, the only viable theory for recovery of the fees expended in this case was, in fact, fee-shifting and not fees-as-damages.

¶11 Attorney's fees expended in the case at bar are not recoverable as damages for the cause of action being litigated (e.g., a claim for breach of an implied contractual covenant), even if litigation was necessary to secure recovery. *See Marcus v. Fox*, 150 Ariz. 333, 334 (1986); *Sanders v. Boyer*, 126 Ariz. 235, 241 (App. 1980); *see also City Ctr. Exec. Plaza, LLC v. Jantzen*, 237

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Ariz. 37, 42, ¶ 13 (App. 2015); *Assyia v. State Farm Mut. Auto. Ins. Co.*, 229 Ariz. 216, 222, ¶ 21 (App. 2012). This principle is based on the “American rule” that, absent an exception, litigants bear their own fees. *Marcus*, 150 Ariz. at 334; *Sanders*, 126 Ariz. at 241. A fee-shifting statute or contract term (like § 12-341.01 or the Agreement here) may vary the rule and authorize an award of fees expended in the ongoing litigation. *Marcus*, 150 Ariz. at 334; *Sanders*, 126 Ariz. at 241. But the fees awarded on this basis are not “damages” from the underlying cause of action. *See, e.g., Jantzen*, 237 Ariz. at 42, ¶ 13; *Assyia*, 229 Ariz. at 222, ¶ 21.

¶12 In contrast, there are certain limited categories of attorney’s fees – generally fees expended in separate litigation against a third party – that do qualify as damages. *Fairway Builders, Inc. v. Malouf Towers Rental Co.*, 124 Ariz. 242, 258 (App. 1979) (“tort of another” necessitating separate litigation with a third party); *Watson v. Ocean Acc. & Guarantee Corp.*, 28 Ariz. 573, 580 (1925) (wrongful repudiation of insurance coverage that should have paid for litigation with a third party in the first instance); *U.S. Fid. & Guar. Co. v. Frohmiller*, 71 Ariz. 377, 380 (1951) (relief from wrongful injunction or attachment ancillary to the primary action); *see also, e.g., Spanier v. U.S. Fid. & Guar. Co.*, 127 Ariz. 589, 599–600 (App. 1980) (emphasizing that “tort of another” requires separate litigation against a third party).

¶13 None of these fees-as-damages categories apply to the Giersts’ request for an award of attorney’s fees incurred in this litigation. The Giersts nevertheless opted to present a request for the full amount of fees to the jury as a component of damages for breach of the implied covenant of good faith and fair dealing. The jury returned a general verdict in the Giersts’ favor and awarded damages in the amount the jury deemed proper.

¶14 Because the only viable basis for an award of attorney’s fees in this case was fee-shifting provisions, it was error to present fees-as-damages to the jury. But because the Giersts chose this tack of their own volition, they invited the error and cannot seek appellate relief on this basis. *See Caruthers v. Underhill*, 235 Ariz. 1, 7, ¶ 23 (App. 2014). And because the Giersts pursued their fees-as-damages theory as part of a claim that resulted in a damages award, they are judicially estopped to claim those same attorney’s fees under any otherwise-applicable fee-shifting provisions. *See State v. Towery*, 186 Ariz. 168, 182 (1996) (party that obtains judicial relief on an issue estopped to assert inconsistent position in subsequent litigation between the parties); *see also In re Marriage of Thorn*, 235 Ariz. 216, 222, ¶ 27

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(App. 2014) (judicial estoppel may apply at different stages of a single action).

¶15 Nor can the Giersts supplement the amount the jury awarded—admittedly far less than the amount requested—with an additional award rendered by the court. The Giersts opted to pursue fees under a damages theory, and having obtained relief on that basis, they cannot now seek to recover the same fees a second time based on fee-shifting provisions. *Cf. Caruthers*, 235 Ariz. at 6, ¶ 20 (principle underlying election of remedies doctrine prevents overcompensation by barring even factually consistent theories of recovery once one is satisfied). Accordingly, we affirm the superior court’s denial of the Giersts’ post-trial request for an award of attorney’s fees under the Agreement and § 12-341.01.

## II. Costs.

¶16 The Giersts assert that the superior court erred by ordering each side to bear its own costs. Under § 12-341, an award of taxable costs in favor of the “successful party” to a civil action is mandatory. *See Assyia*, 229 Ariz. at 223, ¶ 32. The superior court has discretion to determine which party—if any—was “successful.” *Id.* Although the net winner in a case involving competing claims, counterclaims, and setoffs generally qualifies as successful, the court may instead apply a percentage of success or totality of the litigation test when the litigants achieved varied success on multiple claims. *See Murphy Farrell*, 229 Ariz. at 134, ¶ 36; *see also Trollope v. Koerner*, 21 Ariz. App. 43, 47 (App. 1973) (net judgment rule).

¶17 Here, the record does not reflect that the Giersts presented any claim for taxable costs to the jury, so the court’s rationale for denying fees does not apply to their request for costs. And although the superior court determined the Crowes were not successful parties given the jury’s decision to award them no damages, the court did not expressly consider or conclude whether the Giersts were successful parties for an award of costs.

¶18 The Giersts now assert that they qualify as successful parties under any test. Although the net judgment may have been in the Giersts’ favor, the superior court could reasonably have reached a different conclusion based on the parties’ comparative successes on their various competing claims of differing importance. *See Canon Sch. Dist. No. 50 v. W.E.S. Const. Co.*, 180 Ariz. 148, 154 (1994) (finding no successful party based on partial success and loss on “core issue”); *Ahwatukee Custom Ests. Mgmt. Ass’n v. Turner*, 196 Ariz. 631, 637, ¶ 22 (App. 2000) (finding no

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prevailing party by weighing varied success on claims of differing importance). But while the Crowes suggest the court's denial of costs was an implicit finding that neither party was successful, we cannot discern whether the court denied costs on that basis or simply did not consider the issue. See *Coldwell Banker Com. Grp., Inc. v. Camelback Off. Park*, 156 Ariz. 214, 224 (App. 1987) ("We would sustain the trial court's decision that each party bear its own costs . . . were it not for the fact that we are unable to conclude whether the trial court found that there was no successful party."), *vacated in part on other grounds*, 156 Ariz. 226, 232 (1988).

¶19 Accordingly, we vacate the denial of taxable costs and remand for the superior court to determine the successful party (if any) and award costs (if appropriate) on that basis. We express no opinion on how the superior court should resolve that issue.

**III. Attorney's Fees and Costs on Appeal.**

¶20 Both sides request an award of costs and attorney's fees on appeal, the Giersts citing § 12-341.01 and the Crowes relying on both the Agreement and § 12-341.01. Having considered the parties' comparative success on appeal and in an exercise of our discretion under § 12-341.01, we deny the Giersts' request and award the Crowes their reasonable attorney's fees under § 12-341.01 and costs under § 12-341 upon compliance with ARCAP 21.

**CONCLUSION**

¶21 We affirm the superior court's denial of attorney's fees but vacate its denial of costs and remand on that issue alone.



MATTHEW J. MARTIN • Clerk of the Court  
FILED: JR