

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



DIVISION ONE  
FILED: 11-30-2010  
RUTH WILLINGHAM,  
ACTING CLERK  
BY: GH

BRANDON NUNNS, )  
 ) 1 CA-CV 09-0779  
 ) 1 CA-CV 10-0185  
 ) (Consolidated)  
Third Party Counterclaimant/ )  
Appellant, ) DEPARTMENT D  
 )  
v. ) **MEMORANDUM DECISION**  
 )  
MARTIN R. MCGOVERN and EBRA D. )  
MCGOVERN, husband and wife, )  
 )  
Third Party Counterdefendants/ ) Not for Publication -  
Appellees. ) (Rule 28, Arizona Rules  
 ) of Civil Appellate  
 ) Procedure)  
\_\_\_\_\_)  
NUNNS HOMEBUILDERS, LLC, an )  
Arizona limited liability company, )  
 )  
Plaintiff/Appellee, )  
 )  
v. )  
 )  
MARTIN R. MCGOVERN and EBRA D. )  
MCGOVERN, husband and wife, )  
 )  
Defendants/Appellants. )  
 )  
\_\_\_\_\_)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2006-051190

The Honorable Eddward P. Ballinger, Jr., Judge

**AFFIRMED**

Berens, Kozub & Kloberdanz, PLC

Scottsdale

By Daniel L. Kloberdanz  
Attorneys for Third Party Counterclaimant/Appellant and  
Plaintiff/Appellee

The Butler Law Firm Phoenix  
By Everett S. Butler  
and Matthew D. Williams  
Attorneys for Third Party Counterdefendants/Appellees and  
Defendants/Appellants

---

**N O R R I S**, Judge

¶1 In this consolidated appeal, Brandon Nunns appeals from the superior court's judgment denying him relief in his breach-of-contract suit against Martin and Ebra McGovern because he did not have a contractor's license, and the McGoverns appeal from the superior court's order reinstating an unjust enrichment claim by Nunns Homebuilders, LLC ("Homebuilders") against them. We refer to Nunns's appeal as "Case 1," and the McGoverns' appeal as "Case 2." For the following reasons, we affirm the superior court's judgment in favor of the McGoverns as well as its order granting Homebuilders leave to reinstate its unjust enrichment claim against the McGoverns.

**FACTS AND PROCEDURAL BACKGROUND**

¶2 Nunns, who was not a licensed contractor, entered into a contract with Homebuilders, a licensed contractor, to build a house in which he planned to live. In April 2005, while the house was under construction, Nunns agreed to sell it to the McGoverns for \$788,040.17.

¶13 On November 3, 2005, Nunns and the McGoverns signed an Escrow Holdback Agreement ("holdback agreement") in which they agreed to hold \$65,760 in escrow subject to completion of work on the landscaping, pool, and gazebo.<sup>1</sup> Nunns and the McGoverns then closed escrow on November 4, 2005.

¶14 On April 28, 2006, Homebuilders sued the McGoverns for unjust enrichment, alleging Homebuilders had completed the work listed in the holdback agreement but had not been paid. The McGoverns answered and filed a counterclaim against Homebuilders and a third-party complaint against Nunns for breach of contract, declaratory relief, and breach of fiduciary duty, alleging the holdback work had not been completed and/or was deficient.

¶15 In February 2008, Nunns filed an amended third-party counterclaim against the McGoverns alleging breach of written contract, breach of oral contract, and alternatively, unjust enrichment. In March 2008, the superior court dismissed the McGoverns' claims against Homebuilders and Nunns with prejudice.<sup>2</sup>

---

<sup>1</sup>Nunns and the McGoverns signed the holdback agreement, but the agreement listed "Nunns Land Development Company, LLC" as the seller. Nunns purchased the property from this company and did not contest at trial the agreement was between him and the McGoverns as seller and buyers.

<sup>2</sup>At trial, the McGoverns acknowledged receiving \$8500 in a settlement for construction-defect claims against Homebuilders.

On January 29, 2009, the court dismissed Homebuilders's claims without prejudice for failure to be represented by counsel. Thus, by the end of January, only Nunns's breach of contract claim against the McGoverns remained in the case.

¶16 During a two-day bench trial on the breach-of-contract claim, the court sua sponte questioned whether Nunns's claim was barred by Arizona Revised Statutes ("A.R.S.") section 32-1153 (2007). That statute prohibits an unlicensed contractor from maintaining an action to recover compensation for any act requiring a contractor's license. After considering supplemental briefing, the court determined Nunns was required to have a valid contractor's license to maintain his claims, but the McGoverns had waived the requirement by failing to raise the defense "prior to the commencement of trial." The court granted judgment in favor of Nunns for \$43,840.<sup>3</sup>

¶17 The McGoverns moved for reconsideration, asserting, *inter alia*, they had raised A.R.S. § 32-1153 before trial. The court granted the McGoverns' motion, vacated the judgment in favor of Nunns, and entered judgment in favor of the McGoverns. The McGoverns requested \$33,065.82 in attorneys' fees, but the court awarded them \$5000. Nunns timely appealed, and,

---

<sup>3</sup>In December 2006, Nunns received \$21,920 from the escrow company, leaving \$43,840 in escrow. The escrow company released the \$43,840 to the McGoverns before trial.

Homebuilders simultaneously moved to reinstate its unjust enrichment claim against the McGoverns. The superior court granted Homebuilders leave to reinstate its claim, and the McGoverns timely appealed that order. Because both appeals stem from the same set of facts, we consolidated the appeals.<sup>4</sup> We have jurisdiction over both appeals pursuant to A.R.S. § 12-2101(B), (C) (2003).

## DISCUSSION

### Case 1

#### *I. Waiver of Affirmative Defense*

¶8 Nunns argues the McGoverns waived the licensing defense because they did not raise it in their answer as required by Arizona Rule of Civil Procedure ("Rule") 8(c).<sup>5</sup> We disagree.

---

<sup>4</sup>In Case 1, neither party designated the trial transcripts for inclusion in the record on appeal. The McGoverns, however, included the transcripts in the record on appeal in Case 2. Because we have consolidated the appeals, we have considered the transcripts as part of the record on appeal in Case 1.

<sup>5</sup>Because the facts concerning waiver are undisputed and the issue involves application of law to facts, our review is de novo. See *Paczosa v. Cartwright Elementary Sch. Dist. No. 83*, 222 Ariz. 73, 77, ¶ 14, 213 P.3d 222, 226 (App. 2009) (citing *Trust v. Cnty. of Yuma*, 205 Ariz. 272, 274, ¶ 7, 69 P.3d 510, 512 (App. 2003)).

¶9 Asserting A.R.S. § 32-1153 in an action constitutes an affirmative defense.<sup>6</sup> See, e.g., *Reidy v. Blackwell*, 140 Ariz. 333, 335, 681 P.2d 916, 918 (App. 1983). Rule 8(c) requires a party to set forth all affirmative defenses “[i]n pleading to a preceding pleading.” A “pleading” includes “a complaint, an answer, a counterclaim, a cross-claim, a third-party complaint, a third-party answer, and a reply,” but does not include a motion. *King v. Titsworth*, 221 Ariz. 597, 598-99, ¶ 10, 212 P.3d 935, 936-37 (App. 2009) (citing Rule 7(a)). Failure to plead an affirmative defense generally results in waiver of the defense. *City of Phoenix v. Fields*, 219 Ariz. 568, 574, ¶ 27, 201 P.3d 529, 535 (2009).

¶10 The McGoverns did not assert the affirmative defense of illegality under A.R.S. § 32-1153 in their answer to Homebuilders’s original complaint.<sup>7</sup> Case law, however, provides exceptions to Rule 8(c). In *Leone v. Precision Plumbing &*

---

<sup>6</sup>The parties classify this affirmative defense as “illegality” but fail to cite supporting authority. See, e.g., *Hunt v. Douglas Lumber Co.*, 41 Ariz. 276, 287, 17 P.2d 815, 819 (1933) (holding a contract with an unlicensed contractor is void *ab initio* and unenforceable). For purposes of this decision, we accept the parties’ characterization that noncompliance with the statute constitutes an “illegality” within the meaning of Rule 8(c).

<sup>7</sup>The McGoverns did raise two affirmative defenses and reserved “the right to assert any other affirmative defenses or other matters of avoidance including, but not limited to, those set forth in Rule 8.”

*Heating of Southern Arizona, Inc.*, this court explained, an illegality defense not asserted in a pleading is waived “[u]nless the illegality appears on the face of the contract or from appellees’ case.” 121 Ariz. 514, 516, 591 P.2d 1002, 1004 (App. 1979) (emphasis added). Also, a trial court can raise the issue of illegality sua sponte. *Cf. Mitchell v. Am. Sav. & Loan Ass’n*, 122 Ariz. 138, 139-40, 593 P.2d 692, 693-94 (App. 1979) (appeals court and parties can raise illegality for first time on appeal).

¶11 In this case, the McGoverns -- the appellees -- raised the licensing issue and Nunns’s status as an unlicensed contractor before trial, in their initial and supplemental disclosure statements and in two motions for summary judgment, and after trial, in their motion for reconsideration. Additionally, the superior court properly raised the issue sua sponte to explain its “very serious concerns” about Nunns acting as a contractor. For these reasons, the McGoverns did not waive the “illegality” defense.<sup>8</sup>

---

<sup>8</sup>We are unpersuaded by the out-of-state and federal cases Nunns cited construing rules similar to Rule 8(c) because we have Arizona case law on point as discussed in ¶ 10. See *Associated Aviation Underwriters v. Wood*, 209 Ariz. 137, 179-80, ¶ 149, 98 P.3d 572, 614-15 (App. 2004) (in absence of controlling Arizona authority, we look to “out-of-state authority for guidance”).

## II. Acting as Contractor

¶12 Next, Nunns argues he was not acting as a contractor.

A contractor includes:

any person . . . that, for compensation, undertakes to or offers to undertake to, . . . does himself or by or through others, or directly or indirectly supervises others to:

(a) Construct, alter, repair . . . [or] improve . . . any building, . . . project, development or improvement, or to do any part thereof, including . . . work in connection with the construction.

A.R.S. § 32-1101(A)(3) (2007). Because the court found Nunns "was required by A.R.S. § 32-1153 to possess a valid contractor's license," it also implicitly found Nunns was acting as a contractor.<sup>9</sup> See *Coronado Co. v. Jacome's Dep't Store, Inc.*, 129 Ariz. 137, 139, 629 P.2d 553, 555 (App. 1981) ("Implied in every judgment, in addition to express findings made by the court, is any additional finding that is necessary to sustain the judgment, if reasonably supported by the evidence, and not in conflict with the express findings.").

¶13 The superior court's factual finding is supported by the trial evidence. Nunns testified he had agreed to complete the house for the McGoverns, he had Homebuilders complete the

---

<sup>9</sup>We review a superior court's factual findings for clear error and its legal conclusions de novo. *In re Estate of Newman*, 219 Ariz. 260, 265, ¶ 13, 196 P.3d 863, 868 (App. 2008).

gazebo and the pool decking, and he had agreed to put an epoxy floor in the garage after the McGovernns requested it. Because the evidence demonstrated Nunns was acting individually and was undertaking "work in connection with the construction" by "himself or by or through others," A.R.S. § 32-1101(A)(3), he needed to be licensed, even if Homebuilders had its own license.

¶14 Nunns also argues he did not receive compensation for completion of the holdback work because he was only seeking reimbursement of money he paid to Homebuilders. We disagree; Nunns's pursuit of his breach of contract claim against the McGovernns to recover money he paid Homebuilders does not change the reality he was seeking compensation for construction services. The plain meaning of the word "compensation" in the statute<sup>10</sup> proves this: "1. The act of compensating or the state of being compensated. 2. Something, such as money, given or received as payment or reparation, as for a service or loss." The American Heritage Dictionary of the English Language 376 (4th ed. 2006). More significantly, "compensate" is defined as "1. To offset; counterbalance. 2. To make satisfactory payment

---

<sup>10</sup>"Unless the legislature clearly expresses an intent to give a term a special meaning, we give the words used in statutes their plain and ordinary meaning. In determining the ordinary meaning of a word, we may refer to an established and widely used dictionary." *State v. Mahaney*, 193 Ariz. 566, 568, ¶ 12, 975 P.2d 156, 158 (App. 1999) (citations omitted).

or reparation to; recompense or *reimburse*." *Id.* (emphasis added).

¶15 Furthermore, we note that before trial Nunns made no mention of reimbursement and instead stated: "The McGoverns owe Brandon Nunns a total of \$54,364.38 for the remaining balance due under the purchase contract and Addendum (\$43,840.00) plus the costs of the additional work performed after the closing (which adds up to \$10,524.38)."

¶16 The cases Nunns relies on to argue he was not receiving compensation are inapposite. For instance, in *Levitan v. State, Registrar of Contractors*, the court determined receipt of rent does not constitute "compensation" within the meaning of A.R.S. § 32-1101(A)(3). 201 Ariz. 225, 226, ¶ 7, 33 P.3d 796, 797 (App. 2001). Thus, a rental property owner who is statutorily required to repair and maintain rental property and undertakes such work is not a contractor under A.R.S. § 32-1101. See *id.* at 227, ¶ 12, 33 P.3d at 798. The facts here are distinguishable.<sup>11</sup> Nunns was seeking payment for construction work he was not required by law to do, but that he nonetheless chose to provide "himself or by or through others," A.R.S. § 32-1101(A)(3), to the McGoverns. For these reasons, the record

---

<sup>11</sup>Similarly, *City of Phoenix v. Santa Anita Development Corp.* is inapposite as the court held none of the "compensation" the city aimed to tax resulted from contracting activities. 141 Ariz. 179, 182, 685 P.2d 1331, 1334 (App. 1984).

supports the superior court's determination Nunns was acting as a contractor.

### *III. Contractor Exceptions*

¶17 Nunns contends even if he was a contractor he substantially complied with the licensing statute and, therefore, the superior court should not have rejected his claim.<sup>12</sup> We disagree. Substantial compliance with the licensing statute may be found if the party's actions satisfied the purpose of the law. *Aesthetic Prop. Maint., Inc. v. Capitol Indem. Corp.*, 183 Ariz. 74, 77-78, 900 P.2d 1210, 1213-14 (1995) ("We have repeatedly held that the purpose of § 32-1153 is to protect the public from unscrupulous, unqualified, and financially irresponsible contractors."). Nevertheless, the substantial compliance test does not apply if a contractor never had a license, *id.* at 76 n.1, 900 P.2d at 1212 n.1, which is the case here.

¶18 Nunns also contends he substantially complied with A.R.S. § 32-1121(A)(6) (Supp. 2009), which exempts property developers from the licensing statute if they meet the following requirements:

Owners of property who are acting as developers and who build structures or appurtenances to structures on their

---

<sup>12</sup>Contrary to the McGovern's assertion, Nunns raised this argument in the superior court.

property for the purpose of sale or rent and who contract for such a project with a general contractor licensed pursuant to this chapter and owners of property who are acting as developers, who improve structures or appurtenances to structures on their property for the purpose of sale or rent and who contract for such a project with a general contractor . . . licensed pursuant to this chapter. *To qualify for the exemption under this paragraph, the licensed contractors' names and license numbers shall be included in all sales documents.* (Emphasis added.)

On appeal, Nunns acknowledges, however, he was not a developer, and neither the contract nor its addendums referenced Homebuilders or listed a license number. Thus, Nunns was not exempt from the licensing requirement under A.R.S. § 32-1121(A)(6).

#### *IV. Holdback Agreement*

¶19 Next, Nunns argues the holdback agreement is “nothing more than an agreement to assign funds to pay licensed contractors” and enforcement of the agreement does not violate the contractor licensing statutes. We review the interpretation of a contract de novo. *Rand v. Porsche Fin. Servs.*, 216 Ariz. 424, 434, ¶ 37, 167 P.3d 111, 121 (App. 2007) (citing *Callan v. Bernini*, 213 Ariz. 257, 259, ¶ 9, 141 P.3d 737, 739 (App. 2006)).

¶20 The holdback agreement provided in relevant part:  
Certain work in connection with the above

property . . . is incomplete. In order for the Lender to close the loan notwithstanding the incomplete work, the undersigned Sellers (if applicable) and the Borrowers agree with each other and with the Lender, as follows:

[The McGoverns] shall deposit the sum of 65,760.00 with Lender which shall hold that sum in escrow and apply the same as provided herein,

[The McGoverns] shall be responsible for the completion of required work. All related costs and expenses shall be paid from funds held in escrow.

After completion of the work, any excess funds were to be disbursed to the McGoverns.

¶21 Contrary to Nunns's argument, there is nothing in the holdback agreement reflecting it was simply an agreement to assign funds to pay licensed contractors.<sup>13</sup> Further, as the superior court correctly recognized, Nunns's "contract was both for the sale of unimproved real property and to provide construction services." While the initial purchase contract included the cost of the unimproved realty, it also reflected Nunns's obligation to complete construction of the home, and the holdback agreement existed solely to pay for construction work Nunns was required to complete. Because Nunns is prohibited by law from receiving funds for construction work, see *supra* ¶¶ 12-

---

<sup>13</sup>Accordingly, Nunns's reliance on *Smithy Braedon Co. v. Hadid*, 825 F.2d 787 (4th Cir. 1987), is inapposite, and his reliance on *Van Waters & Rogers, Inc. v. Interchange Res., Inc.*, 14 Ariz. App. 414, 484 P.2d 26 (1971), is distinguishable.

16, he was not entitled to recover any of the money subject to the holdback agreement.

¶122 Nunns also argues that because licensed contractors did all of the work on the home he was exempt from the licensing statute. We disagree. In *Topro Services, Inc. v. McCarthy Western Constructors, Inc.*, a federal court construing the Arizona contractor licensing statutes expressly rejected this argument, stating “[t]he fact that someone who was licensed did the actual work” was not sufficient. 856 F. Supp. 1461, 1465 (D. Colo. 1994). The court explained Arizona case law “makes it clear that there are now no loopholes to compliance with the licensing scheme - despite the harsh nature of the statute [sic] and the possibility for inequitable results.” *Id.*

¶123 For these reasons, we reject Nunns’s argument concerning the holdback agreement and affirm the superior court’s resolution of the licensing issue.

#### *V. Attorneys’ Fees in Superior Court*

¶124 Nunns argues the superior court incorrectly awarded attorneys’ fees to the McGoverns because they were not the prevailing parties in that action. We review the superior court’s order for an abuse of discretion. *Maleki v. Desert Palms Prof’l Props., L.L.C.*, 222 Ariz. 327, 333-34, ¶ 32, 214 P.3d 415, 421-22 (App. 2009).

¶125 The contract here requires an award of attorneys' fees to the prevailing party. See *Chase Bank of Ariz. v. Acosta*, 179 Ariz. 563, 575, 880 P.2d 1109, 1121 (App. 1994) ("[T]he court lacks discretion to refuse to award [reasonable] fees under [a] contractual provision."). The superior court awarded the McGoverns the \$43,840 from the holdback funds and Nunns received nothing on his claim.<sup>14</sup> Under these circumstances, the superior court did not abuse its discretion by awarding the McGoverns attorneys' fees.

#### *VI. Attorneys' Fees on Appeal*

¶126 Both parties request attorneys' fees and costs on appeal pursuant to A.R.S. § 12-341.01 (2003) and/or the contract. Because the contract requires an award of attorneys' fees and costs to the prevailing party, we award the McGoverns their reasonable attorneys' fees and costs on appeal in Case 1, subject to compliance with Arizona Rule of Civil Appellate Procedure 21.

---

<sup>14</sup>Nunns received \$21,920 from the holdback funds during the litigation, however, that was not pursuant to a court order. The McGoverns have not filed a cross-appeal, nor did they raise this matter in the superior court.

## Case 2

### *I. Futility of Unjust Enrichment Claim*

¶127 Relying on trial testimony and statements by Nunns's attorney,<sup>15</sup> the McGoverns argue the superior court should not have granted Homebuilders's motion to reinstate its unjust enrichment claim because Homebuilders had not suffered an "impoverishment" and its claim was, therefore, futile as a matter of law. We disagree; accordingly, the superior court did not abuse its discretion in granting Homebuilders leave to reinstate the claim. *Zimmerman v. W. Builders' & Salvage Co.*, 38 Ariz. 91, 95, 297 P. 449, 450 (1931) (court's reinstatement of a claim reviewed for an abuse of discretion).

¶128 "Unjust enrichment occurs when one party has and retains money or benefits that in justice and equity belong to another." *Trustmark Ins. Co. v. Bank One, Ariz., NA*, 202 Ariz. 535, 541, ¶ 31, 48 P.3d 485, 491 (App. 2002). To prove unjust

---

<sup>15</sup>At trial, Nunns testified that he reimbursed Homebuilders for all of the expenses it incurred for holdback work on the McGoverns' home and that all subcontractors were paid. Travis Nunns, the qualifying party for Homebuilders's contractor's license, testified every subcontractor who worked on the home "was paid." Additionally, Nunns's counsel said Homebuilders's unjust enrichment claim is a "moot point" because "Brandon Nunns has paid Nunns Homebuilders for the expenses that Nunns Homebuilders incurred"; Homebuilders did not have "the appropriate claim anyway because they had been paid by Brandon Nunns. They didn't have any damages"; and "[he] felt that it didn't make any difference whether or not [Homebuilders's] claim was dismissed because Brandon Nunns had paid the monies back to Nunns Homebuilders."

enrichment, a plaintiff "must show (1) an enrichment, (2) an impoverishment, (3) a connection between the two, (4) the absence of justification for the enrichment and impoverishment[,] and (5) the absence of any remedy at law." *Mousa v. Saba*, 222 Ariz. 581, 588, ¶ 29, 218 P.3d 1038, 1045 (App. 2009).

¶129 Although futility of recovery can defeat a motion to amend, see *Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 471, ¶ 40, 160 P.3d 1216, 1229 (App. 2007), on this record we cannot say as a matter of law Homebuilders's unjust enrichment claim is futile. Homebuilders was not a party to the case when Nunns testified, and although Travis Nunns testified the subcontractors had been paid, he did not testify Homebuilders had been fully compensated for its construction work. Moreover, Nunns's counsel was not counsel for Homebuilders when he told the court Homebuilders had been paid. Homebuilders should, therefore, be given an opportunity to prove it suffered an "impoverishment" Nunns failed to cure or otherwise discharge on behalf of Homebuilders.

¶130 The McGoverns further argue statements by Nunns and his counsel that Homebuilders had no damages are binding judicial admissions that ensure the futility of the unjust enrichment claim. The McGoverns cite *State v. Fulminante*, which

quotes Wigmore's definition of a judicial admission as: "An express waiver made in court or preparatory to trial by the party or his attorney conceding for the purposes of the trial the truth of some alleged fact . . . ." 193 Ariz. 485, 492, ¶ 17, 975 P.2d 75, 82 (1999) (emphasis added). Although Nunns was a member of Homebuilders and Nunns's counsel had previously represented Homebuilders, Nunns was testifying on his own behalf, in his individual capacity, and Nunns's counsel was counsel of record for Nunns only.

¶31 Even if we presume Nunns and his counsel were speaking for Homebuilders, their statements would not bind Homebuilders. "The words of a party, like the words of any other witness, are rarely conclusive. They may be disputed as inaccurate by either." *Black v. Perkins*, 163 Ariz. 292, 293, 787 P.2d 1088, 1089 (App. 1989). The court in *Perkins* stated the only two exceptions to the rule that the words of a party are not binding are, one, when a party agrees to facts in a pleading or stipulation or, two, when a party has received judicial relief by asserting a set of facts. *Id.* Here, Homebuilders did neither. Thus, the statements by Nunns and his counsel are not binding judicial admissions of Homebuilders.

¶32 It may be, as the McGovern's argue, Homebuilders will be unable to prove an "impoverishment." If so, the McGovern's

may well be entitled to summary judgment. However, on the record before us, we cannot make that determination as a matter of law. We caution Homebuilders it may not use its unjust enrichment claim as an "end run" around A.R.S. § 32-1153, thereby allowing Nunns to indirectly receive compensation for construction work even though he did not have a contractor's license. Reinstatement is only to give Homebuilders an opportunity to demonstrate it has suffered an "impoverishment," not to allow Nunns an opportunity to obtain money to which he is not statutorily entitled.

#### *II. Statute of Limitations*

¶133 The McGoverns argue the unjust enrichment claim is futile because it is time-barred; however, the parties dispute the accrual of the limitations period. Thus, whether the claim is time-barred must be addressed in the superior court.

#### *III. Superior Court Lacked Jurisdiction*

¶134 The McGoverns argue the superior court lost jurisdiction over the unjust enrichment claim 30 days after the claim was dismissed. We disagree.

¶135 Homebuilders's claim was dismissed without prejudice; thus, it could be reinstated. *Union Interchange, Inc. v. Van Aalsburg*, 102 Ariz. 461, 464, 432 P.2d 589, 592 (1967) ("A dismissal without prejudice does not go to the merits of the

plaintiff's cause and does not bar plaintiff from later filing on the same cause of action."). Further, the superior court minute entry dismissing the claim without prejudice did not contain "an express determination that there is no just reason for delay" and "an express direction for the entry of judgment," which is required for a final judgment under Rule 54(b). When a court does not certify finality under Rule 54(b), the order is "subject to [the court's] own modification at any time before the final adjudication of all the claims." *Stevens v. Mehagian's Home Furnishings, Inc.*, 90 Ariz. 42, 45, 365 P.2d 208, 210 (1961) (citations omitted). For these reasons, the superior court retained jurisdiction to reinstate the claim.

#### *IV. Poor Policy*

¶136 The McGoverns argue allowing Homebuilders to reinstate the claim is "an invitation to endless, inefficient, and unfair tactics." We disagree; Homebuilders's claim was dismissed not because it was without merit but because Homebuilders did not have counsel. Reinstatement allows the claim to be addressed on the merits. See *Adams v. Valley Nat'l Bank of Ariz.*, 139 Ariz. 340, 342, 678 P.2d 525, 527 (App. 1984) (courts prefer to decide cases on the merits rather than dismiss on procedural grounds).

## V. Sanctions

¶37 The McGoverns argue the superior court should have sanctioned Homebuilders and its counsel under Rule 11 or A.R.S. § 12-349(A) (2003) because the "motion to reinstate was frivolous and lacks substantial legal and factual justification." We review a court's orders involving Rule 11 sanctions for an abuse of discretion, *James, Cooke & Hobson, Inc. v. Lake Havasu Plumbing & Fire Prot.*, 177 Ariz. 316, 319, 868 P.2d 329, 332 (App. 1993), and its application of § 12-349(A) de novo. *City of Casa Grande v. Ariz. Water Co.*, 199 Ariz. 547, 555, ¶ 27, 20 P.3d 590, 598 (App. 2001). Because the superior court did not abuse its discretion in allowing reinstatement of the claim, and the claim was not futile as a matter of law, the superior court did not abuse its discretion in refusing to sanction Homebuilders under Rule 11 or A.R.S. § 12-349(A).

## VI. Attorneys' Fees

¶38 Both parties request attorneys' fees and costs on appeal. Because neither party has yet to prevail or succeed in Case 2 under either the contract or A.R.S. § 12-341.01(A), respectively, we deny both parties' requests for fees. On remand, the court may consider a request from the prevailing or successful party for fees incurred in the appeal in Case 2.

**CONCLUSION**

¶139 For the foregoing reasons, we affirm the judgment of the superior court in the appeal in Case 1 and Case 2.

/s/

---

PATRICIA K. NORRIS, Judge

CONCURRING:

/s/

---

LAWRENCE F. WINTHROP, Presiding Judge

/s/

---

PATRICK IRVINE, Judge