

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

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DONALD D. BAILEY,  
*Plaintiff/Counterdefendant/Appellant,*

*v.*

INTERRADIOLOGY, INC., AN ARIZONA CORPORATION;  
GARY SKURO, AN UNMARRIED MAN;  
TASHA LOCKHART; AND  
UWE AND RUBY ZINK, HUSBAND AND WIFE,  
*Defendants/Counterclaimants/Appellees.*

No. 2 CA-CV 2016-0058  
Filed October 7, 2016

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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NOT FOR PUBLICATION  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).*

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Appeal from the Superior Court in Pima County  
No. C20144687  
The Honorable Richard S. Fields, Judge

**AFFIRMED**

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COUNSEL

Donald D. Bailey, Tucson  
*In Propria Persona*

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Law Offices of Dennis A. Rosen, Tucson  
By Dennis A. Rosen and Gayle D. Reay  
*Counsel for Defendants/Counterclaimants/Appellees*

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**MEMORANDUM DECISION**

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Miller concurred.

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V Á S Q U E Z, Presiding Judge:

¶1 Donald Bailey appeals from the trial court’s judgment, entered after a bench trial, in favor of appellees Interradiology, Inc., Gary Skuro and his former wife Tasha Lockhart, and Uwe and Ruby Zink, on appellees’ claims that Bailey committed fraud and breached his fiduciary duties.<sup>1</sup> Relying on evidence not presented at trial, Bailey maintains the court erred in finding he had committed fraud and breached his fiduciary duties. He also argues that Skuro and Zink did not tell the truth when they testified at trial. For the following reasons, we affirm.

**Factual and Procedural Background**

¶2 On appeal following a bench trial, we view the facts and all reasonable inferences therefrom in the light most favorable to upholding the trial court’s judgment. *Bennett v. Baxter Grp., Inc.*, 223 Ariz. 414, ¶ 2, 224 P.3d 230, 233 (App. 2010). In 2007, Bailey entered into an agreement with Skuro and Zink to provide tax and accounting services for Interradiology—then a limited liability company—in exchange for a ten-percent interest in the company. Consistent with Bailey’s advice, Skuro and Zink, who each then held a forty-five-percent interest in the company, converted Interradiology into a Subchapter S corporation. They also granted Bailey an option to purchase an additional ten-percent interest.

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<sup>1</sup>“Zink” hereinafter refers to Uwe.

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¶3 In August 2014, Bailey filed this lawsuit, alleging he had exercised his option to purchase the additional interest in 2009, as evidenced by two notes for \$500,000 each and an arrangement under which he declined income distributions from the company for five years as payment on the notes. Bailey further asserted that he had notified Skuro and Zink that he would begin to make interest-only payments on the notes and that they would pay him his monthly income distributions starting in August 2014, but they refused. In response, Skuro and Zink asserted that they had not consented to the note arrangement and that Bailey “never paid in money” for the additional ten percent. They also counterclaimed for fraud and breach of fiduciary duty, maintaining Bailey had failed to disclose that he pled guilty to filing a false tax return and consented to his suspension as a certified public accountant (CPA). In addition, Skuro and Zink requested a declaratory judgment to determine “what rights, if any,” Bailey had in Interradiology.

¶4 After a bench trial, the court found that the original agreement to provide Bailey with a ten-percent interest in Interradiology in exchange for his services had been valid but that the note arrangement for the second ten-percent interest was “fraught with questions of fact as to [its] legitimacy.” The court determined that Bailey’s conduct as to the incorporation and valuation of Interradiology constituted a breach of his fiduciary duties and that Bailey’s failure to disclose “the details of his criminal case and [the] loss of [his] CPA license” constituted fraud. It therefore concluded that “any claimed due distributions or increases” arising after August 2014 from his original ten-percent interest were disgorged and that the arrangement for the second ten-percent interest was “void.” The court then entered a final judgment, also awarding attorney fees to Skuro, Lockhart, and the Zinks. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 12-2101(A)(1).

**Discussion**

¶5 As a preliminary matter, we note that Bailey’s opening brief contains sparse citations to appropriate legal authorities. In addition, his arguments are not properly developed. An appellant’s opening brief must include argument as to “each issue presented for

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review, with supporting reasons for each contention, and with citations of legal authorities and appropriate references to the portions of the record on which the appellant relies.” Ariz. R. Civ. App. P. 13(a)(7)(A). Although Bailey is representing himself, he is held to the same standards as an attorney, *see Kelly v. NationsBanc Mortg. Corp.*, 199 Ariz. 284, ¶ 16, 17 P.3d 790, 793 (App. 2000), and we could consider his arguments waived, *see Polanco v. Indus. Comm’n*, 214 Ariz. 489, n.2, 154 P.3d 391, 393 n.2 (App. 2007). In our discretion, we will nonetheless attempt to address them.

¶6 Bailey first maintains that he did not commit fraud or breach his fiduciary duties because Skuro and Zink knew “he was a convicted felon.” He points to proposed testimony from Timothy Rosales, who Bailey contends would have stated that Skuro told him Bailey was in prison in 2006. But the trial court precluded Rosales’s testimony as untimely disclosed, and Bailey does not challenge that ruling on appeal.<sup>2</sup> We therefore cannot consider Rosales’s proposed testimony. *See GM Dev. Corp. v. Cmty. Am. Mortg. Corp.*, 165 Ariz. 1, 4, 795 P.2d 827, 830 (App. 1990) (“An appellate court’s review is limited to the record before the trial court.”).

¶7 Even assuming Skuro and Zink knew Bailey had been convicted and served time in prison, the trial court’s findings of Bailey’s fraud and breach of his fiduciary duties extended beyond his criminal conviction. The court also found Bailey had “failed to fully explain his status with the courts and the Arizona State Board of Accountancy,” “fraudulently omitted to explain . . . his history of difficulties with the Internal Revenue Service [(IRS)] when he provided advice and accounting services,” and “failed to adequately

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<sup>2</sup>In his opening brief, Bailey acknowledges that the trial court had precluded Rosales’s testimony but claims the court informed him he could raise the issue on appeal. Presumably, the court meant Bailey could challenge its decision to preclude the testimony. Although Bailey has failed to raise this argument, we note that sanctions for disclosure violations are within the trial court’s broad discretion and the preclusion of evidence is generally an appropriate sanction. *See Ariz. R. Civ. P. 37(c); Granger v. Wisner*, 134 Ariz. 377, 381, 656 P.2d 1238, 1242 (1982).

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advise” Skuro and Zink “of the price they would pay if the IRS declined to accept his calculation of the basis of the corporate stock” as part of the incorporation.

¶8 Bailey next contends that Skuro and Zink “did not tell the truth.” He again cites Rosales’s testimony and maintains that Skuro and Zink’s “claims of misrepresentation and failure to disclose” were “clearly false.” But again our review is limited to the trial court record. *See id.* Relying on an exhibit attached to his motion for summary judgment, Bailey also insists he made payments to Skuro and Zink on the notes from 2009 through 2014, insisting that their assertion to the contrary “is clearly a false statement.” However, that exhibit, which apparently was prepared by Bailey, shows his “payments” in the form of redirected distributions, which is consistent with Skuro and Zink’s claim that Bailey “never paid in money” for the additional ten percent.

¶9 At bottom, Bailey’s argument is a challenge to the credibility of witnesses.<sup>3</sup> He suggests the trial court should not have adopted Skuro and Zink’s testimony. But it is the trial court’s function, as the trier of fact at a bench trial, to assess the credibility of witnesses. *In re \$26,980.00 U.S. Currency*, 199 Ariz. 291, ¶ 10, 18 P.3d 85, 89 (App. 2000). We will not second-guess such determinations on appeal, nor will we reweigh the evidence. *In re Estate of Newman*, 219 Ariz. 260, ¶ 40, 196 P.3d 863, 874 (App. 2008).

¶10 Through all of his arguments, Bailey appears to suggest that the evidence does not support the trial court’s judgment. Generally, we will not disturb a judgment when there is substantial evidence in the record to support it. *Fritts v. Ericson*, 103 Ariz. 33, 34, 436 P.2d 582, 583 (1968); *see also Federoff v. Pioneer Title & Tr. Co. of Ariz.*, 166 Ariz. 383, 388, 803 P.2d 104, 109 (1990) (“Our duty begins

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<sup>3</sup>To the extent Bailey is asserting new claims against Skuro and Zink by alleging that they committed fraud, we will not consider such arguments on appeal. *See Azore, LLC v. Bassett*, 236 Ariz. 424, ¶ 6, 341 P.3d 466, 468 (App. 2014) (trial court must have opportunity to address all issues on merits; issues not raised below waived on appeal).

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and ends with inquiring whether the trial court had before it evidence that might reasonably support its action when viewed in the light most favorable to sustaining the findings.”). However, Bailey did not include the transcripts of the trial court proceedings in the record on appeal. It is the appellant’s duty to ensure that we receive the complete record. *See* Ariz. R. Civ. App. P. 11(c); *Rancho Pescado, Inc. v. Nw. Mut. Life Ins. Co.*, 140 Ariz. 174, 189, 680 P.2d 1235, 1250 (App. 1984). Because Bailey failed to provide the transcripts, we must presume the record supports the judgment.<sup>4</sup> *See Kohler v. Kohler*, 211 Ariz. 106, n.1, 118 P.3d 621, 623 n.1 (App. 2005).

**Attorney Fees**

¶11 Appellees have requested their attorney fees on appeal pursuant to Rule 25, Ariz. R. Civ. App. P., and A.R.S. § 12-341.01. In our discretion, we deny their request under Rule 25, which allows us to award attorney fees as a sanction for a frivolous appeal or a violation of our rules. *See Villa de Jardines Ass’n v. Flagstar Bank, FSB*, 227 Ariz. 91, ¶ 26, 253 P.3d 288, 296 (App. 2011) (Rule 25 used with reservation). However, under § 12-341.01, this court may award attorney fees to the successful party in a “contested action arising out of a contract.” *See Ball v. City of Chandler Improvement Dist. No. 48*, 150 Ariz. 559, 564, 724 P.2d 1228, 1233 (App. 1986). Here, the trial court found § 12-341.01 applicable because “[t]here is no question that the entire case was substantially linked to contract questions.” We agree and award appellees their reasonable attorney fees on appeal, contingent upon their compliance with Rule 21, Ariz. R. Civ. App. P.

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<sup>4</sup>In the conclusion of his opening brief, Bailey also asks this court to “dismiss” the award of attorney fees for Lockhart, who the trial court had dismissed before trial. However, Bailey offers no argument or explanation to support his request. We therefore deem the issue waived and do not address it further. *See Polanco*, 214 Ariz. 489, n.2, 154 P.3d at 393 n.2.

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**Disposition**

¶12 For the foregoing reasons, we affirm.