

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION II**

**J.A. PHELPS, D.V.M. and KATARINA S.
PHELPS, husband and wife,**

Appellants,

vs.

**THOMAS J. GILBRAITH and AUDREY
J. WYSTRACH, D.V.M., husband and
wife,**

Appellees.

**Court of Appeals Division Two
Case No. 2 CA-CV 2010-0052**

**Santa Cruz County Superior
Court Case No. CV200800174**

APPELLEES' MOTION FOR RECONSIDERATION

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¶ 1. **COME NOW** Appellees, by and through counsel undersigned, pursuant to Rule 22, Ariz.R.App.P., and hereby file their Motion for Reconsideration.

¶ 2. Appellees believe this Court erred when it determined that “[b]ecause it is unclear whether the trial court considered all relevant *Associated Indemnity* factors in making its attorney fee determination, we remand this issue to the trial court for reconsideration...”. [*Memorandum Decision dated October 29, 2010 (“MD”), at ¶ 16.*] The Court also erred in not awarding Appellees’ their attorney’s fees as the prevailing party in this appeal. The Court’s decisions conflict with Arizona law and misconstrue the tenor of this case.

I. THE TRIAL COURT DID NOT ERR IN DENYING PHELPS’ REQUEST FOR ATTORNEY’S FEES.

¶ 3. The Court correctly determined that its review of the trial court’s decision on whether or not to award attorneys’ fees was limited to an abuse of discretion. [*MD at ¶ 14.*] *Rowland v. Great States Ins. Co.*, 199 Ariz. 577, ¶ 31, 20 P.3d 1158, 1168 (App. 2001). The Court went on to correctly find that the trial court’s decision will be upheld if it is supported by **any reasonable basis**. [*MD at ¶ 14.*] *Uyleman v. D.S. Rentco*, 194 Ariz. 300, ¶ 27, 981 P.2d 1081, 1086 (App. 1999).

¶ 4. However, in remanding this matter, the Court overlooked Arizona’s rule of law which grants the trial court sole discretion to determine which party was the

“successful party” for the purposes of awarding attorney’s fees. By remanding, this Court is clearly changing the standard of review from one favoring the trial court’s discretion to a *de novo* standard of review.

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION.

¶ 5. The decision of whether or not to award attorney’s fees is a two step process. The trial court must first determine that the requesting party is eligible for an award of fees. *Wagenseller v. Scottsdale Memorial Hosp.*, 147 Ariz. 370, 394-95, 710 P.2d 1025, 1049-50 (Ariz.,1985). Under A.R.S. § 12-341.01, a party is only eligible if the matter arises out of contract and the trial court finds there is one clear “successful party.”

¶ 6. The decision as to who is the successful party for purposes of awarding attorneys' fees is within the sole discretion of the trial court, and will not be disturbed on appeal if any reasonable basis exists for it. *Schwartz v. Farmers Ins. Co.*, 166 Ariz. 33, 800 P.2d 20 (App.1990).

Sanborn v. Brooker & Wake Property Management, Inc., 178 Ariz. 425, 430, 874 P.2d 982, 987 (Ariz.App. Div. 1,1994).

¶ 7. Mere eligibility does not automatically establish entitlement to fees. *Wagenseller*, 147 Ariz. at 394-95.

¶ 8. Only after a party is found to be eligible to receive fees does the trial court consider the factors enumerated in *Associated Indemnity Corp. v. Warner*, 143 Ariz. 567, 694 P.2d 1181, (1985). *Sanborn*, 178 Ariz. at 430. Even then, the

trial court's decision to reduce or deny fees altogether is purely discretionary. *Associated Indemnity*, 143 Ariz. at 589; accord *Robert E. Mann Constr. Co. v. Liebert Corp.*, 204 Ariz. 129, 133, ¶ 13, 60 P.3d 708, 712 (App.2003).

¶ 9. **First, the factors listed in *Wagenseller* and *Associated Indemnity* are not a guide for deciding who is the prevailing party but rather are intended “to assist the trial judge in determining whether attorney's fees should be granted ... once eligibility has been established.”** *Wagenseller*, 147 Ariz. at 394, 710 P.2d at 1049 (emphasis added). Second, those factors do not dictate our review of a trial court's decision to award fees. As our supreme court has stated:

In reviewing the exercise of [the trial court's] discretion ...:

[T]he question is not whether the judges of this court would have made an original like ruling, but whether a judicial mind, in view of the law and circumstances, could have made the ruling without exceeding the bounds of reason. We cannot substitute our discretion for that of the trial judge.

Sanborn, 178 Ariz. at 430.

¶ 10. Here, the trial court unequivocally determined that neither party was eligible to receive an award of attorney's fees. Specifically, the trial court concluded that there was no one prevailing party, no “successful party” as defined by § 12-341.01. As such, the trial court was not required to consider any of the *Associated Indemnity* factors.

¶ 11. In remanding this matter and instructing the trial court to consider the *Associated Indemnity* factors, this Court is implicitly instructing the trial court to

find that Phelps is the prevailing party. Such action is inappropriate, not supported by Arizona law, and a complete usurpation of the trial court's discretion.

¶ 12. In reviewing discretionary awards under §12-341.01, the Court must view the record in the light most favorable to sustaining the trial court's decision. *Rowland v. Great States Ins. Co.*, 199 Ariz. 577, 587, 20 P.3d 1158 (Ariz.App. Div. 2,2001).

¶ 13. In its Memorandum Decision, this Court affirmed all of the trial court's findings. Specifically, this Court affirmed the trial court's finding that both parties were partially successful and partially unsuccessful. This Court did not rule that there was no factual basis to support the trial court's findings. Nor did this Court find that the trial court abused its discretion in any regard.

¶ 14. Here, the trial court made specific findings of fact and conclusions of law. This Court is bound by those findings and conclusions unless clearly erroneous. *Aztec Film Productions v. Tucson Gas & Elec. Co.*, 11 Ariz.App. 241, 243, 463 P.2d 547, 549 (1969) (due regard must be given to trial court's ability to weigh the credibility of the evidence and witnesses).

¶ 15. On appeal, Phelps had the burden of presenting specific evidence from the trial record establishing that the trial court abused its discretion in determining that there was no successful party as defined by § 12-341.01. Ariz.R.Civ.App.P.

11 and 13. This Court specifically ruled that, “Phelps failed to provide this court with trial transcripts. Although he asserted at oral argument before this court that he had filed those transcripts, it appears he filed only the transcripts’ cover pages. The complete transcripts do not appear in our docket. Because we must assume items missing from the record on appeal support the trial court’s ruling, this failure would justify our summary disposal of this appeal. *See Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995).” [MD, pg 2, footnote 1.]

¶ 16. The Court misapplies the applicability of *Associated Indemnity* to the present case. In that case, the plaintiff was indisputably the prevailing party. Because the action arose out of contract, plaintiff, as the “successful party,” was eligible for an award of attorney’s fees.¹ Nevertheless, the trial court denied the plaintiff’s fees request without stating any reason therefore. The *Associated* court stands for the proposition that when there is clearly one successful party, the trial court may consider certain factors, among other things, in exercising its discretion to reduce or deny fees.

¶ 17. Here, the trial court specifically found that neither party fully prevailed

¹ The Court also cites *Orfaly v. Tucson Symphony Society*, 209 Ariz. 260, 99 P.3d 1030 (App. 2004). There, identical to *Associated Indemnity*, the trial court determined there was a “successful party” within the meaning of ARS §12-341.01. Only after making that determination did the trial court consider the *Associated Indemnity* factors.

and therefore there was no one successful party within the meaning of § 12-341.01. There is no dispute the trial court was within its discretion in making this determination. Because there was no eligible party, the trial court was not required to consider the *Associated Indemnity* factors.

¶ 18. The trial court’s determination that there was no successful party was dictated by the award of nominal damages. This Court affirmed that determination and in so doing affirmed all of the trial court’s findings thereunder. The trial court expressly stated in the Final Judgment that it **“reviewed and considered the entire record...including testimony and exhibits presented at trial...pleadings...argument of counsel...and legal authorities cited to the Court...”** (emphasis added) [ROA # 79, pg. 2, lns. 3-5] Based on that review and those considerations, there was no “successful party.” [ROA # 79, COL ¶ M]²; accord, *General Cable Corp. v. Citizens Utility Co.*, 27 Ariz.App. 381, 385, 555 P.2d 350, 354 (1976) (finding there was no “successful party” where both parties were partly successful and partly unsuccessful); *Trilogy Network Systems, Inc. v. Johnson*, 144 Idaho 844, 172 P.3d 1119, 1122 (2007) (there was no prevailing party in non-compete case where plaintiff prevailed on the issue of breach and defendant prevailed on the issue of damages.).

¶ 19. On appeal, the presumption is that the trial court made all necessary findings sufficient to sustain its decision regarding attorneys' fees. *General Elec. Capital Corp. v. Osterkamp*, 172 Ariz. 191, 193, 836 P.2d 404, 406 (Ariz.App.Div.2, 1992).

¶ 20. This Court cannot reweigh the evidence or substitute its evaluation of the facts. *Cauble v. Osselaer*, 150 Ariz. 256, 258, 722 P.2d 983, 985 (App.1986). *Castro*, 222 Ariz. at 52 (appellate courts defer to trial judge with respect to any factual findings explicitly or implicitly made.).

¶ 21. Implied in every judgment, in addition to the express findings made by the court, are any additional findings necessary to sustain the judgment, if reasonably supported by the evidence and not in conflict with the express findings...(emphasis added)

General Elec. Capital Corp. v. Osterkamp, 172 Ariz. 191, 193, 836 P.2d 404 (Ariz.App.Div.2, 1992)

¶ 22. Nevertheless, in remanding this matter the Court has in essence ignored the trial court's findings (and ability to make those findings) and substituted its own evaluation of the facts.

¶ 23. "A.R.S. § 12-341.01.A is remedial in nature and such relief is equally available to those who successfully defend an action as to those who successfully seek affirmative relief." *Schwartz v. Farmers Ins. Co. of Arizona*, 166 Ariz. 33,

² See Clerk's Index of Record on Appeal ("ROA").

38, 800 P.2d 20, 25 (Ariz.App.,1990) (trial court did not abuse its discretion in awarding fees to defendant given the substantial disparity between plaintiff's requested relief and actual damages awarded); *Mountain States Broadcasting Co. v. Neale*, 783 P.2d 551, 555 (Utah Ct.App. 1989) (if defendant successfully defends and avoids adverse judgment, defendant has prevailed.).

¶ 24. Based on the substantial disparity between the relief sought by Phelps and the relief he was actually awarded, the trial court determined that Wystrach had prevailed on damages, a central issue of the case. Because the trial court determined that Phelps had prevailed on the other central issue, i.e. breach, the court found the matter to be a draw and thus neither party was eligible for an award of fees. Such determinations were all within the sound discretion of the trial court and cannot be overturned absent clear abuse of such discretion.

B. THERE IS NO EVIDENCE THE TRIAL COURT DID NOT CONSIDER THE RELEVANT ASSOCIATED INDEMNITY FACTORS.

¶ 25. As detailed above, the Court's remand based solely on *Associated Indemnity* is misplaced. The law does not require the trial court to consider any of the *Associated Indemnity* factors until and unless the trial court has determined there is a "successful party." That did not happen in this case.

¶ 26. Assuming *arguendo*, the trial court had determined there was one

prevailing party (which it clearly did not), **there is no evidence before this Court that the trial court did not consider all of the relevant *Associated Indemnity* factors.** In fact, all of the evidence is to the contrary.

¶ 27. The *Associated Indemnity* court set forth factors “which *might be considered* by the trial judge in exercising his discretion to reduce or deny attorney’s fees.” (emphasis added) *Id.* at 589. There is no requirement that the trial consider each and every *Associated Indemnity* factor. “The balancing and evaluation of these factors is within the trial court’s discretion. We will not substitute our discretion for that exercised by the court below...if there is a reasonable basis in the record to sustain the exercise of that discretion.” *Id.*

¶ 28. Likewise, there is no requirement that the trial court expressly set forth each and every factor it considered in denying fees. Arizona law is clear regarding situations when the trial court must specifically set forth the grounds for its decision. For example:

¶ 29. Arizona Rules of Civil Procedure 59(m) provides that “[n]o order granting a new trial shall be made and entered unless the order specifies with particularity the ground or grounds on which the new trial is granted.” **Rule 59(m) compels the trial court to inform the parties and the appellate court of the grounds for its decision in order to facilitate the disposition of appeals by narrowing the issues.** (emphasis added)

Martinez v. Schneider Enterprises, Inc. 178 Ariz. 346, 348, 873 P.2d 684, 686 (Ariz.App. Div. 1,1994); *Liberatore v. Thompson*, 157 Ariz. 612, 617, 760 P.2d 612, 617 (Ariz.App., 1988).

¶ 30. This concept is highlighted in the cases relied upon by this Court in its Memorandum Decision. In those cases, none of the trial courts stated specific considerations and/or findings for their denial of fees. *Uyleman v. D.S. Rentco*, 194 Ariz. 300, 306, 981 P.2d 1081, 1087 (Ariz.App. Div. 1,1999) (upholding trial court’s decision to deny fees where neither party fully prevailed and even though trial court gave no reasons for denying fees).

¶ 31. **The trial court made no express findings when it denied attorney's fees. Nevertheless, by denying the fee request, it *implicitly found* that at least one of the three required elements in § 12-341.01 was lacking.** See *General Elec. Capital Corp. v. Osterkamp*, 172 Ariz. 191, 193, 836 P.2d 404, 406 (App.1992) (necessary findings are implied in every judgment). (emphasis added)

Rowland v. Great States Ins. Co., 199 Ariz. 577, 587, 20 P.3d 1158, 1168 (Ariz.App. Div. 2,2001).

¶ 32. **Although the trial court articulated no reason for the ruling, we believe obvious reasons appear in the record.** First and foremost is the amount of the damage award. At best this was a moral and Pyrrhic victory only. In *Huntley v. Community School Board of Brooklyn, New York District No. 14*, 579 F.2d 738 (2d Cir.1978), the federal court held that there was no abuse of discretion in the conclusion of the trial judge that appellant had at most won a “moral victory” of insufficient magnitude to warrant an award under § 1988. The award in *Huntley* was \$100. Other federal decisions reach this same result. See *New York City Unemployed and Welfare Council v. Brezenoff*, 742 F.2d 718 (2nd Cir.1984); *Drake v. Perrin*,

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593 F.Supp. 1176 (E.D.Pa.1984).

¶ 33. It has always been proper to consider the amount involved and the results obtained in determining the reasonableness of the amount of attorney fees. *Schwartz v. Schwerin*, 85 Ariz. 242, 336 P.2d 144 (1959). (emphasis added)

Moran v. Pima County, 145 Ariz. 183, 184, 700 P.2d 881, 882 (Ariz.App.,1985).

¶ 34. Nevertheless, through its remand and as clearly illustrated in the specially concurring opinion, the Court has put its own spin on the facts of this case. That spin is neither justified nor supported by the evidence and/or trial record. Given that Phelps failed to cite the record, submit any transcripts, or point to any other evidence in support of his claim, it is difficult to reconcile the Court's remand and/or the findings detailed in the special concurring opinion.

¶ 35. Contrary to what Phelps represented to this Court during oral argument, Wystrach's actions were not premeditated or "clandestine." Ken Allen was the attorney who facilitated the negotiations between the parties and who prepared the parties' written agreement. Ken Allen testified at trial that parties clearly understood and agreed Nelson Farms was not included in the covenant not to compete. [*ROA # 57; Transcript 2, at pg 17-22, lns. 16-3, attached hereto and incorporated herein as Exhibit A.*]

¶ 36. In its Memorandum Decision the Court observed that "but for Wystrach's breach, Phelps would not have been required to initiate litigation to stop her

continuing violation of the covenant not to compete.” This finding was never made by the trial court. In fact, the trial court implicitly found the exact opposite.

¶ 37. The issue of whether or not Phelps made any effort to mitigate his damages was specifically argued at trial. [*ROA # 52, Trial Memorandum, at pgs. 8-9, Ins. 13-20 attached hereto and incorporated herein as Exhibit B.*] In deed, Phelps admitted he knew of Wystrach’s actions several years prior to filing suit but did nothing to stop or mitigate the alleged harm:

Q. Dr. Phelps, after May 1st you never called Dr. Wystrach and asked her to stop working for Trish Nelson did you?

A. No.

Q. After May 2005 you never contacted [Dr. Wystrach’s attorney] Ken Allen did you?

A. No.

Q. You never called Ken Allen to complain that Dr. Wystrach had breached the agreement did you?

[Objection, Sustained – Asked and Answered.]

Q. After May 5 you never called Trish Nelson did you?

A. No.

Q. You never called Nelson Farms did you?

A. No.

Q. In fact, you testified in you deposition that after May 5 you didn’t take any action did you?

A. No.

Q. Isn’t it true, as you said in your deposition, that the reason you didn’t take any action was simply because you didn’t want to?

A. No. I didn’t have any evidence.

Q. Didn't you say that the reason that you didn't do it, you didn't take any action was because you didn't want to?

A. I didn't want to stir up trouble without any evidence.

Q. Alright. Dr. Phelps, I would like to refer to your deposition at page 82, specifically...lines 20 through 25.

Q. The testimony on page 82 states, starting at line 20:

Question. "Did you ever call the lawyer back and say we need to resolve this. We need to figure this out what is going on?"
Answer. "No."

Question. "Why didn't you do that?" Answer. "Because I didn't want to."

Q. Is that correct?

A. That's what it says.

Q. And isn't it true that you went on to testify that the reason that you didn't want to, the reason why you didn't want to take any action to prevent Dr. Wystrach from working with Nelson Farms was because you didn't want to waste your time?

A. I didn't want to waste my time because I had no evidence at the moment, no hard evidence.

Q. You said in your deposition, as you sit here today in your testimony, you didn't take any action because you didn't want to waste your time; isn't that correct?

A. Correct. I should add to that I didn't want to waste my time because I didn't have hard evidence to pursue.

Q. You didn't want to waste your time did you?

A. Because I did not have - -

Q. That's a yes or no answer.

A. Correct.

[ROA # 57; Transcript 1, at pg 86-88, lns. 4-15, attached hereto and incorporated
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herein as Exhibit C; ROA # 57, Transcript 2, testimony of Dr. Audrey Wystrach at pgs 114-117, lns. 17-16, attached hereto and incorporated herein as Exhibit D.]

¶ 38. Nor is a remand under the circumstances justified by Arizona law. In fact, remanding this matter merely because the trial court did not expressly state that it considered all of the relevant *Associated Indemnity* factors contradicts Arizona law. As such, the remand is likely to be interpreted as an attempt to order the trial court to (1) find there was a “successful party” and (2) award that party some amount of attorney’s fees. Such result would usurp the trial court’s right to exercise its own discretion.

C. REQUEST FOR ATTORNEY’S FEES AND COSTS.

¶ 39. Because Wystrach was the successful party on this appeal, Wystrach respectfully requests an award of her reasonable attorney’s fees and costs incurred herein pursuant to A.R.S. §12-341.01, A.R.S. §12-341, Rule 21, Ariz.R.Civ.App.P., and Rule 25, Ariz.R.Civ.App.P.

WHEREFORE, Wystrach respectfully request this Court withdraw its remand of this matter on the issue of attorney’s fees. Additionally, Wystrach

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requests an award of her fees and costs as the successful party on this appeal.

RESPECTFULLY SUBMITTED this 12th day of November, 2010.

**MONROE McDONOUGH
GOLDSCHMIDT & MOLLA, PLLC**

By: /s/ D. Rob Burris
D. Rob Burris
Attorney for Appellees

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 6(c) and 22(c), A.R.C.A.P., I certify that this Motion for Reconsideration is proportionately spaced, has a typeface of Times New Roman at 14 points and, according to Microsoft Word's word count function, contains 3,402 words excluding the Certificate of Service, this Certificate of Compliance, and any addendum.

Dated this 12th day of November, 2010.

**MONROE McDONOUGH
GOLDSCHMIDT & MOLLA, PLLC**

By: /s/ D. Rob Burris
D. Rob Burris
Attorney for Appellees

CERTIFICATE OF SERVICE

I hereby certify that an original of the foregoing Motion was electronically transmitted to the Clerk's Office this 12th day of November, 2010, using the

CM/ECF Systems for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrant:

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