

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

CECILIA CRUZ,
Plaintiff/Appellant/Cross-Appellee,

v.

RICHARD MIRANDA, CITY MANAGER, AND ROGER RANDOLPH, CITY
CLERK OF THE CITY OF TUCSON,
Defendants/Appellees/Cross-Appellants.

No. 2 CA-CV 2015-0131
Filed April 21, 2016

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NOT FOR PUBLICATION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. CR20132985
The Honorable Christopher P. Staring, Judge

VACATED AND REMANDED

COUNSEL

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By William J. Risner
Counsel for Plaintiff/Appellant/Cross-Appellee

CRUZ v. MIRANDA
Decision of the Court

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MEMORANDUM DECISION

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

H O W A R D, Presiding Judge:

¶1 Cecilia Cruz appeals from the trial court’s award of attorney fees and costs against the City of Tucson (“City”) pursuant to A.R.S. §§ 39-121.02(B) and 12-349(A)(3). She contends the court abused its discretion by reducing her award based on factors which were unsupported by the record.¹ The City has filed a cross-appeal, contending the court lacked subject matter jurisdiction over this case because Cruz named the defendants in their individual and not official capacities. Because we conclude the court had subject matter jurisdiction, but abused its discretion in determining the amount of attorney fees and costs awarded, we vacate the award of attorney fees and costs and remand for a redetermination of the appropriate amount.

Factual and Procedural Background

¶2 “In reviewing a trial court’s fee award, we view the record in the light most favorable to sustaining the trial court’s decision.” *See Solimeno v. Yonan*, 224 Ariz. 74, ¶ 36, 227 P.3d 481, 489 (App. 2010). In May 2013, Cruz submitted a request to the City

¹In her opening brief, Cruz also challenged the trial court’s denial of her motion for Rule 60(c), Ariz. R. Civ. P., relief to conduct additional discovery into whether the City still had relevant public records in its possession. In her reply brief, however, she “abandons or withdraws that aspect of her appeal,” and we therefore do not address it.

CRUZ v. MIRANDA
Decision of the Court

seeking to review all public records related to the potential sale of El Rio Golf Course (“El Rio”) to Grand Canyon University (“GCU”).² When the City denied her request, Cruz’s attorney sent the City a letter indicating Cruz intended to seek legal action if the records were not made available. In response, the City disclosed what it then claimed were all the relevant public records and stated it was withholding an additional seven documents it believed were privileged. The City asserted it had “fully responded” to Cruz’s request.

¶3 In July, the trial court held a hearing on the issue, at which the seven withheld documents were submitted to the court for an *in camera* review. In August 2013, the court ruled that Cruz was entitled to access some of the withheld records, but others were properly withheld based on attorney-client privilege. It also denied her request for attorney fees and costs.

¶4 Cruz then filed a timely Rule 59(a), Ariz. R. Civ. P., motion for a new trial on the issue of attorney fees, arguing the trial court had not followed the procedures laid out in Rule 54(g), Ariz. R. Civ. P., governing claims for attorney fees by denying her request in the August ruling. Before the scheduled hearing on Cruz’s motion, the City disclosed more than 800 additional documents related to her original request.

¶5 At the hearing on Cruz’s motion, the City’s attorney stated he did not know why the recently released documents had not been found before the July hearing. He went on to state, “We think that we have found most of the documents now, almost all of the documents. I don’t want to tell you that we aren’t going to find a few more. But this release, really, is the last major release there will be. It’s now truly going to be this or that document, I think.” The trial court granted Cruz’s motion for attorney fees and costs, and allowed Cruz to “depose the City concerning the retention and existence of documents responsive to [her] May 12, 2013 document request, and the efforts made in response to that document request.”

²Shortly after Cruz submitted her request for documents, GCU decided it was not interested in the El Rio site.

CRUZ v. MIRANDA
Decision of the Court

¶6 Following those depositions, Cruz filed a motion for a new trial and, alternatively, a Rule 60(c), Ariz. R. Civ. P., motion for relief from judgment, alleging the recent depositions and disclosures showed the City was still withholding relevant documents and seeking “a complete reopening of the proceedings.” In December 2013 and March 2014, the City disclosed additional documents responsive to Cruz’s original request, many of which were e-mails produced prior to May 2013. At the hearing on all pending motions, the City stated, “We have made as good faith an effort as we possibly can to find records. We believe that we have given all the records that there are.”

¶7 In May 2014, the trial court denied Cruz’s motion for new trial as untimely, but granted Cruz’s Rule 60(c) motion in part, and amended its August 2013 ruling to “order[the City] to produce all documents requested in Ms. Cruz’s May 2013 request, with the exception of documents already identified as being subject to the attorney-client privilege” by June 4, 2014. The court also found the City’s previous representation that it had “fully responded” with Cruz’s request “and, at best, slipshod approach to Ms. Cruz’s request, unreasonably expanded and delayed the resolution of this matter, mandating an award pursuant to § 12-349(A)(3).” The court awarded Cruz a portion of her attorney fees and costs pursuant to §§ 39-121.02(B) and 12-349(A). Cruz then filed a timely motion for a new trial on the attorney fees issue, contending the court’s determination of the amount was an abuse of discretion.

¶8 On June 4, the City disclosed approximately 204 additional documents, the majority of which were created between January and June 2013.³ At the hearing on Cruz’s motion for a new trial, the City’s attorney stated he did not “have a good answer” for why those documents had not been found prior to the May 2014 ruling. When asked about his previous representations that the City had complied fully with Cruz’s request, the attorney stated:

³In its notice of compliance, the City stated it had, for the first time, conducted a search of the e-mails in the computer system using the term “project study” despite that being the well-known moniker for the El Rio/GCU proposal.

CRUZ v. MIRANDA
Decision of the Court

I have no answer for that other than that is what I believed at the times, and I keep being wrong. And I don't have a legal answer for you. But you asked me to certify on June 4, and I did. And I do believe it now. I really believe it because I triple-checked everything.

¶9 In September 2014, the trial court granted Cruz's motion for a new trial on the § 12-349(A) sanctions issue and ruled that she could depose three additional City employees "concerning what documents were contained in [the City's] files, including the lost ones, the non-privileged circumstances and timing of the delivery of any files to the City Attorney's office, whether duplicates exist, and whether the witnesses know or have information concerning the possible whereabouts of the files or how they were lost." It also allowed Cruz to file supplemental briefing concerning whether the court should impose additional sanctions pursuant to § 12-349(A), which she did.

¶10 In April 2015, the trial court granted Cruz's motion for an additional award of attorney fees and costs pursuant to § 12-349(A), bringing the total amount awarded, including the May 2014 award, to \$84,079.84. We have jurisdiction over Cruz's appeal pursuant to A.R.S. §§ 12-2101(A)(1) and 12-120.21. See *Ariz. R. P. Spec. Actions* 8(a).

Subject Matter Jurisdiction

¶11 In its cross-appeal, the City argues the trial court lacked subject matter jurisdiction to hear the case. It reasons that § 39-121.02 authorizes special actions against the "public body" or "official" that denies access, but Cruz sued the City Manager and City Clerk in their individual, and not official, capacities, thus depriving the court of jurisdiction. If the trial court lacked subject matter jurisdiction, we would not reach the propriety of the attorney fees award. See *Glover v. Glover*, 231 Ariz. 1, ¶ 22, 289 P.3d 12, 18 (App. 2012). Therefore, we address this issue first. We review a trial court's subject matter jurisdiction de novo. *Id.* ¶ 18.

CRUZ v. MIRANDA
Decision of the Court

¶12 After filing its answer below, the City moved to dismiss this action because Cruz had sued the City Manager and City Clerk in their individual, rather than official, capacities. The trial court found the “plain language of [§ 39-121.02] lets [Cruz] sue the individual officers.” Moreover, it concluded that, ultimately, “how the two gentlemen were denominated as defendants” was not “a subject matter jurisdiction issue.”

¶13 Subject matter jurisdiction refers to a court’s “power to deal with the general abstract question, to hear the particular facts in any case relating to this question, and to determine whether or not they are sufficient to invoke the exercise of that power.” *Gatecliff v. Great Republic Life Ins. Co.*, 154 Ariz. 502, 507, 744 P.2d 29, 34 (App. 1987), quoting *Sil-Flo Corp. v. Bowen*, 98 Ariz. 77, 81-82, 402 P.2d 22, 25 (1965); see also *State ex rel. Baumert v. Mun. Ct. of City of Phx.*, 124 Ariz. 543, 545, 606 P.2d 33, 35 (App. 1979) (“The existence of subject matter jurisdiction is determined by the general nature of the charge contained in the complaint.”). Put another way, it is “the power of the court to hear the class of cases involved.” *Rash v. Town of Mammoth*, 233 Ariz. 577, ¶ 21, 315 P.3d 1234, 1241 (App. 2013). This type of jurisdiction is conferred solely through our constitution and statutes. *Glover*, 231 Ariz. 1, ¶ 18, 289 P.3d at 16.

¶14 Pursuant to § 39-121.02(A), any person “who has been denied access to or the right to copy such records, may appeal the denial through a special action in the superior court, pursuant to the rules of procedure for special actions against the officer or public body.” That statute thus authorizes a trial court “to deal with the general abstract question” of access to public records as it relates to a case’s particular set of facts. See *Gatecliff*, 154 Ariz. at 507, 744 P.2d at 34.

¶15 Here, Cruz filed a special action from the denial of access to the requested public records pursuant to § 39-121.02. Whether Cruz named the defendants in their individual or official capacities does not affect the general nature of the action. Because Cruz’s special action is plainly within the “class of cases” a trial court may hear pursuant to § 39-121.02, the court properly had

CRUZ v. MIRANDA
Decision of the Court

subject matter jurisdiction over the case.⁴ *See Rash*, 233 Ariz. 577, ¶ 21, 315 P.3d at 1241.

Attorney Fees and Costs

¶16 Cruz argues the trial court abused its discretion by failing to award her the full amount of attorney fees and costs she requested. She first contends that, as a matter of law, she was entitled to a full award of attorney fees and costs upon the trial court's findings the City's actions fell within § 12-349(A)(3).⁵ We review de novo the interpretation of a statute. *Bennett v. Baxter Group, Inc.*, 223 Ariz. 414, ¶ 26, 224 P.3d 230, 237 (App. 2010).

⁴The City has not requested that we decide, and we do not decide, whether Cruz properly sued the public body or official.

⁵Cruz additionally contends the plain language of A.R.S. § 12-341.01(C) mandates a full award of requested attorney fees and costs. Although Cruz did raise that statute below as an additional ground for the award of attorney fees and costs, the trial court did not base the final award on § 12-341.01(C), nor could it have. The legislature amended § 12-341.01 in 2012, removing the provision relied upon by Cruz that a court "shall" award fees "in any contested action upon clear and convincing evidence that the claim or defense constitutes harassment, is groundless and is not made in good faith" as grounds for an award of attorney fees and costs. 2012 Ariz. Sess. Laws, ch. 305, § 1. Similarly, Cruz appears to claim a full award of fees and costs was mandatory pursuant to Rule 11(a), Ariz. R. Civ. P., and § 39-121.02(B), but has not developed these arguments in a way which would enable meaningful appellate review and has therefore forfeited the issue. *See Ariz. R. Civ. App. P. 13(a)(7)* ("An 'argument' . . . must contain . . . [a]ppellant's contentions concerning each issue presented for 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."); *Polanco v. Indus. Comm'n*, 214 Ariz. 489, n.2, 154 P.3d 391, 393 n.2 (App. 2007) (appellant's failure to develop and support argument waives issue on appeal).

CRUZ v. MIRANDA
Decision of the Court

¶17 A statute's language is the "most reliable indicator of the legislature's intent." *City of Tempe v. State*, 237 Ariz. 360, ¶ 10, 351 P.3d 367, 371 (App. 2015). When the language is clear and unambiguous, we need not resort to any other methods of statutory interpretation. *Id.* Pursuant to § 12-349(A), if a party "[u]nreasonably expands or delays the proceeding," the trial court "shall assess reasonable attorney fees, expenses and, at the court's discretion, double damages of not to exceed five thousand dollars."

¶18 Cruz argues the plain language of § 12-349(A) required the trial court to award the full amount of attorney fees and costs she requested. Its plain language, however, mandates an award of "reasonable attorney fees" and costs, not necessarily the full amount requested. § 12-349(A) (emphasis added). Therefore, although an award of attorney fees and costs is mandatory upon finding a party engaged in the conducted enumerated in § 12-349(A)(1) through (4), the court retains discretion to determine a reasonable amount of attorney fees and costs to award. *See, e.g., Moedt v. Gen. Motors Corp.*, 204 Ariz. 100, ¶ 17, 60 P.3d 240, 244-45 (App. 2002) (court must award prevailing party attorney fees and costs pursuant to A.R.S. § 44-1265(B) but retains discretion to determine reasonable amount); *Chase Bank of Ariz. v. Acosta*, 179 Ariz. 563, 574, 880 P.2d 1109, 1120 (App. 1994) (court has discretion to determine amount of attorney fees and costs awarded pursuant to contractual provision providing for reasonable attorney fees); *Exodyne Prop., Inc. v. City of Phoenix*, 165 Ariz. 373, 380, 798 P.2d 1382, 1389 (App. 1990) (award of attorney fees and costs to prevailing party mandatory pursuant to A.R.S. § 12-2030, but court has discretion to determine reasonable amount). Cruz's argument therefore fails.

¶19 Cruz next argues the trial court abused its discretion by reducing the award based on factors that lacked a factual basis in the record. "The determination of whether the amount of attorney[] fees is reasonable is a matter peculiarly within the discretion of a trial court, and will not be disturbed absent a showing of abuse of that discretion." *Roberts v. City of Phoenix*, 225 Ariz. 112, ¶ 47, 235 P.3d 265, 277 (App. 2010), quoting *Harris v. Reserve Life Ins. Co.*, 158 Ariz. 380, 384, 762 P.2d 1334, 1338 (App. 1988). "A court abuses its discretion if it commits an error of law in reaching a discretionary

CRUZ v. MIRANDA
Decision of the Court

conclusion, . . . or ‘the record fails to provide substantial evidence to support the trial court’s finding.’” *Flying Diamond Airpark, LLC v. Meienberg*, 215 Ariz. 44, ¶ 27, 156 P.3d 1149, 1155 (App. 2007), quoting *Grant v. Ariz. Pub. Serv. Co.*, 133 Ariz. 434, 456, 652 P.2d 507, 529 (1982); see also *Files v. Bernal*, 200 Ariz. 64, ¶ 2, 22 P.3d 57, 58 (App. 2001). Thus, although a court is not required to explain the factual basis for an award, *In Re Indenture of Trust Dated Jan. 13, 1964*, 235 Ariz. 40, ¶ 44, 326 P.3d 307, 319 (App. 2014), the general rule still applies that “a trial court must find some reasonable support from the evidence or lack of evidence,” *Grand Real Estate, Inc. v. Sirignano*, 139 Ariz. 8, 14-15, 676 P.2d 642, 648-49 (App. 1983). If this court cannot determine the factual basis for an award, we will vacate it and remand for a determination of the appropriate amount of attorney fees. *Id.* at 15, 676 P.2d at 649.

¶20 Cruz requested a total of \$172,787.90 in attorney fees and costs by the time the trial court entered its final order in April 2015. In its May 2014 ruling, the court awarded Cruz \$12,000 in attorney fees and costs pursuant to § 39-121.02(B) and an additional \$15,800 in attorney fees pursuant to § 12-349(A), which included \$5,000 pursuant to that statute’s doubling provision. In its April 2015 ruling, the court awarded Cruz an additional \$56,279.84 in attorney fees and costs. Thus, in total, Cruz was awarded \$84,079.84 in attorney fees and costs, just under half of what she requested.

¶21 The trial court stated it was reducing the award for five reasons:

- (1) the fact Ms. Cruz’s lawyers do not intend to hold her personally responsible for all of the attorney’s fees in this matter . . . ;
- (2) that many of the actions Ms. Cruz’s attorneys have undertaken in discovery and in their review of the documents have served the dual purpose of analyzing the proposed El Rio/GCU transaction for the reasons Ms. Cruz requested the documents in the first place;
- (3) the overall reasonableness of the amounts requested by Ms. Cruz and her lawyers;
- (4) the fact

CRUZ v. MIRANDA
Decision of the Court

that Ms. Cruz's attorneys spent significant time on matters and motions unrelated to the remaining issue of § 12-349(A)(3) sanctions; and (5) the financial challenges facing [the City] in these times."

Cruz contends the court had no factual basis for its findings that she was not responsible for her attorney fees and costs, that her attorney spent a significant amount of time on matters unrelated to § 12-349(A) sanctions, that her litigation efforts appeared to have been focused on other matters, and that the award would impose a financial hardship on the City.

¶22 The trial court's findings that Cruz's attorneys spent time on matters other than the sanctions and that the litigation appeared focused on the underlying transaction are supported by the record. For example, some billing entries include meetings with a County Assessor, which she contended shed light on how the City arrived at its offer to GCU. That is not related to whether Cruz was given access to the requested public records. Similarly, time spent reading "appraisal standards" does not appear to be related to the issues pertinent to whether Cruz was denied access to the public records, particularly in light of Cruz's allegation the appraisal was fake. These illustrative facts reasonably support the court's discretionary finding that the attorneys were spending time analyzing the underlying El Rio/GCU proposed transaction and working on matters other than § 12-349(A) sanctions. *See Schweiger v. China Doll Rest., Inc.*, 138 Ariz. 183, 188, 673 P.2d 927, 932 (App. 1983) (unreasonable or excessive hours, or "time spent on unsuccessful issues or claims may not be compensable").

¶23 The record does not, however, support the trial court's finding that Cruz's attorney did not intend to hold her personally responsible for the fees incurred as a factor to reduce the award. The court relied on her attorney's statement at a hearing that Cruz had "seen the fee list. But if you're asking, have I sent a letter to Cecilia Cruz and said fork over [\$100,000]? No." The court also pointed to the attorney's statement at a later hearing that Cruz "ha[d] a copy of my billings. I haven't asked her to sell her home. But, certainly, I have given her my statement of time."

CRUZ v. MIRANDA
Decision of the Court

¶24 The initial application for attorney fees and costs submitted by Cruz's attorney contained a written declaration that his retention agreement with her provided for a fee of \$360 per hour. *See* Ariz. R. Civ. P. 80(i). Cruz herself later submitted a written declaration that she "alone signed an agreement with . . . [her attorney] to pay attorney fees and costs for [her] legal representation concerning" her public records request and "[n]o other person nor any organization is responsible for the payment of those fees." *See id.* She went on to state that she was the chair for a local committee which had raised \$985 towards her legal costs. Approximately three weeks later, she submitted another declaration that the committee had planned and held a dinner fundraiser, which had raised \$4,580 to help pay the legal fees associated with this case. *See id.*

¶25 The record indicates Cruz was personally responsible for the fees. The written declarations show that Cruz was solely responsible for the fees incurred in litigating this case. And evidence that a local committee was conducting fundraising on her behalf supports her assertion that she was responsible for the legal fees in this case. Consequently, Cruz had a "genuine financial obligation" to pay the fees incurred. *Lisa v. Strom*, 183 Ariz. 415, 419, 904 P.2d 1239, 1243 (App. 1995). The trial court therefore erred by reducing the fees based on that factor.

¶26 Moreover, the recovery of attorney fees requires two things: an attorney-client relationship and "'a genuine financial obligation on the part of the litigant[] to pay such fees.'" *Moedt*, 204 Ariz. 100, ¶ 11, 60 P.3d at 243, quoting *Lisa*, 183 Ariz. at 419, 904 P.2d at 1243 (alteration in *Moedt*). In *Moedt*, the litigant was not personally liable for the fees incurred during litigation; the attorney instead agreed to collect its fees from the trial court's enforcement of the statutory provision awarding attorney fees to the prevailing party. *Id.* ¶ 3. Finding this agreement was akin to a contingency-fee agreement, the court in *Moedt* concluded it created a financial obligation authorizing an award of attorney fees. *Id.* ¶ 12.

¶27 Here, Cruz and her attorney had an attorney-client relationship. And even if the trial court was correct that Cruz was not personally liable for the fees incurred, the agreement would be

CRUZ v. MIRANDA
Decision of the Court

similar to a contingency-fee agreement, in that Cruz would “give her attorney such fees as would be awarded by the court, if any.” *Moedt*, 204 Ariz. 100, ¶ 12, 60 P.3d at 244. As we have stated in the context of attorneys representing clients on a pro bono basis, “It would be a paradox to hold that litigants who are able to pay will have their attorney’s fees reimbursed while attorneys who represent litigants unable to pay will be forced to remain unpaid.” *Arnold v. Ariz. Dep’t of Health Servs.*, 160 Ariz. 593, 608, 775 P.2d 521, 536 (1989). The trial court therefore abused its discretion by relying on this factor to reduce the amount of fees awarded. *See Flying Diamond Airpark, LLC*, 215 Ariz. 44, ¶ 27, 156 P.3d at 1155.

¶28 The record similarly does not contain evidence of the financial hardship facing the City, which the City concedes in its answering brief. The trial court pointed out this consideration was implicated by A.R.S. § 12-350(4), which states a court “shall” consider the “relative financial positions of the parties involved” when determining an award pursuant to § 12-349(A). But a party asserting a financial hardship must present prima facie evidence of that hardship. *See Woerth v. City of Flagstaff*, 167 Ariz. 412, 419-20, 808 P.2d 297, 304-05 (App. 1990) (award pursuant to A.R.S. § 12-341.01). Here, the City presented no evidence it was unable to pay an award of fees. On the contrary, when discussing whether an award would impose a financial hardship, its attorney stated “I can’t really say that in terms of the City directly as I could with certain parties.”

¶29 On appeal, the City contends the trial court could have taken judicial notice of the City’s budget, and, apparently, inferred a financial hardship. The City relies on a February 2014 presentation from a publicly noticed study session, and related news article, indicating the City was facing a \$33 million deficit. That presentation states that figure was a projection, and outlined the steps the City was actively taking to reduce that deficit and increase revenues.

¶30 A court may take judicial notice of “a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Ariz. R. Evid. 201(b)(2). The trial court here did not

CRUZ v. MIRANDA
Decision of the Court

expressly take judicial notice of this presentation and Cruz was not provided the opportunity to be heard on the fact. Ariz. R. Evid. 201(e). And the City's projected budget does not show, beyond reasonable dispute, that an award of another \$80,000 of attorney fees would impose a financial hardship, particularly in light of the fact that the City chose not to present any evidence on that point or argue it. The court consequently abused its discretion by reducing the award on this basis. *Grand Real Estate, Inc.*, 139 Ariz. at 14-15, 676 P.2d at 648-49.

¶31 The trial court's statement that it had considered the overall reasonableness of the fees could support a reduction in the award. However, we cannot determine the extent to which the two inappropriate factors played into the court's determination of overall reasonableness and the final amount of award in this case. Accordingly, we vacate the award of attorney fees and costs and remand for a redetermination of an award of reasonable attorney's fees and costs consistent with this decision. *See id.* at 15, 676 P.2d at 649.

Attorney Fees and Costs on Appeal

¶32 Both Cruz and the City have requested their attorney fees and costs on appeal pursuant to § 12-349(A). Neither side has provided proof, by a preponderance of the evidence, of one of the four grounds listed in that statute. *See Donlann v. Macgurn*, 203 Ariz. 380, ¶ 36, 55 P.3d 74, 80-81 (App. 2002). We therefore deny both parties' request. We similarly deny Cruz's request for fees based on Rule 11. In our discretion, we deny Cruz's request for attorney fees pursuant to § 39-121.02 for her appeal. However, we grant her request for reasonable attorney fees as the substantially prevailing party, on the cross-appeal, pursuant to § 39-121.02(B) upon compliance with Rule 21, Ariz. R. Civ. App. P. And we award Cruz her taxable costs, upon compliance with Rule 21. *See* A.R.S. § 12-341.

Disposition

¶33 For the foregoing reasons, the trial court's award of attorney fees and costs is vacated and this case is remanded for further proceedings consistent with this decision.