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

CARL KARCHER ENTERPRISES, INC., a California corporation, Plaintiff/Counterdefendant Appellee, v. STINE ENTERPRISES, INC. f/k/a WESTWOOD FOOD SERVICES, INC., an Arizona corporation, Defendant/Counterclaimant/ Appellant.	1 CA-CV 11-0702 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication – (Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2002-002862

The Honorable Carey Snyder Hyatt, Judge

VACATED AND REMANDED WITH INSTRUCTIONS

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N O R R I S, Judge

¶1 This appeal arises out of an order entered by the superior court denying Appellant Stine Enterprises, Inc.'s ("Stine") initial motion for an award of $840,131.40 in attorneys' fees under Arizona Revised Statutes ("A.R.S.") section 12-341.01(A) (2003), awarding Stine $4,500 out of $82,000 it requested in a supplemental motion for an award of fees under that statute, and implicitly denying its request for costs. On appeal, Stine essentially argues the superior court committed errors of law in the process of exercising its discretion in determining whether it was entitled to an award of fees and costs. We agree. Accordingly, we vacate the superior court's order and, as discussed, remand with instructions.

¶2 This is the third time this case has been before us. We summarized the facts pertaining to the dispute between Stine and Appellee Carl Karcher Enterprises, Inc. ("CKE") and the procedural history of the litigation in our two prior decisions. *See Carl Karcher Enters. Inc. v. Stine Enters. Inc.*, 1 CA-CV 05-0459 (Ariz. App. Jun. 6, 2006) (mem. decision) ("*Stine I*"); *Carl Karcher Enters. Inc. v. Stine Enters. Inc.*, 1 CA-CV 09-0078, 2010 WL 3571535 (Ariz. App. Sept. 14, 2010) (mem. decision) ("*Stine II*"). After we remanded the case to the superior court

to consider whether Stine was entitled to a fee award under A.R.S. § 12-341.01(A) and pursuant to the factors outlined by our supreme court in *Associated Indemnity Corp. v. Warner*, 143 Ariz. 567, 570, 694 P.2d 1181, 1184 (1985) ("*Warner* factors"), Stine renewed its original fee request and filed a supplemental fee request. As noted above, the superior court denied Stine's original fee request in its entirety, but granted Stine's supplemental fee request, awarding it fees in the "reasonable amount of $4,500.00."

¶3 On appeal, Stine argues the superior court essentially undercut our decision in *Stine II* through its application of the relevant *Warner* factors. Although we do not necessarily agree with Stine's characterization of the superior court's application of the *Warner* factors, we nevertheless agree the superior court committed errors of law in concluding, in the exercise of its discretion, that Stine was not entitled to a fee award under A.R.S. § 12-341.01(A). *See Grant v. Ariz. Pub. Serv. Co.*, 133 Ariz. 434, 456, 652 P.2d 507, 529 (1982) (when superior court commits an error of law in the process of reaching a discretionary conclusion, the court may be regarded as having abused its discretion); *see also State v. Chapple*, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n.18 (1983).

¶4 The superior court considered the first *Warner* factor -- the "merits of the claim or defense presented by the unsuccessful party." *Warner*, 143 Ariz. at 570, 694 P.2d at 1184. Although the superior court correctly recognized CKE's breach claim had merit in that it warranted a jury trial and the jury found in CKE's favor on Stine's claim for breach of the implied covenant of good faith and fair dealing ("implied covenant claim"), it did not acknowledge the full significance of the jury verdicts in Stine's favor. As Stine argues on appeal, and as we concluded in *Stine II*, the jury unequivocally rejected CKE's claim that Stine owed it more money and further found CKE "had acted badly in negotiating the deal" with Stine. *Stine II*, at *3, ¶ 10. Thus, the merits factor favored Stine, not CKE.

¶5 The superior court also considered the second *Warner* factor -- whether "litigation could have been avoided or settled and [whether] the successful party's efforts were completely superfluous in achieving the result." *Warner*, 143 Ariz. at 570, 694 P.2d at 1184. The superior court concluded Stine's efforts were "clearly superfluous (excessive) in achieving the result"

it achieved[1] because, first, Stine had only achieved a "zero dollar recovery on all of its claims" and had suffered an adverse jury verdict against it on its implied covenant claim; second, CKE had offered to settle the matter "before the litigation began" by offering to waive interest on the past due rent, which at that time, amounted to approximately $187,000; and third, Stine should have made "a realistic assessment of the potential outcomes" before incurring over $800,000 in fees. The record, however, does not support the superior court's assessment of what Stine achieved and the "potential outcomes" it faced both before and after CKE sued it.

¶6 First, the net result of the jury's verdicts in the case was not a "zero dollar recovery" for Stine. This case did not end in a draw; Stine won. The jury accepted Stine's interpretation of the sublease, found Stine "owed [CKE] nothing more" and determined CKE had "acted badly in negotiating the deal." *See Stine II*, at *3, ¶ 10. Second, although we agree litigants should make realistic assessments of potential outcomes before incurring substantial litigation fees,[2] the

[1]On the facts presented, the superior court's use of the phrase "clearly superfluous" instead of "completely superfluous" is a distinction without a difference.

[2]In *Fulton Homes Corp. v. BBP Concrete*, 214 Ariz. 566, 570, ¶ 15, 155 P.3d 1090, 1094 (App. 2007), we stated a court

potential outcomes facing Stine before CKE sued it and during the litigation would have required it to pay CKE various six-figure sums in past-due rent and substantial additional rent going forward.

¶7 Specifically, in August 2001, approximately one year before it sued Stine, CKE demanded Stine pay it approximately $123,000 in what CKE asserted was past due rent plus the full monthly rent payment of $8,541.30 on a going forward basis, an increase of $2,510.69 over what Stine had been paying. In October 2001, CKE withdrew its August 2001 proposal and asked Stine to make a counterproposal. But, CKE made it clear it expected Stine to pay the claimed arrearage, with interest thereon, which by then, amounted to approximately $187,000.

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could consider whether "a claim was properly brought, or whether it was unduly expanded or delayed" in deciding whether to award fees under A.R.S. § 12-341.01. Similarly, a court can also consider whether a party weighed potential outcomes against the cost of litigation in pursuing a claim or a defense in deciding that party's entitlement to fees under the statute. And, a court is entitled to consider the reasonableness of the fees incurred in fixing the amount of fees to award. *See generally* A.R.S. § 12-341.01(B) (award of reasonable attorneys' fees under subsection A of the statute should be made "to mitigate the burden of the expense of litigation to establish a just claim or a just defense" and award "need not equal or relate to the attorney[s'] fees actually paid or contracted"); *Schweiger v. China Doll Rest., Inc.*, 138 Ariz. 183, 188, 673 P.2d 927, 932 (App. 1983) (prevailing party may recover reasonable attorneys' fees for time which would have been undertaken by a reasonable and prudent lawyer to advance or protect his client's interests).

After Stine responded with an offer to pay half of the higher monthly rent going forward without paying any of the $187,000 arrearage, CKE rejected that proposal and again demanded Stine pay the entire arrearage of almost $187,000, albeit over time, as well as the higher monthly rent going forward.

¶8 Then, after CKE sued Stine, the parties periodically discussed settlement. But, and this is a critical point, CKE maintained its position that Stine would have to pay the claimed arrearage which, of course, was increasing over time because of the accrual of interest. Thus, in 2004 when the parties were discussing the possibility of mediation, CKE advised Stine that before it would agree to mediation, Stine "should know" the case was "unlikely to settle" unless Stine was willing to "fully cure" its default, which by then amounted to an arrearage, inclusive of interest, of $389,998.07 and agree to pay the higher monthly rent going forward. Indeed, by the time of trial, CKE was seeking $618,616.50 in past due rent and accrued interest.

¶9 The potential outcomes facing Stine both before and after CKE sued it presented escalating claims for additional rent. In contrast, the jury found Stine owed CKE nothing more than what it had already paid. Accordingly, as of a matter of law, Stine's efforts were not, as the superior court found,

"completely superfluous in achieving the result" Stine eventually obtained.

¶10 The superior court also considered the third *Warner* factor -- whether assessing fees against the unsuccessful party would cause "an extreme hardship." *Warner*, 143 Ariz. at 570, 694 P.2d at 1184. The court's analysis of this factor was legally flawed for three reasons. First, this factor requires a court to determine whether awarding fees would cause the unsuccessful party an *extreme* hardship. The superior court concluded, however, that assessing fees against CKE would work "a hardship" on it. Hardship and extreme hardship are not the same.

¶11 Second, the record contains no evidence that awarding fees to Stine would cause CKE an extreme hardship. A party opposing a fee award bears the burden of providing the court with prima facia evidence of financial hardship. *See Woerth v. City of Flagstaff*, 167 Ariz. 412, 420, 808 P.2d 297, 305 (App. 1990). Unsworn and unsupported assertions of hardship do not constitute evidence of financial hardship. *Id.* Even if we could say CKE had argued assessing fees against it would work an extreme hardship, it failed to provide the court with any evidence showing any hardship, extreme or otherwise. Thus, the

court's conclusion that assessing fees would work "a hardship" on CKE is unsupported by the record.

¶12 Third, the superior court measured the extreme hardship factor by considering the fees CKE had "expended . . . for its own claims and defenses." The extreme hardship factor requires the court to focus on a different issue -- whether a fee award against the unsuccessful party would cause that party an extreme hardship. The court did not make that analysis.

¶13 The superior court also considered the fourth *Warner* factor -- whether Stine, as the successful party, "did not prevail with respect to all of the relief sought." *Warner*, 143 Ariz. at 570, 694 P.2d at 1184. Again emphasizing that Stine had received a "zero dollar recovery" and the jury had found for CKE on the implied covenant claim, the court essentially found this factor favored CKE. But, as we explained in *Stine II*, it was reasonable for the jury not to award Stine any damages as it had found for Stine on the "interpretation issue"; Stine had "not paid too much"; and under these circumstances, an award of punitive damages would have been "at best, unusual." *Stine II*, at *3, ¶¶ 10-11. Thus, that Stine did not prevail with respect to all the relief it had sought did not lessen the magnitude of the relief it obtained. As with the first *Warner* factor, this factor favored Stine, not CKE.

¶14 The superior court misapplied the law in analyzing the relevant *Warner* factors, as discussed above. The record before the superior court entitled Stine to an award of fees under A.R.S. § 12-341.01(A). Thus, we vacate the superior court's order denying Stine's original fee request in its entirety. Because the court's legal analysis of the *Warner* factors vis-à-vis Stine's original fee request may have affected its assessment of Stine's supplemental fee request, we also vacate its order awarding Stine $4,500 pursuant to Stine's supplemental fee request. On remand, we direct the court to reconsider Stine's original and supplemental fee requests and to award Stine attorneys' fees in an amount appropriate under A.R.S. § 12-341.01.

¶15 Finally, the court did not rule on Stine's application for an award of $7,955.95 in costs. Accordingly, it implicitly denied that request even though Stine was the successful party and CKE did not object or dispute the costs Stine had requested. *See State v. Hill*, 174 Ariz. 313, 323, 848 P.2d 1375, 1385 (1993) (motion not ruled on deemed denied by operation of law). Therefore, on remand, we direct the superior court to award Stine the $7,995.95 in costs it requested.

CONCLUSION

¶16 For the foregoing reasons, we vacate the superior court's order denying Stine's original fee request in its entirely and awarding Stine $4,500 pursuant to its supplemental fee request. On remand, we direct the superior court to reconsider both requests and to award Stine attorneys' fees pursuant to A.R.S. § 12-341.01. We also direct the court to award Stine $7,955.95 in costs.

¶17 As the successful party, Stine is entitled to an award of costs on appeal. A.R.S. § 12-341. Stine has also requested an award of fees on appeal pursuant to A.R.S. § 12-341.01(A). After considering the relevant factors, we award Stine fees on appeal subject to its compliance with Arizona Rule of Civil Appellate Procedure 21.

/s/
PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/
DIANE M. JOHNSEN, Judge

/s/
JON W. THOMPSON, Judge