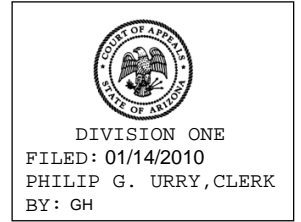


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

EDWARD KUFAHL and JOY KUFAHL,) 1 CA-CV 08-0788
husband and wife,)
) DEPARTMENT B
Plaintiffs/Counter-)
defendants/Appellants,) **MEMORANDUM DECISION**
) (Not for Publication
v.) - Rule 28, Arizona
) Rules of Civil
FEDERICO DAVID JOHNSTON and MARY) Appellate Procedure)
JOHNSTON, husband and wife, dba ACE)
ALUMINUM AND PRODUCTS,)
)
Defendants/Counter-)
claimants/Appellees.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2005-003958

The Honorable Douglas L. Rayes, Judge

AFFIRMED

Britt Law Group PC Phoenix
By Edward H. Britt
and Ryan Skiver
Attorneys for Plaintiffs/Appellants

Federico David Johnston, *In Propria Persona* Yoncalla, OR

Mary Johnston, *In Propria Persona* Yoncalla, OR

N O R R I S, Judge

¶1 This timely appeal arises from the superior court's denial of plaintiffs/appellants Edward and Joy Kufahls' request for an award of attorneys' fees under Arizona Revised Statutes ("A.R.S.") section 12-341.01(A) (2003), even though they were the successful parties in a lawsuit they filed against defendants/appellees Federico David Johnston and Mary Johnston dba Ace Aluminum and Products (collectively, "Johnstons"). The court found the Johnstons had made oral offers to the Kufahls "indicating a willingness to settle in the range of, or greater than the jury verdict" in favor of the Kufahls and relied on this factor in exercising its discretion to deny fees. In full, the court reasoned as follows:

In determining whether to exercise its discretion to award attorneys' fees, the Court has considered the factors set forth in *Associated Indemnity Corp. v. Warner*, 143 Ariz. 567, 694 P.2d 1181 (1985).

In this case, the Court finds the factor of whether the litigation could have been avoided to overwhelmingly carry the most weight. The Court finds that although Defendants did not make a written settlement offer, they made oral offers to Plaintiff indicating a willingness to settle in the range of, or greater than the jury verdict.

In its discretion, the Court declines to award Plaintiffs' attorneys fees.

¶2 On appeal, the Kufahls first assert A.R.S. § 12-341.01(A) limits a court from considering oral settlement offers

in deciding whether to exercise discretion to award fees. We disagree.¹

¶13 As relevant here, A.R.S. § 12-341.01(A) provides:

In any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney fees. If a written settlement offer is rejected and the judgment finally obtained is equal to or more favorable to the offeror than an offer made in writing to settle any contested action arising out of a contract, the offeror is deemed to be the successful party from the date of the offer and the court may award the successful party reasonable attorney fees.

¶14 The second sentence of the statute fixes successful party status as of a certain date -- the date the qualifying settlement offer is made. Even then, however, an award of fees is not mandated. The sentence states the court "may" award reasonable fees to that party. On its face, this statutory language does not prohibit a court from considering oral settlement offers in deciding whether to exercise its discretion to award fees under the statute. *Janson ex rel. Janson v. Christensen*, 167 Ariz. 470, 471, 808 P.2d 1222, 1223 (1991) (if statutory language is unambiguous, we must give effect to the language); *Canon Sch. Dist. No. 50 v. W.E.S. Constr. Co.*, 177

¹This issue presents a question of statutory construction; thus, our review is de novo. *Chaurasia v. Gen. Motors Corp.*, 212 Ariz. 18, 26, ¶ 24, 126 P.3d 165, 173 (App. 2006).

Ariz. 526, 529, 869 P.2d 500, 503 (1994) (absent clear indication of legislative intent to the contrary, "we are reluctant to construe the words of a statute to mean something other than what they plainly state").

¶15 Given the clear wording of the statute, the Kufahls' reliance on Arizona and federal case law construing the state and federal offer of judgment rules, Arizona Rule of Civil Procedure 68 and Federal Rule of Civil Procedure 68, is misplaced. Both rules require the settlement offer be in writing. The Kufahls' reliance on *Cole v. Wodziak*, 169 F.3d 486 (7th Cir. 1999), is also misplaced. In *Cole*, the court found the magistrate judge had given an oral settlement offer the same effect as a written offer of judgment under Federal Rule of Civil Procedure 68. *Id.* at 487. The court correctly recognized that to obtain the benefits of Rule 68, a party must follow its requirements, which did not happen in that case. *Id.* Here, as explained, A.R.S. § 12-341.01(A) does not restrict the exercise of discretion to written settlement offers.²

²The Kufahls argue we should construe A.R.S. § 12-341.01(A) to prohibit a court from considering oral settlement offers because the Johnstons' description of the offers in their answering brief varies from how they described the offers in superior court. Any variance in the Johnstons' description of the offers does not give us the right to disregard the statutory language. Further, in resolving the issues raised in this appeal, we are limited to the factual record made in the superior court. ARCAP 11(a)(1).

¶16 The Kufahls next argue the Johnstons' settlement offers were subject to conditions and thus, were neither genuine nor made in good faith, and accordingly, the court abused its discretion in relying on them in denying the Kufahls' fee request. Again we disagree.

¶17 The Johnstons provided the court with an excerpt from Joy Kufahl's deposition in which she acknowledged "David" had made "two offers to settle back under the first judgment, one was for \$45,000, if I remember right, and one for \$85,000." Mary Johnston also submitted a declaration to the court in which she described the settlement offers in more detail:³

The settlement offers we made to the Plaintiffs in this matter before we hired an attorney were not made conditional upon obtaining financing. When we offered the \$45,000, we were told it was rejected because they wanted \$130,000. When they dropped their demand to \$100,000, we asked whether they would take \$80,000. They said no.

¶18 Although the Kufahls, through counsel, argued in the superior court the settlement offers contained numerous conditions including the Johnstons' ability to borrow the money, they failed to provide the court with any evidentiary proof supporting this argument. Consequently, the court was entitled

³The Johnstons submitted this declaration to the court after it authorized them to respond to a motion filed by the Kufahls asking the court to reconsider its denial of their fee request.

to disregard it. *Cf. Tamsen v. Weber*, 166 Ariz. 364, 368, 802 P.2d 1063, 1067 (App. 1990) (summary judgment opponent cannot defeat motion merely by asserting facts in memorandum or brief).

¶19 Further, although on appeal the Kufahls argue the Johnstons' attorney described the offers in the superior court as a "joke," we have no way to verify this assertion because they failed to include any hearing or trial transcripts in the record on appeal. The superior court was in the best position to determine what defense counsel may have said during the case regarding the offers, and given its denial of the Kufahls' fee request, it must have viewed defense counsel's statements differently. *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995) ("[w]hen a party fails to include necessary items [in the record on appeal], we assume they would support the court's findings and conclusions"). The court, therefore, did not abuse its discretion in relying on the oral settlement offers in deciding whether, in the exercise of its discretion, it should award the Kufahls fees.⁴

⁴The Kufahls also argue the settlement offers were not genuine because it would have been "illogical" for the Johnstons to offer \$80,000 to settle the default judgment against them (which was subsequently vacated) when it was only for \$68,157.23. However, as Mary Johnston explained in her declaration, when the Kufahls rejected the \$45,000 proposal, the Kufahls demanded \$130,000. After the Kufahls dropped their demand to \$100,000, the Johnstons asked whether they would take \$80,000. It is not illogical for a judgment debtor to offer to

¶10 Finally, we reject the Kufahls' argument the court abused its discretion in weighing the factors generally considered by Arizona courts in deciding whether to exercise discretion and award fees under A.R.S. § 12-341.01(A). See generally *Assoc'd Indem. Corp. v. Warner*, 143 Ariz. 567, 694 P.2d 1181 (1985). A superior court has broad discretion to determine whether attorneys' fees should be awarded. *State Farm Mut. Auto Ins. Co. v. Arrington*, 192 Ariz. 255, 261, ¶ 27, 963 P.2d 334, 340 (App. 1998). We will not reverse a superior court's decision awarding or denying fees unless there has been an abuse of discretion. *Bogard v. Cannon & Wendt Elec. Co.*, 221 Ariz. 325, 335-36, ¶ 39, 212 P.3d 17, 27-28 (App. 2009). Accordingly, we will not set aside a superior court's ruling on fees unless it lacks any reasonable basis. *Warner*, 143 Ariz. at 570, 694 P.2d at 1184. Further, in making this determination, we view the record in a light most favorable to upholding the superior court's decision. *Rowland v. Great States Ins. Co.*, 199 Ariz. 577, 587, ¶ 31, 20 P.3d 1158, 1168 (App. 2001).

¶11 Here, the court explicitly stated it had considered the *Warner* factors. It then found the factor entitled to the most weight was whether the litigation could have been avoided,

pay somewhat more than the amount of a judgment to resolve litigation and avoid disruption and expense when the judgment holder attempts to collect the judgment.

and based on the evidence presented by the Johnstons, found they had made offers to the Kufahls "indicating a willingness to settle in the range of, or greater than the jury verdict." The record before us substantiates the court's factual determination and assessment of the *Warner* factors. Accordingly, the court did not abuse its discretion in denying the Kufahls' request for attorneys' fees.

CONCLUSION

¶12 For the foregoing reasons, we affirm the judgment of the superior court.

/s/

PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/

DANIEL A. BARKER, Judge

/s/

PETER B. SWANN, Judge