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See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);
Ariz.R.Crim.P. 31.24



DIVISION ONE
FILED: 09/14/2010
RUTH WILLINGHAM,
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BY: GH

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

CARL KARCHER ENTERPRISES, INC., a) 1 CA-CV 09-0078
California corporation,)
) DEPARTMENT C
Plaintiff/Counterdefendant/)
Appellee,) **MEMORANDUM DECISION**
v.) (Not for Publication -
) Rule 28, Arizona Rules
) of Civil Appellate
) Procedure)
STINE ENTERPRISES INC., f/k/a)
WESTWOOD FOOD SERVICES, INC., an)
Arizona corporation,)
)
Defendant/Counterclaimant/)
Appellant.)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2002-002862

The Honorable Carey Snyder Hyatt, Judge

REVERSED AND REMANDED

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I R V I N E, Presiding Judge

¶1 Appellant Stine Enterprises Inc. ("Stine") appeals the superior court's judgment denying its application for attorneys' fees pursuant to Arizona Revised Statutes ("A.R.S.") section 12-341.01(A) (2003). For the following reasons, we reverse the superior court's judgment denying Stine's fee application and remand to the superior court for further proceedings consistent with this decision.

¶2 Carl Karcher Enterprises, Inc. ("CKE") filed suit against Stine in 2002 seeking recovery of unpaid rent and interest allegedly resulting from Stine's deficient rent payments occurring between 1995 and 2002. The dispute involved CKE subletting premises to Stine on which CKE had a master lease. CKE contended the sublease required that Stine's minimum rental payment become the amount CKE was obligated to pay on its master lease in 1995. Stine disputed the amount of rent its sublease required it to pay.

¶3 The superior court granted CKE summary judgment on its claim. After summary judgment, the superior court granted Stine leave to amend its answer and assert counterclaims against CKE for fraudulent inducement, consumer fraud, and breach of the implied covenant of good faith and fair dealing. Stine's amended answer asserted claims for compensatory and punitive damages.

¶4 The superior court conducted a trial solely on Stine's counterclaims. Before the case could be submitted to the jury, the trial court entered judgment as a matter of law in favor of CKE. In granting judgment for CKE, the trial court principally relied on its earlier summary judgment determination regarding the lease terms. CKE sought a fee award of \$156,207. Stine objected, arguing in part that fees should be apportioned between the contract claims under the sublease and Stine's separate counterclaims. CKE objected to this distinction, arguing:

In this case, Stine's affirmative defenses and counterclaims were essentially defenses to CKE's claim of breach. Attacking the validity and existence of the Sublease was the only way Stine could mount any defense to CKE's breach of contract claim. All of Stine's evidence was presented to reinforce its argument that a valid and enforceable contract did not exist. Thus, apportionment was not necessary.

The trial court awarded fees of \$145,283.50, deducting only amounts for filing a late motion and correcting a mistake. It then entered judgment against Stine for \$587,335.70, which included unpaid rent, accrued interest, and attorneys' fees and costs.

¶5 Stine appealed. This Court reversed and remanded, finding both the summary judgment on CKE's claim and the judgment as a matter of law on Stine's counterclaim were

improper because the evidence presented genuine issues of material fact requiring submission to a jury. *Carl Karcher Enters., Inc. v. Stine Enters. Inc.*, 1 CA-CV 05-0459, at *14-15, ¶¶ 28-29 (Ariz. App. Jun. 6, 2006) (mem. decision).

¶16 The superior court conducted a new trial. Prior to trial, the parties submitted a stipulated statement of the case that described the dispute:

This lawsuit concerns a dispute between CKE and Stine Enterprises about this sublease agreement. CKE filed suit against Stine Enterprises in February 2002. CKE alleges that Stine Enterprises breached the sublease when, at the end of the 8th year of the sublease agreement, Stine Enterprises did not begin paying an increased rental amount that CKE contends Stine Enterprises was obligated to pay. CKE alleges Stine Enterprises is liable to it for the difference between the rent Stine Enterprises had been paying since February 1996 and the rent CKE contends Stine Enterprises should have been paying since that date.

Stine Enterprises filed a counterclaim against CKE. Stine Enterprises alleges that according to the lease structure that Mr. Stine negotiated with CKE in 1987, Stine Enterprises had been paying the correct monthly rent payment all along. Stine Enterprises alleges that, otherwise, CKE fraudulently misrepresented the terms of the deal agreed upon in 1987. Stine Enterprises alleges, therefore, that Stine Enterprises should not have to pay any additional rent or any interest thereon to CKE, that the sublease should be reformed, and that CKE should compensate Stine Enterprises for its damages.

The jury returned a verdict finding in favor of Stine on CKE's breach of lease count. The jury also found for Stine on its counterclaims for fraudulent inducement and consumer fraud, but awarded no damages. The jury found for CKE on the counterclaim for breach of the implied covenant of good faith and fair dealing. The net result of the verdict was that neither party received a damage award.

¶7 Stine filed a timely motion for over \$800,000 in attorneys' fees pursuant to A.R.S. § 12-341.01(A). Stine argued that it was the prevailing party under a "totality of the litigation" test. CKE's response argued that there was no prevailing party because neither party received a net judgment. Alternatively, CKE argued that Stine was not entitled to an award under the six factors enumerated by *Associated Indemn. Corp. v. Warner*, 143 Ariz. 567, 694 P.2d 1181 (1985). CKE specifically argued that Stine's fees were unreasonably high, noting that the total amount billed by CKE's own attorneys through the second trial was \$312,746.50.

¶8 The superior court denied Stine's request for attorneys' fees, for the reasons set forth by CKE, including that Stine was not a successful party within the meaning of A.R.S. § 12-341.01(A) because the trial ended in a draw. The superior court specifically found that the lack of a monetary award to either party rendered the case analogous to *Kaman*

Aerospace Corp. v. Ariz. Bd. of Regents, 217 Ariz. 148, 171 P.3d 599 (App. 2007). Stine filed a timely notice of appeal.

¶9 Stine argues that the superior court abused its discretion by determining that it is not the successful party for the purposes of A.R.S. § 12-341.01(A). Stine argues that it asserted its counterclaims in case the jury did not agree with its interpretation of the sublease provisions so as to show that CKE's conduct in negotiating the sublease and dealing with Stine was actionable. Stine argues that the jury's decision to award it no damages was logical once the jury accepted Stine's interpretation of the lease. Stine also argues that the jury's declining to award it the \$84,000 it claimed as compensatory damages for the higher rent it had to pay after the sublease expired is not controlling as to who is the successful party. Specifically, Stine argues that amount is dwarfed by its far greater success in occupying the premises for nine and one-half years without having to pay CKE more than \$600,000 in additional rent and interest. Although Stine makes several specific arguments, its primary argument is that the superior court should have found that Stine prevailed under the "totality of the litigation." We agree.

¶10 As the documents quoted above show, the primary dispute in this case was over the enforceability of the sublease. CKE presented an interpretation that required Stine to

pay more money. Under Stine's interpretation it owed nothing more. Stine also argued, however, that if CKE was right then CKE had acted badly in negotiating the deal and sought to limit its monetary obligation to CKE by asserting those bad acts in counterclaims. Because the jury found for Stine on the interpretation issue it essentially found that Stine had not paid too much, so it was reasonable for the jury to award no damages.

¶11 We recognize that Stine also unsuccessfully sought punitive damages. Under the circumstances of this case, we do not find its failure to obtain a punitive damage award as determinative of the issue of "successful party." As noted, the jury essentially concluded Stine had not paid more than the sublease required. Although the jury also ruled for Stine on the two fraud claims, by awarding no damages it effectively concluded that any fraud did not result in direct damages. An award of punitive damages at that point would have been, at best, unusual. In light of the overall claims made by the parties, Stine seeking punitive damages as part of its counterclaims was not, however, unreasonable.

¶12 We also agree with Stine that its failure to obtain damages on its \$84,000 claim does not defeat its being a successful party. This claim arose years after the case began and was relatively minor compared to the primary amount at

issue. Considering the totality of the litigation, Stine was the prevailing party.

¶13 We also conclude that the trial court's reliance on *Kaman* was misplaced. In that case, the contract was never fully carried out and each party alleged that the other had breached the contract by failing to fully perform its contractual obligations. 217 Ariz. at 151, ¶ 11, 171 P.3d at 602. The claims and counterclaims were rooted in those alleged breaches. In *Kaman*, the ultimate resolution was a recognition that neither party fully performed its obligations and that each should be left in the position they were in when they ceased to carry out the contract. *Id.* at 157, ¶¶ 36-37, 171 P.3d at 608. Here, Stine's basic argument was not that CKE did not perform its contractual obligations, but that if the sublease meant what CKE alleged it meant, CKE fraudulently induced Stine to enter into it. The jury found that Stine fully performed its obligations under the sublease, rejecting CKE's assertions to the contrary. Under these circumstances, Stine prevailed on its position on the enforcement of obligations under the sublease.

¶14 We recognize that the trial court's order denying fees stated that it was based on all the reasons raised by CKE in its objection to Stine's fee claim. Those reasons included arguments relating to the amounts of the claimed fees, citing the six factor test in *Associated Indemnity Corp.*, 143 Ariz. at 570, 694

P.2d at 1184. CKE argues this is an alternative ground to deny fees because the superior court could have meant to make a zero award even if Stine was the prevailing party. We disagree. The trial court's ruling was plainly based on its determination that there was no prevailing party. There is no evidence that the trial court considered the *Associated Indemnity* factors. Because we now hold that Stine was the prevailing party, any other objections to the fee claim remain to be fully considered by the trial court in light of Stine's status as prevailing party. We express no opinion about how the *Associated Indemnity* factors should be applied to Stine's fee claim, or as to the appropriate amount of any award.

CONCLUSION

¶15 For the foregoing reasons, we reverse the superior court's judgment denying Stine's application for attorneys' fees and remand to the superior court for further proceedings consistent with this decision. Stine has requested attorneys' fees on appeal pursuant to Arizona Rule of Civil Appellate Procedure 21 and A.R.S. § 12-341.01(A). In our exercise of discretion, we grant Stine fees on appeal.

/s/
PATRICK IRVINE, Presiding Judge

CONCURRING:

/s/
MICHAEL J. BROWN, Judge

K E S S L E R, Judge, dissenting:

¶16 I respectfully dissent. I cannot conclude the superior court abused its broad discretion in denying Appellant Stine Enterprises Inc. ("Stine") attorneys' fees.

FACTUAL AND PROCEDURAL HISTORY

¶17 As recounted by the majority, Carl Karcher Enterprises, Inc. ("CKE") filed suit against Stine in 2002 seeking recovery of unpaid rent and interest allegedly resulting from Stine's deficient rent payments occurring between 1995 and 2002. The superior court granted CKE summary judgment on its claim. After summary judgment, the superior court granted Stine leave to amend its answer and assert counterclaims against CKE for fraudulent inducement, consumer fraud, and breach of the implied covenant of good faith and fair dealing. Stine's amended answer asserted over \$325,000 in compensatory damages and a claim for unspecified punitive damages.¹ After a trial on all Stine's counterclaims resulted in the superior court granting judgment as a matter of law ("JMOL") for CKE, this Court reversed and remanded for trial both the summary judgment and the JMOL for a jury trial. *Carl Karcher Enters., Inc. v.*

¹ Although neither brief provides supporting citation, the briefs of both parties indicate that Stine reduced its request for compensatory damages to approximately \$84,000.

Stine Enters. Inc., 1 CA-CV 05-0459, at *14-15, ¶¶ 28-29 (Ariz. App. June 6, 2006) (mem. decision).

¶18 On remand, the jury returned a verdict in favor of Stine on CKE's breach of lease count, and found for Stine on its counterclaims for fraudulent inducement and consumer fraud, but awarded no damages. The jury found for CKE on the counterclaim for breach of the implied covenant of good faith and fair dealing. The net result of the verdict was that neither party received a damage award.

¶19 Stine then argued that it was the prevailing party under a "totality of the litigation" test. CKE argued that there was no prevailing party because neither party received a net judgment and that Stine was not entitled to an award under the six factors enumerated by *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 570, 694 P.2d 1181, 1184 (1985). The superior court denied Stine's request for attorneys' fees for the reasons set forth by CKE, including that Stine was not a successful party within the meaning of A.R.S. § 12-341.01(A) because the trial ended in a draw. The superior court specifically found that the lack of a monetary award to either party rendered the case analogous to *Kaman Aerospace Corp. v. Ariz. Bd. of Regents*, 217 Ariz. 148, 171 P.3d 599 (App. 2007).

ANALYSIS

¶20 Stine argues and the majority agrees that the superior court abused its discretion by determining that Stine was not the successful party for the purposes of A.R.S. § 12-341.01(A). The majority holds that the superior court's reliance on *Kaman* is misplaced because Stine prevailed on two counterclaims (although he received no award of money) whereas both parties in *Kaman* failed to perform their contracts. *Supra*, ¶ 13. It also adopts Stine's argument that because the primary dispute was whether Stine owed more money on the sublease and the jury agreed with him, he must be the prevailing party. *Supra*, ¶ 10. The majority also agrees with Stine that the failure to obtain damages does not defeat Stine being the prevailing party because that claim was minor in amount and arose only after litigation began. *Supra*, ¶ 12. Finally, the majority concludes the court did not really reach the *Associated Indemnity* factors, *supra*, ¶ 14, despite the fact the court's minute entry stated it was denying fees for the reasons stated by CKE, which included *Associated Indemnity*.

¶21 Essentially, I cannot join the majority because of the standard of review. We review the superior court's determination of who is the successful party for an award of attorneys' fees using an abuse of discretion standard. *Kaman*, 217 Ariz. at 157-58, ¶¶ 35-37, 171 P.3d at 608-09 (citation

omitted); *Sanborn v. Brooker & Wake Prop. Mgmt. Co.*, 178 Ariz. 425, 430-31, 874 P.2d 982, 987-88 (App. 1994) (citation omitted); *Pioneer Roofing Co. v. Mardian Constr. Co.*, 152 Ariz. 455, 467, 733 P.2d 652, 664 (App. 1986) (citation omitted). We will affirm the superior court for any reason supported by the record. *Linder v. Brown & Herrick*, 189 Ariz. 398, 402, 943 P.2d 758, 762 (App. 1997). Moreover, when a party fails to supply appropriate transcripts on appeal, we will assume that the record supports the superior court's exercise of discretion. See *Johnson v. Elson*, 192 Ariz. 486, 489, ¶ 11, 967 P.2d 1022, 1025 (App. 1998) (citation omitted).

¶22 In cases involving both claims and counterclaims, this Court will affirm the superior court's consideration of the net recovery or the totality of the litigation to determine whether a party is successful.² *Nataros v. Fine Arts Gallery of Scottsdale, Inc.*, 126 Ariz. 44, 49, 612 P.2d 500, 505 (App. 1980) (totality); *Gen. Cable Corp. v. Citizens Utilities Co.*, 27 Ariz. App. 381, 385, 555 P.2d 350, 354 (1976) (net recovery).

² The parties also discuss a case involving a percentage of success factor. We need not consider this because its prior use has been limited to multi-party litigation. See *Pioneer Roofing*, 152 Ariz. at 467, 733 P.2d at 664. Even if we were to apply the percentage of success factor, the lack of trial transcripts precludes us from knowing what was claimed at trial, rendering the Court unable to make the percentage calculation and bound to affirm the superior court. *Johnson*, 192 Ariz. at 489, ¶ 11, 967 P.2d at 1025.

See also Arizona Attorneys' Fees Manual § 2.7.1 at 2-18 (Bruce E. Meyerson & Patricia K. Norris eds. 5th ed. 2010) (noting that Arizona appellate courts have upheld decisions based on the net recovery principal and the totality of the litigation test). Under either theory, I cannot find an abuse of discretion by the superior court.

I. The Net Judgment Rule

¶23 The majority holds that this case is unlike *Kaman* because there both parties were found not to have performed under the contract, whereas here the jury found for Stine on two of his counterclaims. I think this misreads the effect of *Kaman* and the net judgment rule.

¶24 The lack of a net recovery alone is enough to sustain the court's discretion. *Kaman*, 217 Ariz. at 157, 171 P.3d at 608; *Gen. Cable Corp.*, 27 Ariz. App. at 385-86, 555 P.2d at 354-55; see also Arizona Attorneys' Fees Manual § 2.7.1 at 2-18. Here, although each side brought substantial claims against the other, including a punitive damages claim asserted by Stine, the jury returned a verdict that left each side with no recovery. The superior court was within its discretion to rely purely on that to determine that there was no prevailing party.

¶25 In *Kaman*, *Kaman* argued it was entitled to an award of attorneys' fees because it prevailed on its claims and the Board of Regents' counterclaim. The superior court denied that

request, holding that while Kaman prevailed on the Board's \$10.8 million counterclaim, the jury also awarded Kaman no damages on its \$6 million claim so the net result was a draw. On appeal, this Court reversed the judgment on Kaman's claim, leaving both parties with no net recovery. *Kaman*, 217 Ariz. at 155, ¶ 30, 171 P.3d at 606. This Court then applied the net judgment rule and rejected Kaman's claim that the superior court had abused its discretion in denying it attorneys' fees. *Id.* We relied on *General Cable* and *Coldwell Banker* for the proposition that when parties sue on disparate claim amounts and neither party recovers, the superior court may determine that the suit was a draw and neither party prevailed. *Id.* at 158, ¶ 37, 171 P.3d at 609 (citing *Gen. Cable*, 27 Ariz. App. at 385, 555 P.2d at 354 and *Coldwell Banker Comm. Group, Inc. v. Camelback Office Park*, 156 Ariz. 214, 223-24, 751 P.2d 530, 539-40 (App. 1987) *vacated in part on other grounds*, 156 Ariz. 226, 751 P.2d 542 (1988)).

¶126 Arizona case law is replete with decisions holding that when there are claims and counterclaims leading to a net judgment of zero, the court is well within its discretion to deny fees. In *General Cable*, General Cable sought relief from a contract with Citizens Utilities to have the utility provide it power. 27 Ariz. App. at 382-83, 555 P.2d at 351-52. General Cable had contracted to buy its minimum energy needs for two new plants, but then decided not to build one of the plants. *Id.* at

383, 555 P.2d at 352. The utility counterclaimed for undercharges based on a billing error. *Id.* The court ruled for the utility on the contract and General Cable on the counterclaim and then denied costs to both parties. *Id.* Citizens appealed from the denial of costs, arguing that since General Cable's claim was much larger than Citizens' counterclaim, it should be the prevailing party for an award of costs under A.R.S. § 12-341. *Id.* at 385, 555 P.2d at 354. This Court rejected that argument, holding that if the complaint seeks more than the counterclaim and the court denies relief to both parties, neither party is the prevailing party for purposes of an award of costs. *Id.*

¶127 In *Coldwell Banker*, the superior court declined to award attorneys' fees when the plaintiff did not prevail on the complaint and the defendant did not prevail on the counterclaim. 156 Ariz. at 218, 751 P.2d at 534. This Court reasoned that the superior court has discretion to find that the case ended in a draw and there was no successful party or to consider the relative amounts sought in the claim and counterclaim and declare either party the prevailing party. *Id.* at 223-24, 751 P.2d at 539-40. Similarly, in *Bank One, Arizona v. Rouse*, this Court affirmed the denial of attorneys' fees after the plaintiff failed to recover on its complaint and the defendant (after modification of the judgment on appeal) failed to recover on its

counterclaims, including one where the jury found liability but awarded no damages. 181 Ariz. 36, 38, 41, 887 P.2d 566, 568, 571 (App. 1994).

¶28 In *Morris v. Achen Constr. Co.*, the plaintiff prevailed on a breach of contract claim, but the defendant's successful recoupment of amounts due under the contract resulted in each side receiving no net judgment. 155 Ariz. 507, 511, 747 P.2d 1206, 1210 (App. 1986) *reversed in part on other grounds by Morris v. Achen Constr. Co.*, 155 Ariz. 512, 747 P.2d 1211 (1987). This Court affirmed the superior court's finding that neither party prevailed because neither party had received a damage award. *Id.*

¶29 It matters not that Stine actually prevailed on two of his counterclaims. For whatever reason, the jury refused to award him any damages on those claims, thus resulting in a net judgment of zero to both sides. That is enough to affirm the trial court's discretionary decision to find Stine did not prevail for purposes of attorneys' fees.³

³ On appeal, Stine argues that the alleged egregiousness of CKE's conduct makes *Kaman* inapplicable. The majority appropriately does not address that issue presumably because to the extent that the alleged egregiousness of CKE's conduct may relate to the determination of a successful party, Stine did not provide transcripts of the trial. *Johnson*, 192 Ariz. at 489, ¶ 11, 967 P.2d at 1025. We cannot determine the egregiousness of CKE's conduct and must assume that the superior court correctly dealt with that issue. *See id.* This presumption is especially apt in light of the jury's decision to award Stine no damages.

¶130 I cannot agree with the majority's attempt to limit the net judgment rule. First, the majority attempts to distinguish *Kaman* because *Kaman* involved claims that each party had breached the contract whereas "Stine's basic argument was not that CKE did not perform its contractual obligations, but that if the sublease meant what CKE alleged it meant CKE fraudulently induced Stine to enter into it." *Supra*, ¶ 13. First, I fail to see how this distinguishes *Kaman*. Assuming that the majority's reading of the record is correct, this would mean that the one claim on which Stine obtained affirmative relief, the meaning of the sublease's rent term, was not a key portion of the litigation. Thus, the fact that Stine obtained a favorable judgment on its fraud-based counterclaims but did not obtain any relief, further supports the conclusion that no one party prevailed.

¶131 Second, creating an exception to the net judgment rule when the defendant files an unsuccessful counterclaim for fraud creates a perverse incentive to raise fraud in every contract case by guaranteeing prevailing party status to defendants who include fraud among their multiple unsuccessful counterclaims and litigate to a draw. The policy of Arizona's fee shifting statute is to "mitigate the burden of the expense of litigation to establish a just claim or defense." A.R.S. § 12-341.01(B). Rewarding the defendant who raises an additional unsuccessful

fraud claim with almost per se prevailing party status runs contrary to that policy.

¶132 Third, the majority's conclusion that the superior court abused its discretion cannot be sustained on various cases cited by Stine because those cases never reached the issue of whether fees were required or merely said the trial court has discretion to award fees without any award of monetary damage, not that the court had to award such fees. Thus, in *Nationwide Mut. Ins. Co. v. Granillo*, 117 Ariz. 389, 573 P.2d 80 (App. 1977), the insurance company sought a declaratory judgment whether there was insurance coverage for a policy held by Granillo. The court held there was coverage, but denied Granillo fees on the basis that A.R.S. § 12-341.01 did not apply to declaratory judgments related to a contract. Granillo did not argue on appeal that the court abused its discretion in denying fees, only that the statute did apply and effectively the court erred in not applying its discretion. 117 Ariz. at 394-95, 573 P.2d at 85-86. This Court agreed with Granillo that the statute applied and that a monetary award was not necessary to be considered the prevailing party. *Id.* However, we remanded the matter to the superior court to use its discretion to determine whether fees should be awarded to Granillo. *Id.* In contrast, the court here did not find § 12-341.01

inapplicable, but only found there was a draw and in its exercise of discretion denied fees.

¶133 In *Altfillisch Const. Co. v. Torgerson Const. Co.*, 120 Ariz. 438, 586 P.2d 999 (App. 1978), a buyer sued a seller on a contract claim and the judgment awarded the buyer possession of the property, no damages, and a small amount of attorneys' fees. *Id.* at 439-40, 586 P.2d at 1000-01. On appeal, we held that the court had not abused its discretion in awarding fees because the buyer was awarded possession of the property and, citing *Nationwide*, a monetary award was not a prerequisite to an award of attorneys' fees. *Id.* at 440, 586 P.2d at 1001. Nothing in *Altfillisch* required the court here to award fees. See also *Nataros*, 126 Ariz. at 49, 612 P.2d at 505 (in action arising out of alleged fraud with counterclaims for libel and slander in which neither party took any monetary judgment, trial court did not abuse its discretion in awarding fees to the defendants on the basis of the totality of the litigation).

¶134 In *Schwartz v. Farmers Ins. Co. of Ariz.*, 166 Ariz. 33, 38, 800 P.2d 20, 25 (App. 1990), the plaintiff insured brought a suit alleging breach of contract, on which he recovered \$12,000, and bad faith, on which he failed to recover. *Id.* at 22, 800 P.2d at 35. The superior court found that the defendant insurer was the successful party based on the totality of the litigation, including the substantial disparity in the

amounts requested on the successful and unsuccessful claim. This Court held that the superior court did not abuse its discretion. *Id.* at 22, 25, 800 P.2d at 35, 38. However, as we noted in *Uyleman v. D.S. Rentco*, 194 Ariz. 300, 305, ¶ 26, 981 P.2d 1081, 1086 (App. 1999), *Schwartz* only held that the superior court acted within its discretion and not that an award to the insured or no award at all would have been an abuse of discretion.

¶35 In *Ocean West Contractors, Inc. v. Halec Const. Co., Inc.*, 123 Ariz. 470, 600 P.2d 1102 (1979), the subcontractor (Halec) sued the contractor (Ocean West) for not paying Halec for work done under the contract. Ocean West counterclaimed for the amount it had to spend to complete the project when Halec refused to complete its obligations. The superior court found that Halec was not justified in refusing to continue performance, Ocean West was justified in completing the work, but that the other work done by Halec was done in compliance with the contract. After netting the awards for each party, the court awarded Halec approximately \$8,000 plus attorneys' fees. *Id.* at 472, 600 P.2d at 1104. On appeal, the supreme court found no abuse of discretion in awarding Halec fees. The court stated that while the party awarded damages is not always the prevailing party, the award of money is a substantial factor in determining who is the prevailing party and a party need not be

awarded all it requested to be the prevailing party. *Id.* at 473-74, 600 P.2d at 1105-06. The court held that given the award of damages and the findings of fact and conclusions of law, the superior court did not err in determining Halec was the prevailing party. *Id.* at 473-74, 600 P.2d at 1105-06. In contrast, here while Stine did not get everything he asked for, there was no net award of damages to any party. The court was justified under the net judgment rule to discretionarily deny an award of attorneys' fees.

¶36 This Court has consistently affirmed the superior court's discretionary determination that no party prevailed for purposes of attorneys' fees when the case was a draw and involved substantial claims and counterclaims. Accordingly, I would affirm the superior court's order with a similar holding in this case.⁴

⁴ In its reply brief Stine argues that this Court's decision in *Maleki v. Desert Palms Prof'l Props. L.L.C.*, 222 Ariz. 327, 214 P.3d 415 (App. 2009) undermines the superior court's determination that this case ended in a draw. In *Maleki*, the plaintiff tenant filed suit against his landlord seeking a declaratory judgment vindicating his right to remain in the premises and renew his lease. *Id.* at 330, ¶ 12, 214 P.3d at 418. The defendant counterclaimed for back rent. *Id.* at ¶ 13. The superior court entered a declaratory judgment affirming his right to renew the lease and that he owed back rent. *Id.* at 330-31, ¶¶ 14-15, 214 P.3d at 418-19. The superior court found that the plaintiff was the prevailing party and awarded him reasonable attorneys' fees. *Id.* at ¶ 16. This Court affirmed, holding that the superior court's determination of who is the prevailing party will not be disturbed on appeal as long as "any reasonable basis exists for it." *Id.* at 334, ¶ 35, 214 P.3d at

II. The Superior Court Did Not Have to Consider Claim Values

¶37 The majority also seems to adopt Stine's argument that because the central issue was whether Stine had to pay more money under the lease and that potential liability was much greater than Stine's counterclaims, the trial court abused its discretion in not finding Stine to be the prevailing party. I disagree.

¶38 This Court has not held that the superior court must consider anything beyond the net judgment when determining which party is successful in a multiclaim case. *Uyleman*, 194 Ariz. at 305, ¶ 26, 981 P.2d at 1086. As noted above, this Court has often affirmed the superior court's act of discretion to find no successful party in cases involving no net recovery on disparate claim amounts. *See, e.g., Bank One*, 181 Ariz. at 38, 41, 887 P.2d at 568, 571; *Morris*, 155 Ariz. at 511, 747 P.2d at 1210; *Coldwell Banker*, 156 Ariz. at 224, 751 P.2d at 540; *Gen. Cable*

422 (internal quotation marks omitted). This Court did not specify any factor that the court must consider or what weight or inferences may be drawn from any factor. *Id.* This Court's holding that a superior court may award fees to a party who wins a declaratory judgment but loses a counterclaim for damages does not require the superior court to make that finding in every case. Moreover, even if some factor present in *Malecki* created a requirement that the superior court find one party prevailing and award fees, Stine's failure to proffer transcripts of the trial precludes us from determining whether that factor is present in this case. *Johnson*, 192 Ariz. at 489, ¶ 11, 967 P.2d at 1025.

Corp, 27 Ariz. App. at 385, 555 P.2d at 354. Further, Stine sought punitive damages, which could have been substantial. Even if the superior court were required to consider factors beyond the net judgment, we should affirm because of the unknown value of Stine's punitive damages claim.

III. Stine Did Not Prevail Under the Totality of the Litigation

¶39 The majority also appears to adopt Stine's view that he must be the prevailing party under the "totality of the litigation" because the central issue was whether he owed more money under the sublease and the counterclaims were purely defensive. *Supra*, ¶¶ 9-10. I cannot agree for several reasons. First, the majority determines that Stine was the prevailing party apparently after independently considering the time the counterclaims were first raised and the relative amounts at issue.⁵ I think this misapplies the standard of review. Instead of attempting to determine whether there is any evidence to support the trial court's understanding of the facts in the light most favorable to affirming the superior court, the majority is independently reviewing the record to develop its own conclusion.

⁵ Although the majority characterizes the claim for compensatory damages as one for \$86,000, that claim began its life as a claim for \$325,000, which is 3.78 times greater.

¶140 Further, even if I accepted the majority's approach, Stine's failure to provide this Court with trial transcripts precludes our review of the totality of the litigation. We must assume the superior court's exercise of discretion was supported by the material in the unprovided transcripts. *Johnson*, 192 Ariz. at 489, ¶ 11, 967 P.2d at 1025. Additionally, the limited portions of the record that Stine provided support my conclusion that the superior court did not abuse its discretion. Stine's counterclaims were a substantial part of the litigation and its failure to recover on such a substantial part of the litigation supports the superior court's determination that neither party prevailed. Between October 2002, when the superior court entered summary judgment in favor of CKE on its claim, and June 2005, when the superior court entered its first final judgment in this case prior to the first appeal, the only issues being litigated were Stine's counterclaims. After this Court remanded, Stine's counterclaims remained an active subject of litigation by both parties. Additionally, the counterclaims spawned multiple nonfrivolous post trial motions. The limited record provided to this Court supports the superior court's exercise of discretion even on a totality of the litigation test.

¶141 Third, even if the record supported Stine's and the majority's contention that the counterclaims (which sought

hundreds of thousands of dollars in damages and unspecified punitive damages) were purely defensive, it makes no difference. *Coldwell Banker*, 156 Ariz. at 223, 751 P.2d at 539 (disagreeing with argument that filing an unsuccessful counterclaim "merely in defense" is determinative of whether the defendant is a prevailing party when the defendant also prevails on the complaint). The policy of A.R.S. § 12-341.01(B) is not to mechanically confer prevailing party status by labeling claims as defensive or offensive but to carefully examine the burden that each unsuccessful claim placed on the opposing party. Moreover, the majority's conclusion that the unsuccessful counterclaims were merely defensive is in tension with its attempt to distinguish *Kaman* on the grounds that the significant issue in this case was not who breached the lease, but Stine's counterclaims.

¶142 The majority seems to hold that the punitive damages sought in these claims are insignificant in determining who was the prevailing party under the totality of the litigation because Stine's success on another point *during trial* precluded it from recovering. ¶ 11. I disagree. The statutory purpose of relieving parties of the expense of litigation is not served by ignoring expenses incurred with respect to a claim before and during trial merely because an eleventh hour resolution of another issue moots it. Stine's request for compensatory and

unspecified punitive damages based on these claims is a significant factor the trial court had discretion to consider in determining who prevailed in this lawsuit.

¶43 Finding there is no prevailing party also comports with A.R.S. § 12-341.01's purpose of discouraging unsuccessful litigation.⁶ While A.R.S. § 12-341.01(A) does create a commercial risk for a party initiating an unmeritorious suit, it also creates a risk for defendants asserting unmeritorious defenses or counterclaims. A.R.S. § 12-341.01(B). CKE and Stine took calculated commercial risks in filing the claims and counterclaims. Moreover, Stine's counterclaims helped extend the litigation for three years in the trial court only to prove no entitlement to affirmative relief on those claims. Stine's burden for taking that risk is that it must bear its own attorneys' fees. The superior court's judgment denying Stine's request for fees is not an abuse of discretion in light of the policy underlying A.R.S. § 12-341.01(A).

⁶ Stine's failure to file appropriate transcripts with this Court limits our ability to assess the merits of the claims and defenses in light of the remedial purpose of A.R.S. § 12-341.01(A). *Johnson*, 192 Ariz. at 489, ¶ 11, 967 P.2d at 1025. Therefore, I would assume that the relative merits of the parties' positions supports the superior court's exercise of discretion. *Id.*

IV. Stine Failed to Challenge the Other Ground for the Superior Court's Order

¶144 Finally, the majority concludes that while the superior court denied Stine fees for the reasons stated by CKE, the court never reached the *Associated Indemnity* factors argued by CKE. I cannot agree for three reasons. First, I assume the superior court meant what it said when it denied fees for the reasons argued by CKE. The majority points to no requirement that the superior court has to analyze each of the *Associated Indemnity* factors in its decision. If the superior court had meant to say that it was basing its decision solely on who was the prevailing party, it could easily have said so. I prefer to take the superior court's language at its face value.

¶145 Second, Stine failed to address this argument in its opening brief, thus waiving any challenge to it. *Best v. Edwards*, 217 Ariz. 497, 504 n.7, ¶ 28, 176 P.3d 695, 702 n.7 (App. 2008).

¶146 Third, even if the issue had been raised, some of the *Associated Indemnity* factors would require knowledge of what happened at trial to assess. 143 Ariz. at 570, 694 P.2d at 1184. Stine's failure to provide a transcript on appeal precludes us from reviewing the superior court's application of the *Associated Indemnity* factors for an abuse of discretion, and

I assume that the trial record supported the superior court.
Johnson, 192 Ariz. at 489, ¶ 11, 967 P.2d at 1025.

CONCLUSION

¶47 For the foregoing reasons, I would affirm the superior court's judgment denying Stine's application for attorneys' fees. I would also deny Stine's requests for fees on appeal and deny CKE's requested attorneys' fees on appeal pursuant to A.R.S. § 12-341.01(A).

/s/

DONN KESSLER, Judge