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

In the Matter of the Conservatorship of: MARK ANTHONY MONTOPOLI, An Adult. DIANA SCHLAUDER, as Conservator for MARK MONTOPOLI, Petitioner/Appellee, v. KATHLEEN NELSON, Respondent/Appellant, WESTERN SURETY COMPANY, Intervenor/Appellee.	1 CA-CV 09-0195 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. PB2005-003005

The Honorable Karen L. O'Connor, Judge
The Honorable Barbara A. Hamner, Judge Pro Tem

AFFIRMED

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B A R K E R, Judge

¶1 Kathleen Nelson appeals from the superior court's order dismissing an amended complaint filed by Diana Schlauder as conservator for Mark Montopoli. The complaint centered on Nelson's alleged violation of the Adult Protective Services Act ("APSA") in obtaining real property from Mark.[1] Nelson also challenges the court's orders 1) setting a bond amount, 2) allowing Schlauder to file a lis pendens, 3) dismissing Nelson's counterclaim and denying her request to amend the counterclaim, and 4) awarding Schlauder attorneys' fees as sanctions. For the reasons that follow, we affirm.

[1] Because Mark shares the last name "Montopoli" with his wife, we distinguish between them by using their first names.

Facts and Procedural Background

¶2 In April 2004, Mark purchased a house in Phoenix (the "property"). Mark's wife, Wendy Montopoli, signed a disclaimer deed. In May 2005, Mark was involuntarily hospitalized. During his hospitalization, Mark signed a quitclaim deed conveying the property to Wendy. Wendy subsequently conveyed the property to her mother, Nelson. Thereafter, Nelson refinanced the property, withdrew equity, and obtained a loan in the amount of $289,000.[2]

¶3 In December 2005, Schlauder, Mark's aunt, was appointed as Mark's conservator with Mark's consent. The court also appointed an attorney to represent Mark. Schlauder, as conservator, filed a petition for relief against Wendy and Nelson under Arizona Revised Statutes ("A.R.S.") section 46-456[3] of APSA seeking the property and all money and benefits received as a result of holding title to the property. Schlauder requested an expedited hearing and that Nelson or Wendy post a security bond. At the hearing held on January 4, 2006, the court ordered Nelson to post a $500,000 bond, authorized Schlauder to file a lis pendens, and enjoined Nelson from

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[2] Mark's loan of $153,542 was satisfied with the new loan.

[3] Arizona Revised Statute § 46-456 was substantially amended in 2009. *See* 2009 Ariz. Sess. Laws, ch. 119, § 9 (1st Reg. Sess.). We cite to the current version of the statute because the amendment is not material to this decision.

selling the property. Nelson subsequently posted the bond furnished by Western Surety Company (the "Surety"), and Schlauder filed a lis pendens.

¶4 In September 2007, Schlauder filed an amended complaint, adding claims for constructive trust/equitable lien, conversion, unjust enrichment, fraud, and breach of fiduciary duty. Nelson answered and filed a counterclaim against Schlauder for interference with a contractual relationship. Schlauder moved to dismiss Nelson's counterclaim pursuant to Rule 12(b)(6), Arizona Rules of Civil Procedure,[4] for failing to state a claim and also requested sanctions. Nelson then requested permission to amend her counterclaim to include an abuse of process claim. After oral argument, the court granted Schlauder's motion to dismiss and request for sanctions and denied Nelson's motion to amend the counterclaim. The court also ordered the bond to cover any damages if the property went into foreclosure. The property was foreclosed and subsequently sold at a trustee's sale in July 2008.

¶5 In October 2008, Schlauder, Mark, and the Surety petitioned the court to approve a settlement agreement, dismiss the amended complaint, and discharge the bond. Under the settlement agreement, the Surety agreed to pay $130,000 to Mark

[4] Unless otherwise noted, all subsequent references to "Rules" will be to the Arizona Rules of Civil Procedure.

and $110,000 to Schlauder for attorneys' fees and costs. Nelson objected to the petition. Without holding a hearing, the court overruled Nelson's objection, approved the settlement agreement, dismissed the amended complaint, and discharged the bond. Nelson timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(B), (D) (2003).

Discussion

1. Dismissal of Amended Complaint

¶6 Nelson argues the court abused its discretion in granting the petition to dismiss Schlauder's amended complaint. Under Rule 41(a)(2), an action may be dismissed at the plaintiff's request pursuant to a court order "upon such terms and conditions as the court deems proper." Ariz. R. Civ. P. 41(a)(2). A dismissal pursuant to Rule 41(a)(2) is without prejudice unless otherwise specified. *Id.* It is within the court's discretion to grant a plaintiff's motion for dismissal. *State ex rel. Corbin v. Portland Cement Ass'n*, 142 Ariz. 421, 424, 690 P.2d 140, 143 (App. 1984). "[O]nly the most extraordinary circumstances will justify" the court's refusal "to grant a motion by a plaintiff to dismiss without prejudice." *Goodman v. Gordon*, 103 Ariz. 538, 541, 447 P.2d 230, 233 (1968). The test to determine if dismissal is appropriate is whether dismissal will violate the defendant's substantial legal rights. *Jepson v. New*, 164 Ariz. 265, 273, 792 P.2d 728, 736 (1990).

¶7 First, Nelson contends the court erred by dismissing the amended complaint without holding a hearing. Generally, dismissal of an action after an answer has been filed requires a motion, notice to the defendants, a hearing, and a court order. *Goodman*, 103 Ariz. at 540, 447 P.2d at 232; *Cheney v. Superior Court*, 144 Ariz. 446, 448, 698 P.2d 691, 693 (1985). Nevertheless, in *Schurgin v. Amfac Electric Distribution Corp.*, 182 Ariz. 187, 894 P.2d 730 (App. 1995), we refused to address an argument regarding the failure to hold a hearing prior to granting a plaintiff's motion for voluntary dismissal because it was raised for the first time on appeal. *Id.* at 189-90, 894 P.2d at 732-33; *see generally Payne v. Payne*, 12 Ariz. App. 434, 435, 471 P.2d 319, 320 (1970) (trial court must have an opportunity to rule on legal theories, and arguments raised for the first time on appeal will not be considered). We noted neither the failure to hold a hearing nor the dismissal deprived the defendants of a substantial legal right. *Schurgin*, 182 Ariz. at 190, 894 P.2d at 733.

¶8 Here, Nelson objected to the dismissal but did not request a hearing. In its ruling, the court stated "[n]o hearing has been requested and it appears one is not necessary." Nelson did not challenge this ruling. Therefore, Nelson waived her right to a hearing. Thus, the pertinent issue is whether

Nelson was deprived of substantial legal rights by the dismissal.

¶9 Nelson relies on *Crawford v. Superior Court*, 144 Ariz. 498, 698 P.2d 743 (App. 1984), for support that she was deprived of substantial legal rights. There, the petitioners filed a lawsuit in June 1983 against the defendants for injuries sustained in a truck/bicycle accident. *Id.* at 499, 698 P.2d at 744. The defendants planned on asserting contributory negligence as a defense. *Id.* at 500, 698 P.2d at 745. On August 30, 1984, the Uniform Contribution Among Tortfeasors Act (the "Act") became effective. *Id.* at 499, 698 P.2d at 744. Prior to the Act, a finding of contributory negligence would have barred the petitioners from any recovery. *Id.* at 500, 698 P.2d at 745. Under the Act, however, a contributory negligence defense would not fully bar recovery and would instead only reduce recovery based on the party's degree of fault. *Id.* The petitioners sought to dismiss their complaint without prejudice pursuant to Rule 41(a)(2), enabling them to refile the action under the Act. *Id.* at 499, 501, 698 P.2d at 744, 746. The court held the defense of contributory negligence was a substantial right which would be less effective if the action was filed after the Act became effective. *Id.* at 501, 698 P.2d at 746. Accordingly, there was no error denying the petitioners' motion to dismiss without prejudice. *Id.*

¶10 We find *Crawford* distinguishable. In *Crawford*, the petitioners sought to take advantage of a change in the law to the detriment of the defendants by dismissing their action in order to bring the same action under the new law. *Id.* at 500-01, 698 P.2d at 745-46. Here, we are not presented with any change in the law relevant to the claims at issue. Thus, if Schlauder refiles her action, Nelson is not deprived of any defenses, unlike the defendants in *Crawford*. Nelson, however, asserts that granting the dismissal deprives her of substantial legal rights because of her potential liability to the Surety in a subsequent indemnification action and her inability to raise defenses against Schlauder's claims in that contract action. We disagree that the dismissal has that effect.

¶11 Regardless of any dismissal, Nelson gave the Surety the right to settle the lawsuit. Specifically, her contract with the Surety provides the Surety "shall have the right to handle or settle any claim or suit in good faith and the [Surety's] decision shall be binding and conclusive on the undersigned [Nelson]." Right-to-settle clauses have been routinely upheld in other jurisdictions, and the plain language of the contract in this case does not dictate a contrary result. *See, e.g.*, *Old Republic Sur. Co. v. Palmer*, 5 S.W.3d 357, 361 (Tex. App. 1999) (noting where a surety is given the right to settle claims, it is immaterial whether the surety and principal

are legally liable on the bond); *accord PSE Consulting, Inc. v. Frank Mercede and Sons*, Inc., 838 A.2d 135, 145-46 (Conn. 2004). The Surety is, however, required to act in good faith in reaching a settlement. In a subsequent indemnification action, Nelson may raise any and all defenses she has against the Surety, which have not been contractually waived.[5]

¶12 Under these circumstances, Nelson was not deprived of any substantial legal right by the Surety's decision to enter into a settlement agreement with Schlauder and Mark or by the court's failure to hold a hearing. Therefore, the court did not abuse its discretion in dismissing Schlauder's amended complaint.

2. Bond and Lis Pendens Orders

A. Bond Amount

¶13 Nelson argues the court abused its discretion in setting the bond amount at $500,000. When Schlauder initiated this action, she requested Nelson post a security bond "in an amount not less than $150,000." According to the supporting information, Nelson refinanced the property and obtained a loan for $289,000, which satisfied Mark's loan of $153,542. Schlauder alleged Nelson was subject to at least one judgment

[5] Nelson raises several public policy arguments for the first time in her reply brief. We will not address issues raised for the first time in a reply brief. *Wasserman v. Low*, 143 Ariz. 4, 9 n.4, 691 P.2d 716, 721 n.4 (App. 1984).

lien and sought all damages allowed under A.R.S. § 46-456[6] as well as attorneys' fees and costs.

¶14 At the hearing on January 4, 2006, Mark's attorney requested the bond be set at $500,000. Nelson's attorney objected to the bond amount and requested a $200,000 bond instead. At that time, the property was listed for sale for $382,000. Schlauder expressed concern about other potential judgment liens which could attach to the property by virtue of Nelson's ownership. Mark's attorney stated a $500,000 bond would be "more than sufficient" and would cover "everything."

¶15 The court ordered Nelson to post a $500,000 bond but gave Nelson the opportunity to reduce the bond amount. For instance, if Nelson transferred title of the property or any bank accounts consisting of the equity proceeds[7] to Schlauder as

[6] Under this statute, a court is authorized to award up to two times the amount of actual damages for exploitation of an incapacitated or vulnerable adult. A.R.S. § 46-456(B) (Supp. 2009). At the time this action was filed, A.R.S. § 46-456(C) (2005) allowed a court to award up to three times the amount of actual damages.

[7] Originally, it was alleged Nelson received $150,000 in cash from the refinance. Although it was later clarified Nelson received about $99,000 from the refinance, that information was not available when the court set the bond amount, and Nelson never subsequently requested a reduction in the bond amount.

conservator, the bond amount would have been reduced.[8] Nelson did not act, or request, to reduce the bond amount.[9]

¶16 Based on the listing price for the house at $382,000, Schlauder's concern about Nelson's judgment liens, potential damages, and attorneys' fees and costs, the court did not abuse its discretion setting the bond amount at $500,000. This is particularly so as liability under APSA may be for twice the actual amount of damages in addition to attorneys' fees. A.R.S. §§ 46-455(H)(4), -456(B). Further, even if the bond amount was high, Nelson failed to exercise her right to reduce the bond amount. Accordingly, there was no error.

B. Lis Pendens

¶17 Nelson argues the court abused its discretion when it ordered a lis pendens in addition to the bond because such

[8] Nelson's attorney had stated the equity Nelson received from the refinance was invested for the benefit of Mark's child and Wendy's other children. It was later revealed Nelson spent most of the money for living expenses, attorneys' fees, buying Wendy a car, and taking care of the children. Additionally, as of August 2007, Schlauder refused to take the property because it was subject to a high mortgage and in danger of foreclosure.

[9] Nelson states in her opening brief, without citing to the record, the effect of the bond amount was the requirement to pay $5000 a year to maintain the bond as opposed to $1500 a year for a $150,000 bond. The record, however, shows Nelson's yearly premium on the bond was $2420. Further, there is nothing supporting the statement that a $150,000 bond would cost $1500 per year. Finally, at the bond hearing, Nelson's attorney requested a $200,000, not a $150,000 bond.

orders were duplicative. This argument fails for several reasons.

¶18 First, a lis pendens and a security bond serve different purposes. A lis pendens provides notice to third persons of a legal proceeding that may affect title to real property. *Santa Fe Ridge Homeowners' Ass'n v. Bartschi*, 219 Ariz. 391, 395, ¶ 11, 199 P.3d 646, 650 (App. 2008). A security bond protects a person in a proceeding by providing a source of funds for recovery based upon the nature of the action.[10] *See In re Guardianship of Pacheco*, 219 Ariz. 421, 424-27, ¶¶ 10-22, 199 P.3d 676, 679-82 (App. 2008) (discussing liability on a bond in a guardianship proceeding). Second, Nelson's attorney consented to the filing of the lis pendens. *See Duwyenie v. Moran*, 220 Ariz. 501, 506, ¶ 16, 207 P.3d 754, 759 (App. 2009) (generally a party may not appeal from an order to which he or she consented). Third, Nelson never filed a motion to quash the lis

[10] *Hatch Cos. Contracting, Inc. v. Arizona Bank*, 170 Ariz. 553, 826 P.2d 1179 (App. 1991), is distinguishable from the present case because that case deals with the impropriety of filing a lis pendens after a lien discharge bond has been filed. *Id.* at 557, 826 P.2d at 1183; *see also* A.R.S. § 33-1004 (Supp. 2009) (governing discharge of mechanics liens and sureties). There, the court determined a lis pendens is groundless if filed after a lien discharge bond because the action no longer affects title to real property. *Hatch*, 170 Ariz. at 557, 826 P.2d at 1183. In the present case, a lis pendens was filed to notify non-parties of the APSA action which potentially affected title to real property. Lien discharge bonds were not at issue.

pendens.[11] *See Wall v. Superior Court*, 53 Ariz. 344, 354-55, 89 P.2d 624, 629 (1939) (a court may not grant relief not requested in the pleadings); *Kennedy v. W.M. Sheppard Lumber Co.*, 401 S.E.2d 515, 516 (Ga. 1991) (an order to remove a lis pendens is normally preceded by a motion to cancel the lis pendens).

C. Bond Used for Foreclosure

¶19 After a hearing on January 17, 2008, the court ordered the bond to cover any damages if the property was foreclosed. Nelson argues the superior court had no reason or legal basis for requiring damages to be paid to Schlauder at the time of foreclosure because such order made Schlauder the prevailing party without adjudication on the merits.

¶20 Nelson, however, never objected to the bond being used for foreclosure. At the hearing, Schlauder requested to use the bond to cover a foreclosure.[12] When asked for a response to Schlauder's request, Nelson asserted she could not make the premium payments on the bond and thought the bond coverage would therefore end. Nelson made no other objection. Having failed

[11] After the January 4, 2006 hearing, however, Nelson requested the court vacate all temporary orders other than the bond. This motion was ultimately denied. On May 25, 2007, Nelson filed a motion to refinance the property and mentioned she could not rent or sell the house because of the lis pendens but did not request to quash the lis pendens.

[12] Schlauder first requested to use the bond to cover a foreclosure at a hearing held in September 2007. The court did not rule on the request at that time.

to raise this objection below, Nelson has waived the right to do so on appeal. *Karber v. Karber*, 145 Ariz. 293, 295, 701 P.2d 1, 3 (App. 1984).

3. Counterclaim

¶21 Nelson argues the court erred in dismissing her counterclaim for interference with a contractual relationship. We review the grant of a motion to dismiss for failure to state a claim *de novo*. *Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386, 391, ¶ 18, 121 P.3d 1256, 1261 (App. 2005). We accept as true all well-plead factual allegations and will affirm a dismissal only if the defendant "would not be entitled to relief under any interpretation of the facts susceptible of proof." *Fid. Sec. Life Co. v. Dep't of Ins.*, 191 Ariz. 222, 224, ¶ 4, 954 P.2d 580, 582 (1998); *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, ¶ 7, 189 P.3d 344, 346 (2008).

¶22 In her counterclaim, Nelson alleged she had a pending contract to sell the property in "late 2005 through January 2006," Schlauder "intentionally filed a *lis pendens*" that Schlauder "knew would stop the pending sale" of the property, and Nelson suffered damages because the property was subsequently worth less than the combined total of the then outstanding mortgage and costs of sale.

¶23 A prima facie case of intentional interference with a contractual relationship requires proof of: 1) the existence of

a valid contractual relationship, 2) knowledge of the relationship on the interferer's part, 3) intentional interference inducing or causing a termination of the relationship, and 4) resulting damages to the party whose relationship has been disrupted. *Hill v. Peterson*, 201 Ariz. 363, 366, ¶ 8, 35 P.3d 417, 420 (App. 2001). "In addition, the interference must be improper as to motive or means before liability will attach." *Neonatology Assocs., Ltd. v. Phoenix Perinatal Assocs. Inc.*, 216 Ariz. 185, 187, ¶ 7, 164 P.3d 691, 693 (App. 2007) (quoting *Wallace v. Casa Grande Union High Sch. Dist. No. 82 Bd. of Governors*, 184 Ariz. 419, 427, 909 P.2d 486, 494 (App. 1995) (citations omitted)). In this case, Nelson expressly agreed to alleged interference through her counsel on the record: "I would have no objection to the lis pendens. I would have no objection to an order enjoining the sale of property."

¶24 When granting the motion to dismiss, the court explained:

> There was no objection to the lis pendens that was filed. There was no objection to the Court restricting the sale of the property. If Ms. Nelson didn't want that to happen, she had many opportunities to appeal the Court's decision. She didn't appeal the Court's decision. She didn't ask the Court -– she never filed a petition for the approval of the sale of the real property. She never asked the Court to come back and to lift the restriction so that she could sell the property . . . .

¶25 When a party has expressly consented to the conduct complained of, we decline to hold it forms a basis for an intentional interference with contract claim.[13]

A. Proposed Amendment to Counterclaim

¶26 Nelson argues the court erred by denying her motion to amend her counterclaim to add an abuse of process claim. Leave to amend should be granted liberally. *Owen v. Superior Court*, 133 Ariz. 75, 79, 649 P.2d 278, 282 (1982). "Amendments will be permitted unless the court finds undue delay in the request, bad

[13] Nelson also argues dismissal was inappropriate under a summary judgment standard. If matters outside the pleadings are presented to and considered by the superior court, a motion to dismiss should be treated as a motion for summary judgment. Ariz. R. Civ. P. 12(b); *Frey v. Stoneman*, 150 Ariz. 106, 109, 722 P.2d 274, 277 (1986). The parties dispute whether facts outside the pleadings were presented to and considered by the superior court. Schlauder's motion to dismiss and reply contained prior minute entries and portions of the transcript from the January 4, 2006 hearing. Minute entries and transcripts are support for, and records of, the pleadings and are therefore not "facts outside the pleadings" that necessitate the conversion of a motion to dismiss to one for summary judgment. *See Brosie v. Stockton*, 105 Ariz. 574, 576, 468 P.2d 933, 935 (1970) (where attachments do not add or subtract anything from the deficiency of a claim, the motion to dismiss is not converted to one for summary judgment); and *Strategic Dev. & Constr., Inc. v. 7th & Roosevelt Partners, LLC*, 578 Ariz. Adv. Rep. 42, 43, ¶ 13, (App. Mar. 18, 2010) (a motion that presents a document of public record need not be treated as a motion for summary judgment). Additionally, it does not appear the court considered Nelson's arguments concerning Mark's deposition testimony, which were matters outside of the pleadings. *See Strategic*, 578 Ariz. Adv. Rep. at 43, ¶ 8 (if a court does not rely on extraneous materials, a motion to dismiss is not treated as a motion for summary judgment). Accordingly, the motion was properly treated as a motion to dismiss.

faith, undue prejudice, or futility in the amendment." *MacCollum v. Perkinson*, 185 Ariz. 179, 185, 913 P.2d 1097, 1103 (App. 1996). The denial of a motion for leave to amend is within the superior court's sound discretion, and we will not disturb its ruling absent an abuse of discretion. *Romo v. Reyes*, 26 Ariz. App. 374, 375, 548 P.2d 1186, 1187 (1976).

¶27 The court denied Nelson's motion to amend without explanation. Schlauder contends the amendment would have been futile. While leave to amend may be denied when the proposed amendment is futile, leave to amend should be granted if the "allegations set forth sufficient facts to establish a real dispute based upon an actual controversy." *Yes on Prop. 200 v. Napolitano*, 215 Ariz. 458, 471, ¶¶ 40, 43, 160 P.3d 1216, 1229 (App. 2007).

¶28 To establish an abuse of process claim, there must be "(1) a willful act in the use of judicial process; (2) for an ulterior purpose not proper in the regular conduct of the proceedings." *Nienstedt v. Wetzel*, 133 Ariz. 348, 353, 651 P.2d 876, 881 (App. 1982). A party must show the opposing party's "improper purpose was the primary motivation for its actions, not merely an incidental motivation." *Crackel v. Allstate Ins. Co.*, 208 Ariz. 252, 259, ¶ 18, 92 P.3d 882, 889 (App. 2004). Nevertheless, "[w]here a lawful end is pursued by appropriate process, incidental motives of spite or greed are not

actionable." *Pankratz v. Willis*, 155 Ariz. 8, 22, 744 P.2d 1182, 1196 (App. 1987).

¶29 Here, Nelson alleged Schlauder (1) "[u]sed the court and the legal process in a wrongful manner to accomplish the desires of Schlauder and not to accomplish the best interest of" Mark, (2) "[a]cted with ulterior motive to accomplish her goals of controlling and safeguarding an asset," and (3) "[w]illfully, but improperly, tried to bring back to Mark the house, which Mark had properly and legitimately exchanged." As the proposed amendment spells out, Schlauder tried to safeguard and control an asset that once belonged to Mark and return it to Mark. Notably, there is no allegation Schlauder sought the property for herself. As Mark's conservator, Schlauder had an obligation to safeguard and control Mark's assets and had authority to prosecute an action for an alleged violation of APSA. *See* A.R.S. § 46-456(G) (Supp. 2009) (conservator may file a civil action under this section); A.R.S. § 14-5401(2) (2005) (conservator may be appointed if ward has property which will be wasted or dissipated); A.R.S. § 14-5424(C)(24) (2005) (conservator may prosecute actions for protection of estate assets). We fail to see how filing this action was not in Mark's best interest or how trying to recover property for Mark was not a lawful end.

¶30 Nelson's abuse of process allegation fails to state a claim for which relief could be granted. The proposed amendment would have been futile as it does not set forth facts supporting a claim for abuse of process. Therefore, the superior court correctly denied Nelson's request to amend her counterclaim.

B. Attorneys' Fees

¶31 Nelson argues the court erred in awarding sanctions to Schlauder. In Schlauder's motion to dismiss the counterclaim, she requested sanctions pursuant to A.R.S. §§ 12-349, -341.01(C) and/or Rule 11. The court awarded sanctions but did not cite a basis for the award.

¶32 Section 12-349 mandates an award of attorneys' fees when a claim or defense is pursued without substantial justification, primarily for delay or harassment, which unreasonably delays or expands the proceedings. A.R.S. § 12-349 (2003). Similarly, A.R.S. § 12-341.01(C) mandates an award of attorneys' fees if a claim or defense constitutes harassment, is groundless, and is not made in good faith. A.R.S. § 12-341.01(C) (2003). Rule 11 mandates sanctions if a party signs a pleading, motion, or other paper for any improper purpose such as to harass, cause delay, or increase the cost of litigation. Ariz. R. Civ. P. 11(a). When a fee award is mandatory, we must determine whether sufficient evidence exists to support the award, and we view the evidence in the light most favorable to

sustaining the award. *Phoenix Newspapers, Inc. v. Dep't of Corr.*, 188 Ariz. 237, 243, 244, 934 P.2d 801, 807, 808 (App. 1997).

¶33 Nelson argues the court erred because it made no findings justifying the imposition of sanctions under any of these provisions. *See Fisher v. Nat'l Gen. Ins. Co.*, 192 Ariz. 366, 370, ¶ 13, 965 P.2d 100, 104 (App. 1998) (holding a court must make specific findings to justify sanctions under §§ 12-341.01(C) and -349); *Wells Fargo Credit Corp. v. Smith*, 166 Ariz. 489, 497, 803 P.2d 900, 908 (App. 1990) (stating trial court must make specific findings to justify Rule 11 sanctions). The superior court failed to explain its reasons for imposing sanctions on Nelson. Nevertheless, because Nelson did not object to the lack of findings before the superior court, she has waived this challenge on appeal. *Trantor v. Fredrikson*, 179 Ariz. 299, 300-01, 878 P.2d 657, 658-59 (1994).

¶34 Viewing the evidence in the light most favorable to sustaining the sanctions award, we find no error. Nelson's counterclaim failed to state a claim for which relief could be granted. The facts Nelson alleged were contradicted by the record. Additionally, Nelson's attorney acquiesced in the filing of the lis pendens, which Nelson now claims was improperly filed and the basis for the counterclaim. Therefore, the fee award could be upheld under either A.R.S. § 12-341.01(C)

or A.R.S. § 12-349, and there was no error awarding Schlauder sanctions.

4. Attorneys' Fees on Appeal

¶35 Schlauder requests attorneys' fees on appeal pursuant to A.R.S. §§ 12-341.01(C) and -349. Both statues authorize a court to award attorneys' fees if a claim or defense constitutes harassment, is groundless, and/or is not made in good faith. Although it was not an abuse of discretion for the trial court to award fees on this record, *supra* ¶ 34, the question of whether such fees should be awarded for appeal presents somewhat different considerations. The appeal of the denial of Nelson's counterclaim was frivolous. However, we cannot say that the appeal was for the purpose of harassment or delay required by either A.R.S. §§ 12-341.01(C) or -349. Accordingly, we deny Schlauder's request for fees on appeal.

¶36 The Surety requests attorneys' fees on appeal pursuant to A.R.S. § 12-341.01 and the contract with Nelson. The contract between Nelson and the Surety provides Nelson will completely indemnify the Surety "from and against any liability, loss, cost, attorney's fees and expenses" the Surety sustains "by reason of having been surety on this bond." The Surety incurred attorneys' fees on appeal seeking to uphold discharge of the bond on which it was a surety. Accordingly, the

contractual provision applies, and we award the Surety attorneys' fees on appeal.

¶37 Schlauder and the Surety are the prevailing parties, and we award both their costs on appeal. We deny Nelson's request for costs on appeal pursuant to A.R.S. § 12-341.

Conclusion

¶38 For the foregoing reasons, we affirm the superior court's orders.

/s/
_____
DANIEL A. BARKER, Judge

CONCURRING:

/s;
_____
PATRICIA K. NORRIS, Presiding Judge

/s/
_____
PETER B. SWANN, Judge