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

JANE HALL, a single woman, Plaintiff/Appellee-Cross Appellant, v. READ DEVELOPMENT, INC., an Arizona corporation; READ HOMES, INC., a Nevada corporation, Defendants/Appellants-Cross Appellees.	No. 1 CA-CV 10-0175 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Yavapai County

Cause No. P1300CV2004-0525

The Honorable David L. Mackey, Judge
The Honorable Howard D. Hinson, Jr., Judge (Retired)

AFFIRMED

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B R O W N, Judge

¶1 Read Development, Inc. ("RDI") appeals the trial court's judgment entered following a jury verdict in favor of Jane Hall on her claim for breach of the implied warranty of habitability. RDI asserts the court erred in allowing Hall to introduce improper rebuttal evidence as well as evidence of other homeowners' negative experiences with RDI. RDI also challenges the sufficiency of the evidence supporting the jury's damages award of $30,000. Hall cross-appeals, arguing the court erred in granting an interim award of attorneys' fees to RDI and in denying her request for post-judgment fees. For the following reasons, we affirm.[1]

BACKGROUND[2]

¶2 In 1999, Jane Hall and her now-deceased husband purchased a previously-owned home, constructed by RDI in Prescott Valley. Soon thereafter, Hall experienced various

[1] Pursuant to Arizona Rule of Civil Appellate Procedure (ARCAP) 28(g), we address the trial court's decision to grant summary judgment to RDI on Hall's rescission claim and the court's award of attorneys' fees to Hall by separate opinion filed herewith. The general factual background of the case is set forth in the opinion.

[2] "In reviewing a judgment based on a jury verdict, we view the evidence and all reasonable inferences therefrom in the light most favorable to sustaining the judgment." *Aegis of Ariz., L.L.C. v. Town of Marana*, 206 Ariz. 557, 560, ¶ 2, 81 P.3d 1016, 1019 (App. 2003) (citation omitted).

structural problems with her home due to expansive soil.[3] In 2004, Hall filed suit against RDI, alleging breach of the implied warranty of habitability and requesting "rescission of the purchase," or alternatively, damages for the costs to repair her home.[4] RDI moved for summary judgment on Hall's claim of rescission, asserting the remedy was unavailable to Hall because, as a subsequent purchaser, she was not in privity with RDI. The trial court granted the motion and awarded attorneys' fees to RDI.

¶3 At trial, the court granted judgment as a matter of law as to Hall's claims for negligent infliction of emotional distress and punitive damages. The jury found in favor of Hall on the claim of breach of the implied warranty of habitability and awarded her $30,000 in damages, but found in favor of RDI on the intentional infliction of emotional distress claim. The court subsequently awarded attorneys' fees to Hall as the successful party, denied RDI's motion for new trial, and also denied Hall's motion for supplemental attorneys' fees. This appeal and cross-appeal followed.

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[3] According to the trial record, expansive soil is composed of clay that expands when it comes into contact with water. When expansive soil is located under the foundation of a home, it may lift the interior foundations of the house, resulting in structural damage.

[4] Hall later filed an amended complaint, adding claims for negligent infliction of emotional distress, intentional infliction of emotional distress, and punitive damages.

DISCUSSION

I. Issues Raised on Appeal

A. Rebuttal Testimony

¶4 RDI asserts the trial court erred by allowing Hall to introduce expert testimony during rebuttal on the cost of future repairs to Hall's home because the testimony should have been introduced in Hall's case-in-chief. A trial court's ruling on the admission of rebuttal testimony will not be disturbed on appeal absent a showing of abuse of discretion. *Catchings v. City of Glendale*, 154 Ariz. 420, 426, 743 P.2d 400, 406 (App. 1987).

¶5 Rebuttal testimony is used "to counter a new fact or allegation made by an opponent's case." *Jansen v. Lichwa*, 13 Ariz. App. 168, 171, 474 P.2d 1020, 1023 (1970). However, "[t]estimony will not be precluded from being made part of rebuttal just because it might have been made part of the case in chief." *Id.*

¶6 At trial, Fred Nelson, an engineering defect expert, testified on behalf of Hall. He substantially agreed with the report prepared by RDI's geotechnical expert, Glen Copeland, regarding the repair measures necessary to fix the defects in the house. However, in addition to Copeland's repairs, Nelson suggested that repairs were needed to make the house "more level." Nelson testified as to other possible repair methods

for leveling as well as alternatives to the repairs set forth in the Copeland report. Later, Hall called another expert to quantify the costs of these alternative repairs. However, Hall did not provide evidence of the cost of Copeland's suggested repairs in her case-in-chief.

¶7 Subsequently, Christopher Read, the owner of RDI, testified that the cost of repair on a different home, which included similar damage to the Hall home, was approximately $5000. Read explained that in that situation, RDI utilized a repair protocol set forth by Glen Copeland, which required "similar" repairs to those required by Hall. On cross-examination, Read admitted that RDI informed Hall before the onset of litigation that the "maximum" cost of repairs for her home was approximately $3000.

¶8 In rebuttal, Hall attempted to introduce the deposition testimony of David Garcia, an expert hired by RDI to perform a cost analysis of the Copeland report. She argued that Garcia's deposition, which included a $14,000 repair estimate based on the Copeland report, directly rebutted the testimony of Read that "this was a $3,000 deal." The trial court admitted the evidence, reasoning as follows:

> [I]t's my impression that the defendant's case has implicitly urged that they were prepared to perform the Copeland remediation and . . . Mr. Read was questioned significantly about costs involved in doing

> whatever it was he intended to do, the combination of those two I think makes David Garcia the expert witness appropriate rebuttal testimony.

We find no abuse of discretion. The Garcia deposition testimony was offered to rebut Read's assertions that repairs on the Hall residence totaled approximately $3000, and repairs on another home, which involved repairs similar to the Copeland report, were approximately $5000.[5]

¶9 RDI argues nonetheless that *Deyoe v. Clark Equip. Co.*, 134 Ariz. 281, 655 P.2d 1333 (App. 1982), supports its position that "one cannot offer rebuttal testimony which should have been introduced in the case-in-chief." However, *Deyoe* states as follows:

> [O]ne cannot, *as a matter of right* offer rebuttal evidence which was proper and should have been introduced in chief, even though it tends to contradict the adverse party's evidence. . . . It has been recognized that the line between direct and rebuttal evidence is hazy and hard to determine and the trial court must have reasonable discretion in fixing the line absent manifest abuse.

Id. at 284, 655 P.2d at 1336 (emphasis added) (citations and internal quotation omitted). *Deyoe* does not preclude, as a

[5] RDI argues that Hall "raised this issue [on cross-examination] and cannot open the door for her own rebuttal." But RDI fails to cite any law for this proposition. In any event, we conclude that Read's testimony on direct examination regarding the cost of repairs on the other home was sufficient to permit rebuttal testimony on the issue.

matter of law, a party from offering rebuttal evidence which should have been introduced in a party's case-in-chief; rather, it leaves this determination to the discretion of the judge. *Id.*; *see also Jansen*, 13 Ariz. App. at 171, 474 P.2d at 1023 ("Testimony will not be precluded from being made part of rebuttal just because it might have been made part of the case in chief.").

B. Sufficiency of Evidence

¶10 RDI argues the trial court erred by denying its motion for new trial because the evidence introduced at trial was insufficient to support the jury verdict of $30,000. RDI argues that a verdict is permissible only if it consists of a figure proposed by one of the parties; therefore, the verdict here was improper because the expert witness evidence did not "equate" mathematically to the verdict. We disagree.

¶11 Pursuant to Arizona Rule of Civil Procedure 59(a)(8), a court may grant a new trial where "the verdict, decision, findings of fact, or judgment is not justified by the evidence or is contrary to law." We review a court's decision to deny a motion for new trial for an abuse of discretion. *White v. Greater Ariz. Bicycling Ass'n*, 216 Ariz. 133, 135, ¶ 6, 163 P.3d 1083, 1085 (App. 2007).

¶12 The question of damages is peculiarly within the province of the jury, and such an "award will not be overturned

or tampered with unless the verdict was the result of passion and prejudice." *Larriva v. Widmer*, 101 Ariz. 1, 7, 415 P.2d 424, 430 (1966). Thus, a jury verdict may be overturned only where "the verdict is so 'manifestly unfair, unreasonable and outrageous as to shock the conscience.'" *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 55, ¶ 23, 961 P.2d 449, 453 (1998). However, a verdict will not be deemed the result of passion and prejudice, and a court must uphold a verdict, "[i]f any substantial evidence could lead reasonable persons to find the ultimate facts to support" it. *Ogden v. J.M. Steel Erecting, Inc.*, 201 Ariz. 32, 36, ¶ 15, 31 P.3d 806, 810 (App. 2001). We may not reweigh the evidence and set aside the verdict merely because the jury could have drawn different inferences or because other results were more reasonable. *Hutcherson*, 192 Ariz. at 56, ¶ 27, 961 P.2d at 454.

¶13 Here, the jury instructions provided that Hall was entitled to damages not only for the cost of repairs, but also for the diminution in value of her home and any sums necessary for the costs of temporary housing during periods of repair. The jury returned a general verdict on damages in the amount of $30,000. Because RDI did not request a special verdict that would have allocated damages, we will sustain the general verdict if there is any theory to support it. *See Mullin v. Brown*, 210 Ariz. 545, 551, ¶ 24, 115 P.3d 139, 145 (App. 2005).

¶14 Hall presented evidence at trial that the cost of repair, based on the Copeland report, was approximately $14,000. Nelson testified that in addition to the renovations required under the Copeland report, leveling was required. Robert Brown, another expert, testified that the cost of repair for this process was between $12,000 and $20,000. Both experts testified to alternative repairs, including a cutoff wall, and complete slab replacement, but Nelson asserted that these were probably unnecessary. Because the repair costs ranged between $26,000 to a high of $100,000, sufficient evidence exists in the record to support the jury's general verdict.

¶15 RDI argues further that damages were not sufficiently proven because the testimony on the cost of repair pertained to repairs that Hall's expert "admitted were not necessary to repair the damage." RDI also contends that Hall's cost estimates were inadmissible because "neither expert opined [these] were needed."

¶16 Nelson testified that certain defects needed to be remedied, identifying those repairs he believed were most advantageous and cost-effective. The fact that Nelson identified a preferable repair did not render testimony on alternate repairs mere conjecture. Thus, the trial court did not abuse its discretion in admitting this testimony. *See Saide v. Stanton*, 135 Ariz. 76, 78, 659 P.2d 35, 37 (1983) ("The use

or refusal of an expert to use a 'magic word' or phrase such as 'probability' is not determinative. The trier of fact is allowed to determine probability or lack thereof if the evidence, taken as a whole, is sufficient to warrant such a conclusion.").

C. Testimony of "Disgruntled Homeowners"

¶17 RDI asserts that the trial court erred when it allowed other RDI homeowners to testify about soil expansion problems they experienced with RDI homes and to state that, after complaining, RDI had intimidated and bullied them. RDI argues that the evidence of other homeowners' soil expansion issues and resulting negative interactions with RDI was inadmissible because it was "prior bad act evidence," and therefore precluded under Arizona Rule of Evidence 404(b). RDI also argues that this was "inflammatory, irrelevant evidence" that prejudiced RDI's defense on the implied warranty of habitability claim. "The trial court's ruling on the admission or preclusion of evidence will be affirmed, absent a clear abuse of discretion and a showing of prejudice." *Catchings,* 154 Ariz. at 426, 743 P.2d at 406.

¶18 Rule 404(b) provides that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Ariz. R. Evid. 404(b). However, such evidence may be admissible for

other purposes, such as to show a party's motive, intent, plan, knowledge, or absence of mistake or accident. *Id*. As our supreme court noted in *Lee v. Hodge*, 180 Ariz. 97, 882 P.2d 408 (1994),

> Evidence of other crimes, wrongs, or acts is admissible if: (1) the evidence is related to a material fact, (2) the evidence tends to make the existence of a material fact more or less probable than without the evidence, (3) the material fact that is more or less probable is something other than a party's character and the person's propensity to act in accordance with that character, and (4) the probative value of the evidence substantially outweighs the danger of unfair prejudice.

Id. at 100, 882 P.2d at 411. To establish intent or absence of mistake, the prior acts must be similar to the alleged acts. *Id*. at 101, 882 P.2d at 412.

¶19 Hall introduced testimony of other homeowners showing that they experienced similar structural damage to their homes, including cracks in walls and the misalignment of walls and permanent fixtures. One witness testified that he noticed damage as early as 1996, which persisted until 1998. Another witness testified she observed structural damage to her home in 2000 and eventually filed a complaint with the Arizona Registrar of Contractors.[6]

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[6] RDI asserts that evidence of other homeowners' soil expansion problems was inadmissible because, even in tort cases, "[t]he overwhelming rule is one of non-admissibility where prior

¶20 Further, Hall introduced testimony of other RDI homeowners of RDI's alleged use of intimidation tactics to show that RDI's acts were intentional and not the product of a mistake—a fact material to proving the claim of intentional infliction of emotional distress. This testimony was relevant to Hall's argument that RDI's acts were intentional. The intent or absence of mistake exception to Rule 404(b) is "predicated primarily on a theory of increased probability arising from repetitive actions." *Lee*, 180 Ariz. at 101, 882 P.2d at 412 (citation omitted). "[T]he successive repetition of similar acts tends to reduce the likelihood of the actor's innocent intent [or mistake] on the particular occasion in question." *Id*. (citation omitted). Hall's evidence relating to the experiences of other homeowners was offered for a purpose other than to prove RDI's character and its propensity to act in accordance with that character. Moreover, the evidence of RDI's prior practices of handling homeowner complaints was highly probative on whether the alleged emotional distress experienced

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dissimilar events are sought to be introduced." *See Grant v. Ariz. Pub. Serv. Co.*, 133 Ariz. 434, 450, 652 P.2d 507, 523 (1982). Assuming *Grant* is applicable here, it stands for the proposition that other accidents are admissible upon a showing of "some similarity between the accident under consideration and the prior event." *Id*. at 450, 652 P.2d at 523. Here, this evidence was relevant and admissible under *Grant* because the testimony addressed similar damage to that experienced by Hall in Prescott Valley during the same general time frame.

by Hall was inflicted intentionally and, as discussed below, outweighs the danger of prejudice to RDI.[7] Therefore, the trial court did not err in admitting the testimony of the other homeowners.

¶21 Even assuming that the admission of this evidence was error, we find that RDI suffered no prejudice. The trial court appropriately limited this evidence by providing a limiting instruction to the jury. The jury instructions specifically advised the jury that evidence of "other homeowners' claims of

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[7] RDI cites an excerpt from the trial transcript, which provides in pertinent part as follows:

> COURT: I thought we were hearing from [the witness] to establish that he had expansive soils problems and during his expansive soils problems Glen Copeland made an engineering report and that puts notice on [Read] that there's expansive soils problems that have caused these kinds of problems[.]
>
> We're going all over the ballpark beyond that. We're getting into a lot of evidence of interactions between them that you're eliciting for the purpose of going to the jury, wanting the jury to come to the conclusion that that's the same way they interacted with Mrs. Hall, and that's out of the bounds of evidentiary rules here.

RDI asserts that this excerpt proves that the trial court improperly admitted this evidence. However, the court's comment does not establish that improper evidence had been admitted; rather, it shows the court was concerned about exceeding the scope of its prior ruling. Additionally, at RDI's request, the trial court instructed the jury that this evidence was only to be considered for purposes of showing the intent or knowledge of RDI.

alleged defects in construction of homes built by [RDI] was admitted for a limited purpose; to show intent, knowledge or plan of [RDI.]" This evidence, therefore, was not admitted to prove breach of the implied warranty of habitability, but only to prove Hall's claim of intentional infliction of emotional distress.[8] We presume that the jury properly followed this instruction. *See Perkins v. Komarnyckyj*, 172 Ariz. 115, 119, 834 P.2d 1260, 1264 (1992) (noting jurors are presumed to know and follow jury instructions absent any proof to the contrary). Furthermore, counsel for RDI expressly noted in his closing argument that "the court has indicated other homeowners' claims are not allowed to be considered to prove a breach of the implied warranty in this case." The jurors were properly informed of the import of this evidence and thus we find no abuse of discretion.[9] *See Gaston v. Hunter*, 121 Ariz. 33, 41,

[8] Neither intent, plan, nor knowledge are elements of the claim of implied warranty of habitability. However, in order to prevail on the claim of intentional infliction of emotional distress, Hall had to prove intentional conduct on the part of RDI. Therefore, this limiting instruction applied only to the intentional infliction claim.

[9] Hall requests that we impose attorneys' fees on appeal as a sanction against RDI pursuant to ARCAP 25, Arizona Revised Statutes ("A.R.S.") section 12-349(A) (2003), and A.R.S. § 12-341.01(C) (2003). Although RDI's opening brief was deficient in several respects, including RDI's failure to adequately address the facts of the case and to appropriately cite to portions of the record in support of its arguments, the issues it has raised are not frivolous or groundless. Thus, we decline to impose sanctions.

588 P.2d 326, 334 (App. 1978) (stating that evidence admissible for one purpose "is not to be excluded merely because it may be inadmissible for another purpose").

II. Issues Raised on Cross-Appeal

A. Interim Award of Attorneys' Fees

¶22 Hall asserts the trial court erred when it awarded RDI attorneys' fees on its motion for summary judgment pursuant to A.R.S. § 12-341.01. She argues the "successful party" cannot be determined until the conclusion of the case. We review the award of attorneys' fees for an abuse of discretion. *Bogard v. Cannon & Wendt Elec. Co.*, 221 Ariz. 325, 335, ¶ 39, 212 P.3d 17, 27 (App. 2009). Thus, we will not set aside the trial court's ruling on fees unless it lacks any reasonable basis. *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 570-71, 694 P.2d 1181, 1184-85 (1985).

¶23 Section 12-341.01(A) states in pertinent part: "In any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney fees." Although this portion of the statute contemplates the existence of only one successful party, the court may take into consideration the success of all claims in fashioning an appropriate award. *See Patton v. Cnty. of Mohave*, 154 Ariz. 168, 173, 741 P.2d 301, 306 (App. 1987) (noting that since plaintiff was not successful on all of his claims, the court's

discretionary reduction of the amount of fees awarded was justified); *Schweiger v. China Doll Rest., Inc.*, 138 Ariz. 183, 189, 673 P.2d 927, 933 (App. 1983) (When "a party has achieved only partial or limited success . . . it would be unreasonable to award compensation for all hours expended, including time spent on the unsuccessful issues or claims").

¶24 Here, although the court allocated an award of attorneys' fees to RDI for its successful defense on the rescission claim, the court did not implement the award until resolution of the case when it made a final determination of attorneys' fees. In that ruling, the court determined that Hall was the successful party, but reduced her award of attorneys' fees by $2500 as a result of RDI's success on the rescission claim. Therefore, we cannot say the court abused its discretion in its handling of the $2500 fee offset. *See Chase Bank of Ariz. v. Acosta*, 179 Ariz. 563, 574, 880 P.2d 1109, 1120 (App. 1994) (noting that this court is "hesitant to second-guess the trial court on awards of attorneys' fees in view of the [trial court's] superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters" (citation and internal quotation omitted)).

B. Denial of Post-Judgment Attorneys' Fees

¶25 Hall also argues the court erred when it refused to grant her request for an award of supplemental, post-judgment attorneys' fees. The award of fees itself "is discretionary with the trial court, and if there is any reasonable basis for the exercise of such discretion, its judgment will not be disturbed." *Pioneer Roofing Co. v. Mardian Constr. Co.*, 152 Ariz. 455, 466, 733 P.2d 652, 663 (App. 1986).

¶26 Courts consider a variety of factors in reviewing a request for attorneys' fees. *See Wilcox v. Waldman*, 254 Ariz. 532, 538, 744 P.2d 444, 450 (App. 1987) (finding that no one factor is determinative and that trial courts should consider all relevant factors in exercising discretion). In addition to considering success on the merits of the claim, other relevant factors include:

> (1) Whether litigation could have been avoided or settled and whether the successful party's efforts were completely superfluous in achieving the result;
>
> (2) Whether assessing fees against the unsuccessful party would cause an extreme hardship;
>
> (3) Whether the successful party prevailed with respect to all of the relief sought;
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> (4) Whether the legal question presented was novel and whether such claim or defense had previously been adjudicated in this jurisdiction; and

> (5) Whether a fee award would discourage other parties with tenable claims or defenses from litigating or defending legitimate contract issues.

Ariz. Attorneys' Fees Manual § 2.8.1, at 2-16 (Bruce E. Meyerson & Patricia K. Norris eds., 4th ed. 2003) (citing *Warner*, 143 Ariz. at 570, 694 P.2d at 1184).

¶27 Here, the trial court had previously determined Hall was the successful party and awarded her fees in the amount of $255,000, but that fact did not compel the court to award additional fees. Even as the successful party, a fee award is highly discretionary, as is the amount to be awarded. Hall did not prevail as to all relief sought. Her claims of negligent infliction of emotional distress and punitive damages were dismissed, and the jury found in favor of RDI on Hall's claim of intentional infliction of emotional distress. Thus, Hall only prevailed on three of her four claims. Furthermore, Hall made an offer to settle for $1,000,000 two months before trial, but received a verdict of only $30,000. Although the other factors appear to weigh in favor of Hall, we decline to substitute our judgment for that of the trial court. *See Warner*, 143 Ariz. at 571, 694 P.2d at 1185 ("[T]he question is not whether the judges of this court would have made an original like ruling, but whether a judicial mind, in view of the law and circumstances, could have made the ruling without exceeding the bounds of

reason." (citation and quotation omitted)); *Autenreith v. Norville*, 127 Ariz. 442, 444, 622 P.2d 1, 3 (1980) ("The language [of A.R.S. § 12-341.01] is permissible, and there is no requirement that the trial court grant attorney's fees to the prevailing party in all contested contract actions.").

¶28 Hall argues further that the court erred by failing to address the *Warner* factors in its ruling denying fees. In doing so, she seeks to distinguish *Ad Hoc Comm. of Parishioners of Our Lady of the Sun Catholic Church, Inc. v. Reiss*, 223 Ariz. 505, 224 P.3d 1002 (App. 2010). In that case, we held that the trial court's failure to recite the *Warner*[10] factors in declining attorneys' fees was not error because "the trial court is presumed to know and follow the law." *Id.* at 518, ¶ 42, 224 P.3d at 1015 (citation and quotation omitted). However, we also found that although the trial court did not explicitly refer to the *Warner* factors, the court did make a general statement that was pertinent to the first and fifth factors. *Id.*

¶29 Hall contends that the trial court gave no indication it addressed any of the *Warner* factors, either explicitly or by implication. However, the rule that trial courts are presumed to know and follow the law is not dependent on the status of the

[10] The *Warner* factors have also been referred to in Arizona decisions, including *Ad Hoc Comm.*, as the *Wagenseller* factors. *See Wagenseller v. Scottsdale Mem'l Hosp.*, 147 Ariz. 370, 394, 710 P.2d 1025, 1049 (1985) (citing the *Warner* factors).

record. *See Uyleman v. D.S. Rentco*, 194 Ariz. 300, 305, ¶ 27, 981 P.2d 1081, 1086 (App. 1999) (upholding a denial of attorneys' fees "[a]lthough the trial court gave no reasons for denying the request for fees"). Furthermore, the trial court explicitly considered the *Warner* factors when it previously addressed the issue of attorneys' fees. We therefore presume that the trial court was aware of and properly followed the law.

C. Attorneys' Fees on Appeal

¶30 Both parties request an award of attorneys' fees and costs incurred on appeal pursuant to A.R.S. § 12-341.01(A). RDI did not prevail on its appeal, but neither did Hall prevail on her cross-appeal. In the exercise of our discretion, we decline to award attorneys' fees to either party. We award costs, however, to Hall upon her compliance with ARCAP 21.

CONCLUSION

¶31 For the foregoing reasons, and based on the opinion filed concurrently herewith, we affirm the judgment of the trial court.

/s/
_____
MICHAEL J. BROWN, Judge

CONCURRING:

/s/
_____
DANIEL A. BARKER, Presiding Judge*

/s/
_____
MARGARET H. DOWNIE, Judge

* Judge Daniel A. Barker was a sitting member of this court when the matter was assigned to this panel. He retired effective December 31, 2011. In accordance with the authority granted by Article 4, Section 3 of the Arizona Constitution and pursuant to A.R.S. § 12-145 (2003), the Chief Justice of the Arizona Supreme Court has designated Judge Barker as a judge pro tempore in the Court of Appeals, Division One, for the purpose of participating in the resolution of cases assigned to this panel during his term of office.