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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 01/26/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: DLL

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

WSL ASSOCIATES, a Wyoming ) 1 CA-CV 10-0895  
corporation, )  
) DEPARTMENT D  
Plaintiff/Appellant, )  
) **MEMORANDUM DECISION**  
v. ) (Not for Publication -  
) Rule 28, Arizona Rules of  
FLAGSTAFF ACQUISITIONS, LLC, an ) Civil Appellate Procedure)  
Arizona limited liability )  
company, )  
)  
Defendant/Appellee. )  
)  
)

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-028074

The Honorable Sam J. Myers, Judge

**AFFIRMED**

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by Dale S. Zeitlin  
Attorneys for Plaintiff/Appellant

Gammage & Burnham P.L.C. Phoenix  
by Richard K. Mahrle  
Attorneys for Defendant/Appellee

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**P O R T L E Y**, Judge

¶1 WSL Associates ("WSL") challenges the award of attorneys' fees to Flagstaff Acquisitions, L.L.C. ("FA"). WSL

argues that FA is not entitled to fees because FA did not, and was not obligated to, pay attorneys' fees. For the reasons that follow, we affirm the order.

#### **FACTUAL AND PROCEDURAL HISTORY**

¶12 Vanderbilt Farms, L.L.C. hired WSL in the late 1990s to perform work at Pine Canyon, a residential community in Flagstaff, Arizona. Approximately ten years later, WSL sued Vanderbilt Farms alleging a breach of contract. In the interim, through a series of assignments of property interest initiated by Vanderbilt Farms, Lone Tree Investments, L.L.C. ("LTI") acquired Pine Canyon.<sup>1</sup> LTI, however, had borrowed money from FA to purchase the property, and FA subsequently became LTI's sole member.<sup>2</sup>

¶13 WSL amended its complaint in 2009 and added LTI and FA. LTI and FA explained that they had not been part of any alleged agreement with WSL and filed a motion for more definite statement to clarify the basis of the claims against them. The court denied the motion and LTI and FA moved for summary judgment. WSL secured an extension, took depositions, and then

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<sup>1</sup> Vanderbilt Farms assigned its interest in Pine Canyon to Lone Tree Developments, L.L.C., which assigned its interest to LTI. Because the parties' agreement was binding on their successors and assigns, these assignments did not affect its enforceability.

<sup>2</sup> Later, the entity that became FA's president received a one-percent membership interest in FA and LTI, its only asset; FA retained a ninety-nine percent interest in LTI.

filed its response<sup>3</sup> to LTI's motion. WSL, however, stipulated to dismiss its claims against FA. WSL and Vanderbilt Farms subsequently settled their dispute.

¶4 After the stipulation, FA filed an application to recover its attorneys' fees. In its application,<sup>4</sup> FA stated that it and LTI had been jointly represented and LTI had paid its legal bills. WSL objected to the request, but the trial court observed that "[WSL] conceded that [FA's] motion was well-taken" and awarded FA \$17,890 in fees. WSL appealed, and we have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (West 2012).

## DISCUSSION

### A. Standard of Review

¶5 Whether the fee award is proper under A.R.S. § 12-341.01 (West 2012) is a matter of statutory interpretation that we review de novo. *Zeagler v. Buckley*, 223 Ariz. 37, 38, ¶ 5, 219 P.3d 247, 248 (App. 2009) (citation omitted). If the statute authorizes the award, however, we will affirm if the record reasonably supports the ruling. *Grand Real Estate, Inc. v. Sirignano*, 139 Ariz. 8, 14, 676 P.2d 642, 648 (App. 1983)

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<sup>3</sup> LTI subsequently filed for bankruptcy protection.

<sup>4</sup> FA requested \$26,485.78 in its fees application but submitted a reduced request, for \$24,169.78, after removing inapplicable time entries.

(citations omitted). We review the amount of fees for an abuse of discretion, mindful of the court's substantial discretion to set the amount of the award. *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 570, 694 P.2d 1181, 1184 (1985) (court's broad discretion to set fees limited by § 12-341.01(B), which prohibits an award in excess of "the amount paid or agreed to be paid").

**B. Fees Under § 12-341.01**

¶16 WSL argues that FA cannot recover the fees paid by LTI, a non-prevailing party.<sup>5</sup> Although WSL does not challenge the fact that the litigation arose out of a contract, it contends that FA is not entitled to an award because FA did not pay and was not responsible for paying attorneys' fees. FA argues, however, that a successful party is not required to personally pay fees to qualify for an award. FA also argues that the award was proper because it owns LTI, had loaned LTI the funds that financed their joint legal defense, and would have been responsible for paying the fees if LTI had not.

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<sup>5</sup> WSL argues that FA is not entitled to "fees or costs" but does not develop an argument as to costs. Therefore, any claim as to the costs award is waived. See Ariz. R. Civ. App. P. 13(a)(6); *State v. Moody*, 208 Ariz. 424, 452 n.9, ¶ 101, 94 P.3d 1119, 1147 n.9 (2004) ("Merely mentioning an argument is not enough" to significantly develop a claim and typically constitutes abandonment and waiver); *Ace Auto. Prods., Inc. v. Van Duyne*, 156 Ariz. 140, 143, 750 P.2d 898, 901 (App. 1987) ("It is not incumbent upon the court to develop an argument for a party.").

¶17 WSL cites *Lisa v. Strom*, 183 Ariz. 415, 904 P.2d 1239 (App. 1995), and *Moedt v. General Motors Corp.*, 204 Ariz. 100, 60 P.3d 240 (App. 2002), for the proposition that a party must have an actual obligation to pay fees in order to be eligible to receive a fees award.<sup>6</sup> We agree, but find that FA had a genuine obligation to compensate the law firm and lawyers who represented it. FA had an attorney-client relationship with the firm and accepted the benefits of the representation. As a result, FA had an obligation to pay the firm for its services. See *Journal-Miner Pub. Co. v. Curley*, 31 Ariz. 280, 283, 252 P. 187, 188 (1927); see also W.R. Habeeb, Annotation, *What Constitutes Acceptance or Ratification of, or Acquiescence in, Services Rendered by Attorney so as to Raise Implied Promise to Pay Reasonable Value Thereof*, § 5, *Knowingly Accepting Benefits*, 78 A.L.R. 2d 318 (1961). The fact that FA's obligation was periodically extinguished by a third party does not signify that the obligation never existed or preclude an award of fees.

¶18 WSL also argues that the fees award violated § 12-341.01(B) because it did not "mitigate the burden of the expense of litigation." We disagree, and are guided by our decision in

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<sup>6</sup> In *Lisa*, we held that an attorney who represented himself and his wife could not recover fees under A.R.S. § 12-349 because the financial obligation to repay the community was illusory. 183 Ariz. at 419-20, 904 P.2d at 1243-44. In *Moedt*, we extended the "genuine financial obligation" requirement to all attorneys' fees requests and held that a contingency fee agreement created such an obligation. 204 Ariz. at 104, ¶¶ 11-12, 60 P.3d at 244.

*Catalina Foothills Ass'n v. White*, 132 Ariz. 427, 646 P.2d 312 (App. 1982).

¶9 In *Catalina Foothills*, we affirmed a fee award even though a title company had paid the prevailing defendants' litigation expenses pursuant to a policy agreement. 132 Ariz. at 428, 646 P.2d at 313. We stated that "[w]e do not hold that the trial court cannot properly consider such fact, i.e., that someone else may be obligated to bear the expense, but we find the weight to be accorded that fact to be wholly within the trial court's discretion." *Id.* (citations omitted).

¶10 Here, WSL, like the plaintiffs in *Catalina Foothills*, argued that the award did not mitigate the financial burden of litigation because LTI, like the title company in *Catalina Foothills*, paid or was responsible to pay the attorneys' fees. We rejected the argument in *Catalina Foothills*, and likewise reject it here; the statute applies even if the prevailing party does not personally pay the fees. See *id.* Additionally, as we observed in *Moedt*, fee-shifting statutes such as § 12-341.01 "vest[] the interest in the award in the litigant, not the attorney, regardless of what fee arrangement exists between [them]." 204 Ariz. at 104, ¶ 13, 60 P.3d at 244 (citation omitted). Therefore, the trial court did not err when it found that FA was eligible to receive attorneys' fees under A.R.S. § 12-341.01.

¶11 In addition to finding that FA is not precluded from recovering fees as a matter of law, we find that the court did not err by ordering the award. Our supreme court has identified six factors that a trial court should consider when ruling on a fees request.<sup>7</sup> *Associated Indem.*, 143 Ariz. at 570, 694 P.2d at 1184. In its application, FA addressed each factor and argued

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<sup>7</sup> The Court of Appeals listed several factors which we agree are useful to assist the trial judge in determining whether attorney's fees should be granted under the statute:

1. The merits of the claim or defense presented by the unsuccessful party.
2. The litigation could have been avoided or settled and the successful party's efforts were completely superfluous in achieving the result.
3. Assessing fees against the unsuccessful party would cause an extreme hardship.
4. The successful party did not prevail with respect to all of the relief sought.

*Associated Indemnity [Corp. v. Warner*, 143 Ariz. 585, 589, 694 P.2d 1199, 1203 (App. 1983)]. In addition to these factors, we would include: the novelty of the legal question presented, and whether such claim or defense had previously been adjudicated in this jurisdiction. We also believe that the trial court should consider whether the award in any particular case would discourage other parties with tenable claims or defenses from litigating or defending legitimate contract issues for fear of incurring liability for substantial amounts of attorney's fees. See *Wistuber v. Paradise Valley Unified School*, 141 Ariz. 346, 687 P.2d 354 (1984).

*Associated Indem.*, 143 Ariz. at 570, 694 P.2d at 1184.

that its motion for more definite statement had alerted WSL that its claims against FA were meritless. FA also pointed out that it was forced to participate in numerous depositions before WSL conceded that its claims against FA could be dismissed with prejudice. Consequently, the record contains a reasonable basis for the decision to award fees and the court did not abuse its discretion in doing so.

### C. Amount of Fees

¶12 WSL also challenges the amount of fees awarded by the trial court. It argues that because FA's representation did not "expand the litigation," the award merely allows FA to recover fees expended for LTI. We disagree.

¶13 The trial court has broad discretion to determine what amount of attorneys' fees to award. *Associated Indem.*, 143 Ariz. at 570, 694 P.2d at 1184. In the exercise of that discretion, the court should consider the *Associated Indemnity* factors and other relevant information. For example, in *Catalina Foothills*, we noted that the court may consider who paid the fees when setting a reasonable fee award. 132 Ariz. at 428, 646 P.2d at 313 (citations omitted). Here, because FA had disclosed its joint representation agreement with LTI, and LTI had paid FA's legal bills until it filed for bankruptcy, the court was free to consider this information when deciding the amount of the award.



¶14 We find that the trial court did not abuse its discretion in the fee award. FA did not attempt to recover all of the attorneys' fees expended, but only two-thirds to account for the joint representation. The court then reduced the requested amount by approximately \$6,000, which represents an almost equal split of fees between FA and LTI. Consequently, it is clear that the court exercised its discretion and considered the factors in *Associated Indemnity* and *Catalina Foothills*. We find no error.

¶15 FA has requested fees on appeal. In the exercise of our discretion, we decline to award fees but award FA its appellate costs upon compliance with Arizona Rule of Civil Appellate Procedure 21.

#### CONCLUSION

¶16 Based on the reasons discussed above, the judgment of the trial court is affirmed.

/s/

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MAURICE PORTLEY, Judge

CONCURRING:

/s/

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JON W. THOMPSON, Presiding Judge

/s/

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JOHN C. GEMMILL, Judge