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



DIVISION ONE  
FILED: 10/02/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: sls

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

In the Matter of the Estate of: ) 1 CA-CV 11-0698  
)  
GEORGE MELVIN REESE, ) DEPARTMENT E  
)  
Deceased. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
\_\_\_\_\_ ) Rule 28, Arizona Rules  
ROBERT A. REESE, individually and ) of Civil Appellate  
as putative Personal Representative ) Procedure)  
of the Estate of G. Melvin Reese, )  
Deceased, )  
)  
Plaintiff/Appellee/ )  
Cross-Appellant, )  
)  
v. )  
)  
JOSEPHINE OLIVERSON, )  
)  
Defendant/Appellant/ )  
Cross-Appellee. )  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. PB2002-004752; PB2004-002988

The Honorable John R. Doody, Judge *Pro Tempore*

**AFFIRMED**

Becker & House, P.L.L.C.  
by Mark E. House  
Allison E. Evans  
Attorneys for Plaintiff/Appellee/Cross-Appellant

Scottsdale

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**J O H N S E N**, Judge

¶1 Josephine Oliverson appeals from the superior court's judgment requiring her to pay rent owed during her occupancy of a home owned by the Estate of G. Melvin Reese (the "Estate"). Robert A. Reese, individually and as the putative personal representative of the Estate, cross-appeals the amount of the judgment. For the following reasons, we affirm.

**FACTS AND PROCEDURAL HISTORY**

¶2 Melvin and Wilma Reese were married. Robert was the son of Melvin from a previous marriage; Oliverson was the daughter of Wilma from a previous marriage. Melvin died on May 29, 2002; Wilma died on September 25, 2002. On September 16, 2004, Robert, individually and as putative personal representative of the Estate, filed a complaint alleging Oliverson wrongly had transferred a home from Wilma's estate to herself. The superior court concluded the transfer was not valid and ordered the home be transferred back to Wilma's estate. The superior court then directed that the home be transferred from Wilma's estate to the Estate. Oliverson appealed. This court affirmed the superior court's decision, and our mandate issued on February 11, 2011.

¶13 On April 4, 2011, Robert, on behalf of the Estate, filed a complaint against Oliverson seeking rent for the home at a rate of \$1,000 per month for the period of September 2002 to April 2011. It is undisputed that Oliverson occupied the home during that period and paid no rent.

¶14 The superior court held an evidentiary hearing, then invited the parties to brief whether the statute of limitations limited the period for which the Estate was entitled to collect rent from Oliverson. The parties stipulated that Oliverson would receive credit for any property taxes she paid on the home during the period for which she would have to pay rent.

¶15 The court found the Estate was entitled to rent from Oliverson for the period of September 25, 2002, to April 11, 2011. After considering Oliverson's testimony and that of an expert witness offered by the Estate, the court imposed a rental rate of \$750 a month. It then invited the Estate, as the prevailing party, to file a petition for attorney's fees. The Estate filed a petition for fees to which Oliverson did not respond. The court granted the petition.

¶16 The court entered judgments ordering Oliverson to pay \$69,239.34 in rent and \$7,549 in attorney's fees and costs. Oliverson appealed from both judgments. The Estate filed a cross-appeal regarding the amount of monthly rent awarded. This

court has jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(9) (West 2012).<sup>1</sup>

## DISCUSSION

### A. Standards of Review.

¶7 On appeal from a trial to the court, we are bound by the court's findings of fact unless they are clearly erroneous. *Sabino Town & Country Estates Ass'n v. Carr*, 186 Ariz. 146, 149, 920 P.2d 26, 29 (App. 1996) (quotation omitted). We defer to the court's determinations of witness credibility and do not reweigh conflicting evidence, but determine only if the record contains substantial evidence to support the superior court's decision. *In re Estate of Pouser*, 193 Ariz. 574, 579, ¶ 13, 975 P.2d 704, 709 (1999). Substantial evidence is evidence from which a reasonable person could reach the same result. *Id.* If an appellant fails to provide the information necessary to address the issues raised, we presume the missing information supports the superior court's conclusions. *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995). We view the evidence and reasonable inferences from that evidence in the light most favorable to the prevailing party and must affirm if any evidence supports the judgment. *Inch v. McPherson*, 176

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<sup>1</sup> Absent material revisions after the relevant date, we cite a statute's current version.

Ariz. 132, 136, 859 P.2d 755, 759 (App. 1993). We consider legal questions *de novo*. *Id.*

**B. The Period for Which Oliverson is Liable for Unpaid Rent.**

¶8 The superior court held the Estate had owned the home since September 25, 2002; Oliverson does not dispute that finding on appeal. Nor does Oliverson contest the court's conclusion, recited in a minute entry order and implied in its judgment, that the claim for rent did not accrue until the Estate's claim to ownership of the home had been resolved, in February 2011. The parties agree that a two-year limitations period applies to the Estate's claim for rent.<sup>2</sup> Because the Estate filed its complaint for rent on April 4, 2011, within two months of the date the court found the claim accrued, the complaint is timely, as the superior court held.

¶9 On appeal, Oliverson argues only that the superior court erred when it analyzed the issue with reference to case authority addressing "open account" circumstances. The court engaged in that analysis, however, only because Oliverson herself raised "open account" issues in the memorandum she filed addressing limitations issues. In any event, the court's "open

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<sup>2</sup> Oliverson argues the applicable two-year limitation is found in A.R.S. § 12-542(6) (West 2012) (forcible entry or detainer). The Estate suggests the more appropriate provision is A.R.S. § 12-542(3) (actions for trespass), but a two-year limitations period applies under both provisions.

account" analysis does not bear on its conclusion that the Estate's complaint was timely.

¶10 Citing *Connor Live Stock Co. v. Fisher*, 32 Ariz. 80, 255 P. 996 (1927), Oliverson argues recovery of rent owed is limited by the statute of limitations. But in *Connor Live Stock* the parties had an oral lease, and the plaintiff's right to collect rent was not in question. Consequently, the plaintiff could have brought his action to collect the rent at any time. Here, the ownership of the home, and therefore the Estate's right to collect rent, was in dispute. As noted, Oliverson did not take issue with the Estate's contention that the earliest date by which the cause of action for any rent could have accrued was October 20, 2009, when the court signed the order transferring the home from Wilma's estate to the Estate.

**C. Attorney's Fees.**

¶11 Oliverson also argues the award of attorney's fees to the Estate was unreasonable. She argues only that fees could not have been imposed pursuant to A.R.S. § 12-341.01(C) (West 2012) because her defense was not groundless nor did it constitute harassment.

¶12 The record shows Oliverson failed to file any response to the Estate's fee application, even though the court specifically directed that objections be filed within ten days of the application. This court will not consider on appeal

arguments not first presented to the superior court. *Scottsdale Princess P'ship v. Maricopa County*, 185 Ariz. 368, 378, 916 P.2d 1084, 1094 (App. 1995). Having failed to raise any objection to the award of fees in the superior court, Oliverson has waived the issue on appeal.

**D. The Cross-Appeal.**

¶13 The Estate argues the superior court clearly erred in finding that \$750 was the fair market monthly rental value of the home between October 2002 and April 2011. It argues that the only evidence supporting the court's decision was Oliverson's personal opinion of the value of the home and her unsubstantiated, "biased," and "inherently unreliable hearsay statement" that a neighbor told her that she rented a similar home for \$725. The Estate argues that, in light of the testimony of its expert that the rental value averaged \$927 per month, the court's conclusion was not supported by sufficient evidence.

¶14 In addressing the question of the fair rental value, the superior court first found the Estate's expert qualified and his opinions supported by his calculations submitted into evidence. The court then explained its decision:

Plaintiff's expert rendered an opinion that the fair rental value of the subject property averaged \$927.00 per month between September 25, 2002 through April 11, 2011, though the expert also acknowledged that he

did not find many comparable transactions in the stable neighborhood where the subject property is located.

Defendant herself expressed the view that the fair market value of the property was \$600.00 to \$700.00 per month. Defendant indicated that she paid a maximum rent of \$375.00 per month to her mother before her mother died, but acknowledged that she paid a lower rent in exchange for caring for her mother. Defendant testified without objection that a neighbor near the subject property rented a similar home for \$725.00 per month.

Weighing [the expert's] testimony and the acknowledged lack of comparable sales in the neighborhood, against the Defendant's own testimony, the Court finds that the fair rental value of the property was \$750.00 per month.

¶15 The superior court clearly weighed the opinion of the Estate's expert witness against Oliverson's testimony of what she paid in rent during her mother's lifetime, what she believed the rental value to be, and the amount for which a neighbor said she rented a similar property. Although the court accepted the expert's opinion as supported by his calculations, the court also noted that few of the properties on which he relied represented comparable transactions located in the home's neighborhood. It was within the court's purview to weigh these various factors to reach a conclusion.

¶16 Oliverson's testimony regarding her neighbor supports the court's determination. Although the Estate argues on appeal



that testimony was hearsay, it did not object to the testimony at trial. As for Oliverson's testimony being biased and unreliable, the superior court is the sole arbiter of the credibility of the witness. *City of Tucson v. Apache Motors*, 74 Ariz. 98, 107-08, 245 P.2d 255, 261 (1952). Further, the superior court's determination is not inconsistent with the expert's. The Comparable Market Analysis the expert prepared for the hearing recommends a listing price of \$927, but also notes a high rent of \$1,195 and a low rent of \$650. The rent set by the court falls within that range. We also note that because the Estate failed to provide us with the transcript of the evidentiary hearing, we presume that the evidence presented supports the superior court's decision. See *Rapp v. Olivo*, 149 Ariz. 325, 330, 718 P.2d 489, 494 (App. 1986).

¶17 For these reasons, we conclude the superior court's determination of \$750 per month as the fair market rental value of the home is supported by substantial evidence.

#### **E. The Estate's Request for Sanctions.**

¶18 The Estate seeks sanctions against Oliverson pursuant to Arizona Rule of Civil Appellate Procedure 25. Under this rule, we may impose sanctions against an attorney or party who brings an appeal that is frivolous or brought solely for purpose of delay. ARCAP 25. We exercise great caution in determining an appeal to be frivolous so as not to discourage appeals

involving novel arguments or theories; we therefore use our authority to impose sanctions "most sparingly." *Price v. Price*, 134 Ariz. 112, 114, 654 P.2d 46, 48 (App. 1982). Although Oliverson's arguments on appeal were not well taken, in our discretion, we decline to find that they warrant sanctions as frivolous.

¶19 The Estate also seeks sanctions pursuant to A.R.S. § 12-349 (West 2012) on the grounds that Oliverson brought the appeal without substantial justification. Under A.R.S. § 12-349, this court must assess reasonable attorney fees, expenses and, in the court's discretion, double damages, when a party brings an appeal without substantial justification. A.R.S. § 12-349(A)(1). "[W]ithout substantial justification" means that the [appeal] constitutes harassment, is groundless and is not made in good faith." A.R.S. § 12-349(F). The party seeking sanctions has the burden of proving all three elements by a preponderance of the evidence. *In re Estate of Stephenson*, 217 Ariz. 284, 289, ¶ 28, 173 P.3d 448, 453 (App. 2007).

¶20 The Estate argues Oliverson's arguments were unsupported by legal authority and that she acted in bad faith by suggesting on appeal that the "open account" theory mentioned by the superior court first was raised by the court rather than in her own arguments. Even if these assertions supported the conclusion that Oliverson's appeal was groundless and made in

bad faith, the Estate has provided no basis for a finding that Oliverson's actions were taken with an intent to harass. We therefore conclude that sanctions are not warranted under A.R.S. § 12-349.

**CONCLUSION**

¶21 We affirm the judgment of the superior court. Upon compliance with Arizona Rule of Civil Appellate Procedure 21, the Estate is awarded its costs of appeal.

/s/  
DIANE M. JOHNSEN, Judge

CONCURRING:

/s/  
PATRICIA K. NORRIS, Presiding Judge

/s/  
JON W. THOMPSON, Judge