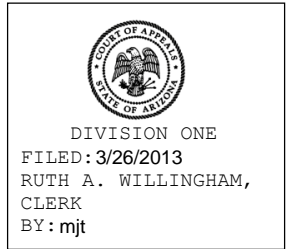


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



PALETAS BETTY, ) 1 CA-CV 12-0182  
)  
Plaintiff/Appellee, ) DEPARTMENT D  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
ROBERT BOBBER, ) Rule 28, Arizona Rules of  
) Civil Appellate Procedure)  
Defendant/Appellant. )  
)  
)

Appeal from the Superior Court in Maricopa County

Cause No. CV2011-092508

The Honorable John R. Ditsworth, Judge

**ORDER AWARDING ATTORNEYS' FEES VACATED**

Robert Bobber  
Defendant/Appellant *in propria persona*

Gilbert

**K E S S L E R**, Judge

¶1 Defendant/Appellant, Robert Bobber ("Bobber") appeals the superior court's judgment awarding attorneys' fees and costs to Plaintiff/Appellee, Paletas Betty ("Paletas Betty") and its attorney, Williams Young PLLC, based on Arizona Revised Statutes ("A.R.S.") section 25-324 (Supp. 2012). Such costs were incurred as a result of Paletas Betty's motion for an injunction

in a contract dispute involving the printing and distribution of Paletas Betty promotional coupons. Because the superior court committed an error of law by awarding attorneys' fees on the basis of section 25-324 which is inapplicable to the underlying proceedings here, and Paletas Betty did not request such an award on any other basis or file an answering brief, we vacate the award of attorneys' fees.

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

¶12 Paletas Betty filed a two-count complaint against Bobber alleging that: (1) Bobber breached the parties' contract to provide a "buy one, get one free" coupon in a coupon booklet that Bobber's business produces; and (2) Bobber violated A.R.S. § 44-1453 (Supp. 2012) by failing to return the misprinted coupons, the sale and distribution of which would damage the brand image of Paletas Betty. Paletas Betty requested that the superior court grant a preliminary injunction that: (1) enjoins Bobber from selling or distributing coupon booklets that included the improper Paletas Betty coupon; (2) requires Bobber to remove all the coupons and return them to Paletas Betty; (3) awards damages amounting to \$9.00 per booklet for each booklet that was sold or distributed prior to the injunction; and (4) awards attorneys' fees, costs, and punitive damages.

¶13 Bobber and Paletas Betty had initially agreed to have Bobber distribute discount coupons for Paletas Betty products in

a coupon book. Ultimately, there was a falling out between the parties and Paletas Betty requested that Bobber not distribute and return all of the coupons to Paletas Betty. At the time of the superior court's award of attorneys' fees, Bobber had removed most of the coupons from the booklets.

¶4 At the end of the trial the superior court granted Paletas Betty's motion finding that: (1) there are no damages because no coupons were turned in for redemption; and (2) "Bobber has turned over approximately 5000 coupons" and the "[r]emaining coupons are to be delivered to counsel for [Paletas Betty] prior to the . . . hearing on damages and attorney fees."

¶5 The court informed Bobber that the injunction will dissolve when he brings in the remaining coupons. A telephonic hearing on damages was scheduled for June in order to give Bobber time to remove the rest of the coupons and to see if any coupons were redeemed in that time. The court also ordered that attorneys' fees would be discussed at the damages hearing, and stated that no further evidence was needed other than counsel's "avowal as to attorney's (sic) fees."

¶6 At the damages and attorneys' fees hearing, the superior court determined that: (1) Paletas Betty must file an affidavit on attorneys' fees; and (2) although there were a number of outstanding coupon booklets, Bobber "has been acting in good faith in returning the remaining packets to [Paletas

Betty].” The court also ordered Paletas Betty to “file an affidavit on Attorney Fees so that [Bobber] has a chance to review it before the Court makes a decision.” The hearing was continued until January 2012.

¶17 Paletas Betty filed an application and affidavit for attorneys’ fees and costs citing A.R.S. § 25-324 and *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 673 P.2d 927 (App. 1983) wherein she claimed a total of \$1,171.00 in costs and fees.<sup>1</sup>

¶18 Bobber responded and argued that although Paletas Betty asserted that it was entitled to fees under A.R.S. § 25-324, it did not assert A.R.S. § 12-341.01 (Supp. 2012) supported an award of fees.<sup>2</sup> Despite this, Bobber asserted that Paletas Betty only submitted a bill to the court and cited no legal grounds or basis for its fee request. Bobber also proceeded to make arguments as to why Paletas Betty was not entitled to fees under the considerations set forth in A.R.S. § 12-341.01. At the continued hearing on damages and attorneys’ fees and costs the court granted judgment in favor of Paletas Betty and awarded attorneys’ fees and costs in the amount requested pursuant to

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<sup>1</sup> Specifically, Paletas Betty asserted it was entitled to \$500 for flat fee representation, \$320 for hourly representation, \$301 for court costs, and \$50 for process server expenses.

<sup>2</sup> Section 12-341.01(A) governs an award of attorneys’ fees to a successful party in an action arising out of contract.

A.R.S. § 25-324.<sup>3</sup> The order approving the fee award was prepared by Paletas Betty.

¶9 Bobber timely filed a notice of appeal. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1) (Supp. 2012).

#### DISCUSSION

¶10 Bobber asserts that the superior court improperly awarded attorneys' fees and costs to Paletas Betty because the court did not appropriately apply A.R.S. § 25-324, A.R.S. § 12-341.01, and *Associated Indemnity Corporation v. Warner*, 143 Ariz. 567, 694 P.2d 1181 (1985).<sup>4</sup> Paletas Betty has not appeared in this appeal and as a result the case has been submitted to this Court based on the record and Bobber's opening brief.

¶11 We review the superior court's decision to award attorneys' fees pursuant to A.R.S. § 25-324 for an abuse of discretion. *Burnette v. Bender*, 184 Ariz. 301, 306, 908 P.2d 1086, 1091 (App. 1995). We determine that the court abused its

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<sup>3</sup> Although recorded, the transcript from this proceeding is not in the record on appeal.

<sup>4</sup> Because Paletas Betty never sought attorneys' fees under A.R.S. § 12-341.01, and the court's award was not based on that statute, the statute is not at issue in this case. Therefore, we need not consider Bobber's argument that the award here is unwarranted under section 12-341.01 or under *Associated Indemnity Corporation v. Warner*, as that case was based entirely on section 12-341.01. See 143 Ariz. at 568, 694 P.2d at 1182 ("We granted review in this case to clarify the proper construction of the statute governing the discretionary award of attorney's (sic) fees to successful litigants in contract actions, A.R.S. § 12-341.01.").

discretion here by committing an error of law when it applied A.R.S. § 25-324 because that statute is inapplicable to this case. See *In re Marriage of Williams*, 219 Ariz. 546, 548, ¶ 8, 200 P.3d 1043, 1045 (App. 2008) ("An abuse of discretion occurs when a court commits an error of law in the process of reaching a discretionary conclusion."); see also *In re Marriage of Zale*, 193 Ariz. 246, 251, ¶ 20, 972 P.2d 230, 235 (1999) (stating section 25-324 "authorizes us to order one party to pay the fees and costs incurred by the other party *in a domestic relations case*" (emphasis added)).

¶12 Paletas Betty specifically cited A.R.S. § 25-324 as the sole basis for its fee request and it was pursuant to this statute that the court awarded fees. However, section 25-324 pertains to cases involving dissolutions of marriage and does not provide a statutory basis for an award of attorneys' fees outside such context. The statute is codified in Title 25 which governs marital and domestic relations and specifically appears in Chapter 3, Article 2 which governs dissolutions of marriage. Thus, the superior court committed an error of law by applying

section 25-324 to the instant case because this case does not involve marital and domestic relations.<sup>5</sup>

¶13 In addition, the court did not state any other basis upon which we can affirm the award here. As discussed above, Paletas Betty did not seek, nor did the court award, fees based on being a successful party to an action arising out of contract pursuant to A.R.S. § 12-341.01.

¶14 We do not have the transcript from the January 2012 continued hearing on damages and attorneys' fees and in such instances we normally presume the transcript supports the court's ruling. See *Kohler v. Kohler*, 211 Ariz. 106, 108 n.1, ¶ 8, 118 P.3d 621, 623 n.1 (App. 2005) ("In the absence of a transcript, an appellate court will presume that the record supports the trial court's rulings."). However, here the court's only ruling was based on an inapplicable statute, the written request for an award of fees was made solely on that statute, and Paletas Betty has not appeared on appeal. Thus, we will exercise our discretion and not presume that the absence of the transcript supports the trial court's ruling.

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<sup>5</sup> Moreover, the court's order stated that its decision was based on a consideration of "the reasonableness of the parties." We note however, that section 25-324(A) requires the court to "consider[] the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings" after which the court "may order a party to pay a reasonable amount." (Emphasis added.)

**CONCLUSION**

¶15 For the foregoing reasons we vacate only the superior court's award of attorneys' fees to Paletas Betty and remand for entry of a judgment without an award of attorneys' fees. We further award Bobber his taxable costs on appeal upon timely compliance with Arizona Rule of Civil Appellate Procedure 21.

/S/  
DONN KESSLER, Judge

CONCURRING:

/S/  
JOHN C. GEMMILL, Presiding Judge

/S/  
JON W. THOMPSON, Judge