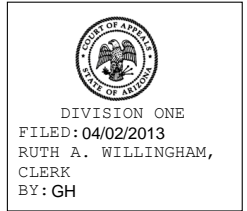


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



DENNIS HANKERSON, individually, ) No. 1 CA-CV 12-0239  
and as trustee of the DP )  
EQUIPMENT MARKETING, INC. PROFIT ) DEPARTMENT C  
SHARING PLAN, )  
) **MEMORANDUM DECISION**  
Plaintiff/Appellee, )  
) (Not for Publication -  
v. ) Rule 28, Arizona Rules of  
) Civil Appellate Procedure)  
HANKERSON MANAGEMENT COMPANY, )  
LLC, an Arizona limited liability )  
company; JACKPOT OIL II, LLC, an )  
Arizona limited liability )  
company; TWO DEUCES OIL & GAS II, )  
LLC, an Arizona limited liability )  
company; and ACE OIL COMPANY, )  
INC., an Arizona corporation, )  
)  
Defendants/Appellants. )

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-025610

The Honorable Mark H. Brain, Judge

**AFFIRMED**

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Broening Oberg Woods & Wilson P.C. Phoenix  
By Richard E. Chambliss  
Brian W. Purcell  
Attorneys for Plaintiff/Appellee

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By Robert D. Mitchell  
Sarah K. Deutsch  
Attorneys for Defendants/Appellants

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J O H N S E N, Judge

¶1 Hankerson Management Company, LLC ("HMC"); Jackpot Oil II, LLC; Two Deuces Oil & Gas II, LLC; and Ace Oil Company, Inc. (collectively "Defendants") appeal from an attorney's fees award in their litigation with Dennis Hankerson ("Plaintiff"), individually and as trustee of DP Equipment Marketing, Inc. Profit Sharing Plan. Finding no reversible error, we affirm.

#### FACTS AND PROCEDURAL HISTORY

¶2 HMC manages and maintains the books and records for several related Arizona limited liability companies ("the Companies"). Plaintiff was a member or shareholder in the Companies.

¶3 By letter to HMC dated June 23, 2009, Plaintiff requested unrestricted access to all records of the Companies, including all electronically stored information. Plaintiff was entitled to review company records under the Companies' operating agreements and Arizona law upon a written five-day notice. See Ariz. Rev. Stat. ("A.R.S.") §§ 10-1602 (West 2013), 29-607(B) (West 2013).<sup>1</sup> HMC denied Plaintiff's request, explaining that it would not produce documents to Plaintiffs until after resolution of pending litigation with Plaintiff that then was on appeal.

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

¶14 On June 26, 2009, Plaintiff filed a complaint for specific performance and declaratory judgment against Defendants, seeking an order directing HMC to provide him unrestricted access to the Companies' books and records. In their answer to the complaint, Defendants admitted that the Companies' operating agreements gave members "unrestricted access" to books and records "for proper purposes" and "upon reasonable request." Defendants admitted they refused to allow Plaintiff access to the books and records, but asserted their reasons were reasonable. Defendants further admitted that they maintained records of costs and expenses in Quickbooks format and asserted they were not required to produce records in that format, because they could be modified or manipulated. Defendants also contended that Quickbooks contained continuing data to which Plaintiff was not entitled because he was no longer a member or shareholder.

¶15 The court of appeals issued its decision in the prior litigation on November 17, 2009. On December 16, 2010, Plaintiff filed a motion to compel, seeking a copy of "all of the Companies' electronic Quickbooks Documents for the Relevant Period." At a conference before the superior court on February 12, 2010, Defendants offered Plaintiff a CD containing PDF copies of all documents to which Defendants contended Plaintiff

was entitled. Defendants provided Plaintiff with additional documents on February 16, 2010.

¶16 Defendants continued to refuse Plaintiff's request for Quickbooks records, however, and after an evidentiary hearing, the court denied Plaintiff's motion to compel production of such records. The court noted that the relief Plaintiff sought in the litigation was production of documents and the motion to compel was filed under the Arizona Rules of Civil Procedure to obtain documents pursuant to the Companies' operating agreements and A.R.S. §§ 10-1602 and 29-607. The court concluded, however, that nothing in the Companies' operating agreements or Arizona law required Defendants to produce the records in any particular format.

¶17 Defendants filed an application for an award of attorney's fees in the amount of \$126,732.50 pursuant to A.R.S. §§ 12-341.01(A) and (C) (1999), and 12-349 (2003). Defendants also argued they were entitled to fees pursuant to Arizona Rule of Civil Procedure ("Rule") 37(a)(4)(B) for successfully defending against Plaintiff's motion to compel. Plaintiff objected, asserting that he was the successful party in the case, and requested \$52,790.75 in attorney's fees pursuant to A.R.S. § 12-341.01(A) and \$620 in costs.

¶18 The superior court concluded that Plaintiff had succeeded in the litigation because he had obtained some of the

records he sought, but that Defendants were successful in defeating Plaintiff's motion to compel production of the Quickbooks records. Accordingly, the court determined the reasonable fees each side had incurred in their respective efforts, and netted out the two competing requests, resulting in an award of \$17,880 to Defendants. In its minute entry ruling, the court explained,

[T]his is surely the type of case that the appellate courts must have had in mind when they declared that the trial court has discretion to determine who is the prevailing (or successful) party. . . . In that regard, several things are worth noting. First, this is the second case in which plaintiff's request to inspect documents has come before the Court. . . . Judge Hyatt earlier ruled that plaintiff had been provided the records to which he was entitled in CV2007-010463, and the Court of Appeals affirmed that ruling . . . . Second, notwithstanding those rulings, what apparently led to the current litigation was defendants' failure to continue allowing plaintiff access to the documents after Judge Hyatt's ruling (notwithstanding the fact that he was entitled to continuing access)--that problem was solved when defendants produced copies of the appropriate documents in the current lawsuit . . . . That said, enough wasn't enough for plaintiff, who insisted on an evidentiary hearing to obtain the "quickbooks," notwithstanding the fact that both Judge Hyatt and the Court of Appeals had confirmed that the records did not need to be produced in the electronic format requested.

The Court finds that plaintiff was the prevailing party during the first portion of the litigation (as he was successful in obtaining records that defendants were now

declining to produce), but that by the time of the evidentiary hearing, he had succeeded to the extent that he was entitled. By dragging out the matter into a further expensive evidentiary hearing, he turned success to failure, as defendants were clearly the successful parties after at least December 2010, when plaintiff filed his ill-fated motion to compel.

[T]he Court concludes that plaintiff should receive its taxable costs of \$620, together with an award of reasonable attorneys' fees in the amount of \$18,500 for the early work, but subject to an offset of \$37,000 of reasonable attorneys' fees associated with defendants' efforts to successfully defeat his motion to compel. These awards are made under A.R.S. § 12-341.01(A) and Rule 37 . . . . This amounts to a net award in favor of defendants in the amount of \$17,880.

Defendants timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1) (West 2013) and -2101(A)(1) (West 2013).

#### **DISCUSSION**

¶19 Under A.R.S. § 12-341.01(A), the court may award reasonable attorney's fees to the successful party in any contested action arising out of contract. The determination of the successful party is within the sole discretion of the superior court, and we will not disturb that decision if any reasonable basis exists for it. *Kaman Aerospace Corp. v. Ariz. Bd. of Regents*, 217 Ariz. 148, 157, ¶ 35, 171 P.3d 599, 608 (App. 2007). We view the record in the light most favorable to upholding the superior court's decision, given that the superior

court is in a better position to determine which party has prevailed. *Berry v. 352 E. Virginia, L.L.C.*, 228 Ariz. 9, 13, ¶¶ 21-22, 261 P.3d 784, 788 (App. 2011).

¶10 In determining the successful party, a court considers the totality of the circumstances and the relative success of the parties. *McAlister v. Citibank*, 171 Ariz. 207, 216, 829 P.2d 1253, 1262 (App. 1992). A party may be the successful party without recovering the full measure of relief it requests. *Sanborn v. Brooker & Wake Prop. Mgmt., Inc.*, 178 Ariz. 425, 430, 874 P.2d 982, 987 (App. 1994). A party may be deemed the successful party by successfully defending against a major issue in the litigation. *Schwartz v. Farmers Ins. Co. of Ariz.*, 166 Ariz. 33, 38, 800 P.2d 20, 25 (App. 1990).

¶11 Defendants argue the superior court abused its discretion when it concluded Plaintiff was the successful party based on the results of what the court referred to as "the first portion of the litigation," in which Defendants produced certain documents to Plaintiff in February 2010. Defendants argue they produced the documents voluntarily, without any court order, as they had promised to do prior to the lawsuit and as they would have done without the lawsuit.<sup>2</sup> They further argue that

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<sup>2</sup> In their reply brief, Defendants argue that Plaintiff can be deemed the successful party only by application of the so-called "catalyst theory," under which a plaintiff is the prevailing party if it achieves the desired result because the lawsuit brings about a voluntary change in the conduct of the

Plaintiff's primary objective in the litigation was to compel Defendants to produce the Quickbooks records, and that he failed to prevail on that issue.

¶12 The superior court's decision has a reasonable basis in the record. Although Defendants argue they would have produced the records even if Plaintiff had not filed his complaint in this case, there is no dispute that when Plaintiff asked for the records, Defendants refused. Instead, Defendants put off making the documents available until after the resolution of the appeal in the prior case, which pertained to documents related to an earlier time period.<sup>3</sup> Not until February 12, 2010, six months after this litigation was filed (more than seven months after Plaintiff's request and three months after resolution of the appeal in the prior case) did Defendants produce the documents. The record also shows that Plaintiff obtained additional documents through the discovery process as late as November 2010. In obtaining the books and records,

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defendant. See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 601 (2001). Defendants failed to present this argument to the superior court or in their opening brief on appeal. We therefore do not address it. See *CDT, Inc. v. Addison, Roberts & Ludwig, C.P.A., P.C.*, 198 Ariz. 173, 178, ¶ 19, 7 P.3d 979, 984 (App. 2000) (we consider only those arguments, theories and facts properly presented below); *In re the Marriage of Pownall*, 197 Ariz. 577, 583, ¶ 25, n.5, 5 P.3d 911, 917 (App. 2000) (arguments first made in the reply brief are waived).

<sup>3</sup> Defendants do not explain their decision to delay making the documents available until after resolution of the appeal in the prior case.



Plaintiff obtained a portion of the relief sought in bringing the action, supporting the court's finding that Plaintiff was a successful party.

¶13 Defendants also argue that Plaintiff's principal objective in bringing the lawsuit was to obtain the Companies' Quickbooks records, and that Defendants successfully defended against that request. Obtaining the electronic records was certainly one of Plaintiff's objectives in bringing the lawsuit, but whether it was the primary objective or simply the main issue remaining after Defendants produced other documents is not evident from the record. Defendants assert that Plaintiff admitted that the "key thing" he wanted was the Quickbooks records. Plaintiff made that statement, however, in December 2010, after Defendants had produced the other documents. By that time, Plaintiff already had succeeded in obtaining some of the relief he sought, meaning obtaining the relief not yet received would naturally become a more prominent objective.

¶14 The superior court is in the best position to assess the circumstances and determine the significance of the various claims and the relative success of the parties. The court's minute entry reflects its careful consideration of the parties' respective positions and achievements in the litigation. The court determined that Plaintiff was the successful party based on having obtained the books and records in the early part of

the litigation, but that Defendants were entitled to an award of fees under Rule 37 for successfully defending against the motion to compel production of electronic Quickbooks documents.<sup>4</sup> We find no basis for concluding that the superior court abused its discretion in deciding that Plaintiff, having received some of the relief sought, was the successful party despite having not succeeded in his attempt to obtain access to the electronic Quickbooks documents.

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<sup>4</sup> In their reply brief, Defendants assert that the court wrongly found two successful parties pursuant to A.R.S. § 12-341.01(A). We generally do not address issues first raised in the reply brief. See *In re the Marriage of Pownall*, 197 Ariz. at 583, ¶ 25, n.5, 5 P.3d at 917. Moreover, it is unclear that the superior court found two successful parties for purposes of A.R.S. § 12-341.01. The court stated that it was awarding costs and attorney's fees to Plaintiff "for the early work, but subject to an offset of \$37,000 of reasonable attorneys' fees associated with defendants' efforts to successfully defeat his motion to compel. These awards are made under A.R.S. § 12-341.01(A) and [Ariz. R. Civ. P.] 37 . . . ." Rule 37(a)(4)(B) provides that if a motion to compel is denied, the court shall award reasonable attorney's fees to the party that successfully opposed the motion unless the motion was substantially justified. The court found Plaintiff to be the successful party in the litigation, as also evidenced by the award of costs. See A.R.S. § 12-341 (West 2013). The court awarded fees to Defendants under Rule 37 for prevailing on the motion to compel. A judicial finding that Plaintiff was the successful party but then offsetting the fees awarded (and awarding Defendants fees pursuant to Rule 37) properly reflects the totality of the circumstances and the relative success of the parties. *McAlister*, 171 Ariz. at 216, 829 P.2d at 1262. Cf. *Wagenseller v. Scottsdale Mem'l Hosp.*, 147 Ariz. 370, 393-94, 710 P.2d 1025, 1048-49 (1985) (party "who achieve[s] reversal of an unfavorable interim order" may be deemed "successful party" for purposes of appeal pursuant to A.R.S. § 12-341.01, without regard to ultimate outcome of litigation) (superseded by statute on other grounds).

**CONCLUSION**

¶15 We affirm the decision of the superior court. We award Plaintiff his costs and reasonable attorney's fees incurred on appeal pursuant to A.R.S. § 12-341.01(A), contingent on compliance with Arizona Rule of Civil Appellate Procedure 21.

\_\_\_\_\_/s/\_\_\_\_\_  
DIANE M. JOHNSEN, Judge

CONCURRING:

\_\_\_\_\_/s/\_\_\_\_\_  
SAMUEL A. THUMMA, Presiding Judge

\_\_\_\_\_/s/\_\_\_\_\_  
MICHAEL J. BROWN, Judge