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

DUSTIN R. CHANTEL and ELIZABETH D. CHANTEL, husband and wife, Plaintiffs/Appellants, v. MOHAVE ELECTRIC COOPERATIVE, INC., an Arizona non-profit corporation, Defendant/Appellee.	No. 1 CA-CV 12-0411 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Mohave County

Cause No. S8015CV200902574

The Honorable Lee Frank Jantzen, Judge

AFFIRMED

Dustin R. Chantel and Elizabeth D. Chantel — Kingman
Plaintiffs/Appellants *In Propria Persona*

Curtis, Goodwin, Sullivan, Udall & Schwab, P.L.C. — Phoenix
By Michael A. Curtis
Larry K. Udall
Attorneys for Defendant/Appellee

J O H N S E N, Judge

¶1 Dustin R. and Elizabeth D. Chantel appeal the superior court's entry of summary judgment in favor of Mohave Electric

Cooperative, Inc. ("MEC"). For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 MEC is a member-owned and –operated electrical cooperative. The Chantels, who live in Kingman, are members of MEC. The membership application the Chantels signed provided that they would be bound by MEC's articles of incorporation, by-laws and rules and regulations. MEC's rules and regulations provide, *inter alia*: "The Customer will be held responsible for . . . interfering with the Cooperative's meter(s) or other utility property." The rules and regulations also allow MEC to disconnect service without advance notice if there is "an obvious and imminent hazard to the safety or health of the Customer or the general population."

¶3 MEC provided the Chantels with electricity via overhead lines installed on the Chantels' property decades before they purchased it. The lines also served a nearby train signal. In the summer of 2008, without a building permit, the Chantels began building what they called a "divinely inspired" structure directly beneath the lines.

¶4 A county building inspector and an MEC employee visited the property in August 2008 and determined that the clearance between the electric lines and the structure violated the National Electric Safety Code. The county issued stop-work

orders, but the Chantels continued construction. On September 12, 2008, the county instructed MEC to de-energize the overhead lines because the structure created an unsafe condition.

¶5 On September 15, 2008, MEC mailed the Chantels notice of the county's directive that MEC de-energize the lines. The following afternoon, MEC contacted Ms. Chantel to inform her that the lines would be de-energized that day. After de-energizing the lines above the Chantels' structure on September 16, MEC installed a new system to provide service to the nearby train signal. When the Chantels asked MEC to reinstate their service, MEC said it would do so only if the Chantels reimbursed MEC for the costs it incurred in de-energizing the lines and installing the new system.

¶6 The Chantels filed a complaint against MEC alleging that the electrical lines were sagging and the power poles were breaking and asserting that the Chantels built the structure to catch any lines or poles that might break because MEC refused to repair them. They alleged eight claims for relief: Breach of contract, breach of the covenant of good faith and fair dealing, quiet title, ejectment, "recovery of rents," negligence, intentional infliction of emotional distress and punitive damages. MEC filed a counterclaim seeking to recover more than $41,000 in expenses it incurred in de-energizing the lines and installing the new system.

¶7 MEC moved for summary judgment on the complaint and counterclaim. The Chantels then withdrew their quiet title and ejectment claims, and the court granted MEC's motion for summary judgment as to the Chantels' claims for recovery of rent, intentional infliction of emotional distress and punitive damages, but denied MEC's motion on the other claims.

¶8 At the summary judgment hearing, the Chantels avowed they would produce additional discovery to support their remaining claims. When they produced no such discovery, MEC moved for reconsideration of the denial of its summary judgment motion on its counterclaim and on the Chantels' claims for breach of contract, breach of the covenant of good faith and fair dealing and negligence. The court granted the motion and entered summary judgment in favor of MEC on all of the remaining counts in the complaint and on the counterclaim, stating "[i]n retrospect, the Court's denial of MEC's entire motion was incorrect." The court also awarded MEC more than $47,000 in damages on its counterclaim and awarded MEC attorney's fees pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-341.01(A) (West 2013) and -349 (West 2013).[1]

¶9 We have jurisdiction of the Chantels' timely appeal pursuant to Article 6, Section 9, of the Arizona Constitution,

[1] Absent material revisions after the relevant date, we cite a statute's current version.

and A.R.S. §§ 12-120.21(A)(1) (West 2013) and -2101(A)(1) (West 2013).

DISCUSSION

A. Legal Principles.

¶10 Summary judgment is appropriate "if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a); *Orme Sch. v. Reeves*, 166 Ariz. 301, 305, 802 P.2d 1000, 1004 (1990). "Summary judgment is also appropriate when a plaintiff fails to establish a *prima facie* case." *Gorney v. Meaney*, 214 Ariz. 226, 232, ¶ 17, 150 P.3d 799, 805 (App. 2007). We review *de novo* the grant of a motion for summary judgment. *Wolfinger v. Cheche*, 206 Ariz. 504, 506, ¶ 4, 80 P.3d 783, 785 (App. 2003). We review the facts in the light most favorable to the party opposing summary judgment. *Id.* Additionally, an award of attorney's fees is left to the discretion of the superior court and will not be reversed on appeal absent an abuse of discretion. *Orfaly v. Tucson Symphony Soc'y*, 209 Ariz. 260, 265, ¶ 18, 99 P.3d 1030, 1035 (App. 2004).

¶11 In their opening brief, the Chantels challenge only the superior court's entry of summary judgment on their negligence claim and on their claim for recovery of rent and the court's award of attorney's fees in favor of MEC. The Chantels therefore have waived any arguments concerning the court's entry

of summary judgment in favor of MEC on the remaining claims in the complaint and on MEC's counterclaim. *See Phoenix Newspapers, Inc. v. Molera*, 200 Ariz. 457, 462, ¶ 26, 27 P.2d 814, 819 (App. 2001).[2]

B. Wrongful Termination of Electrical Service.

¶12 The Chantels argue they are entitled to injunctive relief and money damages for MEC's alleged wrongful termination of their electrical service, claiming it constitutes "actionable tortious conduct." Although MEC argues the Chantels failed to raise this argument in the superior court, we construe the Chantels' argument as a challenge to the summary judgment on their negligence claim, which alleged in part that MEC "wrongfully disconnect[ed] the electricity" to their home.

¶13 A plaintiff must prove four elements to establish a claim for negligence: "(1) a duty requiring the defendant to conform to a certain standard of care; (2) a breach by the defendant of that standard; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) actual damages." *Gipson v. Kasey*, 214 Ariz. 141, 143, ¶ 9, 150 P.3d 228, 230 (2007).

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[2] We also decline to address the various issues the Chantels raise for the first time in their reply brief, including their request that we issue an injunction requiring MEC to reinstate the Chantels' power service. *See Dawson v. Withycombe*, 216 Ariz. 84, 111, ¶ 91, 163 P.3d 1034, 1061 (App. 2007).

¶14 The Chantels do not identify any legal duty owed by MEC to provide them electrical service. "Whether the defendant owes the plaintiff a duty of care is a threshold issue; absent some duty, an action for negligence cannot be maintained." *Id.* at ¶ 11. The only authority the Chantels cite as imposing a duty upon MEC is Arizona Administrative Code ("A.A.C.") R14-2-208(A)(1), which provides that a "utility shall be responsible for the safe transmission and distribution of electricity until it passes the point of delivery to the customer." That regulation does not impose a duty on MEC to provide service that might give rise to a breach for disconnecting service. Rather, A.A.C. R14-2-208(A)(1) simply requires a utility to safely deliver electricity if it is providing such a service.

¶15 The Chantels cite *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1 (1978), and *Walton Electric Membership Corp. v. Snyder*, 508 S.E.2d 167 (Ga. 1998), for the proposition that a utility may not terminate service for nonpayment without affording a customer due process. We do not consider this argument because the Chantels did not raise it in the superior court. *See Best v. Edwards*, 217 Ariz. 497, 504, ¶ 28, 176 P.3d 695, 702 (App. 2008).

¶16 Moreover, MEC did not disconnect the Chantels' electrical service because of an unpaid bill. MEC offered undisputed evidence in support of its motion for summary

judgment that it disconnected the Chantels' service because the county directed MEC to do so because of safety concerns caused by the structure the Chantels had built directly beneath the electrical lines. *See Tucker v. Hinds County*, 558 So. 2d 869, 875-76 (Miss. 1990) (utility company properly may shut off customer's power when acting pursuant to directive from county official). Additionally, MEC provided the Chantels with more than adequate notice of the pending shut-off. Pursuant to A.A.C. R14-2-211(B)(1)(a), a utility may disconnect service without notice when there is "an obvious hazard to the safety or health of the consumer or the general population," and MEC provided the Chantels both written and personal notice prior to de-energizing the lines.

¶17 We therefore affirm the grant of summary judgment on the Chantels' negligence claim.

C. Recovery of Rent for MEC's Use and Occupancy of the Chantels' Property.

¶18 The Chantels also contend they are entitled to rent from MEC pursuant to A.R.S. § 12-1271(A)(2) (West 2013) because they did not grant MEC an easement allowing MEC's electrical lines over their property.

¶19 MEC argues the Chantels' withdrawal of their claims for quiet title and ejectment deprives this court of jurisdiction to address the claim for rent. *See Osuna v. Wal-*

Mart Stores, Inc., 214 Ariz. 286, 289, ¶ 9, 151 P.3d 1267, 1270 (App. 2007) ("Generally, an order granting a voluntary dismissal without prejudice to its being refiled is not an appealable, final judgment." (quotation omitted)). In the "recovery of rents" count of their complaint, however, the Chantels alleged they were entitled under A.R.S. § 12-1271 to the "rents or the fair and reasonable satisfaction for MEC's unauthorized use and possession of the Property."

¶20 In their application for membership to MEC, the Chantels agreed to grant MEC "easements of right of way across [their] property, for construction, use and operation of power lines necessary for the servicing of members in this area." On appeal, the Chantels point to no evidence that would show why this easement grant was not effective. Moreover, the superior court did not abuse its discretion in declining to consider additional arguments the Chantels made for the first time in their motion for reconsideration of the entry of summary judgment against them on this claim.

¶21 Accordingly, we affirm the grant of summary judgment on the Chantels' claim for rent.

D. Attorney's Fees.

¶22 Finally, the Chantels contend the superior court erred in awarding MEC its attorney's fees pursuant to A.R.S. § 12-341.01(A) because their claims did not arise out of contract.

In the superior court, however, the Chantels took the contrary position, and in fact described their claims concerning the placement of power lines and their entitlement to service as arising out of their contract with MEC. The Chantels also failed to argue in the superior court that § 12-341.01(A) did not apply to fees incurred in defending any claims in the litigation that did not arise out of contract. Neither did the Chantels object to the reasonableness of the fees MEC sought; they merely argued they "should not be punished for exercising their right to pursue a claim." The failure to challenge the reasonableness of a fee establishes its reasonableness. *See Boltz & Odegaard v. Hohn*, 148 Ariz. 361, 366, 714 P.2d 854, 859 (App. 1985); *see also United States v. Globe Corp.*, 113 Ariz. 44, 51, 546 P.2d 11, 18 (1976) (because the appellant "did not object to the award of costs and attorneys' fees in the court below, the asserted error will not be considered in this Court").[3]

CONCLUSION

¶23 We affirm the superior court's grant of summary judgment in favor of MEC on all counts in the Chantels' complaint and on MEC's counterclaim. We grant MEC's request for

[3] Because we conclude the superior court did not err in awarding fees to MEC as the successful party pursuant to A.R.S. § 12-341.01(A), we need not address the court's alternate ruling imposing fees pursuant to A.R.S. § 12-349.

costs and reasonable attorney's fees on appeal pursuant to A.R.S. § 12-341.01(A), upon its 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