IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

AMERICAN POWER PRODUCTS, INC., a California corporation; LFMG/APP, LLC, an Arizona corporation, *Plaintiffs/Counter Defendants/Appellants/Cross-Appellees*,

v.

CSK AUTO, INC., an Arizona corporation, *Defendant/Counter Claimant/Appellee/Cross-Appellant*.

No. 1 CA-CV 12-0855
FILED 5-19-2016

Appeal from the Superior Court in Maricopa County
No. CV2005-019594
The Honorable George H. Foster, Jr., Judge

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS

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MEMORANDUM DECISION

Presiding Judge Patricia K. Norris delivered the decision of the Court, in which Judge Samuel A. Thumma and Judge Kent E. Cattani joined.

N O R R I S, Judge:

¶1 In *American Power Products, Inc. v. CSK Auto, Inc.*, 239 Ariz. 151, 367 P.3d 55 (2016), the Arizona Supreme Court reversed this court's decision, 235 Ariz. 509, 334 P.3d 199 (App. 2014), which remanded this case to the superior court for an evidentiary hearing to determine whether an ex parte communication between the bailiff and the jury was improper and prejudicial. The supreme court remanded the case to this court for us to consider "the parties' claims for attorneys' fees, court costs, and other expenses." *American Power Products, Inc.*, 239 Ariz. at __, ¶ 21, 367 P.3d at 61. After considering these issues on appeal, we affirm the superior court's award of attorneys' fees and taxable costs (with one exception) to Plaintiff/Counter Defendant/Appellant/Cross-Appellee American Power Products, Inc. ("American"). We reverse and remand, with instructions, however, the superior court's denial of American's request for non-taxable costs and its denial of Defendant/Counter Claimant/Appellee/Cross-Appellant CSK Auto, Inc.'s ("CSK") request for sanctions under Arizona Rule of Civil Procedure 68(g).

FACTS AND PROCEDURAL BACKGROUND

¶2 In 2003, American and CSK entered into a Master Vendor Agreement ("MVA"), under which American agreed to sell electric scooters and other items to CSK on an open account. In December 2005, American sued CSK for, *inter alia*, breach of contract and negligent misrepresentation, seeking more than $5,000,000 in damages. CSK answered, asserted various affirmative defenses and counterclaims, and sought, *inter alia*, damages in excess of $950,000. On June 27, 2011, several months before trial, CSK

served American with a $1,000,001 offer of judgment under Rule 68, "inclusive of all damages, taxable court costs, interest and attorneys' fees." On the sixth day of the 11-day trial, the parties entered into a stipulation that resolved certain disputed items. Pursuant to their stipulation, the superior court informed the jury that the parties' agreement resulted in "an agreed-upon net balance starting point" "on the account of $10,733 in favor of" American. The jury returned a verdict in favor of American, awarding it $10,733.

¶3 After trial, both parties sought attorneys' fees and costs, each asserting it was the prevailing party under the MVA's attorneys' fees provision. The superior court found American was the prevailing party, awarded it attorneys' fees and taxable costs, denied American's request for non-taxable costs, dismissed CSK's counterclaims with prejudice, and entered judgment in American's favor for $858,403.29 ($10,733 as found by the jury plus pre-judgment interest thereon, $72,670.29 in taxable costs, and $775,000 in attorneys' fees, with post-judgment interest on the foregoing sums). CSK unsuccessfully applied for sanctions under Rule 68(g). American appealed and CSK cross-appealed.

DISCUSSION

¶4 Although phrasing and organizing the issues somewhat differently, the parties focus their arguments on the superior court's rulings regarding the prevailing party, attorneys' fees, taxable costs, non-taxable costs, and Rule 68 sanctions. We address these arguments below.

I. Prevailing Party

¶5 The MVA entitled the "prevailing party" to an award of "reasonable attorneys' fees and costs through all levels of proceedings as determined by the court." Although the MVA did not specify how the superior court was to determine the prevailing party, it provided that Arizona law "shall be deemed to govern the validity and interpretation of the MVA and the rights and remedies of the parties." Thus, Arizona law governed the determination of the "prevailing party" under the MVA.

¶6 Although the most commonly cited Arizona statute authorizing a fee award in a contract action uses "successful party," the parties do not suggest that "prevailing party" as used in the MVA should be construed differently than "successful party" under that statute. *See*

Ariz. Rev. Stat. ("A.R.S.") § 12-341.01 (2015).[1] The superior court has substantial discretion in determining which party "is the successful party for purposes of awarding attorneys' fees," and this court will not disturb the successful party determination "if any reasonable basis exists for it." *Sanborn v. Brooker & Wake Prop. Mgmt., Inc.*, 178 Ariz. 425, 430, 874 P.2d 982, 987 (App. 1994). This court "view[s] the record in a light most favorable to upholding" the superior court's decision on the issue "because that court is better able to evaluate the parties' positions during the litigation and to determine which has prevailed." *Berry v. 352 E. Virginia, L.L.C.*, 228 Ariz. 9, 13, ¶¶ 21-22, 261 P.3d 784, 788 (App. 2011).

¶7 Arizona courts apply three different tests for determining the successful party for a fee award: the net judgment test, the totality of the litigation test, and the percentage of success test. CSK argues the superior court mistakenly applied the net judgment test when it should have applied the totality of the litigation test or the percentage of success test.[2] The record reflects, however, that the court applied both the totality of the litigation test and the percentage of success test. Focusing on the totality of the litigation test, the superior court had a reasonable basis for finding American was the prevailing party. *Murphy Farrell Dev., LLLP v. Sourant*, 229 Ariz. 124, 133, ¶ 33, 272 P.3d 355, 364 (App. 2012).

¶8 Under the totality of the litigation test, a court determines the prevailing party based on all the circumstances of the case, including the

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[1]Although the Arizona Legislature amended certain statutes and the Arizona Supreme Court amended certain rules cited in this decision after the date of the disputes between the parties, the revisions are immaterial to our resolution of this appeal. Thus, we cite the current versions of these statutes and rules.

[2]Under the net judgment test, the prevailing party "is the party that, when both sides are awarded judgments, is awarded a greater amount than the other party." *Vortex Corp. v. Denkewicz*, 235 Ariz. 551, 562, ¶ 40, 334 P.3d 734, 745 (App. 2014). Here, the case involved essentially two parties seeking only monetary relief, and each side recovered less than the amounts sought. Given the superior court's characterization of this case as a "moderately simple" one with "claims and counterclaims" for merely monetary damages and "issues [that] were not so complex," the superior court could have applied the bright-line net judgment test. Under that test, American would also have been the prevailing party.

multiple claims made and the parties' relative success on those claims.[3] *See generally Schwartz v. Farmers Ins. Co. of Ariz.*, 166 Ariz. 33, 800 P.2d 20 (App. 1990); *Nataros v. Fine Arts Gallery of Scottsdale, Inc.*, 126 Ariz. 44, 612 P.2d 500 (App. 1980); *see also Med. Protective Co. v. Pang*, 25 F. Supp. 3d 1232, 1239 (D. Ariz. 2014) (trial courts afforded discretion in reviewing the totality of the litigation and "no strict factors" apply). A party need not prevail on all its claims to be considered "successful" or "prevailing." *Henry v. Cook*, 189 Ariz. 42, 44, 938 P.2d 91, 93 (App. 1996). The party who receives a money judgment "is not always the successful or prevailing party." *Ocean West Contractors, Inc. v. Halec Constr. Co.*, 123 Ariz. 470, 473, 600 P.2d 1102, 1105 (1979). A monetary award, however, is an important factor, and the fact that a party fails to recover the full measure of the relief sought does not preclude it from being considered the prevailing party. *Id.*

¶9 Here, the superior court found American "must be the prevailing party" under the totality of the litigation test because "after litigating all of the claims" and counterclaims, American "obtained relief in the form of monetary damages; [CSK] was awarded nothing." The superior court further explained "the application for fees and the docket" in the case painted "a picture of long and intense years of litigation," much of which "was more about technicalities and minutia in the discovery process." Moreover, "when the parties did appear before" the superior court, it often "admonished counsel on each side for unnecessarily expanding what should [have been] a moderately simple case." As the superior court further recognized, when a "case involves several claims based upon different facts or legal theories," as here, "the court may decline to award fees 'for those unsuccessful separate and distinct claims,'" and such reductions are "noteworthy" to the prevailing party determination. *Berry*, 228 Ariz. at 14, ¶ 23, 261 P.3d at 789.[4] Taking all of this into account, the

[3]"In cases involving various competing claims, counterclaims and setoffs all tried together, the successful party is the net winner." *Ayala v. Olaiz*, 161 Ariz. 129, 131, 776 P.2d 807, 809 (App. 1989). Only when a defendant's setoffs or counterclaims exceed the amount recovered by the plaintiff is the court barred from finding that the plaintiff was the prevailing party. *See Sanborn v. Brooker & Wake Prop. Mgmt., Inc.*, 178 Ariz. 425, 430, 874 P.2d 982, 987 (App. 1994).

[4]CSK argues this "case is analogous" to *Schwartz v. Farmers Ins. Co.*, 166 Ariz. 33, 800 P.2d 20 (App. 1990). We disagree. In *Schwartz*, the insured plaintiff asserted concurrent breach of contract and bad faith claims against the insurer defendant. *Id.* at 33, 800 P.2d at 21. In characterizing the

superior court significantly reduced the fees American requested because it was not successful on major portions of some of its claims. Given this and the record before it, the superior court had a reasonable basis for finding that American was the prevailing party under the totality of the litigation test.

¶10 CSK next argues that even if American was the prevailing party, its June 27, 2011, $1,000,001 Rule 68 offer of judgment triggered A.R.S. § 12-341.01(A), and precluded the superior court from awarding American any attorneys' fees or costs incurred after the date of that offer because the rejected offer was more favorable than the judgment American finally received. Because CSK's argument rests entirely on whether the statute is legally applicable here, we exercise de novo review. *See Armenta v. City of Casa Grande*, 205 Ariz. 367, 369, ¶ 5, 71 P.3d 359, 361 (App. 2003) (appellate court reviews de novo whether statute applies to a case); *Thomas v. Thomas*, 203 Ariz. 34, 36, ¶ 7, 49 P.3d 306, 308 (App. 2002) (de novo review for superior court's application of statutes). We reject this argument.

¶11 When attorneys' fees are based on a contract—as here—the contract controls to the exclusion of A.R.S. § 12-341.01(A). *See* A.R.S. § 12-341.01(A) ("This section shall not be construed as altering, prohibiting or restricting present or future contracts . . . that may provide for attorney fees."); *see also Geller v. Lesk*, 230 Ariz. 624, 627, ¶ 9, 285 P.3d 972, 975 (App. 2012) (when a contract includes an attorneys' fees provision, it controls to the exclusion of A.R.S. § 12-341.01(A)); *Lisa v. Strom*, 183 Ariz. 415, 418 n.2, 904 P.2d 1239, 1242 n.2 (App. 1995). For the foregoing reasons, therefore, we affirm the superior court's finding that American was the prevailing party.

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bad faith claim as "a major issue" in the litigation, this court noted the "substantial disparity in the relief requested" by the plaintiff on the bad faith claim compared to the $2000 breach of contract claim. *Id.* at 38, 800 P.2d at 25. We affirmed the trial court's finding the insurer was the prevailing party under the totality of the litigation test because it had succeeded on the bad faith claim, which was the driving force and "major issue" in the case, even though the plaintiff won the breach of contract claim and was awarded a monetary judgment. *Id.* at 38-39, 800 P.2d at 25-26.

Here, unlike *Schwartz*, this case was not driven by a single "major issue." Instead, both parties alleged various claims and counterclaims, and both claimed millions of dollars in damages.

II. Reasonableness of the Fee Award

¶12 CSK argues the superior court abused its discretion by awarding American an unreasonable amount of fees. *See Geller*, 230 Ariz. at 628, ¶ 11, 285 P.3d at 976 (when contract provides prevailing party recovery of its "reasonable" attorneys' fees, the determination of "reasonableness" is within the discretion of superior court); *Chase Bank of Ariz. v. Acosta*, 179 Ariz. 563, 574, 880 P.2d 1109, 1120 (App. 1994) ("The amount of fees is peculiarly within the trial court's discretion" and "[a]ppellate courts are hesitant to second-guess the trial court on awards of attorneys' fees in view of the [trial court's] superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters.") (internal quotations and citation omitted). We disagree.

¶13 American requested $1,996,329.05 in attorneys' fees. After reviewing "all of the entries by all of the attorneys in [American's] application and its supplements," the superior court awarded American $775,000 in fees—less than 40% of the amount requested. In doing so, the superior court made reductions for, among other matters, unreasonable fees for travel time, duplication of effort, and "for work that was done for which the billings fail[ed] to indicate why they were incurred or were reasonable under the circumstances." The superior court also reduced the fees requested by American's lawyers because of American's "failure to prevail on the material portions of its claims." *See Schweiger v. China Doll Rest., Inc.*, 138 Ariz. 183, 189, 673 P.2d 927, 933 (App. 1983) ("Where claims could have been litigated separately, fees should not be awarded for those unsuccessful separate and distinct claims which are unrelated to the claim upon which the plaintiff prevailed."). The record reflects the superior court thoroughly analyzed the reasonableness of the fee request, reduced the fee award appropriately, and thus did not abuse its discretion in awarding American $775,000 in attorneys' fees.

¶14 CSK nevertheless argues that the superior court failed to make specific, detailed findings regarding fees, including how much "it reduced or eliminated time billed by replacement counsel to 'get up to speed' or on account of the issues lacking complexity." But CSK did not ask the superior court to itemize the particular reductions it believed appropriate to make. Instead, it argued that if the court found American was the prevailing party, it should only award American a "fraction" of the fees it had requested, citing *Metro Data Sys., Inc. v. Durango Sys., Inc.*, 597 F. Supp. 244, 245 (D. Ariz. 1984) (award reduced by a lump sum instead of calculating exact reduction). The superior court did not abuse its discretion

by making a lump sum, substantial reduction in the fees sought by American, particularly because much of counsel's time was "devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis." *Schweiger*, 138 Ariz. at 189, 673 P.2d at 933; *see also Fulton Homes Corp. v. BBP Concrete*, 214 Ariz. 566, 569, ¶ 9, 155 P.3d 1090, 1093 (App. 2007) (appellate court will affirm an award of attorneys' fees "if there is any reasonable basis" in the superior court's discretionary judgment, "even if the trial court gives no reasons for its decision"); *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 571, 694 P.2d 1181, 1185 (1985) (although "it is the better practice to have a record which reflects the justification for the trial court's" fee assessment, the law does not require it). Accordingly, we affirm the superior court's decision to award American $775,000 in attorneys' fees.

III. Award of Taxable Costs to American

A. Award of Taxable Costs after CSK's Rule 68(g) Offer of Judgment

¶15 CSK argues the superior court should not have awarded American its taxable costs after CSK made its June 27, 2011 offer of judgment because, under A.R.S. § 12-341.01, CSK should have been deemed the successful party from the date of the offer since the judgment finally obtained was more favorable to CSK than its offer of judgment. We reject this argument.

¶16 First, the only authority it cites for this argument, A.R.S. § 12-341.01(A), does not apply as discussed *supra* ¶¶ 10-11. Second, A.R.S. § 12-341.01 only applies to fees, not costs. And third, even if the superior court should have awarded Rule 68(g) sanctions to CSK, American was still entitled to recover its taxable costs—even those costs it incurred after the Rule 68 offer of judgment—because it was the prevailing party in the case. *See Drozda v. McComas*, 181 Ariz. 82, 83, 887 P.2d 612, 613 (App. 1994). Thus, American was entitled to post-offer costs as the prevailing party.

B. Award of Court-Ordered Penalty as a Taxable Cost

¶17 CSK argues the superior court should not have awarded American, as a taxable cost, a $26,044.35 penalty the court had previously ordered American to pay to CSK. Reviewing de novo whether a penalty is a taxable cost under A.R.S. § 12-332(A)(6) (2003), we conclude it is not. *Bennett v. Baxter Grp., Inc.*, 223 Ariz. 414, 422, ¶ 36, 224 P.3d 230, 238 (App. 2010) ("Whether certain expenditures are taxable costs is a matter of law that we review de novo.") (internal quotations and citation omitted).

¶18 On May 19, 2008, the superior court granted American relief from a default judgment entered against it pursuant to Arizona Rule of Civil Procedure 60. In so doing, consistent with its authority under Rule 60(c) to condition such relief "upon such terms as are just," the superior court ordered American to pay CSK's attorneys' fees and costs "not only for [its] delay [in finding replacement counsel and prosecuting the case], but also for the time and effort spent by [CSK] in defending their default and judgment at the LAST MINUTE." On July 2, 2008, the superior court ultimately ordered American to pay $26,044.35 to CSK. Although the superior court did not explicitly characterize the fees and costs it ordered American to pay as a penalty, its order—in wording and tone—can only be reasonably read as ordering American to pay these fees and costs as a penalty. Subsequently, American claimed the $26,044.35—which it had paid—as a taxable cost, arguing it was recoverable under A.R.S. § 12-332(A)(6) as an "[o]ther disbursement[] . . . made or incurred pursuant to an order." Over CSK's objections, the superior court awarded the $26,044.35 to American under A.R.S. § 12-332(A)(6) as a taxable cost.[5] The $26,044.35 was not, however, a taxable cost.

¶19 "A party to a civil action cannot recover its litigation expenses as costs without statutory authorization." *Schritter v. State Farm Mut. Auto. Ins. Co.*, 201 Ariz. 391, 392, ¶ 6, 36 P.3d 739, 740 (2001). Thus, American may recover the penalty it paid to CSK only if it falls within the definition of costs under A.R.S. § 13-332(A). "Expenses not enumerated in A.R.S. section 12-332 are not generally recoverable as costs," given that the "legislature has included several specific items of taxable costs." *See Ponderosa Plaza v. Siplast*, 181 Ariz. 128, 134, 888 P.2d 1315, 1321 (App. 1993). The Legislature did not explicitly designate penalties as a specific taxable cost in the statute.

¶20 To decide, however, whether, as American argues, a court-ordered penalty is a cost encompassed within the "other disbursement" provision of A.R.S. § 12-332(A)(6), we turn to "the meaning that naturally attaches to the words used and that best harmonizes with the context." *See Id.*

¶21 In addressing a similar cost statute, A.R.S. § 12-331 (2003), this court defined "costs" as "basically incidental damages allowed to indemnify a party against the expense of successfully asserting his rights in

[5]In awarding the $26,044.35 as a taxable cost, the superior court mistakenly noted it had "not received any objection or other response from" CSK. CSK had in fact objected to American's request for the $26,044.35.

court." *Barry v. Ariz. Dept. of Econ. Sec.*, 25 Ariz. App. 258, 259, 542 P.2d 1138, 1139 (1975). But here, the penalty imposed by the superior court on American for its delay in finding counsel and prosecuting the case was not a necessary expense it incurred in successfully asserting its rights. Instead, the $26,044.35 was the consequence American incurred because of its delay and failure to prosecute its case. A consequence imposed as a penalty does not fall within the definition of a cost. Accordingly, the superior court should not have awarded the $26,044.35 to American as a taxable cost.

IV. Non-Taxable Costs

¶22 American argues the MVA authorized it, as the prevailing party, to an award of non-taxable costs. Accordingly, American argues the superior court should have granted its request for an award of non-taxable costs. In its answering brief, CSK explicitly agreed "that under the parties' contract, 'costs' includes taxable and non-taxable costs." Nevertheless, CSK argues the superior court correctly denied American's request for non-taxable costs because they "were unreasonable in amount and, in many instances, . . . altogether unnecessary."

¶23 Because the superior court denied American's request for an award of non-taxable costs, it did not address the reasonableness of the non-taxable costs American requested. Thus, given that the parties agree the MVA authorized an award to the prevailing party of taxable *and* non-taxable costs, we reverse the superior court's denial of non-taxable costs and remand to the superior court for it to determine and award American its reasonable non-taxable costs.

V. Rule 68 Sanctions

¶24 CSK argues its June 27, 2011 offer of judgment entitled it to sanctions pursuant to Rule 68(g). The superior court rejected CSK's request for sanctions without making the comparison required under Rule 68(g) to determine whether it was entitled to Rule 68 sanctions. Reviewing the denial of Rule 68 sanctions for an abuse of discretion, but interpreting the rule de novo, we hold the superior court should have made this comparison and direct it to do so on remand. *Flood Control Dist. of Maricopa Cty. v. Paloma Inv. Ltd. P'ship*, 230 Ariz. 29, 45, ¶ 57, 279 P.3d 1191, 1207 (App. 2012) ("We review a superior court's" denial of sanctions "pursuant to Rule 68 for an abuse of discretion," but "the court's interpretation of the rule is a legal issue which we review de novo.").

¶25 Rule 68(a) provides, "At any time more than 30 days before the trial begins, any party may serve upon any other party an offer to allow

judgment to be entered in the action." An offer that is not accepted is deemed rejected. Ariz. R. Civ. P. 68(d). "If the offeree rejects an offer and does not later obtain a more favorable judgment, . . . the offeree must pay, as a sanction, reasonable expert witness fees and double the taxable costs . . . incurred by the offeror after making the offer and prejudgment interest on unliquidated claims to accrue from the date of the offer." Ariz. R. Civ. P. 68(g). When the "judgment includes an award of taxable costs or attorneys' fees," the determination of whether "the judgment is more favorable than the offer" requires consideration of only those taxable costs and attorneys' fees that were "reasonably incurred as of the date [of] the offer." *Id.*

¶26 Here, in its June 27, 2011 offer of judgment, CSK offered "to take judgment against itself and in favor of American Power Products and LFMG/APP, LLC in the amount of . . . $1,000,001.00[] inclusive of all damages, taxable court costs, interest and attorneys' fees." American did not respond to CSK's offer, so it was deemed rejected. As discussed, the superior court entered judgment in American's favor for $858,403.29 ($10,733 as found by the jury plus pre-judgment interest thereon, $72,670.29 for taxable costs, and $775,000 for attorneys' fees, with post-judgment interest on the foregoing sums).[6]

¶27 The superior court "determined that such sanctions would not be appropriate,"[7] even though the $1,000,001 offer was on its face greater than the $858,403.29 judgment American finally obtained. Because the "language of Rule 68 is mandatory," however, the superior court "lack[ed] authority to relieve the rejecting recipient from the sanctions that the rule imposes." *Davis v. Discount Tire Co.*, 182 Ariz. 571, 573, 898 P.2d 520, 522 (App. 1995). Thus, if the judgment American obtained was not

[6]We note the superior court entered an amended final judgment on May 3, 2013. This amended judgment did not affect the total amount awarded to American and is immaterial to this appeal.

[7]The superior court stated it "considered the matter of Rule 68 Sanctions and [found] sanctions do not apply." In a subsequent minute entry, the superior court noted it "made the determination in mind of the amount of the ultimate judgment, that is the jury's verdict, the amount of the fees and the amount of the revised costs, that latter of which was not objected to by [CSK], and given the record in the case, the Court determined that such sanctions would not be appropriate and confirm[ed] that finding."

more favorable than CSK's offer of judgment, then CSK was entitled to sanctions under Rule 68(g) as a matter of law.

¶28 American nevertheless argues CSK was not entitled to sanctions because CSK's offer of judgment failed to mention its counterclaims and was thus invalid. Although the offer did not explicitly mention the counterclaims, the offer implicitly included them because CSK's offer "to take judgment against itself" was "inclusive of *all* damages." (Emphasis added.) Moreover, because "Arizona's Rule 68 explicitly states that the judgment entered encompasses the 'action,' it is as though the term 'action' was included in [CSK's] offer itself." *Douglas v. Governing Bd. of Window Rock Consol. Sch. Dist. No. 8*, 221 Ariz. 104, 110, ¶ 14, 210 P.3d 1275, 1281 (App. 2009). Thus, pursuant to the wording of CSK's offer and under Rule 68, CSK's offer encompassed the entire action including all claims and counterclaims. CSK's offer of judgment was a valid offer under Rule 68.

¶29 Even if CSK's offer of judgment failed to include its counterclaims, American waived its objection to the validity of CSK's offer of judgment. Under Rule 68(d), if there are any objections to the "validity of the offer, the offeree must serve upon the offeror, within ten days after service of the offer, written notice of any such objections." *Id.* An offeree that fails to notify "the offeror of any objection . . . waives the right to do so in any proceeding to determine sanctions under" Rule 68(g).[8] *Id.*

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[8]American argues CSK waived its Rule 68(d) waiver argument by not raising it in the superior court. "Generally, an appellate court will not consider issues not raised in the trial court." *Harris v. Cochise Health Sys.*, 215 Ariz. 344, 349, ¶ 17, 160 P.3d 223, 228 (App. 2007) (internal quotations and citation omitted). This rule, however, is one of procedure, not jurisdiction, and is used "for the purpose of orderly administration and the attainment of justice." *Id.* We may exercise our discretion to hear arguments first raised on appeal when it does not undermine sound appellate practice and does not violate "the interests of the party against whom the claim is newly asserted on appeal." *Id.* Here, CSK's waiver argument under Rule 68(d) is not based on a court's discretionary determination or a factual finding. Instead, as a matter of law, when the offeree rejects an offer of judgment "and a more favorable judgment is not obtained at trial, the offeree *must* pay sanctions pursuant to Rule 68." *Canyon Ambulatory Surgery Ctr. v. SCF Arizona*, 225 Ariz. 414, 424, ¶ 35, 239 P.3d 733, 743 (App. 2010) (emphasis added).

¶30 As stated above, CSK served its offer on June 27, 2011. American did not raise any objections to the offer until December 2, 2011, after trial and after CSK had requested Rule 68 sanctions. As a knowing recipient "of such an offer, pursuant to Rule 68(d) [American] bore the burden of informing [CSK] of any objection to its offer." *Boyle v. Ford Motor Co.*, 235 Ariz. 529, 532, ¶ 15, 334 P.3d 219, 222 (App. 2014). American "failed to do so, and thus waived [its] objection in accordance with that rule." *Id.* Thus, we reverse the superior court's denial of CSK's Rule 68 sanction request and remand to the superior court for it to make the comparison required by Rule 68. *See Berry*, 228 Ariz. at 15, ¶ 33, 261 P.3d at 790.

VI. Attorneys' Fees and Costs on Appeal

¶31 Pursuant to the MVA, both parties have requested an award of attorneys' fees and costs as the prevailing party on appeal. Given our resolution of the issues, both parties were partially successful and partially unsuccessful. *See Murphy Farrell Dev., LLP*, 229 Ariz. at 134, ¶ 38, 272 P.3d at 365. Thus, we deny their competing requests for an award of attorneys' fees and costs on appeal.

Moreover, although CSK did not raise the waiver argument until it filed its reply brief, this court authorized American to file a sur-reply brief on the issue. American did so and was not prejudiced by CSK's delay in raising it.

CONCLUSION

¶32 For the foregoing reasons, we affirm the superior court's finding that American was the prevailing party under the MVA and its award of attorneys' fees to American. We also affirm the superior court's award of taxable costs to American except for its award of the $26,044.35. We reverse and remand, however, the superior court's denial of American's request for non-taxable costs and its denial of CSK's request for Rule 68(g) sanctions. On remand, the superior court shall determine and award American its reasonable non-taxable costs and make the comparison required by Rule 68(g) and determine whether CSK is entitled to Rule 68(g) sanctions.

Ruth A. Willingham · Clerk of the Court
FILED: ama