

NOTICE: NOT FOR OFFICIAL PUBLICATION.  
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

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

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BRADLEY BOSCHÉE, et al., *Plaintiffs/Appellants-Cross Appellees*,

*v.*

T.W. LEWIS COMPANY, *Defendant/Appellee-Cross Appellant*.

No. 1 CA-CV 16-0304  
FILED 5-9-2017

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Appeal from the Superior Court in Maricopa County  
No. CV2011-011402  
The Honorable Karen A. Mullins, Judge

**AFFIRMED**

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COUNSEL

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**MEMORANDUM DECISION**

Judge Patricia K. Norris delivered the decision of the Court, in which Presiding Judge Kenton D. Jones and Judge Paul J. McMurdie joined.

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**NORRIS**, Judge:

¶1 Plaintiffs/Appellants Bradley Boschee and Lorraine Boschee appeal the superior court's order denying their motion to vacate a judgment for attorneys' fees, arguing the judgment was void for lack of subject matter jurisdiction. Defendant/Appellee T.W. Lewis Company cross-appeals the superior court's order denying its request for an award of the attorneys' fees it incurred in opposing the Boschees' motion to vacate. For the following reasons, we affirm the superior court's orders

**FACTS AND PROCEDURAL HISTORY**

¶2 In July 2011, the Boschees brought an action to recover for construction defects in a home built and sold by T.W. Lewis. The Boschees alleged claims for breach of contract, breach of express and implied warranty, and violation of the Purchaser Dwelling Act (PDA). *See generally* Ariz. Rev. Stat. ("A.R.S.") §§ 12-1361-1366 (2016) (purchaser dwelling actions).<sup>1</sup>

¶3 T.W. Lewis moved for summary judgment, arguing the superior court lacked subject matter jurisdiction because the Boschees had failed to comply with the PDA's notice of claim provision. *See* A.R.S. § 12-1363(A) (2016).<sup>2</sup> The court granted T.W. Lewis's motion, concluding that,

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<sup>1</sup>With the exception of A.R.S. § 12-1364, which the Legislature has repealed, the Legislature has not materially amended the statutes cited in this decision. Thus, we cite to the current version of the statutes.

<sup>2</sup>Section 12-1363(A) provides: "Before filing a dwelling action, the purchaser shall give written notice by certified mail, return receipt

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because the Boschees had failed to comply with A.R.S. § 12-1363(A), it lacked what it termed “subject matter jurisdiction” over their action. The court nevertheless granted T.W. Lewis’s request for attorneys’ fees under both A.R.S. § 12-341.01(A) (2016) and former A.R.S. § 12-1364 (repealed by Laws 2015, Ch. 60, § 3),<sup>3</sup> and entered a judgment against them for \$48,394.50 (“the fee judgment”).

¶4 In October 2015, pursuant to Arizona Rule of Civil Procedure Rule 60(c)(4)<sup>4</sup> the Boschees moved to vacate the fee judgment, arguing it

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requested, to the seller specifying in reasonable detail the basis of the dwelling action.”

<sup>3</sup>Former A.R.S. § 12-1364 provided:

In any contested dwelling action, the court shall award the successful party reasonable attorney fees, reasonable expert witness fees and taxable costs. If the seller’s offer, including any best and final offer, is rejected and the judgment finally obtained is less than or less favorable to the purchaser than the offer or best and final offer, the seller is deemed to be the successful party from the date of the offer or best and final offer. If the judgment finally obtained is more favorable to the purchaser than the seller’s offer or best and final offer, the purchaser is deemed to be the successful party from the date of the offer or best and final offer. *This section shall not be construed as altering, prohibiting or restricting present or future contracts or statutes that may provide for attorney fees.*

(Emphasis added.)

<sup>4</sup>The Arizona Supreme Court revised the Arizona Rules of Civil Procedure effective January 1, 2017. The court did not substantively change the grounds for relief set out in Rule 60(c)(4), but those grounds are now contained in Rule 60(b)(4). To be consistent with the record in the superior court, we cite to the rules in effect at the time the Boschees moved to vacate the fee judgment.

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was void for lack of subject matter jurisdiction. The superior court denied their motion, concluding: (1) the matter had arisen out of contract; (2) T.W. Lewis had obtained summary judgment in its favor and, therefore, was the successful party, *see* A.R.S. § 12-341.01(A); and (3) the fee judgment was consistent with the policy underlying A.R.S. § 12-341.01(B)—to “mitigate the burden of the expense of litigation to establish a just claim or a just defense.” The court subsequently denied the Boschees’ motion for reconsideration and T.W. Lewis’s request for an additional award of attorneys’ fees.

**DISCUSSION**

I. The Boschees’ Appeal

¶5 Rule 60(c)(4) allows a party to seek relief from a final judgment if it is void. “A judgment or order is ‘void’ if the court entering it lacked jurisdiction: (1) over the subject matter, (2) over the person involved, or (3) to render the particular judgment or order entered.” *Martin v. Martin*, 182 Ariz. 11, 15, 893 P.2d 11, 15 (App. 1994) (citation omitted); *see Fry v. Garcia*, 213 Ariz. 70, 72 n.2, ¶ 9, 138 P.3d 1197, 1199 n.2 (App. 2006); *see also Cockerham v. Zikratch*, 127 Ariz. 230, 233-34, 619 P.2d 739, 742-43 (1980). We review *de novo* the denial of a motion to set aside a judgment as void. *Ezell v. Quon*, 224 Ariz. 532, 536, ¶ 15, 233 P.3d 645, 649 (App. 2010) (citation omitted).

¶6 As they did in the superior court, on appeal, the Boschees argue the fee judgment was void for lack of subject matter jurisdiction. But, subject matter jurisdiction means “a court’s statutory or constitutional power to hear and determine a particular type of case.” *Ader v. Estate of Felger*, 240 Ariz. 32, 44, ¶ 43, 375 P.3d 97, 109 (App. 2016) (citation omitted); *see Fry*, 213 Ariz. at 72 n.2, ¶ 9, 138 P.3d at 1199 n.2 (citation omitted). Under these authorities, the Boschees’ argument turns on whether the superior court had jurisdiction to render the fee judgment because the Boschees had failed to comply with the PDA.<sup>5</sup> *See Taliaferro v. Taliaferro*, 186 Ariz. 221, 223, 921 P.2d 21, 23 (1996) (explaining that, in certain contexts, jurisdiction means “the authority to do a particular thing”). We conclude it did.

¶7 Under A.R.S. § 12-341.01(A), the superior court may award attorneys’ fees to the successful party in “*any* contested action arising out

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<sup>5</sup>The answering brief suggests compliance with the PDA is not jurisdictional. We need not, and do not, decide this issue.

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of a contract.” (emphasis added); see *Assoc. Indem. Corp. v. Warner*, 143 Ariz. 567, 569-70, 694 P.2d 1181, 1183-84 (1985). A “contested action” is one in which the defendant appears and generally defends against a claim. *Assyia v. State Farm Mut. Auto. Ins.*, 229 Ariz. 216, 221, ¶ 18, 273 P.3d 668, 673 (App. 2012) (citation omitted); see also *Vicari v. Lake Havasu City*, 222 Ariz. 218, 224-25, ¶¶ 25-27, 213 P.3d 367, 373-74 (App. 2009) (affirming fee award to defendant following a Rule 41(a) voluntary dismissal). And a “contested action” under the statute simply requires a lawsuit. *McEldowney v. Osborn School Dist. No. 8 Maricopa Cty.*, 123 Ariz. 416, 418, 600 P.2d 29, 31 (1979). Further, a superior court may award fees under A.R.S. § 12-341.01(A) even if it does not render a decision on the merits of the claim. *Fulton Homes Corp. v. BBP Concrete*, 214 Ariz. 566, 572, ¶ 24, 155 P.3d 1090, 1096 (App. 2007). Thus, the superior court may award fees under A.R.S. § 12-341.01(A) to a defendant who prevails on a motion to dismiss for lack of personal jurisdiction, *Balestrieri v. Balestrieri*, 232 Ariz. 25, 28, ¶ 10, 300 P.3d 560, 563 (App. 2013), or prevails on a motion to dismiss without prejudice for lack of prosecution, *Britt v. Steffen*, 220 Ariz. 265, 267-68, ¶¶ 9-11, 205 P.3d 357, 359-60 (App. 2008), or obtains an order setting aside a default, *Corbet v. Superior Court*, 165 Ariz. 245, 248-49, 798 P.2d 383, 386-87 (App. 1990).

¶8 The PDA fee provision in effect when the superior court entered the fee judgment did not restrict the superior court’s authority to award fees under A.R.S. § 12-341.01 or under other statutes authorizing a fee award. Former A.R.S. § 12-1364 specifically provided that, “This section shall not be construed as altering, prohibiting or restricting present or future contracts or statutes that may provide for attorney fees.” For purposes of A.R.S. § 12-341.01(A), the Boschees filed an action<sup>6</sup> arising out

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<sup>6</sup>Citing *Bryant v. Bloch Cos.*, 166 Ariz. 46, 800 P.2d 33 (App. 1990), and *Cochise Cty. v. Kirschner*, 171 Ariz. 258, 830 P.2d 470 (App. 1992), the Boschees argue the superior court’s dismissal of their complaint for what the court called “lack of subject matter jurisdiction” meant that they had never filed an “action” for purposes of a fee award under A.R.S. § 12-341.01(A). Given the well-established authorities construing A.R.S. § 12-341.01(A), see *supra* ¶ 7, we reject that argument. Further, both cases are distinguishable. In *Bryant*, the plaintiff failed to file a complaint against the defendants, thus, no “action” had ever been “commenced.” *Bryant*, 166 Ariz. at 48-49, 800 P.2d at 35-36. In *Cochise Cty.*, the defendant filed a counterclaim, but only after the superior court had ruled it did not have subject matter jurisdiction over the plaintiff’s claim because the plaintiff had failed to exhaust administrative remedies. 171 Ariz. at 259, 830 P.2d at 471. Thus, no action was pending when, after the court made that ruling,

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of a contract and alleged the superior court had jurisdiction to hear and determine their claims. *See* Ariz. Const. art. 6, § 14; A.R.S. § 12-123 (2016); A.R.S. § 12-1362 (2016). T.W. Lewis appeared, defended, and prevailed on its motion for summary judgment. *See Assyia*, 229 Ariz. at 221, ¶ 18, 273 P.3d at 673; *Balestrieri*, 232 Ariz. at 28, ¶ 10, 300 P.3d at 563. On this basis, the court properly denied the Boschees' motion to vacate the fee judgment.

II. T.W. Lewis's Cross-Appeal

¶9 T.W. Lewis argues the superior court abused its discretion in denying its request for the attorneys' fees it incurred in responding to the Boschees' Rule 60 motion. We disagree. *See Fulton Homes*, 214 Ariz. at 569, ¶ 9, 155 P.3d at 1093 (appellate court will uphold superior court's decision under A.R.S. § 12-341.01(A) if any reasonable basis supports it) (citation omitted); *Rowland v. Great States Ins. Co.*, 199 Ariz. 577, 587, ¶ 31, 20 P.3d 1158, 1168 (App. 2001) (appellate court views the record in light most favorable to sustaining superior court's decision) (citation omitted).

¶10 An award of attorneys' fees under A.R.S. § 12-341.01 is permissive. *Title Ins. Co. of Minn. v. Acumen Trading Co.*, 121 Ariz. 525, 526, 591 P.2d 1302, 1303 (1979) (citation omitted). And, the superior court has broad discretion to determine whether a party is entitled to fees under A.R.S. § 12-341.01. *Warner*, 143 Ariz. at 570, 694 P.2d at 1184 (identifying factors court should consider in deciding whether to award fees under A.R.S. § 12-341.01(A)).

¶11 The superior court properly considered the *Warner* factors and found (i) the Boschees had presented a novel legal question and had filed the motion to vacate in good faith, and (ii) those factors outweighed the other factors. *See Warner*, 143 Ariz. at 570, 694 P.2d at 1184. Although T.W. Lewis disputes both novelty and good faith, arguing that Arizona law on subject matter jurisdiction was well settled, the issue before us is whether "a judicial mind, in view of the law and circumstances, could have made the ruling without exceeding the bounds of reason." *Id.* (citation omitted). Although reasonable minds could have concluded differently, we cannot say the superior court abused its discretion in applying the *Warner* factors to the facts of this case and denying T.W. Lewis's fee request. *See*

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the defendant filed the counterclaim and subsequently obtained a fee award. *Id.* at 262, 830 P.2d at 474. Notably, the court in *Cochise Cty.* was not applying A.R.S. § 12-341.01(A), which simply requires a "contested action" arising out of contract.

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*Orafly v. Tucson Symphony Soc'y*, 209 Ariz. 260, 266, ¶ 21, 99 P.3d 1030, 1036 (App. 2004).

III. Attorneys' Fees and Costs on Appeal

¶12 Both parties have requested an award of attorneys' fees and costs on appeal. We deny the Boschees' request for fees under A.R.S. § 12-349 (2016). See *Donlann v. Macgurn*, 203 Ariz. 380, 386-87, ¶ 36, 55 P.3d 74, 80-81 (App. 2002) (party requesting fees must demonstrate, by preponderance of the evidence, requirements for a fee award under A.R.S. § 12-349), and in the exercise of our discretion, we deny T.W. Lewis's request for fees under A.R.S. § 12-341.01. Further, because neither party was successful on appeal, we award neither party costs on appeal.

CONCLUSION

¶13 For the foregoing reasons, we affirm the orders entered by the superior court denying the Boschees' motion to vacate the fee judgment and denying T.W. Lewis's request for an additional award of attorneys' fees under A.R.S. § 12-341.01(A).



AMY M. WOOD • Clerk of the Court  
FILED: AA