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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

STATECRAFT PLLC, et al., *Appellants*,¹

v.

TOWN OF SNOWFLAKE, *Defendant/Appellee*,

COPPERSTATE FARMS LLC,
Real Party in Interest/Appellee.

No. 1 CA-CV 17-0691
FILED 10-30-2018

Appeal from the Superior Court in Navajo County
No. S0900CV201600278
The Honorable Donna J. Grimsley, Judge (Retired)

AFFIRMED AS MODIFIED

COUNSEL

Statecraft, PLLC, Phoenix
By Kory A. Langhofer, Thomas J. Basile
Co-Counsel for Appellant

¹ It is ordered amending the caption as reflected above. This caption shall be used on all further documents filed in this appeal.

Brownstein Hyatt Farber Schreck, LLP, Denver, CO
By Christopher O. Murray
Co-Counsel and Pro Hac Vice for Appellants

Schmitt Schneck Casey Even & Williams, PC, Phoenix
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Counsel for Appellee Real Party in Interest, Copperstate Farms LLC

MEMORANDUM DECISION

Presiding Judge Jennifer B. Campbell delivered the decision of the Court, in which Judge Paul J. McMurdie and Vice Chief Judge Peter B. Swann joined.

C A M P B E L L, Judge:

¶1 Statecraft PLLC attorneys Kory Langhofer and Thomas Basile (together, “Statecraft”) appeal the superior court’s judgment ordering them to pay the attorney fees of the Town of Snowflake (the “Town”) and Copperstate Farms, LLC (“Copperstate”) (collectively, “Appellees”) under Arizona Revised Statutes (“A.R.S.”) section 12-349. Statecraft represented several Snowflake residents (the “Residents”) in a suit to prevent the Town from issuing a special use permit (“SUP”) to Copperstate for the cultivation of marijuana. We affirm the judgment awarding attorney fees, but modify the amount awarded to the Town based on the parties’ stipulation to an arithmetic error.

BACKGROUND

¶2 The Town Code establishes SUPs for the cultivation of marijuana in certain zoning districts. Town Code § 4-5-3(D). Hoping to open a marijuana cultivation facility (the “Facility”), Copperstate negotiated with the Town to create the Medical Marijuana Cultivation Facilities Agreement (the “Agreement”), a document that, together with an SUP, would govern the development and operation of the Facility. On June 28, 2016, the Town Council voted to adopt the Agreement. That same day, it also voted to approve Copperstate’s SUP application. Statecraft filed suit

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on behalf of the Residents to prevent development of the Facility, alleging defects in the issuance of the SUP.²

¶3 The Residents' original complaint, prepared by Statecraft, alleged three defects in the SUP approval process. First, the Residents alleged that the Town Council gave insufficient public notice before voting to approve Copperstate's SUP. Next, they alleged that the rejection of the SUP by the Planning and Zoning Commission was not properly appealed to the Town Council, making the Council's vote improper and invalid. Third, the Residents alleged that the agreement between the Town and Copperstate constituted "illegal contract zoning."

¶4 On behalf of the Residents, Statecraft sought declaratory relief pronouncing Copperstate's SUP invalid and an injunction to prohibit the Town from issuing the SUP and to prohibit Copperstate from operating the Facility. The original complaint alleged that Copperstate agreed to pay up to \$800,000 annually in exchange for the SUP which constituted an illegal contract for zoning. Statecraft attached the full Agreement to the original complaint, which provides that the Facility will operate "[s]ubject to the grant of applicable [SUPs], which shall not be unreasonably withheld by the Town." However, the Agreement required Copperstate to pay a "Business License Fee" per acre used for marijuana cultivation, at a minimum of \$800,000 per year for any facility measuring 40 acres or more. To halt the development, Statecraft filed a motion for preliminary injunctive relief and a temporary restraining order. Before the superior court ruled on the motion, however, the parties stipulated to a temporary stay while the Town attempted to rectify the alleged procedural defects by conducting a rehearing on the Copperstate SUP.

¶5 After the Town approved the Copperstate SUP for a second time, the Residents, through counsel, amended their complaint, again including three claims – the original allegation of "illegal contract zoning," violation of open meeting laws, and violation of setback requirements in the Town's zoning code. The amended complaint was signed by Statecraft attorney Basile but was not verified by any Resident.

¶6 Statecraft attached several exhibits to the amended complaint, including a newspaper article discussing the Town Council's SUP vote and

² George Wilkison is the only remaining Resident in this appeal. Lowry Flake, Maylene Flake, and Aaron Prestwich voluntarily dismissed their claims prior to the filing of an amended complaint in the superior court. Later, Daniel Prestwich also voluntarily dismissed his claims.

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a letter from the Attorney General's office confirming receipt of "complaints concerning the Town" from Statecraft's Kory Langhofer. The article identified nonparty Kenneth Krieger, a retired chiropractor, who told the reporter he was recruited by Langhofer to chair a committee to recall the mayor and all Town Council members who voted in favor of Copperstate's SUP and the Agreement. The article quoted Krieger saying that Langhofer "was adamant that [Krieger] could do some good." Statecraft asserted that the article supported the Residents' open meetings claim, highlighting a quote from the Town mayor saying, "[the recall campaign] is just another tactic to get the council members who voted yes [on the SUP] to change their votes which is not going to happen."

¶7 The Residents, through Statecraft counsel, again demanded declaratory relief to prohibit the Town from issuing or allowing implementation of the SUP. Statecraft filed an amended motion for a temporary restraining order and preliminary injunction. In support of this motion, Statecraft supplied an affidavit signed by nonparty Krieger, stating that he had measured the distance between Resident George Wilkison's property boundary line and the lot line of the property of the proposed Facility at 427 feet. Statecraft maintained that because the Town Code prohibits marijuana cultivation within 500 feet of "residentially zoned property," this affidavit supported the alleged setback requirement violation. Town Code § 4-5-3(F). Statecraft acknowledged in the motion and in the amended complaint that while Wilkison used the property for his residence, his home was a nonconforming use within a light industrial zoned district.

¶8 Copperstate filed a motion, which the Town joined, to dismiss the amended complaint. Appellees argued that Statecraft itself had gathered the Residents to stop the Facility from opening and that they did not have standing on the contract zoning and open meetings claims because the SUP approval did not affect them in a concrete, particularized, or individual way. Appellees also argued that the Residents conceded the setback requirement claim by admitting in their motion that Wilkison lived within a light industrial – and not a residential – zoned district.

¶9 The superior court held oral argument on Appellees' motion and thereafter granted the motion to dismiss. The judge found that the Residents lacked standing to raise the contract zoning and open meetings claims. The judge also found that because George Wilkison did not live on "residentially zoned property," he lacked standing to bring the setback requirement claim. Finally, the superior court found that even assuming Wilkison could establish standing for one or more claims, he failed to state

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claims on which relief could be granted under Rule 12(b)(6) of the Arizona Rules of Civil Procedure.

¶10 Copperstate filed and the Town joined in a motion for attorney fees under A.R.S. § 12-349 against Statecraft and the remaining Residents. They argued that the amended complaint, “though nominally brought by . . . Town residents,” was groundless and formulated in bad faith by Statecraft attorneys. The superior court granted the motion and ordered Appellees to submit a statement of costs and fees. Appellees submitted applications for attorney fees and costs with detailed time entries, totaling \$109,151 for Copperstate and \$46,828.86 for the Town. Statecraft, on behalf of itself and the remaining Resident, objected to the attorney fee applications on several grounds, including arithmetic errors, that the award exceeded the scope of the fees motion, and that the fees were unreasonable, arguing that the combined award should not exceed \$60,000.

¶11 While A.R.S. § 12-349(B) permits the superior court to award attorney fees against attorneys and parties, the court only entered judgment against Statecraft, finding Langhofer and Basile jointly and severally liable for Appellees’ attorney fees. The court found that Statecraft failed to obtain verification from any Resident for the amended complaint and request for injunctive relief, as required by statute.³ The court also found that because the pleadings admitted that Wilkison lived in an area zoned industrial light, Statecraft could make no rational argument that the SUP violated the Town’s setback requirements. Next, the court turned to the contract zoning claim, noting that it was not cognizable in Arizona. The court continued, saying that even if the claim were recognized, the present facts “clearly” demonstrated that the Town did not bargain away its zoning powers. Last, the court found that, based on the evidence presented, Statecraft could make no rational argument for the open meeting law claim.

¶12 The superior court also found that Statecraft pursued the action in bad faith. The court reasoned that sufficient evidence demonstrated that Statecraft knew the claims argued on behalf of the Residents “depended on facts not present . . . and on legal arguments that cannot be made in good faith in [Arizona].” The court noted that significant evidence, including the words of nonparty Krieger, showed “that this litigation was part of a concerted effort by [the Residents’] counsel, acting toward an ulterior end, to impede Copperstate from its lawful business.”

³See A.R.S. § 12-1803(B) (“An injunction shall not be granted on the complaint unless it is verified by the oath of the *plaintiff* that . . . he believes the complaint to be true.”) (emphasis added).

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The court awarded attorney fees against “Statecraft PLLC, Kory A. Langhofer, and Thomas Basile, jointly and severally,” in the full amount requested by Appellees.

DISCUSSION

¶13 Statecraft appeals the award of attorney fees, arguing that the claims were not groundless or brought in bad faith, and that the amount awarded by the superior court evidences an abuse of discretion. Because we see no clear error in the superior court’s findings of groundlessness or bad faith, we affirm the judgment granting fees under § 12-349. However, because the Town’s fee application contained arithmetic errors, we reduce the Town’s award by the amount stipulated by the parties—\$6,714.76.

I. There is sufficient evidence in the record to support the award of attorney fees under A.R.S. § 12-349.

¶14 Pursuant to A.R.S. § 12-349(A)(1), the superior court “shall” award reasonable attorney fees against an attorney or party who “[b]rings or defends a claim without substantial justification.” A claim lacks substantial justification when it is groundless and not made in good faith. A.R.S. § 13-349(F). The superior court must state its findings with only enough specificity that the reviewing court can test the validity of the judgment. *Rogone v. Correia*, 236 Ariz. 43, 50, ¶ 22 (App. 2014); see A.R.S. § 12-350.

¶15 As an initial matter, Statecraft argues that the award of attorney fees under § 12-349(A) in this case will have a chilling effect on future public interest litigation. There is no public interest in a frivolous lawsuit, and discouraging groundless litigation is what the legislature intended. Section 12-349 was enacted with the express purpose of reducing frivolous claims by increasing the threat of sanctions. *Phx. Newspapers, Inc. v. Dep’t of Corr.*, 188 Ariz. 237, 244 (App. 1997). Moreover, an award under § 12-349 is mandatory, so if the statutory elements are present, we must affirm the judgment. *Democratic Party of Pima Cty. v. Ford*, 228 Ariz. 545, 548, ¶ 10 (App. 2012).

A. Statecraft brought groundless claims on behalf of the Residents.

¶16 A claim is groundless if there is no rational argument based upon the evidence or law in support of that claim. *Rogone*, 236 Ariz. at 50, ¶ 22. It is an objective standard. *Id.* A claim is not groundless if it raises a “debatable issue.” *Ickes v. Bache Halsey Stuart Shields, Inc.*, 133 Ariz. 300, 303

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(App. 1982). Not all novel claims have merit, *Dep't of Revenue v. Arthur*, 153 Ariz. 1, 4 (App. 1986), but sanctions are not required merely because a novel claim is unsuccessful.

¶17 Statecraft argues that this court should apply a de novo standard of review to the groundless element of a § 12-349 claim because the superior court considers both evidence and law in its determination. We disagree. Courts apply de novo review to the *application* of A.R.S. § 12-349, but not to the superior court's findings concerning the elements within. *See, e.g., Phx. Newspapers*, 188 Ariz. at 244-45 (applying de novo review to determine that the superior court misapplied § 12-349 by awarding sanctions when only one element of § 12-349(F) was present). We review the "groundless" element under a clearly erroneous standard, viewing the evidence in the light most favorable to affirming the award. *Bennett v. Baxter Grp., Inc.*, 223 Ariz. 414, 422, ¶ 31 (App. 2010) ("We . . . affirm unless the trial court's finding that the action [was groundless, harassing and in bad faith] is clearly erroneous." (quoting *Phx. Newspapers*, 188 Ariz. at 243) (second alteration in original)); *Johnson v. Mohave Cty.*, 206 Ariz. 330, 334, ¶ 18 (App. 2003). This is because the superior court, having heard the evidence firsthand, is in the best position to determine groundlessness. *Rogone*, 236 Ariz. at 51, ¶ 26.

¶18 We cannot say that superior court's determination of groundlessness was clearly erroneous as a matter of fact or legally in error. The superior court cited several reasons for its determination, considering each claim set forth in the amended complaint. The court found the alleged violation of the setback requirement groundless, citing the plain language of the Town zoning laws and the fact that Resident Wilkison lived in light industrial zoning. Next the court found the contract zoning claim groundless, noting the absence of supporting Arizona law; the unverified amended complaint and nonparty affidavit; the plain language of the Agreement; and the Attorney General's report concluding that the Town had not delegated its zoning powers. Finally, when the court considered the open meetings law claim, the court again cited the absence of any rational argument to support the claim based on the evidence supplied by Statecraft on behalf of the Residents.

B. Statecraft's arguments on behalf of the Residents were not made in good faith.

¶19 The good faith element in this statute requires a subjective determination, though it can be proven inferentially by objective factors. *See Rogone*, 236 Ariz. at 50, ¶ 22; *Harris v. Reserve Life Ins. Co.*, 158 Ariz. 380, 383

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(App. 1988).⁴ Statecraft argues that because there was no evidentiary hearing, the court should view the facts de novo. That argument runs contrary to Arizona law. Again, we review § 12-349 awards for clear error, most favorable to sustaining the award of attorney fees. *Rogone*, 236 Ariz. at 50, ¶ 23. Moreover, should a party wish to hold an evidentiary hearing in the superior court, it must request one; otherwise, the party has “effectively agreed to submit the issue for ruling on the written materials and oral arguments of counsel.” *Wyatt v. Wehmueeller*, 163 Ariz. 12, 17 (App. 1989), *vacated in part*, 167 Ariz. 281 (1991). Statecraft did not request an evidentiary hearing in its response to Appellees’ motion for § 12-349 attorney fees.

¶20 The superior court correctly referenced objective factors, such as the quality of the legal and factual arguments presented, to determine that Statecraft attorneys knew their actions were not made in good faith. The court also referenced the newspaper article from the Residents’ amended complaint to show subjective bad faith from Statecraft.

¶21 Statecraft takes exception to the superior court’s reference to Krieger’s quote in the newspaper article, calling it hearsay. But the court did not err because the rules of evidence do not apply to a post-judgment determination of attorney fees. *Hohokam Res. v. Maricopa Cty.*, 169 Ariz. 596, 605 (App. 1991). And even if we agreed that a hearsay issue existed, it would be invited error because Statecraft introduced the article, basing their open meetings law claim on a quote from the Town’s mayor therein. *See State v. Logan*, 200 Ariz. 564, 566, ¶ 11 (2001). We do not allow litigants to benefit on appeal from errors they introduced. *Id.*

II. The amount awarded in attorney fees, with the exception of arithmetic errors, was reasonable.

¶22 We will not disrupt the amount of an attorney fees award absent an abuse of discretion, simply reviewing “whether a judicial mind, in view of the law and circumstances, could have made the ruling without exceeding the bounds of reason.” *Solimeno v. Yonan*, 224 Ariz. 74, 82, ¶ 36 (App. 2010); *see Harris*, 158 Ariz. at 384. The superior court awarded

⁴ Because case law defining “lack of good faith” in § 12-349 is slim, we substitute authority from the former § 12-341.01(C). *See Arizona Attorneys’ Fees Manual* § 5.4 (Bruce E. Meyerson & Patricia K. Norris eds. 6th ed. 2017) (“A.R.S. § 12-349 uses language that in many instances is identical to that found in the former § 12-341.01(C) . . .”).

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attorney fees listed in Appellees' applications in the full amount — \$109,151 for Copperstate and \$46,828.86 for the Town.

¶23 Statecraft argued to the superior court that there were arithmetic errors in the Town's application for fees; while the Town had invoiced \$46,239.76, their itemized fee application only showed a total of \$39,525. The Town admits error on appeal. Therefore, we agree that the superior court erred in awarding an amount of attorney fees that contained arithmetic errors and reduce the award amount accordingly.

¶24 Statecraft renews several other objections about the award amount: that the court awarded fees related to what Statecraft calls "work outside the defense of this lawsuit"; that the award exceeds the scope of the motion by including work done prior to the amended complaint on the alleged procedural defects and stipulated stay; and that the fee award was unreasonable due to block billing, high hourly rates, redacted time entries, and excessive work from Appellees' attorneys. We will not conduct an item-by-item analysis of each objection. *Solimeno*, 224 Ariz. at 82-83, ¶ 38. Appellees submitted fee applications with affidavits that complied with requirements set forth in *China Doll*. See *Schweiger v. China Doll Rest., Inc.*, 138 Ariz. 183 (App. 1983). The application exhibits show a breakdown of fees and costs with contemporaneous records kept by attorneys and paralegals. While portions of the time logs were redacted, the court reviewed all supporting documentation Appellees provided. Based on this extensive documentation and its analysis of the nature and quality of the claims brought by Statecraft, the court awarded attorney fees. Aside from the slight modification above, we see no error requiring us to alter the superior court's award.

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CONCLUSION

¶25 For the reasons above, we affirm the superior court's ruling, but decrease the Town's award of attorney fees to \$39,525 based on the stipulation of the parties.



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