IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

CLEAN ENERGY FOR A HEALTHY ARIZONA, *Appellant*,

v.

VINCE LEACH, et al., *Appellees*.

No. 1 CA-CV 18-0776
FILED 12-5-2019

Appeal from the Superior Court in Maricopa County
No. CV2018-009919
CV2018-010116
CV2018-010651
CV2018-010658
CV2018-010807
(Consolidated)
The Honorable Daniel J. Kiley, Judge

AFFIRMED

COUNSEL

Torres Law Group, Tempe
By Israel G. Torres, James E. Barton, II, Saman John Golestan
Counsel for Appellant

Snell & Wilmer LLP, Phoenix
By Brett William Johnson, Jennifer L. Hadley Catero, Lindsay L. Short, Colin P. Ahler
Counsel for Appellee Leach, et al.

MEMORANDUM DECISION

Judge John C. Gemmill[1] delivered the decision of the Court, in which Presiding Judge Randall M. Howe and Judge David D. Weinzweig joined.

G E M M I L L, Judge:

¶1 Clean Energy for a Healthy Arizona (the "Committee") appeals the superior court's denial of its request for attorney's fees under the private attorney general doctrine, the amount of the fees awarded under Arizona Revised Statutes ("A.R.S.") section 19–118(F) (2019),[2] and the amount of costs awarded under A.R.S. § 12–332(A)(6) (2019). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 The Committee sought to place an initiative on the November 2018 general election ballot.[3] On the Committee's behalf, an intermediary registered more than 1,500 circulators to collect signatures supporting placement of the initiative on the ballot. The Committee filed petition

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[1] The Honorable John C. Gemmill, Retired Judge of the Court of Appeals, Division One, has been authorized to sit in this matter in accordance with Article 6, Section 3 of the Arizona Constitution.

[2] The legislature has amended A.R.S. § 19–118 twice during this litigation. 2019 Ariz. Sess. Laws, ch. 315, § 3 (1st Reg. Sess.); 2018 Ariz. Sess. Laws, ch. 320, § 1 (2d Reg. Sess.). The attorney's fees provision, previously found in § 19–118(D), is now located within § 19–118(F). Although its location within the statute has changed with the recent amendments, the language of the attorney's fees provision has not changed. Therefore, we cite the current version of the statute.

[3] Our supreme court thoroughly described the underlying litigation in its opinion, *Leach v. Reagan*, 245 Ariz. 430, 432–33, ¶¶ 1–10 (2018).

sheets containing signatures, and the Secretary of State determined that the Committee had gathered more than enough signatures to place the initiative of the ballot.

¶3 Meanwhile, a group of qualified electors ("Plaintiffs") sued the Committee and various State and county officials to remove the initiative measure from the ballot for several reasons, including the failure of circulators to lawfully register. The superior court held a five-day trial, for which Plaintiffs subpoenaed over 1,180 witnesses, most of whom were petition circulators. The superior court ultimately upheld the initiative's validity, which the supreme court affirmed by order and a later-issued opinion. *See generally Leach v. Reagan*, 245 Ariz. 430 (2018). Ultimately, the voters rejected the initiative.

¶4 The parties then returned to superior court and briefed whether the Committee could recover its attorney's fees and costs. The Committee argued it was entitled to $200,435.76 in attorney's fees under the private attorney general doctrine and A.R.S. § 19–118(F), and $1,339,137.05 in costs under A.R.S. § 12–332(A). The superior court denied fees under the private attorney general doctrine, but granted $4,107.50 in fees under § 19–118(F) and $2,428.08 in costs.

¶5 The Committee timely appealed the superior court's award of attorney's fees and costs. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S. §§ 12–120.21(A)(1) (2019) and –2101(A)(1) (2019).

DISCUSSION

I. Attorney's Fees.

A. The private attorney general doctrine.

¶6 Attorney's fees may be awarded against private parties under the private attorney general doctrine. *Ariz. Ctr. for Law in the Pub. Interest v. Hassell*, 172 Ariz. 356, 371 (App. 1991). The doctrine represents an

> equitable rule which permits courts in their discretion to award attorney's fees to a party who has vindicated a right that:
>
> (1) benefits a large number of people;
>
> (2) requires private enforcement; and

(3) is of societal importance.

Arnold v. Ariz. Dep't of Health Servs., 160 Ariz. 593, 609 (1989). Because decisions whether to award fees under this doctrine are discretionary, we apply an abuse of discretion standard in our review of this issue. *See id.*; *Meyer v. State*, 246 Ariz. 188, 195, ¶ 26 (App. 2019). We will not disturb the court's "judgment on appeal if there is any reasonable basis for the amount awarded." *ABC Supply, Inc. v. Edwards*, 191 Ariz. 48, 52 (App. 1996).

¶7 The Committee argues its successful defense "vindicated the right of initiative" for voters who signed the qualifying petitions. It then argues attorney's fees should have been awarded under the private attorney general doctrine here, citing two cases: *Meyer*, 246 Ariz. 188, and *Cave Creek Unified Sch. Dist. v. Ducey*, 231 Ariz. 342 (App. 2013), *aff'd*, 233 Ariz. 1 (2013).[4]

¶8 Although we granted fees under the private attorney general doctrine in each case, *see Meyer*, 246 Ariz. at 195–96, ¶¶ 26–31; *Cave Creek*, 231 Ariz. at 353, ¶¶ 34–36, we distinguish both cases for two reasons. First, in those cases, the successful parties defended the integrity of active laws: They challenged the government's failure to recognize and follow laws that voters had already passed at the ballot box and that had been signed into law. *See Meyer*, 246 Ariz. at 191–92, 195, ¶¶ 2–4, 8–9, 24; *Cave Creek*, 231 Ariz. at 345–46, 348, 353, ¶¶ 1–5, 14, 32. Thus, unlike the Committee, the successful parties in those cases ensured that the voters who enacted those measures had a remedy for the violation of their voter-approved laws.

¶9 Second, the rights of societal importance that we held were vindicated in both *Meyer* and *Cave Creek* were not the right of initiative, but the rights guaranteed by measures the voters had already approved. *See Meyer*, 246 Ariz. at 196, ¶¶ 30–31; *Cave Creek*, 231 Ariz. at 353, ¶ 35. In both instances, the successful party's primary motive *of the litigation* was to

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[4] The Committee's brief cites our supreme court's decision in *Cave Creek*, 233 Ariz. 1. Because this court—not the supreme court—granted attorney's fees under the private attorney general doctrine, the analysis or amount of that award was not challenged in the supreme court, and the supreme court summarily affirmed that award and applied this court's analysis in making its own award, *id.* at 8, ¶ 26, we cite and discuss our opinion.

provide a public benefit, not achieve a personal gain.[5] *See Kadish v. Ariz. State Land Dep't*, 155 Ariz. 484, 498 (1987) (opinion of Feldman, J.) ("[P]etitioners seek no recovery for themselves, and will achieve no personal advantage. They do not act for their own benefit, nor even for the benefit of a particular class or group, but only for the purpose of vindicating the interests of the entire citizenry of the state of Arizona."); *see also* State Bar of Ariz., *Arizona Attorneys' Fees Manual* § 6.4.4.3, at 6–21 (Bruce E. Meyerson & Patricia K. Norris eds., 6th ed. 2017) ("guiding principles" for determining whether party vindicated right of societal importance include a party's "motive"; when motive to litigate is "primarily for personal gain, with the public benefit being incidental, application of the private attorney general doctrine has generally been denied").

¶10 In contrast, the Committee's primary motive in this litigation was to preserve the chance for its initiative to become voter-approved law. Plaintiffs argued the initiative was invalid and should not appear on the ballot because the Committee, its formation, its signature-gathering process, and the initiative itself violated various legal requirements. Consequently, the Committee's success in keeping the measure on the ballot did not establish or expand the initiative power; it merely provided the single opportunity for citizens to exercise their right to vote on the Committee's initiative. And conversely, if Plaintiffs had been successful in demonstrating that the Committee had not satisfied all prerequisites for placement of the measure on the ballot, the right of initiative established under Arizona law would not have been "harmed."

¶11 The right the Committee vindicated was not of "societal importance," and the superior court did not abuse its discretion in declining to award the Committee attorney's fees under the private attorney general doctrine.

B. Section 19–118(F).

¶12 Section 19–118(F) states:

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[5] We note that a right of societal importance need not always stem from a constitutional or voter-approved provision. *See Arnold*, 160 Ariz. at 594, 602, 604, 605, 609 (fee award under private attorney general doctrine when party established State and County's duty and breach of duty to provide health care to "the chronically mentally ill").

> Any person may challenge the lawful registration of circulators . . . . The prevailing party in an action to challenge the registration of a circulator under this section is entitled to reasonable attorney fees.

¶13 The superior court ruled that § 19–118(F) only allows recovery of reasonable attorney's fees incurred while litigating the circulator-registration issue. The court also found that most of the time entries in the Committee's billing records did not clearly relate to the circulator-registration challenge. Consequently, it awarded $4,107.50 in fees, based on specific time entries that "clearly relate[d] to the parties' [circulator-registration] dispute." These time entries included researching case law and drafting responses to Plaintiffs' circulator-registration challenge, and preparation and facilitation of experts' testimony on the challenge.

¶14 The Committee makes only one argument: It was "difficult to divide the hours expended defending" only the circulator-registration challenge because the challenge was "intertwined" with the other issues; therefore, the Committee should have received all its fees and the superior court abused its discretion when it awarded only $4,107.50 in fees. We review the amount of the superior court's attorney's fees award for an abuse of discretion. *Lee v. ING Inv. Mgmt., LLC*, 240 Ariz. 158, 161, ¶ 11 (App. 2016).

¶15 The Committee cites no authority indicating a party may recover fees under § 19–118(F) for issues that were "intertwined" with a circulator-registration challenge, nor are we aware of any such authority. We have considered Arizona caselaw recognizing that a party may recover its attorney's fees for tort claims that are "interwoven" with a qualifying contract claim under A.R.S. § 12–341.01 (2019). *See Modular Mining Sys., Inc. v. Jigsaw Techs., Inc.*, 221 Ariz. 515, 521–22, ¶¶ 22–23 (App. 2009) (citing cases). When determining whether claims are interwoven in that context, the focus is on whether the claims are based on the same facts and involve the same legal issues. *See Sparks v. Republic Nat'l Life Ins. Co.*, 132 Ariz. 529, 542–44 (1982) (bad faith tort and breach of contract both involved breach of contract); *Modular Mining Sys.*, 221 Ariz. at 522–23, ¶¶ 23–26 (breach of contract and trade secret, unfair competition and tortious interference tort claims all based on misappropriation of trade secrets); *see also Pettay v. Ins. Marketing Servs., Inc. (West)*, 156 Ariz. 365, 368 (App. 1987) (misrepresentation tort claim could not exist "but for" breach of contract claim).

¶16 We apply that standard here. Although the superior court did not expressly apply that standard, the court rejected the Committee's argument that the Committee could recover fees for intertwined issues, characterizing the litigation's other issues as disputes over

> the Initiative sponsor's statement of organization; the title, text, and 100-word summary of the Initiative; purported irregularities in the notarization of circulator affidavits; the validity of the signatures gathered in support of the Initiative; the significance, if any, of the Committee's own internal "signature validity rate" data; and the constitutionality of A.R.S. § 19–102.01.

The Committee does not specifically challenge these characterizations or explain why all these issues are intertwined with the circulator-registration challenge. It does not argue that the same facts were necessary for the Committee's success on multiple issues, including the circulator-registration issue, or that the circulator-registration challenge forms the basis for or is a variant of another legal issue. Indeed, the Committee merely argues the issues are "intertwined" because the parties litigated many issues in a short period of time, and motions and witness testimony frequently addressed multiple issues. Under these circumstances, we discern no abuse of discretion by the superior court in limiting the attorney's fees award to $4,107.50 under § 19–118(F).

II. Costs.

¶17 In its application in the superior court, the Committee requested $1,339,136.90 in costs. This included $367.78 for "filing and services fees"; $2,060.30 for "[d]eposition transcript[s]"; $6,459.56 for "[t]rial transcripts" and the "[p]rinting of exhibits"; $15,544.41 for "[e]xpert witness costs . . . such as time spent writing a report, time spent researching, time spent preparing for trial, time spent traveling"; $1,314,705.00 for expenses incurred "to ensure subpoenaed circulators appear pursuant to the issuance of subpoenas," including "[o]rganizational costs," the circulators' "[l]ost wages," "[p]ayroll taxes," "[s]nacks," "[f]lights," "[l]odging," "[t]raining and set up," "[p]er [d]iems," "[b]uses," "[s]ecurity" and "[c]hild care." The court awarded the Committee $2,428.08 for the filing and services fees and deposition transcript expenses ($367.78 + $2,060.30 = $2,428.08).

¶18 The Committee argues it is entitled to the remainder of the $1,339,136.90 in costs it requested in the superior court under § 12–332(A)(6). Parties in civil actions are generally responsible for their own

litigation expenses unless a statute permits a party to recover an expense as a taxable cost. *See Schritter v. State Farm Mut. Auto. Ins. Co.*, 201 Ariz. 391, 392, ¶ 6 (2001); *Foster v. Weir*, 212 Ariz. 193, 195, ¶ 4 (App. 2006). Section 12–332(A) identifies the universe of costs that a prevailing party may recover in a civil action, including:

> 1. Fees of officers and witnesses.
>
> * * *
>
> 6. Other disbursements that are made or incurred pursuant to an order . . . .

See also A.R.S. § 12–341 (2019). Whether a particular expense is a taxable cost is a question of law that we review *de novo*. *See Reyes v. Frank's Serv. & Trucking, LLC*, 235 Ariz. 605, 608, ¶ 6 (App. 2014). This involves the interpretation of § 12–332. *See Ponderosa Plaza v. Siplast*, 181 Ariz. 128, 134 (App. 1993). We interpret related statutes in conjunction with one another, *see Foster*, 212 Ariz. at 195–96, ¶ 9, and avoid interpretations that render terms meaningless, *see City of Tucson v. Clear Channel Outdoor, Inc.*, 209 Ariz. 544, 552, ¶ 31 (2005). "We will affirm the trial court's decision if it is correct for any reason." *Reyes*, 235 Ariz. at 610, ¶ 16.

¶19 The Committee argues it was entitled to the expenses it incurred "to ensure petition circulators . . . appear[ed]" at trial under § 12–332(A)(6). The Plaintiffs argue that those expenses are not recoverable costs because (1) those expenses are witness fees under § 12–332(A)(1); (2) a party can recover as witness fees only the amount A.R.S. § 12–303 (2019) requires a witness receive for appearing at trial; and (3) the Plaintiffs, not the Committee, paid the witnesses the amount required by § 12–303.[6] We agree with the Plaintiffs.

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[6] Section 12–303 states:

> A material witness attending the trial of a civil action shall be paid twelve dollars for each day's attendance to and including the time it was necessary for him to leave his residence and go to the place of trial and his discharge as a witness. The witness shall also be paid mileage at the rate of twenty cents for each mile actually and necessarily traveled from his place of residence in the state of Arizona to the place of trial, to be computed one way only.

¶20 The Committee describes the expenses at issue as those it incurred "to ensure petition circulators . . . appear[ed]" at trial, and in fact, argued in superior court that these expenses were recoverable under § 12–332(A)(1). We agree these expenses fit within the category of § 12–332(A)(1) because they were expenses "associated with [a witness's] actual attendance at trial." *Foster*, 212 Ariz. at 196–97, ¶¶ 9, 15.

¶21 This court has held that § 12–332(A)(1) is "restrict[ed] . . . to costs associated with [a witness's] actual attendance at trial to testify," including travel expenses. *See id.* Further, § 12–303 limits the amount of costs recoverable under § 12–332(A)(1) to $12 for each day a witness traveled to attend trial, plus 20 cents per mile for travel from the witness's "place of residence in the state of Arizona to the place of trial." A.R.S. § 12–303; *see Foster*, 212 Ariz. at 196–97, ¶¶ 9, 15 ("When read together with a related provision, A.R.S. § 12–303, § 12–332 restricts witness fees to costs associated with actual attendance at trial to testify."); *Ponderosa Plaza*, 181 Ariz. at 134. Because the Committee does not contest that the Plaintiffs paid the witness's required fee under § 12–303 and the remaining amount far exceeds the statutory cap, the Committee cannot recover its remaining expenses.

¶22 The Committee argues that it can recover those expenses incurred "pursuant to an order" under § 12–332(A)(6) because the superior court issued subpoenas for the Committee's registered circulators to appear and § 19–118(E) would penalize the Committee for a circulator's nonappearance. *See* A.R.S. § 12–332(A)(6); *see also* A.R.S. § 19–118(E) ("If a registered circulator is properly served with a subpoena to provide evidence . . . and fails to appear . . . all signatures collected by that circulator are deemed invalid."). This argument fails for two reasons. First, despite § 19–118(E)'s penalty, the subpoenas were issued at Plaintiffs' request, not the Committee's, and the subpoenas did not order the Committee to pay anything. *See Motzer v. Escalante*, 228 Ariz. 295, 297–98, ¶¶ 12–15 (App. 2011) (party that provided notebooks to jurors could not recover the expense because it was merely encouraged, but not ordered, to incur the expense). Second, these costs are already encompassed under (A)(1) and thus not "[o]ther disbursements" under (A)(6). *See Advanced Prop. Tax Liens, Inc. v. Sherman*, 227 Ariz. 528, 531, ¶ 14 (App. 2011) (we consider the plain language and structure of a statute and strive to harmonize all its provisions).

¶23 The Committee also seeks recovery for expenses it incurred and characterized as "[e]xpert witness costs," "[t]rial transcripts" and the "[p]rinting of exhibits." On appeal, it merely cites § 12–332(A)(6) but does

not develop an argument that (A)(6) entitles it to recover these expenses. Further, in the superior court, the Committee never asserted that § 12–332(A)(6) entitled it to recover those same expenses; it either provided no basis or asserted (A)(1) entitled it to recovery. Consequently, we hold that the Committee has waived any challenge to the superior court's decision not to grant the Committee the expenses it incurred and characterized as "[e]xpert witness costs," "[t]rial transcripts" and the "[p]rinting of exhibits." *See Best Choice Fund, LLC v. Low & Childers, P.C.*, 228 Ariz. 502, 508, ¶ 17 & n.3 (App. 2011) (waiver on appeal when party fails to properly raise issue in the superior court); *Sholes v. Fernando*, 228 Ariz. 455, 461, ¶ 16 (App. 2011) (failure to develop argument waives issue on appeal).

¶24 Accordingly, the superior court did not err in limiting the taxable costs to $2,428.08.

CONCLUSION

¶25 For these reasons, we affirm.

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