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

GECKO POOLS & SPAS, L.L.C., an Arizona limited liability company, Plaintiff/Judgment Creditor/ Appellee, v. BLACKHAWK HOLDINGS, L.L.C., an Arizona limited liability company; BLACKHAWK CUSTOM HOME BUILDERS, L.L.C., an Arizona limited liability company; PHIL TENNYSON, an unmarried man, Defendants/Judgment Debtors/ Appellants, and BRITT LAW GROUP, P.C. and EDWARD H. BRITT, Appellants.	No. 1 CA-CV 08-0757 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2002-018346
Cause No. CV 2004-018944

The Honorable Lindsay Best Ellis, Judge *Pro Tempore* (Retired)

AFFIRMED

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T I M M E R, Chief Judge

¶1 This appeal arises out of the award of attorneys' fees to appellee Gecko Pools and Spas, L.L.C. ("Gecko") against appellants Blackhawk Holdings, L.L.C., Blackhawk Custom Home Builders, L.L.C. (collectively "Blackhawk"), the Britt Law Group, P.C. and Edward H. Britt (collectively "Britt"), and Phil Tennyson in garnishment proceedings initiated by Gecko. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 On September 19, 2002, Gecko, a general building and swimming pool contractor, filed suit (the "Gecko action") against Blackhawk, a general contractor, and its principal, Tennyson, who had guaranteed Blackhawk's contractual obligation to Gecko, to recover payment for services and supplies furnished in the construction of a swimming pool. Blackhawk and Tennyson failed to answer Gecko's complaint, and on January 10, 2003, Gecko obtained a default judgment for the principal amount of

$63,677.04 with accruing interest at the rate of 18% per year. Gecko did not collect on the judgment.

¶3 On September 29, 2004, Blackhawk filed a complaint against Paul J. Mershon (the "Mershon action"), alleging Mershon had failed to pay Blackhawk $162,000 for services Blackhawk provided in the construction of a house. Blackhawk and Mershon eventually settled the case, and on April 25, 2006, the parties stipulated to a judgment against Mershon for $82,500 (the "settlement funds").

¶4 Also on April 25, after learning of the settlement, Gecko obtained and served on Mershon a writ in the Gecko action to garnish the settlement funds.[1] Britt, who served as Blackhawk's attorney in the Mershon action, moved on May 5 to intervene in the Gecko action pursuant to Arizona Rules of Civil Procedure ("Rule") 24(a) in order to assert an attorney's charging lien against the settlement that was superior to Gecko's claim. On May 10, Blackhawk objected to the garnishment and, together with Tennyson, moved the court for relief from the default judgment pursuant to Rule 60(c). Gecko also applied for additional writs of garnishment in the Gecko action against persons and entities that allegedly held funds available to pay the outstanding judgment and applied for a charging order

[1] Gecko also moved to intervene in the Mershon action and asked the court in that case to garnish the settlement funds. The court eventually consolidated the Gecko and Mershon actions.

against Blackhawk's and Tennyson's interests in limited liability companies ("LLCs"). A discovery dispute ensued in the Gecko action, which culminated in Gecko's June 12 motion to compel appellants' attendance at depositions and to impose monetary sanctions pursuant to Rule 37.

¶5 By order dated June 19 and entered July 3, among other rulings, the trial court denied the Rule 60(c) motion, finding the presented argument was "without factual or legal merit and was waived by [Blackhawk's and Tennyson's] failure to answer" and that the motion appeared to be filed "solely for purposes of delaying the garnishment proceedings." The court additionally denied Britt's motion to intervene, ruling Britt lacked a legal basis to assert a charging lien on the settlement funds and therefore lacked standing to intervene in the garnishment proceedings.

¶6 After a hearing on July 11, the court granted Gecko's application for a charging order against Blackhawk's and Tennyson's interests in LLCs. The court also garnished the settlement funds held by Mershon but did not enter a signed order to that effect until August 15. Prior to entry of that order, on July 31, Gecko applied for an award of attorneys' fees and sanctions against Blackhawk, Tennyson, and Britt, and supplemented the application on August 21, for a total request of $47,824 in fees and $2,016.29 in costs. On August 15, the

court entered judgment for Gecko on its garnishment of the settlement funds pursuant to Rule 54(b), leaving the issue of attorneys' fees for later decision. Blackhawk and Tennyson subsequently appealed the judgment. *Gecko Pools & Spas, L.L.C. v. Blackhawk Holdings, L.L.C.,* 1 CA-CV 06-0659, 1 CA-CV 07-0253 (Consolidated), 2007 WL 5448130 (Ariz. App. Oct. 11, 2007) (mem. decision) ("*Gecko I*").

¶7 On August 23, the court granted Gecko's June 12 motion and compelled appellants' attendance at depositions. The court also granted discovery sanctions pursuant to Rule 37 against appellants, with the sum to be determined after completion of the depositions and a written request. The record does not reflect that Gecko made such a request.

¶8 On November 29, after appellants had responded to Gecko's application for attorneys' fees and Gecko replied, the trial court granted $20,000 in "partial attorneys' fees" and $2,016.29 in costs to Gecko against Blackhawk and Tennyson without specifying the basis for the award. The court did not address fees or costs sought against Britt, prompting Gecko on April 10, 2007 to ask for a ruling on that request, as well as reconsideration of the amount awarded against Blackhawk and Tennyson. The court never explicitly ruled on the motions.

¶9 This court in *Gecko I* affirmed the Rule 54(b) judgment and awarded Gecko $19,977.20 in attorneys' fees and costs

incurred on appeal pursuant to Arizona Revised Statutes (”A.R.S.”) section 12-341.01 (2003), as against Blackhawk, and the express terms of the guaranty contract, as against Tennyson. *Gecko I,* 1 CA-CV 06-0659, 1 CA-CV 07-0253 (Consolidated), at *4, ¶ 18. We issued the mandate on May 5, 2008.

¶10 On July 10, Gecko submitted a supplemental request for fees in the amount of $17,062.64 incurred in the trial court after submission of the original application and moved the trial court to enter final judgment on the mandate and on its fee requests. After Blackhawk, Tennyson, and Britt responded to the request and Gecko replied, the court entered judgment on September 3 awarding Gecko attorneys’ fees and costs, with applicable interest, as follows: (1) $47,824 in fees and $2,016.29 in costs payable by Blackhawk, Tennyson, and Britt jointly and severally, (2) an additional $17,062.64 in fees payable by Blackhawk and Tennyson jointly and severally, and (3) an additional $19,977.20 payable by Blackhawk and Tennyson jointly and severally representing the fees ordered by this court in *Gecko I*. After the trial court denied post-judgment motions, this appeal followed.

DISCUSSION

A. Timeliness of fee applications

¶11 Appellants argue the trial court erred by awarding attorneys' fees because Gecko's application and supplemental applications were untimely pursuant to Rule 54(g)(2). We review the proper interpretation of Rule 54(g)(2) de novo as a question of law, but we review the trial court's application of the rule for an abuse of discretion. *King v. Titsworth*, 221 Ariz. 597, 598, ¶ 8, 212 P.3d 935, 936 (App. 2009).

¶12 Rule 54(g)(2) requires a party requesting attorneys' fees to file its application "within 20 days from the clerk's mailing of a decision on the merits of the cause, unless extended by the trial court." The focus of the parties' dispute turns on identifying when the court made "a decision on the merits of the cause." Appellants contend the court made such a decision in its order entered July 3, 2006, which denied both the Rule 60(c) motion and Britt's motion to intervene. Thus, according to appellants, Gecko's application for attorneys' fees filed July 31, 2006 and supplemental applications filed August 21, 2006 and July 10, 2008 were untimely.[2] Gecko counters that because Blackhawk and Tennyson could have raised additional

[2] Appellants do not contend that Gecko's requests for sanctions were untimely. Indeed, Rule 54(g)(4) expressly provides that the timing requirements set forth in Rule 54(g)(2) do not apply to sanctions requests.

objections at the garnishment hearing held on July 11, the court did not make "a decision on the merits of the cause" until it entered its ruling on the garnishment action on August 15. Consequently, the original and first supplemental applications were timely, according to Gecko. Additionally, because the fees requested in the July 10, 2008 application were not incurred at the time of the initial applications, Gecko argues the request was either timely or the court had discretion to extend the filing time. We agree with Gecko.

¶13 Although Rule 54(g)(2) does not require entry of a final judgment before the merits of a cause are considered "decided," neither does the rule contemplate that a cause is "decided" prior to a ruling that can be reduced to a final judgment. Any contrary view would require the court to rule on fee applications during stages of a case – a notion that defies common sense. *See In re Reymundo F.*, 217 Ariz. 588, 590, ¶ 5, 177 P.3d 330, 332 (App. 2008) (noting court employs a common sense approach to interpreting rules). The comment to Rule 54(b) supports this conclusion by noting,

> Typically, the court will render its decision on attorneys' fees issues after the decision on the merits of the cause, but before the entry of judgment. *See*, Rule 58(f), Ariz. R. Civ. P.[3] This procedure

[3] Rule 58(f) concerns judgments in habeas corpus proceedings. From the context of the comment to Rule 54(b), it appears the intended reference was to Rule 58(g).

> will allow an attorneys' fee award (if any) to be included in the judgment so that all issues may be addressed on appeal. In some cases, however, there may be good reasons to enter an immediate judgment on the merits of a cause, while leaving attorneys' fees issues to be addressed later. Rule 54(b) was amended in 1999 to permit that approach.

Rule 54(b), State Bar Committee Notes, 1999 Amendments; *see also* Rule 58(g), State Bar Committee Notes, 1999 Amendments ("In the rare case in which a judgment on the merits of a cause would be appropriate prior to resolution of attorneys' fees, the trial court may certify the entry of a 'merits' judgment under Rule 54(b)."). Based on these authorities and a common sense reading of Rule 54(g)(2), we conclude the rule requires a party to submit a fee application within twenty days after the court enters a ruling on the merits of a cause of action that can be reduced to a final judgment. *Id*.

¶14 The cause of action litigated by the parties in the Gecko action was Gecko's garnishment claim. Although the July 3 ruling impacted the propriety of Gecko's garnishment claim, it did not constitute a decision on the merits of that claim. Rather, the court decided the garnishment claim when it entered the August 15 order granting Gecko's request. On that date, Gecko prevailed on its garnishment claim and arguably qualified for an award of attorneys' fees under the terms of the Tennyson guaranty and several statutes. *See* A.R.S. §§ 12-1580(E) (2003),

-341(C) (2003), -341.01, and -349 (2003). Consequently, Gecko's applications for fees filed July 31 and August 21 were filed timely within twenty days of the court's decision on the merits of the cause, and the trial court did not err by considering them.

¶15 We likewise decide the trial court did not err by ruling on Gecko's July 10, 2008 supplemental application. Without doubt, this application was not filed within twenty days of the court's decision on the cause. As Gecko points out, however, it had no ability to request these fees in its initial applications as Gecko had not then incurred the fees. Therefore, even assuming Rule 54(g)(2) applies to supplemental applications, good cause existed for the court to permit the filing after issuance of the mandate in *Gecko I.* Rule 54(g)(2) (granting court authority to extend deadline for good cause). We do not discern error.

B. Merits of fee awards

¶16 Appellants do not challenge the amount of attorneys' fees awarded to Gecko but instead argue the trial court erred by awarding any fees. We review the trial court's decision to award attorneys' fees and sanctions for an abuse of discretion. *See Charles I. Friedman, P.C. v. Microsoft Corp.*, 213 Ariz. 344, 350, ¶ 17, 141 P.3d 824, 830 (App. 2006) (attorneys' fees);

Taliaferro v. Taliaferro, 188 Ariz. 333, 339, 935 P.2d 911, 917 (App. 1996) (sanctions).

1. Tennyson

¶17 Tennyson argues A.R.S. § 12-1580(E) is the only statutory basis available for awarding attorneys' fees in a garnishment action, and because the trial court erred in applying that provision, we should vacate the award of fees against him. We reject this argument because the trial court had a non-statutory basis for awarding fees against Tennyson.

¶18 The guaranty signed by Tennyson obligated him to pay in full "any indebtedness, direct or contingent, of [Blackhawk] to said GECKO, **plus all interest, attorney's fees, cost of court and charges of whatsoever nature and kind**, whether due or to become due and whether now existing or hereinafter arising." (Emphasis added.) As Tennyson's counsel acknowledged at oral argument before this court, and we agree, the guaranty provision is not superseded by any statute, including § 12-1580(E). "A contractual provision for attorneys' fees will be enforced according to its terms. . . . the court lacks discretion to refuse to award fees under the contractual provision." *Mining Inv. Group, LLC v. Roberts*, 217 Ariz. 635, 641, ¶ 26, 177 P.3d 1207, 1213 (App. 2008) (citation omitted); *see also McDowell Mountain Ranch Cmty. Ass'n v. Simons*, 216 Ariz. 266, 269, ¶ 14, 165 P.3d 667, 670 (App. 2007); *Lisa v. Strom*, 183 Ariz. 415, 418

n.2, 904 P.2d 1239, 1242 n.2 (App. 1995). Consequently, the trial court did not err by awarding fees against Tennyson under the terms of the guaranty, and we need not address the propriety of the award under alternate bases.[4]

2. Blackhawk

¶19 Although the trial court did not specify the basis for awarding attorneys' fees against Blackhawk, we will affirm if fees were appropriate under any of the statutes or rules cited by Gecko in its application.[5] *Harris v. Reserve Life Ins. Co.*, 158 Ariz. 380, 384, 762 P.2d 1334, 1338 (App. 1988).

¶20 Gecko asked for attorneys' fees pursuant to A.R.S. § 12-1580(E), among other authorities, which provides the following authority for imposing fees when a party objects to a judgment creditor's writ of garnishment:

> The prevailing party may be awarded costs and attorney fees in a reasonable amount determined by the court. The award shall not be assessed against nor is it chargeable to the judgment debtor, unless the judgment debtor is found to have objected to the writ solely for the purpose of delay or to harass the judgment creditor.

[4] Under the terms of the guaranty, Tennyson waived any requirement that Gecko first attempt to collect the indebtedness from Blackhawk. Consequently, the correctness of the trial court's imposition of fees against Blackhawk does not affect Tennyson's contractual obligation.

[5] Although not required, some explanation for the award would have assisted appellate review of the award greatly.

Blackhawk objected to Gecko's writ solely because the default judgment was purportedly void or voidable, as set forth in Blackhawk's companion Rule 60(c) motion. The trial court denied that motion, finding it appeared to be filed "solely for purposes of delaying the garnishment proceedings." Blackhawk contests this finding, contending no evidence supports it.[6]

¶21 We agree with Blackhawk that in order to award fees under § 12-1580(E), the court was required to find that Blackhawk's sole purpose for objecting to Gecko's writ was to delay proceedings. The court properly could have based this finding on either direct or indirect evidence. *See James, Cooke & Hobson, Inc. v. Lake Havasu Plumbing & Fire Prot.*, 177 Ariz. 316, 321, 868 P.2d 329, 334 (App. 1993) (affirming imposition of Rule 11 sanctions based on trial court's finding that because party had no valid reason for denying debt it necessarily filed answer to cause delay); *see also Vandeventer v. Wabash Nat.*

[6] Contrary to Gecko's argument, Blackhawk sufficiently preserved its challenge to the *merits* of the court's finding for purposes of appeal by asserting it in the August 8, 2006 response and objection to Gecko's application for attorneys' fees. Blackhawk failed to raise the *sufficiency* of the finding to the trial court, however, and has waived that challenge on appeal. *Richter v. Dairy Queen of S. Ariz., Inc.*, 131 Ariz. 595, 596, 643 P.2d 508, 509 (App. 1982) ("It is settled that an appellate court cannot consider issues and theories not presented to the court below."). Although Blackhawk raised the issue in a motion for reconsideration twenty days after entry of the judgment on the mandate, it filed the notice of appeal before the trial court could timely rule. Regardless, the trial court later struck the motion as untimely filed.

Corp., 893 F. Supp. 827, 840 (N.D. Ind. 1995) (holding when no direct evidence exists of a subjective intent to file document for improper reason, court may infer improper purpose when document is meritless and results in delay or other inappropriate result).

¶22 Our review of the record reveals sufficient evidence to support the court's finding. First, the evidence showed that Blackhawk did not believe it had a meritorious defense to Gecko's complaint at the time it objected to the writ of garnishment. On December 4, 2002, after initiation of the Gecko action and while the application for entry of the default judgment was pending, Blackhawk responded to Gecko's complaint to the Arizona Registrar of Contractors, which was based on the same events underlying the Gecko action. Blackhawk did not deny it owed the debt to Gecko but instead stated it did not have the ability to pay it at that time but anticipated making payment within thirty days. A fair inference exists that Blackhawk, which had been served with the complaint in the Gecko action, allowed the default judgment to be entered the next month as it had no defense against the complaint. The timing of Blackhawk's Rule 60(c) motion, filed approximately 40 months after entry of the default judgment, further supports a conclusion that Blackhawk believed it had no defense to Gecko's complaint but

was instead motivated to file the motion to impede garnishment of the Mershon action settlement funds.

¶23 Second, Blackhawk's objection to the writ of garnishment in the Gecko action coincided with Blackhawk's attempt to set aside the settlement in the Mershon action based on Mershon's alleged breach. This belated appearance in the Gecko action permitted Blackhawk to move to stay the garnishment proceedings to allow it time to pursue its attempt to set aside the settlement in the Mershon action.

¶24 Third, the Rule 60(c) motion was meritless. Blackhawk argued the trial court lacked subject matter jurisdiction to enter the default judgment because Gecko failed to comply with A.R.S. § 32-1153 (2008) by alleging in the complaint that it was a duly licensed contractor when the contract sued on was entered into and when the cause of action arose. *See* Rule 60(c)(4) (providing relief from void judgment). As this court held in *Gecko I*, however, Gecko's purported failure to comply with the statute did not deprive the court of jurisdiction; it merely subjected the complaint to a motion to dismiss. *Gecko I,* 1 CA-CV 06-0659, 1 CA-CV 07-0253 (Consolidated), at *3-4, ¶¶ 13-14. We further explained that Blackhawk misread *Lee v. Molinsky*, 77 Ariz. 184, 268 P.2d 975 (1954), overruled on other grounds in *State v. Woolery*, 93 Ariz. 76, 378 P.2d 751 (1963), the

authority it relied on for its position.[7] *Id*. at ¶ 13. Also, because Gecko attached to the complaint invoices bearing its contractor license number, Blackhawk knew the state of Gecko's licensure and that Gecko had complied with the spirit and purpose of § 32-1153. *Id*. at *4, ¶ 17.

¶25 Based on the foregoing, the trial court could have reasonably found that Blackhawk objected to Gecko's writ of garnishment for the sole purpose of delaying garnishment proceedings in the Gecko action to give Blackhawk sufficient time to obtain relief from the settlement in the Mershon action rather than to allow Blackhawk an opportunity to mount a defense to Gecko's complaint. This conclusion was particularly warranted as Blackhawk never provided any evidence of a contrary intent, although it did state in its unsworn response to Gecko's application for fees that it did not intend to delay the proceedings. Consequently, the trial court did not err by

[7] In *Gecko I*, the court expressed doubt about the accuracy of a statement in *Love v. Double "AA" Constructors, Inc.*, 117 Ariz. 41, 45, 570 P.2d 812, 816 (App. 1977), that *Molinsky* stood for the proposition that the pleading of a license is "jurisdictional" pursuant to A.R.S. § 32-1153. *Gecko I*, 1 CA-CV 06-0659, 1 CA-CV 07-0253 (Consolidated), at *3 n.5, ¶ 13. Blackhawk seizes on this statement and contends that its Rule 60(c) motion necessarily had merit as it was based on an interpretation of case law that had not been overruled at the time of his motion. We reject this contention because (1) Blackhawk never cited or relied on *Love* before the trial court, (2) the *Love* court's statement was dicta, and (3) the *Love* court acknowledged that the lack of statutory compliance did not require dismissal but could be cured by the plaintiff. 117 Ariz. at 46, 570 P.2d at 817.

imposing attorneys' fees on Blackhawk pursuant to A.R.S. § 12-1580(E). In light of our decision, we do not need to address the applicability of any other basis for the attorneys' fee award.

3. Britt

¶26 As with the award imposed against Blackhawk, the trial court did not specify the basis for awarding attorneys' fees against Britt. Thus, we will affirm if fees were appropriate under any of the statutes or rules cited by Gecko in its application. *Harris*, 158 Ariz. at 384, 762 P.2d at 1338.

¶27 Although Britt does not fall within the "judgment debtor" limitation of A.R.S. § 12-1580(E), he nevertheless argues the court could not have awarded fees pursuant to that provision because he was never a party to the Gecko action. Gecko responds that Britt became a party once he submitted himself to the court's jurisdiction by filing an objection and motion to intervene, and the court therefore properly imposed fees under § 12-1580(E).

¶28 To determine legislative intent, we first review a statute's language, *Calmat of Arizona v. State ex rel. Miller,* 176 Ariz. 190, 193, 859 P.2d 1323, 1326 (1993), and will ascribe plain meaning to its terms unless they are ambiguous. *Rineer v. Leonardo*, 194 Ariz. 45, 46, ¶ 7, 977 P.2d 767, 768 (1999). When considering the meaning of a statute, we are not bound to the

parties' arguments if that would cause us to reach an incorrect result. *Evenstad v. State*, 178 Ariz. 578, 582, 875 P.2d 811, 815 (App. 1993).

¶29 Although both parties focus on whether Britt became a "party" to the Gecko action when he moved to intervene, the resolution of that issue does not determine the applicability of § 12-1580(E). Fees are authorized under subsection (E) for a party who prevails in a hearing regarding an objection to a writ of garnishment. *See* A.R.S. § 12-1580(A) – (D). Britt moved to intervene in order to assert his objection to the writ, but the trial court ruled Britt lacked standing to intervene and therefore never held a hearing on the merits of his objection. Although the basis for Britt's motion to intervene and his objection were the same, we nevertheless cannot ignore the plain language of § 12-1580(E), which requires a party to prevail in a hearing on an objection before fees are authorized.[8] For this reason, the trial court was not empowered to award fees against Britt pursuant to A.R.S. § 12-1580(E).

¶30 Gecko also asked for sanctions against Britt pursuant to A.R.S. §§ 12-341.01(C), -349, and Rule 11.[9] Imposition of

[8] Indeed, Gecko acknowledged to the trial court that Britt was not entitled to object unless the court permitted intervention.

[9] Gecko additionally requested imposition of Rule 37 sanctions against Britt, which the trial court granted subject to further request by Gecko after completion of depositions. Because the

sanctions under each of these provisions requires findings justifying the ruling. *Fisher v. Nat'l Gen. Ins. Co.*, 192 Ariz. 366, 370, ¶ 13, 965 P.2d 100, 104 (App. 1998) (holding court must make appropriately specific findings under §§ 12-341.01(c) and -349 to justify sanctions); *Wells Fargo Credit Corp. v. Smith*, 166 Ariz. 489, 497, 803 P.2d 900, 908 (App. 1990) (stating trial court must make specific findings to justify Rule 11 sanctions); A.R.S. § 12-350 (2003) (requiring court to announce specific reasons for imposing sanctions under § 12-349). The trial court in this case failed to explain its reasons for imposing significant sanctions on Britt, if that was the court's intention. Thus, we are left not knowing whether the court erroneously imposed attorneys' fees pursuant to A.R.S § 12-1580(E) or, if the court intended to impose sanctions, the basis for that ruling. Because Britt failed to object to the lack of findings before the trial court, however, he has waived his challenge.[10] *Trantor v. Fredrikson*, 179 Ariz. 299, 301, 878 P.2d 657, 659 (1994). We therefore consider whether the trial

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record does not reflect such a request, we assume the fee award entered against Britt was not imposed in whole or in part as a discovery sanction.

[10] Like Blackhawk, Britt challenged the sufficiency of the findings only after the court entered judgment on the mandate. The court struck the motion as untimely after Britt filed his notice of appeal.

court erred if it imposed sanctions pursuant to any basis sought by Gecko. *Id.*

¶31 An attorney's signature on a paper filed with the court constitutes a certification, among other things, that the paper is not interposed to cause unnecessary delay. Rule 11(a). If the paper was filed for this purpose, Rule 11(a) authorizes the court to impose monetary sanctions, which may include payment of the opposing party's reasonable attorneys' fees expended for responding to the paper. *Id*. We review the trial court's imposition of Rule 11 sanctions for an abuse of discretion. *James, Cooke & Hobson*, 177 Ariz. at 319, 868 P.2d at 332. In making this review, we are cognizant that the "trial court 'is better situated [than the court of appeals] to marshal the pertinent facts and apply the . . . fact-dependent legal standard' mandated by Rule 11." *Id*. (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 401 (1990)).

¶32 The record before us supports imposition of Rule 11 sanctions on Britt for his act in signing and filing papers on behalf of his clients and himself for the purpose of causing unnecessary delay in Gecko's attempt to garnish the settlement funds. As set forth previously, *see supra* ¶¶ 21-25, the evidence demonstrates that Blackhawk's sole purpose for objecting to the garnishment was to delay proceedings to give Britt time to set aside the settlement in the Mershon action on

Blackhawk's behalf. Any reasonable investigation by Britt would have revealed that even if the court vacated the default judgment, Blackhawk and Tennyson had no defense to Gecko's complaint; at most, the objection to the writ only served to delay collection proceedings.

¶33 The record further supports that Britt filed his motion to intervene and related papers without substantial justification. *See* Rule 11(a) (authorizing sanctions for papers filed urging position not well-grounded in fact or law). Britt sought to intervene to assert a priority charging lien in the settlement funds. But he failed to cite any evidence that he and his clients looked to the settlement funds as a source of payment of the attorneys' fees, as required to assert a charging lien. *Nat'l Sales & Serv. Co. v. Superior Court*, 136 Ariz. 544, 545, 667 P.2d 738, 739 (1983). Indeed, the written fee agreement between the parties required payment when billed.

¶34 Under the objective standard of reasonableness used to assess an attorney's conduct for purposes of Rule 11, the trial court properly could have found that after conducting a reasonable investigation of fact and law, Britt knew or should have known that Blackhawk's objection was interposed for an improper purpose, and that his motion to intervene was not well-grounded in fact or law. *James, Cooke & Hobson,* 177 Ariz. at 320, 868 P.2d at 333. For these reasons, imposition of Rule 11

sanctions on Britt was justified by the record. In light of our decision, we need not consider the propriety of sanctions based on any other bases urged by Gecko.

¶35 Britt finally argues the trial court erred by not conducting a hearing pursuant to *In re Kunstler*, 914 F.2d 505 (4th Cir. 1990), awarding sanctions in an arbitrary and inequitable manner, and violating his due process rights by failing to give him notice and an opportunity to be heard regarding Gecko's sanctions request. Because Britt failed to raise these challenges to the trial court, however, he has waived them on appeal absent fundamental error, which we apply "sparingly," if at all, in civil cases. *Williams v. Thude*, 188 Ariz. 257, 260, 934 P.2d 1349, 1352 (1997). We do not discern fundamental error as nothing in the record suggests what evidence or arguments Britt was prevented from presenting at a hearing before the court that could not have been presented in his responses to Gecko's requests for sanctions. *See Johnson v. Elliott*, 112 Ariz. 57, 61, 537 P.2d 927, 931 (1975) (defining fundamental error as error that goes to foundation of case or takes from party a right essential to case and holding no fundamental error from misstatement in closing argument because no evidence of prejudice).

ATTORNEYS' FEES ON APPEAL

¶36 Blackhawk and Tennyson request attorneys' fees on appeal pursuant to A.R.S. §§ 12-1580(E) and -341.01(A). Because they are not the successful parties on appeal, we deny this request. Gecko requests an award of attorneys' fees on appeal against appellants but fails to specify the basis for an award. We therefore deny this request. *Matter of Wilcox Revocable Trust*, 192 Ariz. 337, 341, ¶ 21, 965 P.2d 71, 75 (App. 1998) ("We will award no attorney's fees where no basis for the award is cited to us.").

CONCLUSION

¶37 For the foregoing reasons, we affirm.

/s/
Ann A. Scott Timmer, Chief Judge

CONCURRING:

/s/
Sheldon H. Weisberg, Presiding Judge

/s/
Margaret H. Downie, Judge