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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 09/29/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

REX ALAN WOLTERMAN dba MOHAVE COUNTY) 1 CA-CV 10-0830
POOLS AND SPAS, an individual,)
)
Plaintiff/Appellant,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
) Rule 28, Arizona Rules
JEFFREY YELLAND, an individual; and) of Civil Appellate Procedure)
ARIZONA REGISTRAR OF CONTRACTORS, an)
Arizona agency,)
)
Defendants/Appellees.)
)
_____)

Appeal from the Superior Court in Mohave County

Cause No. CV2009-02259

The Honorable Lee Frank Janzen, Judge

AFFIRMED

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J O H N S E N, Judge

¶1 Rex Alan Wolterman, dba Mohave County Pools and Spas, appeals from the superior court's judgment affirming a decision by the Arizona Registrar of Contractors ("ROC") requiring him to comply with a corrective work order issued in connection with his construction of a swimming pool. For the reasons that follow, we affirm.

BACKGROUND

¶2 The facts, as found by the Administrative Law Judge ("ALJ"), are not disputed. Wolterman holds a Class B-05 contractor's license issued by the ROC. He built a swimming pool for Jeffrey Yelland; after the pool was completed, Yelland filed a complaint with the ROC alleging the pool was "under engineered," resulting in a variety of defects. An ROC inspector evaluated Wolterman's workmanship, then issued a corrective work order directing Wolterman to "engineer[] [the pool] for the location where it is built" and ordering that the pool "must be constructed to the engineering for that location."

¶3 Yelland subsequently informed the ROC that Wolterman had not complied with the corrective work order. At Yelland's request, the ROC then commenced a formal administrative proceeding against Wolterman's license. After considering the exhibits and testimony presented at a hearing, the ALJ concluded that Wolterman's construction of the pool deviated "from plans

and specifications," failed to comply with the corrective work order and local building codes and was not completed in a workmanlike manner, all in violation of Arizona law. See Ariz. Rev. Stat. ("A.R.S.") § 32-1154(A)(2), (3), (7), (23) (2008);¹ Ariz. Admin. Code § R4-9-108 (2010).

¶4 The ALJ recommended the ROC revoke Wolterman's contractor's license unless and until he fully complied with the corrective work order and "addresse[d] the concerns raised by" Yelland's expert witness, who documented several defects in the design and construction of the pool. The ROC issued a final order adopting the ALJ's recommended discipline. Wolterman appealed to the superior court, seeking judicial review of the ROC decision. See A.R.S. §§ 12-901 to -914 (2011). The superior court affirmed the ROC's decision. We have jurisdiction of Wolterman's timely appeal pursuant to A.R.S. § 12-2101(B) (2011).

DISCUSSION

¶5 Wolterman argues the superior court erred in affirming the ROC's decision because the ROC lacks the power to require him to replace the pool. Instead, Wolterman asserts that he "should be afforded an opportunity to correct any deficient

¹ We cite the statute's version in effect at the time Yelland filed his complaint because the legislature later materially revised subsection (A)(7). 2009 Ariz. Sess. Laws, ch. 99, § 3 (1st Reg. Sess.).

workmanship using any appropriate means to comply with the Order of the ROC.” We review the ROC’s decision for a clear abuse of discretion. See *Golob v. Ariz. Med. Bd.*, 217 Ariz. 505, 514, ¶ 35, 176 P.3d 703, 712 (App. 2008).

¶16 The ALJ found Wolterman violated A.R.S. § 32-1154(A)(23) by failing to comply with the corrective work order. Section 32-1154(A)(23) prohibits ROC licensees from failing to take “appropriate corrective action” in response to a written directive by the ROC. Wolterman argues the ROC abused its discretion by effectively requiring him to remove and replace the pool, even though a lesser remedy would have constituted an “appropriate corrective action.”

¶17 We cannot begin to address Wolterman’s challenge to the propriety of the corrective action the ROC ordered because Wolterman does not cite any evidence in the record to support his argument that the remedy the ROC ordered would be too expensive, and he has not provided us with the transcript of the administrative hearing. See *State ex rel. Dep’t of Econ. Sec. v. Burton*, 205 Ariz. 27, 30, ¶ 16, 66 P.3d 70, 73 (App. 2003) (appellant must make certain that record on appeal contains all transcripts or other documents necessary for reviewing court to consider issues raised on appeal). Without the transcript, we cannot evaluate the burden the corrective action imposed on Wolterman; indeed, we cannot determine whether Wolterman even

attempted or requested the opportunity to correct the defects by a measure that would be less burdensome than replacement of the pool. We therefore must assume that the ROC's decision is supported by the evidence presented at the hearing. See *Johnson v. Elson*, 192 Ariz. 486, 489, ¶ 11, 967 P.2d 1022, 1025 (App. 1998); see also *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995) ("When a party fails to include necessary items, we assume they would support the court's findings and conclusions.").

¶18 Wolterman argues that pursuant to A.R.S. § 41-1030(B), the ROC "shall not base a licensing decision in whole or in part on a licensing requirement or condition that is not specifically authorized by statute or rule." But A.R.S. § 32-1154(A)(23) and (B) specifically authorize the ROC to revoke the license of a contractor who fails "to take appropriate corrective action . . . without valid justification." On the record before us, we cannot conclude the ROC exceeded its statutory authority by revoking Wolterman's license pending his completion of the corrective work order.

¶19 Yelland requests his attorney's fees and costs on appeal pursuant to A.R.S. § 12-349 (2011). Although we agree that Wolterman's appeal is groundless, nothing in the record persuades us it constitutes harassment or was not pursued in good faith. See A.R.S. § 12-349(F) ("without substantial

justification' means that the claim or defense constitutes harassment, is groundless and is not made in good faith." (emphasis added)). Yelland also requests an award of attorney's fees as a sanction, arguing Wolterman's appeal is frivolous. See Arizona Rule of Civil Appellate Procedure ("ARCAP") 25. An appeal is frivolous if none of the issues is supportable by any reasonable legal theory or by "a colorable legal argument . . . about which reasonable attorneys could differ." *In re Levine*, 174 Ariz. 146, 153, 847 P.2d 1093, 1100 (1993). We impose Rule 25 sanctions with "great reservation." *Ariz. Tax Research Ass'n v. Dep't of Revenue*, 163 Ariz. 255, 258, 787 P.2d 1051, 1054 (1989). Accordingly, we decline to award sanctions against Wolterman. As the prevailing party on appeal, however, Yelland is entitled to his costs contingent on his compliance with ARCAP 21.

CONCLUSION

¶10 We affirm the judgment.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
PATRICA A. OROZCO, Judge

/s/
DONN KESSLER, Judge