IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

ALBERT WATSON AND WENDY WATSON,
Plaintiffs/Appellants/Cross-Appellees,

v.

STRATTON RESTORATION,
Defendant/Appellee/Cross-Appellant.

No. 2 CA-CV 2014-0063
Filed March 26, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. C20122336
The Honorable Ted B. Borek, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Presiding Judge Miller authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Espinosa concurred.

M I L L E R, Judge:

¶1 Plaintiffs Albert and Wendy Watson appeal from the trial court's grant of defendant Stratton Restoration's (Stratton) motion for judgment as a matter of law (JMOL). Stratton cross-appeals the court's denial of its motion for sanctions. For the reasons stated below, we affirm the grant of Stratton's motion for JMOL and the denial of Stratton's motion for sanctions.

Factual and Procedural Background

¶2 The following facts are undisputed. In 2011, the Watsons' home suffered a water loss, which was reported to and accepted by their insurance carrier. On August 3, 2011, the insurance carrier recommended Damage Control, LLC (DC), to undertake the restoration process.[1] DC was terminated within a week and the carrier then recommended Stratton to complete the restoration work on the Watsons' home. In September 2011, the Watsons discharged Stratton from further duties at their home and hired another restoration company to complete the work. At some point in mid-August, during the weeks that Stratton was working at the Watsons' home, two bathroom countertops, made of lead-containing ceramic tile, were cracked by workers.

¶3 In April 2012, the Watsons brought a negligence action against Stratton, alleging it had caused additional damage to the Watsons' property.[2] Specifically, they asserted the disturbances to

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[1]DC was also a named defendant but settled before trial.

[2]The Watsons also brought suit against the insurance carrier for breach of the covenant of good faith and fair dealing and breach of contract. In addition, they brought a negligence action against the

the bathroom countertops and a lack of proper containment had resulted in hazardous materials being spread throughout the house.[3]

¶4 At the close of the Watsons' case-in-chief, Stratton moved for JMOL pursuant to Rule 50(a), Ariz. R. Civ. P. After oral argument, the trial court granted Stratton's motion, finding the Watsons had failed to meet their burden to present sufficient evidence of standard of care, causation, or damages. Specifically, the court found the Watsons had presented "no expert testimony with regard to [the standard of care]" and even if a standard of care had been developed, they had failed to present "evidence of cause or damages related to either of [the bathroom countertop] breaches."

¶5 After trial, Stratton filed a motion for attorney fees and costs pursuant to A.R.S. § 12-349 and Rule 11, Ariz. R. Civ. P.[4] Although the trial court agreed with Stratton that the Watsons had failed to present standard-of-care or damages evidence, it nevertheless denied Stratton's request for sanctions under § 12-349 and Rule 11. In February 2014, the court entered judgment in favor of Stratton. The Watsons timely appealed, and Stratton cross-appealed.

Judgment as a Matter of Law

¶6 The Watsons argue the trial court erred by granting Stratton's motion for JMOL. Specifically, they contend that all elements of their negligence claim against Stratton were satisfied. We review the trial court's grant of a motion for JMOL de novo and consider the evidence and all reasonable inferences therefrom in the light most favorable to the Watsons as the non-prevailing parties. *Barrett v. Harris*, 207 Ariz. 374, ¶ 9, 86 P.3d 954, 957 (App. 2004).

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restoration company that preceded Stratton's involvement, but the claim was settled and subsequently dismissed.

[3]It was discovered at trial that a third party had opened the countertops in order to conduct an environmental assessment.

[4]Stratton also requested and was granted sanctions and costs pursuant to Rule 68, Ariz. R. Civ. P. and A.R.S. § 12-332.

¶7 Pursuant to Rule 50, Ariz. R. Civ. P., a defendant is entitled to judgment as a matter of law when the plaintiff fails to present a "legally sufficient evidentiary basis for a reasonable jury to find" in favor of the plaintiff on its claim. A motion for JMOL should be granted "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990); *see also* Ariz. R. Civ. P. 50.

¶8 To succeed on their negligence claim against Stratton, the Watsons had the burden of proving four elements: (1) a duty requiring Stratton to conform to a certain standard of care; (2) a breach by Stratton of that standard; (3) a causal connection between Stratton's conduct and the Watsons' resulting injury; and, (4) actual damages. *See Gipson v. Kasey*, 214 Ariz. 141, ¶ 9, 150 P.3d 228, 230 (2007). Stratton argues on appeal, as it did to the trial court, that the Watsons failed to provide expert testimony establishing the relevant standard of care for a water restoration company and failed to present evidence showing how Stratton fell below that standard.[5] The Watsons counter that they were not required to present such evidence because the jury should have been "entitled to use its collective judgment and common sense to conclude that a restoration company should not spread hazardous materials." Accordingly, we first examine whether the standard of care applicable to a water restoration company is within the experience of an average juror, such that the Watsons were not required to present industry-specific expert testimony to establish the standard of care.

¶9 The standard of care for "'one who undertakes to render services in the practice of a profession or trade'" is not the reasonable man standard. *See Chambers v. W. Ariz. CATV*, 130 Ariz. 605, 607, 638 P.2d 219, 221 (1981), *quoting* Restatement (Second) of

[5]Stratton also argues the Watsons failed to present sufficient evidence of causation or damages. We do not address these arguments in view of our decision on the standard of care issue.

Torts § 299A (1965). Instead, the conduct of tradesmen and professionals is judged according to "'the skill and knowledge normally possessed by members of that trade or profession in good standing in similar communities.'" *Powder Horn Nursery, Inc. v. Soil & Plant Lab., Inc.*, 119 Ariz. 78, 82, 579 P.2d 582, 586 (App. 1978), *quoting Kreisman v. Thomas*, 12 Ariz. App. 215, 220, 469 P.2d 107, 112 (1970).

¶10 The case law cited by the Watsons is consistent with the principle outlined in Restatement § 299A and recognized by *Powder Horn Nursery*—that there is a need for standard of care evidence when the specialized services of the defendant are outside the common understanding of the jury. *See Rossell v. Volkswagen of Am.*, 147 Ariz. 160, 167, 709 P.2d 517, 524 (1985) ("We do not disturb the rule that in determining what is 'reasonable care,' expert evidence may be required in those cases in which factual issues are outside the common understanding of jurors."); *Ritchie v. Krasner*, 221 Ariz. 288, ¶ 18, 211 P.3d 1272, 1280 (App. 2009) (independent medical examiner assumed duty to conform to legal standard of care for one with his knowledge, skill, and training); *Bell v. Maricopa Med. Ctr.*, 157 Ariz. 192, 194, 755 P.2d 1180, 1182 (App. 1988) ("In professional malpractice cases, the reasonable man standard is therefore replaced by a standard based upon the usual conduct of other members of the defendant's profession in similar circumstances."). The Watsons provide no authority nor are we aware of any supporting the proposition that specialized services provided by a water restoration company are within the common understanding of jurors. Indeed, before trial the Watsons sought to designate several witnesses to provide expert testimony concerning the standard of care applicable to water restoration services, as well as containment and remediation of hazardous materials. Stratton opposed the designations. The court granted Stratton's motion in limine, precluding two of three witnesses from opinion testimony related to asbestos and lead contamination procedures because they were not qualified. The third witness, an industrial hygienist, was qualified to opine on asbestos and lead contamination but could not offer an opinion on the standard of care for restoration services.

¶11 The evidence also demonstrated that the water restoration services provided by Stratton are the kind of skilled trade governed by Restatement § 299A. Mr. Watson testified that before his water loss he had "no idea" what water restoration companies did and needed to be "educated" on the subject. In addition, testimony from the owner of Stratton established that the company's services with respect to water restoration are the kind of skilled trade governed by Restatement § 299A. Therefore, given the nature of the Watsons' allegations against Stratton, they had the burden of establishing the standard of care in the water restoration industry by specific evidence and could not leave the issue to jury speculation. *See Kreisman*, 12 Ariz. App. at 221, 469 P.2d at 113 (where defendant held out to be trained in particular trade or profession, "standard required for the protection of customers against unreasonable risks must be established by specific evidence").

¶12 The Watsons assert they established the applicable standard of care through the testimony of John McDougall, Bill Martin, T.K. Stratton, and Douglas Maynard. We examine the testimony of each in turn.

¶13 McDougall was the public insurance adjuster hired by the Watsons to help them with their claim under their homeowner's insurance policy. At trial, he testified he had no experience as a remediation contractor; further, he was "not offering any opinion as an expert on the standard of care in the restoration contracting industry." Similarly, Martin, the Watsons' industrial hygienist, admitted he did not do restoration work and agreed he could not "offer an opinion on the standard of care let alone a breach of the standard of care for a restoration company." Therefore, by their own testimony, neither McDougall nor Martin could establish the requisite standard of care in the water restoration industry.

¶14 With respect to Stratton, the co-owner of Stratton Restoration, the Watsons appear to contend the standard of care was established when he testified as follows:

> Q. Mr. Stratton, isn't it true that ordinarily you would want the house dried out within three to five days?
>
> A. From when the loss occurred, yes.
>
> Q. And you would also want the personal properties packed out by that time, wouldn't you?
>
> A. From when the loss occurs, yes.
>
> . . . .
>
> Q. Do you believe that what you discussed regarding your website and being proactive about drying out a location where there has been a water damage is, in fact, the standard of the restoration industry?
>
> A. Yes.

¶15 This exchange establishes, at most, the standard of care for a restoration company three to five days after the water damage occurred. The date the water damage began was estimated by the Watsons to have been in July, although they could not be certain because they had not been in the house for several months. More important for the purpose of determining the relevance of this testimony, however, it is undisputed that the water damage occurred several weeks prior to Stratton's involvement. Moreover, Stratton explained that by the time he was hired to remediate the Watsons' water loss, his project manager, Tyler Weech, had observed visible mold growth and "[a]t that point the need for immediate services [was] kind of out the door." Indeed as Weech amplified, "The reason [Stratton] didn't proceed with the dry out [was] because there was all this visible [mold] growth, and you wouldn't dry out visible growth."

¶16 While Stratton's testimony may have established a standard of care requiring a home's contents to be removed and

dried out to commence within three to five days from the date of the water loss, it did not establish the existence of such a standard of care when the loss occurred several weeks prior to Stratton's involvement and when there was already visible mold growth in the home. In fact, the testimony of both Stratton and Weech expressly negates the existence of such a requirement.[6]

¶17 Finally, the Watsons rely on testimony from Maynard, the contractor who completed restoration work on the Watsons' residence. Maynard testified he was "trained to contain hazardous materials at a water damaged site" because "[y]ou want to keep the potential of hazardous materials isolated in one area . . . [to] protect the rest of the house."

¶18 Maynard's testimony only establishes that a restoration company should work to contain all disturbed hazardous materials. He qualified its application, however, where there had been prior restoration work. For instance, Maynard explained he did not set up any containment in the Watsons' residence because "the whole house could have been contaminated at [that] point," so establishing containment thereafter "is a moot point."[7] More specifically, Maynard did not opine that Stratton's work did not comply with the standard of care. Accordingly, Maynard's testimony was insufficient for the Watsons to establish a standard of care, or Stratton's breach of it, in the situation where the whole house had been exposed to cross-contamination of hazardous materials.

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[6]At oral argument, the Watsons relied on Exhibit 26, a series of screen captures of Stratton Restoration's website, as evidence of the standard of care. But the exhibit provides no evidence of a standard of care for water restoration services when the loss occurred several weeks before and when visible mold growth is present.

[7]Maynard further indicated that prior to his deposition in this case he did not know there were two other contractors that worked at the Watson house before he started, nor did he know the type of work DC did as compared to what Stratton did.

¶19 Because Stratton held itself out to be trained in a particular trade or profession, we conclude the Watsons' negligence claim required them to establish the standard of care by specific evidence. *See Powder Horn Nursery*, 119 Ariz. at 82, 579 P.2d at 586; *Kreisman*, 12 Ariz. App. at 221, 469 P.2d at 113. "It cannot be left to conjecture nor be established by argument of counsel." *Kreisman*, 12 Ariz. App. at 221, 469 P.2d at 113. Without the mandatory evidence regarding duty and breach, there was no basis upon which the jury could have found Stratton liable to the Watsons. *See Thomas v. Goudreault*, 163 Ariz. 159, 171, 786 P.2d 1010, 1022 (App. 1989) (affirming trial court's directed verdict where plaintiff failed to provide expert testimony on standard of care in air conditioning industry). Therefore, the trial court did not err in granting Stratton's motion for JMOL.

Attorney Fees and Costs

¶20 In its cross-appeal, Stratton argues the trial court erred in denying its application for an award against the Watsons of its attorney fees and costs. The motion was brought pursuant to A.R.S. § 12-349 and Rule 11. Although the Watsons filed a reply brief in this court, they declined to respond to Stratton's cross-appeal, claiming that it is frivolous and therefore "merits no response." A failure to respond to a non-trivial issue may be deemed a confession of reversible error. *See DeLong v. Merrill*, 233 Ariz. 163, ¶ 9, 310 P.3d 39, 42 (App. 2013); *Wickman v. Ariz. State Bd. of Osteopathic Exam'rs*, 138 Ariz. 337, 340, 674 P.2d 891, 894 (App. 1983) ("If a debatable issue is raised on appeal, appellee's silence constitutes a confession of reversible error."). We thus determine whether Stratton presented a non-frivolous issue on appeal.[8]

[8]To the extent the Watsons seek to incorporate their lower court pleadings in lieu of a direct response to Stratton's cross-appeal, such practice is not permitted. Appellate arguments and responses thereto must be developed in the body of the brief as provided by Rule 13, Ariz. R. Civ. App. P. *Cf. State v. Walden*, 183 Ariz. 595, 605, 905 P.2d 974, 984 (1995) (under analogous rule of criminal procedure, "[a]rgument must be in the body of the brief," and text in

¶21 Section 12-349(A) provides that a court "shall assess" an award of reasonable attorney fees against a party who (1) "[b]rings or defends a claim without substantial justification," (2) "[b]rings or defends a claim solely or primarily for delay or harassment," (3) "[u]nreasonably expands or delays the proceeding," or, (4) "[e]ngages in abuse of discovery." An attorney fee award under § 12-349(A) requires proof by a preponderance of the evidence of one of the four grounds listed. *See Donlann v. Macgurn*, 203 Ariz. 380, ¶ 36, 55 P.3d 74, 80-81 (App. 2002). Because a fee award under this statute is mandatory, we review whether sufficient evidence existed to support the denial of the award, considering the court's findings of fact under a clearly erroneous standard and applying a de novo standard to its application of the statute. *See Phoenix Newspapers, Inc. v. Dep't of Corr.*, 188 Ariz. 237, 243, 244, 934 P.2d 801, 807, 808 (App. 1997). The trial court must enumerate the reasons for its ruling such that a reviewing court can test the validity of the judgment. *See Rogone v. Correia*, 236 Ariz. 43, ¶ 22, 335 P.3d 1122, 1129 (App. 2014).

¶22 Similarly, Rule 11 requires sanctions against a party and/or counsel "'when: (1) there was no reasonable inquiry into the basis for a pleading or motion; (2) there was no chance of success under existing precedent; and (3) there was no reasonable argument to extend, modify or reverse controlling law.'" *Villa De Jardines Ass'n v. Flagstar Bank, FSB*, 227 Ariz. 91, ¶ 13, 253 P.3d 288, 293 (App. 2011), *quoting Wolfinger v. Cheche*, 206 Ariz. 504, ¶ 29, 80 P.3d 783, 789 (App. 2003). The reasonable inquiry requirement of Rule 11 does not end after the filing of a complaint; rather, counsel and client must review and reevaluate a client's position as the facts of the case are developed. *See Standage v. Jaburg & Wilk, P.C.*, 177 Ariz. 221, 229-30, 866 P.2d 889, 897-98 (App. 1993). In addition, the good faith component of Rule 11 is not subjective, but is judged against the objective standard of what a professional, competent attorney would do in similar circumstances. *See id.* at 230, 866 P.2d at 898.

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appendix stricken), *overruled on other grounds by State v. Ives*, 187 Ariz. 102, 107-08, 927 P.2d 762, 767-68 (1996).

¶23 In its ruling denying Stratton's request for sanctions, the trial court agreed with Stratton that the Watsons had "failed to present evidence of standard of care or damages caused by any breach of duty beyond mere speculation." Nevertheless, the court denied Stratton's motion for sanctions, concluding "there was no bad faith or insubstantial basis for [the Watsons'] claim against Stratton" because it wasn't discovered until trial that someone other than Stratton had breached the bathroom countertops.

¶24 On cross-appeal, Stratton argues it was entitled to sanctions because the trial court found the Watsons failed to, inter alia, present sufficient standard of care evidence. Specifically, Stratton contends the court's reliance on the late-discovered evidence that a third party was involved in the bathroom countertop breach is misplaced. As discussed earlier, the standard of care evidence was arguably embedded in the testimony of several witnesses, and Maynard at least appeared to be qualified to offer an opinion. Although Stratton sought to limit by pretrial motion which witnesses could offer standard of care testimony against it, there was no final ruling precluding Maynard from testifying. On this record, we cannot say the Watsons were squarely presented with missing standard of care evidence until their expert testified. And as the court noted in its ruling, the lack of evidence pertaining to causation or damages was not apparent until the Watsons' case-in-chief. Accordingly, we also conclude that neither Rule 11 or § 12-349 could have provided a basis to award attorney fees.

¶25 Stratton also argues the Watsons lacked substantial justification for filing this appeal and it is therefore entitled to appellate attorney fees pursuant to § 12-349 and Rule 25, Ariz. R. Civ. App. P. But Stratton has failed to show by a preponderance of the evidence that the Watsons' appeal was groundless, in bad faith, and harassing in order to be entitled to a mandatory award of attorney fees under § 12-349. *See Donlann*, 203 Ariz. 380, ¶ 36, 55 P.3d at 80-81. Unlike sanctions under § 12-349, an award of attorney fees and costs under Rule 25 is discretionary. *See Ariz. Dept. of Revenue v. Gen. Motors Acceptance Corp.*, 188 Ariz. 441, 446, 937 P.2d 363, 368 (App. 1996). Although we have rejected the Watsons' argument on appeal, in our discretion we deny Stratton's request for

appellate attorney fees in this case. *See Overson v. Cowley*, 136 Ariz. 60, 73, 664 P.2d 210, 223 (App. 1982).

Disposition

¶26 For the foregoing reasons, we affirm the trial court's grant of judgment as a matter of law in favor of Stratton and its denial of Stratton's motion for sanctions.