IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

MARCIA V. BOLLIN,
Plaintiff/Appellant/Cross-Appellee,

v.

CUMMINGS PLUMBING, INC., AN ARIZONA CORPORATION,
Defendant/Appellee/Cross-Appellant.

No. 2 CA-CV 2014-0127
Filed September 8, 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NOT FOR PUBLICATION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. C20125466
The Honorable James E. Marner, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

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

E S P I N O S A, Judge:

¶1 Appellant Marcia Bollin appeals the trial court's rulings granting appellee Cummings Plumbing's (Cummings) motion for judgment as a matter of law on her claims for negligence, intentional infliction of emotional distress, negligent infliction of emotional distress, and punitive damages. She also challenges, and Cummings cross-appeals, portions of the trial court's judgment denying their requests for attorney fees and costs. Cummings additionally cross-appeals the trial court's preclusion of one of its expert witnesses. For the following reasons, we affirm.

Factual and Procedural Background

¶2 In the fall of 2010, Bollin hired Cummings to install a Heating, Ventilation and Air Conditioning (HVAC) system in her residence. The contract provided that Cummings would complete all work "in a professional manner according to standard practices." A few months after installation, Bollin began noticing a "chemical smell" coming from the HVAC system and dust accumulating in "certain areas" of her house. Bollin notified Cummings of both issues and was told "there's no way anything can get in the[system]" because it was sealed.

¶3 Cummings conducted an annual "checkup" on Bollin's HVAC system in November 2011. Bollin told the Cummings technician she was concerned about the smell and the dust in her home. She also informed him about a pigeon problem she was having on her roof, expressing concern that pigeon debris and feces might be entering into her home through the HVAC system. After

inspecting the system, the employee told her "not to be concerned about the pigeons" and "everything was fine."

¶4 In April 2012, Bollin asked Cummings to inspect the HVAC system again because she was worried that the previously reported fumes and dust inside her home were affecting her health. After Bollin showed a technician some white dust accumulating in her house—which he could not explain—he telephoned his supervisor, Jason Carnes. Bollin then informed Carnes about the odors and dust but he "stern[ly]" told her the HVAC system "was functioning fine," and the problems were caused by something Bollin was doing.

¶5 In June 2012, Bollin contacted Carnes and asked him to clean the ducts on the HVAC system, to which he agreed. About two weeks after the ducts were cleaned, Bollin perceived no improvement with the dust, so she telephoned Carnes again. According to Bollin, she "begged him to come out," but Carnes refused, stating "he was through with . . . making any deals," and "you[a]re one in a million that sees white." When Bollin asked what he had meant by the latter comment, Carnes repeated it several more times, and at one point stated "well, you know, people lie."

¶6 The following day, Bollin hired a different company to inspect the HVAC system. The new technician noted gaps in the HVAC on the roof and was concerned that pigeons nesting around the gap could have been causing "some problems inside the house." Based on this information, Bollin called Cummings to "tell them what [had been] found." When the receptionist told her Carnes would come to her house, Bollin complained of the treatment she had received from him the previous day and asked for someone else instead.

¶7 Carnes nevertheless went to Bollin's home, and she directed him to one of her televisions, which was "covered" in dust, ran her finger down the television, and with her "finger up" said, "now, . . . am I still one in a million that sees white?" Carnes responded in a raised voice, "I just left my boss. I don't have to be here. I can leave . . . ." Bollin described his behavior as "demeaning

. . . intimidating, bullying," and it made her feel "hopeless." Eventually, Bollin hired another company to clean and close the gap in the ducts, and the dust stopped around July 2012.

¶8 Bollin sued Cummings in September 2012 for breach of contract, intentional infliction of emotional distress (IIED), negligent infliction of emotional distress (NIED),[1] negligence, and punitive damages. At trial, Cummings moved for judgment as a matter of law on all counts. The court denied the motion as to the breach of contract claim, but granted it on all remaining counts. The jury returned a verdict for Bollin on the contract claim in the amount of $3,059.

¶9 Both parties sought recovery of attorney fees and costs pursuant to A.R.S. §§ 12-341 and 12-341.01, each claiming to have been the successful party. Cummings also sought fees under A.R.S. § 12-349. After applying "both the 'percentage of success factor' test and the 'totality of the litigation' test," the trial court deemed both parties the successful party "to some degree," but declined to award either side attorney fees. In doing so, the court pointed out that Bollin's actions "unnecessarily morphed [the lawsuit] from a relatively straightforward contract claim . . . subject to compulsory arbitration to a multi-count litigation that was lacking in supportive evidence," and noted that Cummings's failure to respond to Bollin's early settlement attempt "contributed to th[e] protracted litigation."

¶10 The trial court entered judgment in August 2014.[2] Bollin and Cummings filed timely notices of appeal and cross-

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[1]Bollin's complaint did not allege the negligent infliction of emotional distress claim separately, but she asserted it before trial and the trial court determined the complaint provided adequate notice of this claim.

[2]Because neither the final judgment nor the under-advisement ruling resolving the issue of attorney fees contained language indicating "no further matters remain[ed] pending," we suspended the appeal pursuant to Rule 3(b), Ariz. R. Civ. App. P., and

appeal, respectively, and we have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

Judgment as a Matter of Law

¶11 Bollin contends the trial court erred in granting judgment as a matter of law (JMOL) on all of her noncontract claims. We review the court's rulings de novo. *See McBride v. Kieckhefer Assocs., Inc.*, 228 Ariz. 262, ¶ 10, 265 P.3d 1061, 1064 (App. 2011). "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.'" *A Tumbling-T Ranches v. Flood Control Dist. of Maricopa Cty.*, 222 Ariz. 515, ¶ 14, 217 P.3d 1220, 1229 (App. 2009), *quoting Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). In deciding the motion, the trial court must not weigh the credibility of witnesses or resolve conflicts of evidence. *See Estate of Reinen v. N. Ariz. Orthopedics, Ltd.*, 198 Ariz. 283, ¶¶ 12, 15, 9 P.3d 314, 318-19 (2000).

Intentional Infliction of Emotional Distress

¶12 To establish a viable IIED claim, a plaintiff must show the defendant: (1) engaged in extreme and outrageous conduct; (2) intended to cause or recklessly disregarded the near certainty that emotional distress would arise from its conduct; and (3) actually caused the plaintiff to suffer severe emotional distress. *See Nelson v. Phx. Resort Corp.*, 181 Ariz. 188, 199, 888 P.2d 1375, 1386 (App. 1994). Before submitting an IIED claim to the jury, the trial court must make a preliminary determination as to whether the acts complained of are sufficiently extreme and outrageous to state a claim for relief. *See Mintz v. Bell Atl. Sys. Leasing Int'l, Inc.*, 183 Ariz. 550, 554, 905 P.2d 559, 563 (App. 1995). "A plaintiff must show that

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remanded to allow the trial court to consider amending the judgment in compliance with Rule 54(c), Ariz. R. Civ. P., which it did.

the defendant's acts were 'so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community.'" *Id.*, *quoting Cluff v. Farmers Ins. Exch.*, 10 Ariz. App. 560, 562, 460 P.2d 666, 668 (1969).

¶13 Here, Bollin asserts Cummings "acted outrageously in disregarding known health hazards to [her] for almost two years while intimidating, bullying and insulting her, which caused palpable, severe emotional distress that manifested itself with physical symptoms." Even viewed in the light most favorable to her, the claim is not supported by the record. Assuming Cummings negligently installed the HVAC system, there was no evidence that Cummings deliberately disregarded "known health hazards" or failed to respond to her complaints. Cummings promptly responded to each service request made by Bollin, but concluded the dust and odors were not coming from the HVAC system. Even if Cummings was wrong about the source of the dust and odors, it cannot be said its response to Bollin's complaints went "'beyond all possible bounds of decency.'" *Id.*

¶14 Nor did Carnes's conduct rise to a level of being extreme or outrageous. His statements to Bollin that she "was one in a million who saw white" and "people lie," though discourteous and unprofessional, were neither extreme nor outrageous. *See Midas Muffler Shop v. Ellison*, 133 Ariz. 194, 198, 650 P.2d 496, 500 (App. 1982) (liability for IIED does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities). And Carnes's comment that he "d[id no]t have to be here," even if stated in a rude and intimidating manner, did not constitute behavior "'regarded as atrocious and utterly intolerable in a civilized community.'" *Mintz*, 183 Ariz. at 554, 905 P.2d at 563, *quoting Cluff*, 10 Ariz. App. at 562, 460 P.2d at 668.

¶15 Bollin's reliance on *Ford v. Revlon, Inc.*, 153 Ariz. 38, 734 P.2d 580 (1987), is misplaced. There, Revlon was found liable after it failed to respond to Ford's ongoing complaints of sexual harassment by her supervisor. *Id.* at 39-41, 43-44, 734 P.2d at 581-83, 585-86. Contrary to Bollin's characterization, it was not merely the "delay in

the face of actual knowledge of potential harm" that made Revlon's conduct "extreme and outrageous." Rather, it was the underlying, severe sexual harassment, which was egregious, coupled with Revlon's long avoidance and disregard in investigating the complaints that made Revlon culpable. *Id.* at 43-44, 734 P.2d at 585-86. Accordingly, we cannot say the trial court erred in finding the conduct Bollin complained of and her resulting emotional distress were insufficient as a matter of law to sustain an IIED claim. *See Midas Muffler Shop*, 133 Ariz. at 199, 650 P.2d at 501.

Negligent Infliction of Emotional Distress

¶16 A plaintiff may recover damages for mental anguish or emotional distress precipitated by fright, shock, or mental disturbance resulting from conduct by the defendant that placed the plaintiff in fear for her own safety or security. *Quinn v. Turner*, 155 Ariz. 225, 227-28, 745 P.2d 972, 974-75 (App. 1987). However, unless the emotional distress is severe and accompanied by, manifests as, or develops into bodily harm, there can be no recovery. *Keck v. Jackson*, 122 Ariz. 114, 115-16, 593 P.2d 668, 669-70 (1979); *Monaco v. HealthPartners of S. Ariz.*, 196 Ariz. 299, ¶ 7, 995 P.2d 735, 738 (App. 1999). "[T]ransitory physical phenomena," such as "headaches, acid indigestion, weeping, muscle spasms, depression and insomnia" experienced temporarily as a result of distress are not the type of bodily harm to sustain a cause of action for emotional distress. *Burns v. Jaquays Mining Corp.*, 156 Ariz. 375, 379, 752 P.2d 28, 32 (App. 1987) (short-term psychosomatic injuries arising from emotional disturbance not enough to sustain NIED claim). Nor is the threat of future harm, not yet realized, sufficient. *Id.* at 377-78, 752 P.2d at 30-31 (no claim for damages for fear of contracting asbestos-related diseases in future without manifestation of bodily injury).

¶17 In *Burns*, residents of a trailer park adjacent to an asbestos mill were exposed to asbestos fibers "blown from the mill and tailings pile." *Id.* at 376, 752 P.2d at 29. After learning inhalation of asbestos fibers was dangerous and life-threatening, plaintiffs sued the mill, claiming they had suffered from mental anguish as a result of their exposure. *Id.* at 376-77, 752 P.2d at 29-30.

At the time of the lawsuit, none of the plaintiffs had been diagnosed with any asbestos-related conditions. *Id.* at 377, 752 P.2d at 30. Although they provided expert testimony demonstrating clinically significant mental distress, manifesting in temporary psychosomatic injuries consisting of "headaches, acid indigestion, weeping, muscle spasms, depression and insomnia," this court determined such were "not the type of bodily harm which would sustain a cause of action for emotional distress." *Id.* at 378-79, 752 P.2d at 31-32.

¶18 Here, Bollin claimed that the treatment she received from Cummings caused her "mental and emotional distress." She also alleged it caused her to suffer from heart palpitations, vertigo, and insomnia. Her "dealings" with Cummings also resulted in frequent crying, and she sometimes had trouble breathing. These symptoms are similar to those experienced by the plaintiffs in *Burns*, and Bollin failed to show they were not merely transitory, temporary, or inconsequential; thus, they are not the type of bodily harm capable of sustaining a cause of action for emotional distress. *See id.* at 378-79, 752 P.2d at 31-32; *see also Monaco*, 196 Ariz. 299, ¶ 12, 995 P.2d at 739 (emotional disturbances must not be temporary, transitory, inconsequential or "'harmless in themselves'"), *quoting* Restatement (Second) of Torts § 436A cmt. c (1965). Moreover, Bollin presented no medical evidence indicating that heart palpitations, vertigo, or trouble breathing are conditions caused by emotional distress; nor did she indicate whether she had experienced these conditions previously, or whether the conditions manifested only as a result of the emotional distress attributed to Cummings. *See Keck*, 122 Ariz. at 115-16, 593 P.2d at 669-70. We therefore find no error in the trial court's ruling on Bollin's NIED claim as a matter of law.

Negligence

¶19 Bollin next argues the trial court erred in not submitting her negligence claim to the jury based on its finding "no evidence of unreasonable risk of bodily harm to the plaintiff." To prevail on a negligence claim, a plaintiff must prove: "(1) a duty requiring the defendant to conform to a certain standard of care; (2) a breach by the defendant of that standard; (3) a causal connection between the

defendant's conduct and the resulting injury; and (4) actual damages." *Gipson v. Kasey*, 214 Ariz. 141, ¶ 9, 150 P.3d 228, 230 (2007). The elements of breach, causation, and damages are factual issues usually decided by a jury, but "if no reasonable juror could conclude that the standard of care was breached or that the damages were proximately caused by the defendant's conduct," a court may decide those elements as matters of law. *Id.* at n.1, 150 P.3d 228, 230 n.1.

A. Breach of Duty

¶20 A duty is an "'obligation, recognized by law, which requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm.'" *Gipson*, 214 Ariz. 141, ¶ 10, 150 P.3d at 230, *quoting Markowitz v. Ariz. Parks Bd.*, 146 Ariz. 352, 354, 706 P.2d 364, 366 (1985). "The general test for whether a defendant's conduct breached the standard of care is whether a foreseeable risk of injury existed as a result of defendant's conduct." *Robertson v. Sixpence Inns of Am., Inc.*, 163 Ariz. 539, 544, 789 P.2d 1040, 1045 (1990). The conduct of tradesmen and professionals is judged according to "'the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.'" *Powder Horn Nursery, Inc. v. Soil & Plant Lab., Inc.*, 119 Ariz. 78, 81, 579 P.2d 582, 585 (App. 1978), *quoting* Restatement (Second) of Torts § 299A (1965).

¶21 Cummings unquestionably owed a duty to Bollin to install the HVAC system properly, an issue which does not appear to be in dispute. And Bollin presented expert testimony that Cummings failed to meet the industry standard of care in installing the "return grille" on the system, and in sealing gaps in the ducts. The expert also opined that the gaps were the source of the dust in Bollin's home. Accordingly, a reasonable jury could have found Cummings breached its duty of care in installing the HVAC system.

B. Causation

¶22 Causation is usually a question of fact left for the jury unless reasonable persons could not conclude that the plaintiff has proved this element. *Barrett v. Harris*, 207 Ariz. 374, ¶ 12, 86 P.3d 954, 958 (App. 2004). "A party may prove proximate causation by presenting facts from which a causal relationship may be inferred, but the party cannot leave causation to the jury's speculation." *Salica v. Tucson Heart Hosp.-Carondelet, L.L.C.*, 224 Ariz. 414, ¶ 16, 231 P.3d 946, 951 (App. 2010). When plaintiff's evidence fails to establish a causal connection, the trial court may enter a directed verdict. *Robertson*, 163 Ariz. at 546, 789 P.2d at 1047.

¶23 At trial, Bollin testified that the dust and fumes in her home "w[ere] affecting [her] healthwise." Specifically, she stated she contracted eye infections requiring medication and "was having problems with [her] breathing . . . [and] was also having vertigo." She also described experiencing heart palpitations, which she attributed to "smell[ing] the chemicals" coming from the HVAC system.

¶24 The jury also heard from an "industrial hygiene" expert that "dried up bird feces" has "the potential for pathogens," and running an air conditioner could disseminate pathogens throughout a house if "a significant degree" of dried fecal matter had been present "in both air return and the supply return ducts for a significant period of time." The expert also stated the presence of bird feces would present a health concern because of the "potential for pathogens."

¶25 Bollin presented no evidence, however, that exposure to dust, or even bird feces, could have caused the injuries of which she complained. In other words, she failed to link Cummings's breach of duty to any of her medical conditions and symptoms. For instance, there was no medical testimony that inhalation of bird feces and other contaminants caused her vertigo or heart palpitations. Thus, even though she presented evidence of possible exposure to pathogens, Bollin failed to connect their inhalation to the development of the specific conditions she alleged, namely, heart

palpitations, insomnia, vertigo, or trouble breathing; consequently, the jury was left to speculate as to causation. *See Salica*, 224 Ariz. 414, ¶ 16, 231 P.3d at 951. Accordingly, because no reasonable jury could have concluded Bollin met her burden in demonstrating her reported injuries were caused by the dust, the trial court properly granted JMOL as to Bollin's negligence claim.[3]

Punitive Damages

¶26 Punitive damages are only recoverable under special circumstances. *Rawlings v. Apodaca*, 151 Ariz. 149, 162, 726 P.2d 565, 578 (1986). A plaintiff must show, by clear and convincing evidence, that defendant acted with an "'evil hand . . . guided by an evil mind.'" *Murcott v. Best W. Int'l, Inc.*, 198 Ariz. 349, ¶ 67, 9 P.3d 1088, 1100 (App. 2000), *quoting Thompson v. Better-Bilt Aluminum Prods. Co.*, 171 Ariz. 550, 556, 832 P.2d 203, 209 (1992); *see also Rawlings*, 151 Ariz. at 162, 726 P.2d at 576 (availability of punitive damages limited to "those cases in which the defendant's wrongful conduct was guided by evil motives").

¶27 Bollin asserts Cummings knowingly created a substantial risk of harm to her health "due to the high probability of pathogens," and argues the evidence establishing her IIED claim also satisfies the punitive damages standard in Arizona. But Bollin overstates the evidence presented at trial. The industrial hygiene expert testified that dried bird feces has "the potential for pathogens." When asked whether pathogens could disseminate throughout a house if "dried up fecal matter of a significant degree" was present "in both air return and the supply return ducts for a significant period of time," the expert opined it was "possible," but did not say it was "highly probabl[e]," as Bollin contends on appeal. Furthermore, Bollin presented no evidence regarding the risk or

[3] In its cross-appeal, Cummings argues the trial court erred in precluding its expert's opinion "regarding the source of the white dust," and contends it should be admissible if JMOL "on the negligence claim should be reversed." In light of our resolution of that issue, we need not address this argument.

level of harm associated with exposure to the type of unspecified pathogens alleged to be commonly found in bird feces.

¶28 In any event, having determined Bollin failed to meet her burden in proving her negligence claim, we need not further address her punitive damages claim. *See Saucedo ex rel. Sinaloa v. Salvation Army*, 200 Ariz. 179, ¶ 21, 24 P.3d 1274, 1280-81 (App. 2001) (conduct giving rise to punitive damages in negligence actions must follow same general principles of establishing liability for simple negligence).

Attorney Fees and Costs

A.R.S. § 12-341.01

¶29 Both parties claim to have been the successful party in the underlying litigation and argue the trial court erroneously denied their requests for attorney fees pursuant to § 12-341.01, governing the recovery of fees in "any contested action arising out of a contract."[4] "Determining the prevailing party for the purposes of attorneys' fees is within the trial court's discretion and 'will not be disturbed on appeal if any reasonable basis exists for it.'" *Vortex Corp. v. Denkewicz*, 235 Ariz. 551, ¶ 39, 334 P.3d 737, 745 (App. 2014), *quoting Berry v. 352 E. Virginia, LLC*, 228 Ariz. 9, ¶ 21, 261 P.3d 784, 788 (App. 2011). "[A]n award of fees under A.R.S. § 12-341.01 is discretionary; it is not an entitlement." *Munger Chadwick, P.L.C. v. Farwest Dev. & Constr. of the Sw., LLC*, 235 Ariz. 125, ¶ 14, 329 P.3d 229, 232 (App. 2014).

¶30 Section 12-341.01(A) provides:

> In any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney fees. If a written settlement offer is rejected and the judgment finally

[4]As the trial court noted, neither party identified a written contract specifically providing for attorney fees.

> obtained is equal to or more favorable to the offeror than an offer made in writing to settle any contested action arising out of a contract, the offeror is deemed to be the successful party from the date of the offer and the court may award the successful party reasonable attorney fees.

The plain language of the statute permits a trial court to award attorney fees only to "'the successful party.'" *Hall v. Read Dev., Inc.*, 229 Ariz. 277, ¶ 7, 274 P.3d 1211, 1213 (App. 2012).

¶31 Section 12-341.01(A) provides two non-exclusive means to determine the successful party. *See id.* ¶ 10. Under the first, "a trial court exercises its broad discretion to determine whether a party was successful in the litigation" then "weighs various factors to decide the amount of fees, if any, to be awarded the successful party, an exercise that is also highly discretionary." *Id.* ¶¶ 8-9. Under the second, the court must compare a written settlement offer against the final judgment and, "[i]f the offer is more favorable than the judgment finally obtained, then the offeror is 'deemed' to be the successful party 'from the date of the offer.'" *Id.* ¶ 9. The offeror, however, is the successful party in the litigation "only after the date of the offer and the trial court still retains its broad discretion to award the successful party some, all, or none of its claimed attorneys' fees."[5] *Id.*

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[5]This second method was added to the statute in 1999. *See* 1999 Ariz. Sess. Laws, ch. 140, § 1. "While the amendment to the statute is not artfully worded, it seems to provide that, if a defendant in a contract action makes a written settlement offer during the course of the case which is rejected, and the plaintiff's ultimate recovery is less than the amount of the offer, then the defendant is entitled to seek a discretionary award of attorneys' fees incurred from and after the date the offer was made." *Hall*, 229 Ariz. 277, ¶ 9, 274 P.3d at 1214, *quoting* 2A Daniel J. McAuliffe, Arizona Legal Forms, Civil Procedure § 68.0 (3d ed.).

¶32 Cummings offered to settle the case for $7,500 on April 28, 2014. But the jury ultimately returned a verdict of $3,059 for Bollin on her breach of contract claim. The court's final judgment additionally ordered Cummings to pay Bollin $310 in connection with the court's ruling on a motion to strike and half of the jury fees, a sum of $625.41. *See Berry*, 228 Ariz. 9, ¶¶ 28-29, 261 P.3d at 789-90 ("final judgment may exceed the scope and amount of a jury's verdict" and includes items such as taxable costs and prejudgment interest). Cummings's offer of $7,500 was more favorable to Bollin than the final judgment award to her of $3,369; thus, Cummings was the successful party for purposes of seeking a discretionary award of attorney fees incurred on and after the date the offer was made. *See Hall*, 229 Ariz. 277, ¶ 9, 274 P.3d at 1213-14.

¶33 In its ruling, the court concluded "both parties are, to some degree, the 'successful party.'" For Bollin also to be a successful party, she must qualify under the first means in § 12-341.01(A), entitling her to seek attorney fees incurred prior to the date of the offer. *See Hall*, 229 Ariz. 277, n.3, 274 P.3d at 1214, 1214 n.3 (noting parties acknowledged "the second sentence of § 12-341.01(A) may change the successful party status as of the date of an offer and the offeree could still be the prevailing party prior to that point"). In cases "involving multiple claims and varied success," as here, courts may apply a "percentage of success" or a "totality of the litigation" test.[6] *Berry*, 228 Ariz. 9, ¶ 22, 261 P.3d at 788–89. "Partial success does not preclude a party from 'prevailing' and receiving a discretionary award of attorneys' fees." *Id.* ¶ 24. Bollin brought a breach of contract claim against Cummings and received a jury verdict on that claim for $3,059, and therefore reasonably could qualify as the successful party under the "percentage of success" or

[6] Bollin asserts she is the successful party under the "net winner" test. This method, however, applies in cases involving "various competing claims, counterclaims and setoffs which are all tried together," *Ayala v. Olaiz*, 161 Ariz. 129, 131, 776 P.2d 807, 809 (App. 1989), not when a defendant merely defends rather than asserting an independent claim, *see Schwartz v. Farmers Ins. Co. of Ariz.*, 166 Ariz. 33, 38, 800 P.2d 20, 25 (App. 1990).

the "totality of the litigation" test. *See id.* ¶¶ 23-24 (attorney fee award appropriate where party failed to prevail on counterclaim but received monetary judgment); *see also Ocean W. Contractors, Inc. v. Halec Constr. Co.*, 123 Ariz. 470, 473, 600 P.2d 1102, 1105 (1979) (monetary award not dispositive but "an important item to consider when deciding who, in fact, did prevail").

¶34 A trial court's award of attorney fees under § 12-341.01(A) "is discretionary and there is no presumption that the successful party is entitled to attorney's fees." *Layne v. Transamerica Fin. Servs., Inc.*, 146 Ariz. 559, 563, 707 P.2d 963, 967 (App. 1985); *see also Hall*, 229 Ariz. 277, ¶¶ 8-9, 274 P.3d at 1213 (award of fees, if any, "highly discretionary"). Even if a court gives no reasons for its decision to deny a request for fees, we will affirm the decision if it has any reasonable basis. *See Uyleman v. D.S. Rentco*, 194 Ariz. 300, ¶ 27, 981 P.2d 1081, 1086 (App. 1999).

¶35 In its ruling, the trial court faulted both parties for unnecessarily extending the litigation. The court noted that Bollin's actions in particular "morphed [this matter] from a relatively straightforward contract claim . . . [in]to a multi-count litigation that was lacking in supportive evidence," which ultimately "generated significant attorney's fees for both sides." For its part, Cummings "contributed to th[e] protracted litigation" by not settling with Bollin when presented an opportunity prior to litigation and by failing to file a timely motion for summary judgment on certain claims, potentially avoiding trial.

¶36 Bollin maintains, however, that the trial court erred in considering "non-fee shifting" tort claims together with her "fee shifting" contract claim. We find this theory without merit because Bollin's tort claims were interwoven with her contract claim and would not have existed but for Cumming's breach of contract. *Cf. Modular Mining Sys., Inc. v. Jigsaw Techs., Inc.*, 221 Ariz. 515, 212 P.3d 853 (App. 2009) (attorney fees for defending against tort claims properly awarded under § 12-341.01 where tort and contract claims "inextricably interwoven"). Finally, although Bolin persuasively argues the factors set forth in *Associated Indem. Corp. v. Warner* support an award of fees in her favor, the decision to do so remained

within the trial court's broad discretion. 143 Ariz. 567, 570-71, 694 P.2d 1181, 1184-85 (1985); *see also Hall*, 229 Ariz. 277, ¶¶ 7-8, 274 P.3d at 1213.

¶37 In sum, the trial court provided a reasonable basis for its ruling and we cannot say it abused its discretion in refusing to award the parties their requested fees. *See Hale v. Amphitheater Sch. Dist. No. 10 of Pima Cty.*, 192 Ariz. 111, ¶ 20, 961 P.2d 1059, 1065 (App. 1998) ("We will not disturb the trial court's discretionary award of fees if there is any reasonable basis for it.").

A.R.S. § 12-349

¶38 We next consider Cummings's cross-appeal alleging the trial court improperly denied its request for attorney fees under § 12-349, which mandates fee awards for the filing of frivolous lawsuits. *See Phx. Newspapers, Inc. v. Dep't of Corrs.*, 188 Ariz. 237, 243, 934 P.2d 801, 807 (App. 1997). We review a trial court's decision to deny a motion for attorney fees under § 12-349 de novo, but review its findings of fact for clear error. *See Hormel v. Maricopa Cty.*, 224 Ariz. 454, ¶ 27, 232 P.3d 768, 775 (App. 2010); *City of Casa Grande v. Ariz. Water Co.*, 199 Ariz. 547, ¶ 27, 20 P.3d 590, 598 (App. 2001).

¶39 Section 12-349 requires a court to award attorney fees if a party has brought a claim "without substantial justification," meaning that "the claim or defense is groundless and is not made in good faith."[7] § 12–349(F). Each element must be proven by a preponderance of the evidence, *Ariz. Water Co.*, 199 Ariz. 547, ¶ 27, 20 P.3d at 598, and "the absence of even one element render[s] the statute inapplicable." *Johnson v. Mohave Cty.*, 206 Ariz. 330, ¶ 16, 78 P.3d 1051, 1055 (App. 2003). We use an objective standard to determine groundlessness, but a subjective standard to determine bad faith. *Phx. Newspapers, Inc.*, 188 Ariz. at 244, 934 P.2d at 808.

[7] "[W]ithout substantial justification" no longer requires a showing of harassment, effective January 1, 2013. *See* A.R.S. § 12-349; *see also* 2012 Sess. Laws, ch. 305, § 2.

¶40 In view of the jury's award on her contract claim, we cannot say Bollin's action against Cummings was groundless. Further, Cummings provides no evidence of bad faith. The trial court therefore did not err by refusing to award attorney fees pursuant to § 12–349. *See Cypress on Sunland Homeowners Ass'n v. Orlandini*, 227 Ariz. 288, ¶ 49, 257 P.3d 1168, 1181 (App. 2011) ("We review an award under § 12–349 to determine if there is sufficient evidence to support the finding of a frivolous claim or defense.").

A.R.S. § 12-341

¶41 Bollin and Cummings each claim the trial court erred in declining to award mandatory costs under § 12-341. That statute provides "[t]he successful party to a civil action shall recover from his adversary all costs expended or incurred therein unless otherwise provided by law." A.R.S. § 12-341. The trial court has discretion in determining the successful or prevailing party in a civil action for purposes of awarding costs. *McEvoy v. Aerotek, Inc.*, 201 Ariz. 300, ¶ 9, 34 P.3d 979, 981 (App. 2001). Once the successful party is determined, however, the award of costs to that party is mandatory. *Id.*; *see also Assyia v. State Farm Mut. Auto. Ins. Co.*, 229 Ariz. 216, ¶ 32, 273 P.3d 668, 675 (App. 2012) (cost award mandatory in favor of successful party).

¶42 As noted above, the trial court has "substantial discretion to determine who is a 'successful party'" for purposes of § 12-341. *Assyia*, 229 Ariz. 216, ¶ 32, 273 P.3d at 675, *quoting Fulton Homes Corp. v. BBP Concrete*, 214 Ariz. 566, ¶ 25, 155 P.3d 1090, 1096 (App. 2007). Here, the court found both parties successful to some degree in the litigation, but did not deem either one the prevailing party. We therefore cannot say the court erred in declining to award costs. *See Gen. Cable Corp. v. Citizens Utils. Co.*, 27 Ariz. App. 381, 385, 555 P.2d 350, 354 (1976) (upholding trial court's ruling directing parties to bear their respective costs where neither party "successful party" under § 12-341); *Watson Constr. Co. v. Amfac Mortg. Corp.*, 124 Ariz. 570, 584-85, 606 P.2d 421, 435-36 (App. 1979) (affirming award of no costs to either party in multiple count/multiple counterclaim litigation where "successful party" difficult to ascertain).

Attorney Fees on Appeal

¶43 Finally, both parties request attorney fees and costs on appeal pursuant to §§ 12-341.01, 12-341, and Rule 21, Ariz. R. Civ. App. P. In our discretion, we decline to award Cummings its fees. As the prevailing party on appeal, however, it is entitled to its appellate costs upon compliance with Rule 21.

Disposition

¶44 For the foregoing reasons, the trial court's judgment is affirmed.