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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

KATHRYN CHAFFIN-HONDA; LEE BALLARD; PATRICE MISCIONI; JAN COLE; JOYCE IRIYE; DORIS CALDWELL; RAY PHIBBS; CHUCK MAY; CHRISTY HUNT; CLAYTON LEE; YOSHIO HONDA; OLIVE J. TRUMPFELLER; FRANCES GANNON; DAVID CHAFFIN; CAROL CHAFFIN; CLAUDIA KIRBY; OPHELIA SEAPY; SHEILA CLAUDIO; LESLIE CLAUDIO; LANG SECREST; IVAL SECREST; LEONARD ROBERTS; HELEN ROBERTS; PATRICIA WICK; R. MISCIONE; ELIZABETH MISCIONE; BETTY OLSON; PAMELA DRAKE; GAIL STAPLES; and BARBARA PHIBBS, Plaintiffs/Appellees, v. CHERYL LYNN REYNOLDS and ANDREW REYNOLDS, Defendants/Appellants.	2 CA-CV 2008-0136 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CV20070858

Honorable Wallace R. Hoggatt, Judge

AFFIRMED

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and

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E S P I N O S A, Judge.

¶1 In this appeal from the trial court's grant of a motion to dismiss a derivative action brought against defendants/appellants Cheryl and Andrew Reynolds, they challenge the court's order denying their motion for mandatory indemnification. We affirm.

Factual Background and Procedural History

¶2 This case involves actions taken by various members and directors of LimeLight Productions, Inc. (LimeLight), a nonprofit children's theater group in Sierra Vista. On July 23, 2007, LimeLight's board decided to dissolve LimeLight and to transfer its assets to Off Broadway Theatre, L.L.C. (Off Broadway), a for-profit entity created by appellants a few weeks earlier.[1] Several months later, appellees, all allegedly members of LimeLight, filed this

[1]Appellant Cheryl Reynolds (Reynolds) was purportedly one of LimeLight's three board members at the time of the July 2007 meeting, although the parties dispute whether she ever was or continued to be a validly elected board member. Reynolds abstained from the

derivative action against appellants. Appellees simultaneously moved for a preliminary injunction, seeking to preserve the existence of LimeLight and its assets and to remove Reynolds and another board member as directors.

¶3 Appellants filed a motion to dismiss pursuant to Rule 12(b)(1) and (b)(6), Ariz. R. Civ. P., claiming appellees lacked standing to bring the lawsuit because they did not represent twenty-five percent of LimeLight's voting power as required under A.R.S. § 10-3631(A)(1). That section provides that a derivative action must be brought by "members having twenty-five per cent or more of the voting power or by fifty members, whichever is less." Contemporaneously with their motion to dismiss, appellants filed a "Motion for Mandatory Indemnification" pursuant to A.R.S. §§ 10-3852(B) and 10-3854, for their expenses and fees incurred in defending the lawsuit.[2] Without having been named as a party or having moved to intervene, LimeLight also filed its own motion to dismiss.

¶4 After an evidentiary hearing, the trial court granted appellants' motion to dismiss for lack of subject matter jurisdiction, finding appellees had failed to establish they had standing under § 10-3631(A)(1).[3] The court then addressed appellants' motion for

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vote concerning the transfer to Off Broadway but did not abstain on the vote to dissolve LimeLight.

[2]These statutes provide the procedures for obtaining, and the circumstances in which a nonprofit director may apply for and receive, indemnification from a nonprofit corporation. Specifically, § 10-3852(B) sets forth when indemnification is required, and § 10-3854 permits a director to apply to a court for indemnification.

[3]Although appellants' motion was brought pursuant to Rule 12(b)(1) and (b)(6), Ariz. R. Civ. P., the court treated it as one brought under Rule 12(b)(1) because "the standing

indemnification: "Although the Court's decision that [appellees] lack standing to maintain this action would normally foreclose the Court from commenting on the merits, [appellants'] Motion for Mandatory Indemnification nonetheless requires the Court to discuss the merits to some extent." The court then explained that, under LimeLight's constitution and bylaws, Reynolds was not a director of LimeLight on July 23, 2007, and therefore the indemnity provisions of § 10-3852 did not apply to her. The court also concluded that, even if § 10-3852 "might be made applicable to a *de facto* director, and assuming further that [Reynolds] was a *de facto* director in July, 2007, she would still not be entitled to indemnification" because she had "acted contrary to the best interests of LimeLight . . . and in violation of her fiduciary obligations to LimeLight." We have jurisdiction of this appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(B).

Discussion

¶5 Appellants first argue the trial court erred in denying their motion for mandatory indemnification "under § 10-3852(A)" because they were the "prevailing party" for purposes of this subsection due to their successful motion to dismiss. Section 10-3852(A) requires a corporation to "indemnify a director who was the prevailing party, on the merits or otherwise, in the defense of any proceeding . . . against reasonable expenses incurred." However, as appellees correctly point out, appellants never claimed in the trial court that they were the

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requirement is set forth by statute, which grants subject matter jurisdiction in certain actions but denies it in others."

"prevailing party" under § 10-3852(A).[4] Because arguments not presented to the trial court are waived, we do not reach this issue. *See Rand v. Porsche Fin. Servs.*, 216 Ariz. 424, n.8, 167 P.3d 111, 121 n.8 (App. 2007) (appellate court does not consider arguments not first raised in trial court).

¶6 Appellants next argue, apparently in the alternative, that the trial court erred in ruling on their indemnification motion at all because it already had determined it lacked subject matter jurisdiction over the complaint and therefore should not have considered it.[5] Appellees, on the other hand, maintain the court did have the authority to address appellants'

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[4]Appellants moved for indemnification pursuant to § 10-3852(B), which entails a different analysis than that under § 10-3852(A). Section 10-3852(B) provides that a nonprofit corporation "shall indemnify an outside director against liability" unless "limited by its articles of incorporation, [§ 10-3851(D),] . . . or subsection C of this section." In addition, a corporation

> shall pay an outside director's expenses in advance of a final disposition of a proceeding, if the director furnishes the corporation with a written affirmation of the director's good faith belief that the director has met the standard of conduct described in [§ 10-3851(A)] and the director furnishes . . . a written undertaking . . . to repay the advance if it is ultimately determined that the director did not meet the standard of conduct.

§ 10-3852(B).

[5]Appellants apparently invited this error and have arguably waived this issue on appeal. *See Martinez v. Schneider Enters. Inc.*, 178 Ariz. 346, 348, 873 P.2d 684, 686 (App. 1994). Although, in support of their proposed form of judgment, the appellants asserted the trial court had erred in ruling on their motion for indemnification after granting their motion to dismiss, as the trial court correctly noted, "Defendants requested, and obviously expected rulings on both motions, and they hoped that both would be granted."

motion under § 10-3854, which permits a director to apply for indemnification "to the court conducting the proceeding or to another court of competent jurisdiction," regardless of its dismissal of the complaint for lack of standing. We agree.

¶7 The plain language of § 10-3854 allows a director to apply for indemnification "to the court conducting the proceeding or to another court of competent jurisdiction." Under this provision, if a director is haled into court on behalf of a nonprofit corporation, the director is statutorily authorized to request that the court order the corporation to indemnify the director, and the trial court is specifically permitted to address the request, without regard to the validity of underlying claims. *See, e.g.*, § 10-3852(A) (providing for indemnification of director as prevailing party "on the merits or otherwise"); A.R.S. § 10-3853 (providing for advance of director's expenses before any determination of merits); *Castlewood Prop. Owners Ass'n v. Trepton*, 720 N.E.2d 10, 12-14 (Ind. Ct. App. 1999) (affirming indemnification award for directors sought in separate proceeding from underlying litigation under statute similar to § 10-3854; rejecting argument that indemnification not required because underlying litigation meritless). Appellants have cited no authority to the contrary.

¶8 Accordingly, we conclude the trial court had jurisdiction to decide appellants' indemnification motion pursuant to § 10-3854 despite its having dismissed appellants' complaint for lack of standing. For this reason, although neither party challenges the trial court's determination that it lacked subject matter jurisdiction under § 10-3631(A)(1), we need not determine whether that ruling was correct in view of our conclusion that the court

had independent jurisdiction under § 10-3854 to entertain appellants' motion for indemnification regardless of whether it had subject matter jurisdiction over appellees' complaint. *Cf. Danielson v. Evans*, 201 Ariz. 401, ¶¶ 36-40, 36 P.3d 749, 759-60 (App. 2001) (explaining trial court had subject matter jurisdiction over one issue although it lacked jurisdiction over another).[6]

¶9 Finally, citing Rule 25, Ariz. R. Civ. App. P., appellees request their attorney fees and costs on appeal on the ground that appellants' appeal was frivolous. Rule 25 allows this court to impose "reasonable penalties," including attorney fees, when an appeal is frivolous. However, an appeal is not frivolous "if the issues raised are supportable by any reasonable legal theory, or if a colorable legal argument is presented about which reasonable attorneys could differ." *In re Levine*, 174 Ariz. 146, 153, 847 P.2d 1093, 1100 (1993). Because we do not find appellants' appeal frivolous, we decline to award appellees their attorney fees and costs incurred on appeal.

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[6]Due to our resolution of the appeal on these grounds, we need not reach the implications of appellants' seeking indemnification from an entity that was not named in the lawsuit. We disagree, however, with appellants' assertion that appellees stood "in [LimeLight's] shoes" and thus would be liable for any indemnification LimeLight would have been ordered to make. To the contrary, appellants successfully moved to dismiss appellees' derivative suit on the basis that they lacked standing to represent LimeLight's interests.

Disposition

¶10 For the foregoing reasons, we affirm the trial court's judgment and deny appellees' request for attorney fees and costs on appeal.

PHILIP G. ESPINOSA, Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

JOHN PELANDER, Chief Judge