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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Cynthia Cheney,

10 Plaintiff,

11 v.

12 United States Life Insurance Company in  
13 the City of New York, a foreign insurance  
14 company; and American General Life  
15 Insurance Company, d/b/a AIG Benefit  
Solutions Connecticut Claim Center, a  
foreign business entity,

16 Defendants.  
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No. CV-17-0004-PHX-DGC

**ORDER**

18  
19 Plaintiff Cynthia Cheney filed a complaint against Defendants United States Life  
20 Insurance Company (“U.S. Life”) and American General Life Insurance Company  
21 (“American General), d/b/a AIG Benefit Solutions, alleging breach of contract and  
22 insurance bad faith. Doc. 1. The Court granted summary judgment in favor of Defendants,  
23 and the judgment was affirmed on appeal. Docs. 116, 134. Defendants have now filed a  
24 motion for attorneys’ fees and litigation costs. Doc. 135. The motion is fully briefed, and  
25 neither party requests oral argument. Docs. 135- 36, 141. The Court will deny the motion.

26 **I. Background.**

27 Plaintiff, a former trial lawyer, was covered by a disability insurance policy  
28 (“Policy”) issued by U.S. Life that provided for the payment of benefits if the policyholder  
became disabled. Doc. 116 at 1- 2. Plaintiff submitted a disability claim in January 2014,

1 alleging that she had been unable to work for several years because of uncontrolled diabetes  
2 and other health conditions. *Id.* at 2-3. U.S. Life denied Plaintiff’s claim in July 2015,  
3 finding that Plaintiff had not established that she was entitled to benefits under the Policy.  
4 *Id.* at 3. Plaintiff sued U.S. Life and a separate entity, American General, for breach of  
5 contract and bad faith. Doc. 1. The Court granted summary judgment in favor of  
6 Defendants on both claims. Doc. 116 at 15-16. The Court found that Plaintiff failed to  
7 cite any evidence indicating that American General was ever a party to the Policy or  
8 involved in writing or administering the Policy. *Id.* at 5- 6. The Court also found that  
9 Plaintiff did not qualify as “totally disabled” under the language of the Policy because the  
10 undisputed evidence showed that she performed the same substantial and material duties  
11 of her job after her disability date as she did before that date. *Id.* at 13-16.

12 Defendants’ renewed motion requests \$176,442.00 in attorneys’ fees and non-  
13 taxable expenses of \$74,126.52.

## 14 **II. Legal Standard.**

15 Under Arizona law, “[i]n any contested action arising out of a contract, express or  
16 implied, the court may award the successful party reasonable attorney fees.”  
17 A.R.S. § 12- 341.01(A). The attorneys’ fees statute seeks to “mitigate the burden of the  
18 expense of litigation to establish a just claim or a just defense.” *Id.* § 12-341.01(B). Fees  
19 may be awarded at the trial court’s discretion. *See Andra R Miller Designs LLC v. US Bank*  
20 *NA*, 418 P.3d 1038, 1045 (Ariz. Ct. App. 2018). In deciding whether to award fees under  
21 § 12-341.01, courts consider: (1) the merits of the claim or defense presented by the  
22 unsuccessful party; (2) whether the litigation could have been avoided or settled and  
23 whether the successful party’s efforts were completely superfluous in achieving the result;  
24 (3) whether assessing fees against the unsuccessful party would cause an extreme hardship;  
25 (4) whether the successful party prevailed with respect to all of the relief sought; (5) the  
26 novelty of the legal question presented; (6) whether the claim or defense had previously  
27 been adjudicated in this jurisdiction; and (7) whether the award would discourage other  
28 parties with tenable claims or defenses from litigating or defending legitimate contract

1 issues for fear of incurring liability for the opposing party’s fees. *Associated Indem. Corp.*  
2 *v. Warner*, 694 P.2d 1181, 1183-84 (Ariz. 1985).

3 **A. Application of § 12-341.01.**

4 Plaintiff first argues that § 12-341.01 should not apply because Defendants did not  
5 establish a “just defense.” Doc. 136 at 3-5. Plaintiff contends that she was never given a  
6 fair opportunity to challenge the basis for the Court’s summary judgment decision – that  
7 Plaintiff did essentially the same work after the onset of her disability as she did before –  
8 because Defendants relied primarily on a different argument in their motion for summary  
9 judgment. *Id.* at 3. The Court addressed and rejected this argument in response to  
10 Plaintiff’s motion for reconsideration. Docs. 123. As the Court observed, U.S. Life’s  
11 summary judgment motion – while focusing primarily on a legal argument that the Court  
12 did not accept – nonetheless contained the elements of the argument on which the Court  
13 ultimately relied. *Id.* at 4. The Court of Appeals held that the Court did not abuse its  
14 discretion in rejecting Plaintiff’s argument. Doc. 134-1 at 4. Plaintiff’s argument that  
15 Defendants did not establish a just defense is without merit.

16 **B. Warner Factors.**

17 Six of the seven *Warner* factors favor awarding attorney’s fees in this case. 694  
18 P.2d at 1184. On the first factor, Defendants prevailed on the merits of both of Plaintiff’s  
19 claims. Doc. 116. Plaintiff argues, citing an Arizona Court of Appeal case, that “a claim  
20 can have merit even if does not succeed.” Doc. 136 at 5 (citing *Scottsdale Mem’l Health*  
21 *Sys., Inc. v. Clark*, 791 P.2d 1094, 1099 (Ariz. Ct. App. 1990)). But *Clark* involved a  
22 litigant who succeeded at both the trial and appeals courts before losing at the Arizona  
23 Supreme Court, which observed that each party had advanced “plausible” statutory  
24 interpretations. *See id.* Here, by contrast, the Court found that Plaintiff’s arguments – both  
25 about American Life’s involvement in the Policy and U.S. Life’s breach of the Policy –  
26 were unsupported by evidence in the record. *See generally* Doc. 116. The Court of  
27 Appeals agreed. Doc. 134-1.

1           On the second factor, Plaintiff argues that Defendants ignored her settlement offers,  
2 and that litigation could have been avoided if Defendants had “simply accept[ed]” her  
3 disability claim. Doc. 136 at 5. But Plaintiff’s offers, including a \$550,000 settlement  
4 offer in May 2018, were either at or above the maximum value of Plaintiff’s total disability  
5 claim. Docs. 136 at 6, 141 at 3. Defendants’ refusal to entertain these proposals was  
6 reasonable given their belief that Plaintiff did not qualify as disabled under the Policy – a  
7 position affirmed by the Court and upheld on appeal. *See* Docs. 63 at 1-2, 116 at 13-15,  
8 134-1. Plaintiff also suggests that U.S. Life’s legal efforts were superfluous in achieving  
9 its successful result because the Court rejected U.S. Life’s main legal theory and granted  
10 summary judgment on another basis. Doc. 136 at 6. As discussed above, U.S. Life’s  
11 summary judgment motion advanced the theory upon which the Court relied in granting  
12 summary judgment. Doc. 123 at 4. Defendants’ belief that Plaintiff did not qualify for  
13 benefits under the Policy compelled Defendants to litigate this case to a conclusion.

14           The fourth, fifth, sixth, and seventh factors also favor a fee award. Defendants  
15 prevailed on all claims asserted by Plaintiff, and the legal questions implicated by the  
16 litigation – far from being novel and unadjudicated – were standard issues of contract  
17 interpretation governed by two Arizona Court of Appeals cases, in addition to well-  
18 established law regarding disability insurance policies in other states. *See* Doc. 116 at 7-  
19 9. A fee award in this case – where Plaintiff’s arguments lacked evidentiary support and  
20 the record in fact supported U.S. Life’s determination that Plaintiff was not disabled under  
21 the Policy – would do little to discourage tenable claims or defenses.

22           The third *Warner* factor weighs against a fee award. While the party requesting fees  
23 has the burden of proving entitlement, “the party asserting financial hardship has the  
24 burden of coming forward with prima facie evidence of financial hardship.” *Woerth v. City*  
25 *of Flagstaff*, 808 P.2d 297, 305 (Ariz. Ct. App. 1991). This requires the party opposing  
26 fees to “present specific evidence of hardship by affidavit or testimony.” *Best W. Int’l, Inc.*  
27 *v. Patel*, No. CV 04-2307-PHX-JAT, 2008 WL 544820, at \*3 (D. Ariz. Feb. 26, 2008).  
28 Plaintiff has submitted an affidavit stating that she is 70 years old, separated from her

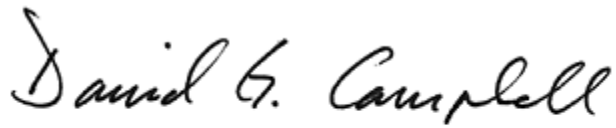
1 husband for 10 years, and suffering from various health ailments that have limited her  
2 ability to work. Doc. 136-1 ¶ 13. Her income over the last decade has been minimal. *Id.*  
3 ¶ 21. While she presently works part time, she is unable to do so on a consistent basis and  
4 her current job – which provides her with an annual income of \$15,000 – will end once her  
5 contract expires at the end of this year. *Id.* ¶¶ 14, 17-19. Her sole sources of income will  
6 then amount to less than \$3,000 each month after taxes. Docs. 138, 139 ¶ 25.

7 Plaintiff has met her burden of establishing financial hardship.<sup>1</sup> Six of seven factors  
8 favor a fee award, but the Court finds such an award would impose an extreme hardship  
9 given Plaintiff’s age, health, and employment status.

10 **IT IS ORDERED:**

- 11 1. Defendants’ motion for attorneys’ fees (Doc. 135) is **denied**.
- 12 2. Plaintiff’s motion for leave to file an amended declaration (Doc. 138) is  
13 **granted**.

14 Dated this 3rd day of December, 2020.

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17 David G. Campbell  
18 Senior United States District Judge  
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27 <sup>1</sup> Defendants assert Plaintiff is still legally married and the financial state of her  
28 community property is unknown, but they present no evidence on this argument and  
request no discovery to support it. *See* Doc. 141 at 3. Plaintiff has met her burden of  
providing prima facie evidence of financial hardship, and Defendants have not rebutted it.