

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000653-001 DT

02/12/2013

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT
J. Eaton
Deputy

JOHN H THALER

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2735 E AMELIA AVE
PHOENIX AZ 85016

v.

DONNA A BROCK (001)

ROBERT D STACHEL JR.

PHX MUNICIPAL CT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case No. 12H4496848.

Defendant-Appellant Donna A. Brock (Defendant) appeals the Phoenix Municipal Court's determination denying her requested attorneys' fees. Defendant contends the trial court erred. For the reasons stated below, the court affirms the trial court's judgment.

I. FACTUAL BACKGROUND.

On March 12, 2012, Plaintiff filed a Petition for an Order of Protection with the Phoenix Municipal Court alleging a series of events which he asserted made him fear for his personal safety. He listed four potential defendants in this request. Because Defendant did not have the required relationship with Plaintiff, the Order was amended to an Injunction Against Harassment (IAH) as to Defendant. Defendant lives in Sierra Vista.

Defendant retained counsel and requested a hearing on the IAH which the trial court held on April 16, 2012. At the conclusion of the hearing, the trial court dismissed the IAH. Defendant requested attorneys' fees and the trial court held a hearing on the attorneys' fees on August 16, 2012. After taking the matter under advisement, the trial court issued a written Order denying Defendant's requested fees. In the Order, the trial court determined that most of the presented testimony "did not establish *direct* evidence of harassment by Defendant Brock." [Sic.] The trial court emphasized the phrase "direct evidence" by repeatedly italicizing the word "direct". The trial court held:

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[T]he evidence was primarily hearsay statements made to Plaintiff Thaler. Plaintiff testified that the hearsay statements were made on behalf of or at the request of Defendant Brock. The only direct statement which was *directly* attributed to Defendant Brock was a text sent on September 15, 2011, “I don’t know you. You don’t know me. You have no idea what I am capable of.”

Finding no other *direct* evidence attributable to Defendant Brock, this Court denied the Petition.

....

The Court specifically informed Defendant that though the majority of Plaintiff’s evidence had been hearsay and had not carried enough weight to support the Petition, that the Court would take into account such hearsay should a written motion for attorneys fees be filed. [Sic.]

Defendant requested \$4,792.50 in fees plus an additional \$1,197.50 in a supplemental affidavit. Following the hearing, the trial court denied Defendant’s requested fees and found (1) it believed Plaintiff had a good faith belief and a meritorious claim against Defendant; (2) the single statement attributable to Defendant was a “clear threat”; and (3) an award of attorneys’ fees would deter others from making valid claims.

Defendant filed a timely appeal. Plaintiff filed a responsive memorandum. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUE: DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT DENIED DEFENDANT’S REQUESTED ATTORNEYS’ FEES:

Abuse of Discretion

A trial court’s decision about attorney fees is subject to review based on an abuse of discretion. Defendant agreed with this standard of review in her appellate memorandum.¹ Because there is little in the way of precedent about attorney fees in Injunction Against Harassment cases, this Court will—for persuasive purposes—look to other instances where attorney fees were awarded or denied. In *Modular Mining Systems Inc. v. Jigsaw Technologies, Inc.* 221 Ariz. 515, 521, ¶ 21, 212 P.3d 853, 859 ¶ 21 (Ct. App. 2009) the Court of Appeals held the appropriate standard to use—in reviewing attorney fee awards—is if the trial court abused its discretion in making the award. Because this Court reviews the trial court’s actions based on an abuse of discretion standard, this Court will not change or revise a trial court’s determination if there is a reasonable basis for the attorney fees ordered or denied. *ABC Supply, Inc. v. Edwards*, 191 Ariz. 48, 52, 952 P.2d 286, 290 (Ct. App. 1996). A court abuses its discretion when there is no evidence supporting the court’s conclusion or the court’s reasons are untenable, legally incorrect, or amount to a denial of justice. *Charles I. Friedman, P.C. v. Microsoft Corp.*, 213

¹ Appellant’s Opening Brief at p. 2, l. 10.
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Ariz. 344, 350, ¶ 17, 141 P.3d 824, 830 ¶ 17 (Ct. App. 2006). In *Charles I. Friedman, P.C. v. Microsoft Corp., id.*, the Arizona Court of Appeals referred to *State v. Chapple*. In *Chapple*, the court held:

Something is discretionary because it is based on an assessment of conflicting procedural, factual or equitable considerations which vary from case to case and which can be better determined or resolved by the trial judge, who has a more immediate grasp of all the facts of the case, an opportunity to see the parties, lawyers, and witnesses, and who can better assess the impact of what occurs before him. Where a decision is made on that basis, it is truly discretionary and we will not substitute our judgment for that of the trial judge; we will not second-guess. Where however, the facts or inferences from them are not in dispute and where there are few or no conflicting procedural, factual or equitable considerations, the resolution of the question is one of law or logic. Then it is our final responsibility to determine law and policy and it becomes our duty to “look over the shoulder” of the trial judge and, if appropriate, substitute our judgment for his or hers.

State v. Chapple, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n. 18 (1983) (citation omitted). An appellate court does not normally sit as a second chance to retry conflicting factual assertions and does not reweigh the evidence to determine if it would reach the same conclusion as the original trier-of-fact. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). The issue about whether to award attorneys’ fees for the successful defense of an IAH is an “assessment of conflicting procedural, factual, or equitable considerations which vary from case to case” rather than a “question . . . of law or logic”. Therefore, it is not appropriate for this Court to substitute its judgment for that of the trial court. This Court will not look over the shoulder of the trial court when the dispute involves conflicting factual considerations. Furthermore, when an appellate court determines that a reasonable view of the facts and law supports the judgment of the trial court, the appellate court must affirm that judgment. “Nevertheless, because we are obliged to uphold the trial court's ruling if legally correct for any reason, . . .” *State v. Canez*, 202 Ariz. 133, 151, ¶ 51, 42 P.3d 564, 582 ¶ 51 (2002) supplemented, 205 Ariz. 620, 74 P.3d 932 (2003). A reasonable view of the facts in this case supports the trial court’s judgment.

Attorneys’ Fees

Plaintiff alleged a series of events which he believed constituted harassment. These included events involving a number of defendants and referenced Defendant as an instigator of conduct allegedly done by Defendant’s son. Plaintiff was not successful in proving his claims, and the trial court did not find his assertions supported a finding of two or more instances of direct harassment against Defendant. The trial court dismissed Plaintiff’s Injunction Against Harassment but specifically found there was a single instance of direct harassment. To maintain an IAH, there must be two or more instances of harassment. A.R.S. § 12–1809(R) states:

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For the purposes of this section, "harassment" means a series of acts over any period of time that is directed at a specific person and that would cause a reasonable person to be seriously alarmed, annoyed or harassed and the conduct in fact seriously alarms, annoys or harasses the person and serves no legitimate purpose. Harassment includes unlawful picketing, trespassory assembly, unlawful mass assembly, concerted interference with lawful exercise of business activity and engaging in a secondary boycott as defined in section 23-1321 and defamation in violation of section 23-1325.

After the trial court dismissed the IAH, Defendant requested attorneys' fees and relied on (1) A.R.S. § 12-1809(N) which provides:

The remedies provided in this section for enforcement of the orders of the court are in addition to any other civil and criminal remedies available. The municipal court and the justice court may hear and decide all matters arising pursuant to this section. After a hearing with notice to the affected party, the court may enter an order requiring any party to pay the costs of the action, including reasonable attorney fees, if any. An order that is entered by a justice court or municipal court after a hearing pursuant to this section may be appealed to the superior court as provided in title 22, chapter 2, article 4, § 22-425, subsection B and the superior court rules of civil appellate procedure [sic] without regard to an amount in controversy. No fee may be charged to either party for filing an appeal.

and (2) the Arizona Rules of Protective Order Procedure (ARPOP), Rule 2(C) which states the costs of the action including attorney fees may be assessed against any party.

In assessing fees, the trial court is to consider three criteria: (1) the merits of the claim asserted by the unsuccessful party; (2) whether the award would pose an extreme hardship to the unsuccessful party; and (3) whether the award might deter others from making a valid claim. There is only one reported case—*Kimicata v. McGee*, 230 Ariz. 6, 279 P.3d 631 (Ct. App. 2012)—interpreting either this rule or A.R.S. § 12-1809 (N).² Defendant argued (1) the IAH proceedings were unduly expanded; and (2) Defendant was forced to incur charges in order to defend her reputation and Constitutional rights. Defendant also claimed (1) Plaintiff's failure to challenge counsel's billing entries as immaterial, irrelevant or unreasonable—as opposed to a "broad challenge"³ to the application—meant Plaintiff consented to the granting of the motion; and (2) the trial court erred because "nothing in the record reflected the trial court's consideration" of the factors set forth in Rule 2(C)(2)⁴.

² There are two unreported decisions. However, unpublished decisions are not regarded as precedent and are not to be cited. *Hourani v. Benson Hosp.* 211 Ariz. 427, 435, ¶ 27, 122 P.3d 6, 14, ¶ 27 (Ct. App. 2005).

³ Appellant's Opening Brief, at p. 6, ll. 18-23.

⁴ *Id.* at p. 8, ll. 14-16.

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This Court notes the trial court (1) found there was an arguable basis for Plaintiff believing Defendant had harassed him even though it was not enough to sustain an IAH; and (2) determined assessing fees against Plaintiff might deter others from making valid claims. Furthermore, the language of the statute—and the Rule—is permissive rather than mandatory. As stated, this Court can only review the award of attorneys’ fees to see if the trial court abused its discretion. This Court finds the trial court did not abuse its discretion. Although Plaintiff may not have presented evidence of financial hardship, neither did Defendant. Therefore, the trial court had no information about this factor when it made its ruling. Defendant asserted there was no merit to the Plaintiff’s claim.⁵ The trial court’s ruling indicates otherwise. The trial court found one specific incident of direct harassment. Additionally, the trial court emphasized the term “direct” in its ruling. The emphasis indicates the trial court considered evidence of indirect harassment in making its ruling and determined Plaintiff had both a good faith belief and a meritorious claim against Defendant. Having found Plaintiff had a good faith belief and a meritorious claim, the trial court decided an award of attorneys’ fee might deter others from making valid claims. While the trial court did not expand on these findings, Defendant did not request specific findings of fact. Nor did the trial court need to make specific findings of fact. In *Kimicata v. McGee, id.*, 230 Ariz. 6, ¶ 10, 279 P.3d 631, 632, ¶ 10 (Ct. App. 2012), the Arizona Court of Appeals held ARPOP, Rule 2(C) does not require a court to make any factual findings.

The trial court is not required to order attorneys’ fees. In looking at the statute—as well as the rule—this Court notes the permissive term “may” is the operative verb. In statutory construction, the general principle is that the use of the word “may” generally indicates a permissive provision. In contrast, the use of the word “shall” usually indicates a mandatory provision. *State v. Lewis*, 224 Ariz. 512, 515, ¶ 17, 233 P.3d 625, 628, ¶ 17 (Ct. App. 2010) aff’d, 226 Ariz. 124, 244 P.3d 561 (2011).

The trial court had the opportunity to review counsel’s China Doll affidavit and listen to argument before denied the requested fees. This Court has also thoroughly reviewed the court file, the transcripts of the two hearings, the legal memoranda and motions, and the exhibits in the underlying cases, and notes Defendant made no objections to the trial court’s alleged failure to make findings of fact and conclusions of law on the record. This Court cannot find the trial court’s decision is untenable, legally incorrect, or a denial of justice. Furthermore, this Court is guided by the Arizona Supreme Court’s standard for the review of attorney fees. In *Associated Indem. Corp. v. Warner*, 143 Ariz. 567 571, 694 P.2d 1181, 1185 (1985)⁶, our Supreme Court commented on the standard for review of attorney fees awards and quoted with approval from the U.S. Supreme Court decision in *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S. Ct. 1933, 1941, (1983) the following :

⁵ *Id.* at p. 8, ll. 21.

⁶ Although *Associated Indem. Corp. v. Warner, id.*, did not deal with protective orders, this Court finds it may be instructive to look to our parallel opinions for assistance in interpreting the rule and statute.

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[W]e reemphasize that the [trial court] has discretion in determining . . . the fee award. This is appropriate in view of the [trial court's] superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters.

Appellate courts must:

. . . affirm where any reasonable view of the facts and law might support the judgment of the trial court. This rule is followed even if the trial court has reached the right result for the wrong reason.

City of Phoenix v. Geyley, 144 Ariz. 323, 330, 697 P.2d 1073, 1080 (1985). Finally, in *Trantor v. Fredrikson*, 179 Ariz. 299, 878 P.2d 657 (1994) the Arizona Supreme Court held the failure of a party to object to the absence of specific findings of fact and conclusions of law barred the party from raising the issue on appeal. Accord, *Kimicata v. Mcgee, id.*, 230 Ariz. 6, ¶ 11, 279 P.3d 631, 632 ¶ 11.

III. CONCLUSION.

Because counsel for Defendant did not raise any failure to provide specific findings of fact and conclusions of law with the trial court, Defendant cannot successfully raise this issue on appeal. An award of attorney's fees is permissive, not mandatory. Furthermore, because this is not a "question . . . of law or logic" this court cannot "substitute its judgment for that of the trial court". This Court will not "look over the shoulder of the trial court" and must, therefore, affirm the determination of the trial court.

Based on the foregoing, this Court concludes the Phoenix Municipal Court did not err.

IT IS THEREFORE ORDERED affirming the judgment of the Justice Court.

IT IS FURTHER ORDERED remanding this matter to the Phoenix Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Myra Harris

THE HON. MYRA HARRIS
Judicial Officer of the Superior Court

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