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February 14, 2011

Arizona Attorney Fees; contracts; unjust conduct

Arizona statutes under Condo Act and Planned Communities Act

ARS 33-1807(A). "The association has a lien for fees, charges, late charges, other than charges for late payment of assessments, monetary penalties or interest charged pursuant to section 33-1803 after the entry of a judgment in a civil suit for those fees, charges, late charges, monetary penalties or interest from a court of competent jurisdiction and the recording of that judgment in the office of the county recorder as otherwise provided by law.

ARS 33-1807(H). "A judgment or decree in any action brought under this section shall include costs and reasonable attorney fees for the prevailing party."

The above can also be found in the condo statutes: ARS 33-1256(A) and (H)

ARS Title 12, Courts and Civil Proceedings, Chapter 3, Fees and Costs.

The following are relevant parts of the Arizona Revised Statutes and corresponding annotations, and is by no means exhaustive. The Annotated ARS for §12-340 et seq. runs some 50 +/- pages. The annotations refer to court history involving the statute in question, and reflect what would be referred to as common law precedent.

The court history is provided in the annotations in order to help the reader to better understand the meaning, or meanings, of the statute.

12-341. Recovery of costs

The successful party to a civil action shall recover from his adversary all costs expended or incurred therein unless otherwise provided by law.

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1. Construction and application

Unless provided for by statute, expenditures made by parties in civil proceedings are not recoverable as costs. *Ahwatukee Custom Estates Management Ass'n, Inc. v. Bach* (App. Div.1 1997) 191 Ariz. 87, 952 P.2d 325, review granted, affirmed in part, vacated in part 193 Ariz. 401, 973 P.2d 106.

"Costs" are incidental damages which are allowed to indemnify a party against the expense of successfully asserting his rights in court. In *re Stavro's Estate* (App. Div.1 1972) 17 Ariz.App. 257, 497 P.2d 77.

"Costs" are incidental damages allowed to indemnify a party against expense of successfully asserting his rights in court and are not recoverable unless provided for by statute. *State v. Griswold* (App. 1968) 8 Ariz.App. 361, 446 P.2d 467.

2. Discretion of court

The trial court has the discretion to determine the successful or prevailing party in a civil action for purposes of awarding costs. *McEvoy v. Aerotek, Inc.* (App. Div.1 2001) 201 Ariz. 300, 34 P.3d 979.

Language of statute which allows successful party to civil action to recover costs is mandatory, and superior court has no discretion to deny costs to successful party. *Roddy v. County of Maricopa* (App. Div.1 1996) 184 Ariz. 625, 911 P.2d 631.

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Statute providing for discretionary award of costs and attorney fees when public records were withheld in bad faith did not prevent award of costs to prevailing party under general costs statute in absence of finding of bad faith. *Star Pub. Co. v. Parks* (App. Div.2 1993) 178 Ariz. 604, 875 P.2d 837, review denied.

The trial court lacked discretion in refusing to grant taxable costs and postjudgment interest to the county in suit on medical care lien, under statute that makes actual awarding of costs mandatory in favor of successful party; discretion extends only to which items to allow. *Matter of Estate of Miles* (App. Div.2 1992) 172 Ariz. 442, 837 P.2d 1177, review denied.

Trial court has discretion to determine who is the "prevailing party" entitled to costs. *Hooper v. Truly Nolen of America, Inc.* (App. Div.1 1992) 171 Ariz. 692, 832 P.2d 709.

Trial court's discretion in awarding costs goes only to question of which items to allow, not to actual awarding of costs which is mandatory in favor of the successful party. *Trollope v. Koerner* (App. Div.1 1973) 21 Ariz.App. 43, 515 P.2d 340, 66 A.L.R.3d 1108.

Amendment to Civil Rule deleting language that "costs shall be allowed as of course to prevailing party unless court otherwise directs" so that rule provided that "court shall pass upon the objections and by its order correct the statement of costs to the extent that it requires correction" did not preclude exercise of discretion on part of trial judge in fixing costs in will contest, but preserved the discretionary authority of trial court, under this section to correct a statement of costs in a manner it deems proper under circumstances of a particular case. In *re Stavro's Estate* (App. Div.1 1972) 17 Ariz.App. 257, 497 P.2d 77.

Taxation of costs in contest of a will before probate is not mandated, but trial court is free to exercise its discretion with regard thereto. In *re Stavro's Estate* (App. Div.1 1972) 17 Ariz. App. 257, 497 P.2d 77.

In 1960, trial judge had great latitude in assessing costs. *Parrish v. Camphuysen* (1971) 107 Ariz. 343, 488 P.2d 657.

Costs are discretionary in a suit to determine the priority of water rights. *Huning v. Porter* (Ariz.Terr. 1898) 6 Ariz. 171, 54 P. 584.

3. Successful parties—In general

Plaintiff motorist was "prevailing party" and therefore was entitled to statutory award of costs in action against defendant motorist and defendant motorist's employer, though plaintiff settled with defendant motorist for \$100,000 before trial and jury awarded plaintiff only \$75,000 in the trial against employer; liability

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was significant issue in trial against employer, no counterclaims were presented, and jury found for plaintiff and awarded damages, though net award after crediting the pretrial settlement was zero. *McEvoy v. Aerotek, Inc.* (App. Div.1 2001) 201 Ariz. 300, 34 P.3d 979.

Once the successful party in a civil action is determined, the award of costs to that party is mandatory. *McEvoy v. Aerotek, Inc.* (App. Div.1 2001) 201 Ariz. 300, 34 P.3d 979.

A plaintiff is the "prevailing party" and therefore is entitled to a statutory award of costs when a jury reaches a verdict in favor of the plaintiff and awards damages, even if the entire amount of damages awarded is offset by a prior settlement. *McEvoy v. Aerotek, Inc.* (App. Div.1 2001) 201 Ariz. 300, 34 P.3d 979.

Determination that adult plaintiff against whom jury had returned a defense verdict, and who had recovered nothing on his claim, was a "successful party" for purposes of recovering costs was an abuse of discretion, even though co-plaintiff was successful. *Bishop v. Pecanic* (App. Div.1 1998) 193 Ariz. 524, 975 P.2d 114, review granted, review vacated, review denied.

Determination of who is a successful party for purposes of awarding costs is left to the discretion of the trial court. *Bishop v. Pecanic* (App. Div.1 1998) 193 Ariz. 524, 975 P.2d 114, review granted, review vacated, review denied.

Awarding management association's nontaxable costs in dispute over homeowners' erection of fence under covenants, conditions and restrictions (CC & Rs), which provided for non-prevailing party's payment of reasonable attorney fees in addition to "any relief or judgment" ordered by court, was not abuse of discretion. *Ahwatukee Custom Estates Management Ass'n, Inc. v. Bach* (1999) 193 Ariz. 401, 973 P.2d 106.

Although defendant in personal injury action was entitled to its expert witness fees and double its taxable costs incurred after its offer of judgment was rejected and after plaintiff obtained judgment in amount less than offer of judgment, plaintiff was nonetheless prevailing party who could recover all her taxable costs. *Davis v. Discount Tire Co.* (App. Div.1 1995) 182 Ariz. 571, 898 P.2d 520.

Although judgment finally obtained by plaintiff was less than defendant's offer of judgment, plaintiff was nonetheless "successful party" and entitled to recover both preoffer and postoffer costs; however, under such circumstance, plaintiff had to pay defendant's postoffer costs. *Drozda v. McComas* (App. Div.1 1994) 181 Ariz. 82, 887 P.2d 612, review denied.

Term "successful party" under statute entitling successful party to recover all costs expended or incurred in civil action means party

who wins lawsuit. *Drozda v. McComas* (App. Div.1 1994) 181 Ariz. 82, 887 P.2d 612, review denied.

Individual employees who were sued along with their employer should have been awarded costs after directed verdict was granted in favor of employees on all counts except negligence, and jury found in favor of employees on negligence charge, even though employer was found liable. *Hooper v. Truly Nolen of America, Inc.* (App. Div.1 1992) 171 Ariz. 692, 832 P.2d 709.

Bank was "successful party" in customer's action for fraud and breach of contract, even though customer received compensation from bank to correct overpayment that occurred when customer's new line of credit was applied to his previous loan obligations, and, therefore, bank was entitled to recover costs; payment made to customer was not result of any motion by customer or court order, and bank prevailed on all other issues. *McAlister v. Citibank (Arizona), a Subsidiary of Citicorp* (App. Div.1 1992) 171 Ariz. 207, 829 P.2d 1253.

Customer's unsuccessful action against bank for breach of alleged promise to renew customer's line of credit at competitive rates arose out of contract, even though customer raised tort claims for fraud and breach of implied covenant of good faith and fair dealing, and, therefore, bank was entitled to recover attorney fees; tort claims could not have existed without alleged breach of contract to loan money. *McAlister v. Citibank (Arizona), a Subsidiary of Citicorp* (App. Div.1 1992) 171 Ariz. 207, 829 P.2d 1253.

State was entitled to an award of costs after it prevailed in quo warranto proceeding to remove mayor, considering that proceeding was civil in nature. *State v. Macias* (App. Div.2 1989) 162 Ariz. 316, 783 P.2d 255, review denied.

In cases involving various competing claims, counterclaims, and setoffs all tried together, the "successful party" for purposes of recovery of costs is the net winner. *Ayala v. Olaiz* (App. Div.1 1989) 161 Ariz. 129, 776 P.2d 807.

Trial court in action challenging validity of contract between cities and utilities erred in refusing to grant utility its costs, where utility was brought into the case as an indispensable party, and aligned itself with cities urging that contract be upheld as valid contract, and contract was upheld. *City of Phoenix v. Long* (App. Div.2 1988) 158 Ariz. 59, 761 P.2d 133.

Purchaser of tax delinquent property was not "successful party" within meaning of this section, where purchaser did not obtain objectives of foreclosing record owners' rights of redemption or recovering attorney fees. *Willow Creek Leasing, Inc. v. Bartzan* (App. Div.1 1987) 154 Ariz. 339, 742 P.2d 840.

12-341.01. Recovery of attorney fees

A. 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 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. This section shall in no manner be construed as altering, prohibiting or restricting present or future contracts or statutes that may provide for attorney fees.

B. The award of reasonable attorney fees pursuant to subsection A should be made to mitigate the burden of the expense of litigation to establish a just claim or a just defense. It need not equal or relate to the attorney fees actually paid or contracted, but the award may not exceed the amount paid or agreed to be paid.

C. The court shall award reasonable attorney fees in any contested action upon clear and convincing evidence that the claim or defense constitutes harassment, is groundless and is not made in good faith. In making the award, the court may consider any evidence it deems appropriate and shall receive this evidence during a trial on the merits of the cause, or separately, regarding the amount of fees it deems in the best interest of the litigating parties.

D. The court and not a jury shall award reasonable attorney fees under this section.

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power of legislature to provide for additive punishments or deterrences. *White v. Kaufmann* (1982) 133 Ariz. 388, 652 P.2d 127.

9. Right to award, generally

Under Arizona law, in determining whether to grant attorney fees and costs, courts should consider whether the unsuccessful party's claim or defense was meritorious, whether the litigation could have been avoided or settled and the successful party's efforts were completely superfluous in achieving that result, whether assessing fees against the unsuccessful party would cause extreme hardship, whether the successful party prevailed with respect to all the relief sought, whether the legal question was novel and whether such claim or defense had previously been adjudicated in that jurisdiction, and whether the award would discourage other parties with tenable claims or defenses from litigating or defending legitimate contract issues for fear of incurring liability for substantial amounts of attorneys' fees. *Newbery Corp. v. Fireman's Fund Ins. Co.*, C.A.9 (Ariz.)1996, 95 F.3d 1392.

Appropriate factors to be considered in denying request for prevailing party attorney fees include the merits of the unsuccessful party's claim, whether the claim could have been avoided or settled, whether the successful party's efforts were completely superfluous in achieving the result, whether assessing fees against the unsuccessful party would cause an extreme hardship, whether the successful party did not prevail with respect to all of the relief sought, the novelty of the legal question presented, and whether an award to the prevailing party would discourage other parties with tenable claims from litigating legitimate contract issues for fear of incurring liability for substantial amounts of attorneys' fees. *Uyleman v. D.S. Rentco* (App. Div.1 1999) 194 Ariz. 300, 981 P.2d 1081.

Statutory authorization for recovery of reasonable attorney fees includes litigation expenses, which are costs incurred in direct connection with provision of legal services and are passed onto client as part of attorney's bill, such as copying, telephone costs, and necessary travel. *Ahwatukee Custom Estates Management Ass'n, Inc. v. Bach* (App. Div.1 1997) 191 Ariz. 87, 952 P.2d 325, review granted, affirmed in part, vacated in part 193 Ariz. 401, 973 P.2d 106.

While attorney-client relationship is prerequisite to recovery of attorney fees by pro se litigant, it is not the only requirement; additional, indispensable requirement is genuine financial obligation on part of litigants to pay such fees to attorney-litigant. *Lisa v. Strom* (App. Div.1

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1995) 183 Ariz. 415, 904 P.2d 1239, review denied.

Although party requesting attorney fees has burden of proving his entitlement thereto, party asserting financial hardship has burden of coming forward with prima facie evidence of financial hardship, as, in most cases, proof related to that factor lies peculiarly within knowledge of party asserting hardship. *Woerth v. City of Flagstaff* (App. Div.1 1990) 167 Ariz. 412, 808 P.2d 297, review denied.

Among factors trial court should consider in deciding whether to award attorney fees is whether assessing fee against unsuccessful party would cause undue hardship. *Woerth v. City of Flagstaff* (App. Div.1 1990) 167 Ariz. 412, 808 P.2d 297, review denied.

Trial court's statutory attorneys' fee award in action involving trustee sale was supported by its consideration that unsuccessful party chose to make highly technical unmeritorious argument and that successful party prevailed with respect to all relief sought. *Main I Ltd. Partnership v. Venture Capital Const. and Development Corp.* (App. Div.1 1987) 154 Ariz. 256, 741 P.2d 1234.

Appellate courts, in deciding whether to award attorney fees under A.R.S. § 12-341.01, should weigh same factors as would trial judge: whether unsuccessful party's claim or defense was meritorious, whether the litigation could have been avoided or settled and successful party's efforts were superfluous, whether assessing fees would cause extreme hardship, whether successful party prevailed with respect to all of relief sought, whether legal question presented was novel, and whether award would discourage other parties with tenable claims or defenses from litigating. *Wagenseller v. Scottsdale Memorial Hosp.* (1985) 147 Ariz. 370, 710 P.2d 1025.

In determining whether attorney's fees should be awarded in contested contract actions, several factors are useful to assist trial judge: merits of claim or defense presented by unsuccessful party; whether litigation could have been avoided or settled; whether assessing fees against unsuccessful party would cause extreme hardship; whether successful party did not prevail with respect to all relief sought; novelty of legal question presented; and whether such claim or defense had previously been adjudicated. *Associated Indem. Corp. v. Warner* (1985) 143 Ariz. 567, 694 P.2d 1181.

In determining whether attorney's fees should be awarded in contested contract actions, trial court should consider whether award in any particular case would discourage other parties with tenable claims or defenses from litigating or defending legitimate contract issues for fear

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of incurring liability for substantial amounts of attorney's fees. *Associated Indem. Corp. v. Warner* (1985) 143 Ariz. 567, 694 P.2d 1181.

Factors that might influence trial court in deciding whether to award prevailing party attorney fees in action on contract are merits of claim or defense presented by unsuccessful party, that litigation could have been avoided or settled and successful parties' efforts were completely superfluous in achieving result, whether assessing fees against unsuccessful party would cause extreme hardship, and whether successful party failed to prevail with respect to all of relief sought. *Wheel Estate Corp. v. Webb* (App. Div.2 1983) 139 Ariz. 506, 679 P.2d 529.

Among factors that might influence trial court in deciding upon appropriateness of awarding prevailing party attorney fees are merits of claim or defense presented by the unsuccessful party, whether litigation could have been avoided or settled and whether successful party's efforts were completely superfluous in achieving the result, whether assessing fees against unsuccessful party would cause extreme hardship, and whether successful party prevailed with respect to all the relief sought. *Grand Real Estate, Inc. v. Sirignano* (App. Div.1 1983) 139 Ariz. 8, 676 P.2d 642.

Fact that property owners' association has only \$8,000 and was voluntary organization serving worthwhile purpose did not preclude assessment of association for attorney fees incurred by prevailing defendants in action seeking to enforce deed restrictions. *Catalina Foothills Ass'n, Inc. v. White* (App. Div.2 1982) 132 Ariz. 427, 646 P.2d 312.

Because discharged public employee's complaint seeking damages for her discharge was properly dismissed, she was not entitled to attorney fees as an incident to the action under any theory, and attorney fees and costs incurred in defending former employer's judicial review action could not alone under statutory authority, support her complaint in the action. *Wichita v. Pima County* (App. Div.2 1982) 131 Ariz. 576, 643 P.2d 21.

Separate action instituted for attorney fees incurred in prior litigation as a result of a tort or breach of contract can only be pursued when plaintiff's expenses were incurred in litigation with someone other than defendant. *Wichita v. Pima County* (App. Div.2 1982) 131 Ariz. 576, 643 P.2d 21.

There was no statute permitting prevailing defendants in action for private way-of-necessity to recover expert witness fees or attorney fees. *Tovrea v. Trails End Imp. Ass'n* (App. Div.2 1981) 130 Ariz. 108, 634 P.2d 396.

In an ordinary two-party lawsuit, attorney fees may only be awarded where agreement

provides for them or when authorized by statute. *Earven v. Smith* (App. Div.2 1980) 127 Ariz. 354, 621 P.2d 41.

General rule is that attorney fees are not allowed except where expressly provided for by either statute or contract. *Sanders v. Boyer* (App. Div.1 1980) 126 Ariz. 235, 613 P.2d 1291.

Award of attorney's fees, when not provided for by contract, is purely statutory, and neither party, by statement or omission in court, can confer authority on a court to make such an award. *Bouldin v. Turek* (1979) 125 Ariz. 77, 607 P.2d 954.

Generally, victim of a breach of contract may recover damages from breaching party to compensate for attorney fees and costs expended by victim to defend a separate suit brought against it as a foreseeable result of the breach. *Fairway Builders, Inc. v. Malouf Towers Rental Co., Inc.* (App. Div.1 1979) 124 Ariz. 242, 603 P.2d 513.

10. Successful parties—In general

Finding that, in debtor's breach of contract action against surety, surety was not entitled to award of attorney fees and costs under Arizona law, was supported by evidence that debtor's rent claim was meritorious, that debtor's belief that its rent claim would exceed surety's offset defense was not unreasonable, that both parties had attempted to avoid trial, that imposition of \$200,000 in fees and costs against debtor would be extreme hardship, that surety did not prevail with respect to all relief sought, that rent determination was not a novel legal issue, and that fee award might have chilling effect on other debtors seeking to bring meritorious claims in similar circumstances. *Newbery Corp. v. Fireman's Fund Ins. Co.*, C.A.9 (Ariz.)1996, 95 F.3d 1392.

To award sanctions of attorney fees pursuant to statute permitting an award of attorney fees to the successful party in a civil action or statute permitting attorney fees in unjustified action the court must determine that the party's claim: (1) constitutes harassment; (2) is groundless; and (3) is not made in good faith; all three elements must be shown and the trial court must make appropriate findings of fact and conclusions of law. *Fisher on Behalf of Fisher v. National General Ins. Co.* (App. Div.1 1998) 192 Ariz. 366, 965 P.2d 100.

Under statute permitting an award of attorney fees to the successful party in a civil action, the court must find clear and convincing evidence. *Fisher on Behalf of Fisher v. National General Ins. Co.* (App. Div.1 1998) 192 Ariz. 366, 965 P.2d 100.

In view of verdict that was partly in favor of lender bank and partly in favor of guarantors of loan to partnership, it was proper for court to

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quishing state's interest in riverbed lands would be awarded attorney fees under private attorney general doctrine for services performed in trial court and on appeal; right asserted belonged to state itself, vindication benefited large numbers of state residents and was of great societal importance, and right could only have been privately enforced. *Arizona Center For Law In Public Interest v. Hassell* (App. Div.1 1991) 172 Ariz. 356, 837 P.2d 158, review dismissed.

Attorney fees to be awarded under private attorney general doctrine to organizations and individuals who successfully challenged validity of legislation relinquishing state's interest in riverbed lands would be assessed against private landowners who intervened as defendants, in addition to state defendants; awarding attorney fees against landowners would promote important public rights and would not be unfair. *Arizona Center For Law In Public Interest v. Hassell* (App. Div.1 1991) 172 Ariz. 356, 837 P.2d 158, review dismissed.

21. Contracts, generally

Where a contract is merely somewhere within the factual background, an award of fees is not proper under Arizona statute authorizing recovery of attorney fees in any contested action arising out of contract. In *re Larry's Apartment, L.L.C.*, C.A.9 (Ariz.)2001, 249 F.3d 832.

When the contract in question is central to the issues of the case, it will suffice as a basis for a fee award, under Arizona statute authorizing recovery of attorney fees in any contested action arising out of contract. In *re Larry's Apartment, L.L.C.*, C.A.9 (Ariz.)2001, 249 F.3d 832.

Pursuant to Arizona statute authorizing recovery of attorney fees in any contested action arising out of contract, mere existence of a contract as a factor in an action does not allow a fee award where the contract is simply peripherally involved in the cause of action. In *re Larry's Apartment, L.L.C.*, C.A.9 (Ariz.)2001, 249 F.3d 832.

Nature of action and circumstances surrounding it must be considered when determining whether fee award is warranted under Arizona statute authorizing recovery of attorney fees in any contested action arising out of contract. In *re Larry's Apartment, L.L.C.*, C.A.9 (Ariz.)2001, 249 F.3d 832.

Action for constructive trust brought by Chapter 11 trustee and others against part-owner of debtor-limited liability company in connection with his purchase and use of parking lot adjacent to debtor's leased premises did not "arise out of a contract" and, thus, it was improper to base plaintiffs' fee award on Arizona statute permitting fee awards in contested contract ac-

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tions; although sales contract between part-owner and vendor might have been a factual predicate to trustee's action, in that it was how part-owner had come into possession of the property, contract was merely peripheral to the action, and plaintiffs did not even want to set it aside but, instead, wanted to obtain the land from part-owner. In *re Larry's Apartment, L.L.C.*, C.A.9 (Ariz.)2001, 249 F.3d 832.

District court's award to community college of \$15,000 in attorney's fees which it found arose out of contract aspects of dispute between administrator and college did not constitute abuse of discretion, where Arizona law provided for award of such fees and defense counsel put in proof of total fees of almost \$92,000. *Nelson v. Pima Community College*, C.A.9 (Ariz.)1996, 83 F.3d 1075.

Optionor was entitled to reasonable attorney fees under Arizona law as successful party in action on option contract to purchase land where optionor had prevailed on optionee's contract claim and counterclaim, which related to alleged oral agreement to extend option contract in land. *Chevron U.S.A. Inc. v. Schirmer*, C.A.9 (Ariz.)1993, 11 F.3d 1473.

Under Arizona law granting attorney fees to successful party in action on contract, defendant is entitled to award of attorney fees if plaintiff is not entitled to recover, or if court finds that contract on which action is based does not exist. *Chevron U.S.A. Inc. v. Schirmer*, C.A.9 (Ariz.)1993, 11 F.3d 1473.

Award of attorney fees allowed by this section upon evidence that claim or defense constitutes harassment, is groundless, and is not made in good faith, did not limit award of attorney fees to prevailing parties. In *re Kun*, C.A.9 1989, 868 F.2d 1069.

Employer which prevailed on breach of contract claim asserted by former employee in wrongful termination suit was entitled to attorney fees under Arizona statute authorizing award to successful party in any contested action arising out of contract, but not for those portion of fees attributable to defending against seven claims alleging violation of federal and Arizona civil rights laws. *Moses v. Phelps Dodge Corp.*, D.Ariz.1993, 826 F.Supp. 1234.

Arizona statute permitting discretionary award of attorney fees to successful party in contested action arising out of contract applies to claim in employment case arising out of contract. *Moses v. Phelps Dodge Corp.*, D.Ariz. 1993, 826 F.Supp. 1234.

Suit by driver's personal insurer for declaratory judgment that employer's garage liability insurer provided primary liability coverage was not an "action arising out of a contract" and, therefore, did not entitle the driver's insurer to

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attorney fees under statute providing for an award to the successful party in an action arising out of a contract; the driver's insurer prevailed on a pure statutory claim as to primary and excess insurers, and neither party challenged the other's underlying insurance contract. *Allstate Ins. Co. v. Universal Underwriters, Inc.* (App. Div.2 2000) 199 Ariz. 261, 17 P.3d 106, review denied.

Fact that aircraft management company and pilot admitted in their pleadings, in breach of contract and negligence action, that allegations in aircraft owner's complaint arose out of contract did not control issue of whether owner was entitled to attorney fees under statute authorizing recovery of attorney fees in any contested action arising out of a contract, where such admission was appropriate because complaint included claim for breach of contract, and owner did not prevail on its contract claim. *Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc.* (App. Div.1 2000) 198 Ariz. 10, 6 P.3d 315.

Aircraft owner's negligence claim, in action for breach of contract and negligence against aircraft management company and pilot, on which owner prevailed did not come within attorney fee statute authorizing recovery of attorney fees in any contested action arising out of a contract, by being interwoven with owner's contract claim, where contract claim was unsuccessful. *Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc.* (App. Div.1 2000) 198 Ariz. 10, 6 P.3d 315.

A successful party on a contract claim may recover not only attorney fees expended on the contract claim, but also fees expended in litigating an "interwoven" tort claim. *Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc.* (App. Div.1 2000) 198 Ariz. 10, 6 P.3d 315.

In the absence of an express contract claim, a tort claim may itself arise out of a contract so as to support an award of attorney fees under statute authorizing recovery of attorney fees in any contested action arising out of a contract. *Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc.* (App. Div.1 2000) 198 Ariz. 10, 6 P.3d 315.

Under statute authorizing recovery of attorney fees in any contested action arising out of a contract, to determine whether a tort claim arises out of a contract, court should look to the fundamental nature of action rather than mere form of pleadings. existence of a contract that merely puts parties within tortious striking range of each other does not convert ensuing torts into contract claims. *Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc.* (App. Div.1 2000) 198 Ariz. 10, 6 P.3d 315.

For purposes of statute authorizing recovery of attorney fees in any contested action arising out of a contract, existence of a contract that

merely puts parties within tortious striking range of each other does not convert ensuing torts into contract claims. *Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc.* (App. Div.1 2000) 198 Ariz. 10, 6 P.3d 315.

Under statute authorizing recovery of attorney fees in any contested action arising out of a contract, a tort claim will arise out of a contract only when the tort could not exist "but for" the breach or avoidance of contract, and when the duty breached is one implied by law based on the relationship of the parties, that claim sounds fundamentally in tort, not contract; test is whether defendant would have a duty of care under the circumstances even in the absence of a contract. *Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc.* (App. Div.1 2000) 198 Ariz. 10, 6 P.3d 315.

Aircraft owner's negligence claim against aircraft management company and its pilot, on which owner prevailed, did not "arise out of a contract" for purposes of statute authorizing recovery of attorney fees in any contested action arising out of a contract; while operating owner's aircraft, pilot owed legal, rather than contractual, duties of care to all persons within foreseeable zone of danger, and pilot's negligence, in causing damage to aircraft's engine, was breach of legal duty that constituted a tort. *Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc.* (App. Div.1 2000) 198 Ariz. 10, 6 P.3d 315.

Statute which holds a pilot responsible for damage to a person or property that is caused by aircraft directed by pilot and results from pilot's negligence merely restated pre-existing tort principles, and thus even if statute applied to property damage caused by aircraft management company's pilot, in aircraft owner's negligence action, statute did not change fundamental nature of owner's negligence claim to one "arising out of a contract," as necessary for owner to be entitled to attorney fees under statute authorizing recovery of attorney fees in any contested action arising out of a contract. *Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc.* (App. Div.1 2000) 198 Ariz. 10, 6 P.3d 315.

Aircraft management company's and pilot's alleged breach of "implied-in-fact" contractual duty of workmanlike performance did not change tort nature of aircraft owner's negligence claim into a claim "arising out of a contract," so as to support award of attorney fees to owner under statute authorizing recovery of attorney fees in any contested action arising out of a contract; such implied duty merely repeated duty already imposed by law. *Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc.* (App. Div.1 2000) 198 Ariz. 10, 6 P.3d 315.

When a contractual duty, either express or implied-in-fact, merely repeats the duty already imposed by law, a breach of that duty does not

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Note 21

12-349. Unjustified actions; attorney fees, expenses and double damages; exceptions; definition

A. Except as otherwise provided by and not inconsistent with another statute, in any civil action commenced or appealed in a court of record in this state, the court shall assess reasonable attorney fees, expenses and, at the court's discretion, double damages of not to exceed five thousand dollars against an attorney or party, including this state and political subdivisions of this state, if the attorney or party does any of the following:

1. Brings or defends a claim without substantial justification.
2. Brings or defends a claim solely or primarily for delay or harassment.
3. Unreasonably expands or delays the proceeding.
4. Engages in abuse of discovery.

B. The court may allocate the payment of attorney fees among the offending attorneys and parties, jointly or severally, and may assess separate amounts against an offending attorney or party.

C. Attorney fees shall not be assessed if after filing an action a voluntary dismissal is filed for any claim or defense within a reasonable time after the attorney or party filing the dismissal knew or reasonably should have known that the claim or defense was without substantial justification.

D. This section does not apply to the adjudication of civil traffic violations or to any proceedings brought by this state pursuant to title 13.

E. Notwithstanding any other law, this state and political subdivisions of this state may be awarded attorney fees pursuant to this section.

F. In this section, "without substantial justification" means that the claim or defense constitutes harassment, is groundless and is not made in good faith.

attorney; attorney failed to conduct formal discovery, make reasonable inquiry, or accept and be governed by previous decisions of Court of Appeals and bankruptcy court that addressed underlying issues. *Standage v. Jaburg & Wilk*, P.C. (App. Div.1 1993) 177 Ariz. 221, 866 P.2d 889, review denied.

Requirement that trial judge make findings when awarding attorney fees under statutes may not be waived. *Trantor v. Fredrikson* (App. Div.1 1993) 176 Ariz. 389, 861 P.2d 674, review granted, vacated 179 Ariz. 299, 878 P.2d 657.

Under statute authorizing appellate courts to award attorneys' fees as sanction for frivolous appeals, harassment or dilatory tactics, ultimate successful party is entitled to recover reasonable attorneys' fees for all stages of litigation, including appellate review. *Larkin v. State ex rel. Rottas* (App. Div.1 1992) 175 Ariz. 417, 857 P.2d 1271, review denied.

Taxpayer who successfully challenged county's property tax assessment satisfied requirements for petition for attorney fees; petition clearly implied that taxpayer agreed to the hourly rate specified in counsel's supporting affidavit, copies of billing statements indicated that taxpayer paid counsel in accordance with hourly rates billed, billing statements detailed services to appropriate degree, county did not show services were duplicative, and record contained sufficient material from which court could evaluate qualities of taxpayer's attorneys, character of work done, work performed, and result obtained. *Hohokam Resources v. Maricopa County* (App. Div.1 1991) 169 Ariz. 596, 821 P.2d 257.

This section providing for assessment of attorney fees in actions determined to be unjustified was not procedural, and thus was not retroactively applicable to libel case pending on its effective date. *Sallomi v. Phoenix Newspapers, Inc.* (App. Div.2 1989) 160 Ariz. 144, 771 P.2d 469.

2. Justification

Employee was not entitled to punitive damages, in disability discrimination and wrongful discharge action under Arizona law, as employer neither engaged in any aggravated or outrageous conduct, nor took actions with evil mind. *Hughes v. Electronic Data Systems, D.Ariz.* 1997, 976 F.Supp. 1303.

City's condemnation action to acquire public utility was fairly debatable, where issue of city's ability to acquire utility without voter approval was one of first impression, and thus public

199 Ariz. 547, 20 P.3d 590.

Action was not brought without substantial justification or for improper purpose so as to support award of costs or fees to defendants after appellate court reversed dismissal of plaintiff's complaint by reinstating one count and granting plaintiffs right to attempt to replead additional count. *Johnson v. McDonald* (App. Div.1 1999) 197 Ariz. 155, 3 P.3d 1075, review denied.

Under statute governing award of attorney fees for unjustified actions, the standard is preponderance of the evidence. *Fisher on Behalf of Fisher v. National General Ins. Co.* (App. Div.1 1998) 192 Ariz. 366, 965 P.2d 100.

Suit by landowner and group of citizens to compel city to reject referendum petitions relating to rezoning ordinance was not frivolous, and thus, opponents of the ordinance were properly denied attorney fees and costs, though opponents prevailed in trial court and Supreme Court disagreed with the argument landowner and citizens made that the rezoning was an administrative act that was not subject to referendum, as the argument was a good faith argument for extension of existing law. *Fritz v. City of Kingman* (1998) 191 Ariz. 432, 957 P.2d 337.

City's actions in defending appeal from denial of award of attorney fees to civil rights plaintiffs and dismissal of certain claims were not without substantial justification or solely or primarily for delay or harassment and therefore plaintiffs, who obtained a reversal on attorney fees issue on appeal, were not entitled to an award of attorney fees on appeal pursuant to applicable Arizona statute; however, fees could be awarded under 42 U.S.C.A. § 1988 for the appeal. *Thomas v. City of Phoenix* (App. Div.1 1991) 171 Ariz. 69, 828 P.2d 1210, review denied.

Trial court, which did not have jurisdiction over cause of action because claimant failed to file a complaint, also lacked jurisdiction to award damages and attorney fees under statutes authorizing attorney fee awards for lack of good faith (A.R.S. § 12-341.01) or substantial justification (A.R.S. § 12-349); such statutes made an award dependent upon the existence of an "action." *Bryant v. Bloch Companies* (App. Div.1 1990) 166 Ariz. 46, 800 P.2d 33.

Husband's appeal claiming that wife was not entitled to any of his share of lottery winnings which he won after hearing had been held on dissolution petition was not unjustified or abusive so as to warrant award of attorney fees. *Lynch v. Lynch* (App. Div.1 1990) 164 Ariz. 127, 791 P.2d 653.

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not supported by this section permitting fee award if party "brings or defends a claim without substantial justification" in light of this section expressly providing that this section was inapplicable to "adjudication of civil traffic violations." *State v. Richey* (1989) 160 Ariz. 564, 774 P.2d 1354.

Claim against a defendant which was neither manufacturer nor distributor of device which allegedly caused plaintiff's injury was not maintained "without substantial justification," so as to support award of attorney fees, during period after receipt of defendant's letter and affidavit denying that it had manufactured or distributed the device; plaintiff was not obligated to rely on defendant's own statement without further limited discovery. *Roberts v. Kino Community Hosp.* (App. Div.2 1988) 159 Ariz. 333, 767 P.2d 56.

Determination that claim for death benefit was brought without substantial justification, thus warranting award of attorney fees, was supported by sufficient evidence showing that attorney knew or should have known at time he filed suit that deceased had made material misrepresentations regarding prior medical treatment on his application for insurance. *Harris v. Reserve Life Ins. Co.* (App. Div.1 1988) 158 Ariz. 380, 762 P.2d 1334.

Evidence supporting inference that insured sought its own legitimate objective, settlement for as little as possible, by improper means, knowingly harassing and coercing plaintiffs through filing unjustified lawsuit, was sufficient to support award of punitive damages. *Bradshaw v. State Farm Mut. Auto. Ins. Co.* (1988) 157 Ariz. 411, 758 P.2d 1313.

Plaintiffs who prevailed at trial and on appeal were not entitled to recover attorney's fees pursuant to subsec. (A)(1) which assesses fees from party who brings claim without substantial justification; given prematurity of plaintiffs' motion to set and certificate of readiness, and its contribution to unfortunate procedural history, defendants did not bring appeal without substantial justification. *Ace Automotive Products, Inc. v. Van Duyne* (App. Div.1 1987) 156 Ariz. 140, 750 P.2d 898.

3. Delay or harassment

Wife's claims in divorce proceeding that husband's repetitive motions had caused unconscionable delays and had caused wife to incur attorneys' fees were not sufficient to show that husband unreasonably delayed proceedings, and thus wife was not entitled to attorneys' fees for unjustified actions. *Donlann v. Macgurn*

Landowner's appeal claiming that city's amendments to the scope of its original condemnation demand provided a statutory or common law basis for award of attorney fees and costs to landowner was not groundless, harassing, or in bad faith, and thus, city was not entitled to statutory attorney fees for the appeal. *City of Sedona v. Devo* (App. Div.1 1999) 196 Ariz. 178, 993 P.2d 1142.

Arizona Department of Corrections (ADOC) was not entitled to attorney fees under statute, mandating attorney fee award for filing of frivolous lawsuit, in action by newspapers challenging ADOC regulations prohibiting visitation of inmates except by five classes of persons; trial judge expressly found no intent to harass and claim was not barred by res judicata, and thus, not groundless. A.R.S. § 12-349. *Phoenix Newspapers, Inc. v. Department of Corrections, State of Ariz.* (App. Div.1 1997) 188 Ariz. 237, 934 P.2d 801.

Awarding attorneys' fees to taxpayers in action to enforce tax refund judgment under statute permitting such awards if party unreasonably expands or delays proceedings was not abuse of discretion, where state continued to resist Tax Court's refund order after Supreme Court refused to accept jurisdiction over state's request for special action relief in that court. *Larkin v. State ex rel. Rottas* (App. Div.1 1992) 175 Ariz. 417, 857 P.2d 1271, review denied.

Tax court's award of attorney fees to taxpayer based on county's unreasonable expansion or delay of proceeding was supported by the record; minute entry made clear that court awarded attorney fees because it found county failed to expediently determine whether taxpayer's factual allegations were legitimately in dispute, record indicated that county assessor had increased limited property tax value of taxpayer's parcel beyond statutory limits, and county failed to diligently pursue discovery and then sought to delay trial to cure its omission. *Hohokam Resources v. Maricopa County* (App. Div.1 1991) 169 Ariz. 596, 821 P.2d 257.

Failure of town's counsel to submit attorney's fee request with sufficient specificity supported trial court's decision to deny town's request for attorney's fees in action challenging validity of town's transaction privilege tax, even though court found that opposing party was guilty of unjustifiably prolonging litigation. *City of Prescott v. Town of Chino Valley* (App. Div.1 1989) 163 Ariz. 608, 790 P.2d 263, review granted in part, affirmed in part and vacated in part 166 Ariz. 480, 803 P.2d 891.

Motion to dismiss appeal on ground that Attorney General lacked standing to challenge

torney General was not entitled to requested attorney fees. *Fund Manager, Public Safety Personnel Retirement System v. Corbin* (App. Div.1 1988) 161 Ariz. 348, 778 P.2d 1244, affirmed in part, dismissed in part 161 Ariz. 364, 778 P.2d 1260.

Telephonic offer to voluntarily dismiss claim two days after learning that the claim was unjustified, and subsequent granting of motion to dismiss four days later, were within a reasonable time, so that award of attorney fees was unjustified. *Roberts v. Kino Community Hosp.* (App. Div.2 1988) 159 Ariz. 333, 767 P.2d 56.

Trial court had jurisdiction to award attorney fees for unreasonable expansion or delay of proceedings and could do so more than 15 days after entry of judgment. *Hamm v. Y & M Enterprises, Inc.* (App. Div.2 1988) 157 Ariz. 336, 757 P.2d 612.

In imposing attorney fees against plaintiff's attorney, trial court did not retroactively apply this section providing for assessment of attorney fees against anyone bringing action for purposes of harassment, given ample evidence in record of actions taken by attorney after effective date of statute which supported trial court's action. *Abril v. Harris* (App. Div.2 1987) 157 Ariz. 78, 754 P.2d 1353.

4. Amount

Maker of note had stated arguable defense of usury sufficient to avoid imposition of sanctions for frivolous pleading against maker's attorney; usury law prohibited charge of interest in excess of maximum provided for in contract, and payee was seeking to enforce contract rate applicable if maker was not in default after maker had defaulted and lower rate provided in contract if maker was in default had taken effect. *Wieman v. Roysden* (App. Div.1 1990) 166 Ariz. 281, 802 P.2d 432.

Award of attorney fees of \$17,840.00, on ground that claim was brought without substantial justification, was not an abuse of discretion. *Harris v. Reserve Life Ins. Co.* (App. Div.1 1988) 158 Ariz. 380, 762 P.2d 1334.

5. Special action

This section did not apply to support award of attorney fees to criminal defendant in special action alleging trial court erred by denying him oral argument and preventing him from filing reply to state's response to his motion to dismiss based on state's allegedly unjustified filing of motion to reconsider court's award of attorney fees in special action; this section by its terms was limited to "any civil action," and accord-

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6. Bad faith

At common law, a condemnee may recover fees and costs if the condemnor acted in bad faith in instituting or in abandoning the proceedings. *City of Sedona v. Devol* (App. Div.1 1999) 196 Ariz. 178, 993 P.2d 1142.

City did not act in "bad faith," as common law basis for awarding attorney fees and costs to landowner, by twice amending its original complaint to reasonably adjust the scope of city's demand and by eventually compromising with landowner regarding the amount and location of the land to be taken for utility easements. *City of Sedona v. Devol* (App. Div.1 1999) 196 Ariz. 178, 993 P.2d 1142.

A condemnor may act in bad faith, as common law basis for awarding attorney fees and costs to condemnee, by arbitrarily initiating condemnation proceedings for land unnecessary for public use. *City of Sedona v. Devol* (App. Div.1 1999) 196 Ariz. 178, 993 P.2d 1142.

Even if statute of limitations had run on client's malpractice claim against her attorneys, trial court did not abuse its discretion in denying attorneys' requests for costs and fees for pursuing groundless claim; trial court found that statute of limitations question was debatable issue, and there was no showing that client pursued action in bad faith. *Reed v. Mitchell & Timbanard, P.C.* (App. Div.1 1995) 183 Ariz. 313, 903 P.2d 621, review denied.

Father who sought to obtain primary residential custody of child was entitled to award of attorney fees incurred on mother's nonmeritorious appeal where mother's actions in prosecuting appeal were motivated at least in part by bad faith. *Rouzaud v. Marek* (App. Div.1 1990) 166 Ariz. 375, 802 P.2d 1074.

7. Willful disobedience

Tax Court had authority to impose award of attorneys' fees against state's General Accountant for willful disobedience of orders requiring that he execute warrants to pay taxpayers' judgment in tax refund case. *Larkin v. State ex rel. Rottas* (App. Div.1 1992) 175 Ariz. 417, 857 P.2d 1271, review denied.

Tax Court abused its discretion when it assessed attorney's fees personally against state's General Accountant based on General Accountant's disobedience of order requiring him to execute warrants to pay taxpayers' refund judgment; General Accountant had disregarded Tax Court's order only once without timely filing appellate court challenge, and Tax Court ulti-

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8. Jurisdiction

Court of Appeals' and Supreme Court's refusal to accept jurisdiction and rule on merits of attorneys' fee request in state's special actions challenging tax refund award constituted final adjudication of taxpayers' claims for attorneys' fees incurred opposing special actions, precluding trial court from ruling on taxpayers' claims for attorneys' fees on grounds not asserted in special actions. *Larkin v. State ex rel. Rottas* (App. Div.1 1992) 175 Ariz. 417, 857 P.2d 1271, review denied.

9. Burden of proof

Party claiming attorney's fees based upon opposing party's bad faith must show that opposing party's claim or defense constitutes harassment, is groundless and is not made in good faith; all three elements must be proven by a preponderance of the evidence. *City of Casa Grande v. Arizona Water Co.* (App. Div.2 2001) 199 Ariz. 547, 20 P.3d 590.

Defendants must show by preponderance of evidence, rather than by clear and convincing evidence, that plaintiffs' lawsuit was groundless, in bad faith, and harassing in order to be entitled to mandatory award of attorney fees for filing of frivolous lawsuit. *Phoenix Newspapers, Inc. v. Department of Corrections, State of Ariz.* (App. Div.1 1997) 188 Ariz. 237, 934 P.2d 801.

10. Findings

Trial judge sufficiently indicated basis for findings of fact and conclusions of law in awarding attorney fees for filing of frivolous lawsuit, where trial judge's minute entry incorporated other trial judge's findings and conclusions in his minute entry denying plaintiffs' motion to amend complaint, which was same as complaint in instant action, and trial judge made specific findings of groundlessness, lack of good faith and intent to harass. *Phoenix Newspapers, Inc. v. Department of Corrections, State of Ariz.* (App. Div.1 1997) 188 Ariz. 237, 934 P.2d 801.

11. Attorney fees

Service mark owners were not entitled to attorney fees, under state or federal law, in action challenging city's enforcement of zoning ordinances in manner preventing owners from displaying their marks unaltered, as city could have reasonably thought that its zoning ordinances did not violate Lanham Act section prohibiting states or their political subdivisions from requiring alteration of marks. *Blockbus-*

Landowner's request for attorney fees as sanction, in its suit to prevent water supplier from transporting water through riverbed which ran across landowner's property, was not warranted in light of appellate determination that water supplier's position was meritorious. *West Maricopa Combine, Inc. v. Arizona Dept. of Water Resources* (App. Div.1 2001) 200 Ariz. 400, 26 P.3d 1171, review denied.

Workers' compensation insurers' position in an action alleging that taxi drivers were employees covered by workers' compensation, and that the insureds had failed to pay necessary insurance premiums, was not wholly without merit, and in the exercise of its discretion, appellate court would deny insureds' request for an award of attorney's fees on appeal, even though summary judgment for insurers was overturned. *State Compensation Fund v. Yellow Cab Co. of Phoenix* (App. Div.1 1999) 197 Ariz. 120, 3 P.3d 1040, review denied.

Uninsured motorist (UM) carrier that successfully defended minor's emotional distress claim was not entitled to sanction of attorney fees pursuant to statute permitting an award of attorney fees to the successful party in a civil action or statute permitting attorney fees in unjustified action, where carrier failed to show that minor's claim, based on automobile accident that killed her step-grandfather, was not brought in good faith or constituted harassment. *Fisher on Behalf of Fisher v. National General Ins. Co.* (App. Div.1 1998) 192 Ariz. 366, 965 P.2d 100.

To award sanctions of attorney fees pursuant to statute permitting an award of attorney fees to the successful party in a civil action or statute permitting attorney fees in unjustified action the court must determine that the party's claim: (1) constitutes harassment; (2) is groundless; and (3) is not made in good faith; all three elements must be shown and the trial court must make appropriate findings of fact and conclusions of law. *Fisher on Behalf of Fisher v. National General Ins. Co.* (App. Div.1 1998) 192 Ariz. 366, 965 P.2d 100.

In exercise of appellate court's discretion, ex-wife would be awarded attorney's fees on ex-husband's appeal of computation of child-support arrearage, as appeal was insufficiently supported by law or record, it unreasonably complicated ex-wife's efforts to collect arrearages, and it could not be said to have been taken in good faith given maintenance of ex-husband's position in light of governing law. *Ziegelbauer v. Ziegelbauer* (App. Div.1 1997) 189 Ariz. 313, 942 P.2d 472.

12-350. Determination of award; reasons; factors

In awarding attorney fees pursuant to section 12-349, the court shall set forth the specific reasons for the award and may include the following factors, as relevant, in its consideration:

1. The extent of any effort made to determine the validity of a claim before the claim was asserted.
2. The extent of any effort made after the commencement of an action to reduce the number of claims or defenses being asserted or to dismiss claims or defenses found not to be valid.
3. The availability of facts to assist a party in determining the validity of a claim or defense.
4. The relative financial positions of the parties involved.
5. Whether the action was prosecuted or defended, in whole or in part, in bad faith.
6. Whether issues of fact determinative of the validity of a party's claim or defense were reasonably in conflict.
7. The extent to which the party prevailed with respect to the amount and number of claims in controversy.
8. The amount and conditions of any offer of judgment or settlement as related to the amount and conditions of the ultimate relief granted by the court.