

**IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE**

4501 NORTHPOINT LP, a limited partnership,	)	1 CA-TX 02-0027
	)	
Plaintiff-Appellant,	)	DEPARTMENT T
	)	
v.	)	<b>O P I N I O N</b>
	)	
MARICOPA COUNTY,	)	FILED: 2-8-05
	)	
Defendant-Appellee.	)	
	)	
_____	)	

Appeal from the Arizona State Tax Court

Cause No. TX 99-000408

The Honorable Paul A. Katz, Judge

**AFFIRMED**

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Fennemore Craig, P.C.	Phoenix
By Paul J. Mooney	
and Jim L. Wright	
and Erika Garner	
Attorneys for Plaintiff-Appellant	

Andrew Thomas, Maricopa County Attorney	Phoenix
By Cary G. Hipps, Deputy County Attorney	
Attorneys for Defendant-Appellee	

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T H O M P S O N, Presiding Judge

¶1 This appeal challenges the tax court's denial of attorneys' fees to 4501 Northpoint LP (Taxpayer) after it accepted an offer of judgment from Maricopa County (County). The tax court ruled that the judgment, entered pursuant to Arizona Rule of Civil Procedure 68, was not an adjudication on the merits qualifying

Taxpayer to receive attorneys' fees under Arizona Revised Statutes (A.R.S.) section 12-348(B)(1) (2003). For the following reasons, we affirm.

### **FACTUAL AND PROCEDURAL HISTORY**

¶2 This case arises out of a property tax valuation for the AMC theater complex and garages located at the Esplanade in Phoenix (Property). The Board of Equalization set the Property's full cash value at \$13,597,923 for the 2000 tax year. Taxpayer filed its complaint in the Arizona State Tax Court on November 24, 1999, and trial was set for June 4, 2002.

¶3 On April 10, 2002, the County offered to reduce the valuation to \$12,000,000, but Taxpayer rejected the offer. The County sent Taxpayer an offer of judgment pursuant to Rule 68 on May 2, 2002. This time, the County offered to reduce the full cash value to \$12,000,000 and to pay for costs but not attorneys' fees. Taxpayer filed a notice of partial acceptance of offer of judgment under Rule 68(c)(3), accepting the value and costs award but requesting attorneys' fees in accordance with A.R.S. §§ 12-348 and 12-349 (2003). The County cross-moved for attorneys' fees incurred after April 10, 2002, or, at least, for attorneys' fees incurred in responding to Taxpayer's fee application.

¶4 Following oral argument, the tax court ruled from the bench that Taxpayer could recover attorneys' fees. The tax court subsequently reversed itself, ruling that the Rule 68 judgment was

not an adjudication on the merits entitling Taxpayer to attorneys' fees.

¶15 Ultimately, the tax court entered judgment. This appeal followed.

#### DISCUSSION

**A. The Rule 68 judgment does not qualify as an adjudication on the merits**

¶16 Statutory interpretation issues are questions of law subject to de novo review. *Columbia Parcar Corp. v. Ariz. Dep't of Transp.*, 193 Ariz. 181, 183, ¶ 11, 971 P.2d 1042, 1044 (App. 1999) (citations omitted). This case turns on the interpretation of A.R.S. § 12-348(B)(1), which states:

In addition to any costs which are awarded as prescribed by statute, a court may award fees and other expenses to any party, other than this state or a city, town or county, which prevails by an adjudication on the merits in an action brought by the party against this state or a city, town or county challenging:

1. The assessment or collection of taxes or in an action brought by this state or a city, town or county against the party to enforce the assessment or collection of taxes.

¶17 In interpreting a statute, "[o]rdinarily each word, phrase, clause, and sentence . . . must be given meaning so that no part of the statute will be void, inert, redundant, or trivial." *Columbia*, 193 Ariz. at 185, ¶ 20, 971 P.2d at 1046 (citation omitted). Under this rule, the phrase "adjudication on the merits"

entails a judicial determination on the substantive cause of action and must be given effect. *Id.*; see generally Black's Law Dictionary 42 (6th ed. 1990) (stating that an adjudication "implies a hearing by a court, after notice, of legal evidence on the factual issue(s) involved"). It is not enough to obtain judgment by a consent decree or settlement agreement. Otherwise, the statute would award fees simply for "prevailing," as in any case in which a taxpayer obtains a reduction in value. See *Arnold v. Ariz. Bd. of Pardons and Paroles*, 167 Ariz. 155, 159, 805 P.2d 388, 392 (App. 1990) (distinguishing between prevailing or successful parties and those who prevail by an adjudication on the merits); *State ex rel. Corbin v. Challenge, Inc.*, 151 Ariz. 20, 28, 725 P.2d 727, 735 (App. 1986) (same); *Wieland v. Danner Auto Supply, Inc.*, 695 P.2d 1332, 1333-34 (Okla. 1984) (same).

¶8 In addition, a taxpayer who obtains a reduction in valuation by accepting an offer of judgment is different than a "successful party" in a contract case for purposes of A.R.S. § 12-341.01 (2003) (providing that the court may award reasonable attorneys' fees to the successful party in a case that arises out of contract). As we stated in *Challenge, Inc.*, 151 Ariz. at 28, 725 P.2d at 735:

We acknowledge that a party who appeals and succeeds in reversing the trial court's entry of summary judgment may be a "successful party" on appeal and thus may be entitled to an award of attorney's fees pursuant to A.R.S. § 12-341.01 . . . . That statute, however, is

readily distinguishable from A.R.S. § 12-348 which expressly permits fees only to a party which prevails by an adjudication on the merits.

*Id.* In other words, a successful party under A.R.S. § 12-341.01 need not prevail by an adjudication on the merits to obtain attorneys' fees. However, a taxpayer must not only obtain a reduction in valuation but also prevail by an adjudication on the merits in order to obtain attorneys' fees under A.R.S. § 12-348. The act of accepting an offer of judgment does not go to "the merits" of an action because there are several reasons why a party may accept an offer of judgment that do not necessarily include any resolution of the merits. See *Cromwell v. County of Sac*, 94 U.S. 351, 356 (1876) (stating that "[v]arious considerations, other than the actual merits, may govern a" party's decision to go forward with a claim or defense).

¶9 The County cites *Columbia* to support this view. In that case, the plaintiff had persuaded the superior court to set aside portions of an administrative order for further administrative proceedings on remand. *Columbia*, 193 Ariz. at 182, ¶ 8, 971 P.2d at 1043. The court, however, declined to award attorneys' fees to the plaintiff pursuant to A.R.S. § 12-348(A)(2), which provides for fees to a party that prevails by an adjudication on the merits in a court proceeding to review a state agency decision.<sup>1</sup> *Id.* at 183,

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<sup>1</sup> That statute provides:

(continued...)

¶ 9, 971 P.2d at 1044. We explained in that case that the word “merits” “embraces a consideration of substance, not of form; of legal rights, not of mere defects of procedure or practice or the technicalities thereof.” *Id.* at ¶ 15 (quotations omitted). Thus, the remand ruling was procedural and did not qualify as an adjudication on the merits, notwithstanding the court’s determinations on which issues to remand. *Id.*; see generally *I Arizona Appellate Handbook* § 11.2.1.4, at 11-10 (Sheldon H. Weisberg & Paul G. Ulrich, eds., 4th ed. 2000).

¶10 In this case, the superior court entered a judgment, not an interlocutory order. Entering a Rule 68 judgment, however, does not determine the substance of issues but instead qualifies as a perfunctory act performed pursuant to the parties’ agreement. *Pope v. Gap, Inc.*, 961 P.2d 1283, 1289 (N.M. Ct. App. 1998) (citations omitted). The court ordinarily exercises no discretion because, once the judgment is accepted, the court simply enters it. *Id.*;

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<sup>1</sup>(...continued)

(A) In addition to any costs which are awarded as prescribed by statute, a court shall award fees and other expenses to any party other than this state or a city, town or county which prevails by an adjudication on the merits in any of the following:

. . . .

2. A court proceeding to review a state agency decision, pursuant to . . . any . . . statute authorizing judicial review of agency decisions.

A.R.S. § 12-348(A)(2).

*Am. Mut. Liab. Ins. Co. v. Mich. Mut. Liab. Co.*, 235 N.W.2d 769, 776 (Mich. Ct. App. 1975) (explaining that the act of signing a judgment based upon consent is ministerial only).

¶11 The Arizona Supreme Court bolstered this view in *Chaney Bldg. Co. v. City of Tucson*, 148 Ariz. 571, 716 P.2d 28 (1986). The court rejected an argument that a stipulation to dismiss one defendant and the corresponding dismissal had collateral estoppel effect in litigation against another defendant. *Id.* at 572-73, 716 P.2d at 29-30. The court explained that “[n]othing is adjudicated between parties to a stipulated dismissal” and “none of the issues is actually litigated” in the case of a judgment entered by confession, consent, or default. *Id.* at 573, 716 P.2d at 30 (citations omitted). A consent judgment may be conclusive as to an issue only if the parties have manifested such an intent in the agreement. *Id.* Otherwise, the issue remains unresolved.<sup>2</sup> *Id.*

¶12 Likewise, we cannot say that the Rule 68 judgment here qualifies as an adjudication on the merits. At no time did the trial court receive evidence or rule on the substance of the issues. The trial court’s sole involvement, other than to rule on

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<sup>2</sup>*Ferreira v. Superior Court*, 189 Ariz. 4, 938 P.2d 53 (App. 1996), is not to the contrary. That case discusses whether the double jeopardy clause attaches in a subsequent prosecution when the prior civil forfeiture proceeding was uncontested. *Id.* at 9, 938 P.2d at 58. We cited *United States v. Ursery*, 59 F.3d 568, 571-72 (6th Cir. 1995), for the proposition that a forfeiture action resolved by a consent decree is an adjudication on the merits. The United States Supreme Court later reversed the Sixth Circuit in *United States v. Ursery*, 518 U.S. 267 (1996).

continuances, was to rule on the request for attorneys' fees. Nothing in the judgment indicates that the parties intended to be bound to any determination of fact or law. As a result, Taxpayer is not entitled to attorneys' fees.

**B. Rule 68(c)(3) does not control a taxpayer's right to attorneys' fees**

¶13 Taxpayer alternatively argues that Rule 68(c)(3) authorizes it to recover attorneys' fees. Rule 68(c)(3) provides in part:

*Partial Acceptance of Offer; Procedure.*  
If, while such an offer remains effective within the meaning of this Rule, the adverse party serves written notice that the portion of the offer stating the monetary award to be made on the causes of action asserted is accepted, either party may file the offer together with proof of acceptance thereof and may apply to the court for a determination whether attorneys' fees should be awarded and, if so, the amount thereof.

¶14 It is fundamental that attorneys' fees are awardable in Arizona to the prevailing party "only when expressly authorized by contract or statute." *Burke v. Ariz. State Retirement Sys.*, 206 Ariz. 267, 270, ¶ 7, 77 P.3d 444, 447 (App. 2003), review denied (Mar. 16, 2004) (citations omitted). Rule 68(c)(3) creates no exception. By its terms, the rule allows a party to partially accept a form of judgment and then *apply* for fees. It is A.R.S. § 12-348(B) that determines the right to obtain fees in this dispute, not Rule 68(c)(3).

**C. Res judicata and collateral estoppel do not apply**

¶15 In an effort to bolster its argument, Taxpayer invokes a series of non-Arizona cases holding that an accepted and satisfied offer of judgment acts or functions as an adjudication on the merits to bar subsequent claims for the same cause of action. One example is *Hanley v. Mazda Motor Corp.*, 609 N.W.2d 203 (Mich. Ct. App. 2000). In *Hanley*, the plaintiff owned a car produced through a joint venture between Ford and Mazda. *Id.* at 204. The plaintiff accepted an offer of judgment from Ford in a lawsuit arising out of injuries from a car accident. *Id.* When the plaintiff later sued Mazda, it argued that the Rule 68 judgment against Ford precluded the plaintiff from obtaining relief on the same cause of action against Mazda. *Id.* at 205.

¶16 The Michigan Court of Appeals determined that an entered and satisfied offer of judgment “functions as a full and final adjudication on the merits” in order to preclude a subsequent cause of action for injuries that arose out of the same cause of action. *Id.* at 208. The fact that a judgment “functions” as an adjudication on the merits implies that it is actually a different kind of judgment altogether. It only operates as an adjudication on the merits to further the res judicata policy “to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, prevent inconsistent decisions, and encourage

reliance on adjudication.”<sup>3</sup> *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464, 1467 (10th Cir. 1993) (citation omitted); see also *Cromwell*, 94 U.S. at 352 (stating that a judgment on “the merits constitutes an absolute bar to a subsequent action”).

¶17 In an attempt to illustrate what is actually entailed in a Rule 68 judgment, the County invokes the doctrine of collateral estoppel. This doctrine applies when the issue or fact in question was actually litigated and finally decided in a previous suit, a final judgment was entered, the party bound had a full and fair opportunity to litigate the issue, and the issue or fact was essential to the prior judgment. *Chaney*, 148 Ariz. at 573, 716 P.2d at 30 (citations omitted). As Taxpayer points out, collateral estoppel cannot entirely apply here because the parties did not litigate the tax valuation issue in a previous suit. Nevertheless,

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<sup>3</sup> For this reason, Taxpayer has misplaced its reliance upon *Eklund v. PRI Env'tl., Inc.*, 25 P.3d 511 (Wyo. 2001), *Day v. Davidson*, 951 P.2d 378 (Wyo. 1997), and *Kashnier v. Donnelly*, 610 N.E.2d 519 (Ohio Ct. App. 1991). All three cases recognize that, although a judgment may function as an adjudication on the merits, it does not actually resolve the merits. Like the *Hanley* court, the *Eklund* court stated that consent judgments and dismissals with prejudice are “the equivalent of a judgment on the merits for purposes of res judicata.” 25 P.3d at 517, ¶ 17. The *Day* court held that a consent “judgment is to be treated the same as any other judgment,” including one entered after an adjudication on the merits. 951 P.2d at 382. Accordingly, a consent judgment entered by a store in a personal injury action by a store patron established a limit on the damages that could be claimed in a subsequent action by the patron against a store employee. *Id.* at 383. Meanwhile, the *Kashnier* court found that a consent judgment is enforceable for res judicata purposes “as if the merits had been litigated.” 610 N.E.2d at 520.

the fact remains that Rule 68 judgments do not adjudicate the merits of a case. See *Cromwell*, 94 U.S. at 354 (explaining that estoppel of a judgment only applies to issues "actually litigated"). Therefore, Taxpayer's Rule 68 judgment is not an adjudication on the merits for purposes of A.R.S. § 12-348(B)(1).<sup>4</sup>

¶18 The dissent argues that, because numerous cases give res judicata effect to stipulated judgments that are then treated as if the merits of each such case were implicated in its resolution, we must conclude that the Rule 68 judgment here is "on the merits." However, whether a judgment is entitled to res judicata effect for purposes of, for example, barring further litigation of the same claim, is an entirely different question than that presented here: Whether the taxpayers must pay attorneys' fees for a claimant who has not accomplished a judicial determination on the evidence that the claim was meritorious. Furthermore, the dissent's view of the statute would provide a disincentive for the state to settle claims brought against it.

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<sup>4</sup> *Bloomer Shippers Association v. Illinois Central Gulf Railroad Company*, 655 F.2d 772 (7th Cir. 1981), does not hold otherwise. In that case, the court ruled that a dismissal with prejudice, not a consent judgment, was a final adjudication on the merits triggering res judicata. *Id.* at 777.

**CONCLUSION**

¶19 For the foregoing reasons, we affirm the trial court's judgment and deny Taxpayer's request for an award of attorneys' fees on appeal.

\_\_\_\_\_  
JON W. THOMPSON, Presiding Judge

CONCURRING:

\_\_\_\_\_  
JOHN C. GEMMILL, Judge

**W I N T H R O P**, Judge, dissenting.

¶20 The majority today holds that a judgment, properly entered pursuant to Rule 58, Arizona Rules of Civil Procedure, and awarding substantive, affirmative relief to the Taxpayer, does not constitute an "adjudication on the merits" such that the Taxpayer qualifies to request an award of attorneys' fees pursuant to A.R.S. § 12-348(B). I disagree with such holding, and respectfully dissent.

¶21 As a starting point, we recognize that, in enacting § 12-348, the legislature intended "to reduce the economic deterrents individuals faced in contesting governmental actions, magnified by the disparity between the resources and expertise of the government and individuals." *Wilderness World, Inc. v. Dep't of Revenue*, 182 Ariz. 196, 202, 895 P.2d 108, 114 (1995) (quoting *Ariz. Tax Research Ass'n v. Dep't of Revenue*, 163 Ariz. 255, 258, 787 P.2d 1051, 1054 (1989)); see also *Estate of Walton*, 164 Ariz. 498, 501, 794 P.2d 131, 134 (1990). This state's public policy, as announced by the legislature and interpreted by our supreme court, favors the trial court having the discretion to award attorneys' fees to taxpayers or other individuals who successfully challenge government actions.

¶22 This case involved the appropriate full cash value assigned to the subject property. The assessor assigned one value, presumed by law to be correct. The Taxpayer protested, contending

that the appropriate value was significantly less. In its complaint, the Taxpayer sought a judgment which substantively sought a change in the tax rolls to a lower cash value for the subject property, and a refund of excess taxes paid, plus interest. Although one may question the diligence with which each side chose to litigate the matter, the case was clearly contested, a trial date was set, and discovery conducted in anticipation of the trial. Although not explicit in the record, it appears that such discovery indicated that the government's position on the assessed value could not be sustained. The government then attempted to settle the case.

**¶23** Having been unsuccessful at achieving informal resolution through settlement negotiations, the government purposefully chose to offer a judgment that could be entered in favor of the Taxpayer in an amount less than the assessed value. The government's proposal clearly indicated that it was not offering or agreeing that the judgment would include any award of attorneys' fees. This proposal was tendered under the authority of Rule 68, Arizona Rules of Civil Procedure. Although some view the rule as merely a coercive settlement technique, it can, through acceptance of the offer, accelerate resolution of the case on the merits. Here, the Taxpayer accepted the offer, while pursuant to Rule 68(c)(3) reserving its right to seek an award of attorneys' fees authorized by § 12-348(B). Thereafter, a judgment was entered, pursuant to

Rule 58, which directed that the tax roll for the subject year be changed to reflect a lower valuation than that originally assessed by the government. Such judgment, of necessity, also resulted in a refund, plus appropriate interest, of taxes paid in excess of the value assigned by the judgment. This was, in large part, the substantive relief sought by the Taxpayer in its lawsuit. The issue of entitlement to attorneys' fees was then presented to the trial court for resolution. The trial court initially agreed that the Taxpayer was entitled to a fee award, but later concluded that this resolution did not constitute an "adjudication on the merits," as required by § 12-348, and denied the application, apparently concluding that the legal predicate which would allow the court to consider the application for fees had not been met.

**¶24** On appeal, and as discussed in the majority opinion, the government contended that the judgment entered here was not the result of any trial or fact-finding, but merely the equivalent of a default or consent judgment, perfunctory in nature and, at best, a ministerial act by the court. The government, and the majority to some extent, relies on language found in *Chaney Building Co. v. City of Tucson*, 148 Ariz. 571, 716 P.2d 28 (1986). In that case, the court primarily addressed the contention that a stipulated dismissal in favor of one defendant should be given preclusive effect as it related to a co-defendant contending that the dismissed defendant was wholly or partially at fault. In

considering the argument that the stipulated judgment was entitled to *res judicata* effect, the court considered whether this dismissal acted as a resolution "on the merits." 148 Ariz. at 573, 716 P.2d at 30. Importantly, the court, citing section 27 of the Restatement (Second) of Judgments, held that a stipulated or "consent" judgment "may be conclusive, with respect to one or more issues, if the parties have entered an agreement manifesting such intention." *Id.* In that case, the issues involving the dismissed party were not "actually litigated," and the stipulated order of dismissal apparently did not include a finding concerning the negligence or lack of negligence of the dismissed party. Accordingly, the "manifestation of intent" required under the Restatement was lacking, and the court refused to extend collateral estoppel effect in favor of the remaining defendant:

If the parties to this action had intended the Kulseth dismissal to be binding as to certain factual issues, and if their intention was reflected in the dismissal, we would enforce the intent of the parties and collateral estoppel would apply.

*Id.*

¶25 In the instant case, the elements of adjudication on the merits, obviously lacking in the *Chaney Building Co.* case, are clearly present. The issue of valuation was litigated to the point where a formal judgment was entered in favor of the Taxpayer, directing the Assessor to change the tax rolls to reflect a more favorable valuation for the subject property. Without question,

that judgment was intended to be and is clearly binding on the parties as it relates to the valuation of the property for the subject tax year, and the Taxpayer's entitlement to an appropriate refund of excess taxes paid based upon the original valuation by the Assessor.

¶26 Any reliance by the government on *Columbia Parcar Corp. v. Arizona Department of Transportation*, 193 Ariz. 181, 971 P.2d 1042 (App. 1999) is equally misplaced. In that case, the issue was whether a superior court ruling directing that an issue be remanded for further administrative hearings constituted a ruling "on the merits" which would entitle the complaining party to an award of attorneys' fees under § 12-348(A)(2). 193 Ariz. at 182, ¶ 1, 971 P.2d at 1043. The court of appeals correctly held that such court action was procedural in nature, and did not at that point in the litigation constitute an "adjudication on the merits," as required by the statute. This court noted that:

It is generally held that where the word "merits" is used when referring to a case having been determined on the merits, "it embraces a consideration of substance, not of form; of legal rights, not of mere defects of procedure or practice or the technicalities thereof." *Cero Realty Corp. v. American Mfrs. Mut. Ins. Co.*, 171 Ohio St. 82, 167 N.E.2d 774,777 (Ohio 1960); see also, *Fairmont Aluminum Co. v. Comm'r of Internal Revenue*, 222 F.2d 622, 625 (4th Cir. 1955) ("A judgment on the merits is one which is based on legal rights as distinguished from mere matters of practice, procedure, jurisdiction or form.").

*Id.* at 183-84, ¶ 15, 971 P.2d at 1044-45. *Cf. also Corley v. Ariz. Bd. of Pardons & Paroles*, 160 Ariz. 611, 614-15, 775 P.2d 539, 542-

43 (App. 1989) (holding that, for purposes of an award of attorneys' fees, a "prevailing party" must receive some relief on the merits of their claim; achieving a remand based upon a violation of due process rights did not constitute some relief on the merits.)

¶27 Here, the Taxpayer "victory" was not mere interim success nor the result of prevailing upon a procedural or due process point. Substantive legal rights--the reduction in valuation and change in the tax roll reflecting same, plus a refund for excessive taxes paid--have been achieved with finality, and cannot be changed or altered by the government for the tax year in question.

¶28 Cases from other jurisdictions support the conclusion that the judgment entered here should be treated as an adjudication on the merits. See, e.g., *Hanley v. Mazda Motor Corp.*, 609 N.W.2d 203, 204 (Mich. Ct. App. 2000); *Kashnier v. Donnelly*, 610 N.E.2d 519, 520 (Ohio Ct. App. 1991) ("A judgment entered by consent, although predicated upon an agreement between the parties, is an adjudication as effective as if the merits had been litigated and remains, therefore, just as enforceable as any other validly entered judgment, for *res judicata* purposes."); *Wieland v. Danner Auto Supply, Inc.*, 695 P.2d 1332, 1334 (Okla. 1984) (concluding judgment by confession has same legal effect as judgment entered after trial by jury or to court; judgment is final determination of rights of parties in action, thus confession of judgment against

defendant is final determination that plaintiff prevailed on his claim); *Day v. Davidson*, 951 P.2d 378, 382 (Wyo. 1997) (concluding judgment entered pursuant to an offer and acceptance of judgment must be treated as judgment on the merits unless court allows parties to agree on effect given to judgment). For example, the Michigan Court of Appeals held "that a judgment entered pursuant to the acceptance of an offer of judgment under [Michigan's civil rules<sup>5</sup>] functions as a full and final adjudication on the merits." *Hanley*, 609 N.W.2d at 204.

In our judgment, an offer of judgment more nearly emulates a judgment after a trial rather than a form of settlement. In our minds, the key defining point is that private party settlement or mediation involve collective consideration of the facts favoring each party, discussion of the issues, arms-length negotiation and compromise, and contemplation of both entry of judgment and dismissal of the action, whereas an offer of judgment is a unilateral act seeking final resolution of a controversy with sanction of a court by entry of an enforceable judgment. This unilateral act results from a party's independent evaluation of the merits of the case with an eye toward complete resolution of the matter.

*Id.* at 208.

¶29 In summary, I believe that a judgment entered that results in the type of affirmative relief sought by the Taxpayer,

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<sup>5</sup>As cited by the court, "In pertinent part, MCR 2.405(B) provides that '[u]ntil 28 days before trial, a party may serve on the adverse party a written offer to stipulate to the entry of a judgment for the whole or part of the claim, including interest and costs then accrued.' If accepted pursuant to the rule, '[t]he court shall enter a judgment according to the terms of the stipulation,' MCR 2.405(C)(1) . . . ." *Hanley*, 609 N.W.2d at 206 (alteration original).

whether it is the result of an offer of judgment, or by stipulation or "consent," constitutes an "adjudication on the merits" that allows the Taxpayer to request a discretionary award of attorneys' fees pursuant to section 12-348(B). To paraphrase our supreme court in *Wilderness World*, the Taxpayer "should not be penalized for winning." 182 Ariz. at 202, 895 P.2d at 114. I would remand this case to the Tax Court for its determination as to whether the Taxpayer is entitled to recover any or all of its attorneys' fees, subject to the court's discretion and the statutory cap set forth in A.R.S. § 12-348(E) (5).

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LAWRENCE F. WINTHROP, Judge

