

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 10/02/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

H. LORRAINE RIENDEAU; LEONARD A.) 1 CA-CV 11-0719
RIENDEAU, husband and wife,)
) DEPARTMENT C
Plaintiffs/Appellants,)
) **MEMORANDUM DECISION**
v.)
) (Not for Publication -
THOMAS, THOMAS & MARKSON, P.C.;) Rule 28, Arizona Rules of
BENJAMIN C. THOMAS; MONIQUE A.) Civil Appellate Procedure)
SIMPSON; KIMBERLY A. BAXTER; and)
CHARLES H. HOUSTON, III,)
)
Defendants/Appellees.)
)

Appeal from the Superior Court in Yuma County

Cause No. S1400CV201001521

The Honorable Mark W. Reeves, Judge

AFFIRMED

H. Lorraine Riendeau
Leonard A. Riendeau
In Propria Persona

Yuma

Zanon Law Offices
By Daniel A. Zanon
Attorneys for Defendants/Appellees

Phoenix

T H U M M A, Judge

¶1 Appellants H. Lorraine and Leonard A. Riendeau appeal from the superior court's grant of a motion for judgment on the

pleadings filed by Appellees Thomas, Thomas & Markson, P.C.; Benjamin C. Thomas; Monique A. Simpson; Kimberly A. Baxter and Charles H. Houston, III. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶12 This matter is the second case the Riendeaus have filed and appealed to this Court arising out of the same underlying facts. In the prior litigation, the Riendeaus sued Wal-Mart Stores, Inc., alleging injuries from a slip-and-fall accident at a Wal-Mart store in Yuma. *See Riendeau v. Wal-Mart Stores, Inc.*, 223 Ariz. 540, 225 P.3d 597 (App. 2010); *Riendeau v. Wal-Mart Stores, Inc.*, 1 CA-CV 09-0202, 1 CA-CV 09-0203, 2010 WL 711200 (Ariz. App. Feb. 25, 2010) (mem. decision). Appellees in this case served as Wal-Mart's counsel in the prior litigation.

¶13 In the prior litigation, after Wal-Mart successfully obtained summary judgment on Mr. Riendeau's claims, Ms. Riendeau filed a motion for disclosure sanctions. *Riendeau*, 2010 WL 711200, at *1-2, ¶¶ 3, 5. On behalf of Wal-Mart, Appellees opposed that motion and attached an unsigned affidavit from Appellee Simpson. *Id.* at *5, ¶¶ 18, 20. The superior court then denied Ms. Riendeau's motion for sanctions. *Id.* at *2, ¶ 5. After Ms. Riendeau refused to appear for trial, the superior court dismissed her claims with prejudice for failure to

prosecute. *Id.* at *2, ¶ 8. The superior court also awarded Wal-Mart attorneys' fees. *Id.*

¶4 On appeal in the prior litigation, Ms. Riendeau challenged the denial of her motion for sanctions, arguing the unsigned affidavit was "inadmissible hearsay because it was improperly executed." *Id.* at *5, ¶ 18. Although agreeing "that the affidavit [was] improperly executed as it is not signed," this Court affirmed the denial of the motion for sanctions and affirmed the judgment dismissing Ms. Riendeau's claims with prejudice for failure to prosecute. *Id.* at *5-6, ¶¶ 22, 25.

¶5 After the mandate issued in the prior litigation, the Riendeaus filed this case. In this case, the Riendeaus allege Appellees committed fraud by improperly filing the unsigned affidavit in the prior litigation. In doing so, the Riendeaus reassert allegations made in the prior litigation, under a different legal theory and against different defendants. The Riendeaus seek as damages the attorneys' fees awarded to Wal-Mart in the prior litigation and seek reversal of the decision in favor of Wal-Mart in the prior litigation.

¶6 In this case, the superior court granted Appellees' motion for judgment on the pleadings, finding (1) the alleged fraud did not injure the Riendeaus and (2) the claims were barred by collateral estoppel. The Riendeaus timely appealed the entry of judgment on the pleadings.

DISCUSSION

¶7 "A motion for judgment on the pleadings tests the sufficiency of the complaint and if the complaint fails to state a claim for relief, judgment should be entered for the defendant. Well-pleaded allegations will be taken as true but conclusions of law are not admitted." *Shannon v. Butler Homes, Inc.*, 102 Ariz. 312, 315, 428 P.2d 990, 993 (1967).

¶8 In this case, the Riendeaus claim the Appellees' filing of the unsigned affidavit in the prior litigation was a "fraud upon the courts" that damaged the Riendeaus through the dismissal of Ms. Riendeau's claim in the prior litigation and the award of attorneys' fees to Wal-Mart. On numerous occasions in the prior litigation, the Riendeaus presented their argument regarding the unsigned affidavit. On appeal in the prior litigation, this Court *affirmed* the denial of Ms. Riendeau's motion for sanctions *despite* concluding the unsigned affidavit was improper. *Riendeau*, 2010 WL 711200, at *5, ¶ 22.

¶9 As this Court found in that prior appeal, the damages claimed by the Riendeaus in this case were caused by Ms. Riendeau's failure to prosecute her claims, not any conduct by Appellees. *Id.* at *6, ¶ 25 ("[Ms. Riendeau's] allegations that the superior court acted improperly [including considering the unsigned affidavit] did not relieve her of her duty to prosecute the case to a final judgment. Therefore, we affirm the superior

court's order dismissing [Ms. Riendeau's] claims with prejudice for failure to prosecute."). Because Ms. Riendeau's failure to prosecute was the sole cause of the alleged damages sought in this case, the superior court properly found the Riendeaus' fraud claim failed as a matter of law. See *Nielson v. Flashberg*, 101 Ariz. 335, 338-39, 419 P.2d 514, 517-18 (1966) (holding consequential injury is required element of common law fraud action and "there is no actionable fraud without a concurrence of all the elements thereof"); *Smith v. Don Sanderson Ford, Inc.*, 7 Ariz. App. 390, 392, 439 P.2d 837, 839 (1968) ("A showing of the actual damages is essential to making out a case of fraud.").

¶10 Turning to their claim for non-monetary relief, the Riendeaus have cited no authority for the proposition that the judgment in the prior litigation properly could be reopened in this separate case. This is particularly true given that the alleged fraud in the prior litigation was intrinsic, not extrinsic. See *Dockery v. Cent. Ariz. Light & Power Co.*, 45 Ariz. 434, 454, 45 P.2d 656, 664 (1935) (noting extrinsic fraud, which may justify setting aside judgment, does not include "any matter which was actually presented and considered in the judgment assailed" (emphasis omitted) (quoting *United States v. Throckmorton*, 98 U.S. 61, 66 (1878))), superseded by statute on other grounds as stated in *In re Milliman's Estate*, 101 Ariz.

54, 61, 415 P.2d 877, 884 (1966). In addition, the Riendeaus did not seek to reopen the judgment in the prior litigation and the time to do so has passed. Ariz. R. Civ. P. 60(c). Accordingly, the Riendeaus have shown no authority for their request in this case that the judgment in the prior litigation be reversed.¹

¶11 Appellees request an award of attorneys' fees on appeal. Under Arizona Rule of Civil Appellate Procedure (ARCAP) 25, reasonable attorneys' fees may be awarded in a frivolous appeal for "the discouragement of like conduct in the future." An appeal is frivolous if "it indisputably has no merit -- when any reasonable attorney would agree that the appeal is totally and completely without merit." *Arizona Tax Research Ass'n v. Dep't of Revenue*, 163 Ariz. 255, 258, 787 P.2d 1051, 1054 (1989) (citation omitted).

¶12 In light of the decision in the prior appeal, see *Riendeau*, 2010 WL 711200, at *6, ¶ 25, the Riendeaus' argument that their claimed injury flowed from the alleged fraud was indisputably without merit. Accordingly, Appellees' request for attorneys' fees pursuant to ARCAP 25 is granted and, upon

¹ Given this holding, we need not and expressly do not address the other grounds relied upon by the superior court or argued by the parties, including collateral estoppel and absolute privilege. Although the Riendeaus argue the superior court improperly awarded attorneys' fees to Appellees in this case, no such award was presented to this Court. Although Appellees request reversal of the superior court's denial of their request for attorneys' fees in this case, Appellees did not cross-appeal and therefore that issue is not properly before this Court.

compliance with ARCAP 21, Appellees are awarded their reasonable attorneys' fees incurred in responding to the Riendeaus' causation argument on appeal. As the prevailing parties on appeal, Appellees are also entitled to recover costs upon compliance with ARCAP 21. A.R.S. § 12-341.

CONCLUSION

¶13 The judgment of the superior court is affirmed.

/s/ _____
SAMUEL A. THUMMA, Judge

CONCURRING:

/s/ _____
PHILIP HALL, Presiding Judge

/s/ _____
PETER B. SWANN, Judge