IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

MARK A. RYAN, for and on behalf of himself and as next friend for HESTER and HANNAH RYAN, minors; and MARGARET LEE RYAN; ANTHONY J. FOSTER; and VIRGINIA FOSTER and RICK PATTEN, his parents, *Plaintiffs/Appellants*,

v.

STATE OF ARIZONA, *Defendant/Appellee*.

No. 1 CA-CV 12-0613
FILED 2-11-2014

Appeal from the Superior Court in Maricopa County
No. CV2011-017196
The Honorable Mark H. Brain, Judge

AFFIRMED

COUNSEL

Treon Aguirre Newman & Norris, PA, Phoenix
By Richard T. Treon

Counsel for Plaintiff/Appellant

Arizona Attorney General, Phoenix
By Claudia Acosta Collings and Michael E. Gottfried

Counsel for Defendant/Appellee

MEMORANDUM DECISION
AMENDED

Judge Patricia A. Orozco delivered the decision of the Court, in which Presiding Judge Randall M. Howe and Judge Samuel A. Thumma joined.

O R O Z C O, Judge:

¶1 Mark A. Ryan and Anthony J. Foster (collectively Appellants) appealed the trial court's order granting the State of Arizona's motion to dismiss. This court issued a memorandum decision on November 19, 2013, converting the appeal to a special action, accepting special action jurisdiction, granting relief in part, and remanding for further proceedings. Having considered the State's motion for reconsideration, which has been fully briefed, we grant the motion for reconsideration, vacate our prior decision, and issue this memorandum decision, in its place, affirming the trial court.

FACTS AND PROCEDURAL HISTORY

¶2 In May 2006, Appellants filed a lawsuit against the State of Arizona for wrongful incarceration, designated CV 2006-008189. On appeal, after the trial court granted the State's motion for summary judgment, this court reversed and remanded for further proceedings in light of *McDonald v. Thomas,* 202 Ariz. 35, 404 P.3d 819 (2002). In reversing, we noted that after *McDonald*, the Board of Executing Clemency lacked probable cause to continue Appellants' respective incarcerations.

¶3 On remand, before trial began, the parties entered into an agreement (Agreement) in which they agreed to dismiss CV 2006-008189 without prejudice to discuss settlement and also agreed Appellants had six months to re-file their claim if the parties could not reach a settlement. In the Agreement, Appellants agreed that if a settlement could not be reached, failure to re-file their lawsuit by August 14, 2011, would forever bar their claims. Also in the Agreement, if Appellants' timely re-filed the lawsuit, the State agreed to waive any statute of limitations or notice of claim defense as a bar.

¶4 On February 14, 2011, the trial court (a different Judge than the Judge who entered the rulings subject this appeal) accepted the parties' stipulated dismissal without prejudice and entered the order of dismissal, but struck the word "out," so the dismissal became "with prejudice." The parties neither appealed nor objected to the trial court's order dismissing the case "with prejudice."

¶5 When the parties did not reach a settlement, Appellants re-filed their complaint on September 9, 2011, designated CV 2011-017196. The State filed a Rule 12(b)(6) motion to dismiss. The trial court granted the motion from the bench, finding (as relevant here) that Appellants were barred from re-filing their claims by the February 14, 2011, dismissal with prejudice order in CV 2006-008189, even if that order was entered incorrectly. The trial court noted, ". . . when the court makes a mistake, the answer is a litigant needs to challenge it if they aren't willing to live with it. It wasn't challenged and I think I'm bound by it. So the motion to dismiss is granted."

¶6 We have jurisdiction over Appellants' timely appeal from the grant of this motion to dismiss pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) sections 12-120.21.A.1 (2003) and -2101.B (Supp. 2013).

JURISDICTION

¶7 Even though the parties did not originally challenge this court's jurisdiction, we must examine our jurisdiction over an appeal as a threshold matter. *Kool Radiators, Inc. v. Evans*, 229 Ariz. 532, 534, ¶ 8, 278 P.3d 310, 312 (App. 2012). To properly invoke appellate jurisdiction, appeals must be timely. *See* ARCAP 9(a) (2014). "[W]here the appeal is not timely filed, the appellate court acquires no jurisdiction other than to dismiss the attempted appeal." *Edwards v. Young*, 107 Ariz. 283, 284, 486 P.2d 181, 182 (1971). Here, neither party objected to, nor timely appealed from the February 14, 2011, dismissal "with prejudice" in CV 2006-008189. Because that dismissal with prejudice was not timely appealed, it became final and is not properly before this court in Appellants' appeal from the dismissal of CV 2011-017196.

¶8 In our November 19, 2013, memorandum decision, we accepted special action jurisdiction to address the February 14, 2011, dismissal "with prejudice" in CV 2006-008189, stating Appellants had no "equally plain, speedy, and adequate remedy by appeal" because the time for appeal had passed. *See* Ariz. R.P. Spec. Act. 1(a) (2013); ARCAP 9(a).

The State timely filed a motion for reconsideration, citing *State ex rel. Neely v. Rodriguez*, 165 Ariz. 74, 796 P.2d 876 (1990). In *Neely*, the supreme court of Arizona expressly held that the Arizona court of appeals lacks subject-matter jurisdiction to accept special action review of an appealable order after the time for appeal had passed. *Id.* at 75, 796 P.2d at 877.

¶9 Even though the statute addressing jurisdiction over special actions was amended in 1990 to expand the court of appeals' jurisdiction "to hear and determine petitions for special actions brought pursuant to the rules of procedure for special actions, without regard to its appellate jurisdiction," *see* 1990 Ariz. Sess. Laws, ch. 395, § 2, Arizona has long expressed a "strong . . . policy against using extraordinary writs as substitutes for appeals," *Neely*, 165 Ariz. at 76, 796 P.2d at 878. Accordingly, as noted in *Neely*, if an appeal from a challenged order is "jurisdictionally time-barred, the court of appeals would have no subject matter jurisdiction to exert its discretionary special action jurisdiction and grant relief." *Id.* at 77, 796 P.2d at 879.

¶10 The February 14, 2011, dismissal with prejudice in CV 2006-008189 is a final judgment on the merits, *see Torres v. Kennecott Copper Corp.*, 15 Ariz. App. 272, 274, 488 P.2d 477, 479 (1971), and was an appealable order, *see* A.R.S. § 12-2101.A.1. Appellants, however, failed to timely appeal from that judgment and the time to do so has long-since passed. *See* ARCAP 9(a). Accordingly, Appellants cannot relitigate the issues resolved by the dismissal with prejudice in CV 2006-008189, meaning res judicata bars Appellants from re-filing to sue again on those same claims. Stated differently, under *Neely*, we lack subject-matter jurisdiction to review the February 14, 2011, dismissal with prejudice in CV 2006-008189. *See* 165 Ariz. at 75, 796 P.2d at 877. The finality of that dismissal with prejudice also serves as a res judicata bar to the claims Appellants seek to press in CV 2011-017196.

CONCLUSION

¶11 For the foregoing reasons, we grant the State's motion for reconsideration, we vacate our November 19, 2013, memorandum decision and issue this memorandum decision, in its place, affirming the trial court's order dismissing the case.