DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

LISA EHLERS, a married woman,	)	1 CA-CV 11-0049
	)	1 CA-CV 11-0129
Plaintiff/Appellant,	)	(Consolidated)
	)	
v.	)	DEPARTMENT C
	)	
TANNIN MEDIA GROUP, INC., an Arizona corporation,	)	**MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)
Defendant/Appellee.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CV2007-051718

The Honorable Robert A. Budoff, Judge (Retired)

FEE AWARD VACATED

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P O R T L E Y, Judge

¶1 Lisa Ehlers appeals from an order granting attorneys' fees to Tannin Media Group, Inc. ("Tannin") and from an order adding her husband to the attorneys' fees judgment for purposes of collection. She contends that the motion for fees was untimely because it was made after a final order had been entered without an appeal. She also contends that the addition of her husband to the judgment violates due process. For the following reasons, we vacate the fee award.

FACTS AND PROCEDURAL HISTORY

A

¶2 Ehlers sued Tannin, her former employer, alleging it had breached its contract by failing to pay her earned commissions. The parties participated in a settlement conference, and their lawyers signed a handwritten agreement that included a provision stating, "[t]his case is fully resolved." Ehlers, however, subsequently took the position that the December 15, 2008 agreement was not a final settlement agreement.

¶3 Tannin filed a Motion to Enforce Settlement Agreement and requested attorneys' fees. Neither Ehlers nor her lawyer appeared for the argument, and the court found that the December 15 agreement represented a full settlement of the case and granted the motion. The court also noted that the case would be dismissed once the dispute over the terms of a mutual release

was resolved, and invited Tannin to file an application for attorneys' fees. The court adopted the settlement and release language proposed by Tannin, and awarded Tannin $10,245 in attorneys' fees in July 2009. After her motion for new trial was denied, Ehlers filed an appeal. The appeal, CV 09-0601, however, was dismissed on March 10, 2010 because she failed to file an opening brief.

B

¶4 In the meantime, Ehlers filed a Motion for Entry of Judgment on October 21, 2009. She claimed that Tannin had failed to make the last settlement payments, and as a result, she was entitled to a penalty payment under the agreement. Tannin asserted: (1) the court did not have jurisdiction to address the motion because the case had been dismissed; (2) it had timely tendered the final payment to Ehlers' counsel because she had failed to cash the two prior payments; and (3) it was entitled to an "award of attorneys' fees and/or other sanctions . . . pursuant to Ariz. R. Civ. P. 11 and A.R.S. § 12-349." After determining that it had jurisdiction, the court denied Ehlers' motion, as well as Tannin's request for attorneys' fees

and sanctions. Neither party filed an appeal or a motion for new trial from the January 2010 ruling.[1]

C

¶5 Six months later (and three months after CV 09-0601 was dismissed), Tannin filed a motion for its reasonable attorneys' fees incurred since July 2009, including fees for the dismissed appeal. Despite Ehlers' opposition, the court granted the motion and awarded Tannin $21,875 in attorneys' fees in October 2010. Ehlers filed her appeal after her motion for new trial was denied.[2]

D

¶6 During the pendency of the appeal of the new attorney's fees award, CV 11-0049, Tannin attempted to collect its judgment. After it discovered that funds had been moved from Ehlers account into a separate account belonging only to

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[1] The motion for entry of judgment could be analyzed as a motion to enforce the prior judgment because Ehlers claimed that Tannin had not complied with the settlement agreement. *See Carp v. Superior Court,* 84 Ariz. 161, 164, 325 P.2d 413, 416 (1958) (where no stay has been issued, court retains jurisdiction to enforce judgment). The orders resulting from that motion were, as a result, special orders after final judgment. *See* Ariz. Rev. Stat. ("A.R.S.") § 12-2101(A)(2) (West 2012). Absent material revisions to this decision, we cite the current Westlaw version of applicable statutes.

[2] The order was initially unsigned, but a signed order was entered after we remanded the case pursuant to *Eaton Fruit Co. v. California Spray-Chem. Corp.*, 102 Ariz. 129, 426 P.2d 397 (1967).

Kevin Ehlers, Tannin filed a Motion to Join Plaintiff's Spouse for Purposes of Execution of Judgment on Community Property. Ehlers responded and argued that the court did not have jurisdiction to amend the judgment, especially since her husband had never been named as a party or served. The court, however, granted the motion and added Kevin Ehlers on the judgment for purposes of collection. Ehlers filed a timely notice of appeal, and we authorized the consolidation of CV 11-0049 with 11-0129.

DISCUSSION

¶7 Ehlers argues that this case was final and completely resolved after the trial court denied the motions by both parties in January 2010 and neither party filed an appeal. As a result, she contends that the issue of fees became law of the case and the court erred by subsequently awarding fees to Tannin.

¶8 "Law of the case" is a judicial doctrine that precludes the reconsideration of questions that have been resolved by the court or an appellate court. *Powell-Cerkoney v. TCR-Montana Ranch Joint Venture, II*, 176 Ariz. 275, 278, 860 P.2d 1328, 1331 (App. 1993). When applied to decisions made by a trial court, it is a procedural doctrine and not a limitation on the court's power. *Id*. The court continues to have jurisdiction to review and reconsider prior decisions that are not final. *Bogard v. Cannon & Wendt Elec. Co.*, 221 Ariz. 325,

333, ¶ 26, 212 P.3d 17, 25 (App. 2009); *Zimmerman v. Shakman*, 204 Ariz. 231, 236, ¶ 15, 62 P.3d 976, 981 (App. 2003). The court, however, does not have jurisdiction to reconsider or change prior decisions that have become final. *Bogard*, 221 Ariz. at 333, ¶ 26, 212 P.3d at 25.

¶9 The January 2010 order resolved all matters then before the court; namely, Ehlers' request to force compliance with the settlement agreement and Tannin's request for fees. The order was final and appealable. Ariz. R. Civ. P. 58(a). Once the time to file an appeal expired and a motion for new trial was not filed, the order terminated the proceedings. *See* ARCAP 9(a). As a result, when Tannin filed its fee request six months later, the court could not reconsider its earlier decision denying fees. *See Bogard*, 221 Ariz. at 333, ¶ 26, 212 P.3d at 25 (Court lacked jurisdiction to reconsider or change final judgment.).

¶10 Tannin argues, however, that its request was not barred because it was brought under a new theory that the court had not addressed; namely A.R.S. § 12-341.01. Although Tannin had argued in 2009 that the case had been concluded, it suggests that the court can reconsider an issue that had become final if a litigant raises a different theory. We disagree.

¶11 Although Tannin sought fees in 2009 as sanctions for the motion Ehlers had filed, it could have and should have

included the argument that it was also entitled to fees pursuant to § 12-341.01 because the settlement agreement was a contract. Moreover, Tannin could have asked the court to reconsider the denial of its fee request under § 12-341.01 before the January 2010 order became final, or it could have raised the issue in a timely motion for new trial. It did neither.

¶12 Rule 54(g) outlines when a fee request must be filed. The rule provides, in pertinent part, as follows:

> (2) *Time of Determination*. When attorneys' fees are claimed, the determination as to the claimed attorneys' fees shall be made after a decision on the merits of the cause. The motion for attorneys' fees shall be filed within 20 days from the clerk's mailing of a decision on the merits of the cause, unless extended by the trial court.
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> . . . .
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> (4) *Scope*. The provisions of subparagraphs (1) through (3) do not apply to claims for fees and expenses as sanctions pursuant to statute or rule, or to causes in which the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial.

Ariz. R. Civ. P. 54(g)(2), (4).

¶13 Despite the language of Rule 54(g), Tannin argues that the twenty-day time limit does not apply if "the substantive laws governing the action provides for the recovery of such fees as an element of damages." Tannin, however, does not identify

the applicable "substantive law" to support its argument, and we have found none. Tannin merely claims that Ehlers engaged in delay tactics and other conduct that resulted in fees and expenses that should be treated as the legal equivalent of damages. Although Tannin relies on *Collins v. First Fin. Servs, Inc.*, 168 Ariz. 484, 815 P.2d 411 (App. 1991), the case does not support its argument. *Collins* addressed circumstances where a defendant's conduct caused a plaintiff to incur expenses and attorneys' fees in third-party litigation, which could be treated as damages in a suit between the plaintiff and defendant. *Id*. at 486, 815 P.2d at 413. Accordingly, *Collins* is not applicable.

¶14 Tannin also argues the court had discretion to extend the filing period for its fees request. Rule 54(g)(2) gives a trial court discretion to extend the time for filing an untimely fee request even if the party did not ask for a time extension. *Aztar Corp. v. U.S. Fire Ins. Co.*, 223 Ariz. 463, 479, ¶ 60, 224 P.3d 960, 976 (App. 2010). Tannin, however, did not ask the court to file an untimely request, nor did it mention Rule 54(g). Tannin argued that "this case is still not over," and outlined the reasons why it was seeking fees. Tannin focused on Ehlers' actions after the settlement and during the appeal, which had been dismissed ninety days earlier. Tannin did not

mention any need for the court to exercise the discretion authorized under Rule 54(g).

¶15 Even if we assume for argument that the court decided that a six-month delay between the final order denying fees and the fee request was appropriate, no Arizona appellate court has ever affirmed such an untimely request. *See Aztar*, 223 Ariz. at 479, ¶ 59, 224 P.3d at 976 (request filed one and one-half months late); *Nat'l Broker Assocs., Inc. v. Marlyn Nutraceuticals, Inc.*, 211 Ariz. 210, 214, ¶¶ 18-19, 119 P.3d 477, 481 (App. 2005) (request filed one month late). But, and again assuming that the court had decided to exercise its discretion, the court could not award fees that Tannin had requested before the court denied its request in January 2010; the law of the case precluded such reconsideration of those fees.

¶16 The trial court was also precluded from awarding Tannin fees and costs incurred during the dismissed appeal. Arizona Rule of Civil Appellate Procedure 21 describes the two ways a party can make a request to recover fees and costs incurred on appeal – in a brief, or in a separate motion filed and served before oral argument or submission of the appeal. A party who does not follow the rule on appeal cannot subsequently recover appellate attorneys' fees from the trial court. *Fulkerson v. How*, 26 Ariz. App. 170, 172, 547 P.2d 22, 24

(1976); *see also Lawrence v. Valley Nat'l Bank*, 106 Ariz. 455, 457, 478 P.2d 79, 81 (1970) (holding that the proper place to demand attorney's fees on appeal is the appellate court).

¶17 Although Tannin did not have to file an answering brief because Ehlers never filed an opening brief in CV 09–0601, Tannin could have requested fees on appeal by filing a written motion. Tannin did not file a motion before the case was dismissed. And, in dismissing the appeal, this court did not award Tannin fees or costs, or direct the trial court to make an award. As a result, the trial court could not award fees and costs Tannin incurred on appeal in CV 09-0961.

¶18 Because Tannin did not explain why the fee request was untimely or seek an extension, the trial court erred in awarding fees and costs six months after a final appealable order had been entered. Consequently, we vacate the June 2010 award of attorneys' fees and costs.[3]

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[3] Because we vacate the award of fees, we need not address the argument that the trial court improperly added Kevin Ehlers to the judgment. A non-party spouse, however, cannot be added to a judgment to collect a community debt without violating due process. *Heinig v. Hudman*, 177 Ariz. 66, 69-70, 865 P.2d 110, 113-14 (App. 1993) (Judgment against husband cannot be converted into one against both spouses without regard to non-party spouse's right to procedural due process.); *Spudnuts, Inc. v. Lane*, 139 Ariz. 35, 36, 676 P.2d 669, 670 (App. 1984) (Post-judgment addition of spouse to judgment violated due process.). "That an *in personam* judgment may not be rendered against one who has never been a party to the litigation would seem so obvious that citation of authority should be unnecessary." *Eng v. Stein*, 123 Ariz. 343, 345-46, 599 P.2d 796, 798-99 (1979)

¶19 Ehlers has requested attorneys' fees and costs on appeal pursuant to A.R.S. § 12-341.01. In our discretion, we deny her request for attorneys' fees. She, however, is entitled to an award of costs pursuant to A.R.S. § 12-341 upon her compliance with ARCAP 21(a).

CONCLUSION

¶20 Based on the foregoing, we vacate the fee award to Tannin in October 2010.

/s/
_____
MAURICE PORTLEY, Judge

CONCURRING:

/s/
_____
PATRICIA K. NORRIS, Presiding Judge

/s/
_____
PETER B. SWANN, Judge

(quoting *King v. Uhlmann*, 103 Ariz. 135, 156, 437 P.2d 928, 948 (1968) (Struckmeyer, J., dissenting)). A creditor seeking to collect a debt from the community must sue the spouses jointly. A.R.S. § 25-215(D). Thus, even assuming the fee award would have been a community obligation, Tannin would be required to bring a separate action on the debt against both Lisa and Kevin Ehlers.