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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 09/20/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ROBERT THOMPSON, personal) No. 1 CA-CV 11-0781
representative of the Estate of)
Billy J. Alexander,) DEPARTMENT A
)
Plaintiff/Appellant,) **MEMORANDUM DECISION**
)
v.) Not for Publication -
) (Rule 28, Arizona Rules
JERRY ALAN WILSON, as Trustee of) of Civil Appellate Procedure)
the Pauline Alexander Trust,)
)
Third-Party Defendant/)
Appellee.)
)

Appeal from the Superior Court in Yuma County

Cause No. S1400CV200900438

The Honorable Mark W. Reeves, Judge

AFFIRMED

Schneider & Onofry, P.C. Yuma
By A. James Clark
Attorney for Plaintiff/Appellant Robert Thompson

Snell & Wilmer L.L.P. Phoenix
By Kevin J. Parker
and
Law Offices of Larry W. Suci Yuma
By Barry L. Olsen
Attorneys for Defendant/Appellee Jerry Alan Wilson

T I M M E R, Presiding Judge

¶1 Robert Thompson, the personal representative of the Estate of Billy J. Alexander ("the Estate"), appeals the superior court's denial of his Arizona Rule of Civil Procedure ("Rule") 60(c)(6) motion to vacate the court's order granting attorneys' fees to the decedent's wife, Pauline Alexander.¹ For the reasons that follow, we affirm.

BACKGROUND²

¶2 The superior court granted summary judgment for Alexander in a signed order entered November 18, 2009, which did not contain Rule 54(b) language. On December 8, Alexander moved for attorneys' fees pursuant to Arizona Revised Statutes ("A.R.S.") section 12-341.01 (West 2012).³ Six days later on December 14, the Estate filed a notice of appeal of the summary judgment order. The Estate then responded to Alexander's application on December 18 arguing, in part, the court lacked jurisdiction to rule on the application in light of the notice of appeal. Alexander replied the court retained jurisdiction

¹ Alexander died during the pendency of the lawsuit, and the court substituted Jerry Alan Wilson, Trustee of the Pauline Alexander Trust, as third-party defendant. For ease of reference, we refer to the appellee as "Alexander."

² The original dispute between the parties is described in this court's prior decision. *Thompson v. Alexander*, 1 CA-CV 10-0057, 2010 WL 5356491 (Ariz. App. Dec. 21, 2010) (mem. decision).

³ Absent material revisions after the relevant date, we cite a statute's current version.

because no final judgment existed until resolution of the fee application, and the Estate's appeal was premature. On January 19, 2010, the court awarded Alexander attorneys' fees of \$41,017 in a signed order; the court did not explicitly address the jurisdiction issue. The Estate did not file a subsequent notice of appeal.

¶13 Neither party apparently raised a jurisdictional issue to this court in the briefing or at oral argument, and we affirmed summary judgment for Alexander on December 21, 2010. *Thompson*, 1 CA-CV 10-0057. We denied Alexander's request for attorneys' fees on appeal, however, holding she was not entitled to fees under § 12-341.01 because the matter did not arise from a contract. *Id.* at ¶ 37. No party filed a petition for review to the supreme court, and this court issued its mandate on January 27, 2011.

¶14 On June 13, 2011, Alexander demanded the Estate pay her attorneys' fees pursuant to the superior court's order. One month later, on July 12, the Estate moved for Rule 60(c)(6) relief, arguing our determination that the dispute did not arise from a contract nullified the superior court order granting fees to Alexander. After briefing and oral argument, the court denied the Estate's motion, concluding extraordinary circumstances did not exist to warrant relief as the Estate could have appealed the attorneys' fees award. The Estate filed

a motion for reconsideration, which was never ruled on. This timely appeal followed.

DISCUSSION

¶5 We review the court's ruling for an abuse of discretion. *Aileen H. Char Life Interest v. Maricopa County*, 208 Ariz. 286, 298, 93 P.3d 486, 498 (2004). The court abused its discretion if it committed an error of law in the process of reaching a discretionary decision. *Hurd v. Hurd*, 223 Ariz. 48, 52, ¶ 19, 219 P.3d 258, 262 (App. 2009).

I. Superior court's jurisdiction to award fees

¶6 The Estate first argues the superior court erred by denying the Rule 60(c)(6) motion because the court lacked jurisdiction to award Alexander her attorneys' fees on January 19, 2010 in light of the December 14, 2009 notice of appeal.⁴ See *Sw. Gas Corp. v. Irwin ex rel. County of Cochise*, 229 Ariz. 198, 201, ¶ 8, 273 P.3d 650, 653 (App. 2012) (noting that when a party files a notice of appeal from a final judgment it usually divests the superior court of jurisdiction to proceed except in

⁴ Alexander argues the Estate waived this argument by not raising it until moving the court to reconsider its ruling on the Rule 60(c)(6) motion. But the Estate originally raised the issue in response to Alexander's application for attorneys' fees. Consequently, even though the Estate failed to raise the issue in its Rule 60(c)(6) motion, because it raised the issue prior to the motion, we consider it. See *State v. Aleman*, 210 Ariz. 232, 240, ¶ 24, 109 P.3d 571, 579 (App. 2005) (holding waiver is a procedural concept we do not "rigidly employ in mechanical fashion.").

furtherance of the appeal). Alexander responds the notice of appeal did not divest the superior court of jurisdiction because the November 18, 2009 summary judgment order was not appealable due to her outstanding fee application.

¶7 We begin by examining rules governing entry of civil judgments. Rule 58(g) provides that "a judgment shall not be entered until claims for attorneys' fees have been resolved and are addressed in the judgment," unless the court certifies a merits decision for immediate appeal pursuant to Rule 54(b). According to State Bar Committee Notes to the 1999 Amendments to Rule 58(g), this procedure fosters resolution of all issues in one judgment for efficient review in a single appeal. Thus, in the absence of Rule 54(b) certification, a signed order only constitutes a final judgment for purposes of appeal if it adjudicates all claims, including claims for attorneys' fees. *Nat'l Broker Assocs., Inc. v. Marlyn Nutraceuticals, Inc.*, 211 Ariz. 210, 218, ¶ 37, 119 P.3d 477, 485 (App. 2005).

¶8 Alexander requested a fee award in her answer to the third-party complaint. See *id.* (characterizing request for attorneys' fees in answer and in open court as "claims"). And she timely filed her application for fees after entry of the summary judgment order and prior to the Estate's notice of appeal. This case is therefore distinguishable from *Allstate Insurance Co. v. Universal Underwriters, Inc.*, 199 Ariz. 261,

266, ¶ 15, 17 P.3d 106, 111 (App. 2000), cited by the Estate, which held that the superior court was divested of jurisdiction to rule on a fee application filed *after* the notice of appeal. *Cf. Britt v. Steffen*, 220 Ariz. 265, 270, ¶ 22, 205 P.3d 357, 362 (App. 2008) (holding court retained jurisdiction to rule on any timely filed fee application). Applying Rule 58(g), the superior court retained jurisdiction to consider the fee application.⁵

II. Law-of-the-case doctrine

¶9 The Estate next argues the superior court erred because the law-of-the-case doctrine required the court to grant the Rule 60(c)(6) motion and vacate the fee award.⁶ This doctrine provides that the superior court is bound by the appellate court's mandate on the same issue it is being asked to address. *Jordan v. Jordan*, 132 Ariz. 38, 40 n.3, 643 P.2d 1008,

⁵ The corollary to our holding is that the November 18, 2009 summary judgment order was not a final, appealable judgment. Because we next conclude the law-of-the-case doctrine did not require the superior court to grant Rule 60(c)(6) relief, we need not decide the viability of our previous decision. *Cf. Hamilton v. Williams*, 237 Ill. App. 3d 765, 772-73 (App. Ct. 1992) (holding appellate court's decision to proceed to merits of appeal constitutes a determination it possessed jurisdiction to do so and this implicit determination becomes law of the case upon issuance of the mandate).

⁶ Alexander argues the Estate waived this argument by failing to raise it to the superior court. We disagree. Although the phrase "law of the case" does not appear in the Estate's motion, the Estate essentially raised the argument by contending our decision rendered the superior court's fee decision unenforceable.

1010 n.3 (1982); *Powell-Cerkoney v. TCR-Montana Ranch Joint Venture, II*, 176 Ariz. 275, 279, 860 P.2d 1328, 1332 (App. 1993). "Under the law of the case doctrine, an appellate court's decision is controlling in both the lower courts and in subsequent appeals in the same case, so long as the facts and law remain substantially the same." *Copper Hills Enters., Ltd. v. Ariz. Dep't of Revenue*, 214 Ariz. 386, 390-91, ¶ 15, 153 P.3d 407, 411-12 (App. 2007).

¶10 The superior court did not err by refusing to apply the law-of-the-case doctrine to grant Rule 60(c)(6) relief. The catch-all provision of Rule 60(c) applies only when our "systematic commitment to finality of judgments is outweighed by extraordinary circumstances of hardship or injustice." *Panzino v. City of Phoenix*, 196 Ariz. 442, 445, ¶ 6, 999 P.2d 198, 201 (2000) (internal citation and quotation marks omitted). No such circumstances exist here. Nothing prevented the Estate from filing a notice of appeal after the court entered its written order granting attorneys' fees to Alexander on January 19, 2010. A.R.S. § 12-2101(A)(2) (West 2012) (providing that an appeal may be taken from "any special order made after final judgment").⁷ Had it done so, this court could have reviewed the propriety of the superior court's fee ruling as well as its decision on the

⁷ Section 12-2101 was amended and reordered in 2011. Section 12-2101(A)(2) was formerly 12-2101(C).

summary judgment motion. We agree with the superior court that, absent extraordinary circumstances and in light of our commitment to the finality of judgments, Rule 60(c)(6) should not be used as a vehicle for relief after issuance of an appellate mandate when that relief could have been achieved through a timely filed notice of appeal. See *Panzino*, 196 Ariz. at 445, ¶ 6, 999 P.2d at 201. Consequently, the superior court did not err by refusing to apply the law-of-the-case doctrine to vacate its prior award of attorneys' fees to Alexander.

ATTORNEYS' FEES ON APPEAL

¶11 Alexander requests an award of attorneys' fees as a sanction pursuant to A.R.S. § 12-2106 (West 2012), contending the Estate's appeal was either frivolous or taken solely for the purpose of delay. We do not discern either basis for sanctions, and we therefore deny the request. Alexander is entitled to taxable costs upon compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶12 For the foregoing reasons, we affirm.

/s/

Ann A. Scott Timmer
Presiding Judge

CONCURRING:

/s/

Margaret H. Downie, Judge

/s/

John C. Gemmill, Judge