NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

BARRY M. ATKINS, et al., *Plaintiffs/Appellants*,

v.

SNELL & WILMER LLP, et al., *Defendants/Appellees*.

No. 1 CA-CV 16-0733
FILED 2-6-2018

Appeal from the Superior Court in Maricopa County
No. CV2015-054630
The Honorable Aimee L. Anderson, Judge

AFFIRMED

COUNSEL

Barry M. Atkins, West Palm Beach, FL
Plaintiff/Appellant

Missy Atkins, West Palm Beach, FL
Plaintiff/Appellant

Fennemore Craig PC, Phoenix
By Amy Abdo, Jessica Post, Theresa Dwyer
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Presiding Judge Jon W. Thompson delivered the decision of the Court, in which Judge Peter B. Swann and Judge James P. Beene joined.

T H O M P S O N, Judge:

¶1 Plaintiffs/appellants, Barry Atkins and Missy Atkins (the Atkinses), appeal from the trial court's October 14, 2016 order, in favor of defendants/appellees Snell & Wilmer LLP; Donald Bivens and Patricia Lee Refo (husband and wife); and Robert M. Kort and Myndi M. Kort (husband and wife) (collectively Snell & Wilmer). For the reasons stated below, we affirm the court's order.

FACTUAL AND PROCEDURAL HISTORY

¶2 This appeal stems from the fifth lawsuit the Atkinses filed, in Arizona, against Snell & Wilmer on November 30, 2015. All five lawsuits arise out of Snell & Wilmer's representation of the Atkinses in a lawsuit filed by a third/non-party for the Atkinses's failure to repay monies to that party.

¶3 In the immediate action, the Atkinses initially sought declaratory and injunctive relief under Arizona's Declaratory Judgment Act, Arizona Revised Statutes (A.R.S.) section 12-1831 (2016), (the Declaratory Action). The Atkinses's Declaratory Action complaint raised the same issues regarding the validity and enforceability of their post-nuptial agreement that were being litigated between the parties in a consolidated legal malpractice lawsuit (the Negligence Action). Specifically, the Atkinses sought a declaration that their post-nuptial agreement was a final judgment under Florida law,[1] that it was to be accorded full faith and credit under the U.S. Constitution,[2] and that Snell & Wilmer lacked the ability and standing to challenge its validity or

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[1] The Atkinses entered into the post-nuptial agreement in 1998 while residing in Florida.

[2] U.S. Const. art. IV, § 1.

enforceability in the Negligence Action. The Negligence Action had been ongoing for years at the time the Declaratory Action was filed.

¶4 Snell & Wilmer filed a motion to dismiss the complaint. The court granted Snell & Wilmer's motion in an unsigned minute entry on January 28, 2016. The Atkinses appealed to this court from the minute entry on March 10, 2016. We dismissed that appeal as the minute entry was (1) not signed by the trial court, pursuant to Arizona Rules of Civil Procedure (Rule) 58(a), and (2) lacked finality language pursuant to Rule 54(b).[3] The trial court entered final judgment for Snell & Wilmer on March 25, 2016, and dismissed the complaint with prejudice. The court also granted sanctions against the Atkinses.

¶5 In dismissing the complaint, the court found that the Atkinses failed to state a claim because they were precluded from litigating issues already being litigated in another lawsuit. *See Merritt-Chapman & Scott Corp. v. Frazier,* 92 Ariz. 136, 139 (1962). The court additionally found that the relief sought—to determine whether the post-nuptial agreement was a Florida final judgment—was not a justiciable controversy.

¶6 The Atkinses did not appeal the final judgment. Instead, they filed a motion titled "Plaintiffs Barry M. Atkins' and Missy Atkins' Rule 60(c)(4) Motion to Vacate Final Judgment" (Rule 60(c)(4) motion). In the motion, the Atkinses argued "[v]acatur of the Final Judgment is proper because the Court lacked subject matter jurisdiction to dismiss Plaintiffs' complaint with prejudice and grant sanctions to Defendants." They averred that "without subject matter jurisdiction the court may do nothing but enforce the Florida final judgment."

¶7 Snell & Wilmer submitted a response to the Rule 60(4)(c) motion and again moved for sanctions pursuant to A.R.S. § 12-349 (2016) and Rule 11. In responding, Snell & Wilmer argued the Atkinses's jurisdiction argument was legally baseless, and highlighted that the motion was yet another attempt by the Atkinses "to re-litigate the same issues that

[3] Erroneously, the Atkinses concluded that this court dismissed the appeal because it was untimely.

have already been litigated numerous times in the Negligence Action."[4] The Atkinses submitted a reply in support of their Rule 60(4)(c) motion.

¶8 The trial court ultimately denied the Atkinses's motion and awarded attorneys' fees and costs to Snell & Wilmer. In denying the motion, the court found it had "jurisdiction to determine whether a claim presents a justiciable controversy" and to "enter judgment in favor of Snell & Wilmer." The court further found that sanctions were again appropriate to be awarded against the Atkinses pursuant to A.R.S. § 12-349 and Rule 11.

¶9 The Atkinses timely appealed from the trial court's order denying their Rule 60(c)(4) motion, and awarding sanctions. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. § 12-2101(A) (2016).

DISCUSSION

¶10 We begin by noting certain preliminary considerations. On appeal, the Atkinses raise several superfluous contentions regarding the trial court's determinations associated with the substance of the Declaratory Action. They again raise issues pertaining to the enforceability and validity of their post-nuptial agreement as a final judgment, whether the agreement is entitled to full faith and credit, and Snell & Wilmer's standing to challenge. We do not review them. The Atkinses's notice of appeal identifies only the trial court's order relating to their Rule 60(c)(4) motion.[5] *See Lee v. Lee*, 133 Ariz. 118, 124 (App. 1982) (the Court of Appeals lacks

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[4] In the responsive motion, Snell & Wilmer disclosed that after the motion to dismiss was granted in the Declaratory Action, another judge, to whom the Negligence Action had been transferred, recognized the rulings of the judges who had previously presided over the Negligence Action. Those judges had rejected the same jurisdictional and standing arguments relating to the Florida judgment and post-nuptial agreement. The new presiding judge also found that 'the evidence supports the commingling of assets' by the Atkinses, and denied a subsequent Rule 60(c)(4) request by the Atkinses to vacate the former Negligence Action judges' rulings.

[5] Nearly the entirety of the Atkinses's opening brief on appeal presents muddled arguments challenging the judgment they ultimately did not appeal. The Atkinses also assert arguments challenging the various interlocutory rulings made outside the Declaratory Action, which are not properly before us.

jurisdiction to review matters not contained in notice of appeal); *see also* Ariz. R. Civ. App. P. (ARCAP) 8(c) (the notice of appeal shall designate the judgment or part thereof appealed from). Moreover, the time to appeal from the actual final judgment regarding the Declaratory Action and associated motion to dismiss has expired. We therefore review only the trial court's order addressing its jurisdiction and award of sanctions.

I. The Trial Court's Jurisdiction

¶11 The Atkinses allege the trial court erred in failing to vacate its final judgment in the Declaratory Action, pursuant to Rule 60(c)(4), because the court lacked jurisdiction to do anything but enforce the Florida judgment and post-nuptial agreement.[6] We disagree.

¶12 Generally, the denial of a motion for relief under Rule 60(c) is reviewed for an abuse of discretion. *City of Phoenix v. Geyler*, 144 Ariz. 323, 328 (1985). The trial court abuses its discretion where it "exceed[s] the bounds of reason by performing the challenged act," *Toy v. Katz*, 192 Ariz. 73, 83 (App. 1997), or in exercising its discretion, commits an error of law, *Grant v. Ariz. Pub. Serv. Co.*, 133 Ariz. 434, 456 (1982), *supp. op.* However, "[w]e review de novo . . . the denial of a Rule 60(c)(4) motion to vacate a void judgment. When a judgment is void due to lack of jurisdiction, the court has no discretion, but must vacate the judgment." *Ezell v. Quon*, 224 Ariz. 532, 536, ¶ 15 (App. 2010).

¶13 We find no merit to the Atkinses's jurisdiction contention. Of course, a court has jurisdiction to decide whether a case brought before it states a claim or raises a justiciable controversy, and to accordingly allow the case to proceed or dismiss it. It is also incongruous that in one instance the Atkinses argue the court had subject matter jurisdiction over the Declaratory Action, in bringing the controversy before the court, then claim the court lacked jurisdiction to decide the action in favor of either party. We affirm the trial court's order denying the Atkinses's Rule 60(c)(4) motion to vacate its final judgment in the Declaratory Action for lack of jurisdiction.

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[6] The Atkinses's arguments, on appeal, concerning Rule 60(c)(4) relief attempts to undercut rulings made in the Negligence Action, and reasserts arguments regarding the validity and enforceability of the Florida judgment and post-nuptial agreement.

II. Award of Sanctions

¶14 The Atkinses also assert the trial court erred by awarding sanctions against them pursuant to Rule 11 and A.R.S. § 12-349 in the order regarding the Rule 60(c)(4) motion. This claim is also unavailing.

¶15 An award of sanctions under Rule 11 is reviewed for an abuse of discretion. *James, Cooke & Hobson, Inc. v. Lake Havasu Plumbing & Fire Prot.*, 177 Ariz. 316, 317 (App. 1993). The trial court's findings of facts supporting an award pursuant to A.R.S. § 12-349 are reviewed for clear error. *Phx. Newspapers, Inc. v. Dep't of Corr.*, 188 Ariz. 237, 244 (App. 1997).

¶16 We find no abuse or error in the court's award. Both Rule 11 and A.R.S. § 12-349 permit such an award against a party that commences an unjustified action. Here, the court noted that in the Declaratory Action it "granted Snell & Wilmer's request for sanctions as this was the fifth lawsuit that Plaintiff's filed against Snell & Wilmer raising the same arguments that had been rejected on multiple occasions previously by other judicial officers of this Court." We infer from the trial court's findings, and the record, that the court regarded the Atkinses's reassertion of the same issues, even in a motion to vacate arguing the court lacked jurisdiction to do anything but dispose of the case in their favor, again merited sanctions. *See Solimeno v. Tonan*, 224 Ariz. 74, 82, ¶ 33 (App. 2010) (this court may uphold an award of sanctions on any basis supported by the record). We therefore affirm the sanction award.

III. Attorneys' Fees on Appeal

¶17 Snell & Wilmer requests an award of attorneys' fees incurred in this appeal, pursuant to ARCAP 21(c) and 25 (sanctioning fees and costs for frivolous actions), and/or A.R.S. § 12-349 (fee award for frivolous actions). Pointing to the record in this case, Snell & Wilmer argues this appeal is frivolous and contains arguments that make "no sense." We agree this action is frivolous and find an award is appropriate given the circumstances of this case. As a sanction, we award Snell & Wilmer fees pursuant to ARCAP 25,[7] subject to timely compliance with ARCAP 21(c), and in an amount to be determined.

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[7] The decision to award fees as sanctions under ARCAP 25 is entirely within this court's discretion. *Ariz. Dep't of Revenue v. Gen. Motors Acceptance Corp.*, 188 Ariz. 441, 446 (App. 1996).

CONCLUSION

¶18 For the foregoing reasons, we affirm the trial court's October 14, 2016 order regarding its jurisdiction and its accompanying sanction award pursuant to Rule 11 and A.R.S. § 12-349.

AMY M. WOOD • Clerk of the Court
FILED: AA