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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

GARY T. JOHANSON, et al.,
Plaintiffs/Appellees,

v.

NICK CASAVELLI, et al.,
Defendants/Appellants.

No. 1 CA-CV 21-0207
FILED 2-15-2022

Appeal from the Superior Court in Maricopa County
No. CV2017-055490
The Honorable Sally Schneider Duncan, Judge

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

COUNSEL

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Counsel for Plaintiffs/Appellees

Nicholas Casavelli, Nicolina Castelli, Sun City
Defendants/Appellants

MEMORANDUM DECISION

Judge James B. Morse Jr. delivered the decision of the Court, in which Presiding Judge Jennifer B. Campbell and Judge Randall M. Howe joined.

M O R S E, Judge:

¶1 Nicholas Casavelli and Nicolina Castelli ("Appellants") appeal the superior court's order designating them vexatious litigants. For the following reasons, we affirm the order in part, vacate in part, and remand to the superior court.

FACTS AND PROCEDURAL BACKGROUND

¶2 This case began in 2017 when Gary and Donna Johanson filed suit against Appellants alleging, among other things, financial exploitation of a vulnerable adult in violation of A.R.S. § 46-456, breach of fiduciary duty, constructive fraud, and unjust enrichment. After the initial claim was filed, the Johansons amended their complaint to include additional claims against Appellants. In the interim, Gary Johanson passed away and his estate was substituted into the litigation. Donna Johanson ("Donna") then began acting individually and as personal representative of her husband's estate.

¶3 In November 2020, Donna moved to deem Appellants vexatious litigants. After an evidentiary hearing that Appellants did not attend, the superior court granted the motion and ordered Donna to submit "findings of fact regarding the 'vexatious litigant' finding." Donna submitted proposed findings of fact and conclusions of law, and the superior court adopted them.¹

¶4 In March 2021, Appellants appealed several of the superior court's rulings and orders. Donna moved to dismiss the appeal, claiming

¹ Appellants claim that "the trial court did not make any determination concerning the vexatious litigant order." However, the superior court granted Donna's motion and was free to adopt the proposed findings of fact and conclusions of law "if those findings [were] consistent with the ones that [the court] reach[ed] independently after properly considering the facts." *Elliott v. Elliott*, 165 Ariz. 128, 134 (App. 1990).

that the issues raised in the notice of appeal were not substantively appealable and the appeal was untimely. After consideration, this Court granted the motion and dismissed the appeal on all issues other than the vexatious-litigant order. As we noted in our order, Appellants timely appealed the vexatious-litigant order. Because we treat such an order as a grant of injunctive relief, we have jurisdiction pursuant to A.R.S. § 12-2101(A)(5)(b). *Madison v. Groseth*, 230 Ariz. 8, 13, ¶ 16 n.8 (App. 2012).

DISCUSSION

¶5 We review an order designating a party a vexatious litigant for an abuse of discretion. See *Flying Diamond Airpark, LLC v. Meienberg*, 215 Ariz. 44, 47, ¶ 9 (App. 2007) (noting a grant of injunctive relief is reviewed for an abuse of discretion).

¶6 Under Arizona law, "the presiding judge of the superior court . . . may designate a pro se litigant a vexatious litigant . . . if the court finds that the pro se litigant engaged in vexatious conduct." A.R.S. § 12-3201(A), (C); see also *Madison*, 230 Ariz. at 14, ¶ 17 (noting a trial court has "inherent authority to curtail a vexatious litigant's ability to initiate additional lawsuits"). "Vexatious conduct" includes "[r]epeated filing of court actions solely or primarily for the purpose of harassment," "[u]nreasonably expanding or delaying court proceedings," "actions brought or defended without substantial justification," and "[r]epeated filing of documents or requests for relief that have been the subject of previous rulings by the court in the same litigation." A.R.S. § 12-3201(E)(1). When the court designates a party a vexatious litigant, they "may not file a new pleading, motion or other document without prior leave of the court." A.R.S. § 12-3201(B).

¶7 Vexatious-litigant orders "must be entered sparingly and appropriately." *Madison*, 230 Ariz. at 14, ¶ 17. For a court to impose pre-filing restrictions on a vexatious litigant: (1) the litigant must be given notice and an opportunity to oppose the order, (2) the court must list all cases and motions leading to the vexatious-litigant order, (3) the court must make "substantive findings as to the frivolous or harassing nature of the litigant's actions," and (4) the order "must be narrowly tailored to closely fit the specific vice encountered." *Madison*, 230 Ariz. at 14, ¶ 18 (quoting *De Long v. Hennessey*, 912 F.2d 1144, 1148 (9th Cir. 1990)). We address each factor in turn.

I. Notice and Opportunity to Oppose the Vexatious-Litigant Order.

¶8 Appellants claim they were not given notice and an opportunity to oppose the order because the hearing on the vexatious-litigant motion was "held in [their] absence one day prior [to] the official notice date."

¶9 The superior court scheduled an evidentiary hearing to address several pending motions in the case, including the vexatious-litigant motion, for January 28, 2021. At the hearing, Appellants were "neither present nor represented." Appellants acknowledge they received notice of the hearing scheduled for January 28, but argue that the hearing was actually held on January 27. In support of this assertion, Appellants point to the superior court's minute entry regarding the hearing that was originally dated January 27, 2021, and documents referencing that minute entry and its date of January 27.² However, the superior court later filed a *nunc pro tunc* order correcting and amending the minute entry to reflect the actual date of the hearing on January 28, 2021. Appellants point to no convincing record evidence supporting their contention that the hearing was held on January 27, 2021. In the absence of such evidence, the presumption of regularity controls, and supports the superior court's finding that Appellants were "properly noticed" of the hearing. *See State v. Hyde*, 186 Ariz. 252, 269 (1996) (noting that a defendant must present "sufficient evidence" to overcome the presumption of regularity).

¶10 Further, Appellants received notice of the motion to deem them vexatious litigants and had the opportunity to file a response. They did not do so. After the hearing, the proposed findings of fact and conclusions of law were docketed and Appellants were notified via email and had the opportunity to object. They did not do so. Accordingly, Appellants were given sufficient notice and opportunity to oppose the vexatious-litigant order.

² Appellants also present a phone bill showing an outgoing call on January 28, 2021, and claim that they attempted to call into the hearing at the scheduled time. However, Appellants first filed the phone bill in their notice of appeal and, as a result, we cannot consider it. *See GM Dev. Corp. v. Cmty. Am. Mortg. Corp.*, 165 Ariz. 1, 4 (App. 1990) (stating an "appellate court's review is limited to the record before the trial court").

II. The Superior Court's Vexatious-Conduct Findings.

¶11 In a proper vexatious-litigant order, the superior court must adequately explain the basis for its determination. *Madison*, 230 Ariz. at 14, ¶ 18. This includes listing the cases and motions leading to the vexatious-litigant order and making "substantive findings as to the frivolous or harassing nature" of the litigant's conduct. *Id.* (quoting *De Long*, 912 F.2d at 1148). The superior court met these requirements.

¶12 The superior court concluded that Appellants had engaged in vexatious conduct as they repeatedly filed court actions "solely or primarily for harassment," unreasonably expanded or delayed court proceedings, brought or defended court actions without substantial justification, and "repeatedly fil[ed] documents or requests for relief that [had] been the subject of previous rulings by the court in the same litigation." In support of its conclusion, the superior court found that Appellants:

"filed at least eight motions seeking to remove Plaintiffs' counsel" that were all denied;

"filed numerous motions alleging forged or falsified documents by Plaintiffs or their counsel" and those allegations were "meritless";

"filed multiple motions for reconsideration," which were all denied;

"twice filed an *Application to Remove Judge for Cause* only days apart" and those applications were "meritless" and "harassing because they sought primarily to delay the *Order to Show Cause Hearing*";

"untimely attempted to strike [the superior court judge] after ruling on multiple issues over a period of months";

"untimely attempted to remove the within case to federal court after two-plus years of litigation in state court";

"walked out of their depositions";

"filed for an *ex-parte* Order of Protection against . . . Gary Johanson . . . [that] was denied";

"three times took an appeal on unappealable rulings";

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"caused the loss of a firm trial setting because their first *Notice of Appeal* of an unappealable order did not resolve in time";

"twice applied for 'Default Judgment' on procedural motions for which judgment of any kind is impermissible";

"improperly filed an Amended Counterclaim . . . without first obtaining leave of Court to do so";

"filed a *Motion to Dismiss* seeking dismissal of all of Plaintiff's claims . . . at a time when the dispositive motion deadline had expired";

"brought a second *Motion to Dismiss* . . . exceeding the limits place[d] on dispositive motions";

"brought several counterclaims in the within case for which they either did not have standing, were barred by an applicable limitations period, or were barred by privilege";
and

"filed a case with the U.S. District Court, District of Arizona . . . seeking to enjoin the within Superior Court case and alleging various constitutional and federal statutory claims" that was dismissed with prejudice.

¶13 These findings exceed a mere recitation of the number of previously filed lawsuits and motions. *Cf. Madison*, 230 Ariz. at 14-15, ¶ 21 (reversing a vexatious-litigant determination when the superior court found plaintiff to be vexatious due to the number of lawsuits filed by plaintiff but did not address the merits of the filings). The record supports the superior court's findings, and it did not abuse its discretion in concluding Appellants had engaged in vexatious conduct and designating them vexatious litigants.

III. Vexatious-Litigant Orders Must be Narrowly Tailored.

¶14 A vexatious-litigant order imposing pre-filing restrictions also "must be narrowly tailored to closely fit the specific vice encountered." *Madison*, 230 Ariz. at 14, ¶ 18 (quoting *De Long*, 912 F.2d at 1148).

¶15 Here, the court ordered that Appellants "are prohibited from filing any new causes of action in any Arizona Court without leave of the Presiding Judge or his/her designee without first furnishing security equal

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to all outstanding unpaid judgments in this matter plus \$10,000.00 in the within case, and security in the amount of \$5,000.00 in any other new litigation that [Appellants] seek to file alleging the same or derivative facts or law." The court further ordered that Appellants are prohibited "from filing any new pleading, motion or other document in any non-criminal case in which judgment concluding the case has been entered without leave of the Presiding Judge or his/her designee."

¶16 In *Madison*, we cited to the federal standards governing vexatious-litigant orders set forth in *De Long v. Hennessey*. *Madison*, 230 Ariz. at 14, ¶ 18. Applying these standards, unpublished decisions of this Court have approved, as narrowly tailored, orders which impose pre-filing restrictions covering the case at issue or the parties involved in the current litigation. See *Marin v. Wilmot Self-Storage, LLC*, 2 CA-CV 2017-0067, 2017 WL 4422410, at *4, ¶ 14 (Ariz. App. Oct. 4, 2017) (mem. decision) (finding a vexatious-litigant order was "narrowly tailored to prohibit claims against these defendants"); *In re Ellen H. Gardner Tr.*, 1 CA-CV 15-0023, 2016 WL 1104855, at *4, ¶ 18 (Ariz. App. Mar. 22, 2016) (mem. decision) (finding a vexatious-litigant order was not narrowly tailored when it "restrict[ed] pre-filing in all cases"). Federal authorities are consistent with this approach. See *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1061 (9th Cir. 2007) (finding an order proper where it "appropriately covers only the type of claims [the litigant] had been filing vexatiously"); *Tyler v. Knowles*, 481 F. App'x 355, 356 (9th Cir. 2012) (finding a vexatious litigant order was not narrowly tailored when it required the litigant to "seek leave of the presiding judge before filing new litigation"); *Cromer v. Kraft Foods N. Am., Inc.*, 390 F.3d 812, 818-19 (4th Cir. 2004) (vacating a pre-filing order that prevented the litigant from making "any and all filings" in the present case and in future unrelated cases without first obtaining permission).

¶17 The superior court's vexatious-conduct findings focus exclusively on Appellants' conduct in their litigation with the Johansons. See *supra* ¶ 12. Therefore, an order prohibiting them from filing "any new causes of action in any Arizona court," even in matters not involving the same plaintiffs or issues involved in the current litigation, is not narrowly tailored to address Appellants' vexatious behavior. As a result, we affirm the pre-filing restrictions in the vexatious-litigant order to the extent they apply to the current case and plaintiffs but vacate the portion of the order as it applies to any broader pre-filing restrictions.

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IV. Attorney's Fees and Costs.

¶18 Appellants request an award of costs incurred on appeal and Donna requests an award of her attorneys' fees, but not costs, incurred on appeal under ARCAP 21(a) and A.R.S. § 12-349(A)(1), (2), (3). In our discretion, we decline both parties' requests.

CONCLUSION

¶19 For the foregoing reasons, we affirm the superior court's designation of Appellants as vexatious litigants and the vexatious-litigant order to the extent that it applies to the current case and plaintiffs but vacate the order with respect to any broader pre-filing restrictions. We remand this case to the superior court to enter an order consistent with this decision.



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