

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

JUN 28 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re the Marriage of:)	
)	
REBECCA BARBER,)	2 CA-CV 2012-0133
)	DEPARTMENT B
Petitioner/Appellant,)	
)	<u>MEMORANDUM DECISION</u>
and)	Not for Publication
)	Rule 28, Rules of Civil
JON ROY STUART,)	Appellate Procedure
)	
Respondent/Appellee.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. D20120117

Honorable Richard D. Nichols, Judge

APPEAL DISMISSED

Law Office of Thomas C. McDaniel III
By Thomas C. McDaniel III

Tucson
Attorney for Petitioner/Appellant

Law Office of Dina Afek, P.C.
By Dina Afek

Tucson
Attorney for Respondent/Appellee

V Á S Q U E Z, Presiding Judge.

¶1 In this action for annulment, Rebecca Barber appeals from the trial court’s denial of her motion for a new trial after finding her in civil contempt for violating its order to return property to appellee Jon Stuart. She contends the court erred by applying the procedure for civil rather than criminal contempt “where [she] would be afforded a jury trial and the burden of proof would be beyond a reasonable doubt.” For the reasons that follow, we dismiss for lack of jurisdiction.

Factual and Procedural Background

¶2 Rebecca and Jon married in August 2010 in Arkansas. In January 2012, Rebecca, who had moved to Tucson, filed a petition for dissolution of marriage, which later was amended to include a claim for annulment. After a hearing in April 2012, the trial court ordered the marriage annulled and accepted as “fair and equitable” the provisions of the parties’ settlement agreement concerning the division of property and debts. Although the court directed Rebecca to prepare a decree of annulment, none has been entered.

¶3 Under the settlement agreement, Jon received the residence in Arkansas and was obligated to pay Rebecca \$120,000 as her share with a \$75,000 cash payment due within two weeks of the hearing. The trial court directed Rebecca and Jon to meet at the Tucson-area storage facility where Rebecca had stored some of Jon’s belongings so that they could be returned. The court admonished Rebecca “to ensure that [Jon]’s belongings [wer]e returned to him with no further vandalism or damage.” Shortly thereafter, Jon filed a notice of non-compliance, requesting that Rebecca “be held in contempt of court and sanctioned for . . . [the] deliberate destruction of [his] property.”

According to the notice, Jon had discovered that several items were damaged and others missing. Jon claimed he had found “fresh dog feces” in both the washer and dryer and his hunting gear smelled “bad[ly] from dog feces” and had to be thrown out. He requested that Rebecca be ordered to reimburse him for the damaged and missing property, his expenses in traveling to Tucson, and his attorney fees and costs.

¶4 After a hearing in May 2012,¹ the trial court found that “damage was done to [Jon]’s property with [Rebecca]’s knowledge and approval” and directed Jon to file an affidavit of attorney fees and costs. Rebecca subsequently filed a motion for a new trial, arguing the court had erred in finding her in civil contempt of court because the contempt was actually “criminal in nature.” Accordingly, she maintained she was entitled to a jury trial in which the higher burden of proof, beyond a reasonable doubt, required to support a criminal contempt sanction, should apply.

¶5 The trial court denied Rebecca’s motion at a hearing on July 9, 2012. The court determined that its finding of contempt “[wa]s not criminal in nature” because it was “not designed to punish” but, instead, was civil in nature because it was “designed to ensure compliance.” However, the court gave Rebecca the opportunity to “purge herself of [the] contempt by agreeing to [pay] a reasonable amount” for the damaged property. Rebecca refused to make an offer “other than minimal,” including “fair market value” for the hunting gear and “no damages for the washer and dryer because [they] . . . work[ed] fine.” After hearing argument, the court took the amount of damages under advisement.

¹The transcript from the hearing is not part of our record on appeal. We thus presume the transcript supports the trial court’s findings and rulings. *See Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995).

¶6 In an unsigned order entered on July 11, 2012, “[t]o rectify the situation and bring [Rebecca] into compliance with the order,” the trial court reduced Jon’s \$75,000 cash payment relating to the residence in Arkansas by \$14,638, which included \$1,100 for the damage to the washer, dryer, and hunting gear; \$4,062 for travel expenses; and \$9,476 for attorney fees and costs. This appeal followed.

Discussion

Appellate Jurisdiction

¶7 In her opening brief, Rebecca asserts we have jurisdiction pursuant to A.R.S. § 12-2101(A)(5)(a), which permits appeals from orders “[g]ranting or refusing a new trial.” Although Jon does not dispute this assertion, we have an independent duty to review our jurisdiction and, if lacking, to dismiss the appeal. *See In re Marriage of Flores & Martinez*, 231 Ariz. 18, ¶ 6, 289 P.3d 946, 948 (App. 2012). Grounded in statute, our jurisdiction is limited to judgments and orders as set forth in § 12-2101(A). *Flores*, 231 Ariz. 18, ¶ 7, 289 P.3d at 948. We have no authority to entertain an appeal over which we lack jurisdiction. *In re Marriage of Johnson & Gravino*, 231 Ariz. 228, ¶ 5, 293 P.3d 504, 506 (App. 2012).

¶8 We first must determine what order Rebecca is challenging. Her notice of appeal indicates she is appealing both the July 9 order denying her motion for a new trial and the July 11 order establishing the amount to purge the contempt citation. In her opening brief, however, Rebecca concedes she is appealing “the final order in which the trial court denied [her] motion for a new trial” concerning her contempt citation and “not

. . . the sanctions themselves.” Rebecca, therefore, has limited our review to the denial of her motion for a new trial—the July 9 order.

¶9 Generally, “an order granting or denying a new trial is . . . an appealable ‘judgment’ for purposes of Arizona’s procedural rules.” *Craig v. Craig*, 227 Ariz. 105, n.1, 253 P.3d 624, 625 n.1 (2011); *compare* Ariz. R. Fam. Law P. 78(A), *with* Ariz. R. Civ. P. 54(a) (both containing identical definition of “judgment”); *see also* § 12-2101(A)(5)(a). However, an appeal solely from an order denying a motion for a new trial is more limited than an appeal from the underlying final judgment itself. *See Ariz. Mgmt. Corp. v. Kallof*, 142 Ariz. 64, 66, 688 P.2d 710, 712 (App. 1984). And, a party cannot appeal the denial of a motion for a new trial when the underlying judgment is itself not a final, appealable order. *See Santa Maria v. Najera*, 222 Ariz. 306, ¶ 10, 214 P.3d 394, 396 (App. 2009) (denial of motion for new trial directed at non-final partial summary judgment not appealable). As we have explained, “[a] party may not create access to appellate review merely by filing a new trial motion from a non-appealable . . . order.” *Id.* ¶ 11. Thus, in order for us to have jurisdiction over the denial of Rebecca’s motion for a new trial, the order underlying that motion—the civil contempt citation—also must be appealable.²

²The trial court never entered a final, signed order—a prerequisite to our jurisdiction under § 12-2101(A)—either finding Rebecca in civil contempt or denying her motion for a new trial. Although normally we might suspend an appeal and revest the trial court with jurisdiction to enter such an order, *see Eaton Fruit Co. v. Cal. Spray-Chemical Corp.*, 102 Ariz. 129, 130, 426 P.2d 397, 398 (1967), we need not do so here because, as we have discussed, we still would lack jurisdiction even with a final, signed order.

¶10 “Our supreme court has repeatedly ruled that contempt orders are not appealable.” *Green v. Lisa Frank, Inc.*, 221 Ariz. 138, n.3, 211 P.3d 16, 23 n.3 (App. 2009). Rather, civil contempt citations typically are reviewable only by special action. *See State ex rel. Dep’t of Econ. Sec. v. Burton*, 205 Ariz. 27, ¶ 18, 66 P.3d 70, 73 (App. 2003). In *Green*, however, we allowed an appeal from a sanctions order entered pursuant to the civil contempt statute, A.R.S. § 12-864, because that order finally disposed of the entire case and fell within the definition of an appealable, interlocutory order. 221 Ariz. 138, ¶¶ 9, 16-17, 211 P.3d at 22-23, 25. We explained that “contempt orders are unappealable unless the substance or effect of the order in question—beyond including a ‘finding[] of contempt’—qualifies the order as one of those made appealable pursuant to § 12-2101.” *Id.* ¶ 21, quoting *State v. Mulligan*, 126 Ariz. 210, 216, 613 P.2d 1266, 1272 (1980).

¶11 Rebecca’s civil contempt citation is not appealable. The exception created in *Green* does not apply here because the citation does not go “beyond including a ‘finding[] of contempt.’” *Id.* At the May 2012 hearing, the trial court found that “damage was done to [Jon]’s property with [Rebecca]’s knowledge and approval,” but it did not entertain any other motions or enter any other orders.³ Indeed, Rebecca has conceded that any challenge to her contempt citation should have been brought by special

³Although the trial court did not expressly find Rebecca in contempt and did not cite § 12-864 as authority for the sanctions imposed, it appears that the court nevertheless sanctioned Rebecca pursuant to § 12-864 and Rule 92, Ariz. R. Fam. Law P. *See Green*, 221 Ariz. 138, ¶¶ 11, 29, 211 P.3d at 23, 27-28 (court has inherent authority to sanction for party’s failure to comply with orders).

action.⁴ Because the contempt citation is not an appealable order, we lack jurisdiction over Rebecca’s appeal from the denial of her motion for a new trial. *See Santa Maria*, 222 Ariz. 306, ¶ 11, 214 P.3d at 396.

Attorney Fees and Costs

¶12 Both parties have requested an award of attorney fees and costs. Although Jon is the successful party on appeal, we deny his request for fees because he has not articulated any statutory basis for the award. *See In re Marriage of Williams*, 219 Ariz. 546, ¶ 16, 200 P.3d 1043, 1047 (App. 2008). However, he is entitled to recover his costs on appeal upon his compliance with Rule 21, Ariz. R. Civ. App. P.

Disposition

¶13 For the foregoing reasons, the appeal is dismissed for lack of jurisdiction.

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Judge

⁴“In certain cases where we lack appellate jurisdiction, we have nevertheless elected to assume special-action jurisdiction over a matter brought as a direct appeal.” *Catalina Foothills Unified Sch. Dist. No. 16 v. La Paloma Prop. Owners Ass’n*, 229 Ariz. 525, ¶ 20, 278 P.3d 303, 309 (App. 2012). Rebecca does not ask us to do so, and “our own review does not demonstrate that this case merits the exercise of our extraordinary jurisdiction.” *Id.*