

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

JEFFREY AND STACY WHITWORTH,
Plaintiffs/Appellants,

v.

AMERICAN HONDA MOTOR CO., INC.,
Defendant/Appellee.

No. 2 CA-CV 2014-0122
Filed February 25, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Cochise County
No. CV201200616
The Honorable Karl D. Elledge, Judge

AFFIRMED IN PART; DISMISSED IN PART

COUNSEL

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MEMORANDUM DECISION

Judge Howard authored the decision of the Court, in which Presiding Judge Kelly and Judge Vásquez concurred.

H O W A R D, Judge:

¶1 Appellants Jeffrey and Stacy Whitworth appeal from a judgment entered in their favor against appellee American Honda Motor Company (“Honda”) following a jury trial. On appeal, they contend the trial court erred by refusing to award sanctions under Rule 68(g), Ariz. R. Civ. P., by awarding less than the full amount of attorney fees they had requested, and by refusing to enforce the judgment against Honda. Because the Whitworths have failed to provide a transcript of the relevant hearing, and we lack jurisdiction over the motion to enforce issue, we affirm in part and dismiss in part.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining the jury’s verdicts. See *Kaman Aerospace Corp. v. Ariz. Bd. of Regents*, 217 Ariz. 148, ¶ 2, 171 P.3d 599, 601 (App. 2007). In June 2012, the Whitworths purchased a new Honda Odyssey in West Virginia. The minivan soon began exhibiting several defects which Honda was unable to repair. The Whitworths shortly thereafter used the Odyssey to move their family to Arizona, and the minivan continued to exhibit defects during the trip and in Arizona.

¶3 In September 2012, the Whitworths sued Honda, alleging a breach of written warranty, a violation of Arizona’s Lemon Law,¹ and a breach of implied warranty. The breach of implied warranty claim later was dismissed, and a jury found in favor of the Whitworths on the Lemon Law and written warranty

¹The Whitworths’ complaint originally alleged a violation under West Virginia’s Lemon Law. The parties later stipulated that Arizona’s Lemon Law would be applied instead.

claim. The trial court's final judgment ordered Honda to buy back the Odyssey for \$27,689 and pay the Whitworths \$77,515 in attorney fees and costs. We have jurisdiction over the Whitworths' appeal as it relates to the attorney fees and costs issues pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1). As discussed below, we lack jurisdiction to address their argument on their motion to enforce filed below.

Attorney Fees and Costs

¶4 The Whitworths first argue the trial court erred by denying their request for sanctions against Honda under Rule 68(g), Ariz. R. Civ. P., because Honda did not obtain a "more favorable judgment" than the Whitworths proposed in a pretrial offer of judgment. Trial courts have "wide latitude in assessing costs and sanctions," and we therefore review a court's decision regarding their imposition for an abuse of discretion. *Berry v. 352 E. Virginia, L.L.C.*, 228 Ariz. 9, ¶ 31, 261 P.3d 784, 790 (App. 2011); *see also Hall v. Read Dev., Inc.*, 229 Ariz. 277, ¶ 16, 274 P.3d 1211, 1216 (App. 2012) ("[C]ourts . . . have no choice but to exercise their discretion to determine the amount of reasonable attorneys' fees incurred up to the date of the offer (and would thus be included in the final judgment) when comparing a settlement offer to the judgment finally obtained.").

¶5 The Whitworths additionally contend the trial court erred by awarding them less in attorney fees than they requested because it determined they should not recover based on their unsuccessful claim for breach of implied warranty and "routine tasks" that appeared in their *China Doll*² affidavit. "An award of attorney fees is left to the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion." *Orfaly v. Tucson Symphony Soc'y*, 209 Ariz. 260, ¶ 18, 99 P.3d 1030, 1035 (App. 2004).

¶6 The Whitworths have failed to include the transcript from the hearing held on the attorney fees and costs issue below. The minute entry for the hearing indicates no court reporter was

²*Schweiger v. China Doll Rest., Inc.*, 138 Ariz. 183, 673 P.2d 927 (App. 1983).

present. After the judgment was entered, the Whitworths requested that the trial court designate the “For The Record” recording as the official transcript, but the court denied that request and the Whitworths’ motion for reconsideration.³

¶7 The Whitworths, as the appellants, were obligated to “mak[e] certain the record on appeal contains all transcripts or other documents necessary for us to consider the issues raised.” *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995); *see also* Ariz. R. Civ. App. P. 11(b)-(d). If no transcript is available, a party “may prepare and file a narrative statement of the evidence or proceedings from the best available source, including the appellant’s recollection.” Ariz. R. Civ. App. P. 11(d). This requirement is particularly important when the trial court has addressed issues over which it has considerable discretion. In the absence of the transcript, we presume it supports the court’s factual findings and ruling. *See Baker*, 183 Ariz. at 73, 900 P.2d at 767; *see also Cardinal & Stachel, P.C. v. Curtiss*, 225 Ariz. 381, ¶ 5, 238 P.3d 649, 651 (App. 2010). Based on this presumption, we cannot say the court abused its discretion in declining to impose Rule 68(g) sanctions or in determining the amount of attorney fees awarded to the Whitworths. *See Berry*, 228 Ariz. 9, ¶ 31, 261 P.3d at 790; *see also Orfaly*, 209 Ariz. 260, ¶ 18, 99 P.3d at 1035.

Enforcing the Judgment

¶8 The Whitworths next argue the trial court erred by failing to grant their motion to enforce the judgment against Honda. Honda, however, asserts this court does not have jurisdiction to address this issue. We only have jurisdiction pursuant to statute and have no authority to consider an appeal over which we do not have jurisdiction. *See Hall Family Props., Ltd. v. Gosnell Dev. Corp.*, 185 Ariz. 382, 386, 916 P.2d 1098, 1102 (App. 1995). Pursuant to § 12-2101(A)(1), we have jurisdiction of an appeal “[f]rom a final judgment.”

¶9 The Whitworths filed their motion to enforce the judgment nearly two months after filing their notice of appeal. The

³The Whitworths have not challenged the trial court’s order denying use of the FTR, and we express no opinion concerning it.

trial court then issued an unsigned notice stating it would “not act on the Motion or any other matter until the mandate is issued by the Court of Appeals unless otherwise directed to rule on the Motion by the Court of Appeals.”

¶10 The Whitworths characterize this notice as a denial of their motion; however, it is clear the trial court did not enter any ruling on the motion. Thus, no final order has been entered on the Whitworths’ motion to enforce. Furthermore, the notice does not dispose of the motion and is not an “intermediate order[] involving the merits of the action.” A.R.S. § 12-2102(A). We therefore do not have jurisdiction to address their argument on this issue. *See* § 12-2101(A)(1).

¶11 Additionally, the Whitworths’ notice of appeal states they are appealing only from the trial court’s award of attorney fees and costs. This court does not have jurisdiction over matters not contained in the notice of appeal. *Lee v. Lee*, 133 Ariz. 118, 124, 649 P.2d 997, 1003 (App. 1982); *see also* Ariz. R. Civ. App. P. 8(c)(3) (“The notice of appeal . . . must . . . [d]esignate the judgment or portion of the judgment from which the party is appealing.”). Consequently, even if the court had entered a final order on the motion to enforce, we would lack jurisdiction to address the Whitworths’ argument on this issue. *See Lee*, 133 Ariz. at 124, 649 P.2d at 1003.

Attorney Fees and Costs on Appeal

¶12 The Whitworths have requested their attorney fees and costs on appeal pursuant to A.R.S. § 44-1265(B) and 15 U.S.C. § 2310(d)(2). Both of those statutes provide for the award of attorney fees and costs to the prevailing party in this type of consumer litigation. Because they have not prevailed in their appeal, we deny their request.

¶13 Honda also has requested its attorney fees pursuant to A.R.S. §§ 12-341.01 and 12-349(A), and Rule 21, Ariz. R. Civ. App. P. Although the Whitworths precluded review of much of their appeal by failing to have a court reporter present at the hearing and not providing the relevant transcript, and raised an issue over which we lack jurisdiction, we cannot say this appeal was groundless or not brought in good faith. *See* § 12-349(A), (F). We therefore deny

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Honda's request under § 12-349(A). And in our discretion we deny its request under § 12-341.01(A).

Disposition

¶14 For the foregoing reasons, we affirm the judgment of the trial court and dismiss the portion of the appeal concerning the motion to enforce the judgment against Honda.