IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

DAVID L. BLACK,
Plaintiff/Appellant,

v.

TOWN OF THATCHER,
Defendant/Appellee.

No. 2 CA-CV 2017-0199
Filed July 18, 2018

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NOT FOR PUBLICATION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 Graham County
No. CV201500043
The Honorable D. Corey Sanders, Judge Pro Tempore

APPEAL DISMISSED

COUNSEL

Jared O. Smith, Safford
Counsel for Plaintiff/Appellant

Matt N. Clifford, Thatcher Town Attorney, Thatcher
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Vásquez and Judge Eppich concurred.

E S P I N O S A, Judge:

¶1 In October 2015, the trial court found David Black in contempt after he refused to submit to a deposition noticed by the Town of Thatcher. As a sanction, the court dismissed, without prejudice, Black's complaint against the town. Black appealed, but because the minute entry reflecting the dismissal was unsigned and not an appealable final order, we dismissed the appeal for lack of jurisdiction. *Black v. Town of Thatcher*, No. 2 CA-CV 2017-0075, ¶ 4 (Ariz. App. Oct. 6, 2017) (mem. decision). Upon Black's request, the trial court signed the minute entry, and Black filed a new notice of appeal. For the following reasons, we conclude the court's signature is insufficient to confer jurisdiction over Black's appeal and again dismiss.

Factual and Procedural Background

¶2 Black filed a complaint and request for damages against the Thatcher Police Department, represented by the Town of Thatcher, in March 2015. In the complaint, he alleged the police department "has claimed and is claiming that they have evidence sufficient to set me up as a suspect of a criminal case" and "released information to the public, along with a movie company." Black further stated the police department's evidence was "based on individuals (ex spou[s]es) with motives and absolu[te]ly no credibility" and he "learned of the gravity of actions by said Th.P.D. as [he] watched a production that used information fabricated by the Th.P.D."

¶3 The town served Black with a notice of deposition in July 2015 and the next month asked the trial court to find him in contempt for failing to submit to the deposition and to dismiss the case as a penalty. Following a hearing in October 2015, the court determined the deposition "was properly noticed" and Black "was under an obligation to submit to that deposition." The court also found "there was a present and lawful order to take the deposition" and Black had the "ability to comply" but "willfully

refused to do so at the time set." Accordingly, the court held Black in contempt and dismissed the case without prejudice as a sanction.

¶4 Black filed a notice of appeal, but as noted above, we dismissed his appeal because the hearing minute entry was not a signed, final appealable order. *See Black*, No. 2 CA-CV 2017-0075, ¶ 4. After the trial court signed the minute entry in October 2017, Black filed another notice of appeal. Upon our initial review of the merits of the appeal, we requested and received briefing from the parties as to "whether this Court has jurisdiction over this appeal pursuant to A.R.S. § 12-2101(A)(3) and *Garza v. Swift Transp. Co.*, 222 Ariz. 281, ¶ 15 (2009)."

Jurisdiction

¶5 Although neither party questioned our jurisdiction in this case prior to our briefing order, we have "an independent duty to determine whether [we have] jurisdiction over an appeal." *McMurray v. Dream Catcher USA, Inc.*, 220 Ariz. 71, ¶ 4 (App. 2009). In *Garza*, our supreme court observed that § 12-2101 generally limits appellate jurisdiction to appeals from final judgments. 222 Ariz. 281, ¶ 12; *see also* § 12-2101(A)(1) ("An appeal may be taken . . . [f]rom a final judgment entered in an action or special proceeding commenced in a superior court . . . .").

¶6 A dismissal without prejudice, as occurred in this case, is not a final judgment. *See McMurray*, 220 Ariz. 71, ¶ 4; *see also Dunn v. FastMed Urgent Care PC*, No. 1 CA-CV 17-0344, ¶ 9, 2018 WL 3032385 (Ariz. Ct. App. June 19, 2018) ("[W]e generally do not have appellate jurisdiction when a case is dismissed without prejudice."); *Kool Radiators, Inc. v. Evans*, 229 Ariz. 532, ¶ 8 (App. 2012) (dismissal without prejudice "is not a final, appealable order"). Section 12-2101(A)(3), however, codifies an exception to the final judgment rule for "any order affecting a substantial right made in any action when the order in effect determines the action and prevents judgment from which an appeal might be taken." *See Garza*, 222 Ariz. 281, ¶ 15.[1] *Garza* recognized a specific instance of this exception for "a dismissal without prejudice entered after the statute of limitations has run." *Id.*

¶7 Both parties have identified October 8, 2013, as the date on which Black's claim against the town accrued, and the record contains a

[1]Although at the time *Garza* was decided, this exception was codified as § 12-2101(D), it has since been renumbered as § 12-2101(A)(3) without any change to its substance. *See* 2011 Ariz. Sess. Laws, ch. 304, § 1.

notice of claim filed by Black against the town indicating that was the date on which the program aired on "national tel[e]vision." Black filed his complaint in March 2015, nearly a year and a half after the accrual date. The town argues in its supplemental brief that Black's claim was one for intentional infliction of emotional distress, which it identifies as having a two-year statute of limitations. Thus, according to the town, Black's lawsuit was timely filed and could have been refiled after the dismissal without prejudice.[2]

¶8 Black, however, in both his opening and his supplemental brief identified his claim as one for defamation. In his supplemental brief, Black acknowledges that the statute of limitations for defamation actions is one year, and therefore his action was not timely filed. *See* A.R.S. § 12-541(1) ("There shall be commenced and prosecuted within one year after the cause of action accrues, and not afterward, . . . [an action] for injuries done to the character or reputation of another by libel or slander."). But he argues the town "waived the defense of statute of limitations by failing to raise it in the responsive pleading" such that if the savings statute, A.R.S. § 12-504, applied, it "would allow the [town] to assert the statute of limitations defense which it had once waived," thereby making the dismissal without prejudice "dispositive of the case."

¶9 As an initial matter, Black is incorrect that the town waived the statute of limitations defense by failing to assert it in its answer. *See Uyleman v. D.S. Rentco*, 194 Ariz. 300, ¶ 10 (App. 1999) ("The trial court has discretion to permit amendment of an answer to assert a limitations defense at any time prior to trial. Denial of leave to amend is generally an abuse of discretion where the amendment merely advances a new legal theory.") (internal citation omitted). Thus, had the case not been dismissed, the town could have amended its complaint to raise the statute of limitations, and the dismissal did not give the town a new defense to raise had Black refiled.

¶10 Black additionally argues the savings statute does not apply to give him additional time to refile after the dismissal because his complaint was not timely filed. Indeed, § 12-504(A) states that "[i]f an

[2]The town states that Black "had two days to re-file the dismissed action," apparently relying on the contempt hearing being held on October 6, 2015, and disregarding that the minute entry was not filed until October 12, 2015. Because we do not rely on the town's interpretation of Black's claim, however, we do not address this issue or any others that would arise due to that interpretation.

action is commenced within the time limited for the action" and "terminated in any manner" other than exceptions not relevant here, the plaintiff "may commence a new action for the same cause after the expiration of the time so limited and within six months after such termination." The court in *Garza* recognized that § 12-2101(A)(3) would not confer jurisdiction in the case of a dismissal without prejudice after the statute of limitations had run if a savings statute applied. *See* 222 Ariz. 281, ¶ 15.

¶11 Had Black filed his complaint within the limitations period, the savings statute would have provided an additional six months after the dismissal to refile and the dismissal would therefore not have "in effect determine[d] the action" and we would not have jurisdiction over his appeal. *See* § 12-2101(A)(3). Correspondingly, the dismissal without prejudice following Black's late filing of his action also did not "in effect determine[] the action." *See* § 12-2101(A)(3). Rather, Black's filing his action after the statute of limitations had run determined the outcome of the case by removing it from the safe harbor of the savings statute. It would be absurd to allow a plaintiff-appellant to avail himself of appellate review as a consequence of having failed to timely file his complaint when he could not have obtained such relief had he timely filed. Accordingly, *Garza* and § 12-2101(A)(3) do not apply here and we lack jurisdiction over Black's appeal.

Disposition

¶12 For the foregoing reasons, this appeal is dismissed.