IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

MICHAEL W. SMITH AND SANDI K. SMITH,
HUSBAND AND WIFE,
Plaintiffs/Appellants,

v.

RAI & BARONE, P.C., AN ARIZONA PROFESSIONAL CORPORATION,
THOMAS M. DUER, AND JACK G. BARONE,
Defendants/Appellees.

No. 2 CA-CV 2021-0110
Filed April 18, 2022

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NOT FOR PUBLICATION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 Pima County
No. C20205572
The Honorable D. Douglas Metcalf, Judge

AFFIRMED

COUNSEL

Michael W. Smith and Sandi K. Smith, Houston, Texas
In Propria Personae

Rai & Barone P.C., Phoenix
By Rina Rai and Brock Kaminski
Counsel for Defendants/Appellees

MEMORANDUM DECISION

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

E C K E R S T R O M, Presiding Judge:

¶1 Michael and Sandi Smith appeal from the trial court's dismissal of their case against Rai & Barone P.C., a law firm, and individually named attorneys from the firm (collectively "RBPC") for conduct in a prior litigation. For the reasons that follow, we affirm.

Factual and Procedural Background

¶2 On appeal from the grant of a motion to dismiss, "we consider the facts alleged in the complaint to be true, and we view them in a light most favorable to the plaintiff to determine whether the complaint states a valid claim for relief." *Mintz v. Bell Atl. Sys. Leasing Int'l, Inc.*, 183 Ariz. 550, 552 (App. 1995). However, we do not accept as true "conclusions of law or unwarranted deductions of fact." *Folk v. City of Phoenix*, 27 Ariz. App. 146, 150 (1976). We may take judicial notice of anything of which the trial court could have taken judicial notice, even if it did not do so. *See Gordon v. Est. of Brooks*, 242 Ariz. 440, n.2 (App. 2017); *see also* Ariz. R. Evid. 201(c)(1), (d) (court may take judicial notice on its own, at any stage of proceeding). And, it has long been established that, "[i]n Arizona it is proper for a court to take judicial notice of the record in another action tried in that same court." *Visco v. Universal Refuse Removal Co.*, 11 Ariz. App. 73, 74 (1969).

The 2013 Case

¶3 In 2013, having been sued by their residential general contractor, the Smiths brought a third-party complaint against D.C. Concrete ("DC"), a subcontractor, which has at all relevant times been represented by RBPC. In 2017, the trial court granted summary judgment in favor of DC on the Smiths' breach of contract and fraudulent misrepresentation claims, awarding DC attorney fees, costs, and sanctions.

¶4 The trial court directed DC to file an application for the attorney fees and costs in question. RBPC (as DC's counsel) did so. The Smiths then objected to the application as "deceptive," claiming that DC had: (a) failed to disclose an amended reservation of rights letter showing

that its insurer, NGM Insurance Company ("NGM"), would provide a defense for the Smiths' claims against DC; (b) failed to disclose any fee agreement between itself and RBPC, or between NGM and RBPC; (c) never actually paid RBPC, who had been paid by NGM; (d) redacted the attorney billing entries submitted to the trial court; and (e) requested recovery of fees and costs incurred in RBPC's defense of a different (ultimately settled) claim against a different defendant. The trial court awarded the requested fees, apparently rejecting each of the Smiths' arguments in opposition.

¶5 On appeal, we affirmed the trial court's judgment for DC, including the award of attorney fees, and awarded DC additional attorney fees and costs. *SK Builders, Inc. v. Smith*, 246 Ariz. 196, ¶¶ 31-32 (App. 2019), *superseded by statute*, 2019 Ariz. Sess. Laws, ch. 145, § 43, *review denied*, CV-19-0070-PR (Sept. 24, 2019). In September 2019, the trial court entered a supplemental judgment against the Smiths in favor of DC, incorporating both its own prior award and our award on appeal.

¶6 Since then, DC has engaged in post-judgment execution efforts, including issuing written discovery requests and notices of deposition seeking the Smiths' financial information. In June 2021, the trial court granted DC's motions for sanctions pursuant to Rules 11 and 37, Ariz. R. Civ. P., due to the Smiths' refusal to comply with a prior discovery ruling. The Smiths separately appealed that decision. In rejecting that appeal, we recently found that the Smiths have engaged in "gamesmanship" involving "repeated and redundant efforts to block [DC] from identifying the Smiths' assets and collecting its judgment against them." *Smith v. D.C. Concrete Co.*, No. 2 CA-CV 2021-0093, ¶ 28 (Ariz. App. Jan. 28, 2022) (mem. decision). Because we concluded that the Smiths' appeal was a "continuation of their taxing of judicial resources merely for the purpose of delay and harassment," *id.*, we awarded DC its attorney fees on appeal pursuant to Rule 25, Ariz. R. Civ. App. P.

The 2019 Case

¶7 In October 2019—less than a month after the trial court issued its supplemental judgment in the 2013 case—the Smiths brought an independent action in superior court against DC and NGM, claiming fraud, fraud on the court, and tort of another. They asked that the judgment in the 2013 case be set aside, and for an award of tort and punitive damages. As grounds, they raised the same allegations already unsuccessfully raised in the initial case, namely: (a) no supplemental disclosure to show that NGM would pay DC's defense costs; (b) no fee arrangements disclosed; (c) NGM, not DC, had paid RBPC's bills; (d) redacted billing statements; and (e) that

RBPC had "falsely represented" to both the trial court and this court that the fees and costs it sought in the 2013 case had all been incurred defending DC against the Smiths' causes of action for breach of contract and fraudulent misrepresentation. In December 2019, DC (again represented by RBPC) answered the complaint and requested that it be dismissed with prejudice.[1]

¶8 In March 2021, DC filed a motion for summary judgment. In July, after a hearing, the trial court granted the motion. The opening brief in the present appeal states that the Smiths' 2019 action to set aside the 2013 judgment "was dismissed by the trial court . . . based upon the court's finding and conclusion that the issue was precluded by the doctrine of [i]ssue [p]reclusion." This is a strikingly incomplete description of the trial court's extensive ruling, which appears in the transcript of the hearing on DC's motion for summary judgment (which the Smiths have tellingly not provided in this case, but which is before us in a separate appeal).

¶9 Regarding the Smiths' allegation that RBPC had wrongfully included unrelated fees and costs when seeking the judgment in the 2013 case, the trial court stated: "[The Smiths] could have, and in fact did, raise this argument, albeit unsuccessfully, in [their] objection to [DC]'s application for attorney's fees in [the 2013 case], as well as in [their] subsequent appeal of that matter. In other words, the Smiths already unsuccessfully litigated this issue," which "cannot properly be re-litigated here in this new lawsuit." The court then addressed the other "alleged procedural flaws" in the fee application—including the incompletely disclosed fee agreements and the redacted billing statements—and rejected them as already unsuccessfully raised in the 2013 case and meritless. The court went on to state:

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[1]The Smiths contend the answer "stat[ed]" that DC "did not own the Judgment awarded in the 2013 case." This is a misrepresentation. Paragraph thirty-nine of the Smiths' complaint in the 2019 case alleged that DC and its agents "are the owners of the judgment and have told the court they wish to remain owners of the judgment." Rather than "stating" anything to the contrary, DC's answer (which the Smiths repeatedly reference in this appeal without any record citation) merely provided, as it did elsewhere, the following standard language: "In response to Paragraphs 26 through 41 [regarding the Smiths' tort of another claim], [DC] is without sufficient information and/or knowledge to form a belief as to the truthfulness of the allegations contained therein and, therefore, denies those allegations."

> The record regarding the briefings on the pending motions and plaintiffs' own admissions in their response illustrate that plaintiffs do not have any evidence to support their claims against [DC] here. In other words, there is insufficient evidence to support the elements of the claims here. Moreover, one of the claims here, tort of another, has no application in this case whatsoever. Moreover, the claims here are legally barred by the preclusion doctrines, both issue and claim, and the law precluding horizontal appeals. Notably, plaintiffs' response nowhere disputes [DC]'s statement and charts demonstrating how, when, and where plaintiffs' assertions here were previously made and rejected in the [2013 case].

After offering what it called a "simple examination of the undisputed facts in this case from the hundred thousand foot level" to illustrate "its lack of merit and extreme danger to [the trial] court's ability to resolve disputes with finality," the court explained: "Ultimately, this case is simply about the Smiths trying to get a second bite at the attorney's fees apple they lost in the trial court and the court of appeals in [the 2013 case]. The law simply does not allow for this under the undisputed facts here." The court then granted DC's request for an award of attorney fees, both because the action arose out of contract and because the Smiths' claims had been "brought without substantial justification and solely or primarily for delay and harassment." The court concluded with "a warning" to the Smiths that "[i]f they bring another lawsuit arising from the outcome in [the 2013 case], and that case is determined, as this one has, to be devoid of legal merit, the [Smiths] and/or their counsel will be subject to serious sanction above and beyond the award of attorney's fees and costs." In September 2021, the court entered judgment and awarded DC attorney fees, costs, and sanctions. The Smiths have separately appealed that judgment.

This Case

¶10 In December 2020—before DC had filed its motion for summary judgment in the 2019 case—the Smiths filed a civil complaint against RBPC, which forms the basis for this appeal. They alleged claims for fraudulent schemes/misrepresentation, negligent representation, negligence, tort of another, and negligence per se. All of these claims relate

to the same conduct from the 2013 case the Smiths have already unsuccessfully raised in both that case and the 2019 case: (a) no supplemental disclosure regarding NGM's agreement to pay DC's defense costs; (b) no fee arrangements or agreements; (c) no fees or expenses paid to RBPC by DC; (d) redacted billing records; and (e) mixed fees and costs "falsely attributed" only to the Smiths' claims against DC.

¶11 The Smiths' claims in this case boil down to two main arguments. First, they contend the ultimate judgment in the 2013 case ordering the Smiths to pay fees and costs to DC was obtained through RBPC's alleged misrepresentations (to the Smiths, the trial court, and this court) regarding "the true nature, scope, and extent" of RBPC's representation of DC and other parties. Second, they argue that because RBPC did not amend DC's disclosures in the 2013 case to reflect that NGM would be paying to defend DC against the Smiths' claims, "the Smiths conducted the litigation as if there was no coverage and they would have no substantial liability for attorney fees in the event of an adverse judgment." They contend that, had they been informed of NGM's payment of DC's defense costs, they would have accepted DC's settlement offer "to limit any liability for substantial attorney fees" to DC "and/or would have devoted time and fees to develop [their] legal case" against DC.

¶12 In February 2021, RBPC filed a motion to dismiss the Smiths' complaint with prejudice.[2] After a hearing—but before the separate trial court granted summary judgment in DC's favor in the 2019 case—the trial court below granted RBPC's motion to dismiss. The Smiths filed a motion to reconsider, which the court denied before entering final judgment. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

[2]Although the motion to dismiss does not reference Rule 12(b)(6), Ariz. R. Civ. P., expressly, it was clearly a motion to dismiss for "failure to state a claim upon which relief can be granted," as evidenced by both its content and the accompanying good faith certificate filed pursuant to Rules 7.1(h) and 12(j), Ariz. R. Civ. P. Indeed, the Smiths expressed their understanding of this fact in a hearing before the trial court in March 2021. Thus, the trial court correctly construed the motion as one brought under Rule 12(b)(6).

Discussion

Standard of Review

¶13 We review the trial court's dismissal of a complaint under Rule 12(b)(6) *de novo* to determine whether the court correctly concluded that, as a matter of law, the plaintiff would not be entitled to relief under any interpretation of the alleged facts. *Coleman v. City of Mesa*, 230 Ariz. 352, ¶¶ 7-8 (2012). In so doing, we consider only the complaint itself, its exhibits, and public records regarding matters referenced in the complaint.[3] *See id.* ¶ 9. This includes the trial court's records and our records in this and associated cases. *See* Ariz. R. Evid. 201(c)(1), (d); *Gordon*, 242 Ariz. 440, n.2; *Visco*, 11 Ariz. App. at 74. "[W]e will affirm the court's order dismissing a complaint if it is correct for any reason." *Fappani v. Bratton*, 243 Ariz. 306, ¶ 8 (App. 2017).

Preliminary Procedural Arguments

¶14 The Smiths advance two procedural arguments. Both fail.

¶15 First, the Smiths contend their filing of an amended complaint rendered moot RBPC's motion to dismiss. But, as the trial court noted, the Smiths filed their amended complaint after briefing on the motion to dismiss had been completed—and, indeed, four days before oral argument was scheduled to be held on the motion. The due date for the Smiths' response to the motion to dismiss having long expired, Ariz. R. Civ. P. 7.1(a)(3) (response due within ten days of service of motion), and the Smiths having already filed such response, they had no right to amend their complaint as a matter of course, *see* Ariz. R. Civ. P. 15(a)(1)(B) ("party may amend its pleading once as a matter of course . . . if a motion under Rule 12(b) . . . is served, on or before the date on which a response to the motion is due").[4] And the Smiths never sought leave of court or RBPC's written consent to amend their complaint. *See* Ariz. R. Civ. P. 15(a)(2) (where no

[3]Reference to facts beyond this scope converts the motion to one for summary judgment under Rule 56, Ariz. R. Civ. P. *See* Ariz. R. Civ. P. 12(d).

[4]Even had the Smiths properly amended their complaint as a matter of course, this would not necessarily have rendered RBPC's motion to dismiss moot, as the Smiths contend on appeal. *See* Ariz. R. Civ. P. 15(a)(3) (after filing of motion under Rule 12(b), "amending a pleading as a matter of course does not, by itself, make moot the motion as to the adequacy of the pleading's allegations as revised in the amended pleading").

right to amend as matter of course, "party may amend its pleading only with leave of court or with the written consent of all opposing parties who have appeared in the action"). Thus, as RBPC correctly argued before the trial court, the Smiths' amended complaint was improper under Rule 15. *Cf. Sierra Tucson, Inc. v. Lee*, 230 Ariz. 255, ¶¶ 22-23 (App. 2012) (ordering amended complaint stricken when plaintiff had no right to file it). We therefore reject the Smiths' contention that the amended complaint had rendered the motion to dismiss moot, such that the trial court should have denied it without further comment rather than ruling on it.

¶16 Second, the Smiths argue the motion to dismiss "should have been dismissed" due to "defects" they claim "evidenced a lack of attention to the drafting, haste, and evidently no proof reading." But the Smiths cite no legal authority, and we are aware of none, to support the proposition that a motion must be flawless in order to be granted. RBPC explained to the trial court that its motion contained inadvertent typographical errors stemming from RBPC's simultaneous preparation of summary judgment filings on behalf of DC in the 2019 case. RBPC addressed the bulk of these errors in a corrected motion to dismiss. Although the Smiths objected to the corrected motion, they did not do so until eighty-four days after it was filed, long after the window for responding to the amended motion had expired. *See* Ariz. R. Civ. P. 7.1(a)(3) ("opposing party must file any responsive memorandum within 10 days after the motion and supporting memorandum are served"). The trial court was therefore correct in its implicit denial of the Smiths' objection. *Cf. Phipps v. CW Leasing, Inc.*, 186 Ariz. 397, 402 n.2 (App. 1996) (denial of outstanding motion implicitly included in final judgment not expressly mentioning motion).

¶17 Moreover, we cannot agree that the corrected motion "changed the entire direction, content and relief sought in the original Motion." All changes—which RBPC italicized, underlined, and bolded for ease of reference—involved correcting "DC" to "Defendants," *i.e.*, the parties the Smiths had sued and who had filed the motion to dismiss. Finally, the Smiths have provided no legal support for their argument that RBPC was required to withdraw the original motion and refile, or to seek leave to amend it. They claim that RBPC's filing of the corrected motion was "an attempt not to comply with Rule 15, Ariz. R. Civ. P." But that rule relates only to amended and supplemental *pleadings*, and a Rule 12(b)(6) motion to dismiss is not a "pleading" under our rules of civil procedure. *See In re $70,070 U.S. Currency*, 236 Ariz. 23, ¶¶ 10-11 (App. 2014).

¶18 For all these reasons, the court properly ruled on RBPC's corrected motion to dismiss the Smiths' original complaint.

Litigation Privilege

¶19 The trial court's dismissal of the Smiths' complaint turns on the court's conclusion, based on its review of the case law, that the Smiths "could not rely on [RBPC's] statements which were made during litigation as a basis for a fraud or misrepresentation claim, nor did [RBPC] have a legal duty towards [the Smiths] that could support a negligence claim." The court ruled that, consequently, the Smiths "cannot sue [RBPC] for their conduct in successfully representing their clients in the prior litigation." Rather, the Smiths' "remedies lie in addressing that conduct in that earlier litigation, which they did, without success." The Smiths raise various challenges regarding this ruling.

¶20 First, the Smiths contend the trial court "overstep[ped] the bounds of impartiality by advocating for [RBPC]." In particular, they complain that the court injected the issue of litigation privilege into the case and then based its ruling upon it, when RBPC had never argued it. They claim the court engaged in improper advocacy on behalf of RBPC, rather than sitting as an impartial and neutral arbiter.

¶21 As an initial matter, we note that the Smiths have failed to cite any legal authority in support of this argument. They have therefore waived it. *See* Ariz. R. Civ. App. P. 13(a)(7)(A) (opening brief "must set forth" argument "with citations of legal authorities" in support of each contention); *Ritchie v. Krasner*, 221 Ariz. 288, ¶ 62 (App. 2009) (appellant waives claims by failing to provide argument with supporting authority); *see also Boswell v. Fintelmann*, 242 Ariz. 52, n.3 (App. 2017) (appellant who "fails to develop and support his conclusory arguments . . . waives them").

¶22 Regardless, the record disproves the argument. RBPC had expressly argued in the motion to dismiss that it" never owed any legal duty to the Smiths" and that any claim stemming from an alleged violation of disclosure requirements could only be raised "in the *same action*," not a separate suit against an opposing party's counsel. Moreover, as the trial court repeatedly explained, the Smiths asserted in their response to the motion to dismiss that RBPC owed them—the opposing party in a litigation they had initiated against RBPC's client—a legal of duty of care as to the accuracy of the disclosures provided pursuant to Rule 26.1, Ariz. R. Civ. P. This argument "piqued" the court's curiosity regarding the following "fundamental legal question": "[C]an a party to a lawsuit sue the lawyers representing the opposing party in the lawsuit for the lawyers' actions in representing their client before the Court in that lawsuit?" For this reason, the court properly asked the parties to be prepared to address that question

at oral argument, which they did. Indeed, as the court explained at the hearing on the motion, having raised the issue, it was incumbent on the Smiths to be able to "defend the legal theory of why [RBPC] had a duty of care to [them] and why [they] could rely on any statements [RBPC] made to the judge" in the prior action.

¶23 The Smiths also argue that litigation privilege is an affirmative defense that RBPC was required to raise "in a responsive pleading."[5] This argument appears to be founded on the misapprehension that RBPC was obligated to file an answer to the Smiths' complaint before filing a motion to dismiss it for failure to state a claim. To the contrary, our rules of civil procedure provide that a Rule 12(b)(6) motion to dismiss for failure to state a claim "must be made before pleading if a responsive pleading is allowed." Ariz. R. Civ. P. 12(b). The trial court advised the Smiths of the infirmity of their legal theory—which they nonetheless continue to advance—that the affirmative defenses listed at Rule 8(d)(1), Ariz. R. Civ. P., may only be raised in a responsive pleading. Just as actions are commonly dismissed under Rule 12(b)(6) based on threshold legal questions such as a statute of limitations, *see, e.g.*, *Standard Constr. Co. v. State*, 249 Ariz. 559, ¶ 5 (App. 2020), it was proper for the court in this case to consider and base its ruling on litigation privilege instead of (in the court's words) "undertaking the arduous task of comparing the claims in this case to what was litigated in [the 2013 case]." *See Green Acres Tr. v. London*, 141 Ariz. 609, 613 (1984) (whether litigation privilege exists "is a question of law for the court" that may be handled in resolving motion to dismiss "if the facts establishing the occasion for the privilege" appear in complaint).

¶24 Finally, the Smiths challenge the "propriety of the trial court's legal conclusion" that their claims are barred by litigation privilege. They contend the trial court "misread the cases it depends upon in its ruling dismissing the case," "disregarded" contrary case law, and "ignor[ed] the facts of the Complaint" that should have been taken as true for purposes of the motion to dismiss. We cannot agree.

¶25 The first prong of the trial court's ruling is that the Smiths "could not rely on [RBPC's] statements which were made during litigation

[5]As the Smiths note, they similarly argued in response to the motion to dismiss that the grounds raised therein—including statutes of limitation, *res judicata*, and estoppel—"are affirmative defenses and must be raised in an Answer."

as a basis for a fraud or misrepresentation claim." This conclusion flows directly from our opinion in *Linder v. Brown & Herrick*, 189 Ariz. 398 (App. 1997). There, the losing parties in a prior lawsuit sued the prevailing adverse party's attorneys, claiming—much like the Smiths do here—that the attorneys had "committed fraud by making false representations to the court and by withholding material information during th[e] litigation." *Id*. at 402. In affirming the trial court's dismissal of the claims under Rule 12(b)(6), we explained that any fraud claim was "legally deficient" because, "as a matter of law and common sense, they had no right to rely on statements made by the attorneys opposing them." *Id*. at 402, 405. In short, "[n]o authority exists in Arizona for bringing a claim of fraud against an opposing attorney for statements made during litigation." *Id.* at 406 (noting that our case law "narrowly limits claims against opposing counsel"); *see also Safeway Ins. Co. v. Guerrero*, 210 Ariz. 5, ¶ 31 (2005) (citing *Linder* with approval for proposition that "[a] party to a lawsuit generally may not premise a fraud claim on alleged misrepresentations by adverse counsel").

¶26 As they did below, the Smiths attempt to avoid this result by claiming that the conduct in question did not occur during litigation. In particular, they contend RBPC's challenged actions "had nothing to do with defending" DC against the Smiths' claims and were instead related to RBPC's "prosecuting a claim for attorney's fees on behalf of NGM . . . in the name of [DC] after the summary judgment had been granted." But the fraud claims are based on allegations that RBPC misrepresented the nature of its relationship with DC and NGM to the Smiths, the trial court, and this court, resulting in the judgment against the Smiths in the 2013 case. Plainly, all the alleged wrongful conduct occurred within the course of the 2013 case—"right in the middle of the litigation," as the trial court put it. *See Drummond v. Stahl*, 127 Ariz. 122, 125 (App. 1980) (motion with "direct relationship" to court proceedings entitled to litigation privilege); *Todd v. Cox*, 20 Ariz. App. 347, 349 (1973) (affirming application of privilege to affidavit attached to motion for new trial because statement made in course of judicial hearing privileged as long as it bears "some relation" to judicial proceeding or has "some reference to the subject of the litigation").

¶27 In addition, the Smiths' claim that the relevant litigation in the 2013 case ended when summary judgment was entered in 2017 and does not include DC's subsequent efforts to collect fees and costs assumes that DC has denied being the "owner" of the judgment in that case. But, as noted above, this requires a misreading of DC's standard answers to the Smiths' complaint in the 2019 case. *See* n.1, *supra*. Moreover, the Smiths have provided no legal authority establishing that efforts to collect a judgment are somehow materially separate from the litigation that led to

that judgment. For all these reasons, the Smiths' fraud claims fail.[6] *See Safeway Ins.*, 210 Ariz. 5, ¶ 31; *Linder*, 189 Ariz. at 406.

¶28 The second prong of the trial court's ruling is that RBPC did not have a legal duty to the Smiths that could support a negligence claim. Neither below nor on appeal have the Smiths been able to cite any authority for their argument that our civil disclosure rules placed an actionable duty upon RBPC, counsel to their (successful) opponents in litigation. For the first time in their reply brief, the Smiths cite *Norwest Bank (Minn.), N.A. v. Symington*, 197 Ariz. 181 (App. 2000). But that case merely establishes that, where a party's "failure to disclose evidence that may be relevant, regardless of whether the disclosure was required by a specific discovery request or by the general duty of Rule 26.1, can constitute misconduct" under Rule 60, Ariz. R. Civ. P., potentially justifying relief from a judgment or order *in the same action*. *Id.* ¶¶ 19-23. It provides no support for filing a separate lawsuit against the attorneys alleged to have engaged in such misconduct. This is particularly so here, where the judge involved in the case during which the alleged misconduct occurred has already rejected the Smiths' challenges to the judgment in question, as has a separate trial court.

¶29 As the trial court in this case correctly noted, *Lewis v. Swenson*, 126 Ariz. 561 (App. 1980), provides support for the contrary conclusion: RBPC did not owe a duty to the Smiths that can now form the basis of a negligence claim. There, we explained that the duties an attorney bears in litigation are to his or her client and "to the court, and not to the adverse party." *Id.* at 565-66 (rejecting appellant's assertion that defense counsel owed duty to plaintiff to prevent defense's expert witness from mentioning medical malpractice insurance to jury). And, "[t]he breach of the duty owed to the court would not give rise to a cause of action in tort by the adverse party against the [attorney]." *Id.* at 566; *see also Wetherill v. Basham*, 197 Ariz. 198, ¶¶ 39, 42 (App. 2000) (refusing to impose on attorneys duty of care "to nonclient third parties whose interests are directly adverse to those of the attorney's client," noting that "practice of law has enough potential pitfalls without adding another one that . . . is not supported by law, public policy, or common sense").

¶30 Rather, as the trial court explained, the available remedies "lie in addressing that conduct in that earlier litigation," which the Smiths did,

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[6]For this reason alone, the Smiths' "tort of another" claim also fails, as it is premised on the alleged existence of a fraudulently obtained judgment in the 2013 case.

unsuccessfully. *See Safeway Ins.*, 210 Ariz. 5, ¶¶ 32-33, 35 (describing existing "deterrence to lawyer misbehavior," including "severe jeopardy" for deceit in litigation under civil procedure and ethical rules); *Norwest Bank*, 197 Ariz. 181, ¶¶ 1, 22, 38 (finding disclosure failures to be misconduct warranting Rule 60 relief from judgment in same action); *Linder*, 189 Ariz. at 406-07 (describing "other remedies" available to litigants who believe opposing counsel guilty of misconduct in litigation, including filing of Rule 60 motion for relief from final judgment on basis of fraud, misrepresentation, or other misconduct); *see also Lewis*, 126 Ariz. at 565 ("The court's inherent power to manage its affairs necessarily includes authority to impose appropriate sanctions on those appearing before it.").

¶31 As they did below, the Smiths argue that the cases cited by the trial court "d[o] not apply" because of our subsequent opinion in *Chalpin v. Snyder*, 220 Ariz. 413 (App. 2008). But that case is not "adverse" to *Linder* and *Lewis*, as the Smiths contend. Rather, *Chalpin* merely declined to extend the reasoning in those cases—regarding limitations on fraud and negligence claims against opposing attorneys for behavior in litigation—to claims against attorneys for aiding and abetting the tortious conduct of their clients. *Id.* ¶¶ 41-45. Importantly here, while the Smiths sued RBPC for fraud and negligence claims, they did not include claims for "aiding and abetting" any alleged tortious conduct by DC or other clients—at least not until their untimely and improperly filed amended complaint (*see* ¶ 15, *supra*).[7]

¶32 Moreover, the facts in *Chalpin* are readily distinguishable. There, an attorney hired by an insurance company concluded that coverage and defense were owed to the insured. *Id.* ¶¶ 6-7. The attorney nonetheless recommended that the insurer file a lawsuit against the insured "raising all coverage defenses as a means to put pressure" on the insured to settle, fully intending "to settle all claims before losing on the merits of the coverage dispute." *Id.* ¶ 8. The insured cross-claimed and succeeded at trial, and the trial court revoked the attorney's ability to practice law in Arizona. *Id.* ¶¶ 9, 12. The insured then sued the attorney for abuse of process, malicious prosecution (*i.e.*, wrongful institution of civil proceedings), and aiding and

[7]The Smiths did not seek to amend their complaint to add claims of "aiding and abetting fraudulent acts" and "aiding and abetting negligence" until May 31, 2021. That was after—and plainly in response to—the trial court's request that the parties be prepared to address *Linder* and *Lewis* at oral argument on the motion to dismiss, and only four days before that argument was scheduled to be held.

abetting various torts. *Id.* ¶ 13 & n.5. As we explained on appeal, "a lawyer is subject to liability to a . . . nonclient when a nonlawyer would be in similar circumstances." *Id.* ¶ 45 (quoting Restatement (Third) of Law Governing Lawyers § 56 (2000)). And "[w]hen a lawyer advises or assists a client in acts that subject the client to civil liability to others, those others may seek to hold the lawyer liable along with or instead of the client." *Id.* (quoting Restatement (Lawyers) § 56 cmt. c). Thus, "[c]ounsel who bring bad faith claims without just cause are . . . exposed to liability for wrongful institution of civil proceedings," *Safeway Ins.*, 210 Ariz. 5, ¶ 35; an attorney who, with "ulterior purpose," willfully initiates duplicative litigation in an inappropriate venue may face abuse of process claims, *Giles v. Hill Lewis Marce*, 195 Ariz. 358, ¶¶ 3, 9, 11 (App. 1999); and, in circumstances like those present in *Chalpin*, aiding and abetting may be a valid cause of action against a lawyer, 220 Ariz. 413, ¶ 45.

¶33 This case in no way fits that pattern. The Smiths have twice initiated litigation against DC. Two separate trial courts and this court have rejected the Smiths' challenges to the 2013 judgment and related arguments regarding DC's alleged liability. Having so failed, they now seek to hold DC's counsel, RBPC, liable for how it helped DC obtain that judgment. But DC was not liable, and neither is RBPC.

¶34 Finally, the Smiths contend the trial court failed to accept as true the complaint's allegations of abuse of process and wrongful institution of civil proceedings "concerning collection efforts that occurred long after the Judgment was entered." But, once again, the Smiths did not include claims for abuse of process or wrongful institution of civil proceedings in their complaint. Rather, they first raised those claims in their improperly filed amended complaint and their later motion for reconsideration. And, as noted, the Smiths premise these claims on a misinterpretation of DC's answer in the 2019 case. *See* n.1, *supra*. It is unremarkable that an insured defendant, who succeeded at trial, has sought to recover defense fees and costs that were paid by an insurance company. That does not imply that such defendant's counsel has committed abuse of process or wrongfully initiated civil proceedings. Neither we nor the trial court are required to accept as true "unwarranted deductions of fact." *Folk*, 27 Ariz. App. at 150.

Costs and Sanctions

¶35 As the prevailing party on appeal, RBPC is entitled to its costs, A.R.S. § 12-341, upon its compliance with Rule 21(b), Ariz. R. Civ. App. P. In addition, because this appeal is frivolous, and to "discourage similar

conduct in the future," we exercise our discretion to sanction the Smiths pursuant to Rule 25, Ariz. R. Civ. App. P. *See also Matter of Wade*, 168 Ariz. 412, 426 (1991) (appellate court may impose fine for frivolous appeal). Given the burden imposed on both RBPC and this court to resolve this frivolous appeal, we find that a fine of $5,000, payable to RBPC, is justified.

Disposition

¶36 For all the foregoing reasons, we affirm the judgment of the trial court and award RBPC its costs on appeal and sanctions in the amount of $5,000.