

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2014-000514-001 DT

01/14/2015

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT

J. Eaton

Deputy

NORTH CANYON PARCEL 3 A
HOMEOWNERS ASSOCIATION

CHAD M GALLACHER

v.

IDA TERZICH (001)
STEVE TERZICH (001)

IDA TERZICH
24491 LOS SERRANOS DRIVE
LAGUNA NIGUEL CA 92677
STEVE TERZICH
24491 LOS SERRANOS DRIVE
LAGUNA NIGUEL CA 92677

NORTH VALLEY JUSTICE COURT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case No. CC2012-012200.

Plaintiff-Appellant North Canyon Parcel 3 A Homeowners Association (Plaintiff) appeals the North Valley Justice Court's determination that reduced the requested attorneys' fees based on the trial court's arbitrary limit for fees in a default case. Plaintiff contends the trial court erred. For the reasons stated below, this Court affirms the trial court's judgment.

I. FACTUAL BACKGROUND

Plaintiff initially filed a complaint against Defendants-Appellees Ida Terzich and Steve Terzich (Defendants) on January 18, 2012, and alleged Defendants failed to pay their HOA assessments as required by the CC&Rs. Plaintiff requested \$1,961.40 plus attorneys' fees and costs. Plaintiff specifically requested its reasonable attorneys' fees in the minimum amount of \$900.00. At the time the Summons and Complaint was filed, Plaintiff was represented by Mark W. Waldron of the Waldron Law Group, PLLC. Defendants were served in California but failed to respond, and Plaintiff filed for the entry of default. Plaintiff did not submit a final Judgment and the trial court notified the parties of the trial court's intent to dismiss the lawsuit because (1) no Judgment had been entered within ten (10) months from the date of the lawsuit being filed; and (2) neither party had filed a written motion to extend the time for an Entry of Judgment. On December 11, 2013, the trial court dismissed the case. Notice of the pending dismissal was sent to Plaintiff's counsel—Potts & Waldron.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2014-000514-001 DT

01/14/2015

On February 3, 2014, Plaintiff's counsel filed a "Notice of Change of Firm and Change of Address For Plaintiff's Attorney" and indicated counsel Mark W. Waldron, Esq.—formerly of the Waldron Law Group, PLLC.—was now with Maxwell & Morgan, P.C. A copy of this Notice was sent to Defendants. That same day, Plaintiff's counsel filed (1) a Motion to Reinstate Case requesting the case be reinstated and a judgment be entered in the matter; and (2) a Notice of Affidavit and Proof of Debt Per JCRCP 140 alleging Defendants had defaulted on the underlying debt and owed a principal amount of \$1,961.40. Counsel subtracted the attorneys' fees incurred for work performed on November 21, 2011, and January 4, 2012, by the previous law firm, and requested Judgment for \$1,533.40 plus interest at the rate of 12% per year pursuant to the terms of the CC&Rs. On February 3, 2014, counsel also filed a request for an award of attorneys' fees of \$1,190.00, and argued Defendants were responsible for all attorneys' fees according to the CC&Rs. Counsel attached a China Doll affidavit¹ and indicated three people worked on the case: MWW who spent 1.7 hours; BWM who spent 0.3 hours; and LMH who spent 0.4 hours. The exhibit included the hourly billing rate for these individuals with MWW billing at \$250.00 per hour for a total of \$425.00; BMW billing at \$225.00 per hour for a total of \$67.50; and LMH billing for 0.4 hours at \$125.00 per hour for a total of \$50.00. In addition, counsel included a charge for work done by the Waldron Law Group with an amount of \$647.50. The work by Waldron Law Group did not include any specification as to the tasks performed or the hourly rate for the Waldron Law Group. These motions were also sent to Defendants.

On March 6, 2014, in response to Plaintiff's February 3, 2014, motion that the case against Defendants be reinstated, the trial court reinstated Plaintiff's claim for unpaid HOA assessments. The trial court mailed a copy of its ruling to Defendants at a California address on March 12, 2014. Counsel submitted a Judgment and requested an award in the principal amount of \$1,533.40; costs of \$262.00; and attorneys' fees of \$1,190.00. The trial court signed the Judgment but reduced the attorneys' fees to \$400.00. The trial court did not give any explanation for the reduction.

On March 20, 2014, counsel for Plaintiff filed a Motion For New Trial And Motion For Reconsideration because the trial court reduced Plaintiff's requested attorneys' fee award. Counsel asserted it was an abuse of discretion to sua sponte reduce a requested attorneys' fee award to a predetermined threshold amount. The trial court denied Plaintiff's motion and in a Ruling on Motion dated April 15, 2014, wrote that no trial ever occurred in the case. Plaintiff prevailed by default. The trial court also wrote that it did not read *McDowell Mountain Ranch Comm. Ass'n v. Simons*, 216 Ariz. 266, 165 P.3d 667 (2007) as requiring that counsel for HOAs automatically be awarded 100% of their requested fees; and the opinion discussed a facially reasonable attorneys' fee. In that Ruling on Motion, the trial court added:

In this case, the justice courts in Maricopa County have adopted a best practice for an award of attorneys' fees in default cases. It states in part that generally, the amount should not exceed \$400.00. In this case, the Court also questions the appropriateness of billing 2.4 hours for three attorneys to draft and to review very short pleadings for a collection action where the majority of the

¹ The China Doll Affidavit was executed by Mark W. Waldron.
Docket Code 512

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2014-000514-001 DT

01/14/2015

language in these pleadings does not change from collection case to collection case. In this case, the principal balance was \$1,533.40 and the majority of the legal work in this case appears to have been done by a different law firm.

Plaintiff filed a timely appeal. Defendants failed to file a responsive memorandum.² This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUE: DID THE TRIAL COURT ABUSE ITS DISCRETION BY REDUCING THE AMOUNT OF REQUESTED ATTORNEYS' FEES:

Abuse of Discretion

In determining if the trial court abused its discretion, this Court must consider the standards for an abuse of discretion claim. The Supreme Court of Arizona stated:

In exercising its discretion, the trial court is not authorized to act arbitrarily or inequitably, nor to make decisions unsupported by facts or sound legal policy. . . . Neither does discretion leave a court free to misapply law or legal principle.

City of Phoenix v. Geyler, 144 Ariz. 323, 328–329, 697 P.2d 1073, 1078–1079 (1985) (citations omitted). Thus, a trial court abuses its discretion if it:

- 1) applied the incorrect substantive law or preliminary injunction standard; 2) based its decision on a clearly erroneous finding of fact that is material to the decision to grant or deny the injunction; or 3) applied an acceptable preliminary injunction standard in a manner that results in an abuse of discretion.

McCarthy Western Constructors v. Phoenix Resort Corp., 169 Ariz. 520, 523, 821 P.2d 181, 184 (Ct. App. 1991) (citation omitted).

A court abuses its discretion when there is no evidence supporting the court's conclusion or the court's reasons are untenable, legally incorrect, or amount to a denial of justice. *Charles I. Friedman, P.C. v. Microsoft Corp.*, 213 Ariz. 344, 141 P.3d 824 ¶ 17 (Ct. App. 2006). In discussing discretion, the Arizona Supreme Court, in *State v. Chapple*, held:

Something is discretionary because it is based on an assessment of conflicting procedural, factual or equitable considerations which vary from case to case and which can be better determined or resolved by the trial judge, who has a more immediate grasp of all the facts of the case, an opportunity to see the parties, lawyers, and witnesses, and who can better assess the impact of what occurs before him. Where a decision is made on that basis, it is truly discretionary and we will not substitute our judgment for that of the trial judge; we will not second-guess. Where however, the facts or inferences from them are not in dispute and where there are few or no conflicting procedural, factual or equitable considerations, the resolution of the question is one of law or logic. Then it is our final responsibility to determine law and policy and it becomes our duty to "look over the shoulder" of the trial judge and, if appropriate, substitute our judgment for his or hers.

² Failing to file a responsive memorandum is not a confession of error. SCRAP—Civ., Rule 8(a).
Docket Code 512

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2014-000514-001 DT

01/14/2015

State v. Chapple, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n. 18 (1983) (citation omitted).³ In this case, the facts are not in dispute and the question is one of law.

Normally, appellate courts do not adjust the attorneys' fee award determined by the trial court because (1) the trial court has a "superior understanding of the litigation" and (2) appellate review of primarily factual matters is not desirable. *Chase Bank of Arizona v. Acosta*, 179 Ariz. 563, 574, 880 P.2d 1109, 1120 (Ct. App. 1994). "[The] trial court abuses its discretion as to attorneys' fees only when its view would not be taken by a reasonable man." *Moser v. Moser*, 117 Ariz. 312, 315, 572 P.2d 446, 449 (Ct. App. 1977). This is generally a matter that is left to the trial court. In commenting on the court's responsibility for evaluating fee requests the Arizona Court of Appeals held:

"The determination of whether the amount of attorney's fees is reasonable is a matter peculiarly within the discretion of a trial court, and will not be disturbed absent a showing of abuse of that discretion." In reviewing for an abuse of discretion, "[t]he question is not whether the judges of this court would have made an original like ruling, but whether a judicial mind, in view of the law and circumstances, could have made the ruling without exceeding the bounds of reason. We cannot substitute our discretion for that of the trial judge." In reviewing a trial court's fee award, we view the record in the light most favorable to sustaining the trial court's decision.

Solimeno v. Yonan, 224 Ariz. 74, 227 P.3d 481, ¶ 36 (Ct. App. 2010) (citations omitted).

Before determining any award (1) the attorney must provide a China Doll affidavit detailing the work performed, *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 673 P.2d 927 (Ct. App. 1983) and (2) any award of attorney fees under A.R.S. 12-341.01 is subject to an analysis about the reasons for the shifting of responsibility for fees *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 569, 694 P.2d 1181, 1183 (1985). In *Schweiger*, 138 Ariz. at 188, 673 P.2d at 932 the Court of Appeals reviewed the types of services which may be included in a fee application but cautioned if "a particular task takes an attorney an inordinate amount of time, the losing party ought not be required to pay for that time." Plaintiff's counsel submitted a China Doll affidavit to the trial court but the trial court made no specific finding that counsel spent an inordinate amount of time on any particular task other than to state it questioned the appropriateness of billing 2.4 hours for three attorneys to draft and to review very short pleadings for a collection action. Here, counsel submitted a combined bill that incorporated charges for work done by the predecessor law firm as well as by the current law firm. While the same attorney was involved with both law firms, counsel did not demonstrate how or why the current law firm should be able to collect fees for work done by a separate law firm. Counsel also did not demonstrate why the fees charged by the prior law firm were initially \$428.00 in the "Notice Of Affidavit And Proof Of Debt Per JCRCP 140" but listed as \$647.50 in Exhibit A to the China Doll affidavit which current counsel submitted. Current counsel requested attorneys' fees of \$1,190.00.

³ The Arizona Supreme Court noted in *State v. Benson*, 232 Ariz. 452, 307 P.3d 19 ¶ 66 (July 31, 2013) that a different standard for the abuse of discretion is used in death penalty cases as the legislature enacted A.R.S. 13-756 (A) after *Chapple* was decided. Although the case is "red flagged" by Westlaw, nothing in the case suggests it applies to civil matters.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2014-000514-001 DT

01/14/2015

The China Doll affidavit lacked specificity. Although counsel requested sums for work done by (1) BWM—\$67.50; and (2) LMH—\$50.00; counsel did not describe the work performed by these two individuals. Counsel also failed to provide specifics about any work done by the predecessor law firm. There was no billing rate for the Waldron Law Group and no indication of the date and times worked or the tasks performed as required by *Schweiger*. The trial court did not abuse its discretion by refusing to award attorneys' fees for unspecified work—particularly where the date for the alleged work was also omitted.

The current case posed an additional problem as the case had been dismissed because Plaintiff failed to comply with the trial court's rules about actively prosecuting cases, JCRCP, Rule 144(e). This failure was Plaintiff's fault. Plaintiff was provided with notice about the trial court's intent to dismiss the action for failing to conclude the lawsuit within ten months and warned that if the requirement of filing the final judgment was not met within two months from the date of filing the notice of intent to dismiss, the trial court would dismiss Plaintiff's claim. Plaintiff did not file any Judgment and the trial court dismissed Plaintiff's case. Plaintiff did not provide any authority or argument demonstrating to the trial court—or this Court—why Defendants should be compelled to compensate Plaintiff for fees incurred when Plaintiff caused the problem.

Although the trial court exercised its discretion and reviewed counsel's China Doll affidavit, the trial court applied its own standard for an allowable amount for attorneys' fees. The trial court referenced a "best practice for an award of attorneys' fees in default cases" that apparently has been adopted by the justice courts. The trial court failed to identify where, how, and under what authority the justice courts adopted a "best practice for an award of attorneys' fees in default cases" without considering the submitted China Doll affidavit or the amount of work that might have been involved. While Plaintiff prevailed by default, nothing in the Justice Court procedural rules allows the trial court to pre-set the amount of allowable attorneys' fees in derogation of counsel's China Doll affidavit. Instead, the trial court should have evaluated the requested fees in light of the work claimed.

Use of Lower Court Of Appeals Decisions

Plaintiff included a Record Appeal Rule/Remand from the Superior Court in LC2009–000938–001 DT between Eastwood Park HOA and Judy Bloomfield as Exhibit 2 in support of the claim for the Motion For New Trial and Motion To Amend Judgment. That ruling involves other parties and is not legal authority. Not every legal opinion creates precedent. Unpublished decisions issued prior to January 1, 2015, carry no such weight.⁴ See *Walden Books Co. v. Dep't of Revenue*, 198 Ariz. 584, 12 P.3d 809, (Ct. App. 2000) stating:

We hold that ARCAP 28(c) applies to memorandum decisions from any court.

A minute entry from an unrelated 2009 Maricopa County Superior Court case has no legal or persuasive authority. In *Kriz v. Buckeye Petroleum Co., Inc.*, 145 Ariz. 374, 701 P.2d 1182, n. 3

⁴ Effective January 1, 2015, Rule 111 of the Rules of the Supreme Court will allow the citation of memorandum decisions for persuasive value if no other opinion adequately addresses the issue before the court and the citation is not to a republished opinion.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2014-000514-001 DT

01/14/2015

(1985) the Arizona Supreme Court chastised one of the litigants—Black Corporation—for its use of a memorandum decision as authority and said: “We will give no consideration to the memorandum decision Black Corporation has cited.” The Arizona Court of Appeals expanded on this holding and ruled out-of-state memorandum decisions are no more citable than in-state memorandum decisions and refused to grant these decisions any credence. *Walden Books Co. v. Dept. of Revenue* at ¶¶ 21–23. The prohibition was extended to federal district court memorandum decisions in *Hourani v. Benson Hosp.*, 211 Ariz. 427, 122 P.3d 6 ¶ 27 (Ct. App. 2005). Persuasively, Ariz. R. Civ. App. P., Rule 28(c) states memorandum decisions shall not be regarded as precedent or cited in any court except for the two limited purposes described above. Although our Supreme Court has amended Rule 111,⁵ the amendment is prospective in that only cases decided after January 1, 2015, may be cited and, when cited, are only persuasive.

Attorneys’ Fees on Appeal

Although Plaintiff prevailed to the extent it demonstrated the trial court should not have relied on a pre-determined threshold amount when awarding attorneys’ fees, Plaintiff did not succeed in showing the trial court erred by reducing the amount of awarded attorneys’ fees. The amount the trial court awarded Plaintiff is similar to the amount the predecessor law firm was originally awarded.

The case included a more unusual situation as the attorney representing Plaintiff left the Waldron Law Group and joined with Plaintiff’s current law firm—Maxwell & Morgan, P.C. This Court does not know if Maxwell & Morgan, P.C had the authority to request fees for work done by Waldron Law Group. If it had this authority, counsel failed to support its request for increased fees of \$647.50 as counsel did not identify the time spent, the dates worked, or the tasks performed by the Waldron Law Group, and the trial court could exercise its discretion to limit the fees to the amount the Waldron Law Group had previously been awarded—\$428.00. If counsel lacked the authority to request these fees, at best the total amount of attorneys’ fees should have been the amount claimed by the current law firm and supported by its China Doll—\$425.00. The trial court’s award of \$400.00 is substantially similar to these amounts.

⁵ The new rule states:

c) Dispositions as Precedent.

(1) Memorandum decisions of Arizona state courts are not precedential and such a decision may be cited only:

(A) to establish claim preclusion, issue preclusion, or law of the case;

(B) to assist the appellate court in deciding whether to issue a published opinion, grant a motion for reconsideration, or grant a petition for review; or

(C) for persuasive value, but only if it was issued on or after January 1, 2015; no opinion adequately addresses the issue before the court; and the citation is not to a depublished opinion or a depublished portion of an opinion.

(2) A citation must indicate if a decision is a memorandum decision.

(3) A party citing a memorandum decision must provide either a copy of the decision or a hyperlink to the decision where it may be obtained without charge.

(4) A party has no duty to cite a memorandum decision.

Arizona R. Supreme Court, Rule 111(c).

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2014-000514-001 DT

01/14/2015

Counsel failed to demonstrate why Defendants should be responsible for any additional attorneys' fees when Plaintiff's need to reinstate the lawsuit arose because Plaintiff was dilatory and not because of any post-default conduct on Defendant's part.

Because Plaintiff did not fully prevail, Plaintiff is not entitled to attorneys' fees on appeal.

III. CONCLUSION

Based on the foregoing, this Court concludes the North Valley Justice Court erred by relying on a pre-set formula—or threshold amount—in determining the correct attorneys' fee award but did not err by exercising its discretion to reduce the requested attorneys' fees where (1) current counsel included charges for the predecessor law firm in their request but failed to demonstrate any authority that allowed Maxwell & Morgan, P.C. to collect for fees that were owed to the Waldron Law Group; and (2) the need for the current fees emanated from Plaintiff's failure to comply with the JCRCP. Defendants are not responsible for the fees counsel charged for re-instating the case.

IT IS THEREFORE ORDERED affirming the judgment of the North Valley Justice Court about the amount of fees awarded.

IT IS FURTHER ORDERED remanding this matter to the North Valley Justice Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Myra Harris

THE HON. MYRA HARRIS
Judicial Officer of the Superior Court

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