

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:)	No. 1 CA-CV 06-0112
)	
BARBARA A. LEES,)	
)	DEPARTMENT E
Petitioner/Judgment Creditor/)	
Appellee,)	MEMORANDUM DECISION
)	
v.)	(Not for Publication -
)	Rule 28, Rules of the
NICHOLAS W. LEES, III,)	Arizona Supreme Court)
)	
Defendant/Judgment Debtor/)	FILED 3-6-07
Appellant.)	
)	

Appeal from the Superior Court in Maricopa County

Cause No. DR2000-017704

The Honorable Stephen J.P. Kupiszewski, Judge *Pro Tempore*

AFFIRMED IN PART, VACATED IN PART, REMANDED

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T I M M E R, Judge

¶1 Nicholas Lees ("Nicholas") appeals¹ from the superior court's judgment requiring him to pay Barbara Lees ("Barbara") \$46,572.50, representing the entirety of her attorneys' fees expended in her successful garnishment of \$75,000 from JP Morgan Chase Bank, N.A. ("Chase Bank"). The garnishment proceeding emanated from judgments entered in the parties' contentious marital dissolution case. Nicholas does not challenge the court's decision to garnish money from Chase Bank, and we therefore affirm that portion of the judgment. Rather, Nicholas contends the court erred by awarding attorneys' fees to Barbara as the award was not warranted by law or the evidence. Alternatively, Nicholas asserts the court erred by awarding an unreasonable amount of fees.

¶2 We review an award of attorneys' fees for an abuse of discretion. *Jones v. Burk*, 164 Ariz. 595, 597-98, 795 P.2d 238, 240-41 (App. 1990). The applicability of a fee statute is a matter of law, which we review de novo. *Ahwatukee Custom Estates Mgmt. Ass'n, Inc. v. Bach*, 193

¹ Lees filed his notice of appeal before entry of final judgment. Because a final judgment has since been entered, Lees' premature notice of appeal was timely. *Barassi v. Matison*, 130 Ariz. 418, 421-22, 636 P.2d 1200, 1203-04 (1981).

Ariz. 401, 402, ¶ 5, 973 P.2d 106, 107 (1999). We view the evidence in the light most favorable to upholding the judgment. *Motel 6 Operating Ltd. P'ship v. City of Flagstaff*, 195 Ariz. 569, 571, ¶ 7, 991 P.2d 272, 274 (App. 1999). The focus of our evidentiary review is whether the evidence reasonably supports the court's ruling. *Id.*

¶13 For the following reasons, we are unable to determine whether the superior court properly awarded fees against Nicholas. We therefore vacate that portion of the judgment that awards attorneys' fees and remand for additional proceedings.²

ANALYSIS

¶14 At the conclusion of the garnishment proceedings, the superior court found that a valid judgment existed against Nicholas and in favor of Barbara in excess of \$75,000. The court further found that Amjad Abulhala had lent \$75,000 in the form of a cashier's check to Nicholas for the purpose of qualifying him to bid at a bankruptcy auction for the sale of the parties' marital home. Consequently, the court concluded that it had legally garnished the check and that neither Nicholas nor Abulhala

² Barbara cross-appealed the superior court's ruling declining to award attorneys' fees in the dissolution case because of a bankruptcy stay. After the stay was subsequently lifted, this court dismissed the cross-appeal as moot.

had the right to request Chase Bank to stop payment on the check. The court therefore ordered Chase Bank to honor the check by paying \$75,000 to Barbara. The court concluded its ruling by ordering Nicholas to pay all Barbara's legal fees "as this transaction and subsequent legal battle are his sole and ultimate responsibility."

¶15 Barbara thereafter applied for an award of \$46,572.50 as attorneys' fees expended in the garnishment proceeding pursuant to Arizona Rules of Civil Procedure ("Rule") 11 and 37, Arizona Revised Statutes ("A.R.S.") section 12-349 (2003), and the court's inherent powers. The court granted the application, finding that Lees had "attempted to mislead the Court," and awarded as reasonable attorneys' fees all Barbara's requested fees. The court did not specify the basis for its ruling. Therefore, we address each bases in turn and will affirm if any one supports the award.

A. Rule 11(a)

¶16 Rule 11(a) authorizes the superior court to assess reasonable attorneys' fees against an attorney, represented party, or both if a pleading, motion, or other paper is signed knowing the paper is not grounded in fact, warranted by existing law, or a good faith argument exists for the extension, modification, or reversal of existing

law, or is submitted for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. The purpose of the rule is to deter lawyers and parties from engaging in wasteful and costly advancement of positions not justified by law or fact. *Wells Fargo Credit Corp. v. Smith*, 166 Ariz. 489, 497, 803 P.2d 900, 908 (App. 1990). Nicholas argues that Rule 11(a) was not appropriately used by the court to award fees to Barbara. Barbara counters that the court properly sanctioned Nicholas under Rule 11(a) because he "immersed this divorce case in a windy, excessive and voluminous style of practice" and took meritless positions.

¶17 Based on the record before us, we cannot say the court properly based its fee award on Rule 11(a). First, we are unable to determine whether the court ruled that Nicholas submitted pleadings or other papers in violation of Rule 11(a). Barbara did not identify any papers in her application signed in violation of Rule 11(a), and the court did not identify any, as it was required to do in order to impose Rule 11(a) sanctions. *Resolution Trust Corp. v. W. Techs., Inc.*, 179 Ariz. 195, 205, 877 P.2d 294, 304 (App. 1994) (concluding that "if the court decides to award sanctions [under Rule 11(a)], it must make proper findings to support its conclusion"); *Wells Fargo*, 166

Ariz. at 497, 803 P.2d at 908 ("The trial court must make specific findings to justify its conclusion that a party's claims or defenses are frivolous.").

¶18 Second, the court rejected Barbara's request to jointly award fees against Nicholas's counsel. Because counsel signed all papers submitted to the court, the court's refusal to sanction counsel suggests that Rule 11(a) was not a basis for the fee award.

¶19 Third, no explanation appears for awarding all Barbara's fees as a result of a Rule 11(a) violation. The rule is not a fee-shifting provision, and any fees awarded must bear a relationship to the violation. *Taliaferro v. Taliaferro*, 188 Ariz. 333, 341, 935 P.2d 911, 919 (App. 1996). Thus, the rule authorizes the court to award only fees reasonably incurred by the opposing party as a result of the violation. *Id.* It does not appear that the court considered all of Nicholas's papers or positions to be without merit, as Barbara suggests. For example, at the conclusion of the hearing held on August 16, 2005, the court expressed concern with an issue raised by Nicholas in the proceedings and asked for additional briefing. Accordingly, because it does not appear that all fees incurred by Barbara resulted from a Rule 11(a) violation by

Nicholas, the court's fee award was not supported by this rule.

B. Rule 37(d)

¶10 Rule 37(d) provides that "[a] party's or attorney's knowing failure to timely disclose damaging or unfavorable information shall be grounds for imposition of serious sanctions in the court's discretion up to and including dismissal of the claim or defense." We agree with Nicholas that Rule 37(d) does not appear to be a basis for the court's fee award. The court stated that fees were appropriate because Nicholas was both responsible for the transaction and subsequent litigation and had attempted to mislead *the court*. No mention is made of a failure to disclose or produce unfavorable information *to Barbara*. Moreover, Barbara cannot point to any discovery violation. We reject her contention that Nicholas's alleged failure to tell the truth at the hearing about his beneficial interest in the cashier's check supported a fee award under Rule 37(d). The title and entirety of Rule 37 makes clear that only discovery and disclosure violations form bases for sanctions under subsection (d).

C. A.R.S. § 12-349

¶11 Section 12-349, A.R.S., provides as follows:

A. Except as otherwise provided by and not inconsistent with another statute, in any civil action commenced or appealed in a court of record in this state, the court shall assess reasonable attorney fees, expenses and, at the court's discretion, double damages of not to exceed five thousand dollars against an attorney or party, including this state and political subdivisions of this state, if the attorney or party does any of the following:

1. Brings or defends a claim without substantial justification.
2. Brings or defends a claim solely or primarily for delay or harassment.
3. Unreasonably expands or delays the proceeding.
4. Engages in abuse of discovery.

¶12 Nicholas asserts fees were inappropriate under § 12-349(A) for a number of reasons, one of which we find dispositive. Specifically, he argues the superior court was not authorized to award fees pursuant to § 12-349(A) because A.R.S. § 12-1580(E) (2003), which neither served as a basis for Barbara's application nor was cited in the court's ruling, serves as the exclusive basis for shifting fees to a judgment debtor in a garnishment action. Section 12-1580(E) authorizes a discretionary fee award to the prevailing party in a garnishment proceeding but further provides that "[t]he award shall not be assessed against

nor is it chargeable to the judgment debtor, unless the judgment debtor is found to have objected to the writ solely for the purpose of delay or to harass the judgment creditor." In light of the mandatory language in § 12-1580(E), Nicholas contends the superior court was precluded from awarding fees under § 12-349(A). Barbara does not address this argument.

¶13 Prior to 1986, former A.R.S. § 12-1589(D) authorized a fee award against a judgment debtor in a garnishment action when that party "unsuccessfully object[ed] to the writ or answer." A.R.S. § 12-1580, Historical and Statutory Notes. By amending that provision as currently provided in § 12-1580(E), the legislature explicitly limited such fee awards to circumstances in which the judgment debtor objected to the garnishment solely for purposes of delay or harassment of the judgment creditor. Section 12-349(A) explicitly states that it applies only when not inconsistent with another provision. Because application of § 12-349(A) would be inconsistent with § 12-1580(E), the court was precluded from awarding fees against Nicholas pursuant to the former provisions.³

³ Section 12-349(A)(2), in relevant part, seemingly mirrors § 12-1580(E) to the extent it authorizes a fee award if a party defends a claim solely for purposes of delay or harassment of a judgment creditor. Because an

¶14 Although neither Barbara nor the court cited § 12-1580(E) as a basis for the fee award, Nicholas offers no reason why the court could not have sua sponte based the award on this provision. Barbara contends the record supports such an award because, among other things, the record shows that Nicholas opposed the garnishment solely for purposes of delaying the proceedings and harassing her. Specifically, she points to evidence that Nicholas provided false testimony, tried to delay the proceedings by filing motions to stay, and submitted a declaration from Abulhala that contained false testimony.

¶15 The record does not reflect that the court based the fee award on a finding that Nicholas objected to the garnishment solely for purposes of delay or harassment of Barbara. As previously noted, the court stated only that fees were appropriate because Nicholas was responsible for the transaction and ensuing litigation and that he had attempted to mislead the court. It does not necessarily follow from these statements that the court further found that Nicholas's sole purpose in objecting to the garnishment was delay and/or harassment of Barbara.

award of fees under § 12-349(A)(2) is *mandatory* if these circumstances exist, however, we conclude that its application would be inconsistent with § 12-1580(E), which provides a *discretionary* award in the same circumstances.

¶16 Additionally, although evidence in the record suggests that Nicholas may have intended to delay proceedings or harass Barbara, the evidence may also be viewed as an attempt by Nicholas to prevent garnishment of funds that he might ultimately have to repay to Abulhala. Identification of Nicholas's purpose in opposing the garnishment must be left in the first instance to the superior court, which was in the best position to evaluate his intention. See *In re Commitment of Frankovitch*, 211 Ariz. 370, 375, ¶ 19, 121 P.3d 1240, 1245 (App. 2005) (noting superior court in best position to judge credibility of witnesses). For these reasons, we decline to hold that the court properly awarded fees under A.R.S. § 12-1580(E).

D. Inherent authority

¶17 The superior court possesses inherent power to sanction bad-faith conduct during litigation independent of the authority granted by other provisions, including A.R.S. § 12-1580(E) and Rule 11(a). See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46-47 (1991) (upholding court's inherent authority to impose sanctions for bad-faith conduct despite enactment of fee provisions, reasoning "we do not lightly assume that Congress has intended to depart from established principles such as the scope of a court's

inherent power") (citation omitted); *Hmielwewski v. Maricopa County*, 192 Ariz. 1, 4, ¶ 14, 960 P.2d 47, 50 (App. 1998) (recognizing court's inherent authority to impose sanctions outside authority of Rule 11(a)). These powers emanate from "the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Hmielwewski*, 192 Ariz. at 4, ¶ 14, 960 P.2d at 50 (citations omitted). Because inherent powers are potent, they must be used "with restraint and discretion" and ordinarily only if other statutes or rules are inapplicable. *Chambers*, 501 U.S. at 44, 50.

¶18 Barbara argues the superior court properly sanctioned Nicholas because he "mounted a fraudulent defense" to the writ of garnishment and exhibited a "black heart" by attempting to evade his child support obligations. In light of the court's statement that fees were appropriately imposed because Nicholas attempted to mislead the court, sanctions could be assessed pursuant to the court's inherent authority. *See Chambers*, 501 U.S. at 46 (stating when court believes "fraud has been practiced upon it . . . [the court] may assess attorney's fees against the responsible party") (citation omitted). If that was the case, however, the court was only permitted to

fashion an "appropriate sanction" to address the misdeed. *Id.* at 44-45.

¶19 We cannot discern from the record whether an award of all Barbara's fees is an appropriate sanction for Nicholas's attempt to mislead the court. The court's ruling does not explain what it considered attempted subterfuge or why an award of all fees is appropriate, explanations we would expect to see if the court exercised its inherent authority in this manner. *See id.* at 56 (affirming trial court's award of all fees expended in litigation in light of court's finding that amount "warranted due to the frequency and severity of . . . abuses of the judicial system and the resulting need to ensure that such abuses were not repeated"). The court's failure to explain the basis for awarding the full amount of Barbara's fees prevents us from determining whether an award in this amount is an appropriate exercise of the court's inherent authority. *See Plaintiffs' Baycol Steering Comm. v. Bayer Corp.*, 419 F.3d 794, 809 (8th Cir. 2005) (vacating fee award imposed pursuant to inherent authority in part because court failed to explain basis for amount of sanction); *see also Vollmer v. Publishers Clearing House*, 248 F.3d 698, 711 (7th Cir. 2001) (vacating \$50,000 Rule 11 sanction and remanding for more detailed

explanation regarding imposition of such significant monetary sanction). We cannot therefore affirm the court's fee award as a proper exercise of its inherent authority.

CONCLUSION

¶120 For the foregoing reasons, we affirm that portion of the superior court's judgment garnishing monies from Chase Bank. We vacate that portion of the judgment awarding attorneys' fees to Barbara and remand for the court to determine whether and to what extent fees should be awarded in light of our decision today. In doing so, the court must not award fees pursuant to A.R.S. § 12-349(A). Moreover, should the court again award fees to Barbara, the court should set forth the legal and factual basis for its ruling sufficient to permit meaningful appellate review. In light of our decision, we need not address whether the court awarded a reasonable amount of attorneys' fees. Both parties have requested an award of fees on appeal. In our discretion, we decline both requests.

Ann A. Scott Timmer, Judge

CONCURRING:

Philip Hall, Presiding Judge

Michael J. Brown, Judge