Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: September 23, 2019
Certiorari to the Court of Appeals, 2018CA618 District Court, City and County of Denver, 2017CV30158	
Petitioners: Frances Jane Moorer Scott and Galen LeMar Amerson, **v.** **Respondents:** Atlas Law Firm, P.C. and DebtBusters, P.C.	Supreme Court Case No: 2019SC365
ORDER OF COURT	

Upon consideration of the Motion for Reconsideration of Denial of Petition for Writ of Certiorari filed in the above cause, and now being sufficiently advised in the premises,

IT IS ORDERED that said Motion shall be, and the same hereby is, DENIED.

BY THE COURT, SEPTEMBER 23, 2019.

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: August 19, 2019
Certiorari to the Court of Appeals, 2018CA618 District Court, City and County of Denver, 2017CV30158	
Petitioners: Frances Jane Moorer Scott and Galen LeMar Amerson, **v.** **Respondents:** Atlas Law Firm, P.C. and DebtBusters, P.C.	Supreme Court Case No: 2019SC365
ORDER OF COURT	

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, AUGUST 19, 2019.

18CA0618 Atlas Law PC v Scott 04-04-2019

COLORADO COURT OF APPEALS DATE FILED: April 4, 2019

Court of Appeals No. 18CA0618
City and County of Denver District Court No. 17CV30158
Honorable Jay S. Grant, Judge

Atlas Law P.C. and DebtBusters P.C.,

Plaintiffs-Appellees,

v.

Frances Jane Moorer Scott and Galen LeMar Amerson,

Defendants-Appellants.

JUDGMENT AFFIRMED AND CASE
REMANDED WITH DIRECTIONS

Division III
Opinion by JUDGE ROMÁN
Webb and Freyre, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced April 4, 2019

Atlas Law Firm, P.C., Edward Levy, Denver, Colorado, for Plaintiffs-Appellees

Frances Jane Moorer Scott, Pro Se

Galen LeMar Amerson, Pro Se

¶ 1 In this civil dispute over unpaid legal fees, defendants, Frances Jane Moorer Scott and Galen LeMar Amerson, appeal the judgment entered in favor of plaintiffs, Atlas Law P.C. and DebtBusters P.C., as a discovery sanction pursuant to C.R.C.P. 37. We affirm.

I. Background

¶ 2 Plaintiffs represented defendants in various state and federal legal proceedings over the course of nearly two years. When defendants refused to pay plaintiffs $18,183.20 in legal fees, plaintiffs filed a civil action, alleging breach of contract, liability for family expenses,[1] quantum meruit, and unjust enrichment.

¶ 3 Plaintiffs served defendants with written interrogatories and deposition notices. Defendants refused to provide individual responses to plaintiffs' written discovery requests and did not appear for their scheduled depositions. Instead, defendants filed pleadings challenging the district court's jurisdiction.

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[1] Specifically, plaintiffs argued that because defendants are married, they are liable for one another's legal expenses. *See* § 14-6-110, C.R.S. 2018 (providing that "[t]he expenses of the family . . . are chargeable upon the property of both husband and wife").

¶ 4 Plaintiffs filed a notice of discovery violations and sought sanctions under C.R.C.P. 37. At a hearing on the motion, plaintiffs described multiple failed attempts to communicate with defendants regarding discovery in general — including "close to 30 or 40 emails" that went unanswered. Plaintiffs also informed the court that they had not received a response to any discovery requests. Defendants responded that they had not answered the discovery requests due to a pending jurisdictional challenge. With regard to depositions, they told the court that scheduling conflicts were to blame for the communication difficulties.

¶ 5 The district court noted that this was a "pretty straightforward attorneys' fee case" that "shouldn't be as convoluted as it is." It found that defendants' jurisdictional pleadings lacked any legal foundation and that it was "not buying" defendants' arguments with regard to discovery.[2] Thus, the court ordered defendants to comply with discovery.

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[2] Specifically, the court noted that "[e]very possible turn of trying to communicate [had been] met with I don't know" and "every single attempt at communication [had been] thwarted."

¶ 6 Plaintiffs filed two subsequent notices of discovery violations and motions for sanctions, and the district court held two additional hearings. At each hearing, plaintiffs asserted that defendants had submitted incomplete written discovery responses, and the district court agreed.[3] Accordingly, the court directly ordered defendants to "[a]nswer the questions" and comply with plaintiffs' discovery requests. It also warned defendants that if they did not submit honest and complete responses to the written interrogatories, it would "just find judgment in favor of [plaintiffs] because [of] this constant behavior in terms of filing evasiveness."

¶ 7 Despite the court's orders, defendants continued to provide deficient written discovery responses. Thus, plaintiffs filed a fourth notice of discovery violations and renewed their motion for entry of judgment against defendants.

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[3] For example, when asked to verify her signature on a written contract, defendant Scott answered, "Objection — neither admit nor deny, unable to answer, do not have the original to compare to the copy, Defendant lacks sufficient information to respond." The district court concluded these types of answers were disingenuous and "clearly an attempt to basically avoid answering the questions and creating . . . roadblocks for the litigation."

¶ 8 This time, the district court granted plaintiffs' motion under C.R.C.P. 37 and, as a sanction, entered judgment against defendants for the full amount sought in plaintiffs' complaint, in addition to attorney fees and costs. In doing so, the court noted that it had ordered defendants to comply with discovery multiple times, yet defendants' answers continued to be "evasive and unresponsive." The court found that defendants' conduct "manifest[ed] a flagrant disregard of discovery obligations and clearly violated the [c]ourt's order[s]," and that their "willful and deliberate . . . attempt to stonewall the legal process" and "derail this litigation" had significantly prejudiced plaintiffs' ability to prepare for trial, scheduled to occur in three weeks.

II. Discussion

A. Jurisdiction

¶ 9 Because jurisdiction is a threshold inquiry, we first address defendants' argument that the district court was divested of jurisdiction based on its due process violations. Specifically, defendants argue that the district court had jurisdiction at one point but lost it when: it improperly entered judgment on the basis of inadequate interrogatory responses; it denied defendants a jury

trial; it presumed defendants' liability; it threatened defendants with fines and sanctions; it colluded with Douglas County sheriffs to deprive defendants of their property; and it issued a coercive warrant intended to place defendants under duress.

¶ 10 Despite defendants' arguments, however, a district court's execution of a judgment has no bearing on its jurisdiction to impose sanctions. *See Willy v. Coastal Corp.*, 503 U.S. 131, 138 (1992) (holding that the district court's authority to impose sanctions did not relate to the issue of jurisdiction or the merits of the case, but to the conduct of a party and his counsel with respect to court filings).

¶ 11 Apart from broad constitutional citations, defendants provide no further authority to support their position that the district court was divested of jurisdiction based on its alleged due process violations. Accordingly, we reject this contention.

¶ 12 We turn next to the judgment at issue in this appeal — the district court's imposition of sanctions under C.R.C.P. 37.

B. Judgment Under C.R.C.P. 37

¶ 13 Defendants contend that the sanction entered under C.R.C.P. 37 is unwarranted and an abuse of discretion. We disagree.

1. Standard of Review and Applicable Law

¶ 14 Under C.R.C.P. 37, "a trial court has broad discretion to order and to determine the nature of sanctions for a party's failure to comply with discovery." *Scott v. Matlack, Inc.*, 39 P.3d 1160, 1172 (Colo. 2002). Because discovery rulings and the imposition of sanctions are within the sound discretion of the trial court, such rulings will not be disturbed on review absent an abuse of discretion. *Keybank, Nat'l Ass'n v. Mascarenas*, 17 P.3d 209, 214-15 (Colo. App. 2000). An abuse of discretion only occurs when the trial court's action is manifestly arbitrary, unreasonable, or unfair. *Hock v. N.Y. Life Ins. Co.*, 876 P.2d 1242, 1251 (Colo. 1994).

¶ 15 Among the available sanctions for a discovery violation is "[a]n order . . . rendering a judgment by default against the disobedient party." C.R.C.P. 37(b)(2)(C). However, entry of a default judgment is among "[t]he harshest of all sanctions" and thus "should be imposed only in extreme circumstances." *Newell v. Engel*, 899 P.2d 273, 276 (Colo. App. 1994).

> To impose the sanction of a default judgment against a party for failure to comply with a discovery rule or order, the trial court must make a specific finding of one of three factors on the part of the disobedient party. The

> factors are: (1) willfulness or deliberate disobedience of discovery rules; (2) bad faith conduct which is a flagrant disregard or dereliction of one's discovery obligations; or (3) culpable conduct which is more than mere inadvertence or simple negligence but is gross negligence.

Nagy v. Dist. Court, 762 P.2d 158, 161 (Colo. 1988) (discussing the guidelines articulated in *Kwik Way Stores, Inc. v. Caldwell*, 745 P.2d 672, 678 (Colo. 1987)).

2. Application

¶ 16 Here, the district court supported its order entering judgment against defendants under C.R.C.P. 37 based on the following:

- The court had repeatedly ordered defendants to comply with plaintiffs' discovery requests, but they had not done so.
- Defendants engaged in a continuing pattern of only providing evasive and unresponsive answers to interrogatories and requests for admission.
- Instead of complying with discovery, defendants continued to raise the same jurisdictional challenges that the court had already squarely rejected.
- At its last discovery hearing, the court had clearly warned defendants that if they continued to provide evasive

answers, the court may grant plaintiffs' request for entry of judgment.

- "Time after time" defendants failed to follow the court's discovery orders.
- Defendants flagrantly disregarded their discovery obligations and "clearly violated the [c]ourt's order regarding responses to interrogatories and request for admission and production."
- The court noted that defendant Scott is a seasoned litigator whose pleadings "reflect her understanding of civil procedure and the discovery process," and thus found defendants' actions to be "willful and deliberate in an attempt to stonewall the legal process."

¶ 17 We conclude the district court properly exercised its discretion under C.R.C.P. 37 when it entered judgment against defendants. C.R.C.P. 37(b)(2)(C) expressly permits entry of a default judgment where a party "fails to obey an order to provide or permit discovery." *See also Kwik Way Stores, Inc.*, 745 P.2d at 678 (noting "that a sufficient level of culpability for default generally will be present in cases where an order compelling discovery was entered and the

party failed to comply"). And, the record the supports the district court's findings that defendants repeatedly provided evasive or incomplete answers to plaintiffs' discovery requests. *Casillas v. People*, 2018 CO 78M, ¶ 18 ("Where sufficient evidence exists in the record to support a trial court's findings of fact, we defer to those findings.").

¶ 18 Moreover, the district court made multiple findings to justify use of the severest sanction of default judgment. Specifically, the court concluded that defendants acted both willfully and in flagrant disregard for the district court's discovery orders. *See Nagy*, 762 P.2d at 161 (noting that a specific finding on just one of these factors is sufficient to warrant entry of default judgment for failure to comply with discovery).

¶ 19 None of defendants' arguments on appeal negate the district court's findings or its proper use of its broad discretion under C.R.C.P. 37.[4] *See Scott*, 39 P.3d at 1172.

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[4] Defendants provide no citations to the record or substantive legal analysis to support their assertions that the district court lacked jurisdiction and denied them due process. Therefore, we will not address these arguments. *See Barnett v. Elite Props. of Am., Inc.*, 252 P.3d 14, 19 (Colo. App. 2010); *see also Garrett v. Selby Connor*

¶ 20 Accordingly, the district court properly entered a default judgment against defendants as a sanction for their failure to comply with discovery. *See id.*

C. Appellate Attorney Fees

¶ 21 Plaintiffs argue they are entitled to an award of reasonable appellate attorney fees and costs pursuant to section 13-17-102, C.R.S. 2018. Again, we agree.

1. Applicable Law

¶ 22 Under section 13-17-201(2), "the court shall award . . . reasonable attorney fees" against any party "who has brought or defended a civil action, either in whole or in part, that the court determines lacked substantial justification." As set forth in section 13-17-102(4), the phrase "lacked substantial justification" means "substantially frivolous, substantially groundless, or substantially vexatious." Under section 13-17-102(6), no party appearing without an attorney may be assessed attorney fees unless the party

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Maddux & Janer, 425 F.3d 836, 840 (10th Cir. 2005) (noting that, although we make some allowances for pro se litigants, "the court cannot take on the responsibility of serving as the litigant's attorney in constructing arguments and searching the record").

"clearly knew or reasonably should have known that his [or her] action or defense, or any part thereof, was substantially frivolous."

¶ 23 Likewise, under C.A.R. 38 and 39, we may, in our discretion, "award attorney fees and double costs when an appeal lacks substantial justification, including when it is substantially frivolous." *Auxier v. McDonald*, 2015 COA 50, ¶ 29.

¶ 24 An appeal may be frivolous as filed or frivolous as argued. *Averyt v. Wal-Mart Stores, Inc.*, 2013 COA 10, ¶ 40. An appeal is frivolous as filed when the district court's judgment "was so plainly correct and the legal authority contrary to appellant's position so clear that there is really no appealable issue." *Id.* (quoting *Castillo v. Koppes-Conway*, 148 P.3d 289, 292 (Colo. App. 2006)). An appeal is frivolous as argued when the appellant commits misconduct in arguing the appeal. *Id.* In that regard, an appeal "'lacks substantial justification' and is 'substantially frivolous' under § 13-17-102(4) when the appellant's briefs fail to set forth, in a manner consistent with C.A.R. 28, a coherent assertion of error, supported by legal authority." *Castillo*, 148 P.3d at 292.

2. Discussion

¶ 25 We conclude that defendants' appeal is frivolous as argued. *See id.* In violation of C.A.R. 28, defendants' briefs fail to present a coherent assertion of error supported by any legal authority or citations to the record regarding the subject of this appeal — namely, imposition of sanctions under C.R.C.P. 37. *See* C.A.R. 28(a)(7)(B) (requiring an appellant's brief to contain "contentions and reasoning, with citations to the authorities and parts of the record on which the appellant relies"); *see also Castillo*, 148 P.3d at 292.[5]

¶ 26 Rather than present developed legal arguments based on authority, defendants rely on a lengthy list of purported instances of misconduct, devoid of any support in the record or reasoned assertion of legal error. *See Martin v. Essrig*, 277 P.3d 857, 860 (Colo. App. 2011) (awarding attorney fees and costs where the appellant's briefs "fail[ed] to set forth a cogent argument" and "the

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[5] The fact that defendants are pro se do not excuse them from compliance with C.A.R. 28. *See Finegold v. Clarke*, 713 P.2d 401, 403 (Colo. App. 1985) ("[A] pro se litigant is bound by the same procedural rules as those who are licensed to practice law.").

analysis [was] obscured by irrelevant digressions, lack of structure, and use of a rhetorical style that is verbose, derogatory, and sarcastic"). In fact, even though they had an opportunity to respond to plaintiffs' request for appellate sanctions, defendants make no attempt to justify their conduct in their reply brief. *Castillo*, 148 P.3d at 292-93 (noting that "if appellee requests sanctions in the answer brief, appellant has notice and an opportunity to respond").

¶ 27 Moreover, pursuant to section 13-17-102(6), the record shows that defendants knew or should have reasonably known that the appeal of their claim was frivolous. As the district court recognized, defendants are experienced litigants with extensive exposure to the courts and their procedural requirements. Indeed, they have filed at least five appeals in this court alone, all of which were pro se, and one of which resulted in an award of appellate attorney fees against them. *See Amerson v. Am. Mortg. Network, Inc.*, slip op. at 6 (Colo. App. No. 14CA1286, June 11, 2015) (not published pursuant to C.A.R. 35(f)) (awarding appellate attorney fees "because appellants reasonably should have known that this appeal was vexatious").

¶ 28 We therefore conclude that an award of attorney fees and costs incurred on appeal is warranted under section 13-17-102(2) and C.A.R. 38. *See In re Marriage of Purcell*, 879 P.2d 468, 469 (Colo. App. 1994) (awarding appellate attorney fees against a pro se appellant based on a finding that his appeal was frivolous). We leave the determination of the amount of attorney fees and costs to the trial court on remand. *See Ringquist v. Wall Custom Homes, LLC*, 176 P.3d 846, 851 (Colo. App. 2007).

III. Conclusion

¶ 29 The judgment is affirmed, and the case is remanded to the district court to conduct further proceedings to determine a reasonable award of appellate attorney fees and costs.

JUDGE WEBB and JUDGE FREYRE concur.

Court of Appeals

STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203
(720) 625-5150

PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Steven L. Bernard
Chief Judge

DATED: December 27, 2018

Notice to self-represented parties: *The Colorado Bar Association provides free volunteer attorneys in a small number of appellate cases. If you are representing yourself and meet the CBA low income qualifications, you may apply to the CBA to see if your case may be chosen for a free lawyer. Self-represented parties who are interested should visit the Appellate Pro Bono Program page at http://www.cobar.org/Portals/COBAR/repository/probono/CBAAppProBonoProg_PublicInfoApp.pdf*