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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 11/23/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

LAURA LEE GRACE, individually,) 1 CA-CV 11-0695
and as Trustee of the Laura Lee)
Grace Revocable Trust,) DEPARTMENT A
)
Plaintiff/Appellant,) **MEMORANDUM DECISION**
) (Not for Publication -
v.) Rule 28, Arizona Rules of
) Civil Appellate Practice)
STEVEN W. ALLEN and LINDA TANNER)
ALLEN, husband and wife; STEVEN)
W. ALLEN, P.C., an Arizona)
professional corporation,)
)
Defendants/Appellees.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-016254

The Honorable J. Richard Gama, Judge

AFFIRMED

Leonard & Felker, P.L.C. Tucson
by David J. Leonard
Attorneys for Plaintiff/Appellant

Broening Oberg Woods & Wilson Phoenix
by Robert T. Sullivan
Alicyn M. Freeman
Michelle L. Donovan
Attorneys for Defendants/Appellees

T I M M E R, Presiding Judge

¶1 Laura Lee Grace appeals from the entry of summary judgment in favor of Steven Allen on her tort claims. Finding no genuine dispute of material fact or legal error, we affirm.¹

BACKGROUND

¶2 In January 1997, Grace sought advice from attorney Steven Allen on reducing her overall tax liability. They agreed Allen would establish three levels of off-shore business trusts in Belize (the "Belize Trusts").² According to Allen, such trusts were structured to conceal Grace's income and control of the trusts, thereby minimizing her tax liability.

¶3 Grace executed several six-month durable powers of attorney authorizing Allen to create and manage the Belize Trusts. At Grace's direction, Allen sold Grace's stock portfolio and transferred the proceeds to the second-level trust. Grace testified she would have sold the stock with or without Allen's advice, although not all at once. She further acknowledged that Allen was not the one choosing investments,

¹ Allen asks us to remand so that issues not encompassed within the Rule 54(b) judgment can be ruled on by the court. Remand is not necessary, however, as the superior court was never deprived of jurisdiction to decide matters not on appeal.

² The first level of the Belize Trusts served as trustee for the second level of trusts. The third level of trusts owned the certificates of the second level and received the second-level trust's distributions. Grace served as trustee of the first-level trust.

that he never questioned her investment decisions, and that he always followed her directions on investments.

¶14 Allen also retained an accountant to prepare a Form 1040NR, United States Nonresident Alien Income Tax Return, on behalf of the second-level trust for the 1997 tax year. The tax form reported income to the second-level trust as well as a purported income distribution to the third-level trust, reducing the second-level trust's tax liability to zero.

¶15 Grace did not report the sale of her stocks on a state or federal personal income tax form for the 1997 tax year. To date, Grace has not paid taxes on the sale, resulting in a benefit of approximately \$556,000.

¶16 Eventually, Grace instructed Allen to remove assets from the Belize Trusts and sign them over to Credit Bancorp Ltd. ("CBL"). Grace concedes she made her own decision and that the CBL investment was unrelated to the creation of the Belize Trusts. CBL turned out to be a Ponzi scheme, and Grace incurred significant losses.

¶17 Meanwhile, the Internal Revenue Service ("IRS") was investigating Grace and the Belize Trusts between 2001 and 2003. The Tax Division of the United States Department of Justice subsequently determined the Belize Trusts' structure to be illegal because Grace had never relinquished control of the

assets.³ Nevertheless, no taxing authority has assessed taxes, penalties, or interest against Grace.

¶18 Grace sued Allen and others (collectively, "Allen"), alleging claims of malpractice, constructive fraud, and violation of the RICO statutes based upon a criminal syndicate and/or scheme or artifice to defraud.⁴ She sought rescission and damages. Grace subsequently moved for partial summary judgment on her rescission, constructive fraud, and breach of fiduciary duty claims, which the superior court denied. On Allen's motion, the court then entered summary judgment against Grace on all claims against Allen based on a lack of damages. Specifically, the court ruled the damages alleged by Grace are "speculative, remote, and uncertain." The court then entered judgment pursuant to Arizona Rule of Civil Procedure 54(b) dismissing the complaint without prejudice. This timely appeal followed.

DISCUSSION

¶19 Summary judgment is warranted when "the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine

³ Pursuant to a plea agreement, Allen pled guilty to one count of conspiracy to defraud the United States pursuant to 18 U.S.C. § 371.

⁴ Grace also sued an accountant for malpractice. The propriety of that claim is not before us.

issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Ariz. R. Civ. P. 56(c)(1). This court reviews the grant of summary judgment de novo. *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App. 2000). We view the evidence and the inferences fairly arising from it in the light most favorable to Grace as the party against whom summary judgment was granted. *Prince v. City of Apache Junction*, 185 Ariz. 43, 45, 912 P.2d 47, 49 (App. 1996).

¶10 Grace argues the superior court erred by (1) denying her motion for partial summary judgment, and (2) granting summary judgment for Allen. Because resolution of the second issue renders the first issue moot, we only address whether the court correctly ruled that Allen is entitled to summary judgment because Grace failed to show she suffered damages as a result of Allen’s actions.

¶11 All Grace’s claims require proof of damage or detriment resulting from reliance. Damages that are speculative or uncertain cannot support a judgment; the plaintiff must prove the fact of damage with certainty. *Coury Bros. Ranches, Inc. v. Ellsworth*, 103 Ariz. 515, 521, 446 P.2d 458, 464 (1968). Such proof “must be of a higher order than proof of the amount of damages.” *Id.* With these principles in mind, we turn to Grace’s damages allegations.

A. Back taxes, interest, penalties

¶12 Grace argues that as a result of Allen's erroneous advice that she could avoid taxes by transferring her stock portfolio to one of the Belize Trusts and then permitting him to sell stock to purchase bonds, Grace became subject to state and federal tax liability together with interest and penalties accruing since 1997. Although no taxing authority has pursued her for back taxes, she asserts that because no statute of limitations applies, she will always be at risk for paying these amounts and has therefore suffered damages.⁵ Allen does not dispute that a taxing authority may choose to pursue collection of back taxes from Grace in the future, but he argues Grace has not yet incurred any ascertainable liability that could serve as recoverable damages.

¶13 To support her argument, Grace relies primarily on our supreme court's decision in *Echols v. Beauty Built Homes, Inc.*, 132 Ariz. 498, 500, 647 P.2d 629, 631 (1982). In *Echols*, four homeowner-families sued a homebuilder for fraud stemming from alleged misrepresentations regarding their eligibility for a federal tax credit. *Id.* at 499, 647 P.2d at 630. Two of the families claimed the credit, which the IRS disallowed, and one family did not claim the credit. *Id.* The remaining family, the

⁵ As of April 15, 2011, she calculates she owes approximately \$900,000 to the IRS.

Baxters, claimed the tax credit, but the IRS did not challenge their tax return. *Id.* Regardless, the Baxters alleged they had been "injured by the uncertainty and continuing risk that they may be found to have willfully evaded taxes." *Id.* at 500-01, 647 P.2d at 631-32. The superior court entered summary judgment against the Baxters, but the supreme court reversed, reasoning as follows:

Admittedly, the Baxters have as yet suffered no monetary loss as a result of the alleged misrepresentations and it is true, as defendants contend, that the Restatement (2d) of Torts contemplates recovery in fraud actions only for pecuniary loss. A tax and penalty might still be assessed. We believe that the Baxters should be allowed to show what pecuniary loss they have sustained as a result of their reliance upon the defendants' misrepresentation as to the tax credit. In any event, the extent of the damage they have sustained is a matter for trial and not for summary judgment.

Id. at 501, 647 P.2d at 632 (citations omitted). Grace argues that because her obligation to pay back taxes, like the Baxters, may arise in the future, we should follow *Echols* and remand to permit a jury to determine the amount of Grace's damages.

¶14 Although *Echols* contains language supportive of Grace's position, we nevertheless find it distinguishable. First, the supreme court did not dispense with the requirement that a plaintiff must prove a pecuniary loss in order to recover for fraud. *Id.* at 501, 647 P.2d at 632 (acknowledging pecuniary

loss must be shown but allowing the Baxters the opportunity to “show what pecuniary loss they have sustained”). We therefore reject Grace’s suggestion at oral argument before this court that the superior court could properly award her damages for back taxes, interest, and penalties that Grace may never be required to pay.

¶15 Second, reading *Echols* to mean a plaintiff could recover damages for the possibility of future pecuniary loss would conflict with other cases clearly disallowing recovery for speculative damages. See, e.g., *Coury Bros. Ranches*, 103 Ariz. at 521, 446 P.2d at 464 (“Damages that are speculative, remote or uncertain may not form the basis of a judgment.”). We presume the supreme court would have made a more explicit holding had it intended to depart from this long-established principle.

¶16 Third, and finally, the recitation of facts in *Echols* suggests the Baxters sought damages so they could pay the taxes withheld to remove the “uncertainty and continuing risk” of nonpayment. The Baxters argued they had “a moral, if not a legal, obligation to repay the credit,” and the supreme court agreed with their position and permitted them an opportunity to prove their pecuniary loss. *Id.* Conversely, the record in this case does not suggest Grace seeks to pay back taxes. Indeed, at

oral argument, her counsel acknowledged she may receive a "windfall" as a result of any damages paid by Allen.

¶17 We find this court's decision in *Lewin v. Miller Wagner & Co.*, 151 Ariz. 29, 34, 725 P.2d 736, 741 (App. 1986) instructive. The *Lewin* plaintiffs established the amount of damages they would sustain if the IRS disallowed their claimed losses. *Id.* at 34, 725 P.2d at 741. Notwithstanding evidence establishing that an IRS agent would likely challenge the losses, we held that the claimed damages were speculative due to the absence of evidence that "this agent's determination was likely to be upheld either at a higher administrative level or against a legal challenge." *Id.* Other states and commentators are in accord with our holding in *Lewin*. See *Thomas v. Cleary*, 768 P.2d 1090, 1093 (Alaska 1989) (concluding plaintiffs could not show damages stemming from an alleged potential tax liability because the IRS had never sent a deficiency notice or imposed any assessment upon them); *Bronstein v. Kalheim & Kalheim, Ltd.*, 90 Ill. App. 3d 957, 959-60 (App. Ct. 1980) (to same effect); Jacob L. Todres, *Tax Malpractice Damages: A Comprehensive Review of the Elements and the Issues*, 61 Tax Law. 705, 715-22 (2008); but cf. *Jamison, Money, Farmer & Co., P.C. v. Standeffer*, 678 So. 2d 1061, 1067 (Ala. 1996) (concluding it was certain that Alabama would levy corresponding state taxes

when the IRS had already issued an assessment against plaintiff).

¶18 Grace's claim is more speculative than the one at issue in *Lewin*. She produced no evidence that any taxing authority intended to prosecute her for failing to file and pay personal income taxes in 1997. Further, Grace testified she had sustained no more liability from the illegal tax structure than she would have under a legal structure. Under *Lewin*, Grace has not established the fact of damage with respect to this claim. See *Lewin*, 151 Ariz. at 34, 725 P.2d at 741.

¶19 Grace additionally argues that her risk of liability for back taxes, interest, and penalties sufficiently establishes Allen's obligation to indemnify her. We disagree. Grace has not shown her entitlement to indemnity. Indemnity is only triggered once liability attaches. *MT Builders, L.L.C. v. Fisher Roofing, Inc.*, 219 Ariz. 297, 302, ¶ 11, 197 P.3d 758, 763 (App. 2008). Grace claims liability attached under 26 U.S.C. § 6501(c)(3) (West 2012),⁶ which provides that taxes may be assessed at any time in the case of a failure to file a return. No tax liability attaches, however, in the absence of an assessment of back taxes. *CDT, Inc. v. Addison, Roberts & Ludwig, C.P.A., P.C.*, 198 Ariz. 173, 180, ¶ 25, 7 P.3d 979, 986

⁶ Absent material revisions after the relevant date, we cite a statute's current version.

(App. 2000) (holding that a claim for damages against a tax preparer or advisor does not accrue until the deficiency tax assessment or finality of audit).⁷

¶20 For all these reasons, the superior court correctly ruled that Grace has not suffered damages as a result of the risk she may have to pay back taxes, interest, and penalties in the future. If she is required to pay back taxes in the future, she can seek recovery from Allen.

B. Loss of stock appreciation

¶21 Grace also claims as damages the loss of appreciation of her stock as a result of transferring it to one of the Belize Trusts. She contends that had she not sold her stock in 1997, it would have appreciated substantially. Although Grace focuses much of her argument on the wide latitude given plaintiffs for proving the *amount* of damages, her proof of the *fact* of damages is again lacking.

⁷ According to Grace, *CDT's* analysis of California tax statutes is not applicable to her federal tax liability. She underscores that 26 U.S.C. § 6151(a) provides that when a tax return is required "the person required to make such return shall, without assessment or notice and demand from the Secretary, pay such tax . . . at the time and place fixed for filing the return . . ." We do not find *CDT* distinguishable. The California statutes at issue also provide for payment without assessment. See Cal. Rev. & Tax Code § 6451 ("The taxes imposed by this part are due and payable to the board quarterly on or before the last day of the month next succeeding each quarterly period."); *id.* § 6452 (requiring a return to be filed on a quarterly basis and imposing misdemeanor liability on persons who fail to comply).

¶122 To recover damages for lost appreciation due to Allen's purported tortious acts, Grace was required to prove both that she would not have sold the stock but for Allen's advice, and that the sale of the stock to one of the Belize Trusts proximately caused the stock to depreciate. See *Standard Chartered PLC v. Price Waterhouse*, 190 Ariz. 6, 33, 945 P.2d 317, 344 (App. 1996) (noting it is a "basic tort principle that a plaintiff must demonstrate both 'but for' and proximate causation") (quoting *McGonigle v. Combs*, 968 F.2d 810, 821 (9th Cir. 1992)); see also Restatement (Second) of Torts § 548A cmt. b (1977) ("[T]here is no liability [for pecuniary loss] when the value of the stock goes down after the sale, not in any way because of the misrepresented financial condition, but as a result of some subsequent event that has no connection with or relation to its financial condition.").

¶123 The record does not support a conclusion that Allen's tax advice caused Grace's stock to depreciate. Grace testified she did not rely on Allen for investment advice, that she was planning to sell her stock portfolio anyway, albeit over time, and that she chose how to invest the assets in the Belize Trusts. She further testified that there was nothing about the creation of the Belize Trusts that caused her to invest in CBL as they were "unrelated," and Allen did not make any misrepresentations regarding that investment. Any diminishment

of value in the stock stems from Grace's investment choices and market forces and not Allen's tax advice.

¶124 In her reply brief, Grace fails to address *Standard Chartered* but urges us to follow *Strebel v. Brenlar Invs., Inc.*, 37 Cal. Rptr. 3d 699 (Ct. App. 2006). In that case, a homeowner sold his house in San Bruno in reliance on a real estate agent's misrepresentation that the homeowner would be able to immediately close escrow on the purchase of a house in Sonoma County. *Id.* at 700. The Sonoma County sale did not close. *Id.* The homeowner placed the proceeds of the sale into a bank account for use in purchasing another home, but he was unable to secure one in Sonoma County before housing values substantially increased, thereby effectively decreasing the buying power of his sale proceeds. *Id.* at 700, 706. In the subsequent lawsuit against the real estate agent for fraudulent concealment, the California Court of Appeals held that the jury properly awarded the homeowner lost appreciation as such damages restored his ability to purchase a comparable home in Sonoma County. *Id.* at 706.

¶125 *Strebel* is distinguishable. The *Strebel* court noted that the real estate agent's fraud was required to be "a substantial factor in causing Strebel's loss." *Id.* There, the misrepresentation affected the timing of the San Bruno sale, which proximately caused the homeowner to miss the opportunity

to reap the benefit of the substantial increase in home values. *Id.* In contrast, Allen's poor tax advice caused Grace to transfer her stock to one of the Belize Trusts - an act that did not affect the value of the investment. It was Grace's subsequent decision to invest in CBL that proximately caused her loss. We are not persuaded, therefore, to follow *Strebel*.

C. Fees

¶26 Grace finally claims she is entitled to recover trustee fees and legal fees from Allen as a result of his breach of fiduciary duty. Because Grace never sought forfeiture of these fees in the superior court, however, she has waived this argument. *Airfreight Express, Ltd. V. Evergreen Air Ctr., Inc.*, 215 Ariz. 103, 109-10, ¶ 17, 158 P.3d 232, 238-39 (App. 2007).

¶27 In summary, we hold the superior court correctly entered summary judgment in favor of Allen because Grace failed to show that Allen's tax advice proximately caused her pecuniary loss. If the IRS seeks recovery of back taxes, interest, and penalties in the future as a result of Allen's advice to transfer the stock portfolio to one of the Belize Trusts, Grace will suffer damages, and she can seek recovery from Allen. In light of our decision that Grace failed to show the fact of damages, we need not address her argument concerning the benefit-of-the-bargain measure of damages.

CONCLUSION

¶28 For the foregoing reasons, we affirm the superior court's grant of summary judgment.

/s/

Ann A. Scott Timmer
Presiding Judge

CONCURRING:

/s/

John C. Gemmill, Judge

/s/

Margaret H. Downie, Judge