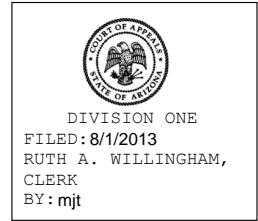


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

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

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



MARY HAYDEN,)	1 CA-SA 13-0170
)	
Petitioner,)	DEPARTMENT E
)	
v.)	Maricopa County
)	Superior Court
THE HONORABLE SALLY SCHNEIDER)	No. CV2008-024245
DUNCAN, Judge of the SUPERIOR)	
COURT OF THE STATE OF ARIZONA,)	DECISION ORDER
in and for the County of)	
MARICOPA,)	
)	
Respondent Judge,)	
)	
STEVEN PITTENDRIGH,)	
)	
Real Party in Interest.)	

The court, Presiding Judge Andrew W. Gould and Judges Patricia K. Norris and Kent E. Cattani, participating, has considered the special action petition of the Petitioner, Mary Hayden ("Wife"). Petitioner seeks relief from the trial court's order entering final judgment on mandate regarding her breach of contract claim against her former husband, Steven Pittendrigh ("Husband").

We accept jurisdiction of this special action because the entry of final judgment on mandate is not appealable; consequently, Wife has no equally plain, speedy, or adequate remedy by appeal. See *Sepo v. Case*, 25 Ariz. App. 176, 180, 541

P.2d 1160, 1164 (1975) (explaining that a special action is the appropriate method "to test whether the trial court is acting contrary to the directives of the appellate court"); Ariz. R.P. Spec. Act. 1(a).

We reject Husband's argument that Wife's petition is a collateral attack on the memorandum decision. Wife does not ask us to vacate the memorandum decision, but simply to clarify the scope of the decision in light of the trial court's interpretation of the mandate.

In 2005, Husband and Wife entered into a property settlement agreement dividing all of their marital assets including their interest in InPulse Response Group, Inc. ("IRG"). Husband was awarded IRG as his sole and separate property, and in exchange he was required to pay Wife \$1 million over a three-year period. The agreement made all outstanding payments due and payable upon the sale of IRG. On October 5, 2006, Husband sold IRG, but did not inform Wife of the sale or pay her the remaining \$700,000 he owed her on the date of the sale. She did not learn of the sale until May 2007 and later sued him for fraud and breach of contract.

The trial court granted Husband's motion to dismiss all claims. Wife appealed, and another panel of this court affirmed the trial court's dismissal of the fraud claim but held the court should not have dismissed her breach of contract claim.

That panel's memorandum decision remanded the breach of contract claim to the trial court with the following instruction, which appears to have been directed at Husband's argument that his payment of 5% interest foreclosed Wife's claim for breach of contract:

We remand to the trial court for a calculation of the prejudgment interest owed to Wife on all unpaid equalization payments at the rate of 10% per annum beginning on October 5, 2006 (the date IRG was sold) and accruing until the date each such equalization payment was actually paid.

The decision also found that "the trial court erred in holding that Wife failed to state a claim for breach of contract."

After remand, Husband moved for entry of final judgment on mandate. Wife responded to Husband's motion by arguing that she had not had the opportunity to litigate her breach of contract claim. She further argued that several aspects of her breach of contract claim were never considered on appeal because the allegations in the complaint were accepted as true given the nature of a motion to dismiss: (1) the "prejudgment interest on the amount owed that began to accrue after [Husband] paid the principal, but not the outstanding interest," (2) consequential damages arising from [Husband's] breach, and (3) attorneys' fees. Wife also pointed out that our memorandum decision "did not, and could not, decide liability and all damages arising from the breach" because this issue had never been presented to

the trial court and the matter was resolved on the pleadings, without any discovery. The trial court entered final judgment on mandate without Husband ever filing an answer to Wife's complaint and without further disclosure or discovery relating to Wife's breach of contract claim.¹

Wife initially filed a notice of appeal from the court's entry of judgment on mandate; after realizing that the proper avenue of relief was by way of a special action,² she filed the petition before us. She seeks (1) to litigate her breach of contract claim by presenting evidence proving liability and damages, (2) to conduct further discovery regarding compensatory damages, including consequential damages, (3) to be permitted to seek all damages, including consequential damages, at trial, and (4) to obtain reversal of the attorneys' fees awarded to Husband

¹ Wife admits that discovery relating to other, non-dismissed defendants other than Husband has taken place; however, there does not appear to have been any discovery relating to Wife's claim that Husband breached the settlement agreement by failing to pay her the full amount due on the date the business was sold; the discovery identified by Husband appears to be related to other matters, including the underlying dissolution proceeding and subsequent Rule 60 motion to set aside the consent decree, not Wife's current breach of contract claim.

² See *Scates v. Ariz. Corp. Comm'n*, 124 Ariz. 73, 76, 601 P.2d 1357, 1360 (App. 1979) (explaining that a special action is the appropriate way to seek review of a judgment on mandate); *Purcell v. Superior Court*, 172 Ariz. 166, 169, 835 P.2d 498, 501 (App. 1992).

as a result of the court's original dismissal of her claims, and which the trial court offset in its judgment on the mandate.

Under normal circumstances, when a motion to dismiss has been improperly granted, our reversal of that motion entitles the claimant to proceed with litigation as though the motion to dismiss had never been granted. Usually, this means that the opponent would file an answer and disclosure and discovery would begin, as well as any other procedures authorized by the Arizona Rules of Civil Procedure.

Here, this court's memorandum decision explained that "the trial court erred in holding that Wife failed to state a claim for breach of contract" and "remand[ed] for proceedings consistent with [the court's] decision." Accordingly, the court should not have entered judgment on the mandate as Wife was entitled to litigate her breach of contract claim.

We acknowledge that a literal reading of the memorandum decision may have resulted in confusion based on the following language:

We remand to the trial court for a calculation of the prejudgment interest owed to Wife on all unpaid equalization payments at the rate of 10% per annum beginning on October 5, 2006 (the date IRG was sold) and accruing until the date each such equalization payment was actually paid.

However, this language did not resolve all aspects of Wife's breach of contract claim and simply referred to Husband's

argument that his payment of the 5% penalty contained in the contract was meant to take the place of the statutory rate of interest at 10%.³

Wife argues in her petition that the court's interest calculation failed to include additional interest that had accrued before Husband made a partial payment in 2008 because Husband's payments had to pay interest before principal under Arizona law. She also reiterates that the court's calculation did not address the consequential damages portion of Wife's breach of contract claim (which was never at issue in the appeal).

These arguments will need to be resolved through further proceedings in the trial court, and we express no opinion on them. We note, however, that Wife is correct that the trial court should have vacated the award of fees to Husband because the fee award was based on the dismissal of Wife's complaint

³ Contrary to Husband's arguments, Wife is not estopped from arguing that the memorandum decision authorized her to pursue her breach of contract claim, including consequential damages. Although she argued to the contrary in her petition for review to the supreme court, she did not prevail or obtain any advantage from her earlier position. Judicial estoppel requires the party asserting the inconsistent position to be successful in the prior proceeding. See *Bank of Am. Nat. Trust & Sav. Ass'n v. Maricopa Cnty.*, 196 Ariz. 173, 175-76, 993 P.2d 1137, 1139-40 (App. 1999) (explaining that a party is not considered successful in the prior proceeding unless "the court in that proceeding granted the party relief or accepted the party's earlier inconsistent position either as a preliminary matter or as part of a final disposition").

which, as discussed above, we reversed in part. See *Aida Renta Trust v. Maricopa County*, 221 Ariz. 603, 614, ¶ 39, 212 P.3d 941, 952 (App. 2009) (explaining that a costs award ceased to exist when the summary judgment the award was based on was reversed); *In re Jake's Granite Supplies, L.L.C.*, 442 B.R. 703, 712 (D. Ariz. 2010) (setting aside lower court's fee award in light of reversal of summary judgment that had originally provided the basis of the award).

Accordingly,

IT IS ORDERED accepting jurisdiction of Wife's special action petition.

IT IS FURTHER ORDERED vacating the trial court's entry of final judgment on mandate regarding Wife's contract claim.

IT IS FURTHER ORDERED denying Wife's Request for Oral Argument.

IT IS FURTHER ORDERED that the clerk of this court provide a copy of this Decision order to the Honorable Sally S. Duncan, a Judge of the Superior Court, and to each party appearing herein.

/s/

ANDREW W. GOULD, Presiding Judge