

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In the Matter of the Estate of:

BEATRICE STOLOFF-KELTER, Deceased

I. ESTELLE SCHONEBERGER, Personal representative of Estate
of Beatrice S. Stoloff-Kelter Trust,
Plaintiff/Appellant,

v.

CAMPBELL SCHONEBERGER & ASSOCIATES LTD.; NATHAN LAINE
SCHONEBERGER AND LISA SCHONEBERGER, husband and wife,
Defendants/Appellees.

No. 1 CA-CV 15-0451
FILED 11-1-2016

Appeal from the Superior Court in Maricopa County
No. CV2013-093826
The Honorable Mark F. Aceto, Judge (Retired)

**AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART,
AND REMANDED**

COUNSEL

Johnson-Stovall and Associates, PLC, Tempe
By Joyce M. Johnson-Stovall and Lori A. Curtis
Counsel for Plaintiff/Appellant

Jaburg & Wilk, P.C., Phoenix
By Kathi Mann Sandweiss and Lauren L. Garner
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Judge Maurice Portley¹ delivered the decision of the Court, in which Presiding Judge Diane M. Johnsen and Judge Jon W. Thompson joined.

P O R T L E Y, Judge:

¶1 I. Estelle Schoneberger (“Estelle”), the personal representative of the Estate of Beatrice S. Stoloff-Kelter, appeals the summary judgment dismissing the Estate's claims against Campbell Schoneberger & Associates LTD (“CSA”), a corporation, Nathan Laine Schoneberger (“Laine”) and his spouse, Lisa Schoneberger. Because we find that there are genuine issues of material fact on the claims against Laine and Lisa, we reverse the summary judgment in part and remand for further proceedings.

FACTS² AND PROCEDURAL BACKGROUND

¶2 This is a family dispute about a \$75,000 check. Beatrice Stoloff-Kelter (“Beatrice”) was Estelle's step-mother and Laine’s step-grandmother. Laine, on behalf of CSA, signed a promissory note dated May 3, 2007, agreeing that CSA would repay a \$75,000 loan from Beatrice. A few days later, Laine received a personal check for \$75,000 from Beatrice payable to him, with the notation “loan,” and deposited the check into an

¹ The Honorable Maurice Portley, Retired Judge of the Court of Appeals, Division One, has been authorized to sit in this matter pursuant to Article VI, Section 3 of the Arizona Constitution.

² We review the facts in a light favorable to the non-moving party. *See Taser Int'l. Inc. v. Ward*, 224 Ariz. 389, 393, ¶ 12, 231 P.3d 921, 925 (App. 2010).

SCHONEBERGER v. CAMPBELL et al.
Decision of the Court

account owned by him, not owned by CSA. Laine made a couple of loan payments before Beatrice passed away in February 2009.

¶3 Estelle, who was also the trustee of the Beatrice Stoloff-Kelter Trust (“Trust”), filed a lawsuit as the personal representative and trustee against CSA, and Laine and Lisa (collectively “Laine”), in May 2011. The lawsuit, CV 2011-095000, was subsequently dismissed for failure to prosecute, but the superior court gave Estelle until June 17, 2013 to file a new action pursuant to Arizona Revised Statute (“A.R.S.”) section 12-504.³

¶4 Estelle did not appeal the dismissal, but filed a new lawsuit in her capacity as the personal representative of Beatrice’s estate and for Stuart Stoloff, the successor trustee of the Trust,⁴ against CSA and Laine on June 5, 2013.⁵ Estelle alleged CSA, Laine and Lisa breached the promissory note by failing to repay the loan according to its terms. She also asserted claims for bad faith breach of contract; unjust enrichment; violation of A.R.S. § 46-456 by financial exploitation of Beatrice; breach of the statutory duty to notify a representative of estate regarding the debt; and requested a constructive trust.

¶5 CSA and Laine moved to dismiss the complaint. After receiving Estelle’s response and the reply, the superior court took judicial notice of the dismissed 2011 case, and dismissed the breach of contract claim and the bad faith claim against Laine and Lisa because the promissory note was between Beatrice and CSA, not Laine and Lisa, and was not their individual obligation; dismissed the unjust enrichment and the constructive trust claims against CSA because the promissory note governs any relationship between CSA and Beatrice; dismissed the financial exploitation claim as to all parties because it was barred by the one year statute of limitations; and dismissed, as to all defendants, the breach of statutory duty to notify for failing to state a claim upon which relief can be granted.

³ We cite to the current version of the statute unless otherwise noted.

⁴ Estelle was appointed trustee of the Trust in November 2008, but was removed by the Maricopa County Probate Court on March 8, 2012 for failing to perform the duties of trustee.

⁵ The successor trustee did not join the lawsuit or intervene, but subsequently indicated that he was not pursuing any claims on behalf of the Trust.

SCHONEBERGER v. CAMPBELL et al.
Decision of the Court

¶6 CSA and Laine then answered the remaining allegations in the complaint. After some discovery, CSA and Laine moved for summary judgment, arguing that Estelle does not have standing because the remaining claims involve funds allegedly owed to the Trust and she cannot pursue any claim for the Trust, and that her breach of contract claim fails for lack of consideration for the same reason. In response, Estelle argued that she has standing to bring the breach of contract action because the loan agreement was between Beatrice, individually, and CSA, not the Trust; that the check for \$75,000 came from Beatrice's individual account; and the equitable claims of unjust enrichment and constructive trusts cannot be decided as a matter of law.

¶7 The superior court granted the motion for summary judgment, ruling that the funds from the \$75,000 check were from the Trust, and because a trust is a legal entity that is separate from the settlor, Estelle did not have standing as the estate's personal representative to bring a claim on behalf of the Trust. The court also awarded CSA and Laine attorney's fees and costs of \$27,529.36 pursuant to A.R.S. § 12-341.01.

¶8 Estelle filed her notice of appeal from the signed final judgment, and we have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

ISSUES

¶9 Estelle, as the personal representative of Beatrice's estate, argues the superior court erred in granting summary judgment by: 1) ruling that the contract claims belonged to the Trust; 2) failing to find a genuine triable issue of fact regarding the breach of contract and bad faith breach of contract claims against CSA; and 3) failing to find a triable issue of fact regarding unjust enrichment and constructive trust claims against Laine.⁶

DISCUSSION

¶10 We review a ruling granting summary judgment de novo to determine if any genuine issues of material fact exist and whether the superior court properly applied the law. *L. Harvey Concrete, Inc. v. Agro Constr. & Supply Co.*, 189 Ariz. 178, 180, 939 P.2d 811, 813 (App. 1997) (citations omitted). We view the evidence and draw all inferences in the light most favorable to the non-moving party. *Id.* (citation omitted).

⁶ Estelle has not challenged the superior court's rulings on the CSA/Laine motion to dismiss in her notice of appeal or the opening brief. As a result, we will not address the ruling.

SCHONEBERGER v. CAMPBELL et al.
Decision of the Court

Summary judgment is appropriate when “there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law.” Ariz. R. Civ. P. 56(a). Moreover, summary judgment is only appropriate “if the facts produced in support of the claim or defense have so little probative value . . . that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense.” *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). If our review reveals that reasonable inferences about material facts could be resolved for either party and reasonable persons could come to different conclusions from the evidence, summary judgment is improper. *Salerno v. Atl. Mut. Ins. Co.*, 198 Ariz. 54, 56 ¶2, 6 P.3d 758, 760 (App. 2000).

¶11 Here, the superior court found that there were no genuine issues of material fact and defendants were entitled to judgment as a matter of law. Specifically, the court found that the loan funds came from an account owned by the Beatrice Stoloff-Kelter Trust, and not by Beatrice individually; thus, Estelle did not have standing to bring a claim on behalf of the trust.

I. Standing

¶12 Standing is a question of law that we review de novo. *Strawberry Water Co. v. Paulsen*, 220 Ariz. 401, 406, ¶ 7, 207 P.3d 654, 659, (App. 2008) (citing *Robert Schalkenbach Found. v. Lincoln Found., Inc.*, 208 Ariz. 176, 180, ¶ 15, 91 P.3d 1019, 1023 (App. 2004)). The question of standing does not raise constitutional concerns because the Arizona Constitution, unlike the United States Constitution, contains no case or controversy requirement. *Id.* at 405 (citing *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. in Arizona*, 148 Ariz. 1, 6, 712 P.2d 914, 919 (1985)). Instead, standing only raises “questions of prudential or judicial restraint.” *Id.* at 405. And our review for standing helps the courts avoid issuing advisory opinions, guards against mootness, and ensures the full development of the issues. *Id.* (citing *City of Tucson v. Pima County*, 199 Ariz. 509, 514, ¶ 11, 19 P.3d 650, 655 (App. 2001)).

¶13 Generally, a party has standing to sue in Arizona if the party possesses an interest in the outcome of the litigation and alleges an injury in fact, economic or otherwise, caused by the complained of conduct, resulting in a distinct and palpable injury giving the plaintiff a personal stake in the controversy’s outcome. *Strawberry Water Co.*, 220 Ariz. at 406, ¶ 8, 207 P.3d at 659. A personal representative has standing to sue on a debt owed to a decedent. *See* A.R.S. § 14-3110.

SCHONEBERGER v. CAMPBELL et al.
Decision of the Court

¶14 Here, the issue is whether the \$75,000 check that Laine received from Beatrice and deposited into a non-CSA account was from Beatrice or the Trust. There is no indication on the check that it was from the Trust. The check was inscribed with Beatrice's name, but not as trustee, nor was there any indication she signed it as the trustee, instead of in her individual capacity. Moreover, the bank statements Laine presented in support of his motion reveal that Beatrice transferred \$75,000 from her money market fund, placed it into her checking account, and then wrote the check payable to Laine individually with the notation "loan."

¶15 Although one of the four accounts referenced in the statement showing the fund transfer may indicate that Beatrice was the trustee of an account, Laine did not produce any evidence that the money market account or the checking account were owned by the Trust at the time of the transfer, and the bank statement does not support the argument. Laine also contends that he made a \$25,000 payment on the loan "into a joint checking account" to be credited to Beatrice. This argument however, undermines Laine's argument that the funds were from the Trust because he made a payment to Beatrice personally, and not the Trust. Because the evidence Laine submitted suggests that at least three of the accounts were not owned by the Trust at the time of the fund transfer, Laine did not establish the absence of a genuine issue of material fact about whether the \$75,000 Laine received came from Beatrice or from the Trust.

¶16 Laine also submitted a bank statement dated three months after the fund transfer that seems to indicate that all four accounts were part of the Trust. However, in the absence of evidence that all four accounts were owned by the Trust at the time Beatrice transferred the money into her checking account and wrote the check to Laine, we must presume that at the time Beatrice wrote and signed the check, she owned and managed her checking account individually. Accordingly, there is a genuine issue of material fact whether Beatrice or her Trust owned the checking account and the funds from that account at the time she wrote the check. Consequently, the court erred by concluding, as a matter of law, that Estelle, as the personal representative of Beatrice's estate, did not have standing to prosecute this matter.

II. Contract Claim

¶17 We next turn to whether CSA was entitled to summary judgment on Estelle's breach of contract and bad faith breach of contract claims for failing to repay the loan evidenced by the promissory note. Although it is axiomatic that a contract requires an offer, acceptance, consideration, and sufficient specification of terms so that the obligations involved can be ascertained, *Savoca Masonry Co., Inc. v. Homes & Son Constr. Co., Inc.*, 112 Ariz. 392, 394, 542 P.2d 817, 819 (1975), the issue here is whether there is evidence that CSA actually received the \$75,000 loan proceeds.

¶18 Once CSA challenged the breach claims, Estelle had to present evidence that CSA received the money that it had to repay. Estelle did not meet her burden. Although we know that Beatrice wrote a check payable to Laine with the notation of "loan," Estelle did not submit any evidence that CSA received the proceeds of the loan, or the check was anything other than a loan to Laine, individually. There was no evidence that the check or proceeds from the check were given to or deposited into a CSA account. Thus, in the absence of evidence that CSA received \$75,000 from Beatrice, CSA was entitled to summary judgment on the breach of contract and bad faith claims. Consequently, the court did not err in granting summary judgment to CSA.

III. Unjust Enrichment

¶19 Estelle argues that Laine was not entitled to summary judgment on the unjust enrichment claim. Laine counters by arguing that the funds came from the Trust, not from Beatrice personally.

¶20 Unjust enrichment is an equitable remedy available when a party receives a benefit at the expense of another and, in good conscience, the benefitted party should compensate the other. *Wang Elec., Inc. v. Smoke Tree Resort, LLC*, 230 Ariz. 314, 318, ¶ 10, 283 P.3d 45, 49 (App. 2012) (citing *Murdock-Bryant Constr., Inc. v. Pearson*, 146 Ariz. 48, 53, 703 P. 2d 1197, 1202 (1985)). To prove unjust enrichment, a plaintiff must present proof of the following: 1) an enrichment of defendants; 2) an impoverishment of plaintiff, 3) a connection between the enrichment and impoverishment, 4) an absence of justification and 5) an absence of a remedy provided by law. *Id.* (citing *Freeman v. Sorchych*, 226 Ariz. 242, 251, ¶ 27, 245 P.3d 927, 936 (App. 2011)); *Stapley v. Am. Bathtub Liners, Inc.*, 162 Ariz. 564, 568, 785 P.2d 84, 88 (App. 1989).

SCHONEBERGER v. CAMPBELL et al.
Decision of the Court

¶21 Here, it is undisputed that Beatrice gave Laine a \$75,000 check and the “loan” notation suggests that he had to repay it. And the bank statements he presented demonstrate that he made two interest payments while Beatrice was still alive. Although Laine argues that Beatrice was not impoverished individually because the funds came from her Trust, that is, as previously noted, a genuine issue of material fact that will have to be resolved by a trier of fact.

IV. Constructive trust

¶22 Estelle also argues that the court erred as a matter of law by dismissing her constructive trust claim. We disagree.

¶23 A constructive trust may be imposed when title to property has been obtained through actual fraud, misrepresentation, concealment, undue influence, duress, or similar means, or if there has been a breach of fiduciary duty. *Turley v. Ethington*, 213 Ariz. 640, 643, ¶ 9, 146 P.3d 1282, 1285 (App. 2006) (citing *Harmon v. Harmon*, 126 Ariz. 242, 244, 613 P.2d 1298, 1300 (App. 1980); *French v. French*, 125 Ariz. 12, 15, 606 P.2d 830, 833 (App. 1980)). A constructive trust is a flexible, equitable remedy a court may use to shape and impose in a variety of circumstances, especially situations where conscience demands. See *Raestle v. Whitson*, 119 Ariz. 524, 526, 582 P.2d 170, 172 (1978). It is a remedial device, used “to compel one who unfairly holds a property interest to convey that interest to another to whom it justly belongs.” *Harmon*, 126 Ariz. at 244, 613 P.2d at 1300. A constructive trust arises by operation of law rather than agreement and will be imposed when circumstances resulting, or likely to result, in unjust enrichment make it inequitable that the property should be retained by the one who holds the legal title. See *Burch & Cracchiolo, P.A. v. Pugliani*, 144 Ariz. 281, 285, 697 P.2d 674, 678 (1985); *Golleher v. Horton*, 148 Ariz. 537, 544, 715 P.2d 1225, 1232 (App. 1985).

¶24 Here, Estelle did not plead that Laine obtained the \$75,000 by means of fraud, undue influence, or breach of a fiduciary duty. Moreover, if Estelle can ultimately prove her case, the estate would be entitled to a money judgment, with interest, and that judgment will be sufficient to protect the interest of the estate. Consequently, the superior court did not err by granting summary judgment on the constructive trust claim.

SCHONEBERGER v. CAMPBELL et al.
Decision of the Court

V. Fees

¶25 Finally, because we have reversed the summary judgment granted to Laine on the unjust enrichment claim, we vacate the court's award of costs and fees. We remand the issue of fees and costs to the superior court so the court can determine the amount of fees and costs CSA was entitled to recover on the contract and related claims apart from the award of any fees and costs to Laine.

¶26 CSA and Laine also request fees on appeal pursuant to A.R.S. § 12-341.01. Because Laine has not prevailed, he is not entitled to fees on appeal. And in the exercise of our discretion, we deny fees on appeal to CSA.

CONCLUSION

¶27 Based on the foregoing, we affirm the superior court's summary judgment to CSA on Estelle's breach of contract claims, and to Laine and Lisa on the constructive trust claim. We, however, reverse the ruling that Estelle, as the estate's personal representative, does not have standing to pursue this collection action and the unjust enrichment claim against Laine and Lisa because there are genuine issues of material fact that need to be resolved on remand. Finally, we vacate the superior court's award of costs and fees so that on remand the court can recalculate the fees and costs to be awarded to only CSA.



AMY M. WOOD • Clerk of the Court
FILED: AA