DIVISION ONE
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**IN THE COURT OF APPEALS**
**STATE OF ARIZONA**
**DIVISION ONE**

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| JOHN H. LABRECQUE,<br><br>Claimant/Appellant,<br><br>v.<br><br>STEVE R. JAMES,<br><br>Claimant/Appellee. | ) | 1 CA-CV 09-0113<br><br>DEPARTMENT A<br><br>**MEMORANDUM DECISION**<br>(Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure) |

Appeal from the Superior Court in Maricopa County

Cause No. CV 2008-052188

The Honorable Brian R. Hauser, Judge

**AFFIRMED**

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John H. Labrecque — Phoenix
In *propria persona*

Tiffany & Bosco, P.A. — Phoenix
By J. Lawrence McCormley
Lance R. Broberg
Attorneys for Appellee

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**T I M M E R**, Chief Judge

**¶1** John H. Labrecque appeals the trial court's judgment awarding Steve R. James one-half the remaining excess sale

proceeds from Labrecque's former residence. For the following reasons, we affirm.

**BACKGROUND**

**¶2** Labrecque and James were friends for about fifteen years. In April 2004, when Labrecque was facing foreclosure on his home in Phoenix (the "Property"), he agreed to sell a one-half interest in the Property to James. The parties did not memorialize their agreement; however, there is no dispute that, in reliance on the agreement, James provided significant payments to the mortgage holder for the benefit of the Property. Several days later, Labrecque was incarcerated in an unrelated matter.

**¶3** In May 2004, Labrecque executed a power of attorney ("POA") giving James authority to conduct business in Labrecque's name. Pursuant to the POA, James executed a warranty deed that purported to convey the Property from Labrecque[1] to James and succeeded in refinancing the Property using only James's credit. James then hired a title company to prepare a joint tenancy deed ("JT Deed") "to get [Labrecque's] name back on the property" and mailed the deed to Labrecque. Labrecque executed the JT Deed in November 2004, and James executed and recorded the JT Deed in November 2006.

[1] James admitted he signed Labrecque's name on the warranty deed.

**¶4** In June 2008, Fidelity National Title Insurance Company ("Fidelity") conducted a trustee's sale of the Property, deposited $113,042.54 in excess proceeds with the Maricopa County Treasurer's Office, and instituted this action to seek a discharge of its responsibilities. Thereafter, Maricopa County sought and received $920 of the excess proceeds pursuant to a criminal restitution order against Labrecque. On July 22, 2008, Foreclosure Assistance Company, LLC ("FAC"), as Labrecque's assignee and the real-party-in-interest, filed an application claiming entitlement to the remaining $112,122.54. The trial court approved the application and released $112,092.54 to FAC's counsel.[2]

**¶5** On September 3, 2008, James filed an application claiming entitlement to $56,521.27 of the excess proceeds and sought a temporary restraining order to prevent FAC's counsel from disbursing the released funds to Labrecque or any of his representatives. The trial court granted James's application for a temporary restraining order, but subsequently modified the order to permit the distribution of one-half the held funds. The court also set an evidentiary hearing on the competing

[2] The trial court's order permitted the Maricopa County Treasurer's Office to retain $30 in statutory fees.

claims for the remaining $56,046.27. FAC's counsel then entered an appearance on behalf of Labrecque.[3]

**¶6** Prior to trial, the court entered an order in limine that Labrecque bore the burden of proving the invalidity of the JT Deed. At trial, Labrecque presented only the testimony of one witness, James, to satisfy the burden of proof. After Labrecque rested, James moved for judgment as a matter of law ("JMOL"), which the trial court granted. The court subsequently signed a formal judgment, which included findings of fact, and awarded James $56,061.27.[4] Labrecque timely appealed.[5]

**DISCUSSION**

**¶7** We review the trial court's grant of JMOL de novo. *Warner v. Sw. Desert Images, LLC*, 218 Ariz. 121, 127, ¶ 8, 180 P.3d 986, 992 (App. 2008). JMOL is appropriate "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that

[3] Thereafter, Labrecque essentially pursued and defended FAC's claim, and FAC is not a party to this appeal. James does not challenge Labrecque's standing as a claimant and appellant in this case. We therefore do not address the issue further.

[4] James stipulated that there was an error in the judgment form and that the correct amount should be $56,046.27 rather than $56,061.27.

[5] Following the notice of appeal, the trial court awarded James $45,042.96 in attorneys' fees. Labrecque does not challenge that award on appeal except to the extent he challenges the entry of judgment in James's favor.

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). We view the evidence in the light most favorable to Labrecque as the non-moving party. *Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 505, 917 P.2d 222, 234 (1996).

**¶8** Labrecque essentially argues the trial court erroneously granted JMOL in James's favor because (1) James misused the POA; (2) James made false representations before the court; (3) the JT Deed was invalid; (4) Labrecque's counsel ineffectively represented his interests; and (5) James offered no evidence of any oral contract between the parties concerning the sale of the Property. We address these contentions in turn.

**1. The POA**

**¶9** Labrecque argues James misused the POA and violated former Arizona Revised Statutes ("A.R.S.") section 14-5506(B)[6] (2005) "by forging [Labrecque's] name on multiple documents without [his] knowledge or consent." Labrecque failed to raise

[6] At the time of trial, § 14-5506(B) provided, in relevant part, as follows:

> Any authority, the use of which is not in the principal's best interest or is for the agent's benefit . . . shall be specifically identified in detail . . . and be separately initialed by the principal and the witness at the time of execution.

this argument at trial and has therefore waived it on appeal. *See Richter v. Dairy Queen of S. Ariz., Inc.*, 131 Ariz. 595, 596, 643 P.2d 508, 509 (App. 1982) ("It is settled that an appellate court cannot consider issues and theories not presented to the court below.").

**2. James's credibility and claim of ownership**

**¶10** Labrecque argues the trial court did not "render a reasonable judgment" because James's testimony consisted of "[m]isstatements and evasive answers." Labrecque further contends that James falsely claimed ownership to the Property in violation of A.R.S. § 33-420 (2007)[7] and committed forgeries on numerous documents that Labrecque's "counsel failed to submit to the court."

**¶11** To the extent Labrecque contends his counsel failed to adequately represent his interests, we address that argument in section four below. *See infra* ¶ 17.

[7] Section 33-420(A) provides, in part, as follows:

> A person purporting to claim an interest in . . . real property, who causes a document asserting such claim to be recorded in the office of the county recorder, knowing or having reason to know that the document is forged, groundless, contains a material misstatement or false claim or is otherwise invalid is liable to the owner or beneficial title holder . . . .

**¶12** Labrecque failed to argue any violation of A.R.S. § 33-420 to the trial court and has therefore waived the issue on appeal. *See Richter*, 131 Ariz. at 596, 643 P.2d at 509. Even if the issue is properly before us, Labrecque does not explain how A.R.S. § 33-420 is applicable in this case. He does not point to any evidence that James forged the JT Deed or knowingly recorded that document in violation of A.R.S. § 33-420;[8] indeed, Labrecque admitting signing the JT Deed. If Labrecque means that James violated A.R.S. § 14-5506(B) and therefore violated § 33-420 by recording the original warranty deed transferring Lagrecque's ownership interest in the Property to James, we reject that argument for the reason previously explained. *See supra* ¶ 9.

**¶13** Moreover, Labrecque offered no evidence at trial to dispute James's version of events or his claim to partial ownership of the Property. Thus, even if, as Labrecque contends, James was evasive and his credibility was questionable at trial, the trial court did not err in granting James's motion for JMOL, especially in the absence of any conflicting evidence. *See Estate of Reinen v. N. Ariz. Orthopedics, Ltd.*, 198 Ariz. 283, 287, ¶ 12, 9 P.3d 314, 318 (2000) ("[A] directed verdict is

[8] As James points out, and the record confirms, the documents that Labrecque identified as being forged by James were actually a notice of lodging, motions in limine, and certificate of service signed and filed by counsel, not James.

appropriate 'only when, *without weighing the credibility of the witnesses,* there is [no] difference of opinion over the factual issues in controversy.'") (citations omitted). For these reasons, we reject Labrecque's challenge on this point.

**3. The JT Deed**

**¶14** Labrecque next argues the JT Deed was invalid because "James never owned the property." Further, Labrecque contends that he was not aware of the wording of the JT Deed because James engaged in "deceptive activities" and "sent [him] a blank form" of the JT Deed to sign.

**¶15** Although Labrecque argued a defective chain of title and a constructive trust theory at trial, he offered no evidence to dispute the presumed validity of the JT Deed.[9] *See Corn v. Branche*, 74 Ariz. 356, 358, 249 P.2d 537, 538 (1952) (absent clear and convincing evidence sufficient to reform the deed, court will not disturb duly executed and valid deed). Indeed, Labrecque stipulated prior to trial that he signed the JT Deed. Further, on appeal, Labrecque does not explain how "James never owned the property." *See In re U.S. Currency in Amount of $26,980.00*, 199 Ariz. 291, 299, ¶ 28, 18 P.3d 85, 93 (App. 2000) (court will not consider appellant's "bald assertion" made

[9] In part, the JT Deed read, "**STEVE JAMES, an unmarried man** do/does hereby convey to **STEVE JAMES, an unmarried man and JOHN H. LABRECQUE, an unmarried man** . . . ."

without elaboration or citation). If Labrecque means that James violated A.R.S. § 14-5506(B) and therefore never held sufficient title to transfer it to Labrecque and James as joint tenants, we reject that argument for the reason previously explained. *See supra* ¶ 9.

**¶16** Moreover, despite Labrecque's claim that James had "sent [him] a blank form" and deceived him into signing the JT Deed, James testified that he hired a title company to draft the JT Deed and mailed it to Labrecque "just as [he] got it." James denied making any alterations to the JT Deed. Labrecque offered no evidence to dispute this testimony. In light of this record, we cannot say the trial court erred in its ruling.

**4. Ineffective assistance of counsel**

**¶17** Labrecque argues his counsel did not effectively represent his interests because counsel (1) "erred in procedure and allowed opposing counsel to ask for a verdict before [he] could testify" and (2) did not request James to produce certain documents or submit relevant evidence to the court. As James contends, and we agree, a plaintiff in a civil matter generally cannot obtain post-judgment relief based on his counsel's alleged errors. *See Glaze v. Larsen*, 207 Ariz. 26, 31, ¶¶ 19-21, 83 P.3d 26, 31 (2004) (stating "[i]n the civil context, a party generally cannot obtain post-judgment relief because of

the inexcusable neglect of counsel" except for legal malpractice). To the extent Labrecque's counsel made a strategic decision to not offer Labrecque's testimony or other evidence, that decision is imputed to Labrecque. *See Panzino v. City of Phoenix*, 196 Ariz. 442, 447, ¶ 16, 999 P.2d 198, 203 (2000) (explaining attorney-client relationship governed by general rule of agency, which imputes attorney's conduct to client when attorney acting within scope of his authority). We therefore reject Labrecque's contentions as a basis for relief.

**5. Oral sale contract**

**¶18** Labrecque finally argues James failed to provide evidence of an oral sale contract between the parties or the existence of any money exchanged in that sale. Labrecque further contends that James's claim of having purchased a one-half interest in the Property with certain funds was unfounded and in violation of Arizona Rule of Civil Procedure ("Rule") 37.[10] We disagree for two reasons.

**¶19** First, Labrecque did not raise any discovery or disclosure issues at trial and has therefore waived the issue on appeal. *See Richter*, 131 Ariz. at 596, 643 P.2d at 509. Even if the issue is properly before us, Labrecque does not explain, and we do not understand, how James violated Rule 37 in this

[10] Rule 37 governs discovery and disclosure in civil proceedings.

case. The record shows that both parties engaged in extensive discovery prior to trial, and Labrecque was not surprised by any claim of an oral sale contract. To the extent that Labrecque did not seek the production of certain documents, that decision rests with Labrecque and his counsel. *See supra* ¶ 17. We do not discern error.

**¶20** Second, as James contends, and we agree, whether an oral sale contract existed between the parties was not the dispositive issue in this case. As the party disputing record title, Labrecque had the burden to prove that the JT Deed was invalid and that James did not own a one-half interest in the Property. Labrecque did not offer any evidence to dispute James's version of events and consequently failed to satisfy his burden of proof.

**¶21** For all these reasons, we affirm the trial court's judgment.

**ATTORNEYS' FEES ON APPEAL**

**¶22** James requests an award of attorneys' fees on appeal pursuant to A.R.S. § 12-349(A) (2003). That statute provides, in part, as follows:

> [I]n any civil action commenced or appealed in a court of record in this state, the court shall assess reasonable attorney fees . . . against an attorney or party . . . if

> the attorney or party does any of the following:
>
> 1. Brings or defends a claim without substantial justification.
>
> . . . .
>
> 3. Unreasonably expands or delays the proceeding.

**¶23** James urges us to award sanctions as "there is no factual, procedural, or legal justification for this appeal." We agree, in part. As described previously, with the exception of arguments presented in issue three, Labrecque failed to preserve in the trial court the arguments he raises on appeal and also failed to explain many of his arguments on appeal. Thus, we find that Labrecque unreasonably expanded the proceedings, and James is entitled to some fees for responding to arguments that were raised for the first time on appeal, subject to his compliance with Arizona Rule of Civil Appellate Procedure 21.

**CONCLUSION**

**¶24** For the foregoing reasons, we affirm.

/s/
_____
Ann A. Scott Timmer, Chief Judge

CONCURRING:

/s/
_____
Maurice Portley, Presiding Judge

/s/
_____
Lawrence F. Winthrop, Judge