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



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

LEONARD A. RIENDEAU and H.) 1 CA-CV 09-0202
LORRAINE RIENDEAU,) 1 CA CV 09-0203
) (consolidated)
Plaintiffs/Appellants,)
) DEPARTMENT C
v.)
) **MEMORANDUM DECISION**
WAL-MART STORES, INC., an Arizona)
Corporation) (Not for Publication -
) Rule 28, Arizona Rules
Defendant/Appellee.) of Civil Appellate
) Procedure)
)

Appeal from the Superior Court in Yuma County

Cause No. S1400CV200600284

The Honorable Denise D. Gaumont, Judge

AFFIRMED

Leonard A. Riendeau, Yuma
In Propria Persona
H. Lorraine Riendeau, Yuma
In Propria Persona
Thomas, Thomas & Markson, P.C. Phoenix
By Benjamin C. Thomas, Esq.
Monique A. Simpson, Esq.
Attorneys for Defendant/Appellee Wal-Mart Stores,
Inc.

K E S S L E R, Judge

¶1 Plaintiff Leonard Riendeau ("Husband") appeals the superior court's entry of summary judgment against him, the denial of his motion to amend his complaint, and the denial of his motion to vacate summary judgment. Plaintiff H. Lorraine Riendeau ("Wife") appeals the superior court's denial of a motion to change judge for cause and dismissal of her case for failure to prosecute. Both Husband and Wife appeal the superior court's decision to complete a pretrial conference in their absence after they were disconnected from a telephonic appearance in that conference. We consolidate their appeals on our own motion pursuant to Arizona Rule of Civil Appellate Procedure ("ARCAP") 8(b). For the reasons stated below we affirm the judgment of the superior court.

FACTUAL AND PROCEDURAL HISTORY

¶2 Husband and Wife filed a complaint in the superior court alleging that they each suffered damages as a result of Wife's slip and fall in the gardening section of a Wal-Mart store. Wife alleged personal injury damages and Husband alleged damages for emotional distress as well as the cost of caring for his injured wife. The superior court certified the case for compulsory arbitration pursuant to Arizona Rules of Civil Procedure ("Ariz. R. Civ. P.") 72 - 76. The arbitrator denied Wife's claim for special damages because she failed to produce any evidence of the amount of her loss, but granted her \$3000 of

general damages for pain and suffering. The arbitrator denied Husband's claims for emotional distress and loss of consortium because he failed to produce any evidence of damages. The plaintiffs were also awarded \$540 in costs.

¶13 Husband and Wife timely filed a notice of appeal requesting a *de novo* hearing of all issues. See Ariz. R. Civ. P. 77(a). Wal-Mart filed a motion for summary judgment against Husband, arguing that Husband's deposition transcript showed that he had no evidence of emotional distress or loss of consortium damages. Husband objected to the use of his deposition transcript on the ground that he had been denied an opportunity to review it for error, but did not contend that it was actually erroneous. He also asserted that he had evidence of damages he would proffer at trial. Husband did not file a separate statement of facts and did not attach any admissible evidence to his response. Wal-Mart replied, supporting its use of the deposition and arguing that the Husband's failure to produce any evidence in response to the summary judgment motion demonstrated Wal-Mart's entitlement to summary judgment. The court found that Husband had failed to present evidence to support his claim and granted summary judgment to Wal-Mart on all of Husband's claims in a signed order with no Rule 54(b) language.

¶14 Husband later filed a "Motion to Vacate Judgment" requesting that the superior court reconsider its summary judgment order, rearguing his claim about the validity of his deposition transcript and claiming that "[t]he Court erred [sic] in the granting of a Summary Judgment by not ruling on the Amended Motion as justice requires [sic] and rewarded the Defendnats [sic] for delaying the action by the granting of s [sic] Summary Judgment against the Plaintiff."¹ As discussed infra, ¶ 16, the superior court eventually denied Husband's motion to vacate after he failed to appear at trial, when all outstanding motions were to be heard.

¶15 In the meantime, Wife filed a motion for disclosure sanctions against Wal-Mart, arguing that Wal-Mart had failed to disclose unfavorable information. The court heard telephonic argument on the motion to vacate and the motion for sanctions. The superior court first granted Husband the opportunity to be heard on his motion to vacate, but Husband declined as he preferred to argue after Wife's motion was decided. Wife presented argument on her motion for sanctions. During the telephonic hearing, the plaintiffs were disconnected. The

¹ The "Amended Motion" likely refers to a motion for leave to file a second amended complaint which Husband filed after briefing on Wal-Mart's summary judgment motion was complete. The second amended complaint alleges "gross negligence" as opposed to mere negligence, is more factually specific on the defendant's alleged breach of duty, and assigns specific dollar values to the damage award.

superior court delayed the proceeding for several minutes waiting for Wife to reconnect. Defense counsel terminated her connection and then reconnected, advising the court that she had called Wife's home and the call had gone to an answering machine. After enduring the delay, the superior court continued the proceeding without further participation by Wife or Husband, and denied Wife's motion for sanctions.²

¶16 Wife became convinced that the trial judge was biased against her based on the superior court's completion of the hearing after her disconnection. Wife filed a motion requesting a change of judge for cause. The presiding judge transferred the matter to a new judge who heard the motion to change judge for cause. The hearing judge denied the motion, holding that Wife's motion was untimely because she learned the factual basis for her bias allegation more than 20 days before filing her motion.

¶17 Wife then filed a document captioned "Request for Re-Hearing of the Motion to Change Judge for Cause." The superior court treated the filing as a motion for reconsideration and denied it without further briefing. Wife then filed a "Request for Clarification" with the presiding judge of the superior

² Because Husband objected to his motions being considered at a hearing where notice was not directed to him, the superior court declined to rule on Husband's motion to vacate at that argument. Husband's motion to amend his pleading was not mentioned at all.

court, requesting that the presiding judge reconsider the motion to change judge for cause and also requesting legal advice on how to obtain relief from the superior court's adverse rulings. The presiding judge forwarded the request to the judges who were assigned to the case and the motion to change judge for cause. Wife sent additional correspondence to the presiding judge as well as the trial judge and the motion judge raising the same issues. The presiding judge filed a letter in the record indicating that the denial of the motion to change judge for cause was proper and that the court would not provide Wife with legal advice. Wife filed a "Request to Intervene" with the presiding judge, arguing that the Code of Judicial Ethics mandates that the presiding judge grant Wife relief from the trial judges' allegedly biased rulings. The presiding judge filed additional correspondence declining to review the conduct of other superior court judges.

¶18 Four days before the final pretrial conference, Wife still felt the trial judge would be biased against her and filed a notice in the superior court that she would not participate in any further trial hearings, contending that the superior court's failure to grant her untimely motion "made a mockery of the Judicial System." (emphasis omitted) The superior court treated Wife's filing as a request to vacate the pretrial conference and denied it. Wife failed to appear for the final

pretrial conference and for the trial. The superior court entered a final judgment dismissing Wife's case with prejudice for failure to prosecute and awarding Wal-Mart its attorneys' fees.

¶9 The plaintiffs filed timely notices of appeal. We considered our jurisdiction in a separate opinion issued this day, and determined that we have jurisdiction to review the merits of the superior court's judgment.³

ANALYSIS

¶10 Husband claims that the superior court erred by granting summary judgment against him, denying his motion to vacate the summary judgment, and denying his motion for leave to file a second amended complaint. Wife claims that the superior court erred by denying her motion to change judge for cause and denying her motion for disclosure sanctions. Both Husband and Wife claim impropriety in the superior court's conclusion of the telephonic hearing in their absence. Wife also appears to contend that her allegation of bias excused her need to attend the final pretrial conference and the trial.

³ In a separately filed opinion, we hold that the superior court had jurisdiction to hear the appeal from arbitration. See ARCAP 28(g) (authorizing partial publication of appellate opinions).

I. Husband Failed To Produce Admissible Evidence of Damages

¶11 The superior court correctly granted Wal-Mart's motion for summary judgment on all of Husband's claims. We review the grant of summary judgment *de novo*. *Logerquist v. Danforth*, 188 Ariz. 16, 18, 932 P.2d 281, 283 (App. 1996). Summary judgment is appropriate when the record indicates that there is "no genuine issue as to any material fact." Ariz. R. Civ. P. 56(c)(1). For an issue of fact to be genuine, there must be evidence from which a reasonable jury could find in favor of the nonmoving party. *See Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, 115, ¶ 12, 180 P.3d 977, 980 (App. 2008) (holding that party resisting summary judgment must "come forward with evidence establishing the existence of a genuine issue of material fact that must be resolved at trial"). A party may not rest on his pleading to create a genuine issue of material fact. Ariz. R. Civ. P. 56(e) ("When a motion for summary judgment is made . . . an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading . . .").

¶12 Wal-Mart's motion relied on Husband's deposition transcript admitting that there was no evidence of emotional distress damages. Husband's response to the motion for summary judgment did not dispute any fact in Wal-Mart's separate

statement of facts, nor did he proffer any evidence that he suffered emotional damages. He resisted summary judgment on the bare allegation that he would produce, at trial, evidence whose character or content he did not disclose. The superior court was correct to grant summary judgment against Husband when he failed to produce any evidence in favor of his position.

¶13 Husband claims that the superior court erred by considering his deposition transcript. Husband claims that Wal-Mart failed to comply with Rule 30(e) by failing to provide him an opportunity to verify and sign the transcript, however he never argues that any part of the transcript is wrong. Even if Husband's claim were correct, his failure to produce any evidence of emotional distress damages in response to Wal-Mart's motion for summary judgment precludes him from prevailing regardless of the admissibility of the transcript. See *Thruston*, 218 Ariz. at 115, ¶ 12, 180 P.3d at 980. Further, Wal-Mart presented evidence that the court reporter who took the deposition gave Husband an opportunity to review and correct it, and that Husband declined to do so. We find no error in Wal-Mart's use of Husband's deposition transcript.

¶14 For the first time on appeal, Husband claims that the amended complaint he sought leave to file creates a genuine issue of material fact. Ordinarily, arguments not raised before the superior court are waived and we do not address them on the

merits. *County of Cochise v. Faria*, 221 Ariz. 619, 624, ¶ 18, 212 P.3d 957, 962 (App. 2009) (citation omitted). Even if we were to address Husband's contention on the merits, he would lose because an unverified pleading is not sufficient to oppose summary judgment. Ariz. R. Civ. P. 56(e). Like the response to the motion for summary judgment, the motion to amend included no evidence of emotional distress damages. Therefore, we affirm the superior court's entry of summary judgment.

II. The Superior Court Did Not Err by Denying Husband's Motions for Reconsideration and Leave to Amend

¶15 Husband seems to argue that the superior court erred by denying the motion to amend he filed after briefing on Walmart's summary judgment was complete. We disagree. The superior court properly denied leave to amend because Husband's amendment would have been futile in light of the fact that Husband had no evidence of his damages. See *Walls v. Ariz. Dep't. of Pub. Safety*, 170 Ariz. 591, 597, 826 P.2d 1217, 1223 (App. 1991) ("While it is true that leave to amend a pleading is usually freely given, ... if the amended pleading could be defeated by a motion for summary judgment, [the court's] grant[ing] [of] leave to amend would be a futile gesture.") (quoting *Eria v. Tex. E. Transmission Corp.*, 377 F.Supp. 344, 345 (E.D.N.Y. 1974)). We affirm the superior court's denial of Husband's motion for leave to amend.

¶16 Husband also argues that the superior court erred by not granting him a hearing on his motion for reconsideration of the summary judgment against him. The superior court may rule on motions for reconsideration without oral argument. Ariz. R. Civ. P. 7.1(e). Additionally, the superior court ordered all parties to appear ready to present argument on all outstanding motions at 8:30 a.m. the morning of the trial. Husband failed to appear and forfeited his opportunity for a hearing. The court denied his motion the same day. We affirm the superior court's denial of Husband's motion for reconsideration.

III. The Superior Court Correctly Found That Wife's Motion to Change Judge for Cause Was Untimely

¶17 The superior court correctly denied Wife's untimely motion to change judge for cause. A motion to change judge for cause must be filed within twenty days of the time the party discovers the factual basis for accusing the judge of bias. Ariz. R. Civ. P. 42(f)(2)(C). Failure to timely apply for a change of judge for cause constitutes waiver of the right. *Fendler v. Phoenix Newspapers, Inc.*, 130 Ariz. 475, 481, 636 P.2d 1257, 1263 (App. 1981). Wife applied to change judge for cause on October 14. The factual basis for her application is the alleged impropriety in the conduct of the August 5 proceeding which her affidavit admits she discovered on September 10. The superior court correctly found that Wife

filed her application more than twenty days after learning of the alleged bias. Wife waived the issue by failing to timely file her application. Ariz. R. Civ. P. 42(f)(2)(C); *Fendler*, 130 Ariz. at 481, 636 P.2d at 1263.

IV. The Superior Court Properly Denied Wife's Motion for Sanctions

¶18 Wife argues that the superior court's order denying her motion for sanctions is erroneous because it is based on inadmissible hearsay. Specifically, Wife argues that the affidavit of Monique Simpson, which was attached to the Wal-Mart's response, is inadmissible hearsay because it was improperly executed. Because the record would support the superior court's action without the unsigned affidavit, we affirm the superior court's decision.

¶19 We review the denial of a motion for disclosure sanctions for an abuse of discretion. *Jimenez v. Wal-Mart Stores, Inc.*, 206 Ariz. 424, 426, ¶ 5, 79 P.3d 673, 675 (App. 2003). The superior court does not abuse its discretion when its ruling is consistent with the law and supported by evidence. *Scottsdale Princess P'ship v. Maricopa County*, 185 Ariz. 368, 379, 916 P.2d 1084, 1095 (App. 1995) (citation omitted). The superior court has broad discretion to deny an award of disclosure sanctions when "circumstances make an award of [sanctions] unjust." Ariz. R. Civ. P. 37(a)(4)(A).

¶120 Wife's motion for disclosure sanctions was based on Wal-Mart's failure to include in a written disclosure statement prior to compulsory arbitration the fact that the bicycle rack Wife fell over moves even when the wheels are locked. Wife's evidence included a statement prepared by Charles Houston, Wal-Mart's lead defense attorney, in response to a bar complaint Wife filed. The statement admitted that the failure to disclose was improper, asserted that it was completely inadvertent, and argued that Wife suffered no prejudice because the fact had been discussed in a deposition of a Wal-Mart retail associate prior to the arbitration. The deposition transcript showing that Wife was aware of the condition prior to the arbitration is attached to Wife's motion. Monique Simpson's unsigned statement simply states that Plaintiffs attended a physical inspection of the bike rack which Wife tripped over, asserts that Plaintiffs had opportunities to ask questions of Wal-Mart associates, and states that a Wal-Mart associate informed plaintiffs that the bike rack will slide even when the wheels are locked.

¶121 We find no error. The deposition transcript reveals that Wife had the "undisclosed" information. The superior court was within its discretion to determine that revelation of the information in deposition despite defense counsel's failure to include it in a subsequent or earlier written disclosure prior to arbitration were "circumstances mak[ing] an award of

[sanctions] unjust." Ariz. R. Civ. P. 37(a)(4)(A); see also *Bryan v. Riddel*, 178 Ariz. 472, 476-77, 875 P.2d 131, 135-36 (1994) (holding sanctions for failure to disclose were inappropriate when deposition testimony had already revealed the undisclosed information).

¶22 Wife is correct that the affidavit is improperly executed as it is not signed, see Ariz. R. Civ. P. 80(i) (requiring affiant's signature on affidavit), however, the abundance of other evidence in the record supports the superior court's decision. Because the superior court's act of discretion was supported by the evidence, we affirm the superior court's denial of disclosure sanctions. See *Scottsdale Princess P'ship*, 185 Ariz. at 379, 916 P.2d at 1095.

V. The Superior Court Did Not Engage in Improper Ex Parte Communications

¶23 Husband and Wife both argue that the judgment of the superior court should be reversed because its completion of the August 5 hearing after they stopped participating is an impermissible ex parte communication. We disagree. Allowing parties to halt court proceedings by willfully absenting themselves would cripple judicial administration, and our rules do not require proceedings to terminate when one party stops participating.

¶124 The purpose of our prohibition on ex parte communications is that the judge must provide every party a chance to be heard and avoid an appearance of partiality. *San Carlos Apache Tribe v. Bolton ex. rel. County of Maricopa*, 194 Ariz. 68, 72, ¶ 8, 977 P.2d 790, 794 (1999) (citations omitted). Husband and Wife each were heard prior to the disconnection, and, assuming that Wal-Mart was correct when it stated that it had attempted to call them, they had had the opportunity to be heard further if they had picked up the telephone when defense counsel made any of her four or five separate attempts to reconnect them. Even if the plaintiffs had not received a call from Wal-Mart's counsel, they could have called the court on their own. Additionally, they could have moved for reconsideration or rehearing on the order the superior court entered after they disconnected. Therefore, we hold that continuing the hearing in the absence of the plaintiffs did not violate the prohibition on ex parte communications.

VI. The Superior Court Properly Dismissed Wife's Claim for Failure to Prosecute

¶125 Implicit in Wife's arguments is a notion that the alleged misconduct of the superior court excused her from participating in the trial. The superior court may dismiss a complaint with prejudice if a party fails to appear for the scheduled trial. Ariz. R. Civ. P. 41(b); *Bloch v. Bentfield*, 1

Ariz. App. 412, 417, 403 P.3d 559, 564 (1965). Alleged erroneous rulings by the superior court do not relieve a party of its duty to prosecute the case to a final judgment. See *Yaeger v. Vance*, 20 Ariz. App. 399, 401, 513 P.2d 688, 690 (1973) (declining to consider propriety of non-final order when superior court subsequently dismissed the case for failure to prosecute). Wife's allegations that the superior court acted improperly did not relieve her of her duty to prosecute the case to a final judgment. Therefore, we affirm the superior court's order dismissing Wife's claims with prejudice for failure to prosecute.

CONCLUSION

¶126 For the foregoing reasons, we affirm the superior court's judgment dismissing the complaint with prejudice. Walmart is entitled to costs pursuant to Arizona Revised Statutes

section 12-342 (2003) upon compliance with Arizona Rule of Civil Appellate Procedure 21(a).⁴

/s/

DONN KESSLER, Judge

CONCURRING:

/s/

PATRICK IRVINE, Presiding Judge

/s/

MICHAEL J. BROWN, Judge

⁴ Wal-Mart also argues that the superior court's award of attorneys' fees is correct, and a small part of Wife's reply brief suggests that attorney's fees were improper. Because attorneys' fees were not raised in the opening brief, the issue is waived and we will not consider it. See ARCAP 13(a)(6); *Nelson v. Rice*, 198 Ariz. 563, 567 n. 3, ¶ 11, 12 P.3d 238, 242 n. 3 (App. 2000) (citations omitted).