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

IN THE MATTER OF THE ESTATE OF: SARAH H. JOHNSTON, Deceased.	1 CA-CV 09-0447
	DEPARTMENT D
	MEMORANDUM DECISION (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)
VIRGINIA E. KEENAN, Personal Representative of the Estate of Sarah H. Johnston, Petitioner/Appellee, v. JOAN ANN BUELL and CHARLES H. BUELL, III, wife and husband, Respondents/Appellants.	

Appeal from the Superior Court in Maricopa County

Cause No. PB 2007-001018

The Honorable Harriett E. Chavez, Judge

AFFIRMED

The Nathanson Law Firm, P.L.L.C. Scottsdale
By Philip J. Nathanson
Attorneys for Respondents/Appellants

Asimou & Roddy, P.L.C. Phoenix
By Thomas G. Asimou
And Michelle J. Roddy
Attorney for Petitioner/Appellee

T H O M P S O N, Judge

¶1 This appeal arises from a jury verdict finding respondent/appellant, Joan Ann Buell (Buell), liable for conversion and a trial court order awarding damages against Buell upon finding, *inter alia,* that Buell committed financial exploitation of a vulnerable adult. For the reasons that follow, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

¶2 Sarah H. Johnston (decedent) passed away at the age of 92 years in December 2006. She had three daughters: Buell, Virginia Keenan (Keenan), and Barbara Congello (Congello). Keenan is the personal representative of decedent's estate. Keenan filed a complaint against Buell and her husband, Charles Buell,[1] for conversion, undue influence, lack of testamentary capacity, abuse of power of attorney, and elder abuse.

¶3 In 1994, decedent was diagnosed with congestive heart failure and began living with family members. She lived on-and-off between Buell in Arizona and Keenan in Nevada for the last eleven years of her life. Decedent executed a Will and revocable trust agreement in 1996, leaving 40% of her assets to Buell, 40% to Keenan, and 20% to Congello's two sons.[2] Decedent, Keenan, and Buell were co-trustees of the trust and were co-signatories on a Bank of America trust account. Keenan and Buell routinely withdrew funds from the trust account to pay for decedent's various

[1] Charles Buell agreed to return $110,559.20 to the estate and was dismissed as a party to the lawsuit.

[2] The trust intentionally omitted Congello as a beneficiary.

obligations, such as rent, doctor visits, healthcare costs, prescriptions, and other items.

¶4 In 1999 or 2000, decedent began distributing her estate by making gifts to family members in accord with the 40/40/20 split. In 2001, decedent was diagnosed with significant dementia by her primary care physician. Her physician noted she was unable to understand and act on ordinary affairs in life or manage or direct the management of funds. By fall 2003, she was becoming difficult to handle, was incontinent, confused, and often refused to shower.

¶5 In 2004, decedent went to live with Keenan in Nevada, where Keenan was granted a temporary guardianship of decedent. She spent nine days in June 2004 in an in-patient geriatric psychiatric facility to treat her hallucinations and agitation. A geriatric psychiatrist diagnosed decedent with progressive degenerative dementia with psychiatric complications, which included anger, depression, hallucinations and delusions. Her psychiatric symptoms were treated, but nothing could improve her cognitive function. Buell and Keenan stipulated that effective June 2004, decedent was a vulnerable adult as defined by Arizona Revised Statutes (A.R.S.) § 46-451 (10) and that Buell was in a position of trust with decedent as defined by A.R.S. § 46-456 (G) (3).

¶6 After her discharge from the psychiatric facility, decedent went to reside with Buell and Buell's husband in Arizona. Approximately three months later, decedent received a letter, which

she reviewed with Buell, from an attorney in New York informing decedent that she was going to inherit $100,000 from her sister, with more to come. Within days of receiving the letter, Buell contacted an estate planning attorney, Dorothy Brogan (Brogan). The testimony at trial was that Brogan visited Buell's residence, at Buell's request, and discussed a new Will, power of attorney, and healthcare power of attorney with decedent.

¶7 Brogan drafted a new Will (2004 Will) for decedent which made Buell agent under the powers of attorney and heir to decedent's estate, except for a grant of $1,000 each to Keenan and Congello. Brogan returned to the residence to execute the documents on September 27, 2004. Brogan was not informed of decedent's psychiatric condition or of the temporary guardianship. Brogan did not know the size of decedent's estate nor did she review decedent's prior estate-planning documents. Brogan testified that if she had known of the temporary guardianship in Nevada and decedent's inpatient admission and diagnosis of Alzheimer's disease, she probably would have walked away from doing the estate plan.

¶8 In October 2004, Buell went alone to a Wells Fargo bank and opened a joint checking account in her own and decedent's names, using the $100,000 inheritance check. The court concluded that Buell used the power of attorney to open the joint account, although bank officials went to Buell's residence and met privately with decedent to obtain decedent's signature. The remaining

inheritance funds in the amount of $316,669.62 were deposited in the joint account in 2005. When the court asked Buell why she put the inheritance in a separate account rather than the original trust account, Buell testified, "it was just for my mother and myself. It didn't have to be a trust type of situation or with anyone else's name on it." Buell further testified she believed that by depositing the funds into the joint account, she immediately became an owner of the funds.

¶9 The court conducted a five day jury trial. The jury was convened to decide the issue of conversion and for advisory determinations on the remaining statutory issues regarding A.R.S. § 14-5506 (power of attorney), A.R.S. § 46-456 (vulnerable adult and breach of fiduciary duty), and testamentary capacity and undue influence. The jury returned a verdict in favor of the estate on the issue of conversion. The jury further found by interrogatory that the decedent did not have testamentary capacity at the time she executed the 2004 Will. The jury further found by interrogatory that Buell exercised undue influence over the decedent, violated A.R.S. § 46-456 regarding the 2004 Will, power of attorney, and Wells Fargo account, and violated A.R.S. § 14-5506 by improperly using decedent's money, property, or other assets as an agent for the decedent. The court adopted the jury advisory verdict finding that decedent lacked testamentary capacity and that the 2004 Will was the product of undue influence. Accordingly, the court found the 2004 Will and power of attorney were invalid.

¶10 The court further found that Buell violated A.R.S. § 46-456 and § 14-5506 and awarded damages in favor of Keenan and against Buell in the amount of $416,669.62.[3] The court further awarded compensatory damages to Keenan in the amount of $67,726.60 against Buell. The court reduced the amount of the judgment by $296,564.43, which was held in trust pending the proceedings and returned to Keenan; and by $55,000.00, which represented credit for legitimate expenses for Buell's caretaking of decedent prior to her demise. Keenan was also awarded her attorney's fees and costs. Pursuant to A.R.S. § 46-456 (D), the court ordered Buell to forfeit all benefits with respect to decedent's probate estate, not including the 1996 trust assets.

¶11 Buell filed a timely appeal. We have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

II. DISCUSSION

¶12 Buell raises a myriad of issues, which we address in turn.

1. Evidence of Prior Settlement

¶13 Buell claims reversible error occurred when the jury learned about Charles Buell's settlement and dismissal from the lawsuit. We review the trial court's ruling allowing the use of settlement evidence for purposes of impeachment for abuse of

[3] This award includes the jury verdict on the issue of conversion in favor of Keenan in the amount of $253,693.20.

discretion. *Larsen v. Decker*, 196 Ariz. 239, 241, ¶ 6, 995 P.2d 281, 283 (App. 2000).

¶14 The following exchange took place during direct examination of Charles Buell:

> Q. Initially, when this matter started, you were named as a defendant, correct?
>
> A. That's correct.
>
> Q. And you actually received some of the money that was in the Wells Fargo account set up by your lawyer, correct?
>
> A. That's correct.
>
> Q. How much did you receive?
>
> A. 110,000 and change.
>
> [Buell's attorney]: Relevance, your Honor.
>
> Court: Okay.
>
> [Buell's attorney]: Mr. Buell[]---
>
> Court: What's the relevance?
>
> [Keenan's attorney]: That was he was a party defendant and he had to settle this lawsuit. He gave back $110,000. I think it goes to bias, with this witness.
>
> [Buell's attorney]: Goes to what?
>
> Court: Bias. Well, I'm going to overrule the objection, but I will instruct the jury that he was dismissed as a party. So his case is over. So we're not going to retry that case here today.
>
> [Keenan's attorney]: That's fine, your Honor.

¶15 Keenan's attorney then asked Charles Buell questions regarding a declaration he signed in order to be dismissed from the

lawsuit. Specifically, he asked, "in that declaration, you said, other than rent and the amounts paid to you from the joint Wells Fargo Bank account . . . you received no other funds, benefit, co-ownership or other consideration from the decedent since January, 2004, correct?" Buell objected and the court sustained the objection, stating, "I'm going to ask the jury to disregard [counsel's questions] regarding the declaration, what it meant, and what its role was in a prior lawsuit."

¶16 Although Arizona Rule of Evidence 408 prohibits evidence of settlement to prove liability, the rule "permits admission of the fact of settlement in certain circumstances . . . 'such as proving bias or prejudice of a witness.'" *Henry ex rel. Estate of Wilson v. HealthPartners of S. Ariz.*, 203 Ariz. 393, 397-98, ¶ 14, 55 P.3d 87, 91-92 (App. 2002); Ariz. R. Evid. 408. Evidence admitted to impeach the credibility of a party, such as evidence proving bias or prejudice, "does not prove liability for or invalidity of a claim." *Hernandez v. State*, 203 Ariz. 196, 198, ¶ 9, 52 P.3d 765, 767 (2002).

¶17 The court's evidentiary rulings were proper. In the first instance, the court overruled the objection because Keenan was trying to prove Charles Buell's bias, based on the fact that he had received $110,000 of decedent's money. Charles Buell later testified that decedent had testamentary capacity, and his receipt of money from her might tend to explain his view that decedent was "sharp as a tack." In the second instance, the court sustained

Buell's objection when the witness was asked about his declaration as it relates to settlement and ruled the declaration was inadmissible. The court told the jury to disregard counsel's questions regarding the declaration as improper evidence of settlement. We conclude no abuse of discretion occurred in the court permitting Charles Buell's testimony regarding the amount of money he received while properly ruling the declaration and its role pertaining to settlement inadmissible.

2. Conversion Claim

¶18 Buell alleges Keenan failed to prove the elements of a claim for conversion of money. "If substantial evidence exists permitting reasonable persons to reach such a result, we will affirm the judgment." *Hutcherson v. City of Phoenix,* 192 Ariz. 51, 53, ¶ 13, 961 P.2d 449, 451 (1998).

¶19 Buell relies on *Universal Marketing and Entertainment, Inc. v. Bank One of Arizona*, 203 Ariz. 266, 53 P.3d 191 (App. 2002). In that case, Universal made a $50,000 deposit by wire into an unrestricted Bank of America account belonging to Wensel. 203 Ariz. at 268, ¶ 3, 53 P.3d at 193. The funds were intended by Universal as a loan to a company that Wensel was assisting Universal in acquiring. *Id.* However, the funds were not segregated in Wensel's account. *Id.* Before Wensel could release the funds to the company, his Bank of America account was garnished by Bank One, his judgment creditor. *Id.* at 268, ¶ 4, 53 P.3d at 193. Universal sued Bank One on the theory of conversion,

contending that Bank One converted Universal's $50,000 by taking control of the funds and refusing to return them. *Id.* We held that Universal had no conversion action against Bank One for garnishment of Wensel's account because Universal relinquished its right to immediate possession of its funds when the funds, unsegregated and undifferentiated, were deposited into Wensel's unrestricted bank account. *Id.* at 270-71, 53 P.3d at 195-96. We further held that the money in that case did not constitute "a chattel in which Universal had an immediate right to possession at the time of the conversion." *Id.* at 269, ¶ 13, 53 P.3d at 194.

¶20 As Keenan correctly observes, Bank One was an outside third party that had no knowledge that the money in Wensel's account did not belong to Wensel. In affirming the trial court's dismissal of Universal's complaint, we held that under those circumstances, Bank One did not commit the tort of conversion. *Id.* at 271, ¶ 19, 53 P.3d at 196.

¶21 The circumstances presented here present a different scenario. Buell stipulated she was in a position of trust and confidence to decedent and occupied a fiduciary role as decedent's power of attorney. In *Autoville, Inc. v. Friedman*, we acknowledged the nature of a fiduciary relationship in the context of a claim for conversion:

> Where one intrusts his property to another for a particular purpose, it is received in a fiduciary capacity; and, when turned into money, that is also received in the same capacity. It does not belong to the agent, and he can lawfully exercise no power or

> authority over it, except for the benefit of his principal, and only as authorized by him. If the agent uses it for his own purposes . . . it is a conversion of that which does not belong to him.

20 Ariz. App. 89, 93, 510 P.2d 400, 404 (1973) (citation omitted). Furthermore, "money can be the subject of a conversion provided that it can be described, identified or segregated, and an obligation to treat it in a specific manner is established." *Id.* at 91, 510 P.2d at 404.

¶22 Here, the jury had substantial evidence to find Buell liable for conversion. Decedent's inheritance was easily identifiable as a subject of conversion and Buell had an obligation to use the funds for decedent's benefit. Instead, Buell put the funds in a joint account which she believed gave her ownership and withdrew the funds for personal use. Accordingly, we affirm the judgment against Buell on the issue of conversion.

3. Power of Attorney (A.R.S. § 14-5506) Findings

¶23 Buell contends that there is no factual basis in the record to support the jury's interrogatory finding and the court's finding that she violated A.R.S. § 14-5506, the power of attorney statute. Essentially, Buell argues no evidence was presented to show that she took any action pursuant to the power of attorney. We accept the trial court's factual findings on appeal unless they are clearly erroneous and review legal conclusions de novo. *In re Estate of Newman*, 219 Ariz. 260, 265, 196 P.3d 863, 868 (App. 2008).

¶24 A.R.S. § 14-5506 requires an agent to use a principal's money or assets "only in the principal's best interest and the agent shall not use the principal's money . . . for the agent's benefit." § 14-5506 (A) (2008). The trial court found that Buell used the power of attorney to assist in the opening of the Wells Fargo account. Buell also admitted in her deposition that she used the power of attorney to assist in opening the joint account. The court further found that subsequent to opening the account, Buell used decedent's money to write numerous checks totaling $77,726.60 "without authority and in violation of A.R.S. § 14-5506." We find no error in the court's reasoning or judgment and affirm the finding that Buell's conduct violated A.R.S. § 14-5506.

4. Financial Exploitation (A.R.S. § 46-456) Findings

¶25 At the time of trial, A.R.S. § 46-456 stated, "A person who is in a position of trust and confidence to an incapacitated or vulnerable adult shall act for the benefit of that person to the same extent as a trustee pursuant to title 14, chapter 7." A.R.S. § 46-456 (A) (2008). Buell stipulated she was in a position of trust and confidence to a vulnerable adult.

¶26 On appeal, Buell complains she did not commit financial exploitation of decedent, citing *Davis v. Zlatos*, 211 Ariz. 519, 123 P.3d 1156 (App. 2005), and *Newman v. Newman*, 219 Ariz. 260, 196 P.3d 863 (App. 2008), our recent decisions addressing the standard of conduct required of a family member dealing with a vulnerable adult. In *Davis,* we noted that at the very least, a prudent

trustee should advise the vulnerable adult to seek the help of a family member or a lawyer in making a transfer. *Davis,* 211 Ariz. at 527, ¶ 34, 123 P.3d at 1164.

¶27 Buell asserts she complied with this duty by arranging for attorney Brogan to assist decedent with preparation of the 2004 Will. Buell further points to the fact that decedent signed the Wells Fargo application outside Buell's presence. This conduct does not amount to advising decedent to seek independent advice. In fact, Brogan testified she never advised decedent regarding the $416,000 inheritance or about the joint account. Rather, we agree with the trial court that Buell's solicitation of Brogan to meet with decedent in procuring an invalid Will and power of attorney amounts to undue influence on decedent.[4]

¶28 Buell also argues that because Keenan did not introduce any evidence relating to the standard of care for a prudent

[4] The court considered eight factors in determining whether the Will and power of attorney were procured through undue influence:

> (1) Whether the alleged influencer made fraudulent representations to the testator;
> (2) Whether the execution of the Will was the product of hasty action;
> (3) Whether the Will was concealed from others;
> (4) Whether the person benefited from the Will was active in securing its drafting and execution;
> (5) Whether the Will was consistent with prior declarations and plannings of the testator;
> (6) Whether the Will was reasonable under the circumstances, attitudes, and family;
> (7) Whether the testator was susceptible to undue influence; and,
> (8) Whether the testator and the beneficiary were in a confidential relationship.

trustee, Keenan's statutory claim fails as a matter of law. Buell cites no authority for this argument. In *In re Estate of Newman*, we found that a family member was in a position of trust and confidence with respect to the decedent. 219 Ariz. at 270, ¶ 34, 196 P.3d at 873. We held the family member breached his duty under A.R.S. § 46-456 (A) "by failing to keep clear and accurate records, commingling funds, and engaging in transactions that benefitted him without advising [the vulnerable adult] to seek the help of a family member or lawyer." *Id.* at 270, ¶ 35, 196 P.3d at 873. Buell repeatedly engaged in transactions benefitting herself without advising decedent to seek independent advice. We presume the trial court knows and follows the law, including the standard of care applicable to a prudent trustee. *Maher v. Urman*, 211 Ariz. 543, 548, ¶ 13, 124 P.3d 770, 775 (App. 2005). Thus, substantial evidence supports the finding that Buell breached her duty and violated A.R.S. § 46-456.

A. Unclean hands

¶29 As part of Buell's argument that she did not violate A.R.S. § 46-456, Buell alleges that Keenan had unclean hands and that as a result, Keenan "should not be heard to complain about [Buell's] conduct." Buell alleges Keenan's hands are unclean because Keenan issued checks to her family members as "gifts" as a co-trustee of decedent's 1996 trust.

¶30 The doctrine of unclean hands states that one "who comes into a court of equity seeking equitable relief must come with

clean hands." *McRae v. McRae*, 57 Ariz. 157, 161, 112 P.2d 213, 215 (1941). The doctrine operates to bar a claim if the "dirt upon [the claimant's] hands [is the] bad conduct in the transaction complained of. If he is not guilty of inequitable conduct toward the defendant in that transaction, his hands are as clean as the court can require." *Sines v. Holden,* 89 Ariz. 207, 209-210, 360 P.2d 218, 220 (1961) (quoting 2 Pomeroy 91, Equity Jurisprudence, 5th Ed., § 397). We review a trial court's application of the doctrine of unclean hands under an abuse of discretion standard. *Manning v. Reilly,* 2 Ariz. App. 310, 314, 408 P.2d 414, 418 (1965). The application of the doctrine "rests in the sound discretion of the trial court." *Id.*

¶31 Here, the court implicitly decided the unclean hands doctrine was inapplicable in denying Buell's motion for judgment as a matter of law. At the time Keenan wrote the checks in 1999-2000, Keenan was acting as a co-trustee with Buell, prior to decedent's diagnosis of dementia. The gifts were made in accordance with the 40/40/20 split of decedent's 1996 trust, and the power of attorney signed by decedent in 1996 specified authorizations for gifts. Finally, the court considered Keenan's actions with respect to making gifts in its judgment by noting, "the [c]ourt has considered the conduct of the family and their practice of spending [d]ecedent's money under the trust since its inception in a manner similar to [Buell] and her actions regarding the Wells Fargo Account." Thus, we hold no abuse of discretion occurred.

5. Denial of Motion for New Trial and Election of Remedies

¶32 Buell contends that because Keenan submitted the conversion claim to the jury and reduced that claim to judgment, Keenan effectively made an election of remedies. Buell argues that as a consequence, Keenan should be precluded from any equitable or forfeiture relief under A.R.S. § 46-456.

¶33 Election of remedies is an affirmative defense that is waived unless timely asserted. *Estate of Wesolowski v. Indus. Comm'n of Ariz.*, 192 Ariz. 326, 329, 965 P.2d 60, 63 (App. 1998). Buell did not raise election of remedies as an affirmative defense, but rather raised the issue for the first time in her motion for new trial. Buell also failed to move the court for election of remedies prior to submission of all claims to the jury or argue the issue during the jury instructions discussion with the court. *See Kelman v. Bohi*, 27 Ariz. App. 24, 33, 550 P.2d 671, 680 (1976) (holding the issue of election of remedies waived on appeal because the appellant's transcript citation did not reveal the existence of a motion requiring an election to be made).

¶34 The trial court denied Buell's motion for new trial, reasoning that "[o]n the issue of election of remedies, the issue was not raised, and therefore waived." Buell has not preserved this issue for appeal, and it is therefore waived. *See id.*

6. Double Damages

¶35 Buell claims the evidence does not support an award of double damages.[5] At the time of trial, A.R.S. § 46-456(C) (2008) provided that "[a] person who violates subsection A or B of this section is subject to damages in a civil action brought by or on behalf of an incapacitated or vulnerable adult that equal up to three times the amount of the monetary damages." In determining the amount of damages in this case, the court reasoned:

> Although the complaint prays for treble damages, the Court has considered the conduct of the family and their practice of spending decedent's money . . . Further, the court has considered the personal sacrifice of [Buell] in caring for her mother over the years. The court concludes that an award of double damages is appropriate in that [Buell] concealed the inheritance of $416,669.62 from the family and converted it to her own name and disbursed monies in breach of the fiduciary duty to her mother.

¶36 We conclude the trial court did not abuse its discretion. The award of double compensatory damages in the amount of $67,726.60 was reasonable in light of the evidence presented at trial.

[5] Buell argues that double damages were inappropriate because "there was no evidence that [decedent] lacked testamentary capacity." We agree with Keenan that testamentary capacity has nothing to do with A.R.S. § 46-456, as A.R.S. § 46-456 simply addresses whether the decedent was a "vulnerable adult." Buell stipulated that decedent was a vulnerable adult. Thus, we do not consider Buell's testamentary capacity argument with respect to damages.

7. Forfeiture of Interest in the Trust

¶37 Buell argues she is entitled to receive benefits as a beneficiary of the trust and that the court erred by ruling that the forfeiture includes any trust assets. Although the court initially ordered Buell to forfeit all trust assets, it later ruled that "[o]n the issue of forfeiture of assets under the trust, IT IS ORDERED granting [Buell's] motion for judgment as a matter of law." Accordingly, this claim is moot.

¶38 We also find no merit to Buell's argument that the January 16, 2009 judgment should have been modified with respect to double compensatory damages in the amount of $135,453.20 and the $55,000 credit to Buell. The court modified its January 16, 2009 judgment on May 15, 2009 as follows:

> It is ordered amending the judgment to reflect damages to be $416,669.62, plus **double damage award of $67,726.60**, plus double expert fees of $26,242.64, plus interest, **less a credit for $55,000 for caretaking expenses**, and less a credit of money transferred previously held in trust of $296,564.43." (emphasis added).

¶39 Finally, Buell proposes she "is legally entitled any and all credits for interest earned by the monies in the trust account pending the outcome of these proceedings." We find no support for this claim and therefore reject it.

III. CONCLUSION

¶40 For the foregoing reasons, we affirm. Keenan requests an award of attorneys' fees and costs on appeal based on A.R.S. §§ 46-

456(E) (2008), -455(H)(4) (2008), and 14-3720. We award Keenan her reasonable attorneys' fees and costs, contingent upon compliance with Arizona Rule of Civil Appellate Procedure 21.

/s/
_____
JON W. THOMPSON, Judge

CONCURRING:

/s/
_____
MICHAEL J. BROWN, Presiding Judge

/s/
_____
MARGARET H. DOWNIE, Judge