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Ariz. R. Crim. P. 31.24



DIVISION ONE
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RUTH WILLINGHAM,
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

RICHARD G. MARTINEZ,) No. 1 CA-CV 10-0032
)
Plaintiff/Appellant,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
)
JOHN C. LINCOLN HEALTH NETWORK;) (Not for Publication -
MILUSE VITKOVA, M.D.; JIRI VITEK;) Rule 28, Arizona Rules of
LARRY POHORILY; LESLIE POHORILY;) Civil Appellate Procedure)
and AUTOPSY SERVICES, INC.,)
)
Defendants/Appellees.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2008-017287

The Honorable Sam Myers, Judge
The Honorable Hugh Hegyi, Judge

AFFIRMED

Richard G. Martinez
In propria persona

Thousand Oaks, CA

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J O H N S E N, Judge

¶1 Richard Martinez appeals from the superior court's judgment in favor of the defendants. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Martinez's wife died of congestive heart failure after routine shoulder surgery on November 26, 2001. Martinez hired Dr. Miluse Vitkova to conduct an autopsy. Almost three years later, in August 2004, Martinez filed a complaint against Vitkova and Vitkova's assistant, Larry Pohorily.¹ Martinez alleged a variety of torts based on his contention that the defendants mishandled his wife's remains. Those claims were dismissed and the judgments affirmed on appeal. Indeed, this is Martinez's fifth appeal arising out of the events that followed his wife's death. A full history is recounted in our decisions in *Martinez v. Donor Network of Ariz.*, 1 CA-CV 07-0144, 2008 WL 4133379, at *1, ¶¶ 1-7 (Ariz. App. Feb. 12, 2008) (mem. decision); *Martinez v. Vitkova*, 1 CA-CV 07-0776, 2008 WL

¹ Martinez also named as defendants the respective spouses of Vitkova and Pohorily. For the sake of simplicity, we will not refer to them in this decision.

4790671, at *1-2, ¶¶ 1-7 (Ariz. App. Oct. 30, 2008) (mem. decision); *Martinez v. John C. Lincoln Health Network*, 1 CA-CV 08-0131, 2008 WL 4965944, at *1-2, ¶¶ 1-7 (Ariz. App. Nov. 18, 2008) (mem. decision); and *Martinez v. SCI Ariz. Funeral Serv., Inc.*, 1 CA-CV 08-0466, 2009 WL 960800, at *1-2, ¶¶ 1-8 (Ariz. App. Apr. 9, 2009) (mem. decision).

¶3 Martinez's complaint in this case was filed July 21, 2008. It named as defendants Vitkova, Pohorily, John C. Lincoln Health Network ("John C. Lincoln"), Donor Network of Arizona ("Donor Network") and Autopsy Services, Inc. ("Autopsy Services"). The superior court granted motions to dismiss brought on *res judicata* grounds by Vitkova, Pohorily, Donor Network and Autopsy Services and later entered judgment on the same grounds in favor of John C. Lincoln.

¶4 We have jurisdiction of Martinez's appeal pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

DISCUSSION

A. The Superior Court Correctly Dismissed Vitkova, Pohorily, Autopsy Services and Donor Network.

¶5 On appeal, Martinez argues the court questioned him roughly during oral argument on the motions to dismiss brought by Vitkova, Pohorily, Autopsy Services and Donor Network,

entitling him to a new trial pursuant to Arizona Rule of Civil Procedure 59(a)(1), (7) and (8).

¶16 A new trial motion brought pursuant to Rule 59(a) must be filed in the superior court and is not properly filed in this court. *Cf. Adroit Supply Co. v. Elec. Mut. Liab. Ins. Co.*, 112 Ariz. 385, 389, 542 P.2d 810, 814 (1975) ("The grant or denial of the motion for a new trial is within the sound discretion of the trial court and we will not upset its ruling absent a clear showing of abuse of discretion.").

¶17 Nevertheless, we will construe Martinez's argument on appeal to be that the court erred by granting the motions to dismiss. "We review an order granting a motion to dismiss for abuse of discretion and review issues of law . . . de novo." *Dressler v. Morrison*, 212 Ariz. 279, 281, ¶ 11, 130 P.3d 978, 980 (2006) (citations omitted). "[*Res judicata*] is a question of law and is therefore reviewed de novo." *Pettit v. Pettit*, 218 Ariz. 529, 531, ¶ 4, 189 P.3d 1102, 1104 (App. 2008).

¶18 The doctrine of *res judicata* promotes finality in litigation, the prevention of harassment and judicial economy. *Circle K Corp. v. Indus. Comm'n of Ariz.*, 179 Ariz. 422, 426, 880 P.2d 642, 646 (App. 1993).

Under the doctrine of *res judicata*, a judgment on the merits in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action. This doctrine binds the same

party standing in the same capacity in subsequent litigation on the same cause of action, not only upon facts actually litigated but also upon those points which might have been litigated.

Pettit, 218 Ariz. at 531, ¶ 4, 189 P.3d at 1104. In *Pettit*, this court relied on the "same evidence" test from the Restatement (First) of Judgments § 61 (1942) to preclude a litigant from "subsequently maintaining a second action based upon the same transaction, if the evidence needed to sustain the second action would have sustained the first action." *Pettit*, 218 Ariz. at 532-33, ¶¶ 8-9, 189 P.3d at 1105-06 (quoting the Restatement (First) of Judgments § 61).

¶19 In an amended complaint filed in 2005 in the prior case, Martinez alleged a multitude of claims against Vitkova, including breach of contract, negligent misrepresentation or fraud, negligent interference with remains, negligent and intentional infliction of emotional distress, negligence, and "conversion/aiding and abetting tortious conduct." The complaint also alleged numerous claims against Pohorily, including negligent interference with remains, negligent and intentional infliction of emotional distress, negligence, and "conversion/aiding and abetting tortious conduct." Each of the claims against Vitkova and Pohorily was based on facts relating to the autopsy; the claims alleged in various forms that the

defendants were liable to Martinez for mishandling his wife's remains in connection with the autopsy.

¶10 After the court granted Vitkova's motion for partial summary judgment in the prior case, Vitkova, Pohorily and Martinez entered into a "Mutual Release Agreement" ("Agreement"), in which Martinez agreed to dismiss all claims against the defendants and in exchange the defendants agreed not to pursue their claims for costs and attorney's fees. *Martinez v. Vitkova*, 1 CA-CV 07-0776, 2008 WL 4790671, at *1, ¶ 3. Thereafter, pursuant to the Agreement, the superior court dismissed all of Martinez's claims with prejudice. *Id.* Six months later, Martinez asked the superior court to "rescind his signature" from the Agreement. *Id.* at ¶ 4. The court denied his request, and this court affirmed. *Id.* at ¶¶ 5, 21.

¶11 Martinez's current complaint lists two causes of action against Vitkova, Pohorily and Autopsy Services, "Damages Caused by Acting In Concert for Conversion" and "Damages Caused by Conversion." The complaint also alleges breach of fiduciary duty by Vitkova. Each of the claims is based on the alleged mishandling of Martinez's wife's remains during the autopsy. Among other things, Martinez alleges the defendants conspired to harvest his wife's organs without consent and fraudulently removed his wife's brain.

¶12 Although the causes of action Martinez alleges against the defendants in this case are not precisely the same causes of action dismissed by agreement in the earlier litigation, they are barred by *res judicata* because they are based on evidence that would have supported the claims that were dismissed previously. See *Pettit*, 218 Ariz. at 533, ¶ 9, 189 P.3d at 1106. Each of the claims in the current case, like each of the claims dismissed previously, arises out of what Martinez alleges was the mishandling of his wife's remains. In the prior case, Martinez alleged that Vitkova and Pohorily breached a contract and committed various torts by mishandling the remains; in this case he alleges they committed conversion and breached a fiduciary duty by mishandling the remains.²

¶13 Moreover, *res judicata* encompasses both claims "actually litigated" and "those which might have been litigated." *Pettit*, 218 Ariz. at 531, ¶ 4, 189 P.3d at 1104. Martinez argues his current conspiracy claims are different than

² Martinez's allegation that the defendants conspired to commit conversion (he alleged "conversion/aiding and abetting tortious conduct" in the earlier litigation) adds nothing to his conversion claim in this case. See *Consol. Tungsten Mines, Inc. v. Frazier*, 87 Ariz. 128, 138, 348 P.2d 734, 741 (1960) ("A conspiracy itself furnishes no grounds whatever for a civil action. It is the doing of the thing for which the conspiracy was formed that furnishes the basis for such civil action."); *Baker ex rel. Hall Brake Supply, Inc. v. Stewart Title & Trust of Phoenix, Inc.*, 197 Ariz. 535, 545, ¶ 42, 5 P.3d 249, 259 (App. 2000) ("civil conspiracy requires an underlying tort which the alleged conspirators agreed to commit").

the claims resolved against him in the earlier case. But the facts on which his current claims are based are the same as those set forth in his earlier complaints. Therefore, even though his prior complaints did not allege a conspiracy to commit conversion, the facts alleged in those complaints would have supported the conspiracy he now alleges.³

¶14 In his current complaint, Martinez alleges that Autopsy Services is a partnership composed of Vitkova and Pohorily and is liable for their actions with respect to the autopsy. Although Autopsy Services was not a defendant in the prior action, Martinez's claims against it are barred by defensive collateral estoppel. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 328 (1979); *Wetzel v. Ariz. State Real Estate Dep't*, 151 Ariz. 330, 333, 727 P.2d 825, 828 (App. 1986) ("Defensive use of [collateral estoppel] occurs when a party defending a claim asserts a previous judgment to which it was not a party to preclude litigation by an opponent who was a party to the prior determination.").

¶15 Further, after a thorough review of the transcript of the oral argument on the motion to dismiss, we see no indication that the superior court was inappropriately terse with Martinez or unkind to him during the oral argument. To the contrary, the

³ In fact, Martinez admitted in the superior court that he discovered the "conspiracy to illegally harvest" his wife's remains in 2006 during discovery in his earlier case.

court displayed considerable patience, even taking care to explain to Martinez that its decision did not suggest Martinez's case was meritless or that his arguments on the merits were incorrect. The court merely clarified that Martinez was precluded from re-litigating issues already resolved by final judgment. In sum, the transcript contains no inappropriate language or conduct by the superior court.⁴

B. The Superior Court Correctly Granted Summary Judgment in Favor of John C. Lincoln.

¶16 Martinez's complaint in this case alleged conversion, "acting in concert for conversion" and breach of fiduciary duty against John C. Lincoln. The hospital filed a "Motion to Dismiss or in the Alternative Motion for Summary Judgment," arguing the claims against it were barred by *res judicata*. After giving Martinez notice and time to respond, the court considered the motion as a motion for summary judgment and granted it.

⁴ The court at the same time granted a motion to dismiss brought on *res judicata* grounds by Donor Network. The complaint in the current case alleged claims against Donor Network for conversion, "acting in concert for conversion" and breach of fiduciary duty. The complaint in the prior case alleged claims against Donor Network for negligent interference with remains, infliction of emotional distress, negligence and "conversion/aiding and abetting tortious conduct." As with the claims against the other defendants, each of the claims against Donor Network was based on the alleged mishandling of Martinez's wife's remains. For the reasons set forth above, we conclude the superior court in this case correctly determined that Martinez's current claims against Donor Network are barred by *res judicata*.

¶17 Summary judgment is proper when “there is no genuine issue as to any material fact and [] the moving party is entitled to judgment as a matter of law.” Ariz. R. Civ. P. 56(c)(1). “We review a trial court’s grant of summary judgment de novo.” *Corbett v. ManorCare of Am., Inc.*, 213 Ariz. 618, 621, ¶ 2, 146 P.3d 1027, 1030 (App. 2006).

¶18 We agree with the superior court that *res judicata* bars Martinez’s claims against John C. Lincoln. Among Martinez’s claims against John C. Lincoln in the earlier case were that the hospital negligently interfered with his wife’s remains, negligently handled the remains and/or failed to take proper steps to ensure proper monitoring of the autopsy, and converted or aided and abetted the conversion of his wife’s remains. *Martinez v. John C. Lincoln Health Network*, 1 CA-CV 08-0131, 2008 WL 4965944, at *1, ¶ 3. The superior court entered summary judgment in favor of John C. Lincoln in the earlier case, and this court affirmed. *Id.* at ¶¶ 5, 17.

¶19 Martinez’s claims against John C. Lincoln in the current case are based on the same set of facts that allegedly supported his claims against the hospital in the prior case, namely that John C. Lincoln allegedly allowed Vitkova and Pohorily to use the hospital morgue for illegal tissue-harvesting in connection with his wife’s autopsy. Indeed, Martinez’s claim for conversion is the same as one of the claims

dismissed in the earlier case. For this reason, *res judicata* precludes Martinez from re-litigating his claims against John C. Lincoln. See *Pettit*, 218 Ariz. at 533, ¶ 9, 189 P.3d at 1106.

CONCLUSION

¶20 We affirm on *res judicata* grounds the superior court's entry of judgment in favor of Vitkova, Pohorily, Donor Network and John C. Lincoln. We also affirm the judgment in favor of Autopsy Services on grounds of defensive collateral estoppel. Appellees ask that we sanction Martinez by assessing him for their reasonable attorney's fees pursuant to A.R.S. § 12-349(A)(1) (2003) and Arizona Rule of Civil Appellate Procedure 25. These provisions permit a court to assess fees or sanctions against a lawyer or party that "[b]rings or defends a claim without substantial justification," A.R.S. § 12-349(A)(1), or that "files a frivolous appeal," ARCAP 25. Although it is a close question, we are not persuaded that Martinez's appeal falls within the statute or the rule. We do not doubt the sincerity of Martinez's grief over the loss of his wife and his concern over the treatment of her remains. Nevertheless, we must emphasize that the law does not allow him to continue to litigate with Vitkova, Pohorily, Autopsy Services, Donor Network and John C. Lincoln over matters pertaining to the autopsy of his wife. Martinez's claims were resolved against him in the earlier lawsuits, and the orders dismissing those claims bar any

future claims he might seek to bring against those defendants arising from the handling of his wife's remains or her autopsy. Martinez should be on notice that in the event he initiates any additional claims against Vitkova, Pohorily, Autopsy Services or John C. Lincoln based on those matters, he will risk sanctions pursuant to A.R.S. § 12-349(A)(1) and/or ARCAP 25.

¶21 We grant appellees their costs subject to compliance with ARCAP 21.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
MICHAEL J. BROWN, Judge

/s/
JOHN C. GEMMILL, Judge