DIVISION ONE
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PHILIP G. URRY, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

PAUL C. NORMAN and JANE DOE NORMAN, as natural persons; PAUL C. NORMAN REVOCABLE LIVING TRUST, Petitioner, v. THE HONORABLE KENTON D. JONES, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of YAVAPAI, Respondent Judge, HUGH and BERTHICA FITZSIMONS, husband and wife; REAL ESTATE EXCELLENCE, INC., d/b/a RMA-SEDONA; PHILIP TATUM, its designated broker; BRUCE TOBIAS, sales agent; KELLY HOME INSPECTION, L.L.C., a purported Arizona limited liability company, Real Parties in Interest.	No. 1 CA-SA 10-0095 DEPARTMENT E Yavapai County Superior Court No. V1300CV820090222 (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure) **DECISION ORDER**

The court, Presiding Judge Diane Johnsen and Judges Patrick Irvine and Philip Hall, has considered Petitioners' Petition for Special Action, Real Parties in Interest Fitzsimons' Response to Petition, and Petitioners' Reply.

As Real Parties concede, a litigant that contends the superior court erred by denying a notice of change of judge pursuant to Arizona Rule of Civil Procedure 42(f) may obtain review of that decision only by way of special action. *Taliaferro v. Taliaferro*, 186 Ariz. 221, 223, 921 P.2d 21, 23 (1996).

By order dated July 8, 2009, the superior court set oral argument on Petitioners' Motion to Dismiss for November 18, 2009. We have the benefit of a transcript of the proceeding that occurred on November 18. At the outset of that proceeding, the superior court informed the parties of the various filings it had received and noted that it anticipated at least one additional filing and possibly others. The court then asked the parties whether they "would . . . rather go ahead with the oral argument today" or whether the argument should be continued until after all anticipated filings had been filed. One of the parties suggested that in order to decide whether to go forward with oral argument, the court would need to rule on whether it would allow supplemental briefing. At that point, the court indicated that it was inclined to put off considering the motion to dismiss until it had received all the respective filings:

> I do think it would be so fraught with potential rule violations to try and be very, you know, circumspect about what we may be able to handle today in light of not even having pleadings in front of us. I

> think every bit of that really does a disservice to the clients if in fact this court then can't look at those in some sort of a process-oriented fashion and be able to attribute, I'm kind of overstating this a bit, but to be able to attribute value as appropriate to each pleading as it's reviewed.

When one of the parties then noted that depending on the nature of the filings, the court might need to consider the Rule 12(b) motion pursuant to Rule 56, the court responded, "And we are truly engaging in a dissociative intellectual discussion for me right now, because I truly don't know what the attachments are." The court then invited other counsel to comment. At that, there was discussion about stipulating to allowing defendants' answers to the initial complaint to stand as responses to an amended complaint. Immediately thereafter, one of the parties noted that the parties had agreed to mediate the matter. The discussion thereafter concerned the mediation and the court's decision to continue oral argument on the motion to dismiss pending the mediation.

Several months later, after the mediation failed, Petitioners filed a notice of change of judge pursuant to Rule 42(f)(1). After Real Parties objected, the superior court denied the request for change, reasoning that what occurred on November 18, 2009 was a "scheduled conference" that acted as a waiver pursuant to Rule 42(f)(1)(D)(ii).

As relevant to the petition, Rule 42(f)(1)(D)(ii) precludes a party from exercising an of-right change of judge "when . . . (ii) after notice to the parties . . . (cc) the judge holds a scheduled conference or contested hearing." We review the denial of a Rule 42(f)(1) notice for an abuse of discretion, but we review *de novo* the superior court's interpretation of the rule. *Anderson v. Contes*, 212 Ariz. 122, 124, ¶ 5, 128 P.3d 239, 241 (App. 2006).

We hold the proceeding that occurred on November 18, 2009 was not a "scheduled conference" within the meaning of Rule 42(f). The order the court issued scheduling the proceeding announced that oral argument on the motion to dismiss would be held on that date; it said nothing indicating the court would hold a conference of any nature on that date. "Scheduled" in this context means "plan[ned] for a certain date," Random House Webster's Unabridged Dictionary 1713 (2001), or an event "place[d] or include[d] in a schedule," New World Dictionary 1272 (2d coll. ed. 1980). Assuming that what occurred on November 18 was a "conference," it was not a "scheduled conference" because it was not planned (scheduled) in advance.

Moreover, although an oral argument had been scheduled for November 18, as the superior court impliedly concluded, no contested hearing took place on that day. Instead, as related above, the court learned the parties had filed and were expected

to file additional papers relating to the motion. Because additional filings were expected, and because the parties informed the court they had agreed to participate in mediation, the oral argument was put off. As the superior court later observed, "the Court directed that the mediation be pursued and that the pending motions, and argument thereon, be held in abeyance until mediation had been completed."

Real Parties argue that because the hearing scheduled for November 18 evolved into a conference, the waiver provision of Rule 42(f)(1)(D)(ii)(cc) applies because what occurred effectively was a "scheduled conference." But we cannot construe the rule in that fashion. Because subpart D distinguishes between a "scheduled conference" and a "contested hearing," we will not interpret it to encompass a scheduled-but-aborted contested hearing that on the spur of the moment turns into a conference. As we held in *Williams v. Superior Court*, 190 Ariz. 80, 83, 945 P.2d 391, 394 (App. 1997), the concept of notice is fundamental to Rule 42(f)(1)'s waiver provisions. Because a conference was not noticed (scheduled) for November 18, the fact that the proceeding that occurred on that day may have turned into a conference does not bring it within the waiver provisions of Rule 42(f)(1)(D)(ii).

Real Parties also argue that Petitioners' right to a change of judge under these circumstances should not turn on the

fortuity of the court's decision (which it appears no party had suggested or advocated prior to the hearing) to continue the oral argument pending the mediation. Again, the language of the Rule controls. Pursuant to subpart D(ii)(cc), waiver occurs when "the judge holds a scheduled conference or contested hearing." If a conference or a hearing is scheduled but for any reason is not held, waiver does not occur.

Accordingly,

IT IS ORDERED accepting jurisdiction of the petition for special action;

IT IS FURTHER ORDERED granting relief by vacating the superior court's order dated April 28, 2010 and directing the court to grant Petitioner's Notice of Change of Judge pursuant to Arizona Rule of Civil Procedure 42(f)(1);

IT IS FURTHER ORDERED denying Real Parties' request for attorney's fees.

/s/_____
DIANE M. JOHNSEN, Presiding Judge