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



DIVISION ONE
FILED: 01/12/2012
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In the Matter of the Estate of:) No. 1 CA-CV 10-0641
)
GLADYS E. GORSIK,)
)
Deceased.) DEPARTMENT A
)
_____)
)
ELIZABETH GORSIK-PETROWITZ,) **MEMORANDUM DECISION**
Personal Representative for THE) (Not for Publication -
ESTATE OF GLADYS E. GORSIK,) Rule 28, Arizona Rules
) of Civil Appellate
Plaintiff/Appellee,) Procedure)
)
)
v.)
)
BARBARA DENZIN and MERRILL E.)
DENZIN, aka EDWARD DENZIN, wife)
and husband; and JULIE WOODHEAD,)
)
Defendants/Appellants.)
)
_____)
)
HAL WOODHEAD, in his sole and)
separate capacity,)
)
Plaintiff/Appellant,)
)
)
v.)
)
)
ELIZABETH GORSIK-PETROWITZ,)
Personal Representative for THE)
ESTATE OF GLADYS E. GORSIK,)

deceased; THE ESTATE OF GLADYS E.)
GORSIK, deceased; BARBARA DENZIN)
and EDWARD DENZIN, her husband,)
)
Defendants/Appellees.)
)

Appeal from the Superior Court in Maricopa County

Cause Nos. CV2010-000210 and
PB2006-070064 (Consolidated)

The Honorable Harriett E. Chavez, Judge

AFFIRMED

Charles M. Geisler, Attorney at Law Sun City
By Charles M. Geisler
Attorney for Plaintiff/Appellee Elizabeth Gorsik-Petrowitz

Porter Law Firm Phoenix
By Robert S. Porter
Attorneys for Defendants/Appellants Barbara A. Denzin,
Merrill E. Denzin and Julie Woodhead

Hal Woodhead Scottsdale
Plaintiff/Appellant *in propria persona*

T I M M E R, Presiding Judge

¶1 Defendants/appellants Barbara Denzin, her husband Merrill E. Denzin aka Edward Denzin, and her daughter Julie Woodhead (collectively, "Appellants") appeal the trial court's judgment finding that Barbara's mother, decedent Gladys Gorsik, was a vulnerable adult when Barbara used Gladys's money for her own benefit in violation of Arizona Revised Statutes ("A.R.S.") section 46-456 (2005). For the following reasons, we affirm.

BACKGROUND¹

¶2 Gladys Gorsik had two daughters, plaintiff/appellee Elizabeth Gorsik and defendant/appellant Barbara Denzin. Gladys moved to Arizona from Kansas in 1987 and lived in Sun City West. Barbara moved to Arizona in 1998 and maintained regular contact and a close relationship with Gladys; Elizabeth moved to Arizona in 1999 and had intermittent contact with Gladys.

¶3 Gladys and Barbara shared bank accounts for years, and Gladys relied on Barbara's assistance with her banking, in filling out checks, making transfers, and making withdrawals. Gladys and Barbara were joint tenants on two bank accounts that were later changed to pay-on-death ("POD") accounts with Barbara as beneficiary; a Bank of America account was changed to POD in June 1991, and a Chase Bank account was changed to POD in January 1999. Gladys was a joint tenant in a third account at Wells Fargo with Barbara and her husband Merrill. Gladys also had two Treasury Direct accounts from 1986 for which Barbara was the POD beneficiary.

¶4 Between April 17, 2000, and August 2, 2001, Barbara purchased six condominiums - Units 23, 16A, 22, 25A, 17, and 18 - in the Pima Plaza Estates in Scottsdale and titled them in her name. She lived in a seventh condominium - Unit 24.

¹ We view the facts in the light most favorable to upholding the superior court's judgment. *Harris v. City of Bisbee*, 219 Ariz. 36, 37, ¶ 3, 192 P.3d 162, 163 (App. 2008).

¶15 In 2001, Gladys fell in her Sun City West home and expressed concern to Barbara that she would not be able to get up on her own if she fell again. As a result, in August 2001, Barbara moved Gladys into Unit 23 of the Pima Plaza Estates in Scottsdale, next door to Barbara's residence. Barbara assisted Gladys with her daily needs such as driving her to the doctor, shopping, and going to the bank.

¶16 Barbara placed a "For Sale" sign on the front of Gladys's Sun City West home and tried to sell the property. When Elizabeth learned of the attempted sale, she told Gladys, who stopped the sale. In Spring 2002, Gladys, Barbara, and Elizabeth executed documents transferring the Sun City West property to Elizabeth. Gladys transferred property she owned in Kansas to Barbara.

¶17 Gladys died on January 21, 2003, at the age of 92. In August 2008, Elizabeth, as personal representative of Gladys's estate, filed a complaint against Appellants. Elizabeth alleged Gladys was a "vulnerable adult," as defined by A.R.S. § 46-451(A)(10) (2005), and that Barbara was in a position of trust and confidence as to Gladys under A.R.S. § 46-456(G)(3) (2005) because she assumed a duty to provide care to Gladys and acted

as a fiduciary.² Elizabeth asserted Barbara violated subsection (A) or (B) of A.R.S. § 46-456 by using Gladys's money to purchase the six condominium units. Elizabeth further alleged that in April 2006, Barbara fraudulently transferred four of the units to her children, Julie Woodhead and Hal Woodhead.³

¶18 Appellants denied Elizabeth's allegations, and the superior court held a five-day bench trial. The court ruled in Elizabeth's favor, finding that Gladys was a vulnerable adult, Barbara held a position of trust with Gladys, and Barbara violated that trust by using Gladys's money to purchase five of the six condominiums. The court additionally found that Barbara used fraudulently prepared purchase and sales contracts to fraudulently transfer four of the condominiums to her children, who were not bona fide purchasers.

¶19 For relief on the complaint, the court voided the transfers of the four condominiums, awarded damages against Barbara in the amount of \$179,518.51, representing the funds used to purchase the five condominiums, imposed a constructive trust on the five condominiums to the extent of the monetary damages, and authorized Elizabeth as personal representative to

² We cite the statutes in effect at the relevant time; the legislature subsequently amended and renumbered these provisions. A.R.S. §§ 46-451, 46-456 (Supp. 2010).

³ Barbara transferred Units 17, 23, and 25A to Julie and transferred Unit 16A to Hal.

market and sell the condominiums as necessary to pay the monetary amount owed to the estate. The court further ordered that Barbara forfeit all beneficial interest in Gladys's estate. The court declined to award treble damages authorized by A.R.S. § 46-456(C).

¶10 Appellants filed a motion for new trial and motion to open the judgment to hear new evidence pursuant to Rules 59(a)(4) and 59(b), Arizona Rules of Civil Procedure. The court denied the motions. This timely appeal followed.⁴ We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1), (9) (2003).⁵

⁴ Hal also filed a notice of appeal and joined in the briefs filed by Appellants. He purports to be a proper party to this appeal because he bought one of the condominiums and has the right to appeal the taking of his property without due process, noting he has not had a hearing on his separately filed quiet title action, which was consolidated with the probate action after entry of the judgment on appeal. To appeal from a judgment, one must be both a party to the action and aggrieved by the judgment. *Christian v. Cotten*, 1 Ariz. App. 421, 423, 403 P.2d 825, 827 (1965); ARCAP 1. Hal was not a party to the action in the trial court at the time the court entered judgment. He therefore is not a proper appellant in this appeal. Additionally, since initiation of this appeal, the superior court entered judgment against Hal; he failed to appeal that judgment and has forfeited his right to appellate review.

⁵ At the time Appellants filed their notice of appeal, two other matters were pending before the superior court. Because the court did not direct the entry of final judgment pursuant to Arizona Rule of Civil Procedure 54(b), this court asked the parties to submit supplemental briefs regarding our jurisdiction, and they did so. Since that time, the superior court entered final judgments on the remaining matters, and nothing remains pending before that court. Without doubt, the judgment at issue in this appeal is now final. *Hill v. City of Phoenix*, 193 Ariz. 570, 574, ¶ 16, 975 P.2d 700, 704 (1999)

DISCUSSION

¶11 Appellants argue the superior court erred by (1) deciding in favor of Elizabeth at trial because insufficient evidence supported a finding that Gladys was a "vulnerable adult," and (2) denying the motions for new trial and to reopen to admit new evidence. We address each argument in turn.

I. Sufficiency of evidence

¶12 We are bound by the superior court's findings of fact unless they are clearly erroneous. *Sabino Town & Country Estates Ass'n v. Carr*, 186 Ariz. 146, 149, 920 P.2d 26, 29 (App. 1996). We must affirm if any evidence supports the trial court's judgment. *Inch v. McPherson*, 176 Ariz. 132, 136, 859 P.2d 755, 759 (App. 1992).

(holding that judgment lacking Rule 54(b) language became final upon entry of final judgment on remaining claims). Consequently, even assuming this court lacked jurisdiction at the time the notice of appeal was filed, we now have jurisdiction to decide this matter. *Turner v. City of Flagstaff*, 226 Ariz. 341, 342, ¶ 4 n.2, 247 P.3d 1011, 1012 n.2 (App. 2011) (rejecting appellee's challenge to appellate jurisdiction to decide propriety of judgment without Rule 54(b) language because trial court entered final judgment after notice of appeal filed).

As a precautionary measure, Appellants filed a second notice of appeal upon entry of the last judgment entered by the superior court, asked this court to decide the matter on the previously submitted briefs and oral argument, and moved this court to consolidate the appeals. In light of our assertion of jurisdiction over the present appeal, the subsequent appeal is unnecessary. By separate order, we dismiss the second appeal and deny the motion to consolidate as moot.

¶13 Pursuant to A.R.S. § 46-456(A), a person in a position of trust and confidence to an incapacitated or vulnerable adult must act for the benefit of that incapacitated or vulnerable adult to the same extent as a trustee. A.R.S. § 46-456(A). During the pertinent timeframe, the legislature defined "vulnerable adult" as "an individual who is eighteen years of age or older who is unable to protect himself from abuse, neglect or exploitation by others because of a physical or mental impairment." A.R.S. § 46-451(A)(10). An "impairment" results if injury or deterioration exists or if something causes a decrease in strength or quality of life. *Davis v. Zlatos*, 211 Ariz. 519, 525, ¶ 24, 123 P.3d 1156, 1162 (App. 2005).

¶14 Appellants do not contest that Gladys suffered from a physical impairment in 2000 and 2001, and we conclude the evidence supports this conclusion. Gladys was in her early 90s and suffered from numerous illnesses and conditions, including loss of sight in one eye, diminished hearing in one ear, and an unsteady gait.⁶ Appellants argue, however, that Elizabeth failed to present any medical or other evidence, and the court failed

⁶ Additionally, Gladys suffered from persistent hip and low back pain, atrial fibrillation, mitral valve prolapse, edema in her legs, congestive heart failure, peripheral vascular disease, shortness of breath, osteoarthritis, osteoporosis, incontinence, urinary tract infections, cellulitis in the right leg, and spinal stenosis.

to find,⁷ that any of these conditions made Gladys unable to protect against exploitation.⁸ Our resolution of this issue turns on a review of the pertinent authority and the evidence presented at trial.

¶15 A person may be a vulnerable adult if a physical impairment alone makes that person unable to protect himself from exploitation. A.R.S. § 46-451(A)(10). In *Davis*, this court found that Mrs. Zlatos, an eighty-six-year-old woman who was physically frail, unable to walk, and relied on home care assistance, was physically impaired, noting her ability to care for herself was lessened by her age and health problems. 211 Ariz. at 525-26, ¶¶ 25, 27, 123 P.3d at 1162-63. The court further found that Mrs. Zlatos's physical impairments made her "unable to protect herself if targeted for abuse, neglect or exploitation," even if she was able to make informed decisions. *Id.* at 525, 527, ¶¶ 23, 31, 123 P.3d at 1162, 1164. She was

⁷ Although unclear, Appellants apparently also fault the judgment because the court failed to find that Gladys suffered from a *mental* impairment. The court was not required to find that Gladys was mentally impaired in order to rule Gladys was a vulnerable adult. As set forth in § 46-451(A)(10), a person can be vulnerable due solely to a physical impairment. See also *Davis*, 211 Ariz. at 526, ¶ 27, 123 P.3d at 1163.

⁸ Appellants do not contest the court's finding that Barbara was in a position of trust and confidence to Gladys and therefore was obligated to act to the same extent as a trustee. A.R.S. § 46-456(A). Nor do they challenge the court's finding that Barbara used Gladys's funds to purchase the condominiums for Barbara's own benefit.

dependent on others for her daily care and managing many of her financial affairs, and an earlier fall demonstrated her inability to take care of herself. *Id.* at 527, ¶ 31, 123 P.3d at 1164. The court rejected an argument that Mrs. Zlatos's failure to complain about the exploitation despite having opportunities indicated she was not vulnerable. *Id.* at 526, ¶¶ 28-30, 123 P.3d at 1163. The court noted that an elderly person might not be aware of the financial exploitation or might willingly participate. *Id.* at 526, ¶ 30, 123 P.3d at 1163.

¶16 The evidence supports the superior court's finding that Gladys, like Mrs. Zlatos,⁹ had physical impairments that rendered her unable to protect herself from exploitation. Barbara testified that until about 2000 she visited Gladys in the Sun City West home at least three times a week, but that in 2000 she became concerned that Gladys was not as strong as she had been and so made more frequent trips, during which they would go to the grocery store and shop. In 2001, Barbara noticed that if Gladys got on the floor, she had trouble getting up, so Barbara increased her trips to Sun City West. By the time Gladys moved to Scottsdale, Barbara was visiting the Sun City West home daily to check on Gladys. Gladys moved next door

⁹ Appellants attempt to distinguish *Davis* by noting that Mrs. Zlatos had cognitive impairment, and her relatives lived in another state. As previously explained, see *supra* ¶ 15, the holding in *Davis* rested solely on Mrs. Zlatos's physical impairment. Appellants' distinction, therefore, lacks merit.

to Barbara in Scottsdale after Gladys fell in her home and expressed a fear that if she fell again, she would not be able to get up.

¶17 Gladys was 90 years old in 2000 with numerous ailments. Her inability to get up from the floor and her risk of falling show she was unable to care for herself without the assistance of others, causing increased reliance on Barbara for her daily needs, including transportation and banking. In addition, Gladys's diminished vision and hearing could also have made her more susceptible to exploitation, as they could make her less aware of her surroundings and the circumstances of any transactions in which she became involved, thereby making her less able to protect herself if targeted for exploitation.

¶18 Appellants argue that Elizabeth's claim must fail because she does not challenge Gladys's transfer of the Sun City West house to her in March 2002, implying that if Gladys were vulnerable with respect to the condominium transactions then the transfer of the Sun City West house must fail. We disagree.

¶19 A vulnerable adult may still have the capacity to transfer property. *Davis*, 211 Ariz. at 527, ¶ 32, 123 P.3d at 1164. The superior court did not find that Gladys lacked capacity; it found that physical impairment made her vulnerable to exploitation. Thus, it is consistent for Elizabeth to simultaneously argue that Barbara exploited Gladys when

purchasing the condominiums but that Gladys was not exploited when she transferred the Sun City West house to Elizabeth and the Kansas house to Barbara.

¶20 In sum, although the evidence is not overwhelming, we decide the record contains sufficient evidence to support the trial court's ruling that Gladys was a vulnerable adult under A.R.S. § 46-451(A)(10) due to physical impairment.

B. Rule 59(b) motion

¶21 Appellants argue the trial court erred in denying their motion filed pursuant to Rule 59(b), Arizona Rules of Civil Procedure, which authorizes the court, after a bench trial, to open the judgment, take additional testimony, and then make new findings of fact and conclusions of law.¹⁰ The trial court has broad discretion to open a judgment to accept additional evidence in the interest of justice. *Flying Diamond Airpark, LLC v. Meienberg*, 215 Ariz. 44, 50, ¶ 24, 156 P.3d 1149, 1155 (App. 2007). In reviewing the trial court's decision, we must affirm unless "there is a clear showing that there was no reasonable basis within the range of discretion for the action taken." *Id.* (internal citations omitted).

¶22 Appellants based their motion on Hal's then-recent discovery of letters written by Gladys in 2000 in which Gladys

¹⁰ Appellants do not argue that the court erred in denying their motion for new trial pursuant to Rule 59(a)(4), Arizona Rules of Civil Procedure, on the grounds of newly discovered evidence.

stated she was helping Barbara and her husband buy six condominiums so they could have income when they retired. They argued Hal found the letters only when he was packing to move from his condominium because of the judgment, and that before that time he was unaware Elizabeth was claiming Barbara had used Gladys's funds to purchase the condominiums. He claimed none of the attorneys had talked to him before he found the letters.

¶23 The court found that Appellants had failed to show that reasonable diligence was used to discover the letters, given that no one ever talked to Hal even though he was available, he claimed title to a property in question, and he resided in one of the properties at issue. The court further found that Appellants had not shown that the newly discovered evidence would have changed the result.¹¹

¶24 The superior court did not abuse its discretion by denying the motion. Appellants argue they had no reason to believe that Hal had any relevant evidence and therefore the motion should not have been denied on the basis that they did not exercise due diligence to discover the letters. But the motion asserted Hal and Gladys had a close relationship, and Hal

¹¹ The court's analysis was based on the paradigm for deciding Appellants' motion filed pursuant to Rule 59(a)(4), which requires a showing that newly discovered evidence existed at the time of trial but was not discoverable despite the exercise of due diligence and that the evidence would probably change the result upon a new trial. *Wendling v. S.W. Sav. & Loan Ass'n*, 143 Ariz. 599, 602, 694 P.2d 1213, 1216 (App. 1984).

lived in one of the condominiums at issue. The court therefore had a reasonable basis to conclude Appellants failed to show due diligence because no one had talked to Hal about whether he had any relevant information from his grandmother.

¶125 More significantly, the court reasonably concluded as the fact-finder that the new evidence would not have changed the result. First, as the court noted, the new evidence was contrary to Barbara's consistently taken position at trial that she did not use Gladys's money to purchase the condominiums. Appellants assert other evidence demonstrated that Gladys's plan was to dispose of her property so no probate of her estate would be necessary and that the letters were consistent with that evidence. Regardless, a party cannot take a position in a motion for new trial that differs from the position taken at trial. *McClennen v. McClennen*, 11 Ariz. App. 395, 399, 464 P.2d 982, 986 (App. 1970). Second, as the court also noted, Barbara could have exploited Gladys even with her consent and participation. See *Davis*, 211 Ariz. at 526, ¶ 30, 123 P.3d at 1163. The superior court did not err.

CONCLUSION

¶26 For the foregoing reasons, we affirm.

/s/
Ann A. Scott Timmer, Presiding Judge

CONCURRING:

/s/
Daniel A. Barker, Judge*

/s/
Patrick Irvine, Judge*

*Judge Daniel A. Barker and Judge Patrick Irvine were sitting members of this court when the matter was assigned to this panel of the court. Both judges retired effective December 31, 2011. In accordance with the authority granted by Article 4, Section 3 of the Arizona Constitution and pursuant to Arizona Revised Statutes section 12-145 (2003), the Chief Justice of the Arizona Supreme Court has designated Judges Barker and Irvine as judges pro tempore in the Court of Appeals, Division One, for the purpose of participating in the resolution of cases assigned to this panel during their term of office.