

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 06/07/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In the Matter of the Estate of:) No. 1 CA-CV 11-0238
)
BERTHA JUANITA SCOTT,) DEPARTMENT C
)
Deceased.) **MEMORANDUM DECISION**
) (Not for Publication - Rule 28,
Ariz. Rules of Civil Appellate
Procedure)

WILLIAM V. SCOTT, Personal)
Representative of the ESTATE OF)
BERTHA JUANITA SCOTT,)
)
Plaintiff/Appellant/)
Cross-Appellee,)
)
v.)
)
JOHN SCOTT and JEAN SCOTT,)
husband and wife; DAVID SCOTT and)
BILLIE SCOTT, husband and wife,)
)
Defendants/Appellees/)
Cross-Appellants.)

Appeal from the Superior Court in Maricopa County

Cause Nos. CV2008-053679 and PB2007-050284 (Consolidated)

The Honorable Rosa Mroz, Judge

APPEAL DISMISSED

Collins & Collins, LLP
By Joseph E. Collins
Attorneys for Appellant

Phoenix

Baumann, Doyle, Paytas & Bernstein, PLLC
By Gary T. Doyle
Attorneys for Appellees

Phoenix

G O U L D, Judge

¶1 William V. Scott, in his capacity as co-personal representative of the Estate of Bertha Juanita Scott ("Decedent"), appeals from a judgment entered on February 2, 2011. For the reasons that follow, we dismiss this appeal for lack of jurisdiction.

FACTS AND PROCEDURAL BACKGROUND

¶2 On October 11, 2007, the superior court appointed William and his brothers, John Scott and David Scott as co-personal representatives of their mother's estate. In May 2008, William filed a petition to turn over assets alleging that John and David wrongfully acquired property from Decedent by having Decedent execute a deed when she was incapacitated, selling Decedent's personal property at an auction without depositing the proceeds in Decedent's accounts, and using Decedent's money to pay personal debts and expenses. The superior court ordered William to file a conversion case in civil court.

¶3 Accordingly, on September 18, 2008, William, in his capacity as co-personal representative, filed a complaint against John, David and their respective spouses, Jean and Billie (collectively, "Appellees"), for conversion and quiet title. On September 24, 2009, William filed an amended complaint naming Luella Owens and RLI Insurance as additional

defendants and asserted claims against them for fraud and negligence. William alleged that Owens committed fraud by notarizing the subject deed transferring real property to John and Jean without witnessing Decedent sign it and that RLI Insurance was liable for any damages Owens caused in her capacity as a notary public. The court consolidated the probate and civil actions.

¶4 William served Owens and RLI and subsequently moved for default against both. On December 1, 2009, William dismissed his claim against RLI with prejudice pursuant to Rule 41(a), Arizona Rules of Civil Procedure. Thereafter, the court found Owens in default, and reserved the issue of damages for argument at the end of the probate proceedings.

¶5 After a trial on the conversion and quiet title claims, the jury determined that Decedent was incapacitated when she executed the deed, but that title to the subject real property should be vested in John and Jean. Additionally, the jury found against David and Billie for conversion. The jury's determination as to the Decedent's incapacity and its verdict regarding William's quiet title claim were advisory verdicts. The court adopted the jury's advisory verdicts and directed William to file an application for attorneys' fees.

¶6 On December 10, 2010, William filed a motion to remove John and David as personal representatives in the probate case.

William asserted that based on the jury verdicts, there was good cause to remove John and David as personal representatives of Decedent's estate.

¶7 On February 2, 2011, the court entered a signed judgment assessing damages against David and Billie, awarding William a portion of his requested attorneys' fees, and quieting title to the real property in favor of John and Jean. The judgment did not address the pending damage claim against Owen, the motion to remove John and David as personal representatives, and it did not contain a determination of finality as to one or more of the parties or their claims pursuant to Arizona Rule of Civil Procedure ("Rule") 54(b).

¶8 William filed a notice of appeal on March 1, 2011.¹ On April 6, 2011, the court entered a signed judgment in favor of the Estate and against Owens in the amount of \$0. William did not file a new or amended notice of appeal after entry of the April 6 judgment.

JURISDICTION

¶9 We have an independent duty to determine whether this court has jurisdiction over the appeal. *Sorensen v. Farmers Ins. Co.*, 191 Ariz. 464, 465, 957 P.2d 1007, 1008 (App. 1997).

¹ Appellees filed a notice of cross-appeal on March 2, 2011, however, they did not pursue the cross-appeal and only filed an answering brief in this appeal. Therefore, we deem the cross-appeal abandoned.

Our colleagues on the motions panel previously determined that this court has jurisdiction over the appeal. Nevertheless, this court is not bound by decisions of the motions panel and we disagree with its conclusion for the reasons that follow. See *Tripati v. Forwith*, 223 Ariz. 81, 84, ¶ 12, 219 P.3d 291, 294 (App. 2009); and *In re Stagecoach Utils., Inc.*, 86 B.R. 229, 230 (B.A.P. 9th Cir. 1988) (“Motion [p]anel decisions are not binding on the [p]anel assigned the case.”).

¶10 This court has jurisdiction over appeals from a judgment, decree, or order entered in any formal probate proceeding. A.R.S. § 12-2101(A)(9). “An ‘order’ pursuant to this section means an order similar to a final judgment or decree[.]” *Ivancovich v. Meier*, 122 Ariz. 346, 353, 595 P.2d 24, 31 (1979);² see also *In re Estate of McGathy*, 226 Ariz. 277, 280, ¶ 17, 246 P.3d 628, 631 (2010) (A.R.S. § 12-2101(A)(9) permits appeals from the final disposition of each formal proceeding in an unsupervised probate administration). “A final judgment or decree decides and disposes of the cause on its merits, leaving no question open for judicial determination.” *Decker v. City of Tucson*, 4 Ariz. App. 270, 272, 419 P.2d 400,

² *Ivancovich* involved a supervised probate administration in which the court determined that it lacked jurisdiction over a tax apportionment order entered prior to a final decree distributing the estate. *Ivancovich*, 122 Ariz. at 353, 595 P.2d at 31.

402 (App. 1966). The scope of a formal probate proceeding is framed by the petition or complaint initiating the proceeding. *McGathy*, 226 Ariz. at 279, ¶ 13, 246 P.3d at 630 (citations omitted).

¶11 Thus, to be appealable, a judgment or order should “finally adjudicate some particular aspect of the probate proceeding or affect some substantial right of a party of the same nature as those involved in the other appealable orders specified in A.R.S. § 12-2101.” *Arizona Appellate Handbook* § 3.3.1.7 at 3-18 (5th ed. 2010); see also *In re Estate of Lewis*, 631 Ariz. Adv. Rep. 15, ¶¶ 1, 12, 275 P.2d 615, 618, 620 (Ariz. App. Mar. 29, 2012) (court has jurisdiction over an appeal from orders entered in a probate proceeding dismissing a complaint, entering a default judgment, and overruling an objection to informal probate of a will). When multiple claims and parties are involved in an action, Rule 54(b) controls the finality of judgments. *Pulaski v. Perkins*, 127 Ariz. 216, 217, 619 P.2d 488, 489 (App. 1980); *Kinnear v. Finegan*, 138 Ariz. 34, 35, 672 P.2d 986, 987 (App. 1983) (Rule 54(b) applies to probate proceedings). If claims remain unadjudicated and parties remain in the action, the absence of Rule 54(b) language defeats finality. *Stevens v. Mehagian's Home Furnishings, Inc.*, 90 Ariz. 42, 365 P.2d 208 (1961).

¶12 The February 2 judgment from which William appeals is not a final judgment or order similar to a final judgment because it does not dispose of William's claim against Owens and does not contain Rule 54(b) language. *Pulaski*, 127 Ariz. at 217, 619 P.2d at 489.

¶13 Prior to trial, the court found Owens in default. Based on the default, the court determined that Owens notarized a signature without the proper party being present, which resulted in the transfer of property to John and Jean. The court further stated that "[t]he issue of damages will be argued at the conclusion of the probate proceeding." In the joint pretrial statement, William listed as a contested issue the amount of the judgment to be entered against Owens. *See Carlton v. Emhardt*, 138 Ariz. 353, 355, 674 P.2d 907, 909 (App. 1983) (the joint pretrial statement "controls the subsequent course of the litigation."). The court did not resolve William's claim against Owens until April 6, 2011, when it entered the signed judgment against Owens. Accordingly, William's notice of appeal was premature.³

³ Our motions panel also determined that the February 2 judgment was not final when William filed his notice of appeal because claims remained pending and the judgment does not contain Rule 54(b) language. Nevertheless, the panel concluded that because the April 6 judgment resolved the remaining claim in the action, this court had jurisdiction pursuant to A.R.S. § 12-2101(A) (9).

¶14 A premature notice of appeal is effective if it is filed "after the trial court has made its final decision, but before it has entered a formal judgment, if no decision of the court could change and the only remaining task is merely ministerial." *Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 415, ¶ 37, 132 P.3d 1187, 1195 (2006) (citing *Barassi v. Matison*, 130 Ariz. 418, 636 P.2d 1200 (1981)). A task is "ministerial" if no discretion or judgment is necessary. *Bryant v. Bryant*, 40 Ariz. 519, 521, 14 P.2d 712, 713 (1932); see also *S. Cal. Edison Co. v. Peabody W. Coal Co.*, 194 Ariz. 47, 53, ¶ 19, 977 P.2d 769, 775 (1999) (whether to certify a judgment as final pursuant to Rule 54(b) is a discretionary decision). Absent these limited circumstances, a notice of appeal filed "in the absence of a final judgment . . . is 'ineffective' and a nullity." *Craig v. Craig*, 227 Ariz. 105, 107, ¶ 13, 253 P.3d 624, 626 (2011) (citing *Smith*, 212 Ariz. at 415, ¶ 39, 132 P.3d at 1195).

¶15 Although the court found Owens in default prior to trial, it did not enter a default judgment or determine the amount of damages Owens would be liable for until after William filed his notice of appeal. In his amended complaint, William sought damages from Owens as to the full value of the subject real property, attorneys' fees and costs in bringing the lawsuit, and "all other relief the court deems proper."

Consequently, resolving the outstanding damages claim and entering judgment against Owens required the exercise of judicial discretion. See *Connolly v. Great Basin Ins. Co.*, 5 Ariz. App. 117, 121, 423 P.2d 732, 736 (App. 1967) (“‘[J]udgment’ means the judicial act which clearly fixes the rights and liabilities of the respective parties to litigation and determines the controversy between them.”); see also *Mayhew v. McDougall*, 16 Ariz. App. 125, 130, 491 P.2d 848, 853 (App. 1971) (determining damages in a default setting when the amount is unliquidated requires judicial discretion). Because William’s notice of appeal was premature and the remaining tasks were not ministerial, William’s notice of appeal is a nullity. *Craig*, 227 Ariz. at 127, ¶ 13, 253 P.3d at 626.

¶16 In supplemental briefing we ordered on jurisdiction, William argues that because the jury’s verdict could not change, the resulting February 2 judgment containing the jury’s findings was a final order as to the probate action. Contrary to William’s argument, after entry of the February 2 judgment, the court denied William’s motion to remove the co-personal representatives,⁴ noted there are still pending issues in the probate action to be resolved, and a small amount of work left in order to close the Estate. Additionally, the February 2

⁴ The court denied William’s motion to remove David and John as personal representatives on February 14, 2011, or two weeks after the February 2 judgment.

judgment did not resolve a formal proceeding within the probate action due to the outstanding claim against Owens. *McGathy*, 226 Ariz. at 279, ¶ 13, 246 P.3d at 630. Therefore, the February 2 judgment was not a final order.

¶17 William also argues that dismissing this appeal does not further the purposes of requiring a final judgment. The reasons for requiring a final judgment are to prevent disruption of the trial process, prevent appellate courts from considering issues that might be later addressed by the superior court, and to promote efficiency. *Barassi*, 130 Ariz. at 421, 636 P.2d at 1203; *Engel v. Landman*, 221 Ariz. 504, 509, ¶ 13, 212 P.3d 842, 847 (App. 2009). William contends the jury's role in the litigation was complete when he filed the notice of appeal, there was no chance the verdict would be addressed later by the superior court, and the judgment against Owens was unrelated to the issues before the jury.

¶18 It is irrelevant whether the jury's role in the litigation had concluded when William filed his notice of appeal because an appeal cannot be taken from a verdict; the appeal must be from the judgment. *Assocs. Fin. Corp. v. Scott*, 3 Ariz. App. 1, 3, 411 P.2d 174, 176 (App. 1966). In addition, the claim against Owens related to the issues presented at trial as evidenced by the April 6 judgment which provides "[t]he court finds that the verdicts entered above render any damages that

have not already been paid by the bond of Ms. Owens zero." Although it appears that no one intended to appeal from the judgment against Owens, the outstanding claim from the amended complaint needed to be resolved in order to confer appeal rights in this action. *McGathy*, 226 Ariz. at 279, ¶ 13, 246 P.3d at 630. Alternatively, the February 2 judgment needed Rule 54(b) language. *Pulaski*, 127 Ariz. at 218, 619 P.2d at 490.

¶19 Although equity favors hearing an appeal on the merits, this court's jurisdiction over an appeal is statutory and if we do not have jurisdiction, we are obligated to dismiss the appeal. *Davis v. Cessna Aircraft Corp.*, 168 Ariz. 301, 304, 812 P.2d 1119, 1122 (App. 1991). Because William filed a premature notice of appeal from a non-final judgment, this court lacks jurisdiction over the appeal. *Craig*, 227 Ariz. at 107, ¶ 13, 253 P.3d at 626.

CONCLUSION

¶20 Based on the foregoing, we dismiss this appeal for a lack of appellate jurisdiction.

/S/

ANDREW W. GOULD, Judge

CONCURRING:

/S/

MICHAEL J. BROWN, Presiding Judge

/S/

MARGARET H. DOWNIE, Judge