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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: 04/26/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: sls

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

BRUCE A. SHOLES, ) No. 1 CA-CV 11-0290  
)  
Appellant, ) DEPARTMENT D  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
JUDY R. FERNANDO aka JUDY ) Rule 28, Arizona Rules  
FERNANDO SHOLES, ) of Civil Appellate  
) Procedure)  
Appellee. )  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. CV2006-051204

The Honorable Michael R. McVey, Judge

**AFFIRMED**

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Bruce A. Sholes Cortaro  
Appellant In *Propria Persona*

Mesch Clark & Rothschild P.C. Tucson  
By Michael J. Crawford  
Attorneys for Appellee

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**D O W N I E**, Judge

¶1 Bruce Sholes ("Bruce") appeals from a judgment entered against him in the superior court in favor of Judy Fernando ("Judy"). Finding no error, we affirm.

#### FACTS AND PROCEDURAL HISTORY

¶2 Judy owned a home in Scottsdale (the "Scottsdale house") before marrying Bruce in 1999. In May 2006, Russell and Mary Sholes ("the Sholeses"), Bruce's parents, filed a complaint in Maricopa County Superior Court against Judy and Bruce, alleging an oral contract with Judy pursuant to which they loaned her \$222,000 to pay off the mortgage on the Scottsdale house. The Sholeses asked the superior court to, *inter alia*, impose an equitable lien in their favor on the Scottsdale house. The Sholeses also sought to establish priority over any interest Bruce might claim in the Scottsdale house. Bruce filed a crossclaim against Judy, seeking an equitable lien on the Scottsdale house to secure Judy's alleged indebtedness to him.

¶3 Three weeks after the Sholeses filed suit, Judy filed a dissolution petition in the Pima County Superior Court. Judy moved to dismiss Bruce's crossclaim, asking that it be transferred to Pima County. Bruce objected, and the court denied Judy's motion.

¶4 In September 2006, Bruce recorded a notice of lis pendens against the Scottsdale house. Judy thereafter filed a "counter-crossclaim" against Bruce, alleging, *inter alia*, that

his lis pendens filing violated Arizona Revised Statute ("A.R.S.") section 33-420(A).

¶15 Judy moved for partial summary judgment on Bruce's crossclaim and on her counter-crossclaim. In a December 15, 2008 ruling, the court addressed the lis pendens filings by the Sholeses<sup>1</sup> and Bruce, concluding:

[T]here is no genuine dispute that the relevant facts do not support a claim for any non-marital equitable interest in the real property at issue here and that plaintiffs' (and Bruce Sholes') filing of a notice of lis pendens against the real property at issue in this matter violated A.R.S. §33-420.

The court ordered both lis pendens expunged and released. It transferred remaining claims between Judy and Bruce to Pima County.

¶16 In December 2009, the Sholeses tried their claims against Judy for breach of contract, promissory estoppel, and unjust enrichment to a jury in Maricopa County. At the same trial, Judy presented her counterclaim for actual damages arising from the Sholeses' wrongful lis pendens filing. The jury found in favor of Judy on all of the Sholeses' claims. It awarded Judy no actual damages for the Sholeses' wrongful lis

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<sup>1</sup> The Sholeses had recorded a lis pendens against the Scottsdale house in May 2006.

pendens recording. Judy received statutory damages of \$5,000, plus attorneys' fees pursuant to A.R.S. § 33-420(A).

¶17 In May 2010, Judy asked the Pima County court to enter judgment against Bruce based on his wrongful lis pendens filing, including statutory damages and attorneys' fees. Pima County transferred her request to Maricopa County for resolution. Judy lodged a proposed form of judgment in Maricopa County, to which Bruce objected.

¶18 The Maricopa County court concluded: (1) Judy's request was timely; (2) the requested attorneys' fees were reasonable as long as Judy did not recover fees "already awarded to her against [the Shoases] in the February 10, 2010 judgment;" (3) Judy's request was properly resolved in Maricopa County; and (4) Bruce's claimed community property interest in the Scottsdale house was not at issue in the Maricopa County proceedings.

¶19 On December 21, 2010, the court entered judgment in Judy's favor against Bruce, awarding her \$5,000 in statutory damages and \$57,706 in attorneys' fees pursuant to A.R.S. § 33-420(A). Bruce filed a motion for new trial, which the court denied. Bruce timely appealed. We have jurisdiction under A.R.S. § 12-2101(A)(1).

## DISCUSSION

¶10 Bruce's briefing is extremely disjointed and fails to comply in meaningful respects with ARCAP 13. As we understand his appellate issues, they can be resolved by determining: (1) whether the court properly granted summary judgment to Judy on Bruce's crossclaim and on her counter-crossclaim; (2) whether the Maricopa County Superior Court had jurisdiction to enter the December 2010 judgment; and (3) whether the fee award under A.R.S. § 33-420 was proper.

¶11 To the extent Bruce is attempting to raise additional claims, they are not clearly articulated, and we do not address them. See *Schabel v. Deer Valley Unified Sch. Dist. No. 97*, 186 Ariz. 161, 167, 920 P.2d 41, 47 (App. 1996) (issues not clearly raised and argued in a party's appellate brief are waived). We also decline to discuss issues and arguments that Bruce failed to timely preserve in the superior court. See *Richter v. Dairy Queen of S. Ariz., Inc.*, 131 Ariz. 595, 596, 643 P.2d 508, 509 (App. 1982) (appellate courts will not consider issues and theories not presented below); *Cahn v. Fisher*, 167 Ariz. 219, 221, 805 P.2d 1040, 1042 (App. 1990) (parties cannot raise new theories on appeal to seek reversal of summary judgment); *Evans Withycombe, Inc. v. W. Innovations, Inc.*, 215 Ariz. 237, 240, ¶ 15, 159 P.3d 547, 550 (App. 2006) (appellate courts will not

consider arguments on appeal that were raised for the first time in a motion for reconsideration).

### **I. Entry Of Summary Judgment**

¶12 We review the grant of summary judgment *de novo*; our review is limited to the record that was before the trial court. *Modular Mining Sys., Inc. v. Jigsaw Techs., Inc.*, 221 Ariz. 515, 518, ¶ 9, 212 P.3d 853, 856 (App. 2009) (citation omitted). We view the record in the light most favorable to the non-moving party. *State Comp. Fund v. Yellow Cab Co. of Phx.*, 197 Ariz. 120, 122, ¶ 5, 3 P.3d 1040, 1042 (App. 1999) (citation omitted).

¶13 Section 33-420(A) states:

A person purporting to claim an interest in, or a lien or encumbrance against, real property, who causes a document asserting such claim to be recorded in the office of the county recorder, knowing or having reason to know that the document is forged, groundless, contains a material misstatement or false claim or is otherwise invalid is liable to the owner or beneficial title holder of the real property for the sum of not less than five thousand dollars, or for treble the actual damages caused by the recording, whichever is greater, and reasonable attorney fees and costs of the action.

¶14 Bruce's lis pendens notice stated that he was seeking an equitable lien based on a verbal agreement with Judy whereby she "promised to encumber" the Scottsdale house to secure "indebtedness . . . for repaying sums paid, costs and services, including legal work, primarily before marriage and also after

. . . ." <sup>2</sup> The grant of summary judgment against Bruce was predicated on the court's finding there was "no genuine dispute that the relevant facts do not support a claim for any non-marital equitable interest" in the Scottsdale house. The court specifically reserved the question of any *marital* equitable interest in the home for the family court in Pima County.

¶15 The facts of record and the relevant case law support the superior court's ruling. When determining whether a *lis pendens* was wrongfully recorded under A.R.S. § 33-420, a court must first decide whether the *lis pendens* arises from an action "affecting title to real property." *Evergreen W., Inc. v. Boyd*, 167 Ariz. 614, 620, 810 P.2d 612, 618 (App. 1991). A lawsuit does not become an action "affecting title" merely by virtue of a party's request that the court impose a lien on real property. *Santa Fe Ridge Homeowners' Ass'n v. Bartschi*, 219 Ariz. 391, 397, ¶ 21, 199 P.3d 646, 652 (App. 2008) (citation omitted). It is essential that the party have some basis upon which it can "conclude that a lien would be imposed on the property subject to the *lis pendens*." *Id.* If a party lacks a reasonable basis for concluding that an equitable lien will be imposed and records a *lis pendens* regardless, the notice is groundless and violates § 33-420. *Id.*

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<sup>2</sup> Bruce could perform legal work for others while a licensed attorney. He was disbarred at some point during the proceedings below.

¶16 Based on the record before it, the superior court properly ruled that Bruce lacked a reasonable basis for his lis pendens filing, which asserted "sole and separate property claims." It was undisputed that Judy owned the Scottsdale house before marriage and that it was her sole and separate property. See Ariz. Rev. Stat. ("A.R.S.") § 25-213(A). Rather than disputing title, Bruce alleged an oral contract whereby Judy purportedly became indebted to him for legal services and other expenditures. That alleged contract was the basis for Bruce's claimed sole and separate property interest in the Scottsdale house. As the superior court recognized, § 33-420 does not permit a party attempting to recover a debt to record a lis pendens "merely by characterizing the action as one seeking a constructive trust or equitable lien." *Coventry Homes, Inc. v. Scottscom P'ship*, 155 Ariz. 215, 218, 745 P.2d 962, 965 (App. 1987).

## **II. Jurisdiction**

¶17 Bruce argues the Maricopa County Superior Court lacked jurisdiction to enter the December 2010 judgment. He contends that all claims between the divorcing spouses were transferred to Pima County in December 2008, divesting Maricopa County of jurisdiction. We disagree.

¶18 "The Arizona Constitution creates superior courts in each county of the state that together 'constitute a single



court.'" *State v. Patterson*, 222 Ariz. 574, 580 n.7, ¶20, 218 P.3d 1031, 1037 n.7 (App. 2009) (citation omitted). The superior court of Arizona is a "single unified trial court of general jurisdiction." *Marvin Johnson, P.C. v. Myers*, 184 Ariz. 98, 102, 907 P.2d 67, 71 (App. 1995). Furthermore, Bruce's argument rests on a misreading of the December 2008 order. The Maricopa County court granted Judy's motion for summary judgment as to Bruce's lis pendens filing and expressly preserved any *community property* issues for the Pima County family court proceedings.<sup>3</sup> When Pima County transferred Judy's request for statutory damages and attorneys' fees under A.R.S. § 33-420 to Maricopa County, such action was entirely consistent with the December 2008 order, as the Maricopa County court itself noted.

### **III. Attorneys' Fee Award**

¶19 Bruce argues that because of the time that elapsed between the December 2008 summary judgment ruling and the December 2010 final judgment, the fee award to Judy was improper. We conclude otherwise.

¶20 Bruce relies on Arizona Rule of Civil Procedure ("Rule") 54(g)(2), which directs a fee request to be submitted "within 20 days from the clerk's mailing of a decision on the

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<sup>3</sup> The court stated it was granting Judy's motion "without prejudice to the judge in the pending family court action involving [Bruce] and [Judy] considering whether any equitable remedy is required as a result of his resolution of the parties' property, debts and obligations."

merits of the cause, unless extended by the trial court.” Bruce does not address Rule 54(g)(4), though, which states: “The provisions of subparagraphs (1) through (3) do not apply to claims for fees and expenses as sanctions pursuant to statute or rule . . . .” The December 2010 fee award was a sanction imposed pursuant to statute.<sup>4</sup> See *Wyatt v. WehmueLLer*, 167 Ariz. 281, 286, 806 P.2d 870, 875 (1991) (statutory penalties for filing groundless lis pendens are punitive in nature). Judy’s fee request was timely.

#### **IV. Attorneys’ Fees On Appeal**

¶21 Judy requests an award of attorneys’ fees incurred on appeal pursuant to A.R.S. §§ 33-420(A) and 12-341.01, Rule 11, and ARCAP 25. We grant her request under § 33-420(A) upon

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<sup>4</sup> Even if Rule 54(g)(4) were inapplicable, 54(g)(2) specifically authorizes the trial court to extend the time for filing a fee request, making clear that any applicable time limitation would be discretionary, not jurisdictional.

compliance with ARCAP 21(a). See *R&M Oxford Const., Inc. v. Smith*, 172 Ariz. 241, 247, 836 P.2d 454, 460 (App. 1992); *Janis v. Spelts*, 153 Ariz. 593, 598, 739 P.2d 814, 819 (App. 1987).

/s/  
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/  
MICHAEL J. BROWN, Acting Presiding Judge

/s/  
JON W. THOMPSON, Judge