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

SANDRA J. O'BRIEN, KENNETH S. O'BRIEN, husband and wife,	1 CA-CV 11-0505 1 CA-CV 11-0701 (Consolidated)
Plaintiffs/Appellants,	**MEMORANDUM DECISION**
v.	(Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)
RAUNI MARSH aka RAUNI ARMBRUSTER,	**DEPARTMENT C**
Defendant/Appellee.	

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-011964

The Honorable J. Richard Gama, Judge

AFFIRMED

The Calhoun Law Firm, PLC — Tempe
by Jay Calhoun
Attorneys for Plaintiffs/Appellants

Dessaules Law Group — Phoenix
by Jonathan A. Dessaules
Douglas C. Wigley
Attorneys for Defendant/Appellee

H A L L, Judge

¶1 Sandra J. O'Brien (O'Brien) and Kenneth S. O'Brien appeal from a summary judgment on their breach of contract claim. They also challenge the superior court's award of attorneys' fees to Rauni Marsh, also known as Rauni Armbuster (Marsh). For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Afra Leroy Makinson (Makinson) died intestate in Yavapai County on May 7, 2005. Makinson's sister, O'Brien, successfully applied for informal appointment as personal representative shortly thereafter. O'Brien's application identified the heirs as O'Brien and Makinson's three adult brothers: Ronald S. Makinson, James A. Makinson, and Ted D. Makinson.

¶3 Marsh then contacted O'Brien and asked to take a representative share in the estate because Marsh's then-deceased mother, Laura Green, was Makinson's sister. After consulting with her brothers, O'Brien filed an amended application that added Marsh and Marsh's sister, Serena Green (Green), as heirs and again secured appointment as personal representative.

¶4 O'Brien knew that Makinson had two children, Teddy Makinson (Teddy) and Frankie Makinson (Frankie), but did not list them as heirs in either of her applications. According to O'Brien, a document created by Makinson and his first ex-wife indicated that Makinson had relinquished custody of Teddy and

Frankie, and O'Brien was not sure whether Teddy and Frankie had subsequently been adopted. *See* Ariz. Rev. Stat. (A.R.S.) § 14-2114 (2012) ("An adopted person is the child of that person's adoptive parent or parents and not the natural parents."). O'Brien was also uncertain as to whether Makinson had divorced his second wife.

¶5 After consulting an attorney, O'Brien became concerned that she could be personally liable if the estate proceeds were improperly distributed. Accordingly, she sent her brothers, Marsh, and Green the following letter.

> July 17, 2005
>
> Dear Family,
>
> I have spoken to an attorney regarding the Estate. With Questions such as, what if the Step Father did not adopt Leroy's kids, where did we stand. He said there is a possibility that they (the kids) could possibly make us reimburse the estate, but he added, it would be quite costly for them to do so, also any attorney would require payment up front before taking the case. Just in case, he advised me to have everyone sign the following documents.
>
> Please sign and notarize each of the documents enclosed, send it back to me. I have enclosed a copy for your file.
>
> I must receive the documents back before I distribute your share to you.
>
> Sandra

She included the following promissory note (the Promissory Note) to be signed by the heirs listed in her applications:

> ESTATE OF AFRA LEROY MAKINSON
>
> I feel, I am one of the rightful heir [sic] of Afra Leroy Makinson's estate.
>
> I understand that Sandra J. O'Brien is acting as personal Representative, only, for the sole purpose to settle the estate.
>
> I take full responsibility for any monies I may receive. If for any reason, any inheritance I have received, must be paid back to the estate, I take full and total responsibility for full re-payment.

Marsh signed the document under oath on August 3, 2005.

¶6 On October 19, 2005, O'Brien recorded a deed of distribution reflecting the transfer of estate shares to Ted Makinson, Ronald Makinson, James Makinson, Marsh, Green, and O'Brien (collectively the Distributees). Marsh concedes that she received $12,917.39 from this distribution on or about October 19, 2005.

¶7 In March 2006, Teddy and Frankie petitioned for an order to show cause for O'Brien's removal as personal representative based upon their superior priority as Makinson's children under A.R.S. §14-3203(5) (2012). According to counsel for the estate, John Phillips (Phillips), the court ordered the return of the Makinson estate assets and O'Brien began marshalling the distributed funds. The parties subsequently stipulated that O'Brien would file a full accounting.

¶8 All Distributees, except for Marsh, eventually returned all or a portion of their distributions to O'Brien. O'Brien supplied evidence that, in March 2006, she sent Marsh e-mail and fax requests for a $12,917.39 check but received no response. On March 27, 2006, O'Brien wrote a check to "Cash" with the notation "Rauni Portion Payback." This check was written on a Marshall and Ilsley Bank account for "Sandra J. O'Brien" and posted on March 28, 2006. According to O'Brien, this was a personal payment to the estate for money Marsh had refused to pay.

¶9 O'Brien subsequently withdrew $90,590.91 from her personal account and delivered a cashier's check for that amount to Phillips. In his affidavit, Phillips verified that the cashier's check on which O'Brien based her arguments was the one O'Brien had delivered to his office. Marsh never submitted any evidence contesting any statement in Phillips' affidavit, including his assertion that O'Brien had made a deposit to cover Marsh's share.

¶10 On December 28, 2006, the Yavapai County probate court removed O'Brien as personal representative and appointed Teddy and Frankie as co-personal representatives. The court determined that Teddy and Frankie had priority to serve as co-personal representatives under A.R.S. § 14-3203. On May 8, 2008, the probate court dismissed the order to show cause

petition after resolving all issues in accordance with the parties' stipulation.

¶11 On July 28, 2009, O'Brien and her spouse (collectively the O'Briens) filed a breach of contract claim against Marsh in Yavapai County Superior Court. Marsh's motion to dismiss based upon standing was unsuccessful, but she did secure a transfer of the case to Maricopa County Superior Court.

¶12 After Marsh answered, the parties filed cross-motions for summary judgment on the issues of direct/legal and equitable assignment and the relevant limitations period. After considering the parties' arguments and concluding that no assignment had occurred, the superior court on June 30, 2011 entered judgment in Marsh's favor in a signed minute entry with Rule 54(b) language. The O'Briens' timely appeal followed.

¶13 Marsh then pressed a motion for attorneys' fees and costs pursuant to A.R.S. § 12-341.01(A) (2003). The superior court awarded $17,456.50 in fees and $916.15 in costs and filed a judgment on September 14, 2011. The O'Briens timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101 (Supp. 2012).

DISCUSSION

¶14 A court may grant summary judgment 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). Summary judgment should be granted "if the facts

produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). If the evidence would allow a jury to resolve a material issue in favor of either party, summary judgment is improper. *United Bank of Ariz. v. Allyn*, 167 Ariz. 191, 195, 805 P.2d 1012, 1016 (App. 1990).

¶15 In reviewing a summary judgment, our task is to determine de novo whether any genuine issues of material fact exist and whether the trial court incorrectly applied the law. *L. Harvey Concrete, Inc. v. Agro Constr. & Supply Co.*, 189 Ariz. 178, 180, 939 P.2d 811, 813 (App. 1997). We review the facts in the light most favorable to the party against whom summary judgment was entered, *Riley, Hoggatt & Suagee v. English*, 177 Ariz. 10, 12-13, 864 P.2d 1042, 1044-45 (1993), and will affirm the entry of summary judgment if it is correct for any reason, *Hawkins v. State*, 183 Ariz. 100, 103, 900 P.2d 1236, 1239 (App. 1995).

¶16 The trial court granted summary judgment in favor of Marsh on the basis that O'Brien "failed to establish either a direct or equitable assignment." In addition, the trial court found that, even assuming O'Brien had received an assignment

from the estate, "there is a viable legal argument that the claim for breach of contract [was] untimely filed." We need not reach these issues because we affirm on what we perceive to be a more compelling basis. Even assuming that the promissory note constitutes a valid contract that would otherwise be enforceable, we conclude it is void as against public policy. *See Liberty Mut. Fire Ins. Co. v. Mandile*, 192 Ariz. 216, 220, 963 P.2d 295, 299 (App. 1997) (recognizing that contracts contrary to public policy are void). *See generally* William W. Story, *A Treatise on the Law of Contracts* § 674 (5th ed. 1874) ("[A]ll agreements which contravene the public policy are void, whether they be in violation of law or morals, or tend to interfere with those artificial rules which are supposed by the law to be beneficial to the interests of society, or obstruct the prospective benefits flowing indirectly from some positive injunction or prohibition.").

¶17 A personal representative is a fiduciary charged with prudently preserving and protecting the assets of the decedent's estate. A.R.S. § 14-1201(19), -1104 (2012). Consistent with this obligation, pursuant to A.R.S. § 14-1401 (2012), the personal representative is obligated to provide notice of hearings to all interested parties. *See* A.R.S. § 14-1201(28) (defining "interested party" to include heirs and children). When the address or location of a person "is not known and

cannot be ascertained with reasonable diligence," notice shall be provided "by publishing at least three times prior to the date set for the hearing a copy thereof in a newspaper having general circulation in the county where the hearing is to be held, the first publication of which is to be at least fourteen days before the hearing." A.R.S. § 14-1401(A)(3).

¶18 In her July 17, 2005 letter, O'Brien demonstrates that she had knowledge of Makinson's surviving children and was aware that they may be the rightful intestate heirs. Rather than provide the requisite statutory notice, O'Brien orchestrated an agreement to avoid taking the appropriate legal steps to notify the heirs and opted instead to distribute the estate assets to herself and her siblings, believing that Makinson's children would be deterred from asserting their legal rights through litigation by the prospect of incurring substantial legal fees. As reflected in her letter, O'Brien evaluated the possibility that Makinson's children would pursue litigation and determined it was unlikely, but nonetheless required each recipient to sign the promissory note as an attempt to avoid personal liability for her failure to fulfill her fiduciary duties. We conclude that the promissory note is therefore void as against public policy. *See* Restatement (Second) of Contracts § 193 ("A promise by a fiduciary to violate his fiduciary duty . . . is unenforceable on grounds of public policy."); *cf. Stelluti v.*

Casapenn Enterprises, LLC, 1 A.3d 678, 689 (N.J. 2010) (noting "it has been held contrary to the public interest to sanction the contracting-away of a statutorily imposed duty"). Therefore, the trial court correctly entered summary judgment in favor of Marsh on O'Brien's breach of contract claim.

¶19 O'Brien next argues that the trial court erred by awarding Marsh her attorneys' fees pursuant to A.R.S. § 12-341.01 (2003). We review attorneys' fees awards generally for an abuse of discretion and determine de novo whether a fee statute applies to an award of attorneys' fees. *Burke v. Ariz. State. Ret. Sys.*, 206 Ariz. 269, 272, ¶ 6, 77 P.3d 444, 447 (App. 2003). Section 12-341.01 provides that "[i]n any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney fees" in order "to mitigate the burden of the expense of litigation to establish a just claim or defense." A.R.S. § 12-341.01(A), (B). A defendant qualifies for attorneys' fees under the statute "if the plaintiff's claims arise out of an alleged contract that is proven not to exist." *Harris v. Maricopa County Superior Court*, 631 F.3d 963, 974 (9th Cir. 2011).

¶20 In this case, the contested action arose out of a contract for purposes of A.R.S. § 12-341.01. *See id*. Although we conclude the promissory note is unenforceable on a basis neither alleged by Marsh nor found by the trial court, we

nonetheless conclude the trial court acted within its discretion[1] in awarding Marsh her attorneys' fees under the statute.

¶21 Both parties request an award of their attorneys' fees incurred on appeal pursuant to A.R.S. § 12-341.01. In our discretion, we deny both parties' requests for attorneys' fees.

CONCLUSION

¶22 For the foregoing reasons, we affirm the trial court's grant of summary judgment in favor of Marsh. We award Marsh her taxable costs upon her compliance with Arizona Rule of Civil Appellate Procedure 21.

_/s/_____
PHILIP HALL, Presiding Judge

CONCURRING:

_/s/_____
PETER B. SWANN, Judge

_/s/_____
SAMUEL A. THUMMA, Judge

[1] Contrary to O'Brien's claim, the record does not reflect that the trial court erroneously believed an award of attorneys' fees was mandatory rather than permissive pursuant to A.R.S. § 12-341.01. As noted by Marsh, in its discretion, the trial court awarded Marsh attorneys' fees in the amount of $17,456.50, reflecting a reduction of $7,000.00.