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See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);
Ariz.R.Crim.P. 31.24



DIVISION ONE
FILED: 6/4/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

MICHAEL S. GLEASON,) 1 CA-CV 12-0038
)
Plaintiff/Appellant,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
) Rule 28, Arizona Rules
JAMES SHAWN RING, as Successor) of Civil Appellate
Trustee of the MARLENE RING FAMILY) Procedure)
TRUST DATED AUGUST 26, 2006 and)
individually; MARLENE RING FAMILY)
TRUST DATED AUGUST 26, 2006;)
JENNIFER MARY MORIARITY; JACQUELINE)
MARIE RING; JOYCE ANN RING ALLARD;)
JUDITH ANN RING,)
)
Defendants/Appellees.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CV2007-022032

The Honorable Eileen S. Willett, Judge

AFFIRMED

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H O W E, Judge

¶1 Gleason appeals from the superior court's grant of summary judgment against him on his claims that appellees deprived him of his community property interests in certain insurance proceeds and personal property in connection with the death of his wife. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Gleason was the husband of Marlene Joyce Ring, who died August 30, 2006. Marlene had five adult children from a prior marriage: Jennifer Mary Moriarty, Jacqueline Marie Ring, Joyce Ann Ring Allard, Judith Ann Ring, and James Shawn Ring.

¶3 Marlene had four life insurance policies: a \$250,000 policy and two \$50,000 policies naming Gleason as beneficiary, and a \$150,000 policy naming her daughter Jennifer as beneficiary. On August 26, 2006, four days before her death, Marlene changed the beneficiary designations on three of the policies while in the hospital. Her five children became the beneficiaries of the \$250,000 policy, her daughter Jennifer became the beneficiary of one \$50,000 policy and the \$150,000 policy, and her son James became beneficiary of the other \$50,000 policy.

¶4 James Ring ("Ring") was Marlene's personal representative and opened probate. On October 3, 2008, Gleason's lawyer was advised by letter that personal property from the house Gleason had shared with Marlene would be sold at an estate

sale. The letter identified property belonging to Gleason and invited him to reclaim those items. It also invited Gleason to provide evidence that any other item was his separate property and stated that items not shown to be his property would be sold. Gleason did not respond, and in spring 2009 Ring, as the personal representative, sold the property. The sale netted \$9,824.19, which Ring deposited into a separate account pending the probate court's order.

¶15 In August 2009, Gleason moved to compel Ring, as personal representative, to pay him a spousal allowance, which the court had awarded conditioned on the estate's having the proceeds to pay. Ring opposed such a payment because the estate lacked funds after paying expenses. Ring moved for the probate court to release proceeds from the sale of the house and personal property to reimburse him for amounts he had advanced for estate expenses. The amounts expended exceeded the proceeds by \$9,855.22. Gleason objected to the reimbursement.

¶16 At the hearings on the motions, Gleason asserted a community property interest in the personal property. Ring then moved to bar Gleason's community property claims, asserting that they were time-barred. Gleason disputed this and asserted, "The issue . . . is whether or not the decedent had full, complete, unequivocal and absolute title to various items of personal property or whether Gleason had an interest in the various items

of personal property which were (wrongfully) included in the decedent's estate and (wrongfully) sold or otherwise disposed of by the Personal Representative in derogation of the community property rights of Gleason and the separate property/sole ownership rights of Gleason." The probate court granted Ring's motion to bar Gleason's community property claims because the claims "were not raised by the pleadings framing the issues" for the hearings on the parties' motions for spousal allowance and for reimbursement. It also granted Ring's request for reimbursement.

¶17 The probate court entered an Order of Complete Settlement of the Estate on November 18, 2010. The court held that Ring had "fully and properly performed his duties as a personal representative of the estate" and discharged Ring "from further claim or demand of any interested party." Gleason did not appeal from this order.

¶18 On November 30, 2007, while the probate case was proceeding, Gleason filed an action in superior court against Marlene's children and the Marlene Ring Family Trust Dated August 26, 2006. Gleason alleged that Marlene was vulnerable in the days before her death because of illness, and that her children conspired to cause her to take certain actions, including changing the beneficiary designation of certain life insurance policies from Gleason to her children. Gleason further

alleged that Marlene's children had converted his personal property located at the residence. He asserted claims for declaratory relief, which sought to set aside the change in beneficiaries of the insurance policies; constructive trust, fraudulent conveyance; conversion of Gleason's personal property; conspiracy to defraud; and violation of the vulnerable adult statute, Arizona Revised Statutes ("A.R.S.") section 46-456 (West 2013),¹ by which Gleason contended that Marlene's children took control of Marlene's property when she was incapacitated and vulnerable and therefore deprived Gleason of his community property interests.

¶19 Ring filed two motions for partial summary judgment. In his Motion for Partial Summary Judgment Re Real and Personal Property Claims, Ring argued that the real and personal property had already been sold to third-party bona fide purchasers and that the probate court's rulings approving the sales of the real and personal property and the release of the proceeds to Ring precluded Gleason's claims. In his Motion for Partial Summary Judgment Re Life Insurance Proceeds and Vulnerable Adult Claim, Ring argued that Gleason had no community property claim to life insurance proceeds paid to Marlene's children that were not

¹ We cite the current version of the applicable statute because no revisions material to this decision have since occurred.

"excessive, fraudulent or capricious," or to which he had not consented. See *Gaethje v. Gaethje*, 8 Ariz. App. 544, 442 P.2d 579 (1968). Ring argued that the \$50,000 designations to Marlene's children were not excessive and, even if they were, Gleason had consented to the distribution. Ring relied in part on a statutory presumption in A.R.S. § 20-1128(C), which provides that a spouse is presumed to have consented to the designation by the other spouse of a child, grandchild, parent, brother, or sister of either of the spouses as a beneficiary of an insurance policy on the life of the other spouse. Ring noted that through discovery, Gleason had recounted that he and Marlene had discussed the \$250,000 policy, and stated, "Marlene explained to me that this was for the benefit of her surviving five children. The \$250,000 was to be split five different ways; each of the children were to receive \$50,000 at the time of her death." Ring asserted that Gleason acknowledged by this statement that he knew about and consented to Marlene's beneficiary designations under the insurance policy. Ring also argued that Gleason could not bring a claim under the vulnerable adult statute because the statute provides for a private right of action by one bringing an action on behalf of an incapacitated or vulnerable adult, and Gleason did not bring his claim on Marlene's behalf. He argued that Gleason could produce no admissible evidence showing that Marlene's children

controlled her when she was in a vulnerable state, resulting in Marlene's changing her estate documents shortly before her death.

¶10 Gleason responded to the motions for summary judgment. He first argued that the probate court had not addressed his claims of a community property interest in the personal property. He further sought to amend his vulnerable adult claim to eliminate any reference to the statute and to instead assert that he was entitled to monetary damages resulting from Ring's misconduct dealing with Gleason's community property interests, particularly the insurance proceeds. As for the insurance proceeds, Gleason asserted that Ring was the direct beneficiary of \$50,000 and received for distribution \$250,000 and that, although he had acknowledged that he was aware of Marlene's intention that the \$250,000 was to go to her five children, whether he consented to that distribution was a question of fact that precluded summary judgment.

¶11 The court granted both of Ring's motions for partial summary judgment and dismissed the case. The court determined that Gleason could not bring a claim under the vulnerable adult statute because he had failed to present evidence to contradict Ring's evidence that Marlene was lucid and of sound mind when she signed the documents and that Marlene's sister—who gained nothing from the estate documents—and not Marlene's children,

had assisted Marlene in executing the various documents. The court denied Gleason's motion for leave to amend the claim "as untimely" and because "the Court deems it futile." Regarding the life insurance, the court found that no evidence suggested that Marlene had been subjected to any undue influence or that she lacked the capacity to make the decision to change her beneficiary designations. The court found that Gleason had failed to show any right to the insurance. The court also found that the probate court had previously ruled on any rights Gleason might have had to the personal property, and concluded that the matter was *res judicata*. The court concluded that Gleason had failed to meet his burden of proof on his claims for the personal property, and that if any claims were still undecided, he could have raised them in the probate court. The court dismissed the complaint with prejudice.

¶12 The court awarded attorneys' fees to Ring, and denied a motion for new trial filed by Gleason. Gleason timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

DISCUSSION

¶13 Summary judgment may be granted when no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law. *Johnson v. Earnhardt's Gilbert Dodge, Inc.*, 212 Ariz. 381, 385, ¶ 15, 132 P.3d 825, 829

(2006). In reviewing a motion for summary judgment, we determine de novo whether any genuine issues of material fact exist and whether the trial court properly applied the law. *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App. 2000). The party moving for summary judgment must produce evidence it believes demonstrates the absence of a genuine issue of material fact and must explain why summary judgment is warranted. *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, 115, ¶ 14, 180 P.3d 977, 980 (App. 2008). If the moving party meets its burden, the burden shifts to the non-moving party. *Id.* at 119, ¶ 26, 180 P.3d at 984. The non-moving party cannot then rest on its pleadings, but must point to evidence in the record showing a disputed issue of material fact justifying a trial. *Id.* General statements or allegations by counsel are insufficient. *In re the Estate of Kerr*, 137 Ariz. 25, 29-30, 667 P.2d 1351, 1355-56 (App. 1983) *disapproved on other grounds by In re Estate of McGathy*, 226 Ariz. 277, 246 P.3d 628 (2010).

I. Life Insurance Proceeds

¶14 Gleason argues that the trial court erred in finding that he had no claim to any portion of the life insurance proceeds. He asserts claims to the \$250,000 policy and the \$50,000 policy paid to Ring. He bases his argument on the concept of constructive fraud of a spouse as recognized in *Gaethje*. 8 Ariz. App. at 52, 442 P.2d at 875. When a spouse

designates someone other than the other spouse as the beneficiary of a life insurance policy, and in so doing leaves the other spouse with less than one-half of all the community and other jointly acquired property, the spouse has committed constructive fraud against the rights of the other spouse. *Id.* In such a case, the beneficiary designation is ineffective to the extent of the constructive fraud. *Id.*

¶15 But no constructive fraud occurs if the other spouse has consented to the beneficiary designation. *Id.* Moreover, the other spouse's consent to the beneficiary designation is statutorily presumed if the designation was in favor of either spouse's child, grandchild, parent, brother, or sister. A.R.S. § 20-1128(C); *Gaethje*, 8 Ariz. App. at 52, 442 P.2d at 875. Because Marlene designated her children as the beneficiaries of the life insurance policies, Gleason's consent is presumed. Gleason acknowledges the existence of the statutory presumption of consent, but offers no argument to rebut it.

¶16 Gleason argues, however, that under *Gaethje* the presumption presents a question of fact that defeats summary judgment. But he is mistaken. In *Gaethje*, this Court reversed a summary judgment in favor of a wife who had challenged her husband's designation of his son as beneficiary of a life insurance policy. 8 Ariz. App. at 53, 442 P.2d at 876. This Court noted that the only evidence to rebut the statutory

presumption of consent was the wife's uncorroborated affidavit. *Id.* This Court concluded that, under the circumstances, summary judgment in the wife's favor was inappropriate and that whether the wife consented should be left to the trier of fact. *Id.*

¶17 In this case by contrast, Gleason points to nothing in the record to rebut the presumption. Gleason had the burden to produce or point to evidence demonstrating the existence of a disputed issue of fact. Gleason argued that no evidence of consent existed; he did not, however, submit an affidavit or point to any evidence in the record to refute the statutory presumption. He therefore failed to meet his burden, and summary judgment was properly entered against him.²

II. Personal Property

¶18 Gleason also argues that the superior court erred in granting summary judgment on his claims pertaining to the personal property. We find that summary judgment was appropriate because Gleason's personal property claims were precluded. A claim is precluded when a court of competent jurisdiction has issued a former judgment on the merits that determined or could have determined the matter at issue between the same parties or

² The parties disagreed whether Gleason's statement that Marlene had explained to him that the \$250,000 policy was for the benefit of her children demonstrated consent. Because Gleason did not rebut the statutory presumption of consent, however, the meaning of Gleason's statement is irrelevant.

their privities. *Hall v. Lalli*, 194 Ariz. 54, 57, ¶ 7, 977 P.2d 776, 779 (1999).

¶19 Gleason argues that claim preclusion does not apply because the instant action sued Ring in his individual capacity and as trustee, whereas Ring's involvement in the probate case was as personal representative. He also asserts that the instant case was filed long before the probate court heard any matters pertaining to the personal property and so the probate case was not a "former action." Gleason made neither of these arguments in the superior court and so has waived them on appeal.³ See *CDT Inc. v. Addison, Roberts & Ludwig, CPA, P.C.*, 198 Ariz. 173, 178, ¶ 19, 7 P.3d 979, 984 (App. 2000) (We consider only those arguments, theories, and facts properly presented below.).

¶20 Gleason also argues on appeal, as he did in the superior court, that the probate court did not address whether Ring, as personal representative, mishandled Gleason's claimed personal property and therefore that claim could not be barred by claim preclusion. But issues pertaining to the personal

³ Not only did Gleason not argue that Ring was being sued in a capacity other than as personal representative, Gleason responded to Ring's motions for partial summary judgment regarding the personal property, that "The First Amended Complaint asserts mis-dealings with Plaintiff Gleason's property by the personal representative." We also note that the probate court entered its Order of Complete Settlement of the Estate on November 18, 2010; the motions for partial summary judgment in this action were filed three months later, making the probate order a "former judgment."

property were addressed in the probate case. The court issued orders related to the proceeds derived from those items Gleason alleged then and alleges in this action were wrongly sold. Gleason brought his objection to the probate court's attention, but the court found his claim barred. The court declared that Ring had properly performed his duties and discharged him from any further claims of any interested party. The order settling an estate and discharging the personal representative was conclusive and subject to challenge only through appeal and not through collateral attack. *Roberson v. Teel*, 20 Ariz. App. 439, 445, 513 P.2d 977, 983 (App. 1973). Gleason's recourse was to file a direct appeal of the probate court's settlement order.

¶21 Gleason's claim for conversion of the personal property seeks to hold Ring liable for his actions as personal representative in direct conflict with the settlement order's declaration that Ring properly performed his duties. As such, this action constitutes an improper collateral attack on the settlement order. *See, e.g., Cox v. Mackenzie*, 70 Ariz. 308, 312, 219 P.2d 1048, 1051 (1950) (A decree in the probate court has all the conclusiveness inherent in a judgment of a common law court and cannot be collaterally attacked.). The superior court thus properly granted summary judgment to Ring on Gleason's conversion claim regarding the personal property.

III. Motion to Amend

¶122 Gleason also argues that the superior court erred in denying his motion to amend his claim for violation of the vulnerable adult statute. However, we find the trial court did not abuse its discretion because the proposed amendment would have been futile.

¶123 Leave to amend pleadings should be freely given when justice requires. Ariz. R. Civ. P. 15(a)(1). A decision on a motion to amend the pleadings is within the discretion of the trial court, and we will not disturb that decision absent an abuse of that discretion. *Hall v. Romero*, 141 Ariz. 120, 124, 685 P.2d 757, 761 (App. 1984). The court does not abuse its discretion in denying a motion to amend if the court finds undue delay in the request, bad faith, undue prejudice to the opposing party, or futility in the amendment. *Bishop v. State*, 172 Ariz. 472, 474-75, 837 P.2d 1207, 1209-10 (App. 1992).

¶124 Gleason's proposed amendment sought to remove the heading of "Vulnerable Adult Violation - A.R.S. § 46-456," and to replace a paragraph seeking treble damages under that statute with a paragraph asserting entitlement to damages resulting from the appellees' conduct dealing with community property interests, particularly the insurance proceeds. Gleason did not seek to amend allegations that the defendants were in a position of trust and confidence with Marlene and that they took control

of Marlene's property when she was incapacitated and vulnerable and thereby deprived Gleason of his community property rights.

¶125 We find the amendment unclear about what claim Gleason was asserting. On appeal, he explains that the claim did not hinge on Marlene's condition when the beneficiary was changed, but simply on the fact that the beneficiary of the life insurance was changed so that all of the insurance went to Marlene's children in violation of Gleason's community property rights, and that he did not consent to the change.

¶126 On the basis of this explanation, we conclude that Gleason's amendment was an attempt to assert a claim in accord with *Gaethje*. Because we have already concluded that Gleason cannot succeed on such a claim, the amendment would have been futile. The superior court therefore did not abuse its discretion in denying the motion to amend.

IV. Attorneys' Fees and Costs

¶127 Ring seeks an award of attorneys' fees pursuant to A.R.S. § 46-455(H) and § 46-456(F). These statutes permit an award of attorneys' fees "after a determination of liability" under the Vulnerable Adult Act. But no court had determined such liability, and therefore attorneys' fees are not authorized.

¶128 Ring also seeks an award of fees pursuant to A.R.S. § 12-349. Section 12-349(A) requires this Court to assess reasonable attorneys' fees and expenses against an attorney or

party if the attorney or party brings or defends a claim without substantial justification, brings or defends a claim solely or primarily for delay or harassment, unreasonably expands or delays the proceeding, or engages in abusive discovery. Ring argues that Gleason has engaged in multiple unsuccessful actions and must take responsibility for his conduct. Ring's arguments are based on Gleason's prior actions, however, and Ring does not present any argument to which A.R.S. § 12-349 applies in the instant appeal. We therefore decline to award fees, but award Ring his costs as the prevailing party on appeal, subject to his compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶129 The superior court decision is affirmed.

_____/s/_____
RANDALL M. HOWE, Judge

CONCURRING:

_____/s/_____
PATRICIA K. NORRIS, Presiding Judge

_____/s/_____
ANDREW W. GOULD, Judge