

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

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 1/24/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

JOAN A. BUELL and CHUCK H. BUELL,) 1 CA-CV 12-0146
III,)
Plaintiffs/Appellants,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
BRIAN M. MUELLER, and MARISCAL,) Rule 28, Arizona Rules of
WEEKS, MCINTYRE & FRIEDLANDER,) Civil Appellate Procedure)
P.A., an Arizona professional)
Corporation,)
Defendants/Appellees.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV2011-055351

The Honorable Linda H. Miles, Judge

AFFIRMED

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G O U L D, Judge

¶1 Appellants, Joan Ann Buell ("Buell") and her husband, Charles Buell, (collectively "the Buells"), appeal the trial

court's judgment dismissing their legal malpractice claim against Appellees Brian M. Mueller and Mariscal, Weeks, McIntyre & Friedlander, P.A. (collectively "Mueller"). For the reasons discussed below, we affirm the trial court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 The Buells hired Mueller to represent them in a probate action involving Buell's mother, Sarah H. Johnston (Decedent). Decedent had three daughters: Buell, Virginia Keenan ("Keenan"), and Barbara Congello ("Congello"). In 1996, Decedent executed a will and revocable trust agreement (the "1996 Will"), leaving 40% of her estate to Buell, 40% to Keenan, and 20% to Congello's two sons.

¶3 In 2001, Decedent was diagnosed with dementia and in the following years, her condition deteriorated to the point that she became difficult to handle, was incontinent, confused, and neglected her hygiene. In 2004, Decedent went to live with Keenan, who was granted a temporary guardianship. That same year Decedent spent time in an in-patient geriatric psychiatric facility to treat her hallucinations and agitation. While Decedent was in the psychiatric facility, she was diagnosed with progressive degenerative dementia with psychiatric complications.

¶4 After Decedent left the psychiatric facility, she went to live with Buell in Arizona. Months later, Decedent learned she would inherit \$100,000 from her sister. Thereafter, Buell

retained an estate planning attorney to draft a new will (the "2004 Will"). The 2004 Will changed the 1996 Will by removing Keenan as a personal representative and naming Buell as the sole personal representative, and also by naming Buell as Decedent's sole heir.¹ In addition to the changes in the 2004 Will, Decedent also granted Buell a power of attorney over her assets.

¶5 The 2004 Will was executed on September 27, 2004, and in October 2004, Buell opened a joint checking account in her name and Decedent's name. Buell deposited the \$100,000 check from Decedent's sister in the account, as well as additional monies (\$316,669.62) of Decedent. Buell believed that by depositing Decedent's funds into the joint account, she became a joint owner of the funds.

¶6 In 2006, Decedent passed away. Keenan subsequently filed a probate action² against Buell and her husband, alleging causes of action for conversion, undue influence, lack of testamentary capacity, abuse of power of attorney pursuant to Arizona Revised Statutes ("A.R.S.") § 14-5506, and breach of duty to a vulnerable adult pursuant to A.R.S. § 46-456. The Buells retained Mueller to defend them in the probate case.

¹ The 2004 Will provided that Keenan and Congello would each receive only \$1,000 from Decedent's estate.

² Maricopa County Cause No. PB 2007-001018, *Virginia E. Keenan v. Joan Ann Buell and Charles H. Buell, III* (hereinafter, the "probate case.")

¶7 The probate case went to trial on November 25, 2008. At the end of a five day trial, the jury returned a verdict in favor of Keenan on her conversion claim, awarding her \$253,693.20 in damages.³ The damage award was based on Buell's conversion of Keenan's 40% interest in Decedent's estate, as well as Buell's conversion of Congello's sons' 20% interest in the estate.

¶8 With respect to Keenan's power of attorney and vulnerable adult claims, the court ordered that Buell forfeit her own 40% interest in Decedent's estate. Thus, the total judgment consisting of conversion damages and equitable relief was \$416,669.62, or the total value of Decedent's estate.

¶9 Following the verdict, the Buells replaced Mueller with new counsel. Through new counsel, the Buells moved for a new trial, arguing that because Keenan submitted a conversion claim to the jury and reduced that claim to a judgment, Keenan effectively elected damages as her remedy. As a result, the Buells asserted Keenan should have been precluded from obtaining any equitable relief based on her power of attorney and vulnerable adult claims.

¶10 The trial court denied the Buells' motion for new trial. The trial court determined the Buells had waived the

³ The jury was also seated as an advisory jury with respect to Keenan's claims challenging the validity of Buell's power of attorney (A.R.S. § 14-5506) and Buell's breach of fiduciary duty to Decedent as a vulnerable adult (A.R.S. § 46-456).

election of remedies defense because they did not raise it until after the trial. On appeal, we affirmed the trial court's ruling and held the Buells waived the election of remedies defense. *In re Estate of Johnston, Keenan v. Buell*, 2010 WL 2927438, No. 1 CA-CV 09-0447, *7, ¶ 33 (App. July 27, 2010).

¶11 In August 2011, the Buells filed a complaint alleging Mueller committed legal malpractice in the probate case. The complaint alleged Mueller committed malpractice by failing to: (1) timely allege the defense of election of remedies, (2) retain and offer expert testimony on the applicable standard of care of a prudent trustee, and (3) file a motion in limine and/or properly object to the admission of evidence at trial concerning Mr. Buell's settlement with Keenan. The Buells also alleged Mueller committed malpractice by stipulating that Decedent was a vulnerable adult.

¶12 Mueller filed a motion to dismiss the Buells' complaint. Mueller argued that even if his alleged errors/omissions were proven to be true, the Buells' complaint failed to sufficiently allege that his negligence affected the outcome of the probate case.

¶13 The court granted Mueller's motion to dismiss, and the Buells timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

STANDARD OF REVIEW

¶14 We review a court's grant of a motion to dismiss de novo. *Coleman v. City of Mesa*, 230 Ariz. 352, 356-57, ¶¶ 7-8, 284 P.3d 863, 866-67 (2012). We will "uphold dismissal only if the plaintiff[] would not be entitled to relief under any facts susceptible of proof in the statement of the claim." *Mohave Disposal, Inc. v. City of Kingman*, 186 Ariz. 343, 346, 922 P.2d 308, 311 (1996).

¶15 In determining if a complaint states a claim on which relief can be granted, courts must assume the truth of all well-pleaded factual allegations, and resolve all doubts and inferences in favor of the party opposing a motion to dismiss. *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, ¶ 7, 189 P.3d 344, 346 (2008). Dismissal of a complaint for failure to state a claim is appropriate if "as a matter of law . . . the plaintiff would not be entitled to relief under any interpretation of the facts." *Bunker's Glass Co. v. Pilkington PLC*, 202 Ariz. 481, 484-85, 47 P.3d 1119, 1122-23 (App. 2002) (citations omitted), *aff'd*, 206 Ariz. 9, 75 P.3d 99 (2003).

¶16 In addition to allegations of duty, breach, and damages, "[i]n a legal malpractice action, the plaintiff must prove that but for the attorney's negligence, he would have been successful in the prosecution or defense of the original suit." *Phillips v. Clancy*, 152 Ariz. 415, 419, 733 P.2d 300, 304 (App.

1986). See also *Hyatt Regency Phoenix Hotel Co. v. Winston & Strawn*, 184 Ariz. 120, 131-32, 907 P.2d 506, 517-18 (App. 1995) (finding jury could have reasonably concluded that, but for attorney's legal malpractice, client could have significantly reduced his liability in underlying litigation).

DISCUSSION⁴

I. Election of Remedies

¶17 The Buells argue Mueller committed legal malpractice by failing to timely assert election of remedies as an affirmative defense. The Buells contend the defense was waived due to Mueller's negligence and, as a consequence, they were found liable for both conversion damages and equitable forfeiture of

⁴ The Buells contend Mueller's motion to dismiss should have been converted into a motion for summary judgment because it referenced factual allegations/evidence not contained in the Buells' complaint. See Ariz. R. Civ. P. 12(b)(6) ("If, on a motion . . . to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment"). However, Rule 12(b)(6) does not require a motion to dismiss to be treated as a motion for summary judgment if the court does not rely on the proffered extraneous allegations/evidence. *Strategic Dev. & Constr., Inc. v. 7th & Roosevelt Partners, LLC*, 224 Ariz. 60, 63, ¶ 8, 226 P.3d 1046, 1049 (App. 2010) (citing *Anderson v. Angelone*, 86 F.3d 932, 934 (9th Cir. 1996)). Here, in reviewing the trial court's order granting Mueller's motion to dismiss, there is no indication that the trial court relied upon matters outside the Buells' complaint in reaching its decision. Indeed, for the reasons discussed below, the trial court was warranted in granting the motion to dismiss without considering Mueller's extraneous factual allegations/information. Thus, it was not error for the court to treat Mueller's motion as a motion to dismiss.

their interest in Decedent's estate. The Buells assert that if Mueller had timely alleged election of remedies as a defense, Keenan would have been compelled to choose between pursuing conversion damages and equitable forfeiture.

¶18 In response, Mueller asserts that his failure to allege election of remedies as a defense was of no consequence to the eventual outcome of the probate case. Mueller contends that even if he had alleged election of remedies as a defense, the defense would not have applied in the probate case because the remedies sought by Keenan were consistent and not subject to the election of remedies doctrine.

¶19 The doctrine of election of remedies applies to cases where a plaintiff pursues two inconsistent remedies that are based upon the same set of facts. *Phillips v. Adler*, 134 Ariz. 480, 482, 657 P.2d 893, 895 (App. 1982); *Aritex Land Co., Inc. v. Baker*, 14 Ariz. App. 266, 274, 482 P.2d 875, 883 (App. 1971). In such cases, an election of remedies is required to prevent the plaintiff from: (1) receiving a double recovery for the same wrong, and/or (2) obtaining remedies that are "inconsistent and repugnant." *Phillips*, 134 Ariz. at 482, 657 P.2d at 895; *Aritex*, 14 Ariz. App. at 274, 482 P.2d at 883. Thus, for example, a person claiming fraudulent inducement in the creation of a contract must elect between affirming the contract and suing for damages, or repudiating the contract and seeking equitable

rescission; a person cannot pursue the remedy of rescission by repudiating the contract while at the same time affirming the contract in an effort to obtain contractual damages. *Jennings v. Lee*, 105 Ariz. 167, 173, 461 P.2d 161, 167 (1969). See also *Hennesy Equip. Sales Co. v. Valley Nat'l Bank*, 25 Ariz. App. 285, 286, 543 P.2d 123, 124 (1975)("[a] person who has been fraudulently induced to enter into a contract may sue for damages under the contract or may sue to rescind that contract, but cannot do both-one act being an affirmance of the contract, the other being a disavowal of the contract . . . ").

¶20 However, the doctrine of election of remedies does not apply to those cases where a plaintiff pursues consistent remedies based on separate and distinct facts. *Aritex*, 14 Ariz. App. at 274, 482 P.2d at 883. In such cases, the underlying purposes of the doctrine - to bar double recovery and judgments based on fundamentally inconsistent remedies - does not exist. *Id.*

¶21 Here, even if Mueller had timely alleged election of remedies as a defense in the probate case, it would not have forced Keenan to make an election of remedies, because the remedies pursued by Keenan were consistent and arose from separate and distinct facts. The damage award was based on Keenan's conversion claim, which consisted of Buell depositing Keenan's funds (as well as the funds belonging to Congello's

sons) into a joint account and exercising ownership and control over those funds. See *Case Corp. v. Gehrke*, 208 Ariz. 140, 143, ¶ 11, 91 P.3d 362, 365 (App. 2004) (quoting *Sears Consumer Fin. Corp. v. Thunderbird Prods.*, 166 Ariz. 333, 335, 802 P.2d 1032, 1034 (App. 1990) (conversion is “an act of wrongful dominion or control over personal property in denial of or inconsistent with the rights of another.”)).

¶22 In contrast, the equitable forfeiture⁵ of Buell’s own interest in Decedent’s estate was a statutory remedy based on Keenan’s power of attorney and vulnerable adult claims. A.R.S. § 46-456(C); A.R.S. § 14-5506(A); *In Re Estate of Newman*, 219 Ariz. 260, 269-70, ¶ 32, 196 P.3d 863, 872-73 (App. 2008). The facts underlying these claims did not concern the conversion of Keenan’s assets, but rather Buell’s abuse of her position of trust with the Decedent, a mentally incapacitated, vulnerable adult. A.R.S. § 46-456 (A); A.R.S. §§ 14-5506(A), (B).

¶23 Consistent with this reasoning, the trial court in the probate case specified that the \$416,669.62 total judgment included the \$253,693.20 damages for conversion, comprised of Keenan’s 40% interest and Congello’s sons’ 20% interest in the

⁵ At the time of the trial and judgment in the probate case, forfeiture was mandatory for a violation of the vulnerable adult statute. *In Re Estate of Newman*, 219 Ariz. at 269-70, ¶ 32, 196 P.3d at 872-73. The statute has since been amended to leave forfeiture in the discretion of the court. A.R.S. § 46-456(C)(1) (2012).

Decedent's estate. The trial court also noted that the forfeiture of Buell's 40% interest in the estate was based on Keenan's power of attorney and vulnerable adult claims.

¶24 We also note that the vulnerable adult statute expressly allows for actual damages in addition to forfeiture of the wrongdoer's portion of the estate. A.R.S. §§ 46-456(C) and (D) (2009). Based on this statute, this court has upheld verdicts wherein defendants were ordered to forfeit their interest in the estate in addition to paying damages under the vulnerable adult statute. *In Re Estate of Newman*, 219 Ariz. 260, 196 P.3d 863 (App. 2008).

¶25 We conclude the trial court did not abuse its discretion in granting the motion to dismiss. The defense of election of remedies was not, as a matter of law, available to the Buells. As a result, even if Mueller had raised the defense in a timely manner, it would not have affected the outcome in the probate case.

II. Retention of Expert

¶26 The Buells broadly allege that Mueller committed legal malpractice by failing to retain an expert "to testify to the standard of conduct of a prudent trustee under the circumstances." However, the Buells do not allege that Mueller

made this purported error in bad faith,⁶ nor do they allege that they were required to present such expert testimony as a matter of law.⁷ Finally, absent from the Buells' complaint is any allegation that the outcome of the probate case would have been changed if Mueller had retained an expert. *Cullen v. Auto-Owner's Ins. Co.*, 218 Ariz. 417, 419-20, ¶¶ 6, 14, 184 P.3d 344, 346-47 (2007) (holding that even though Arizona assesses the "sufficiency of a claim" under a "notice pleading standard," a court may not "speculate about hypothetical facts that might entitle a plaintiff to relief.") (internal citations omitted).

III. Testimony Re Settlement

¶27 The Buells also allege that Mueller failed to file a motion in limine and failed to object under Arizona Rule of Evidence 408⁸ to preclude the admission of evidence that Mr.

⁶ See *Martin v. Burns*, 102 Ariz. 341, 343, 429 P.2d 660, 662 (1967) (citing *Hodges v. Carter*, 239 N.C. 517, 520, 80 S.E.2d 144, 146 (1954)) (an attorney "[w]ill not be held liable, while acting in good faith and in a belief that his conduct is for the benefit of his client, for a mere error of judgment"); *Talbot v. Schroeder*, 13 Ariz. App. 230, 231, 475 P.2d 520, 521 (1970); *Cecala v. Newman*, 532 F.Supp.2d 1118, 1139 (D. Ariz. 2007) ("under judgment error rule, malpractice liability will not attach for tactical decisions made in good faith in the course of preparing or trying a case").

⁷ Compare *Riedisser v. Nelson*, 111 Ariz. 542, 544, 534 P.2d 1052, 1054 (1975) (holding that expert testimony regarding the standard of care is necessary to prove that a physician is negligent).

⁸ Arizona Rule of Evidence 408 precludes the admission of settlement agreements and discussions. However, such

Buell had settled with Keenan prior to the probate case. The Buells do not allege how this omission caused them to suffer additional liability, or how, but for Mueller's omission, they would have been successful in the probate action. Instead, they merely assert the jury should not have heard this evidence.

¶28 Absent from the Buells' complaint is any allegation the trial court would have precluded the evidence if Mueller had filed a motion in limine or referenced Rule 408 in his objection. In fact, on appeal we held the trial court's decision to admit evidence of the settlement was proper to show Mr. Buell's bias and prejudice. *In re Estate of Johnston*, 2010 WL 2927438 at *3, ¶ 17. Moreover, even assuming the trial court erred in admitting the settlement evidence, the trial court's error is not attributable to Mueller and it does not constitute grounds for a malpractice claim.

IV. Stipulation Re Decedent's Status as a Vulnerable Adult

¶29 Finally, the Buells allege Mueller negligently stipulated at trial to the fact the Decedent was a vulnerable adult. We disagree. The Buells do not allege Mueller made this trial strategy decision in bad faith, or that evidence existed showing the stipulation was incorrect and/or unsupported by the evidence. Even if it was negligent for Mueller to enter the

evidence may be admissible to prove a witness's bias or prejudice. Ariz. R. Evid. 408(b).

stipulation, the Buells do not allege how this stipulation negatively affected the outcome in the probate case.

Conclusion

¶30 Accordingly, the trial court did not abuse its discretion in granting Mueller's Motion to Dismiss. We therefore affirm the trial court's order dismissing the Buells' complaint against Mueller with prejudice.

/S/

ANDREW W. GOULD, Judge

CONCURRING:

/S/

PATRICIA K. NORRIS, Presiding Judge

/S/

RANDALL M. HOWE, Judge