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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

R. DALE SCOTT and MARY JANE SCOTT, husband and wife; SCOTT HOSPITALITY, LLC, an Arizona limited liability company,
Plaintiffs/Appellants,

v.

RANDY NUSSBAUM and POLLY MORRIS husband and wife; GREGORY P. GILLIS and BETTY GILLIS, husband and wife; NUSSBAUM AND GILLIS P.C.; NUSSBAUM, GILLIS & DINNER, P.C.; JABURG & WILK, P.C., Arizona professional corporation, *Defendants/Appellees*.

No. 1 CA-CV 16-0583
FILED 4-3-2018

Appeal from the Superior Court in Maricopa County
No. CV2015-006155
The Honorable Arthur T. Anderson, Judge

AFFIRMED

COUNSEL

Treon & Aguirre, PLLC, Phoenix
By Richard T. Treon
Counsel for Plaintiffs/Appellants

Broening Oberg Woods & Wilson, PC, Phoenix
By Alicyn M. Freeman
Counsel for Defendants/Appellees Randy Nussbaum, Polly Morris, Gregory Gillis, Betty Gillis, Nussbaum & Gillis P.C., and Nussbaum, Gillis & Dinner, P.C.

Jaburg & Wilk, PC, Phoenix
By Roger L. Cohen, David N. Farren
Counsel for Defendant/Appellee Jaburg & Wilk, P.C.

MEMORANDUM DECISION

Judge Kenton D. Jones delivered the decision of the Court, in which Presiding Judge Randall M. Howe and Judge James B. Morse Jr. joined.

J O N E S, Judge:

¶1 Appellants (collectively, Scott) appeal the trial court's order granting summary judgment in favor of Appellees on Scott's claims for legal malpractice. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In August 2007, Scott sued Five Star Development, Inc., Five Star Development Resort Communities, L.L.C., and their principals (collectively, Five Star) to recover a real estate commission related to Scott's actions in assisting Five Star with the purchase and development of real property in Maricopa County in 2004. The trial court in *Scott I* granted summary judgment in favor of Five Star after finding Scott was not entitled to payment because he did not have a written agreement for brokerage services and did not have a valid real estate license during the relevant times. This Court affirmed that analysis on appeal in February 2011. *See Scott v. Five Star Dev., Inc.*, 1 CA-CV 10-0139, 2011 WL 540292, at *7, ¶ 40 (Feb. 15, 2011) (mem. decision).

¶3 Thereafter, Scott filed a second action against Five Star. In *Scott II*, Scott sought tort damages for fraud, intentional interference with a prospective economic advantage, and intentional infliction of emotional distress, all on the theory that Five Star wrongfully employed Scott's services and prevented Scott from working with other developers without any intention to compensate him. In May 2014, the trial court in *Scott II*

granted summary judgment in favor of Five Star on multiple grounds, finding that: (1) Scott was precluded from bringing tort claims that arose from the same transaction that formed the basis of *Scott I*, (2) Scott failed to bring his tort claims within the applicable statutes of limitations, and (3) Scott was unable to prove his damages resulted from Five Star's conduct, rather than his own failure to procure a written contract and maintain his real estate license. Scott did not appeal the *Scott II* judgment.

¶4 In May 2015, Scott brought the present action against Appellees, his legal counsel in *Scott I* and *II*, alleging they committed malpractice by failing to timely identify and plead the tort claims raised in *Scott II*.[1] Appellees immediately moved for summary judgment, arguing, *inter alia*, that the *Scott II* judgment, concluding that Scott was unable to prove causation on his tort claims, proved that he was not damaged by attorney negligence. The trial court granted Appellees' motions and entered final judgment in their favor. Scott timely appealed, and we have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) §§ 12-120.21(A)(1)[2] and -2101(A)(1).

DISCUSSION

¶5 Scott argues the trial court erred in granting Appellees' motion for summary judgment. Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a); *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, 115, ¶ 14 (App. 2008). When reviewing a grant of summary judgment, we view the facts in the light most favorable to the non-moving party. *Campbell v. SZL Props., Ltd.*, 204 Ariz. 221, 223, ¶ 8 (App. 2003) (quoting *Hartford Accident & Indem. Co. v. Fed. Ins.*, 172 Ariz. 104, 107 (App. 1992)). We then determine *de novo* whether a genuine issue of material fact exists and whether the court correctly applied the substantive law. *Id.* (citing *Gonzalez v. Satrustegui*, 178 Ariz. 92, 97 (App. 1993)).

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1 Scott also alleged Appellees were negligent in pursuing a legal theory in *Scott I* that was "fatally flawed from the outset." Scott does not argue this ground for relief on appeal, and it is deemed waived. *See Sobol v. Marsh*, 212 Ariz. 301, 303, ¶ 7 (App. 2006) (citing *Ruth v. Indus. Comm'n*, 107 Ariz. 572, 574 (1971)).

2 Absent material changes from the relevant date, we cite a statute's current version.

¶6 Appellees urge us to affirm the trial court's application of collateral estoppel to bar Scott's negligence claim against them. We hesitate to do so where the estoppel traces back to a judgment against Scott purportedly occasioned by Appellees' misconduct. To adopt Appellees' position would sanction, as a general rule of law, the ability of an attorney to malpractice himself out of a malpractice case. We need not decide the issue, however, because we may affirm summary judgment on any ground argued by the parties and supported by the record. *KB Home Tucson, Inc. v. Charter Oak Fire Ins.*, 236 Ariz. 326, 329, ¶ 14 (App. 2014) (citing *Mutschler v. City of Phx.*, 212 Ariz. 160, 162, ¶ 8 (App. 2006)). Here, even accepting Scott's facts as true, his malpractice claim fails as a matter of law.

¶7 To prevail on a claim for legal malpractice, a plaintiff must prove duty, breach, causation, and damages. *See Glaze v. Larsen*, 207 Ariz. 26, 29, ¶ 12 (2004) (citing *Phillips v. Clancy*, 152 Ariz. 415, 418 (App. 1986)). A plaintiff is entitled to relief only if he can prove that "but for the attorney's negligence, he would have been successful in the prosecution or defense of the original suit." *Phillips*, 152 Ariz. at 418; *see also Amfac Distrib. Corp. v. Miller*, 138 Ariz. 152, 154 (1983) ("[E]ven where a plaintiff has discovered actual negligence, if he has sustained no damages, he has no cause of action."). Thus, the plaintiff must prove "a 'case within the case.'" *Phillips*, 152 Ariz. at 418 (quoting *Frey v. Stoneman*, 150 Ariz. 106, 111 (1986)).

¶8 Within his complaint, Scott alleges Appellees were negligent in failing to timely file claims of fraud and intentional interference with prospective economic advantage against Five Star, depriving him of his opportunity to recover the resulting losses.[3] To prevail on this attorney malpractice claim, Scott must prove he would have been successful on those claims had they been timely filed. *See id.* Scott cannot do so here.

I. Scott's Fraud Claim Fails as a Matter of Law.

¶9 Fraud requires proof of nine elements:

> (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted upon by and in the manner reasonably contemplated; (6) the hearer's ignorance

[3] Although *Scott II* included a claim for intentional infliction of emotional distress, *see supra* ¶ 3, he does not allege any malpractice associated with that cause of action.

> of its falsity; (7) his reliance on the truth; (8) his right to rely thereon; and (9) his consequent and proximate injury.

Lininger v. Sonenblick, 23 Ariz. App. 266, 267 (1975) (citations omitted). But a party has no right to rely upon oral representations that are unenforeceable because they are required to be memorialized in writing. *Id.* at 268-69.

¶10 For example, in *Lininger,* the plaintiff-buyer brought a fraud claim against the defendant-seller, alleging the seller had agreed to a stock sale but later refused to reduce the understanding to writing. *Id.* at 267. This Court found the sale was governed by the statute of frauds, *see* A.R.S. § 44-101, and unenforceable if not memorialized in writing. *Id.* at 268. Thus, "the alleged agreement was no agreement at all until it was placed in written form," and the buyer "had no right to rely on representations made by [the seller] as to the terms of the agreement until there was, in fact, an agreement." *Id.* The Court concluded that, "without the right to rely, [the buyers] were unable to maintain an action for fraud." *Id.* at 269. The Court acknowledged that its holding potentially benefited the deceitful defendant, who "at the time of the making of the oral contract may have had no intention of performing it" but determined the solution was nonetheless "best calculated to uphold the theory upon which the statute of frauds is founded." *Id.* (quoting *Canell v. Arcola Hous. Corp.*, 65 So. 2d 849, 851 (Fla. 1953)); *see also McMurran v. Duncan*, 17 Ariz. 552, 555-56 (1916) (concluding that forcing payment of an oral brokerage contract "would render nugatory the statute [of frauds]" because "[t]he very nature of a broker's or agent's contract is such that in no instance could suit be maintained until the services had been rendered").

¶11 The same reasoning applies here. Scott alleges Five Star fraudulently induced him to maintain the relationship by its false promise to pay. But "an agreement authorizing or employing an agent or broker to purchase or sell real property, or mines, for compensation or a commission" is unenforceable if not memorialized "in writing and signed by the party to be charged." A.R.S. § 44-101(7); *see also Butterfield v. MacKenzie*, 37 Ariz. 227, 229 (1930) (strictly enforcing the statute of frauds' requirement that brokerage contracts be memorialized in writing). Scott admits he did not have a written contract with Five Star. In the absence of a written agreement authorizing Scott to work on Five Star's behalf, Scott had no right to rely upon representations made by Five Star as to the agreement's supposed terms. Accordingly, Scott's fraud claim fails as a matter of law, and therefore, he cannot win the "case within a case" as required by *Phillips*.

II. Scott's Intentional Interference with Prospective Economic Advantage Claim Fails as a Matter of Law.

¶12 A person is liable for intentional interference with a prospective contractual relationship if he "intentionally and improperly interferes with another's prospective contractual relation . . . whether the interference consists of (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation." Restatement (Second) of Torts § 766B (1979) (cited with approval by *Bar J Bar Cattle Co. v. Pace*, 158 Ariz. 481, 486 (App. 1988)). "If the interferer is to be held liable for committing a wrong, his liability must be based on more than the act of interference alone[;] [t]hus, there is ordinarily no liability absent a showing that [the] defendant's actions were improper as to motive or means." *Safeway Ins. v. Guerrero*, 210 Ariz. 5, 11, ¶ 20 (2005) (discussing intentional interference with an existing contract) (quotation omitted).

¶13 Scott does not suggest Five Star interfered with third persons as described in subsection (a). Therefore, we consider whether Scott created a genuine issue of material fact as to whether Five Star wrongfully prevented Scott from acquiring or continuing prospective relations with third persons under subsection (b). We conclude he does not.

¶14 Within his intentional interference with prospective economic advantage claim, Scott alleges that had Five Star not misrepresented its intention to pay for his services, he would have pursued other qualified buyers to complete the transaction — buyers whom he asserts would have paid him a commission. Although fraud is one of the wrongful actions that may give rise to a claim for intentional interference with prospective economic advantage, *see* Restatement (Second) Torts § 768 cmt. e (1979), we have already determined that Scott's fraud claim fails for lack of reasonable reliance. *See supra* Part I. Accordingly, Five Star's actions were not "improper," and Scott's intentional interference claim likewise fails as a matter of law.[4] *See Neonatology Assocs., Ltd. v. Phx. Perinatal Assocs. Inc.*, 216 Ariz. 185, 187, ¶ 9 (App. 2007) (resolving the issue of the propriety of an action as a matter of law where there is no reasonable inference to the

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[4] Because we conclude summary judgment was appropriate on the evidence, we need not and do not address Jaburg & Wilk, P.C.'s argument that we should affirm summary judgment in its favor because it is not vicariously liable for the other Appellees' actions taken after they dissociated from the firm.

contrary in the record) (citing *Woerth v. City of Flagstaff*, 167 Ariz. 412, 419 (App. 1990)).

CONCLUSION

¶15 Because Scott cannot prevail, as a matter of law, on either his claim for fraud or his claim for intentional interference with prospective economic advantage, he cannot prove the "case within a case" required by *Phillips*, and his legal malpractice action fails. The trial court's order granting summary judgment in favor of Appellees is affirmed. As the prevailing parties, Appellees are awarded their costs incurred on appeal upon compliance with ARCAP 21(b). *See* A.R.S. § 12-341.

AMY M. WOOD • Clerk of the Court
FILED: AA