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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  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

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In the Matter of the Estate of:

JOYCE CLARA LOESCH, *Deceased*,

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JOYCE C. LOESCH, et al., *Plaintiffs/Appellees*,

*v.*

JEFFREY M. ROSEN and TRACY C. ROSEN, husband and wife,  
*Defendants/Appellants.*

No. 1 CA-CV 17-0142  
FILED 1-11-2018

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Appeal from the Superior Court in Yavapai County  
No. P1300CV201101130  
The Honorable Joseph C. Butner, Judge *Pro Tempore*

**VACATED AND REMANDED**

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COUNSEL

Berk Law Group, P.C., Scottsdale  
By Kent S. Berk, Daphne J. Reaume  
*Counsel for Defendants/Appellants*

Law Office of L. Richard Mabery, P.C., Prescott  
By L. Richard Mabery  
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By Hans Clugston  
*Co-Counsel for Plaintiff/Appellee*

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**MEMORANDUM DECISION**

Chief Judge Samuel A. Thumma delivered the decision of the Court, in which Presiding Judge Paul J. McMurdie and Judge Peter B. Swann joined.

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**T H U M M A**, Chief Judge:

¶1 Defendants Jeffrey and Tracy Rosen (Rosens) appeal from the entry of partial summary judgment in favor of plaintiff Bradley M. Stromberg. Because the record does not show that plaintiff is entitled to summary judgment concerning whether Joyce Loesch was a vulnerable adult from and after July 2007, the entry of partial summary judgment is vacated in its entirety and this matter is remanded for further proceedings consistent with this decision.

**FACTS<sup>1</sup> AND PROCEDURAL HISTORY**

¶2 In April 2007, Tracy Rosen’s mother Joyce Loesch created the Joyce Clara Loesch Living Trust. At that time, the Trust held approximately \$500,000 in assets. Beginning in August 2007, the Rosens are alleged to have wrongfully caused Trust assets to be transferred to them and their children. In 2011, Loesch individually and as Trustee, filed this action against the Rosens. The September 2011 verified amended complaint alleges Loesch

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<sup>1</sup> This court views “the evidence and reasonable inferences in the light most favorable to” the Rosens, who opposed the motion for summary judgment. *Andrews v. Blake*, 205 Ariz. 236, 240 ¶ 12 (2003).

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was a vulnerable adult, *see* Ariz. Rev. Stat. (A.R.S.) section 46-451(A)(9) (2017),<sup>2</sup> and asserts other statutory and common law claims.

¶3 Loesch died in March 2013 and Bradley M. Stromberg, as successor Trustee and Loesch’s Personal Representative, was substituted as plaintiff. After disclosure and discovery, in September 2016, plaintiff moved for partial summary judgment. As relevant here, plaintiff argued that, based on the undisputed facts and as a matter of law, Loesch was a vulnerable adult “at all times after” moving from Washington to Prescott in July 2007.<sup>3</sup> After briefing and oral argument, the superior court granted plaintiff’s motion for partial summary judgment. After the entry of a final appealable partial judgment, *see* Ariz. R. Civ. P. 54(b), the Rosens filed a timely appeal. This court has jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21 (A)(1) and -2101(A)(1).

### DISCUSSION

¶4 Summary judgment is appropriate “if the moving party shows that 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). This court reviews the entry of summary judgment *de novo*. *Andrews*, 205 Ariz. at 240 ¶ 12. The dispositive issue is whether plaintiff, in seeking partial summary judgment, demonstrated that there was no dispute as to any material fact and that he was entitled to judgment as a matter of law on the issue of whether Loesch was a vulnerable adult from and after July 2007.

¶5 The facts relied upon by plaintiff in pressing summary judgment were limited to a September 5, 2007 email sent from Sue McElree, Loesch’s friend, to the Rosens, and a few pages of McElree’s deposition. Plaintiff claimed the email informed the Rosens that Loesch (1) “was having memory problems and difficulty accomplishing daily tasks in 2007;” (2) “needed to be in senior housing because of concerns about . . . Loesch living alone, declining memory, and hearing loss” and that McElree (3) “did not want . . . Loesch in a dementia center, *per se*, but in senior living.” In fact,

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<sup>2</sup> Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

<sup>3</sup> Plaintiff’s motion for partial summary judgment raised residual issues, and the superior court granted partial summary judgment on many, but not all, of those issues. Because on this record, summary judgment was not proper on the vulnerable adult issue, the ruling on those residual rulings also is vacated and the merits of those issues need not be addressed here.

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McElree's email stated that (1) Loesch's "memory is not good," adding that she thought Loesch would be "get[ting] better here in Arizona and away from the stress in Washington, but I don't believe she is better;" and (2) Loesch "really needs to be closer to [the Rosens] where you can look in on her once in a while . . . or she needs to be in a senior housing development where there is supervision." During her deposition, McElree characterized some of Loesch's limitations as "[l]ack of experience," that she was concerned about Loesch "living alone," adding that "she cared for herself physically, but she also had a hearing loss" and that McElree did not learn Loesch was diagnosed with Alzheimer's until 2010.

¶6 "Vulnerable adult' means an individual who is eighteen years of age or older and who is unable to protect himself from abuse, neglect or exploitation by others because of a physical or mental impairment. Vulnerable adult includes an incapacitated person as defined in § 14-5101." A.R.S. § 46-451(A)(9). "Incapacitated person' means any person who is impaired by reason of mental illness, mental deficiency, mental disorder, physical illness or disability, chronic use of drugs, chronic intoxication or other cause, except minority, to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person." A.R.S. § 14-5101(3). A vulnerable adult finding is based on a showing that the individual's impairment is "to such an extent that [the individual] was unable to protect herself if targeted for abuse, neglect or exploitation." *Davis v. Zlatos*, 211 Ariz. 519, 527 ¶ 31 (App. 2005); accord *In re Estate of Newman*, 219 Ariz. 260, 270 ¶ 33 (App. 2008) (affirming post-trial vulnerable adult finding where the evidence showed the individual was described, by medical expert, "as someone who couldn't be left alone, and that she needed to have twenty-four hour care"). The issue of vulnerability, including when an individual may have become a vulnerable adult, is an extremely fact-intensive, case-by-case inquiry.

¶7 On this record, plaintiff has not shown as an undisputed fact and matter of law that, "at all times after" moving from Washington to Prescott in July 2007, Loesch was a vulnerable adult under A.R.S. § 46-451(A)(9). To be sure, McElree was concerned about her friend, and wanted to make sure she was safe and had the services she needed. But this email and deposition testimony does not show, as an undisputed fact and matter of law, that as of September 2007, Loesch was "unable to protect [herself] from abuse, neglect or exploitation by others because of a physical or mental impairment." A.R.S. § 46-415(A)(9). Moreover, even if this evidence could be read to show vulnerability as a matter of law as of September 2007, it does not address Loesch's condition in July or August 2007, which was required for the motion for partial summary judgment to be granted.

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Accordingly, the grant of partial summary judgment cannot stand. *See Comerica Bank v. Mahmoodi*, 224 Ariz. 289, 292 ¶ 19 (App. 2010) (“Viewing the evidence in the light most favorable to the nonmoving party, the motion [for summary judgment] must be denied if a reasonable jury could conclude that the plaintiff had not established every element of the claim with evidence sufficient to satisfy the applicable burden of proof.”).

¶8 A variety of procedural oddities in this case confound the analysis but do not alter the result.

¶9 First, the Rosens did not dispute plaintiff’s factual statements in opposing the partial motion for summary judgment. This meant that those facts were deemed admitted for purposes of summary judgment, but did not mean that plaintiff was entitled to have the motion granted. *See Peacock v. Samaritan Health Serv.*, 159 Ariz. 123, 125 (App. 1988). As set forth above, plaintiff did not make the required showing for summary judgment on vulnerability to be granted.

¶10 Second, plaintiff argues that the Rosens did not include, in the appellate record, “the complete record of the five (5) days of testimony and evidence presented.” Plaintiff bases this argument on the consolidation of civil and probate cases regarding Loesch as well as filings and transcripts from both before and after briefing on the motion for partial summary judgment. Nowhere, however, did plaintiff rely on this material in moving for partial summary judgment. Nor has plaintiff shown it was the obligation of the superior court, or this court on appeal, to sua sponte perambulate through the record to divine factual support for the motion. *See White v. Lewis*, 167 Ariz. 76, 80 (App. 1990) (citation omitted).

¶11 Third, plaintiff argues the Rosens are precluded from claiming Loesch was not vulnerable from and after July 2007 based on the superior court’s ruling, after an evidentiary hearing in August 2016, that Loesch did not lack testamentary capacity to execute a will in 2011. This argument fails for a variety of reasons. The legal standards for capacity and vulnerability are not the same. *See Davis*, 211 Ariz. at 525, ¶ 23. In addition, Loesch’s condition in 2011 does not resolve whether she was a vulnerable adult as a matter of law in and after July 2007. Finally, plaintiff did not rely on this finding in moving for partial summary judgment.

¶12 Fourth, plaintiff correctly states that the Rosens did not provide a transcript of the hearing from oral argument on the partial motion

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for summary judgment.<sup>4</sup> See ARCAP 11(c). But that hearing involved counsel's argument, not the presentation of evidence, and given this court's de novo review, plaintiff has not shown how the lack of a transcript would alter the result. Cf. *Hawkins v. State*, 183 Ariz. 100, 103 (App. 1995) (noting appellate court will affirm ruling on summary judgment if correct for any reason).

¶13 Finally, plaintiff argues that, in a vulnerable adult case, the superior court "is the trier of fact" and that "[a]s fact finder, the trial court's findings, conclusions and judgments are given deference." This is generally true in post-trial appeals. But there has been no vulnerability trial here. The issue presented to the superior court was whether, as a matter of law on purportedly undisputed facts, Loesch was a vulnerable adult from and after July 2007. Resolving that issue did not involve the court sitting as a finder of fact at trial, see Ariz. R. Civ. P. 56, and does not involve deference to the ruling, *Andrews*, 205 Ariz. at 240 ¶ 12.

¶14 For these reasons, the grant of partial summary judgment cannot stand. Plaintiff has requested professional fees, expenses, attorneys' fees and costs. See A.R.S. §§ 12-349, 14-1105, and 14-11004(B). In the court's discretion, that request is denied. The Rosens are awarded their taxable costs on appeal contingent on their compliance with Arizona Rule of Civil Appellate Procedure 21.

### CONCLUSION

¶15 The grant of partial summary judgment is vacated in its entirety and this matter is remanded to the superior court for further proceedings consistent with this decision.



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

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<sup>4</sup> Although the hearing where oral argument was presented on the partial motion for summary judgment began at 2:11 p.m., the transcript provided does not start until 3:02 p.m., after oral argument and the court's ruling on the summary judgment issue.