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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 12/28/2010
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In the Matter of the Estate of:) 1 CA-CV 09-0178
)
JAY LIONEL BLUE,) DEPARTMENT D
)
Deceased.) **MEMORANDUM DECISION**
)

ROBERT BLUE, as Personal) (Not for Publication -
Representative of the ESTATE OF) Rule 28, Arizona Rules of
JAY LIONEL BLUE,) Civil Appellate Procedure)
)
Petitioner/Appellant,)
)
v.)
)
JO DEE WRIGHT, as former Special)
Administrator of the Estate of)
Jay Lionel Blue; and AMERICAN)
CONTRACTORS INDEMNITY COMPANY,)
)
Respondents/Appellees.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. PB 2003-004652

The Honorable Richard L. Nothwehr, Commissioner

AFFIRMED IN PART; REVERSED IN PART

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N O R R I S, Judge

¶1 Robert Blue ("Blue") appeals from probate court orders granting attorneys' fees to Jo Dee Wright and exonerating a bond issued by American Contractors Indemnity Company ("ACIC"). Blue argues the probate court, first, should not have awarded fees to Wright because it had previously rejected her fee request in a final judgment which we affirmed in a prior appeal and, second, should not have exonerated ACIC's bond because of the pendency of his own request for fees. Because we agree with Blue's first argument, but not with his second, we reverse the fee award to Wright but affirm exoneration of the bond.

FACTS AND PROCEDURAL BACKGROUND

¶2 In November 2003, the probate court appointed Wright as the special administrator of the estate of Jay Lionel Blue ("Decedent"), and she posted a bond in the amount of \$83,500, provided by ACIC. On January 29, 2004, the probate court appointed Blue, Decedent's brother, as the estate's personal representative, and thus terminated Wright's appointment as special administrator. Arizona Revised Statutes ("A.R.S.")

section 14-3618 (2005) (appointment of special administrator terminates pursuant to the order of appointment or on the appointment of a general personal representative).

¶3 In January 2005, Blue filed a petition with the probate court ("surcharge proceeding") and asserted Wright had improperly disbursed "substantial sums of money" from the estate during her tenure as special administrator ("wrongful disbursement claim"). After a three-day trial, the probate court issued a detailed minute entry with findings of fact and conclusions of law, and determined Wright owed the estate \$26,975 plus taxable costs. The probate court expressly denied Wright's request for attorneys' fees in defending against the wrongful disbursement claim, which, as reflected in the parties' joint pretrial statement,¹ she had sought under A.R.S. § 14-3720 (2005).² Although the probate court also did not award Blue any fees because he had failed to request any, it did note it "may

¹Specifically, the parties agreed the contested material issues of fact or law included: "Did [Wright] defend this matter in good faith as defined in A.R.S. § 14-3720?" and "Which party, if any, is entitled to attorney's fees?"

²Section 14-3720 provides: "If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith, whether successful or not he is entitled to receive from the estate his necessary expenses and disbursements including reasonable attorneys' fees incurred." Blue does not challenge the applicability of the statute to Wright as special administrator as opposed to personal representative. Accordingly, we decline to address that issue.

be appropriate" for him to seek fees under A.R.S. § 14-3720. Pursuant to its minute entry, the probate court then entered a final judgment.

¶14 Wright appealed from the judgment, but only challenged the probate court's ruling requiring her to repay the estate a portion of the \$26,975. Notably, she did not appeal the probate court's denial of her fee request.

¶15 During the pendency of the appeal, the probate proceeding was reassigned to a different judicial officer, and Wright applied for an award of attorneys' fees under A.R.S. § 14-3720 for her defense against the wrongful disbursement claim. The judicial officer refused to rule on the petition because Wright's appeal was pending, but stated Wright could renew her fee request at the completion of the pending appeal. On June 3, 2008, we affirmed the probate court's judgment. See *Blue v. Wright*, 1 CA-CV 07-0728, 2008 WL 2315681 (Ariz. App. June 3, 2008) (mem. decision).

¶16 Subsequently, Wright and Blue renewed their fee requests, and ACIC satisfied the judgment and requested exoneration of the bond. The judicial officer granted Wright \$19,367 in attorneys' fees, denied Blue's request for fees, and exonerated the bond, rejecting Blue's request that it not do so because of the competing fee requests. Blue appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(J) (2003).

DISCUSSION³

I. Wright's Fees

¶7 On appeal, Blue argues the doctrine of res judicata prevented the judicial officer from awarding attorneys' fees to Wright because the probate court had previously denied fees to Wright in its final judgment. Although res judicata is not applicable to this case as a matter of law,⁴ nevertheless, the judicial officer should not have granted Wright's fee request.

¶8 The doctrine of res judicata provides that a final judgment is conclusive for the parties to that judgment on every issue decided and every issue that could have been decided in the prior action, thereby barring any future lawsuit on those issues. *Pettit v. Pettit*, 218 Ariz. 529, 531, ¶ 4, 189 P.3d 1102, 1104 (App. 2008); *Pima Cnty. Assessor v. Ariz. State Bd. of Equalization*, 195 Ariz. 329, 335, ¶ 20, 987 P.2d 815, 821 (App. 1999). Res judicata is not the appropriate doctrine to apply in this case because there is only one action. *See Kadish*

³As a preliminary matter, Wright filed an untimely answering brief. Blue, however, did not move to strike Wright's untimely brief. *See Berryhill v. Moore*, 180 Ariz. 77, 82 n.2, 881 P.2d 1182, 1187 n.2 (App. 1994). Nevertheless, Wright did not make any arguments in her brief and instead joined ACIC's timely filed answering brief. *See* ARCAP 13(f). Accordingly, we consider ACIC's arguments on appeal on behalf of both ACIC and Wright.

⁴Whether res judicata applies in a particular case is a question of law we review de novo. *Phx. Newspapers, Inc. v. Dep't of Corr.*, 188 Ariz. 237, 240, 934 P.2d 801, 804 (App. 1997).

v. Ariz. State Land Dep't, 177 Ariz. 322, 327, 868 P.2d 335, 340 (App. 1993) (res judicata inapplicable to denial of fee request because the request was made in the same action, not a prior action).

¶9 Although res judicata is inapplicable here, the judicial officer should not have awarded Wright fees. Under the "law of the case" doctrine and pursuant to policies against horizontal and piecemeal appeals, the fee award was improper.⁵

¶10 The "law of the case" doctrine "describes the judicial policy of refusing to reopen questions previously decided in the same case by the same court or a higher appellate court." *Powell-Cerkoney v. TCR-Mont. Ranch Joint Venture, II*, 176 Ariz. 275, 278, 860 P.2d 1328, 1331 (App. 1993). Consistent with the purpose of the "law of the case" doctrine, is the policy against piecemeal appeals. Under that policy, any issues not raised on appeal are considered fully and finally determined and implicitly affirmed. *Bogard v. Cannon & Wendt Elec. Co.*, 221 Ariz. 325, 332, ¶ 24, 212 P.3d 17, 24 (App. 2009); accord *Ariz.-Parral Mining Co. v. Forbes*, 16 Ariz. 395, 401-02, 146 P. 504,

⁵ACIC and Wright argue Blue waived his res judicata argument by failing to raise it in the probate court. Because this doctrine is inapplicable, we need not address their waiver argument. We note, however, that Blue argued Wright's renewed request for fees constituted an impermissible horizontal appeal. See *Montgomery Ward & Co. v. Indus. Comm'n*, 27 Ariz. App. 765, 770, 558 P.2d 960, 965 (App. 1976) (addressing the law of the case despite petitioner's failure to expressly or directly raise the issue).

506 (1915). Thus, issues that could be raised in one appeal cannot be presented or considered in a subsequent appeal. *Bogard*, 221 Ariz. at 333, ¶ 24, 212 P.3d at 25 (citing *Paramount Pictures, Inc. v. Holmes*, 58 Ariz. 1, 4, 117 P.2d 90, 91 (1941)). Similarly, we disfavor horizontal appeals. *Powell-Cerkoney*, 176 Ariz. at 279, 860 P.2d at 1332. In a horizontal appeal, a party "requests a second trial judge to reconsider the decision of the first trial judge in the same matter, even though no new circumstances have arisen in the interim and no other reason justifies reconsideration." *Id.* at 278-79, 860 P.2d at 1331-32.

¶11 Here, as set out in the parties' joint pretrial statement, Wright requested attorneys' fees in the surcharge proceeding under A.R.S. § 14-3720. See *Carlton v. Emhardt*, 138 Ariz. 353, 355, 674 P.2d 907, 909 (App. 1983) (a joint pretrial statement "controls the subsequent course of the litigation"). And, in her closing argument at the conclusion of trial, Wright asserted she had acted in good faith and reiterated her request for a fee award. Thus, contrary to Wright's and ACIC's argument, the record demonstrates the probate court considered and denied Wright's request for attorneys' fees under A.R.S. § 14-3720. See *Lansford v. Harris*, 174 Ariz. 413, 419, 850 P.2d 126, 132 (App. 1992) (an issue is litigated when it is "raised

by the pleadings or otherwise, is submitted for determination, and is determined by a court of competent jurisdiction").

¶12 Wright did not, however, challenge the probate court's denial of attorneys' fees in her prior appeal, and as discussed, we affirmed the probate court's judgment and thus implicitly affirmed the probate court's decision denying her fee request. *Bogard*, 221 Ariz. at 332-33, ¶¶ 24-25, 212 P.3d at 24-25. Therefore, under the "law of the case" doctrine and the policies against piecemeal and horizontal appeals, the judicial officer should not have reconsidered and granted Wright's fee request.

¶13 *In re Estate of Killen*, 188 Ariz. 569, 937 P.2d 1375 (App. 1996), did not authorize the judicial officer to revisit Wright's fee request, as Wright and ACIC argue on appeal. A.R.S. § 14-3720. In *Killen*, we held the probate court had jurisdiction to award fees to a former personal representative pursuant to A.R.S. § 14-3720 while an appeal was pending in a will-contest action. 188 Ariz. at 573, 937 P.2d at 1379. There, the probate court entered a judgment invalidating a will and denying the former personal representative "all attorneys' fees and costs." *Id.* at 571, 937 P.2d at 1377. During the pendency of his appeal, the personal representative applied for fees under A.R.S. § 14-3720. *Id.* The probate court declined to award him fees because it believed it lacked jurisdiction. *Id.* at 571-72, 937 P.2d at 1377-78. On appeal from the denial of

fees, we reversed and concluded the personal representative's entitlement to fees under A.R.S. § 14-3720 did not depend on whether his position would be upheld on appeal. *Id.* at 573, 937 P.2d at 1379. We also explained the judgment in the will contest was merely an intermediate order in the probate proceeding which did not end the matter. *Id.*

¶14 *Killen* is distinguishable. In *Killen*, the probate court did not decide whether the personal representative was entitled to fees under A.R.S. § 14-3720 in the will-contest proceeding; the issue was not before the court. *Id.* at 572, 937 P.2d at 1378. In contrast to the situation in *Killen*, Wright's entitlement to fees under § 14-3720 was raised, litigated, and determined in a final judgment. Therefore, Wright's failure to challenge the probate court's denial of her fee request in her prior appeal precluded the judicial officer from reconsidering that denial and, in effect, changing the probate court's judgment.

¶15 Additionally, we reject Wright's and ACIC's argument that the probate court and then the judicial officer "reserved" Wright's request for fees under A.R.S. § 14-3720. The probate court squarely rejected Wright's fee request, and the judicial officer was in no position to reserve an issue the probate court had already decided.

¶16 Accordingly, the court should not have awarded Wright attorneys' fees pursuant to A.R.S. § 14-3720. We therefore reverse the court's fee award to her.

II. Exoneration of the Bond

¶17 The court's final judgment in the surcharge proceeding also resolved Blue's claims for attorneys' fees against Wright.⁶ Blue did not appeal from that judgment. ACIC satisfied the judgment in November 2008. Thus, the judicial officer properly exonerated the bond. See A.R.S. § 14-3606(B) (2005) ("No action or proceeding may be commenced against the surety on any matter as to which an action or proceeding against the primary obligor is barred by adjudication or limitation."). Therefore, we affirm the order exonerating the bond.

III. Attorneys' Fees on Appeal

¶18 Blue has requested attorneys' fees on appeal pursuant to A.R.S. § 12-341.01(A) (2003) (authorizing a successful party fees in a contract action),⁷ and ACIC and Wright have requested attorneys' fees on appeal under that statute or alternatively

⁶In his reply brief, Blue states we can consider his claim for attorneys' fees withdrawn if we determine that Wright's claim for fees is barred. In light of our resolution of this appeal, we consider Blue's request for fees withdrawn.

⁷Blue also requests fees on appeal under A.R.S. § 14-3709(D) (2005) (authorizing fee award and double damages to personal representative if court issues order of disclosure requiring turnover of documents or property wrongfully concealed or disposed). This statute has no application here.

under Arizona Rule of Civil Appellate Procedure 25. We reject the parties' competing requests for fees on appeal. Even if we assume A.R.S. § 12-341.01(A) is applicable here, *but cf. In re Naarden Trust*, 195 Ariz. 526, 530, ¶ 18, 990 P.2d 1085, 1089 (App. 1999) (claim asserting trustee breached fiduciary duties does not arise under A.R.S. § 12-341.01(A)), a fee award under that statute requires a successful party and is discretionary. Wright is not the successful party on appeal so the statute is inapplicable to her. Blue and ACIC were both successful but only partially. Accordingly, because Blue and ACIC were only partially successful, in the exercise of our discretion we deny them fees under A.R.S. § 12-341.01(A). Rule 25 authorizes an award of fees as a sanction if an appeal "is frivolous or taken solely for the purpose of delay." Blue's appeal was not frivolous or taken solely to delay. Accordingly, we deny Wright and ACIC fees under Rule 25.

CONCLUSION

¶19 For the foregoing reasons, we reverse the probate court's order awarding attorneys' fees to Wright and affirm its order exonerating the bond.

/s/

PATRICIA K. NORRIS, Judge

CONCURRING:

/s/

LAWRENCE F. WINTHROP, Presiding Judge

/s/

PATRICK IRVINE, Judge