

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: 04/07/11
RUTH WILLINGHAM,
ACTING CLERK
BY: DLL

VAN E. FLURY and ROSAURA N.) 1 CA-CV 10-0396
FLURY, husband and wife,)
) DEPARTMENT E
Plaintiffs/Appellants,)
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
DESERT GOLD CONSTRUCTION, LLP,) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
Defendant/Appellee.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-019872 and CV2008-032820 (Consolidated)

The Honorable Eileen S. Willett, Judge

AFFIRMED

Van E. Flury
Rosaura N. Flury
In Propria Persona Plaintiffs/Appellants

Laveen

The Law Office of Bonny Brogdon
by Bonny Brogdon
Attorneys for Defendant/Appellee

Thorndale, TX

P O R T L E Y, Judge

¶1 Van and Rosaura Flury (collectively, "the Flurys")
appeal the judgment awarding attorneys' fees to Desert Gold

Construction, LLP ("Desert Gold"). For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 In 2008, the Flurys filed two separate complaints against Edward and Bonny Brogdon (collectively, "the Brogdons"); one concerning a construction defect claim and the other for termite damage to their house.¹ The Flurys subsequently filed an amended complaint in the construction defect action naming Desert Gold as an additional defendant.² The court consolidated the actions.

¶3 Before dissolving in 2002, Desert Gold had five limited partners, including the Brogdons. Desert Gold built the Flurys' house and sold it to them. Mrs. Brogdon, a licensed attorney, represented Desert Gold, as well as her and her spouse's interests.

¶4 In August 2009, the trial court granted the Brogdons' motion for summary judgment and dismissed the complaints. Thereafter, Desert Gold filed a motion for summary judgment, which the court also granted. In a signed order entered on December 4, 2009, the court dismissed the Flurys' claims against Desert Gold and determined that Desert Gold was entitled to

¹ The construction defect action was titled "purchaser dwelling action" and the termite action was titled "contract-money damages."

² The original and amended complaint also named Gurumay, L.L.C. as a defendant. Gurumay was later dismissed from the action.

attorneys' fees and costs for defending the action. Desert Gold timely submitted an application for fees and costs, which the Flurys challenged.

¶15 The trial court subsequently signed a judgment awarding Desert Gold \$8,700 in attorneys' fees pursuant to Arizona Revised Statutes ("A.R.S.") section 12-341.01 (2003), plus \$133 in costs pursuant to A.R.S. § 12-341 (2003). The Flurys appealed,³ and we have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

DISCUSSION⁴

¶16 The Flurys argue that the superior court erred in awarding attorneys' fees because Desert Gold has no legal status or legal existence and cannot be the beneficiary of a monetary judgment.⁵ We review this mixed question of fact and law de

³ Because Mr. and Mrs. Flury both signed the notice of appeal, they are both parties on appeal. See *Haberkorn v. Sears, Roebuck & Co.*, 5 Ariz. App. 397, 399, 427 P.2d 378, 380 (1967).

⁴ Although Desert Gold argues that this appeal should be dismissed because the notice of appeal is allegedly deficient, the notice of appeal complies with the requirements of ARCAP 8(c), which requires that the notice must specify the parties taking the appeal, the judgment being appealed, and the name of the court to which the appeal is taken.

⁵ Although the Flurys frame the issue as one of standing, they never argued below that Desert Gold could not be sued. Instead, the issue is whether a dissolved partnership can exist for purposes of being awarded fees. See *Strawberry Water Co. v. Paulsen*, 220 Ariz. 401, 406, ¶ 8, 207 P.3d 654, 659 (App. 2008) (finding that a party has standing if it has an interest in the outcome of the litigation).

novo.⁶ *Columbia Parcar Corp. v. Ariz. Dep't of Transp.*, 193 Ariz. 181, 183, 971 P.2d 1042, 1044 (App. 1999); *Huskie v. Ames Bros. Motor & Supply Co.*, 139 Ariz. 396, 401, 678 P.2d 977, 982 (App. 1984).

¶7 Desert Gold was a limited liability partnership. The Arizona Revised Uniform Partnership Act states that a partnership continues after its dissolution for the purpose of winding up its business. A.R.S. § 29-1072(A) (1998). Further:

A person winding up a partnership's business may preserve the partnership business or property as a going concern for a reasonable time, prosecute and defend actions and proceedings, whether civil, criminal or administrative, settle and close the partnership's business, dispose of and transfer the partnership's property, discharge the partnership's liabilities, distribute the assets of the partnership, . . . settle disputes by mediation, arbitration or otherwise and perform other necessary acts.

A.R.S. § 29-1073(C) (1998) (emphasis added). Although Desert Gold dissolved in late 2002, it still had to defend this lawsuit. As a result, all of the partnership's business had not been completed. See *Arndt v. First Interstate Bank, N.A.*, 991 P.2d 584, 587 (Utah 1999) (holding that "to the extent necessary during the winding up process, a partnership retains the ability to sue and be sued").

⁶ Because the Flurys do not challenge the applicability of § 12-341.01 or the reasonableness of the fees, we will not address either issue.

¶18 The Flurys, however, contend that Desert Gold admitted that it had resolved all of its business because the Brogdons', in a motion to dismiss, stated that "Desert Gold has wound up its business and has not built or sold any property or dwellings since 2003." Assuming that the statement is accurate, § 29-1072(A) clearly states that a "partnership is terminated when the winding up of its business is completed."⁷ The Brogdons' statement, although assumedly accurate, does not, however, control the legal determination of whether the partnership might have to defend itself, as in this lawsuit, for business conducted before it was dissolved. In fact, Desert Gold later stated "that it continues to wind up its business by defending itself against legal actions brought by" the Flurys. Because there is evidence in the record that the Flurys have filed multiple lawsuits against Desert Gold that the partnership has to defend against, it continues to wind up its business. See *Grossman v. Davis*, 34 Cal. Rptr. 2d 355, 357 (Cal. Ct. App. 1994) ("[W]inding up a legal partnership's unfinished business may require the filing of new litigation.").

⁷ The Flurys concede that if Desert Gold was merely dissolved, but not terminated, it would have the legal existence necessary to collect attorneys' fees. See *Rhue v. Dawson*, 173 Ariz. 220, 226 n.8, 841 P.2d 215, 221 n.8 (App. 1992) (noting the differences between dissolution and termination of a partnership).

¶9 The Flurys are, moreover, estopped from denying that the partnership exists because they named and served Desert Gold as a defendant, separate and apart from the Brogdons or other partners. See, e.g., *Jones v. Teilborg*, 151 Ariz. 240, 247, 727 P.2d 18, 25 (App. 1986) (stating that the parties "cannot take advantage of the corporate entity when convenient, and disregard it when inconvenient"). Therefore, Desert Gold, as a partnership still winding up its unfinished business, is entitled to collect attorneys' fees incurred in defending itself.

¶10 The Flurys' next argue that Mrs. Brogdon is improperly attempting to collect fees for representing herself. A licensed attorney may not collect attorneys' fees for representing herself due to the absence of an attorney-client relationship. See *Connor v. Cal-Az Props., Inc.*, 137 Ariz. 53, 56, 668 P.2d 896, 899 (App. 1983) (holding that an attorney representing herself is not engaged in the practice of law). Nevertheless, "a partner cannot represent a partnership, except in an attorney-client relationship" because a partnership has interests beyond that of just one partner, *Hunt Inv. Co. v. Eliot*, 154 Ariz. 357, 363, 742 P.2d 858, 864 (App. 1987), and a partnership cannot represent itself "because it is not a natural person." *Id.* at 362, 742 P.2d at 863. An award of attorneys' fees, however, requires "a genuine financial obligation on the

part of the litigants to pay such fees." *Lisa v. Strom*, 183 Ariz. 415, 419, 904 P.2d 1239, 1243 (App. 1995).

¶11 Here, Desert Gold is a named defendant separate from the Brogdons. See *Hunt*, 154 Ariz. at 362, 742 P.2d at 863 (partnership as plaintiff); cf. *Lisa*, 183 Ariz. at 416, 420, 904 P.2d at 1240, 1244 (marital community as plaintiffs). Although Desert Gold and the Brogdons jointly responded to some of the Flurys' motions, Desert Gold filed separate pleadings after the Brogdons were dismissed.

¶12 Mrs. Brogdon was the attorney of record for Desert Gold throughout these proceedings.⁸ In the fee application, she asserted that Desert Gold agreed to pay her \$300 per hour, a fact that the Flurys do not challenge. Cf. *Lisa*, 183 Ariz. at 420, 904 P.2d at 1244 (holding that despite an oral fee agreement, the Lisas admitted that the fee would not be reimbursed without a court award of attorneys' fees). The fee application and its attachments detail the legal fees Desert Gold incurred to defend this action. As a result, the trial court did not err by awarding attorneys' fees to Desert Gold.

¶13 Finally, the Flurys argue that the trial court erred when it entered a separate judgment for attorneys' fees three

⁸ The Brogdons were two of five Desert Gold partners. Mrs. Brogdon was not acting solely for herself or her marital community. Cf. *Lisa*, 183 Ariz. at 420, 904 P.2d at 1244 ("[A] financial obligation from the marital community to itself is no obligation at all.").

months after signing an order on the merits. The Flurys did not, however, raise the issue before the trial court and have waived the issue on appeal.⁹ See *Alano Club 12, Inc. v. Hibbs*, 150 Ariz. 428, 431, 724 P.2d 47, 50 (App. 1986) (holding that we do not consider arguments made for the first time on appeal).

¶14 Desert Gold does not request attorneys' fees or costs on appeal. Desert Gold, however, requests sanctions on appeal pursuant to ARCAP 25. ARCAP 25 authorizes sanctions if a party is "guilty of an unreasonable infraction of" the rules of appellate procedure. See, e.g., *Jhagroo v. City of Phx. Mun. Court*, 143 Ariz. 595, 598, 694 P.2d 1209, 1212 (App. 1984). Although the Flurys failed to identify the proper standard of review in violation of ARCAP 13(a)(6) and did not file a bond in violation of ARCAP 10, we exercise our discretion and decline to find the Flurys in civil contempt or otherwise impose sanctions. See *Davies v. Beres*, 224 Ariz. 560, 568, ¶ 30, 233 P.3d 1139, 1147 (App. 2010).

⁹ Even if we assume the argument was not waived, the court did not err. In its order of December 4, 2009, which awarded Desert Gold attorneys' fees, the court ordered it to submit a fee application. The court followed Arizona Rule of Civil Procedure 54(b) which provides that "a claim for attorneys' fees may be considered a separate claim from the related judgment regarding the merits of a cause." Accordingly, the court properly gave the Flurys the opportunity to see the fee request and challenge it. Thus, the court did not err or abuse its discretion in handling the claim for attorneys' fees separate from the merits.

CONCLUSION

¶15 For the foregoing reasons, we affirm the superior court's judgment awarding Desert Gold attorneys' fees.

/s/

MAURICE PORTLEY, Judge

CONCURRING:

/s/

PETER B. SWANN, Presiding Judge

/s/

PATRICK IRVINE, Judge