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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

GLEN BALLARD and MELODY BALLARD, husband and wife; BRUCE BESSETTE and MARGARET BESSETTE, husband and wife; TIMOTHY BROWN and ANNETTE BROWN, husband and wife; TWO-TEN, LLC, an Arizona limited liability company; ANGEL GOMEZ and DIANA GOMEZ, husband and wife; GLEN LYON, a single person; MICHAEL MAGRAS and WENDY MAGRAS, husband and wife; JOHN MIKELS and JUDY MIKELS, husband and wife; WOLFRAM SCHUH and ORTRUD SCHUH, husband and wife; KENNETH SPAULDING and PATRICIA SPAULDING, husband and wife; CARL TAYLOR and MADONNA TAYLOR, husband and wife; LAWRENCE J. JOYCE, a single person; ZEIGH OWENSBY and CARLENE DANIS, husband and wife; CHARLES P. DELCOUR and JANET O. DELCOUR, husband and wife; and FRANK WAGNER and LISA WAGNER, husband and wife, Plaintiffs/Appellants, v. DECONCINI MCDONALD YETWIN & LACY, P.C., Defendant/Appellee.	2 CA-CV 2013-0010 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20097601

Honorable Charles V. Harrington, Judge

AFFIRMED

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H O W A R D, Chief Judge.

¶1 Appellants, current and former property owners in the Ruby Star Airpark (collectively "the Ballards"), appeal from the trial court's grant of summary judgment in favor of DeConcini McDonald Yetwin & Lacy, P.C. ("DeConcini") on their legal malpractice claims. On appeal, the Ballards argue the court erred in granting summary judgment against them because DeConcini owed them a duty of care as non-clients and made negligent misrepresentations. Because the trial court did not err, we affirm.

Factual and Procedural Background

¶2 "We view the facts and the inferences to be drawn from those facts in the light most favorable to the party against whom [summary] judgment was entered." *Mousa v. Saba*, 222 Ariz. 581, ¶ 15, 218 P.3d 1038, 1042 (App. 2009). Dennis Nolen purchased the property now known as Ruby Star Airpark ("Ruby Star") in November 1996 with the intention of developing the land into forty-acre parcels. He retained

DeConcini to assist him in creating a development company and property owners' association for Ruby Star.

¶3 In early 2000, Nolen applied for, and received, an unsubdivided lands public report. This report authorizes the sale or lease of "unsubdivided lands," which, pursuant to A.R.S. §§ 32-2101(60) and 32-2195.03(A), requires the parcels to be between thirty-six and 160 acres. Around that same time, Nolen asked DeConcini to "dress up" the Ruby Star Conditions, Covenants and Restrictions (CC&Rs) that he and his wife had written and recorded. Nolen's version did not refer to Ruby Star as a "subdivision." DeConcini modified the CC&Rs and added the term "subdivision." DeConcini informed Nolen that its version was "only a draft" and "not yet suitable for recording." It also advised Nolen he could not sell any parcel that was less than forty acres, or participate in any plan to divide the lots into less than forty acres. Shortly thereafter, Nolen revoked his version of the CC&Rs and recorded DeConcini's CC&Rs.

¶4 Beginning in 2003, Nolen began illegally subdividing Ruby Star into parcels smaller than thirty-six acres through a series of straw-man transactions. These straw buyers eventually sold individual lots to the Ballards under the guise of a legal subdivision. Nolen did not tell DeConcini he was doing so. In October 2006, Pima County Development Services informed the Ballards that Ruby Star was not a legal subdivision.

¶5 The Ballards sued Nolen and several others involved in the transactions in October 2009. In July 2010, the Ballards added DeConcini as a defendant and alleged

legal malpractice and negligent misrepresentation. DeConcini twice moved for summary judgment, claiming that they owed no duty to the Ballards as non-clients and, additionally, that the Ballards' claims were barred by the statute of limitations. The trial court granted both motions. We have jurisdiction over the Ballards' appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Standard of Review

¶6 On appeal from summary judgment, we determine de novo whether the trial court correctly applied the law and whether there are any genuine disputes as to any material fact. *See Dayka & Hackett, LLC v. Del Monte Fresh Produce N.A., Inc.*, 228 Ariz. 533, ¶ 6, 269 P.3d 709, 711-12 (App. 2012). The trial court should grant summary judgment when "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). Where no evidence exists to support an essential element of a claim, summary judgment is appropriate. *Orme Sch. v. Reeves*, 166 Ariz. 301, 310, 802 P.2d 1000, 1009 (1990).

Restatement of the Law Governing Lawyers § 51

¶7 The Ballards first argue DeConcini owed them a duty of care as non-clients under the Restatement (Third) of the Law Governing Lawyers § 51(2) (2000) because they relied on the term "subdivision" in the CC&Rs DeConcini had prepared when making their decision to purchase land in Ruby Star. They reason that the term "subdivision" has a specific meaning under Arizona law, indicating the property

described has a 100-year guaranteed water supply and that DeConcini had a duty to use the term accurately because it knew third parties would rely on its use. *See* A.R.S. § 45-576(A); Ariz. Admin. Code R12-15-704.

¶8 Restatement § 51(2) provides that an attorney owes a duty of care to a non-client where

> (a) the lawyer or (with the lawyer's acquiescence) the lawyer's client invites the nonclient to rely on the lawyer's opinion or provision of other legal services, and the nonclient so relies; and
>
> (b) the nonclient is not, under applicable tort law, too remote from the lawyer to be entitled to protection.

See Kremser v. Quarles & Brady, L.L.P., 201 Ariz. 413, ¶ 20, 36 P.3d 761, 765 (App. 2001) (applying Restatement § 51(2) to law firm representing debtor in secured transaction).

¶9 The Ballards did not produce any evidence showing that DeConcini invited the Ballards to rely on its services. DeConcini had repeatedly advised Nolan he could not legally subdivide the property and Nolen intentionally concealed from DeConcini the fact he was improperly subdividing and selling the land to the Ballards. DeConcini could not invite the Ballards' reliance when DeConcini was unaware of Nolen's relationship with the Ballards. Similarly, to the extent Nolen himself invited the Ballards to rely on the CC&Rs, DeConcini could not have acquiesced to that invitation.

¶10 Just as there was no invitation, the Ballards have not shown actual reliance. Nolen did not disclose DeConcini's involvement, and the Ballards, by their own

admission, were unaware of DeConcini's involvement until, at the earliest, May 2009. Thus, the Ballards simply were unaware DeConcini provided any services upon which they might rely. Their claim under Restatement § 51(2) therefore fails.

¶11 The Ballards also argue that DeConcini owed them a duty of care under Restatement § 51(3), which provides that a lawyer owes a duty to a non-client when

> (a) the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer's services benefit the nonclient;
>
> (b) such a duty would not significantly impair the lawyer's performance of obligations to the client; and
>
> (c) the absence of such a duty would make enforcement of those obligations to the client unlikely.

See Paradigm Ins. Co. v. Langerman Law Offices, P.A., 200 Ariz. 146, ¶ 23, 24 P.3d 593, 599-600 (2001) (applying § 51(3) to attorney representing insured). Under this section, all three elements must be proven with admissible evidence. *Capitol Indem. Corp. v. Fleming*, 203 Ariz. 589, ¶¶ 11-12, 58 P.3d 965, 968 (App. 2002). Moreover, there must be "adequate evidence of [the client's] intent" to avoid "discourag[ing] lawyers from following client instructions [where it would] adversely affect[] third persons." Restatement § 51 cmt. f.

¶12 Our supreme court examined this section and explained the "'general rule is that a professional owes no duty to a non-client unless special circumstances require otherwise.'" *Paradigm Ins. Co.*, 200 Ariz. 146, ¶ 27, 24 P.3d at 601, *quoting Napier v. Bertram*, 191 Ariz. 238, ¶ 15, 954 P.2d 1389, 1393 (1998). It found, however, an

attorney hired by an insurance company to represent one of its insureds owed a duty of care to the insurer even though only the insured was the attorney's client. *Id.* ¶ 28. The court stated "a special relationship exists between the insurer and the counsel it assigns to represent its insured." *Id*. The insurer is "dependent" upon the lawyer it hires to, first, fulfill the insurer's contractual obligations to provide a defense, and, second, to "thwart claims of liability" for which the insurer would have to pay. *Id.* "Thus, the lawyer's duties to the insured are often discharged for the full or partial benefit of the nonclient." *Id*.

¶13 Similarly, this court found a law firm, representing the debtor, would owe a duty to the non-client creditors if the firm expressly agreed to perfect the creditor's security interest in the debtor's property. *Kremser*, 201 Ariz. 413, ¶ 23, 36 P.3d at 766. Under those circumstances, the creditors, as parties to the loan transaction, were the "obvious beneficiaries" of the firm's services. *Id.* ¶ 21. Moreover, the absence of a duty to the non-client would make enforcement of the original duty to the client unlikely because "the client/debtor would have little or no interest in pursuing a malpractice action against its own attorney because such an action would benefit only the creditor, rather than the debtor." *Id.* ¶ 26.

¶14 But in the majority of dealings "where no duty is expressly assumed or no shared benefit can be found, attorneys remain free to zealously represent their clients' interests without the risk of liability to the nonclient." *Id*. ¶ 28; *see also* Restatement § 51 cmt. c ("[A] lawyer representing a client in an arm's-length business transaction does not

owe a duty of care to opposing nonclients."). For example, in *Fleming*, the conservator of an estate hired an attorney to assist her and also received a conservator's bond from a surety. 203 Ariz. 589, ¶ 3, 58 P.3d at 966. The conservator proceeded to engage in serious financial misconduct, of which her attorney was aware but did not stop. *Id.* We found the attorney did not owe a duty of care to the surety who was forced to partially reimburse the estate after the misconduct was discovered. *Id.* ¶¶ 10-14. Similarly, an attorney who represented the co-settlor of a trust owed no duty to the disinherited former beneficiary as a non-client. *Wetherill v. Basham*, 197 Ariz. 198, ¶¶ 32, 35-42, 3 P.3d 1118, 1127, 1128-29 (App. 2000).

¶15 Here, the Ballards did not produce any evidence that DeConcini knew that Nolen intended, as a primary objective of the representation, that DeConcini's services benefit the Ballards. Nor did DeConcini "expressly assume[]" any undertaking for the primary benefit of the Ballards. *See Kremser*, 201 Ariz. 413, ¶ 28, 36 P.3d at 767. No specific transaction took place, such as the security agreement in *Kremser* or a real estate sales contract between Nolen and the Ballards, for which DeConcini undertook the task of creating the CC&Rs. And unlike the facts in *Paradigm*, the Ballards did not hire DeConcini to represent Nolen in an attempt to protect their own interests. Instead, similar to *Fleming*, Nolen retained DeConcini solely for his own benefit in developing Ruby Star years before he began illegally subdividing the land.

¶16 Additionally, while DeConcini was acting at Nolen's direction when it "dress[ed] up" the CC&Rs, it did not assume the subsequent task of recording the

CC&Rs and directly advised Nolen both that the CC&Rs were "not yet suitable for recording" and that subdividing the land would be illegal. Nolen recorded the CC&Rs nearly two years before he began transferring land in Ruby Star, and nearly three years before the first transfer via a "straw" buyer, knowing that Ruby Star legally could not be subdivided. Moreover, Nolen intentionally concealed those illegal activities from DeConcini. Consequently, the evidence shows that Nolen did not intend, nor did DeConcini believe that he intended, to benefit the Ballards as one of his "primary objectives" under Restatement § 51(3)(a).

¶17 However, the Ballards argue that this objective is evidenced by the fact the CC&Rs contain a provision stating they "are for the benefit of each owner of said real property," and also because DeConcini advised Nolen that buyers rely on CC&Rs and may object to any changes. But the relevant transaction is DeConcini's representation of Nolen, not the relationship established by the CC&Rs. Furthermore, property owners rely on CC&Rs for the protection of a set of governing rules restricting the use of property, not as a substitute for the subdivision public report. *See Powell v. Washburn*, 211 Ariz. 553, ¶ 18, 125 P.3d 373, 378 (2006) ("[T]he plain intent and purpose of the restrictions was to limit residences in the Airpark to mobile or manufactured homes, constructed homes, or hangar-homes."); *Nahrstedt v. Lakeside Vill. Condo. Ass'n*, 878 P.2d 1275, 1288-89 (Cal. 1994) ("Refusing to enforce the [use restrictions in] CC&R's . . . would frustrate owners who had purchased their units in reliance on the CC&R's."); *cf. Atl. Paradise Assocs., Inc. v. Perskie, Nehmad & Zeltner*, 666 A.2d 211,

214-15 (N.J. Super. Ct. App. Div. 1995) (foreseeable that prospective buyers of condominium units would rely on representation units could be rented as stated in public offering statement). Those use restrictions "are for the benefit of each owner" within the meaning of the Ruby Star CC&Rs. Accordingly, reliance upon those use restrictions was the subject of DeConcini's warning to Nolen. Without more, the Ballards have not demonstrated with "adequate evidence" that Nolen intended, or that DeConcini believed Nolen intended, to benefit the Ballards as one of his primary objectives. Restatement § 51(3)(a) & cmt. f. Because the Ballards have not shown this mandatory element of Restatement § 51(3), DeConcini owed no duty of care to them and their claim fails.

Restatement (Second) of Torts § 552

¶18 The Ballards next argue that, even if DeConcini owed them no duty under Restatement § 51, DeConcini is still liable for negligent misrepresentation under Restatement (Second) of Torts § 552 (1977). Restatement § 552(1) provides that a professional who "supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information." *See Sage v. Blagg Appraisal Co.*, 221 Ariz. 33, ¶ 8, 209 P.3d 169, 171 (App. 2009) (applying § 552 to professional real estate appraisers). The liability resulting from a claim for negligent misrepresentation is limited to losses suffered

> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the

> information or knows that the recipient intends to supply it; and
>
> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

Restatement § 552(2); *see also Sage*, 221 Ariz. 33, ¶ 8, 209 P.3d at 171.

¶19 The record does not support a finding that DeConcini's liability extends to the Ballards under this section. Nolen was DeConcini's client and DeConcini was acting at his direction when it modified the Ruby Star CC&Rs. DeConcini only made the representation at issue to Nolen, did not publicly record the CC&Rs, and specifically told Nolen the lots could not be subdivided and the CC&Rs were "not yet suitable for recording." Moreover, Nolen hid from DeConcini the fact that he was illegally subdividing the land and selling the parcels to the Ballards. No evidence supports a claim that DeConcini knew Nolen would supply this information to the Ballards. Lastly, as discussed above, CC&Rs are created to dictate the restrictions on land use in a particular community, and are not meant to be a substitute for a subdivision public report. DeConcini never made any representation to the Ballards, nor intended that they rely on the term "subdivision" in the CC&Rs when deciding whether to purchase land in Ruby Star. Summary judgment in favor of DeConcini was therefore appropriate on this issue.[1]

[1]The Ballards also contend the trial court erred in finding their claim was barred by the statute of limitations. Because we conclude the trial court properly granted DeConcini's motion for summary judgment on the grounds that it owed no duty to the Ballards, we do not address the Ballards' other argument on appeal. *See Schwab v. Matley*, 164 Ariz. 421, 422, 793 P.2d 1088, 1089 (1990) (where one issue dispositive, court need not reach other issues presented in appeal).

Conclusion

¶20 For the foregoing reasons, we affirm the judgment of the trial court.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge