IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

IN RE THE JULIA K. WOOTAN
REVOCABLE LIVING TRUST, DATED JULY 18, 2000

No. 2 CA-CV 2014-0092
Filed February 13, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. PB20121120
The Honorable Kyle A. Bryson, Judge

AFFIRMED

COUNSEL

Michael Lee Wootan, Albuquerque, New Mexico
Jeffrey Robert Wootan, Quincy, Massachusetts
In Propria Personae

Waterfall, Economidis, Caldwell, Hanshaw & Villamana, P.C., Tucson
By Corey B. Larson
Counsel for Eric C. Wootan

MEMORANDUM DECISION

Judge Vásquez authored the decision of the Court, in which Presiding Judge Kelly and Judge Howard concurred.

V Á S Q U E Z, Judge:

¶1 This appeal arises out of a trust agreement executed by Julia Wootan originally for the benefit of her sons, Eric, Michael, and Jeffrey Wootan. Michael and Jeffrey initiated this action for a declaration of rights under the trust and an accounting from the trustee, Eric. On appeal, Michael and Jeffrey argue the trial court erred by granting Eric's motion for summary judgment, imposing sanctions against them under A.R.S. § 33-420, denying their motion for a new trial, and awarding Eric attorney fees. For the following reasons, we affirm.

Factual and Procedural Background

¶2 On appeal from the entry of summary judgment, we view the facts and any inferences drawn therefrom in the light most favorable to the party against whom judgment was entered. *Nickerson v. Green Valley Recreation, Inc.*, 228 Ariz. 309, ¶ 2, 265 P.3d 1108, 1112 (App. 2011). In July 2000, Julia executed a pour-over will, revocable trust agreement, and financial power of attorney. The trust originally named Eric, Michael, and Jeffrey as beneficiaries. However, Julia revised the trust several times beginning in January 2009. In the first revision, she stated that she had transferred her house and various bank and investment accounts into the trust. Under the last amendment in January 2012, Julia named Eric's sons, Max and Scott Wootan, as sole residuary beneficiaries. She appointed Eric as successor trustee of the trust and Michael as the first alternate.[1] She also made specific bequests of personal property to various family members, including Michael and Jeffrey, and

[1]Julia's power of attorney similarly named Eric as her agent and Michael as her alternate agent.

confirmed that she had transferred her real and personal property and various bank and investment accounts into the trust.

¶3 In February 2012, Julia died in a house fire that destroyed much of her house and personal property. Eric began administering the trust, and, in October 2012, Michael and Jeffrey initiated this action by filing a "Petition to Declare Rights in Trust and for Accounting."[2] They sought (1) a determination of "the pertinent terms of any trust that may exist . . . , what assets constitute its res, and what rights the interested parties have," (2) the appointment of Michael as trustee, (3) an "accounting" from Eric of all the actions he took for Julia and her estate, (4) an "accounting" from Eric of all assets in the trust or Julia's estate, and (5) all estate planning documents in Eric's possession. In November 2012, Michael and Jeffrey recorded a notice of lis pendens against Julia's real property that had been conveyed to the trust. Eric asked them to remove the lis pendens, but they failed to do so.

¶4 As trustee, Eric moved for summary judgment, primarily arguing that Michael and Jeffrey's petition failed "to set forth any reason why the rights should not be exactly as they [were] set out in the last amendment to the trust." He also requested sanctions pursuant to § 33-420(A) and (C) based on their recording of the lis pendens and failure to remove it, and for sanctions pursuant to A.R.S. § 12-349 based on Michael's filing of a change of address form with the postmaster, causing all mail sent to Julia and the trust to be forwarded to him. Michael and Jeffrey then filed a motion to amend their petition to include an additional claim under A.R.S. § 46-456, the vulnerable adult statute.[3]

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[2] In August 2012, Michael and Jeffrey also filed an action seeking to probate Julia's will and to have Michael appointed as personal representative. However, they later dismissed that action.

[3] The trial court initially denied the motion to amend for lack of procedural compliance, but it allowed Michael and Jeffrey to refile the motion two more times while the motion for summary judgment was pending.

¶5 The trial court ultimately granted Eric's motion for summary judgment and imposed sanctions against Michael and Jeffrey. It also denied the motion to amend, finding Michael and Jeffrey lacked standing to bring a § 46-456 claim. Michael and Jeffrey subsequently filed a motion for a new trial based on newly discovered evidence. The court denied that motion and also ordered Michael and Jeffrey to pay Eric's attorney fees and costs. This appeal followed the court's entry of a final judgment. We have jurisdiction pursuant to A.R.S. §§ 12-120.21 and 12-2101(A)(1).

Summary Judgment

¶6 Michael and Jeffrey first challenge the trial court's entry of summary judgment. In reviewing a motion for summary judgment, we determine de novo whether any genuine issues of material fact exist and whether the trial court properly applied the law. *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, ¶ 4, 7 P.3d 136, 139 (App. 2000).

¶7 Summary judgment shall be granted when "there is no genuine dispute as to any material fact and the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(a).[4] The moving party "must come forward with evidence it believes demonstrates the absence of a genuine issue of material fact and must explain why summary judgment should be entered in its favor." *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, ¶ 14, 180 P.3d 977, 980 (App. 2008). If the moving party meets this initial burden of production, the burden shifts to the non-moving party, who "must call the court's attention to evidence overlooked or ignored by the moving party or must explain why the motion should otherwise be denied." *Id.* ¶ 26. Summary judgment should be granted "if the facts produced in support of the claim . . . have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the

[4]Although this is a probate proceeding generally governed by the Arizona Rules of Probate Procedure, *see* Ariz. R. Probate P. 1, the Arizona Rules of Civil Procedure also apply to the extent they are not inconsistent, *see* Ariz. R. Probate P. 3(A).

proponent of the claim." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).

¶8 In its summary judgment ruling, the trial court addressed each of the five requests for relief in Michael and Jeffrey's petition. On appeal, however, Michael and Jeffrey challenge the court's ruling only on their first request, for the court to "determine the pertinent terms of any trust that may exist for Decedent, what assets constitute its res, and what rights the interested parties have in said trust."

¶9 Relying on A.R.S. § 14-10201(C), Michael and Jeffrey maintain:

> It is an inference from the plain language of the statute that once the estate documents are admitted into evidence, after notice and hearing, the lower court will review the estate documentation, make a determination, if a trust exists, make a determination of rights, again, if any and it is presumed that the court would make a determination regarding questions of authenticity of the estate documents and resolve questions regarding whether the estate documents actually fulfill the purpose and function to establish the testamentary desires of the Decedent.

Section 14-10201(C) provides that "[a] judicial proceeding involving a trust may relate to any matter involving the trust's administration, including a request for instructions and an action to declare rights." Accordingly, a petition seeking a declaration of rights under a trust is proper under § 14-10201(C).

¶10 However, Michael and Jeffrey have cited no authority that requires the trial court to address such matters when there is no actual dispute, and we are aware of none. In its summary judgment ruling, the court found Julia executed the trust in July 2000, and, beginning in 2009, she amended the trust annually with the most

recent amendment in January 2012. The court additionally found as follows:

> Specific bequests were made of personal property to various family members, including [Michael and Jeffrey]. The distribution of the remainder of the trust was amended such that the entire remainder went to the Decedent's grandsons, Scott and Max. That amendment also specifically removes Michael as a remainder beneficiary. [Eric] claims that the specific distributions of personal property have been made, although receipts were not returned by Michael and Jeffrey. Michael and Jeffrey do not dispute that those distributions were made to them.

Michael and Jeffrey neither challenged the court's findings below nor do so on appeal. And, because there was no "genuine dispute as to any material fact" regarding the trust's existence or its terms, Ariz. R. Civ. P. 56(a), the court did not err when it granted Eric's motion for summary judgment on the basis that Michael and Jeffrey had failed to identify "any dispute or failure of administration of the trust,"[5] *see Eller Media*, 198 Ariz. 127, ¶ 4, 7 P.3d at 139; *see also In re*

[5]Although they did not raise an issue concerning the trust's authenticity in their petition, Michael and Jeffrey suggested in their response to the motion for summary judgment that Eric had manipulated Julia to amend the trust "to provide assistance for his family." In their statement of facts, they further asserted that Eric "was borrowing from his mother's accounts to fund [his sports car rehabilitation] business and support his family" after he had declared bankruptcy. As support, they attached an affidavit from Michael, in which he avowed that, in September 2010, Eric had "asked [him] to transfer $4,000 from the trust account to [Eric's] personal account" and that "[Eric] told [him] that he had done this many times before." *See* Ariz. R. Civ. P. 56(e). However, because

Estate of Sherer, 10 Ariz. App. 31, 37, 455 P.2d 480, 486 (1969) ("Rule 56 requires at least a minimal showing of the existence of admissible evidence to make out a factual issue for determination by the fact finder . . . .").

Sanctions

¶11 Michael and Jeffrey next maintain the trial court erred by imposing sanctions under § 33-420(A) and (C) based on their recording of and failure to remove the notice of lis pendens. We review awards of sanctions for an abuse of discretion. *In re Estate of Lewis*, 229 Ariz. 316, ¶ 20, 275 P.3d 615, 623 (App. 2012); *Hmielewski v. Maricopa County*, 192 Ariz. 1, ¶ 13, 960 P.2d 47, 50 (App. 1997).

¶12 Section 33-420(A) provides:

> A person purporting to claim an interest in, or a lien or encumbrance against, real property, who causes a document asserting such claim to be recorded in the office of the county recorder, knowing or having reason to know that the document is forged, groundless, contains a material misstatement or false claim or is otherwise invalid is liable to the owner or beneficial title holder of the real property for the sum of not less than five thousand dollars, or for treble the actual damages caused by the recording, whichever is greater, and reasonable attorney fees and costs of the action.

Michael and Jeffrey do not advance these issues on appeal, we deem them abandoned and waived, and we do not address them further. *See State v. Nirschel*, 155 Ariz. 206, 208, 745 P.2d 953, 955 (1987) (failure to provide argument on appeal constitutes abandonment and waiver of issue); *Blutreich v. Liberty Mut. Ins. Co.*, 170 Ariz. 541, 542 n.1, 826 P.2d 1167, 1168 n.1 (App. 1991) (same).

Similarly, § 33-420(C) states:

> A person who is named in a document which purports to create an interest in, or a lien or encumbrance against, real property and who knows that the document is forged, groundless, contains a material misstatement or false claim or is otherwise invalid shall be liable to the owner or title holder for the sum of not less than one thousand dollars, or for treble actual damages, whichever is greater, and reasonable attorney fees and costs as provided in this section, if he wilfully refuses to release or correct such document of record within twenty days from the date of a written request from the owner or beneficial title holder of the real property.

The purpose of § 33-420 is to "protect property owners from actions clouding title to their property." *Wyatt v. Wehmueller*, 167 Ariz. 281, 286, 806 P.2d 870, 875 (1991).

¶13 Section 12-1191, A.R.S., governs the recording of a notice of lis pendens. This statute allows a party to file a notice to make others aware of the pendency of an action "affecting title to real property." § 12-1191(A); *see also Richey v. W. Pac. Dev. Corp.*, 140 Ariz. 597, 601, 684 P.2d 169, 173 (App. 1984) ("A lis pendens states to the world that the claimant purports to have an interest in the real property and that litigation affecting that interest is underway."). "Recording a groundless lis pendens is within the statutory meaning of . . . § 33-420." *Bianco v. Patterson*, 159 Ariz. 472, 474, 768 P.2d 204, 206 (App. 1989).

¶14 Michael and Jeffrey argue their lis pendens was not groundless. [6] Relying on *Coventry Homes, Inc. v. Scottscom*

[6]Michael and Jeffrey also seem to suggest they relied on the advice of counsel in recording the notice of lis pendens. But

Partnership, 155 Ariz. 215, 218, 745 P.2d 962, 965 (App. 1987), they contend "the trial court only need[ed] to find 'some basis' for the filing of the lis pendens." And, they suggest that their basis was to protect the property from being disposed of while this action was pending. However, Michael and Jeffrey's reliance on *Coventry Homes* is misplaced.

¶15 *Coventry Homes* involved sanctions under § 33-420(A) for the recording of a notice of lis pendens in an action to impose an equitable lien. 155 Ariz. at 216, 745 P.2d at 963. In that case, we first concluded that the action was one affecting the title of real property, permitting the recording of a notice of lis pendens under § 12-1191. *Coventry Homes*, 155 Ariz. at 218, 745 P.2d at 965. We then turned to the question of whether recording a notice of lis pendens in the action was groundless, making § 33-420(A) sanctions permissible. *Coventry Homes*, 155 Ariz. at 218, 745 P.2d at 965. We rejected Coventry Homes' argument that "a court may look no further than the action on its face to determine whether a lis pendens is groundless." *Id.* Rather, we concluded, "There must be some basis for concluding that an equitable lien . . . would be imposed on the real property subject to the notice of lis pendens." *Id.* As we explained in *Evergreen West, Inc. v. Boyd*, two propositions are raised in *Coventry Homes*: (1) the trial court's inquiry in determining whether the recording of a notice of lis pendens is groundless "is limited to determining whether the action is one 'affecting title to real property,'" and (2) the court "need only find 'some basis' for concluding that the action affects title to real property." 167 Ariz. 614, 620, 810 P.2d 612, 618 (App. 1991), *quoting* § 12-1191, *and Coventry Homes*, 115 Ariz. at 218, 745 P.2d at 965.

¶16 The subject of this action is Julia's trust. In their petition, Michael and Jeffrey primarily sought a declaration of rights

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damages under § 33-420(A) may not be assessed against a client only when his or her attorney files a lis pendens without the client's knowledge or consent. *Wyatt*, 167 Ariz. at 286-87, 806 P.2d at 875-76. Michael and Jeffrey suggested below that they relied on the advice of counsel but presented no evidence in the trial court that this was the case.

under the trust and an accounting. Although they also requested a determination of "what assets constitute [the] res," they did not argue the real property belonged to anyone other than the trust and, in fact, recognized Julia conveyed the property to the trust in July 2000. This action is thus not one affecting title to the property. *See Evergreen W.*, 167 Ariz. at 620, 810 P.2d at 618. Accordingly, the recording of a notice of lis pendens in this action was groundless. *See Bianco*, 159 Ariz. at 474, 768 P.2d at 206. The trial court did not abuse its discretion by imposing sanctions pursuant to § 33-420(A) and (C). *See Estate of Lewis*, 229 Ariz. 316, ¶ 20, 275 P.3d at 623; *Hmielewski,* 192 Ariz. 1, ¶ 13, 960 P.2d at 50; *see also Guarriello v. Sunstate Equip. Corp.*, 187 Ariz. 596, 598, 931 P.2d 1106, 1108 (App. 1996) (discussing propriety of sanctions under both subsections).[7]

New Trial

¶17 Michael and Jeffrey also contend the trial court erred by denying their motion for a new trial based on newly discovered evidence. We review the court's denial of a motion for a new trial for an abuse of discretion. *Boatman v. Samaritan Health Servs., Inc.*, 168 Ariz. 207, 212, 812 P.2d 1025, 1030 (App. 1990).

¶18 The newly discovered evidence offered by Michael and Jeffrey consisted of an affidavit from document examiner and handwriting expert Wendy Carlson, who reviewed copies of Julia's estate planning documents. Carlson opined that Julia's pour-over will "has been altered and/or is fraudulent." She also referred to the trust and its latest amendment as "questionable documents" but said she required additional samples of Julia's signature and the original documents to form a conclusive opinion as to their authenticity. After reviewing the pleadings and the record, the trial

[7]In *Bianco*, this court noted that § 33-420(A) and (C) apply to distinct parties: (A) applies to those with notice of a recording and (C) applies to those without. 159 Ariz. at 474, 768 P.2d at 206. However, in *Guarriello*, we clarified that subsection (C) applies to "a person named in a groundless document, regardless whether that person caused it to be recorded in violation of subsection (A)." 187 Ariz. at 598, 931 P.2d at 1108.

court summarily concluded that Michael and Jeffrey failed to "establish[] cause exists to set aside the judgment and set the matter for a new trial."

¶19 For the trial court to grant a motion for a new trial based on newly discovered evidence, the moving party must show that "the evidence (1) is material, (2) existed at the time [the court entered summary judgment], (3) could not have been discovered before [the entry of summary judgment] by the exercise of due diligence, and (4) would probably change the result at a new trial." *Waltner v. JPMorgan Chase Bank, N.A.*, 231 Ariz. 484, ¶ 24, 297 P.3d 176, 182 (App. 2013); *Boatman*, 168 Ariz. at 212, 812 P.2d at 1030; *see also* Ariz. R. Civ. P. 59(a)(4).

¶20 Here, Michael and Jeffrey failed to show that Carlson's affidavit existed at the time the trial court entered summary judgment in November 2013. *See Waltner*, 231 Ariz. 484, ¶ 24, 297 P.3d at 182. Although Julia's will, trust, and amendments thereto existed at that time, Carlson's affidavit, completed in February 2014, did not. In addition, Michael and Jeffrey failed to show that they reasonably could not have obtained Carlson's affidavit before the entry of summary judgment by the exercise of due diligence. *See id.* Due diligence is "diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation." *Black's Law Dictionary* 523 (9th ed. 2009). Michael and Jeffrey maintain they could not have obtained Carlson's affidavit sooner because they interviewed various document examiners but almost all of them wanted to review the original documents, which Michael and Jeffrey did not have. But Eric's counsel possessed the original documents and made them readily available. Indeed, Michael and Jeffrey's counsel at the time reviewed the original documents in December 2012, and a different document examiner provided by Michael and Jeffrey reviewed the documents in January 2013, both prior to the filing of the motion for summary judgment in April 2013.

¶21 Moreover, as Eric points out, Michael and Jeffrey failed to exercise due diligence in obtaining Carlson's affidavit to the extent they did not raise this issue in their response to the motion for summary judgment. Pursuant to Rule 56(f), Ariz. R. Civ. P., they

could have requested additional time to locate another document examiner before responding to the motion for summary judgment. The trial court then could have delayed ruling until it had all the evidence. However, Michael and Jeffrey failed to make any discovery request pursuant to Rule 56(f) and never suggested this was an issue. Additionally, when the court mentioned Rule 56(f) at the summary judgment hearing, Michael and Jeffrey did not request additional time for discovery and again failed to point out that they were looking for another document examiner.

¶22 Because Michael and Jeffrey failed to meet their burden of establishing the affidavit was newly discovered evidence,[8] *see Waltner*, 231 Ariz. 484, ¶ 24, 297 P.3d at 182, we cannot say the trial court abused its discretion by denying their motion for a new trial, *see Boatman*, 168 Ariz. at 212, 812 P.2d at 1030.

Attorney Fees

¶23 Last, Michael and Jeffrey argue the trial court erred by awarding attorney fees to Eric. We review awards of attorney fees for an abuse of discretion. *In re Indenture of Trust Dated Jan. 13, 1964*, 235 Ariz. 40, ¶ 41, 326 P.3d 307, 318 (App. 2014).

¶24 The trial court granted attorney fees based on A.R.S. §§ 14-11004 and 33-420. Section 14-11004(A) provides that a trustee is entitled to reimbursement for attorney fees "that arise out of and that relate to the good faith defense . . . of a judicial . . . proceeding involving the administration of the trust." And, § 14-11004(B) allows the court to order that those fees be paid by any party to the proceeding. Subsections 33-420(A) and (C) mandate an award of attorney fees when the court imposes sanctions under those provisions. *Janis v. Spelts*, 153 Ariz. 593, 598, 739 P.2d 814, 819 (App. 1987).

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[8]We also question the materiality of Carlson's affidavit and its potential to change the outcome of the case because Carlson's affidavit addressed the authenticity of Julia's pour-over will. *See Waltner*, 231 Ariz. 484, ¶ 24, 297 P.3d at 182. Carlson offered no definitive opinion regarding the trust document.

¶25 Michael and Jeffrey argue that, because we should grant them relief on the above arguments, we should reverse the corresponding awards of attorney fees. This argument is unavailing because we are not granting them relief on any basis. Michael and Jeffrey offer no additional argument explaining why the trial court improperly awarded fees, and we are not aware of any reason to conclude the court erred. The court cited proper authority for its decision and awarded the attorney fees only after Eric's compliance with S*chweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 188, 673 P.2d 927, 932 (App. 1983), which requires attorneys to submit affidavits detailing their work. We therefore cannot say the court abused its discretion. *See Indenture of Trust Dated Jan. 13, 1964*, 235 Ariz. 40, ¶ 41, 326 P.3d at 318.

Disposition

¶26 For the foregoing reasons, we affirm. Eric has requested attorney fees and costs on appeal pursuant to §§ 14-11004 and 33-420. We grant his reasonable attorney fees and costs contingent upon his compliance with Rule 21, Ariz. R. Civ. App. P.