

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

KENNETH W. REED,
Plaintiff/Appellant,

v.

CORIZON, LLC; KELLI ROGERS; MADELINE LOWELL;
FABIOLA GONZALEZ; TAMARA PORTER; LISA LYON; ANNIE ANDREWS;
QUENNA MCCRANEY; TAMMY RICHARDS; AND CHARLES L. RYAN,
Defendants/Appellees.

No. 2 CA-CV 2016-0184
Filed October 2, 2017

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NOT FOR PUBLICATION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. C20155837
The Honorable Catherine Woods, Judge

AFFIRMED

COUNSEL

Kenneth W. Reed, Florence
In Propria Persona

Renaud Cook Drury Mesaros, PA, Phoenix
By J. Scott Conlon
Counsel for Defendants/Appellants

MEMORANDUM DECISION

Presiding Judge Staring authored the decision of the Court, in which Judge Espinosa and Judge Kelly¹ concurred.

S T A R I N G, Presiding Judge:

¶1 Kenneth Reed appeals from the trial court’s dismissal of his amended complaint against Corizon, LLC, various Corizon employees (collectively, “Corizon”), and Charles Ryan, director of the Arizona Department of Corrections (“ADOC”). He asserts the court erred by denying his motion to join the State of Arizona as a party in interest, granting defendants’ motions to dismiss for failure to state a claim, and denying Reed’s motion to adjudicate his case as a special action. For the reasons that follow, we affirm.

Procedural Background

¶2 Reed initiated the lawsuit underlying this appeal in December 2015. In February 2016, he filed an amended complaint asserting he is a third-party beneficiary to a health care services contract requiring Corizon to comply with an ADOC order governing inmates’ access to their own medical records. Reed alleged seven counts of breach of contract against Corizon, and alleged in count eight that Ryan breached a fiduciary duty by failing to ensure Corizon’s compliance.

¶3 The defendants filed motions to dismiss, asserting among other things that Reed’s complaint failed to state a claim for relief because he was neither a party nor a third-party beneficiary to the contract. The trial court granted the motions to dismiss. Reed filed a notice of appeal, but subsequently filed a motion pursuant to Rule 60(b), Ariz. R. Civ. P., arguing the trial court should construe his

¹The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

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case as a special action.² The court denied the Rule 60(b) motion, and Reed filed an amended notice of appeal. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).³

Dismissal for Failure to State a Claim

¶4 On appeal, Reed argues the trial court erroneously dismissed his complaint for failure to state a claim. *See* Ariz. R. Civ. P. 12(b)(6). This is a question of law we review de novo, accepting as true the well-pled allegations in the complaint, and affirming only if Reed “would not be entitled to relief under any interpretation of the facts susceptible of proof.” *Blankenbaker v. Marks*, 231 Ariz. 575, ¶ 6, 299 P.3d 747, 749 (App. 2013).

¶5 Reed first contends that Corizon’s motion to dismiss was untimely and should have been rejected on that basis. But the defense of failure to state a claim need not be raised in the pleadings, and may even be raised during trial. Ariz. R. Civ. P. 12(h)(2). The timing of Corizon’s motion is therefore immaterial to whether the court should have considered it.

¶6 Reed next argues dismissal was inappropriate because there was an issue of fact as to whether he was a third-party beneficiary under the contract, which was not introduced into the record. We disagree. To state a claim for breach of contract, a complaint must allege facts that, if true, would establish the existence

²Rule 60 was recently amended, including renumbering and otherwise restructuring several provisions. The revisions are immaterial to the disposition of this appeal; we therefore cite the current version of the rule.

³We reject appellees’ contention that we lack jurisdiction to review the denial of Reed’s motion to join the State of Arizona as a party in the lawsuit, which was an interlocutory order and not separately appealable. *See Rourk v. State*, 170 Ariz. 6, 13, 821 P.2d 273, 280 (App. 1991) (notice of appeal not required to list intermediate orders to be challenged on appeal); *cf. Belen Loan Inv’rs, L.L.C. v. Bradley*, 231 Ariz. 448, n.5, 296 P.3d 984, 987 n.5 (App. 2012) (judgment on fewer than all claims and parties not appealable without certification under Ariz. R. Civ. P. 54(b)).

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of an agreement, a breach thereof, and a right to recover damages. *City of Tucson v. Superior Court*, 116 Ariz. 322, 324, 569 P.2d 264, 266 (App. 1977). In order to allege the right to recover as a third-party beneficiary, a complaint must include a factual allegation that the parties intended to directly benefit the plaintiff, and so indicated in the contract itself. *Norton v. First Fed. Sav.*, 128 Ariz. 176, 178, 624 P.2d 854, 856 (1981). To allege a mere indirect benefit is insufficient; to recover as a third-party beneficiary, the plaintiff must be the primary party in interest under the contract. *Sherman v. First Am. Title Ins. Co.*, 201 Ariz. 564, ¶¶ 6-13, 38 P.3d 1229, 1232-34 (App. 2002) (real estate salesperson entitled to compensation from completed sales not third-party beneficiary of associated escrow instructions between title companies and broker); *see also Norton*, 128 Ariz. at 178-80, 624 P.2d at 856-58 (land purchaser not third-party beneficiary of seller's performance bond simply because bond secured timely completion of improvements benefitting lots).

¶7 Reed's allegation that he receives health care pursuant to the contract between Corizon and ADOC is the same type of indirect benefit found insufficient to allow recovery as a third-party beneficiary in *Norton* and *Sherman*. Moreover, Reed's conclusory allegation that he was a third-party beneficiary to the health services contract was insufficient as a matter of law to establish an entitlement to recover for either breach of contract or breach of fiduciary duty based on the same contract. *See Dube v. Likins*, 216 Ariz. 406, 167 P.3d 93, *supp. op.*, 216 Ariz. 421, ¶ 14, 167 P.3d 108, 111 (App. 2007) (conclusory allegation of claim elements insufficient to satisfy minimal pleading standards). Because Reed has failed to allege facts that would entitle him to relief, *see Blankenbaker*, 231 Ariz. 575, ¶ 6, 299 P.3d at 749, we conclude the trial court properly dismissed his claims pursuant to Rule 12(b)(6).⁴

⁴Reed also contends, for the first time on appeal, that regardless of whether he is a party or third-party beneficiary to the contract, he has standing to bring the action "qui tam." We do not consider this argument, however, because "absent extraordinary circumstances, errors not raised in the trial court cannot be raised on appeal." *See Trantor v. Fredrikson*, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994).

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Undeveloped Issues

¶8 Reed's two remaining arguments on appeal are that the trial court erred by denying his motion to join the State of Arizona as a plaintiff in the lawsuit and by not construing his complaint as a special action or otherwise determining whether he might be able to recover under any other theory of liability. Reed, however, offers no authority that would compel the state to participate as a party in the lawsuit, especially when he has failed to raise any claims that he himself might pursue without the state's participation. Neither does Reed cite any authority for his assertion that Ryan has a legal duty to enforce the medical records policy, such that a writ of mandamus might be appropriate. *See Bd. of Educ. of Scottsdale High Sch. Dist. No. 212 v. Scottsdale Educ. Ass'n*, 109 Ariz. 342, 344, 509 P.2d 612, 614 (1973) (mandamus "does not lie if the public officer is not specifically required by law to perform the act").

¶9 Although it is ultimately Reed's responsibility to establish error in order to obtain relief on appeal, *see Gen. Elec. Capital Corp. v. Osterkamp*, 172 Ariz. 191, 193, 836 P.2d 404, 406 (App. 1992), he admits he does not know what other remedy or theory of liability might be appropriate in his case. Reed has thus failed to develop any meaningful argument concerning his attempt to join the state as a party or to seek special action relief, waiving both issues for review. *See Ariz. R. Civ. App. P. 13(a)(7)(A)* (appellate brief must contain argument with citation to authority); *FIA Card Servs., N.A. v. Levy*, 219 Ariz. 523, n.1, 200 P.3d 1020, 1021 n.1 (App. 2008) (failure to develop argument on appeal constitutes abandonment).

Disposition

¶10 We affirm the trial court's dismissal of Reed's claims.