IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

IN RE THE ESTATE OF
KENNETH F. NORVELLE, DECEASED

FLORA LOIODICI, LINDA WELLIN,
NANCY JIMENEZ, AND CONNIE HICKERSON,
Petitioners/Appellants,

v.

PRESTON NORVELLE,
Respondent/Appellee.

No. 2 CA-CV 2021-0007
Filed August 10, 2021

Appeal from the Superior Court in Pima County
No. PB20190907
The Honorable Kenneth Lee, Judge

AFFIRMED

COUNSEL

East Valley Law Firm, Chandler
By Daryl R. Wilson
Counsel for Petitioners/Appellants

Miller, Pitt, Feldman & McAnally P.C., Tucson
By Lindsay E. Brew and Timothy P. Stackhouse
Counsel for Respondent/Appellee

MEMORANDUM DECISION

Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Espinosa and Vice Chief Judge Staring concurred.

E C K E R S T R O M, Judge:

¶1 Flora Loiodici, Linda Wellin, Nancy Jimenez, and Connie Hickerson (collectively "Sisters") appeal from the trial court's grant of summary judgment in favor of their brother, Preston Norvelle. The court ruled that Sisters' complaint alleging financial exploitation of a vulnerable adult under the Adult Protective Services Act ("APSA") was filed beyond the relevant statute of limitations and dismissed it accordingly. For the reasons that follow, we affirm.

Factual and Procedural Background

¶2 On appeal from summary judgment, we view all facts and reasonable inferences in the light most favorable to the non-moving party, here Sisters. *Equihua v. Carondelet Health Network*, 235 Ariz. 504, ¶ 2 (App. 2014). In 2002, the parties' father, Kenneth Norvelle ("Father"), executed a trust and a will, with the trust as the beneficiary of the will. Norvelle was appointed both successor trustee and personal representative for Father's estate. The six beneficiaries of the trust were Norvelle, Sisters, and a second brother who is not party to this action.

¶3 Father suffered a stroke in 2012, which left him impaired. Afterwards, Norvelle lived with Father to assist him with his needs, until Father's death in December 2016.

¶4 In February 2017, Norvelle's counsel wrote to Sisters and advised them of the status of the trust. Then, in June, he sent a letter specifying that the trust contained three assets worth a total of $196,000, a sum significantly less than Sisters expected. The June letter further advised that other unspecified assets had been conveyed outside of the trust.

¶5 Concerned that Norvelle had taken advantage of their Father's vulnerable condition to receive more than his fair share of assets, Sisters retained counsel. In a July 2017 letter, that counsel wrote to Norvelle's attorney detailing Sisters' concerns and demanding documents and information.

¶6 Norvelle's counsel responded in a letter dated August 24, 2017. It set forth the details of all Father's assets, including the amounts of each account and insurance policy, and what had been transferred to Norvelle upon Father's death. Sisters concede that they received this letter, but they did not respond.

¶7 In September and December 2017, Norvelle distributed all the assets in the trust—less fees, taxes, and costs—to its six beneficiaries. Each beneficiary received two payments totaling $30,204 and signed a release agreeing to hold Norvelle harmless from any claim related to the trust or its administration.

¶8 In November 2018, Norvelle took steps to evenly distribute among the six siblings the assets that had passed to him outside the trust. Three of the Sisters (Wellin, Jimenez, and Hickerson) received an additional cash sum of $32,861. Norvelle intended for the fourth Sister, Loiodici, to receive the same amount, but in $300 monthly installments over eight years. Norvelle stopped making these payments two months after this lawsuit was filed, at which point Loiodici had received only $1,500.

¶9 In January 2019, after the lump sum payments had been made, Sisters' counsel wrote to Norvelle, repeating their concerns and demanding an accounting and distribution schedule for Father's remaining assets. Norvelle's counsel responded that all assets had been distributed and there would be no additional payments.

¶10 On July 15, 2019, Sisters filed a Petition for Leave to File a Financial Exploitation Claim (the "Petition for Leave"), although it had been prepared by counsel and verified by Sisters in May. Sisters were required to seek leave of the trial court to file their financial exploitation claim under the APSA because they were not appointed personal representatives of Father's estate. *See* A.R.S. § 46-456(G). Over Norvelle's objection, the court granted Sisters' Petition for Leave on October 8. Two months later, on December 5, Sisters filed their Petition for Financial Exploitation of a Vulnerable Adult (the "Complaint").

¶11 In September 2020, Norvelle moved for summary judgment on the ground that the statute of limitations had run because Sisters had filed their Complaint more than two years after they had notice and actual knowledge of their claim. *See* A.R.S. §§ 46-455(K), 46-456(F) (establishing two-year statute of limitations for financial exploitation claims under APSA). Sisters responded, but they failed to file an opposing statement of fact to either dispute the facts asserted by Norvelle or to specify any facts establishing a genuine dispute or otherwise precluding summary judgment, as required by Rule 56(c)(3)(B), Ariz. R. Civ. P.

¶12 After a hearing, the trial court found that the August 24, 2017 letter from Norvelle's counsel had triggered the running of the statute of limitations. Assuming ample mailing time, the court concluded the triggering date was "no later than September 1st, 2017." The court equitably excluded from the statute of limitations period the forty-seven days from July 15, 2019—the date Sisters had filed their Petition for Leave—and October 8, 2019—the date the trial court had granted that Petition. But even with this exclusion, and "even applying the best date for [Sisters] under the facts," the court concluded that the two-year statute of limitations had expired on November 25, 2019. The court further found that Sisters' filing of their Petition for Leave in July 2019 had been insufficient to stop the running of the statute, which required the filing of a complaint. Because Sisters had not filed their Complaint until December 5, 2019, the court ruled that the statute of limitations had run and granted summary judgment in Norvelle's favor, dismissing the case and awarding him costs. Sisters appealed.[1] We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Discussion

¶13 We review de novo a trial court's decision granting summary judgment. *In re Estate of Wyttenbach*, 219 Ariz. 120, ¶ 8 (App. 2008). We will affirm such a decision when there are no genuine issues of material fact and the moving party was entitled to judgment as a matter of law. *Id.*

¶14 Sisters challenge the trial court's determination that their APSA financial exploitation claim was time-barred. They first contend that disputed material facts exist as to the date they had actual knowledge of their claim. But at the hearing on the motion for summary judgment, the trial court expressly asked Sisters' counsel to confirm that the August 2017 letter was "the triggering date for [the] statute because at that point you knew everything you needed to know." Sisters' counsel responded affirmatively: "That's when they had the who, the what, yes, and were able to actually file a lawsuit for the exploitation. . . . With this information, they were able to move forward and file that." Counsel further stated that it was from Sisters' July 2017 demand letter that "they finally got the information they needed." Based on this concession that Sisters had actual knowledge of their claim at the time they received the August 2017 letter, the trial court

[1]Sisters' notice of appeal became effective upon the trial court's entry of formal judgment. Ariz. R. Civ. App. P. 9(c). The day after filing their notice of appeal, Sisters also filed a motion for a new trial, which the trial court denied.

found it "undisputed that [they] had sufficient notice of the basis of their claim not later than August 31, 2017."

¶15 Their counsel's concession at the hearing was not, as Sisters contend on appeal, a misstatement that was inconsistent with their pleading in response to the motion for summary judgment. That pleading expressly provided the receipt of the August 2017 letter as one possible date on which "they discovered the cause of action," arguing it was only with receipt of the letter "in August or September 2017 that they received sufficient information from [Norvelle's counsel] to become concerned about financial exploitation of [Father] when he was still alive." In particular, the response argued the August 2017 letter "finally informed [Sisters] of which assets had passed to [Norvelle], what their value was," and that he "had been added as a joint owner with right of survivorship" on multiple bank accounts less than two months after Father suffered his stroke.[2] Thus, the trial court reasonably concluded—as Sisters urged in their pleading and their counsel conceded at the hearing—that the August 2017 letter "provided all the necessary information for [Sisters] to know they had a potential claim against [Norvelle], thus, starting the statute of limitation."[3]

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[2]Sisters' agreement that Norvelle's counsel provided this information in August 2017 contradicts their argument on appeal that summary judgment was inappropriate because Norvelle "actively concealed the acts necessary for [Sisters] to discover the cause of action."

[3]Sisters argue the trial court "applied the wrong standard" when it found they had the necessary information "to know they had a potential claim" against Norvelle in August 2017. They contend the APSA requires "a heightened level of knowledge of the cause of action before the statute of limitations begins to run," such that "[i]t is not enough to know of a 'potential claim' to start the statute of limitations under A.R.S. § 46-455(K)." But Sisters did not raise this argument in their response to Norvelle's motion for summary judgment or at the hearing on that motion, raising it for the first time in their motion for a new trial. We generally decline to consider an issue raised for the first time in a motion for a new trial. *See, e.g.*, *Kent v. Carter-Kent*, 235 Ariz. 309, ¶ 20 (App. 2014) (party waives issue by raising it for first time in motion for new trial); *Conant v. Whitney*, 190 Ariz. 290, 293 (App. 1997) (party cannot raise new argument in motion for new trial). Although we have, on occasion, considered an argument first raised in a motion for a new trial when the trial court expressly ruled on the new argument and the denial of the motion for new trial was itself appealed, *Parra v. Cont'l Tire N. Am., Inc.*, 222 Ariz. 212, ¶ 7 & n.2 (App. 2009), such conditions do not exist here. We therefore decline to address

¶16 Sisters also contend that, even if the statute of limitations began running in August 2017, they timely initiated their action by filing their Petition for Leave in July 2019. The trial court rejected this argument, concluding that a "complaint is enough to stop the statute," and "a petition . . . to get leave to file a complaint is not the same as a complaint." We agree.

¶17 The remedy provided for financial exploitation of a vulnerable adult is "a civil action."[4] § 46-456(B). "[A]ll civil actions and proceedings" in superior court are governed by the Arizona Rules of Civil Procedure, Ariz. R. Civ. P. 1, which stipulate that such actions are "commenced by filing a complaint with the court," Ariz. R. Civ. P. 3. The rules of probate procedure in effect at the time Sisters filed their Petition for Leave likewise established that "[a] civil action filed within a probate case shall be commenced in accordance with Rule 3, Arizona Rules of Civil Procedure," Ariz. Sup. Ct. Order R-07-0012 (Sept. 16, 2008), *i.e.*, by filing a complaint.

¶18 Sisters contend that their filing of the Petition for Leave in July 2019 initiated a "proceeding" as required under § 46-455(K) to stop the running of the statute of limitations. But the statute of limitations refers not to a "proceeding" generally, but rather to "civil proceedings," § 46-455(K), which are governed by the Rules of Civil Procedure, under which all actions are commenced through the filing of a complaint under Rules 1-3, Ariz. R. Civ. P. *See also In re Stephens Revocable Trust*, 249 Ariz. 523, ¶¶ 13-15 (App. 2020) (improper for trial court to evaluate merits of proposed financial exploitation claim at "pre-pleading stage" when interested person files petition for leave to file APSA complaint).

¶19 Indeed, in their Petition for Leave, Sisters asked the trial court to grant them standing to allow them "to investigate and pursue, if needed,

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Sisters' new argument that our legislature intended to require a heightened standard of knowledge for triggering the running of the statute of limitations on APSA claims.

[4]Sisters' arguments regarding the initiation of formal probate proceedings are irrelevant, given that a claim for financial exploitation under the APSA requires initiation of "a civil action," § 46-456(B), and the statute of limitations expressly references initiation of "civil proceedings," § 46-455(K)*; see also* Ariz. Sup. Ct. Order R-07-0012 (Sept. 16, 2008) (probate rules in effect at time of Sisters' filings, establishing: "The term 'probate proceeding' does not mean a civil action . . . even if such civil action . . . is filed within or consolidated with a probate case.").

an action for financial exploitation of a vulnerable adult." This language reflects that the Petition itself was insufficient to commence an action for financial exploitation under § 45-456(B), which Sisters had not yet decided to file. For all these reasons, the trial court correctly concluded that Sisters' civil action for financial exploitation was commenced with the filing of their Complaint in December 2019, not their Petition for Leave to (possibly) file it.

¶20 Finally, Sisters contend the trial court erred in dismissing Loiodici's claims "to the remainder of her final distribution," which the court "ignored" without making any findings when dismissing the Complaint. But no such claim was included in Sisters' Complaint, which only stated a cause of action for financial exploitation of a vulnerable adult under § 46-456. Loiodici never sought to amend the Complaint or otherwise file any separate claim. The trial court cannot have denied or dismissed a claim that was never before it.

Disposition

¶21 We affirm the judgment of the trial court. Sisters' request for attorney fees and costs is denied. As the prevailing party, Norvelle is entitled to recover his costs on appeal, A.R.S. § 12-341, upon his compliance with Rule 21(b), Ariz. R. Civ. App. P.