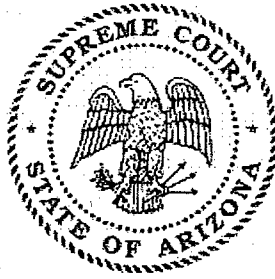


APPENDIX C

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Supreme Court

STATE OF ARIZONA

ROBERT BRUTINEL
Chief Justice

ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET, SUITE 402
PHOENIX, ARIZONA 85007
TELEPHONE: (602) 452-3396

TRACIE K. LINDEMAN
Clerk of the Court

August 3, 2023

RE: IN RE THE SIMPSON FAMILY TRUST
Arizona Supreme Court No. CV-23-0045-PR
Court of Appeals, Division Two No. 2 CA-CV 22-0094
Pima County Superior Court No. PB20211970

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on August 3, 2023, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

FURTHER ORDERED: Request for Attorneys' Fees (Appellee Alan Simpson) = GRANTED.

A panel composed of Vice Chief Justice Timmer, Justice Lopez, Justice Beene and Justice King participated in the determination of this matter.

Tracie K. Lindeman, Clerk

TO:
Denice R Shepherd
Warren Simpson
Beth C Beckmann
my

APPENDIX B

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IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

IN RE THE SIMPSON FAMILY TRUST

ALAN SIMPSON,
Petitioner/Appellee,

v.

WARREN SIMPSON,
Respondent/Appellant.

No. 2 CA-CV 2022-0094
Filed January 31, 2023

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NOT FOR PUBLICATION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. PB20211970
The Honorable Kyle A. Bryson, Judge

AFFIRMED

COUNSEL

Law Office of Denice R. Shepherd P.C., Tucson
By Denice R. Shepherd
Counsel for Petitioner/Appellee

Warren Simpson, Tucson
In Propria Persona

IN RE SIMPSON FAM. TR.
Decision of the Court

MEMORANDUM DECISION

Judge Sklar authored the decision of the Court, in which Presiding Judge Eckerstrom and Chief Judge Vásquez concurred.

S K L A R, Judge:

¶1 Warren Simpson appeals the trial court's order granting Alan Simpson's cross-motion for summary judgment, which resulted in Warren's removal as trustee of the Simpson Family Trust ("Trust"). We reject Warren's arguments that the trial court violated his constitutional rights to court-appointed counsel and a jury trial. We also agree with the court that Warren had breached his fiduciary duties by failing to provide required information to Alan, a trust beneficiary. We therefore affirm the court's judgment.

Factual Background

¶2 We view the facts and reasonable inferences in the light most favorable to Warren, the party opposing the cross-motion for summary judgment. *See Braillard v. Maricopa Cnty.*, 224 Ariz. 481, n.11 (App. 2010).

¶3 In 1993, Barton and Irene Simpson executed the Trust, under which they were named the original trustees. After Barton died, Irene signed the fourth amendment and restatement of the Trust, which remains in effect.

¶4 Under the amended Trust, Barton and Irene's two sons, Warren and Roger, would serve as the Trust's co-trustees after Irene's death. Additionally, upon the death, resignation, or incapacity of one of her sons, the other son would continue as sole trustee. The Trust provided that each surviving son would receive a one-half interest in the Trust's assets upon Irene's death. The Trust also provided that if Roger predeceased Irene, his interest would be divided equally among his descendants.

¶5 Roger died in 2019 and was survived by three children, Alan and two siblings. Irene died in June 2020, at which point Warren became the sole trustee. In February 2021, Alan demanded that, within sixty days, Warren provide a Trust inventory and preliminary accounting. After Warren failed to provide the requested documents, Alan repeated his request in April 2021. A few days later, Warren provided Alan with an

IN RE SIMPSON FAM. TR.
Decision of the Court

inventory of the Trust's purported assets, which included some estimated values.

¶6 In May 2021, Alan sent Warren a letter challenging and requesting clarification on certain items in the inventory. Two days later, Warren responded, claiming that Alan had "no rights for any demand or say upon the trust." He did not otherwise respond to Alan's letter.

¶7 The following month, Alan sent another letter to Warren asking whether he was living at a residential property owned by the Trust, whether he was paying rent for the property and, if so, how the property's rental value was being determined.

¶8 In Warren's response, he did not indicate whether he was living in Trust property or paying rent. Nor did he provide an accounting. Warren also disputed whether Alan was a beneficiary of the Trust.

Procedural Background

¶9 In November 2021, Alan commenced this action, seeking a declaratory judgment that he was a Trust beneficiary, an accounting of the Trust, and removal of Warren as trustee. Warren filed a motion for summary judgment. He argued that he was not at fault for failing to provide the requested information and that Alan's "case rests only on speculation and conjecture." The motion did not contain a statement of facts and was not supported by affidavits. Alan's response included a cross-motion for partial judgment on the pleadings, which the court treated as a cross-motion for summary judgment pursuant to Ariz. R. Civ. P. 12(d). He argued that there was no genuine dispute of material fact that he was entitled to a share of the Trust assets and that Warren should be removed as trustee for breaching his fiduciary duties. Warren's response to the cross-motion contained no statement of facts, nor was it supported by any controverting affidavits.

¶10 At oral argument in April 2022, the trial court determined that Alan and his siblings were entitled to a share of the Trust assets, and Alan withdrew his request for an accounting. In a subsequent ruling, the court granted Alan's cross-motion and removed Warren as Trustee. The court also appointed a special fiduciary to serve as Warren's replacement and denied Warren's motion for summary judgment. Warren now appeals the

IN RE SIMPSON FAM. TR.
Decision of the Court

trial court's grant of summary judgment. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(9).¹

Warren's Constitutional Arguments are Waived and Lack Merit

¶11 Warren contends that his rights under the Fifth, Sixth, Seventh, and Fourteenth Amendments to the United States Constitution were violated. But, based on the record before us, Warren did not raise these arguments below. Nor did Warren provide a transcript of the April 2022 oral argument so we could determine whether he raised the constitutional issues there. As the appellant, Warren bore the responsibility of ordering the necessary transcripts. See *Ariz. R. Civ. App. P. 11(c)(1)*; *Baker v. Baker*, 183 Ariz. 70, 73 (App. 1995). We presume the missing transcript supports the trial court's ruling. *Myrick v. Maloney*, 235 Ariz. 491, ¶ 11 (App. 2014). We therefore could deem the constitutional arguments waived. See *Rhoads v. Harvey Publ'ns, Inc.*, 131 Ariz. 267, 269 (App. 1981) ("[S]ummary judgment may not be reversed on grounds first advanced on appeal."). Nevertheless, in our discretion, we will address Warren's constitutional arguments. See *City of Tempe v. Fleming*, 168 Ariz. 454, 456 (App. 1991) (general rule that arguments cannot be raised for first time on appeal may be suspended at court's discretion). We review constitutional issues de novo. *Fragoso v. Fell*, 210 Ariz. 427, ¶ 13 (App. 2005).

¶12 First, Warren argues that the trial court's failure to provide him with court-appointed counsel violated his rights under the Fifth, Sixth, and Fourteenth Amendments. However, the right to court-appointed counsel under the United States Constitution exists only when an indigent litigant may lose his or her physical liberty if the case is lost. *State ex rel. Corbin v. Hovatter*, 144 Ariz. 430, 431 (App. 1985) (citing *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981)). No such right exists in civil cases. *Powell v. State*, 19 Ariz. App. 377, 378 (1973). As this probate matter is civil rather than criminal, Warren had no right to a court-appointed attorney.

¶13 Additionally, Warren argues that the trial court's grant of summary judgment violated his right to a jury trial under the Seventh

¹Warren's notice of appeal challenged the trial court's April 22, 2022 ruling. Because that ruling did not include language under Rule 54(b) or 54(c), *Ariz. R. Civ. P.*, making it a final appealable judgment, this court remanded for the trial court to consider including the necessary language, which it did by amendment entered August 31, 2022. See *Brumett v. MGA Home Healthcare, L.L.C.*, 240 Ariz. 420, ¶ 13 (App. 2016) ("absent compliance with Rule 54(b) or 54(c), a judgment, decree or order entered in a formal Title 14 proceeding is not appealable under A.R.S. § 12-2101(A)(9)").

IN RE SIMPSON FAM. TR.
Decision of the Court

Amendment. The Seventh Amendment ensures the right to a jury trial for actions that are similar to common-law cases ordinarily decided in English law courts in the late eighteenth century. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 41-42 (1989). The right does not extend to actions customarily heard by courts of equity or admiralty. *Id.* Actions for breach of a trustee's fiduciary duties in probate proceedings are equitable and not sufficiently analogous to any long-standing, common-law cause of action. See *In re Estate of Newman*, 219 Ariz. 260, ¶¶ 53-55 (App. 2008). Warren thus has no right to a jury trial. See *id.* ¶¶ 56-57 (applying equivalent analysis under Arizona Constitution).

¶14 Warren also appears to argue that the trial court deprived him of a jury trial by deciding this matter on summary judgment. But even if a jury-trial right existed in this action, summary-judgment proceedings would not violate it. See *Orme Sch. v. Reeves*, 166 Ariz. 301, 308 (1990) (summary judgment does not interfere with constitutional right to jury trial because "right to jury trial only attache[s] if the case present[s] a genuine factual question"). Accordingly, the court did not violate Warren's constitutional rights.

The Trial Court Properly Granted Summary Judgment to Alan

¶15 Warren also appears to challenge the trial court's grant of summary judgment on the basis it was not supported by proper evidence. He maintains "there were only unproven and unexamined words presented before the court." And "[a]ny type of judicial decision made and given with such fractured and unverified information points to something judicially unmentionable."

¶16 Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(a). In reviewing a grant of summary judgment, we determine de novo whether any genuine issues of material fact exist and whether the trial court properly applied the law. *Underwood v. Wilczynski*, 252 Ariz. 405, ¶ 6 (App. 2021). We will affirm a grant of summary judgment if it is correct for any reason. *S & S Paving & Constr., Inc. v. Berkley Reg'l Ins. Co.*, 239 Ariz. 512, ¶ 7 (App. 2016). If the party opposing a motion for summary judgment fails to file affidavits or other items listed in Rule 56, Ariz. R. Civ. P., in opposition to the motion, the facts stated in the moving party's affidavits are uncontroverted and are accepted as true. *Swansea Props., Inc. v. Hedrick*, 3 Ariz. App. 594, 596 (1966); *Maxwell v. Fid. Fin. Servs., Inc.*, 184 Ariz. 82, 86 (1995). But as noted above, we must still draw all inferences in favor of the party against whom summary judgment was granted.

IN RE SIMPSON FAM. TR.
Decision of the Court

¶17 Whether a trustee may be removed is governed by A.R.S. § 14-10706. As relevant here, it provides that upon the request of a beneficiary or on the court's own initiative, a trustee may be removed if "[t]he trustee has committed a material breach of trust." § 14-10706(B)(1); *see also* A.R.S. § 14-11001(B)(7) (allowing court to remove trustee to remedy breach of trust). A "breach of trust" is a "violation by a trustee of a duty the trustee owes to a beneficiary." § 14-11001(A).

¶18 A trustee's duties to a beneficiary are set forth by the terms of a trust, as supplemented by the Arizona Trust Code. A.R.S. § 14-10105(A) (setting default and mandatory rules for trustees); A.R.S. §§ 14-10801 to 14-10820 (outlining trustee's duties, including duties of good faith, loyalty, prudent administration, and record keeping). The duties are fiduciary in nature. *See Ariz. Tile, L.L.C. v. Berger*, 223 Ariz. 491, ¶ 38 (App. 2010).

¶19 Relevant here, the Trust's terms required the trustee to "keep and maintain adequate books and records reflecting all income and principal transactions." This requirement is mirrored in A.R.S. § 14-10810, which requires trustees to keep adequate records of trust administration. The Trust's terms also obligated the trustee to render an annual accounting to each "income beneficiary" of the Trust. This requirement supplements that of § 14-10813(A), which requires a trustee to keep the "qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests." That same statute also requires a trustee to "promptly respond to a beneficiary's request for information related to the administration of the trust," absent unreasonableness. *Id.*

¶20 Although Warren has argued at times that Alan is not a beneficiary – such that Warren would not owe Alan these duties – the Trust provides otherwise. That document defines an "income beneficiary" as a "distributee or permissible distribute[e] under the Arizona Trust Code." *See* A.R.S. § 14-10103(5) (defining "[d]istributee" as "a person who receives property from a trust other than as a creditor or purchaser"). Alan meets this definition, as he is entitled to distributions in light of his father's death. Thus, Warren owed Alan fiduciary duties.

¶21 The trial court properly determined that there was no genuine dispute of material fact that Warren failed to comply with these duties. Specifically, Warren failed to respond to Alan's questions about whether he was residing in property owned by the Trust, whether he was paying rent for the property, and, if so, how the rental value was being determined. He also failed to substantively respond to Alan's requests for an accounting and other information concerning the Trust. And he never provided more than a partial inventory of the Trust's assets after Alan had threatened to

IN RE SIMPSON FAM. TR.
Decision of the Court

take legal action. Taken together, these failures establish that Warren materially breached his obligations as trustee.

¶22 Notably, Warren's failure to provide the required information was undisputed, given that Warren failed to present meaningful admissible evidence in support of his motion for summary judgment or in opposition to Alan's cross-motion. Moreover, although some factual disputes may exist about whether Warren was actually living in trust property without paying rent, those disputes are immaterial in light of Warren's failures to provide the necessary information and accounting. The trial court therefore did not err in granting summary judgment.

Attorney Fees

¶23 Alan has requested attorney fees on appeal pursuant to A.R.S. § 12-349. Under that statute, a court "shall assess reasonable attorney fees" if a party brings or defends a claim "without substantial justification" or "solely or primarily for delay or harassment." § 12-349(A). The statute defines "without substantial justification" as a claim or defense that "is groundless and is not made in good faith." § 12-349(F). Although Warren's arguments lack merit, this court is not persuaded that they were made in bad faith or primarily for the purpose of delay or harassment. Alan also alluded to the possibility of pursuing a surcharge claim against Warren under A.R.S. § 14-1105. But he has not actually made such a claim, so we do not consider it. Therefore, Alan's request for fees on appeal is denied. Nevertheless, as the prevailing party, Alan is entitled to his costs on appeal upon compliance with Rule 21, Ariz. R. Civ. App. P. See A.R.S. § 12-341.

Disposition

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

APPENDIX A

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APPENDIX A

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. KYLE BRYSON

CASE NO. PB20211970

DATE: April 22, 2022

IN THE MATTER OF:

THE SIMPSON FAMILY TRUST

RULING

IN CHAMBERS UNDER ADVISEMENT

At issue in this Under Advisement Ruling are the Trustee's Motion For Summary Judgment And The Cross-Motion For Judgment On The Pleadings; the Motion to Strike the Response to Application for Default, Motion to Strike Response to Petition for Declaratory Action, Accounting, and Removal and Surcharge of the Trustee, and the Motion to set Default Hearing. The court has reviewed the pleadings and considered the arguments of counsel and finds and rules as follows.

1. TRUSTEE'S MOTION FOR SUMMARY JUDGMENT AND THE CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS

The respondent trustee filed a Motion for Summary Judgment on January 28, 2022. In his motion, which does not comply with the requirements of Arizona Rule of Civil Procedure 56(e), he requests that the court dismiss the petition filed on November 18, 2021. The court is disinclined to strike the non-compliant motion, but will consider only supported factual allegations and legal arguments.

Petitioner filed a response to the Motion and a Cross-Motion for Judgment on the Pleadings on February 18, 2022. However, since the parties have included information outside of the pleadings, and the court has not excluded that information, the court will treat the Cross-Motion as a Cross-Motion for Summary Judgment. Ariz. Rule Civ. Proc. 12(d).

Summary judgment is proper when there are no genuine issues of material fact in the case. "A party may move for summary judgment, identifying each claim or defense--or the part of each claim or defense--on which summary judgment is sought. The court shall grant summary judgment if 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).

Facts, either in support of, or in opposition to, a motion for summary judgment must be established by the presentation of supporting evidence or affidavits. "When a summary judgment motion is made and supported as provided in this rule, an opposing party may not rely merely on allegations or denials of its own pleading. The opposing party must, by affidavits or as otherwise provided in this rule, set forth specific facts showing a genuine issue for trial" Ariz. R. Civ. P. 56(e).

Jennifer Thorson
Law Clerk

RULING

Page 2

Date: April 22, 2022

Case No.: PB20211970

Petitioner is requesting summary judgment on two issues. The first is to find that Petitioner and his sisters are entitled to a one-half share of the trust assets allocated to their deceased father under the terms of the trust. The court has already made this finding after oral argument and need not rule on that issue. The second issue is to request removal of Respondent Trustee from the office of Trustee, and to appoint the firm of Laber & Laber to serve as special fiduciary. (Petitioner in her motion had also requested that the court order a full accounting by Respondent, however, at oral argument on the motion she withdrew that request.)

THE COURT FINDS the Respondent has breached his fiduciary responsibility as Trustee. He has failed to provide a comprehensive inventory of the Trust and accountings as required by the Trust. He has failed to properly protect Trust assets. He has engaged in what, at worst, could be self-dealing, at best, a lack of understanding of his duties, by residing in the home, a Trust asset, without paying rent. These facts are uncontroverted by the respondent. The Court is satisfied the Respondent will not correct these errors or omissions if he is allowed to serve as Trustee.

THEREFORE, IT IS ORDERED granting the cross-motion for summary judgment.

IT IS ORDERED Warren Simpson is removed as Trustee of the Simpson Family Trust, effective immediately.

IT IS FURTHER ORDERED appointing Laber & Laber as special fiduciary for the Simpson Family Trust, to have the authority of a Trustee, including but limited to the investigation of the assets of the Simpson Family Trust, to pursue the reacquisition of any Trust assets that may be recovered by operation of law, to administer the Trust in accordance with its terms and conditions, as well as Arizona law, and to perform any other duties appropriate and necessary in the furtherance of its fiduciary responsibilities.

Based upon the above ruling, IT IS ALSO ORDERED the Trustee's Motion for Summary Judgment is DENIED.

2. MOTION TO STRIKE RESPONSE TO APPLICATION FOR DEFAULT

Petitioner asserts the Trustee's Response to Application for Default should be stricken. The Court concurs; such a filing is not permissible or contemplated under the rules.

IT IS THEREFORE ORDERED the Trustee's Response to Application for Default is hereby stricken.

3. MOTION TO STRIKE RESPONSE TO PETITION FOR DECLARATORY ACTION, ACCOUNTING, AND REMOVAL AND SURCHARGE OF THE TRUSTEE

Petitioner submits the Trustee's response should be stricken because he failed to pay a filing fee. While that would be grounds for dismissal, here, the record reflects Trustee did pay a filing fee via a fee waiver, albeit a month after the Response was filed. Mr. Simpson filed an application for a fee waiver was filed July 28, 2022, and this Court signed the proposed waiver order that same day.

IT IS ORDERED the motion to strike is denied.

4. MOTION TO SET DEFAULT HEARING

This motion is rendered moot by the Court's rulings contained herein, and as such, is DENIED.

Jennifer Thorson
Law Clerk

RULING

Page 3

Date: April 22, 2022

Case No.: PB20211970

The Court will sign this in-chambers ruling in lieu of a formal order. If, however, counsel for Petitioner wishes the Court to issue a formal order, she is given leave of court to lodge a formal order, and caption it "Amended Order" or "Superseding Order" to avoid any confusion that might otherwise arise.

 **HON. KYLE BRYSON** *lsf*

(ID: 224e7291-f0d4-4cbd-aa3d-3dfb0a96dbe6)

cc: Hon. Kyle Bryson
Denice R. Shepherd, Esq.
Warren Simpson
Clerk of Court - Probate Unit
Clerk of Court - Under Advisement Clerk

Jennifer Thorson
Law Clerk

APPENDIX D

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FILED BY CLERK

SEP 08 2023

COURT OF APPEALS
DIVISION TWO

COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

M A N D A T E

2 CA-CV 2022-0094
Department A
Pima County
Cause No. PB20211970

RE: IN RE THE SIMPSON FAMILY TRUST

To: The Superior Court of Pima County and the Hon. Kyle A. Bryson, Presiding Judge, in relation to Cause No. PB20211970.

This cause was brought before Division Two of the Arizona Court of Appeals in the manner prescribed by law. This Court rendered its Memorandum Decision and it was filed on January 31, 2023.

No Motion for Reconsideration was filed and the time for filing such has expired. A Petition for Review was filed and DENIED by Order of the Arizona Supreme Court.

NOW, THEREFORE, YOU ARE COMMANDED to conduct such proceedings as required to comply with the accompanying Memorandum Decision of this Court.

I, Beth C. Beckmann, Clerk of the Court of Appeals, Division Two, hereby certify the accompanying Memorandum Decision (see link below) to be a full and accurate copy of the decision filed in this cause on January 31, 2023.

To view the decision, please click on the following link:
<https://www.appeals2.az.gov/APL2NewDocs1/COA/965/3761156.pdf>

DATED: September 08, 2023

BETH C. BECKMANN
Judge Pro Tempore/Clerk of the Court



2 CA-CV 2022-0094

Pima County Superior Court Number PB20211970

Superior Court Record returned on September 08, 2023

[NO RECORD TO RETURN]

RECEIVED: _____
Clerk, Pima County Superior Court

BY: _____
Deputy Clerk

2 CA-CV 2022-0094
Pima County Superior Court Number PB20211970

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Hon. Kyle A. Bryson
Judge
Pima County Superior Court
110 W. Congress, Div. 5
Tucson, AZ 85701

Gary Harrison
Clerk of the Court
Pima County Superior Court
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[ORIGINAL MANDATE]

Michelle Madrid
Director, Case Management Services
Arizona Superior Court in Pima County
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