IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

GARY WALKER, PERSONAL REPRESENTATIVE FOR THE ESTATE OF EVE F. WALKER; GARY WALKER, TRUSTEE OF THE ROBERT W. WALKER DYNASTY TRUST,
Plaintiffs/Appellees,

v.

NILES S. LIPIN,
Defendant/Appellant.

No. 2 CA-CV 2021-0023
Filed October 6, 2021,

Appeal from the Superior Court in Pinal County
No. S1100CV201901745
The Honorable Stephen F. McCarville, Judge

AFFIRMED

COUNSEL

Fennemore Craig P.C., Phoenix
By David A. Timchak
Counsel for Plaintiffs/Appellees

Davillier Law Group, Phoenix
By Alexander Kolodin, Chris Ford, and Christopher Viscovic
Counsel for Defendant/Appellant

OPINION

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

E S P I N O S A, Presiding Judge:

¶1 In this action on a judgment, appellant Niles Lipin challenges the trial court's entry of judgment on the pleadings in favor of Gary Walker, in Walker's capacity as personal representative of the Estate of Eve F. Walker and as trustee of the Robert W. Walker Dynasty Trust ("Trust"). Lipin contends the court erred by permitting Walker's substitution as plaintiff and by rejecting Lipin's defense that the judgment had lapsed under A.R.S. § 12-1611. He also challenges the court's sanction of attorney fees pursuant to A.R.S. § 12-349. For the reasons stated below, we affirm.

Factual and Procedural Background

¶2 In reviewing the grant of a motion for judgment on the pleadings, we accept as true the well-pled factual allegations of the complaint. *Shaw v. CTVT Motors, Inc.*, 232 Ariz. 30, ¶ 8 (App. 2013). The relevant facts here, however, are largely undisputed. On May 21, 2010, Eve and Robert Walker ("the Walkers"[1]) obtained a final monetary judgment against Lipin as part of a Pinal County civil lawsuit for fraud. On September 16, 2011, Lipin filed for Chapter 11 Bankruptcy. In December 2011, the Walkers instituted an adversary proceeding in the bankruptcy court alleging their judgment was non-dischargeable. Five years later, the bankruptcy court ruled, contrary to Lipin's argument, that the Walkers' time to renew their judgment had been tolled during the pendency of the bankruptcy stay. The bankruptcy court ultimately entered a final judgment

[1]Robert Walker died in May 2010, and his estate assets transferred to the Trust; the Walkers' son Gary Walker is the trustee. Eve Walker died in April 2018. As of the filing of this appeal, Eve's estate was open, with Gary Walker serving as the personal representative. Except where the circumstances require otherwise, we will use "the Walkers" when referring to Eve and Robert, their estates, and the Trust in this decision.

on November 22, 2017 excepting the Walkers' 2010 judgment from discharge.

¶3 In May 2017, Lipin filed a civil action in Pinal County Superior Court against the Walkers requesting a declaratory judgment that their renewal time—five years pursuant to § 12-1611—had expired and their judgment was unenforceable. The court granted the Walkers' motion for judgment on the pleadings, finding Lipin's action barred by the doctrines of claim and issue preclusion. The court further determined that regardless of preclusion, Lipin's claims failed as a matter of law because the Walkers' time to bring their enforcement action tolled during the bankruptcy proceeding, had not lapsed, and would not lapse "until December 7, 2020 at the earliest."[2] We affirmed the court's ruling on appeal. *Lipin v. Estate of Walker*, No. 2 CA-CV 2018-0182 (Ariz. App. July 29, 2019) (mem. decision).

¶4 In November 2019, the Walkers, in the name of their estates, filed the instant action on the 2010 judgment. Lipin moved to dismiss, arguing that the recently amended language of § 12-1611 barred the claim, and the trial court denied the motion. The Walkers then moved for judgment on the pleadings, and Lipin moved for summary judgment. Lipin later urged dismissal for lack of standing and, in the alternative, alleging neither estate was a real party in interest. In response, Gary Walker, as personal representative of Eve Walker's estate and trustee of the Trust, ratified the actions taken in the matter and requested substitution as the proper plaintiff, which the court granted.

¶5 After oral argument, the trial court granted the Walkers' motion for judgment on the pleadings and denied Lipin's motion for summary judgment. The court reasoned that Lipin was precluded from arguing that the Walkers' time to renew their judgment had lapsed in light of the previous trial court's ruling that the time to renew would not lapse until December 7, 2020 at the earliest and this court's decision affirming that ruling. The court also rejected Lipin's argument that the amended language of § 12-1611 rendered the Walkers' action untimely and granted the Walkers' request for attorney fees pursuant to § 12-349. A signed, final order was thereafter entered, from which Lipin appealed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 12-2101(A)(1).

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[2]We again take no position on the propriety of the bankruptcy court's ruling. *See Lipin v. Estate of Walker*, No. 2 CA-CV 2018-0182, n.10 (Ariz. App. July 29, 2019) (mem. decision).

Substitution of Real Party in Interest

¶6 Lipin first contends the trial court erred by denying his motion to dismiss and granting Gary Walker's motion to substitute as the real party in interest. As noted above, Lipin moved to dismiss the Walkers' complaint for the estates' lack of standing as the real parties in interest. In response, Gary Walker "ratifie[d] the actions taken" by the estates and requested substitution as follows, "Gary R. Walker, personal representative of the Estate of Eve F. Walker in place of the Estate of Eve F. Walker" and "Gary R. Walker, trustee of the Walker Dynasty Trust, in place of the Estate of Robert W. Walker." The court granted the request, and we review its ruling for an abuse of discretion. *See Valley Farms, Ltd. v. Transcon. Ins. Co.*, 206 Ariz. 349, ¶ 6 (App. 2003).

¶7 In *Carranza v. Madrigal*, our supreme court clarified the procedure for the substitution of a real party in interest. 237 Ariz. 512, ¶¶ 9-12 (2015). Rule 17(a)(3), Ariz. R. Civ. P., which provides that "[t]he court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action," is "not self-executing, nor does it provide a mechanism for substitution of a party." *Carranza*, 237 Ariz. 512, ¶ 9. Rule 15(a), Ariz. R. Civ. P., "governs the amendment of pleadings to substitute or add a party." *Carranza*, 237 Ariz. 512, ¶ 12. As Lipin correctly points out, the court in *Carranza* held that a trial court may deny a Rule 15(a) motion if it finds undue delay or prejudice to the opposing party. *Id.* ¶ 13.

¶8 Lipin contends that because Gary Walker failed to follow "the proper procedural method" and file a separate "motion to substitute under Rule 15(a)," instead requesting substitution in response to Lipin's motion to dismiss, the trial court "unequivocally erred" by granting substitution. But Lipin has provided no authority that the court must deny a request for substitution under such circumstances. In fact, Rule 7.1(b)(1), Ariz. R. Civ. P., provides that upon a party's failure to substantially comply with subsection (a) as to the requirements for the form of a motion, the court *may* summarily grant or deny a motion, but such a ruling is not mandated. In any event, the court was free to deem Walker's "request for substitution" a motion for leave to amend under Rule 15(a). *See Carranza*, 237 Ariz. 512, ¶ 13.

¶9 Lipin further asserts the trial court erred in failing to deny substitution on the grounds of undue delay and prejudice. We note, however, that Lipin did not raise his delay or prejudice arguments in

opposition to Walker's substitution. Those arguments were not raised until Lipin's motion for reconsideration of the court's grant of judgment on the pleadings to the Walkers and denial of Lipin's motion for summary judgment. "Generally we do not consider arguments on appeal that were raised for the first time at the trial court in a motion for reconsideration" because "the prevailing party below is routinely deprived of the opportunity to fairly respond." *Evans Withycombe, Inc. v. W. Innovations, Inc.*, 215 Ariz. 237, ¶ 15 (App. 2006). Here, the trial court denied Lipin's motion for reconsideration without response from the Walkers and they had no opportunity to demonstrate they had not unduly delayed substitution or caused prejudice to Lipin. We therefore follow our general rule and decline to consider this portion of Lipin's argument.[3] *See id.*

¶10 To the extent Lipin contends Gary Walker lacked standing as the real party in interest, we disagree. *See* Ariz. R. Civ. P. 17(a)(1)(A), (E); A.R.S. § 14-3110 (cause of action surviving decedent may be asserted by personal representative); *Ader v. Estate of Felger*, 240 Ariz. 32, ¶ 22 (App. 2016) (estate has no capacity to bring lawsuit, but sues through personal representative who acts on behalf of estate). Notably, Lipin's motion to dismiss acknowledged Gary Walker as the trustee of the Trust and the personal representative of Eve Walker's estate. Lipin nevertheless appears to suggest Walker lacked standing because Eve Walker's estate had closed as of November 3, 2020, before Gary's substitution was granted. In denying Lipin's motion for reconsideration on this issue and granting substitution, the court implicitly rejected his contention that Eve Walker's estate had closed and found that Gary Walker was the personal representative of Eve Walker's open estate, findings supported by the record.[4] *See Engstrom v.*

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[3]Even were we to consider this claim, we would find it unpersuasive. As to undue delay, Gary Walker ratified all actions taken in the lawsuit and requested substitution within five days of Lipin raising the standing issue. And we fail to see how Lipin could be prejudiced by Walker's amendment of the complaint, given that the only change to the pleading was substituting Gary Walker as the representative for Eve Walker's estate and the Trust. *See Preston v. Kindred Hosps. W., L.L.C.*, 226 Ariz. 391, ¶ 13 (2011) ("[I]t is difficult to imagine how the substitution of one representative plaintiff for another with identical claims could result in prejudice.").

[4]Ostensibly because Lipin maintains in his opening brief that Eve Walker's estate had closed, the Walkers moved for this court to take judicial notice of a May 4, 2021 order from the probate court that Eve Walker's estate remains open and will remain open through August 2022. We ordinarily

McCarthy, 243 Ariz. 469, ¶ 4 (App. 2018) ("[W]e defer to the court's findings of fact unless they are clearly erroneous."). Lipin has failed to demonstrate the trial court abused its discretion in granting substitution. *See id.* (court abuses discretion when commits error of law or record devoid of competent evidence to support decision).

Timeliness of Action on Judgment

¶11 Lipin next contends the trial court erred by precluding him from arguing the Walkers' action was untimely and failing to address his argument that the judgment had lapsed based on § 12-1611 as amended.[5] In 2018, the legislature amended § 12-1611 to extend the statute of limitations on renewal-of-judgment actions from five years to ten years. 2018 Ariz. Sess. Laws, ch. 36, § 2. The statute was further amended in 2019 to read, "A judgment may be renewed by action thereon at any time within ten years after the date of the judgment, except that an action may not be brought to renew a judgment entered on or before August 2, 2013 that was not renewed on or before August 2, 2018." 2019 Ariz. Sess. Laws, ch. 20, § 2. Lipin claims these amendments constitute a sufficient change in the law such that he should not have been precluded from relitigating whether the Walkers' renewal time had lapsed. *See* Restatement (Second) of Judgments § 28 (1982) (relitigation not barred when issue is one of law and new determination warranted to take account of intervening change in legal context). But even if we agreed with Lipin that a change in the law warranted relitigation, we disagree that application of the amended statute supports his position.

¶12 As noted above, the previous litigation established by a final judgment affirmed on appeal that the bankruptcy action tolled the statute of limitations and the Walkers' time to renew their judgment extended at least until December 7, 2020. The Walkers brought their action to renew

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decline to consider materials outside the record on appeal because this court does not act as a fact finder. *See State v. Schackart*, 190 Ariz. 238, 247 (1997). More importantly, however, we need not consider the probate court's order to resolve Lipin's appeal. Accordingly, we deny the motion to take judicial notice.

[5]Contrary to his contention that the trial court did not address his argument regarding the amendments to § 12-1611, the court rejected it on the merits, concluding, "It is clear that the argument propounded by [Lipin] would lead to an unreasonable result."

well before then, in November 2019. Lipin contends, however, that because the Walkers' judgment was entered before August 2, 2013 (in May 2010) and was not renewed before August 2, 2018, their renewal action "may not be brought," citing § 12-1611 as amended. But such an application of the statute's plain language would result in an absurdity, rendering the Walkers' renewal untimely because it was not filed by August 2018 when it had been judicially determined the time to file had been tolled and would not expire until at least two years later. "[W]e interpret and apply statutory language in a way that will avoid an untenable or irrational result." *State v. Estrada*, 201 Ariz. 247, ¶ 16 (2001).

¶13 Moreover, the legislative materials that Lipin cites confirms the legislature's intention that a claim not be time-barred under these circumstances:

> Anybody whose time to file had expired before August 3, 2018—the effective date of the 2018 legislation—did not receive additional time when that legislation went into effect (*see* A.R.S. § 12-505(A)). Everyone whose time to file did not expire until August 3, 2018, or later received 5 additional years to file (A.R.S. § 12-505(B)).

See Calik v. Kongable, 195 Ariz. 496, ¶ 20 (1999) ("Courts should avoid 'hypertechnical constructions that frustrate legislative intent.'" (quoting *State v. Cornish*, 192 Ariz. 533, ¶ 16 (App. 1998))). Here, the Walkers' renewal was not barred by the five-year time of limitation because their time had not yet expired due to tolling, thus the ten-year limitation governs their action. And such a result is supported by the statute governing the effect of amendments that change the time of limitation, also specifically referenced in the legislative materials. *See* § 12-505(B) ("If an action is not barred by pre-existing law, the time fixed in an amendment of such law shall govern the limitation of the action."). Because the Walkers' action was brought well before any lapse date, the trial court correctly rejected Lipin's argument and entered judgment in the Walkers' favor.[6]

[6] In light of this resolution, we need not address the Walkers' constitutional arguments regarding Lipin's interpretation of § 12-1611. *See Hayes v. Cont'l Ins. Co.*, 178 Ariz. 264, 273 (1994) ("[I]f possible we construe statutes to avoid unnecessary resolution of constitutional issues.").

Attorney Fees Sanction

¶14 Lipin lastly challenges the trial court's sanction of attorney fees pursuant to § 12-349. "We review the trial court's findings of fact for clear error, but review de novo its application of the statute." *Rogone v. Correia*, 236 Ariz. 43, ¶ 23 (App. 2014). In doing so, we view the evidence in the light most favorable to sustaining the award. *Phx. Newspapers, Inc. v. Ariz. Dep't of Corr.*, 188 Ariz. 237, 243 (App. 1997). Section 12-349(A) provides that the trial court "shall assess" reasonable attorney fees and costs "against an attorney or party . . . if the attorney or party": (1) "Brings or defends a claim without substantial justification," (2) Brings or defends a claim solely or primarily for delay or harassment," (3) "Unreasonably expands or delays the proceeding," or (4) "Engages in abuse of discovery." For purposes of this statute, "'without substantial justification' means that the claim or defense is groundless and is not made in good faith." § 12-349(F). "'Groundless' and 'frivolous' are equivalent terms, and a claim is frivolous 'if the proponent can present no rational argument based upon the evidence or law in support of that claim.'" *Rogone*, 236 Ariz. 43, ¶ 22 (quoting *Evergreen W., Inc. v. Boyd*, 167 Ariz. 614, 621 (App. 1991)).

¶15 The trial court here made specific findings as required by A.R.S. § 12-350, which Lipin challenges as "fundamentally flawed" because no court had yet ruled on whether the amended statute barred the Walkers' action on their judgment. While we acknowledge that Lipin's specific defense theory, asserted below and here, had not expressly been considered and rejected by previous courts, it was a successive attempt to avoid the collection of a valid judgment against him based on the same issue—the timeliness of the Walkers' action—that had repeatedly been raised and rejected by multiple courts.[7]

¶16 Moreover, as outlined above, Lipin's shifting avenue for avoiding preclusion of his repeatedly rejected defense required an unreasonable statutory application that would clearly frustrate the legislature's intent. The trial court's findings are supported by the record, and we see no error in its determination that the Walkers were entitled to

[7]As noted earlier, Lipin's argument that the judgment had lapsed was previously rejected by the bankruptcy court, the Pinal County Superior Court, and this court, which also upheld the trial court's attorney fees sanction in that case. Further, the Arizona Supreme Court denied his petition for review and followed suit in awarding attorney fees to the Walkers.

an award of attorney fees pursuant to § 12-349. *See Rogone*, 236 Ariz. 43, ¶ 23.

Attorney Fees and Costs on Appeal

¶17 Lipin requests his attorney fees on appeal pursuant to A.R.S. §§ 12-341.01 and 12-349. Because he is not the prevailing party and the Walkers' defense of this appeal was not "without substantial justification," his request is denied. *See* §§ 12-341.01(A) (court may award fees to "the successful party"), 12-349(A)(1) (fees assessed if party "[b]rings or defends a claim without substantial justification"). The Walkers, however, are granted their request for reasonable attorney fees and costs on appeal pursuant to § 12-349(A)(1), upon compliance with Rule 21, Ariz. R. Civ. App. P.

Disposition

¶18 The trial court's order granting the Walkers' motion for judgment on the pleadings and awarding them attorney fees and costs is affirmed.