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See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FIVE POINTS HOTEL PARTNERSHIP,)	
an Arizona partnership; and)	2 CA-CV 2008-0052
PARAGON HOTEL CORPORATION, a)	DEPARTMENT A
Delaware corporation,)	
)	<u>MEMORANDUM DECISION</u>
Plaintiffs/Appellants,)	Not for Publication
)	Rule 28, Rules of Civil
v.)	Appellate Procedure
)	
RAY and PATRICIA PACIONI; and)	
THE ESTATE OF VIRGIL KOENIG,)	
)	
Defendants/Appellees.)	
)	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV-200501706

Honorable Robert Carter Olson, Judge

VACATED AND REMANDED

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B R A M M E R, Judge.

¶1 This case involves a dispute among partners, filed by Five Points Hotel Partnership (Five Points) and its managing partner, Paragon Hotel Corporation (Paragon), against Ray Pacioni and Patricia Pacioni (Pacioni), and the estate of Virgil Koenig. On appeal, Five Points and Paragon contend the trial court erred in granting Pacioni and Koenig’s motion for summary judgment and in granting their request for attorney fees and costs. We vacate the trial court’s grant of summary judgment, its award of attorney fees and costs, and remand the case to the trial court.

Factual and Procedural Background

¶2 The relevant facts are undisputed. Paragon, Pacioni, Koenig, and non-party Jack Halland were partners in Five Points. Five Points’s sole asset was a hotel in Casa Grande, Arizona. Deep in debt, Five Points decided to sell the hotel in late 2004. In

March 2005, Five Points sold the hotel for \$3.8 million to Casa Grande Resort Living, LLC (CGRL), which intended to immediately resell the hotel. According to Five Points and Paragon, CGRL paid nothing to Five Points at the time of the sale and instead agreed that it would assume Five Points's bond debt on the hotel and, after reselling the hotel, would subsequently "reconcile the [hotel's] various bond reserve accounts and specified operating accounts," "pay Five [Points] any remaining funds in those accounts," and "pay to Five [Points] any difference between the total payoff amount of the bonds and the stated purchase price of the Hotel."

¶3 In December 2005, Paragon and Five Points filed this action against CGRL, alleging it had failed to reconcile the hotel's accounts and had not paid Five Points all the money owed to it after reselling the hotel. Their complaint also alleged the escrow company that handled their transaction had breached its fiduciary duties. During discovery in this action, Five Points and Paragon learned that Pacioni and Koenig had received nearly \$300,000 in "consulting fees" from the manager of CGRL when it sold the hotel. Five Points and Paragon then filed an amended complaint, adding Pacioni and Koenig as defendants, claiming they had breached their fiduciary duties to Five Points and Paragon.

¶4 In support of their claims, Paragon and Five Points alleged that, while the partnership was seeking a buyer for the hotel, Pacioni had recommended that Five Points sell the hotel to CGRL. They further contended that, unbeknownst to them, CGRL had secured a purchaser for the resale of the hotel in early February 2005, before Five Points had agreed

to sell CGRL the hotel. Five Points and Paragon asserted that CGRL had paid Pacioni and Koenig the “consulting fees” for aiding CGRL in its purchase and resale of the hotel during the same period that Five Points had negotiated to sell the hotel to CGRL, and sought enforcement of the sales agreement with CGRL.

¶5 Pacioni and Koenig moved for summary judgment, asserting Five Points and Paragon’s claims against them were barred by the terms of a previous release among Five Points, Paragon, Pacioni, Koenig, and Halland. That release was contained in a “Full Release and Final Settlement” agreement arising out of an earlier lawsuit by Pacioni, Koenig, and Halland against Paragon, relating to the management, not the sale, of the hotel. The agreement, entered into less than a week before Five Points and CGRL had entered into the hotel sale contract, stated in pertinent part:

The division of proceeds set forth above totaling three hundred thousand dollars (\$300,000) from whatever source represents a full and final settlement and release of all claims between the parties to this Agreement, together with their successors and assigns whether past, present or future, which arises out of any interest they have in the Hotel, including its operation and management.

¶6 After oral argument, the trial court granted Pacioni and Koenig’s motion, dismissed Five Points and Paragon’s claims against them, and entered judgment pursuant to Rules 54(b) and 56, Ariz. R. Civ. P., in favor of Pacioni and Koenig. The court also awarded Pacioni \$27,000 and Koenig \$17,000 in attorney fees and costs. This appeal followed.

Discussion

¶7 On appeal, Paragon and Five Points argue the trial court erred in granting Pacioni and Koenig’s motion for summary judgment because, they contend, the settlement agreement does not bar their claims. Paragon and Five Points advance several theories in support of their argument, including that, pursuant to public policy, partners cannot, as the settlement agreement purports to do, agree to waive all fiduciary duties owed to each other or to the partnership. We review a trial court’s grant of summary judgment de novo and view the facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. *Hourani v. Benson Hosp.*, 211 Ariz. 427, ¶ 13, 122 P.3d 6, 11 (App. 2005). “A motion for summary judgment should only be granted if ‘there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.’” *Id.*, quoting Ariz. R. Civ. P. 56(c) (alteration in *Hourani*).

¶8 In Arizona, the fiduciary duties owed by partners to each other and to their partnership are governed by statute. Pursuant to A.R.S. § 29-1034, partners owe each other and the partnership the duty of loyalty, which includes refraining from usurping the partnership’s business opportunities and “dealing with the partnership in the conduct . . . of the partnership business as or on behalf of a party having an interest adverse to the partnership,” § 29-1034(B)(2). Partners must discharge this duty to each other and the partnership “consistently with the obligation of good faith and fair dealing.” § 29-1034(D). Partners, moreover, cannot wholly eliminate the duty of loyalty in their partnership agreement.

A.R.S. § 29-1003(B)(3). Rather, they can only limit that duty by “identify[ing] types or categories of activities that do not violate the duty of loyalty.” *Id.*¹

¶9 Paragraph six of the settlement agreement purported to bar all claims among the partners that “arise out of any interest they have in the [h]otel”—the partnership’s sole asset—thereby effectively eliminating all fiduciary duties they owed each other or the partnership. *See* § 29-1003; *Maestro Music, Inc. v. Rudolph Wurlitzer Co.*, 88 Ariz. 222, 234, 354 P.2d 266, 274 (1960) (“There can be no duty without a correlative right in someone else to enforce that duty; it is an illusory ‘duty’ and therefore no duty at all.”). The settlement agreement’s release provision, moreover, wholly eliminates the partners’ reciprocal fiduciary

¹Five Points and Paragon neither cited nor argued A.R.S. § 29-1003(B)(3) in the trial court. Although failure to raise an argument below generally results in its waiver on appeal, the waiver rule is procedural, not jurisdictional. *Sobol v. Marsh*, 212 Ariz. 301, ¶¶ 7-8, 130 P.3d 1000, 1002 (App. 2006). As we have noted, “when we are considering the interpretation and application of statutes, we do not believe we can be limited to the argument made by the parties if that would cause us to reach an incorrect result.” *Yarbrough v. Montoya-Paez*, 214 Ariz. 1, n.6, 147 P.3d 755, 762 n.6 (App. 2006), quoting *Evenstad v. State*, 178 Ariz. 578, 582, 875 P.2d 811, 815 (App. 1993). And, “[i]f application of a legal principle, even if not raised below, would dispose of an action on appeal and correctly explain the law, it is appropriate for us to consider the issue.” *Id.*, quoting *Evenstad*, 178 Ariz. at 582, 875 P.2d at 815. Accordingly, we consider the application of § 29-1003(B)(3), as well as other relevant statutes, to the issue raised on appeal—whether the settlement agreement’s release provision bars Five Points and Paragon’s claims. The parties, moreover, have had ample opportunity to address the application of these statutes in supplemental briefing and at oral argument in this court. *See Liristis v. Am. Family Mut. Ins. Co.*, 204 Ariz. 140, ¶¶ 9-11, 61 P.3d 22, 25 (App. 2002) (addressing legal argument not raised below when “both parties ha[d] briefed and argued the issue extensively” on appeal); *Evenstad*, 178 Ariz. at 582, 875 P.2d at 815 (considering application of statute not relied upon below when parties addressed statute in supplemental briefing).

duties without limiting the agreement’s application to specific types of activities, as required by § 29-1003(B)(3).

¶10 Pacioni and Koenig contend the restrictions in § 29-1003(B) against wholly eliminating fiduciary duties in partnership agreements do not apply here because the release was part of a settlement agreement, not the original partnership agreement.² Section 29-1001(12), A.R.S., defines a partnership agreement as an “agreement . . . among the partners concerning the partnership,” including any amendments to such an agreement. A partnership agreement, moreover, simply serves to govern the “relations among the partners and between the partners and the partnership.” § 29-1003(A). Here, the settlement agreement was entered into by all of the partners and concerned the partnership. *See* § 29-1001(12). It purported to alter their relationship by releasing any claims among them regarding the sole asset of the partnership, effectively eliminating all fiduciary duties. *See* § 29-1003. Thus, it was a “[p]artnership agreement” within the meaning of §§ 29-1001 and 29-1003.

¶11 That the settlement agreement was not expressly denominated a “partnership agreement” or an “amendment” to an extant agreement does not alter our conclusion. As Five

²The original partnership agreement is not part of the record on appeal. We normally presume items missing from the record on appeal support the trial court’s judgment. *See Foster v. Weir*, 212 Ariz. 193 ¶ 18, 129 P.3d 482, 487 (App. 2006). The record does not suggest, however, that the original settlement agreement was before the trial court. Neither party asserted the original agreement was relevant to the issues presented and the court relied exclusively on the settlement agreement in granting Pacioni and Koenig’s motion for summary judgment. We, therefore, do not consider the partnership agreement or any of its provisions here.

Points and Paragon observe, to allow partners to avoid the constraints of § 29-1003 by simply otherwise naming a document that modifies the partners' fiduciary duties—a document that, in substance, is a partnership agreement or an amendment—would render meaningless the restrictions in § 29-1003 against eliminating fiduciary duties and contradict the plain language of § 29-1001. We will not interpret a statute in a way that renders it meaningless or ineffective. *See Deer Valley Unified Sch. Dist. v. Houser*, 214 Ariz. 293, ¶ 8, 152 P.3d 490, 493 (2007) (“Each word, phrase, clause, and sentence [of a statute] must be given meaning so that no part will be void, inert, redundant, or trivial.”), *quoting Williams v. Thude*, 188 Ariz. 257, 259, 934 P.2d 1349, 1351 (1997) (alteration in *Williams*); *Redhair v. Kinerk, Beal, Schmidt, Dyer & Sethi, P.C.*, 218 Ariz. 293, ¶ 6, 183 P.3d 544, 546 (App. 2008).

¶12 Pacioni and Koenig next contend that, even if the release provision of the settlement agreement could not waive all future breaches of fiduciary duties, Five Points and Paragon's claims relate only to past, unknown conduct. The timing of the breach underlying Five Points and Paragon's claims, however, is irrelevant. Section 29-1003 bars the settlement agreement's purported waiver of any past or future claims. As discussed above, § 29-1003(B)(3) provides that an agreement between the partners cannot wholly eliminate the duty of loyalty, but, rather, it can only limit the duty by “identify[ing] types or categories of activities that do not violate the duty of loyalty.” This statute was based on § 103 of the Revised Uniform Partnership Act, which makes clear that its restrictions against eliminating

fiduciary duties apply to releases for past, as well as future, breaches of those duties.

Comment Four to § 103 states:

It is clear that [under this section] partners can “consent” to a particular conflicting interest transaction or other breach of duty, after the fact, provided there is full disclosure. . . . [But] [i]t is not necessary that the [exculpatory] agreement be restricted to a particular transaction. That would require bargaining over every transaction or opportunity, which would be excessively burdensome. The agreement may be drafted in terms of types or categories of activities or transactions, but it should be reasonably specific.

Consistent with § 29-1003, therefore, partners are free to release past claims between them provided the release limits its application to specific activities. In their supplemental brief, Pacioni and Koenig do not contest that § 29-1003 applies to agreements eliminating past duties. Rather, they contend the settlement agreement’s release provision was sufficiently specific to comply with § 29-1003 because its terms suggest “that there were no activities that would constitute a breach of duty.” But Pacioni and Koenig have not cited, nor have we found, any authority supporting their contention that an explicit waiver of all activities, known or unknown, that could amount to a breach of fiduciary duties satisfies the requirement in § 29-1003 that partners “identify types or categories of activities” that would not violate the partner’s fiduciary duties. And, the release provision of the settlement agreement nowhere mentions “duty of loyalty,” only claims. A blanket waiver is precisely what § 29-1003 aims to prevent, and we decline Pacioni and Koenig’s invitation to interpret this statute to render

its restrictions meaningless, particularly when the facts provide no basis for such an argument. *See Deer Valley*, 214 Ariz. 293, ¶ 8, 152 P.3d at 493.

¶13 Pacioni and Koenig suggest in passing, as they did below, that the settlement agreement did not amend the partnership agreement, but instead dissolved it or dissociated the partners, presumably eliminating any future reciprocal fiduciary duties and allowing them to broadly release claims for past breaches. The trial court’s order neither acknowledged nor ruled on either matter. We need not address whether dissolution or dissociation would eliminate all future duties and allow the partners to agree to a blanket waiver of past breaches because, as we explain below, the settlement agreement neither dissolved the partnership nor dissociated the partners.

¶14 Section 29-1051, A.R.S., defines the events that may cause a partner’s dissociation from the partnership. Among the many ways in which a partner may dissociate from the partnership, § 29-1051(1) permits a partner to dissociate by notifying the partnership “of [his or her] express will to withdraw as a partner.” The settlement agreement, however, contains no expression of any of the partners’ desire to dissociate. Pacioni and Koenig point to nothing in the record suggesting Five Points was on notice that any partner wanted to dissociate from it. Nor does the record suggest that any of the other many methods of dissociation provided in § 29-1051 either had occurred or were to occur.

¶15 Section 29-1071, A.R.S., describes the methods by which partnerships may dissolve. Pursuant to § 29-1071(2)(b), “a partnership for a definite term or particular

undertaking” may dissolve by the “express will of all of the partners.” Because the original agreement is not part of the record, we do not know whether Five Points was formed for a definite term or a particular undertaking, making § 29-1071(2)(b) inapplicable. The settlement agreement, moreover, did not expressly state it dissolved the partnership or suggest any intent to do so.

¶16 A partnership may also dissolve upon the completion of the “particular undertaking” for which the partnership was formed. § 29-1071(2)(c). But, because the record does not indicate why Five Points was formed, § 29-1071(2)(c) does not apply. Nonetheless, Pacioni and Koenig assert, as they did below, that the “sole purpose” of the Five Points partnership was the construction, operation, and management of the hotel. They further argue that purpose was fulfilled when Five Points sold the hotel to CGRL. Pacioni and Koenig asserted the same when moving for summary judgment. That Five Points and Paragon filed no statement of facts or evidence controverting Pacioni and Koenig’s assertion would normally allow the court to presume it to be true. *See Tamsen v. Weber*, 166 Ariz. 364, 368, 802 P.2d 1063, 1067 (App. 1990). But Pacioni and Koenig only asserted Five Points’s sole purpose at oral argument on their motion. They did not include that assertion in the statement of facts in support of their motion or provide any evidentiary support for it. A party’s unsupported assertions are not facts capable of supporting a motion for summary judgment. *See In re 1996 Nissan Sentra*, 201 Ariz. 114, ¶ 6, 32 P.3d 39, 42 (App. 2001) (“Generally, the “facts” which the trial court will consider . . . in ruling on a motion for summary judgment

are those which are set forth in an affidavit or a deposition; an unsworn and unproven assertion in a memorandum is not such a fact.”), quoting *Prairie State Bank v. I.R.S.*, 155 Ariz. 219, 221 n.1A, 745 P.2d 966, 968 n.1A (App. 1987); *GM Dev. Corp. v. Cmty. Am. Mortgage Corp.*, 165 Ariz. 1, 5, 795 P.2d 827, 831 (App. 1990) (“As a general rule, an unsworn and unproven assertion is not a fact that a trial court can consider in ruling on a motion for summary judgment.”); *Borbon v. City of Tucson*, 27 Ariz. App. 550, 551, 556 P.2d 1153, 1154 (1976) (“Summary judgment cannot be granted on the basis of statements of fact in moving party’s brief even though they are uncontroverted by an opponent.”).

¶17 Other than Pacioni and Koenig’s bald assertion, the record is silent regarding the purpose or purposes of Five Points. At oral argument in this court, Pacioni and Koenig urged that, because it is undisputed the hotel was Five Points’s sole asset, it necessarily follows that the ownership and operation of the hotel was the sole purpose for which Five Points was formed. But that is not a necessary implication, and nothing in the record supports Pacioni and Koenig’s assertion. As we noted above, we view the facts in the light most favorable to the non-moving party. *See Hourani*, 211 Ariz. 427, ¶ 13, 122 P.3d at 11. And, even had Pacioni and Koenig properly asserted, uncontested, that Five Points’s sole purpose was the hotel, the evidence, viewed in the light most favorable to Five Points and Paragon, *see Hourani*, 211 Ariz. 427, ¶ 13, 122 P.3d at 11, suggests that purpose continues because the final transactions relating to the hotel’s sale—the settling of accounts between Five Points and CGRL—have not yet occurred. *See* § 29-1071(2)(c). Accordingly, the settlement agreement

does not conform to any of the dissolution methods found in § 29-1071. It is clear from the record, moreover, that the partnership continued to exist after the settlement agreement was executed.

¶18 Last, Pacioni and Koenig suggest that, “as a matter of law,” § 29-1003 does not apply and Five Points and Paragon can make “no valid claim” if the alleged breaches of fiduciary duty occurred after Five Points sold the hotel to CGRL. They assert that “once the hotel ha[d] been sold it was no longer an asset of the partnership” and “by definition, cannot form the basis of a breach of loyalty [claim],” because “there can be no breach of loyalty claim in connection with an asset owned by some third party.” But Pacioni and Koenig cite no authority to support this contention—nor are we aware of any—and they do not develop the argument in any meaningful way. We find this suggestion troubling in view of the fact that the partnership continued to own the right to have the accounts settled by CGRL after the sale. Nonetheless, Pacioni and Koenig have waived this matter and we do not address it further. *See Lohmeier v. Hammer*, 214 Ariz. 57, n.5, 148 P.3d 101, 108 n.5 (App.2006).

¶19 The partnership and the parties’ fiduciary duties to it and to each other existed during the period Pacioni and Koenig allegedly breached those duties. The release in the settlement agreement, which purports to waive all past, present, future, known or unknown breaches of fiduciary duties, is ineffective to do so because its provisions do not comply with § 29-1003. The release, therefore, does not bar Five Points and Paragon’s claims against Pacioni and Koenig, and the trial court erred in granting summary judgment on that basis.

Disposition

¶20 For the reasons stated, we vacate the trial court's judgment in favor of Pacioni and Koenig and remand the case to the trial court. Because we vacate the judgment in favor of Pacioni and Koenig, we also vacate the trial court's award of attorney fees and costs.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

JOHN PELANDER, Chief Judge

PETER J. ECKERSTROM, Judge