

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 1386

September Term, 2013

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MICHAEL K. FISHER, ET AL.

v.

DORIS R. FISHER

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Krauser, C.J.,  
Zarnoch,  
Raker, Irma S.  
(Retired, Specially Assigned),

JJ.

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Opinion by Zarnoch, J.

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Filed: July 9, 2015

\*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

On December 10, 2012, appellant Michael K. Fisher filed a 36-count pro se complaint against his stepmother, appellee Doris R. Fisher in the Circuit Court for Anne Arundel County, claiming he had a right to sue in his individual capacity and as personal representative of the estate of his father, Robert K. Fisher. The son asserted actions for breach of contract, unjust enrichment and conversion and sought an injunction requiring his stepmother to surrender the assets of her husband’s estate. The stepmother moved to dismiss the complaint and this motion was granted. The court rejected the son’s individual claims because the stepmother’s use and transfer of assets when her husband was alive was authorized by a 1997 prenuptial agreement. In addition, the court concluded that the son could not sue as personal representative because the stepmother had become personal representative. The son has appealed pro se the dismissal of his case. For reasons set forth below, we affirm the circuit court’s dismissal of the individual claims. However, because of the impact of subsequent litigation voiding a 2005 will naming the stepmother as personal representative and the Orphan’s Court’s reappointment of appellant as personal representative, we reverse and remand to the circuit court for consideration of the son’s remaining claims as personal representative.

#### FACTS AND PROCEEDINGS

Robert K. Fisher died testate on January 11, 2010. Thereafter, appellant filed with the Register of Wills a petition for administrative probate. Attached was a will dated April 7, 1993 which named the son as personal representative and sole beneficiary of his

father's estate, should Johanna Fisher predecease him.<sup>1</sup> The Register of Wills issued letters of administration on January 19, 2010 naming the son as personal representative of the estate.

On February 24, 2010, the stepmother filed in the Orphan's Court a petition to caveat, stating that her husband had revoked the 1993 will in a subsequent will executed on September 1, 2005. That will effectively disinherited the son in favor of the stepmother and named her as personal representative of the Fisher estate. The son opposed the petition, claiming, among other things, that his father was not mentally competent to execute a will in 2005. In a June 15, 2010 decision, the Orphan's Court accepted the 2005 will, ordered the appointment of the stepmother as personal representative and the removal of the son. That ruling was appealed to the Circuit Court for Anne Arundel County where the litigation stalled for some four years.

In the interim, this lawsuit was filed by the son against the stepmother.<sup>2</sup> The primary focus of that litigation was language contained in an April 28, 1997 prenuptial agreement between appellee and Robert Fisher. That agreement stated that "each party shall keep and retain sole ownership and control of all property, real or personal, now owned or hereafter acquired by such party." It further provided that

the parties recognize that it is possible, through accident or intent, for their income or assets to become, or appear to be, commingled. It is the parties' intention that such commingling

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<sup>1</sup> Johanna died in 1993 and Robert Fisher married appellee in 1997, after entering into a prenuptial agreement.

<sup>2</sup>The son also brought a suit against his stepmother in federal court. That litigation has been stayed.

or pooling of assets not be interpreted to imply any abandonment of the terms and provisions of the Agreement and that the provisions contained herein addressing the parties' interests in jointly held property be applied and that in other instances each party be determined to be the owner of the proportion of the total fund or value of the assets in question which reflects the proportionate amount deposited or invested by each party.

However, the Paragraph Four of the agreement said that

either party shall have the right to transfer or convey to the other any property or interest therein which may be lawfully conveyed or transferred during his or her lifetime or by Will, and neither party intends by this Agreement to limit or restrict in any way the right and power to receive any such transfer or conveyance from the other.

Relying on Paragraph Four, the circuit court rejected the son's contention that the agreement had been breached by his stepmother: "The Court finds the language of the Prenuptial Agreement unambiguous, and hence, gives effect to its plain meaning that either party is free to transfer or convey any property or interest to the other during their lifetime and upon their deaths." Turning to the counts of the son's complaint asserted as personal representative of the estate, the court said:

These counts are predicated on Plaintiff's assertion that he is the current Personal Representative of the Deceased's estate. In a decision filed on June 15, 2010, the Orphans' Court removed Plaintiff as the Personal Representative and Special Administrator of the Estate. Further, the Orphans' Court upheld the Last Will and Testament of the Deceased, dated September 1, 2005, naming Defendant the Successor Personal Representative of the Estate. Plaintiff's subsequent appeal of the Orphans' Court's decision stayed all proceedings in the Orphan's Court concerning the issue appealed. Md. Code Ann., Cts. & Jud. § 12-701(a)(1). However, his appeal did not stay the Orphan's Court order appointing Defendant as the Successor Personal Representative, but, instead, made her a

Special Administrator. Md. Code Ann., Cts. & Jud. § 12-701(a)(3)(ii). Defendant remains the Special Administrator of the Estate until a favorable resolution of Plaintiff’s appeal of the Orphans’ Court decision.<sup>[3]</sup>

After the son sought our review in this case, his appeal of the Orphan’s Court’s decision went to trial in the circuit court and he prevailed, convincing a jury that the 2005 will, which named his stepmother as personal representative, was not duly executed. *See Fisher v. Fisher*, No. 02-C-10-154548 (Cir. Ct. for Anne Arundel Co., June 30, 2014).<sup>4</sup> This decision was appealed to this Court, but the appeal was voluntarily dismissed on May 29, 2015. After his victory in the circuit court, the son moved that he be reappointed as personal representative of the estate of his father. Without granting or denying the motion, the trial court, on July 28, 2014, transferred the issue to the Orphan’s Court, where it languished until June 23, 2015, when the Orphan’s Court reappointed appellant as personal representative.

### **QUESTIONS PRESENTED**

Appellant raises four issues<sup>5</sup> on appeal, which we have restated:

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<sup>3</sup> In earlier actions, appellant filed a First Amended Complaint on May 9, 2013, which appellee moved to strike. Following a hearing on the motion to dismiss, the circuit court issued an order on June 18 granting that motion of the stepmother. The son sought leave to file a second amended complaint on July 11. On July 16, the circuit court granted appellee’s motion to strike the First Amended Complaint and denied all other outstanding motions as moot. Appellant filed a motion for reconsideration on July 23, which was denied on August 22.

<sup>4</sup> We take judicial notice of this decision, which is clearly relevant to this case.

<sup>5</sup> Appellant asks:

(continued...)

- I. Did the circuit court err by granting appellee’s motion to dismiss?
- II. Did the circuit court err by striking appellant’s First Amended Complaint?
- III. Did the circuit court err by not granting appellant leave to file a Second Amended Complaint?
- IV. Did the circuit court err by denying appellant’s motion for reconsideration?

### STANDARD OF REVIEW

An appellate court reviews de novo the circuit court’s grant of a motion to dismiss. *Price v. Upper Chesapeake Health Ventures, Inc.*, 192 Md. App. 695, 702 (2010). The court “must assume the truth of, and view in a light most favorable to the non-moving party, all well-pleaded facts and allegations contained in the complaint, as well as all inferences that may reasonably be drawn from them, and order dismissal only if the allegations and permissible inferences, if true, would not afford relief to the plaintiff.” *RRC Northeast, LLC v. BAA Maryland, Inc.*, 413 Md. 638, 643 (2010).

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(...continued)

1. Did the lower Court err in striking appellant’s First Amended Complaint?
2. Did the lower Court err in denying the appellants’ [*sic*] leave to file the Second Amended Complaint which Motion for leave was filed before the Court struck the First Amended Complaint and dismissed the Action?
3. Assuming, *arguendo*, that the lower Court’s dismissal of the then already superseded and inoperative initial complaint filed on December 10, 2012 was of legal consequence, did the lower Court err in dismissing the initial Complaint?
4. Did the lower Court err in denying the appellant’s Motion for Reconsideration?

## DISCUSSION

### I. Dismissal of Individual Capacity Claims

In its order dismissing the complaint, the court reviewed the thirty-six counts advanced by appellant and divided them according to whether they were related to appellant as the personal representative of the estate or appellant in his individual capacity. With respect to the individual capacity claims that hinged on the interpretation of the prenuptial agreement, the court determined that the language of the agreement was “unambiguous” and gave “effect to its plain meaning that either party is free to transfer or convey any property or interest to the other during their lifetime and upon their deaths.” The court dismissed “all counts pertaining to the alleged breach of the Prenuptial Agreement for failure to state a claim for breach of contract upon which relief can be granted.”

Maryland follows the objective theory of contract interpretation, “according to which, unless a contract’s language is ambiguous, we give effect to that language as written without concern for the subjective intent of the parties at the time of formation.” *Ocean Petroleum, Co. v. Yanek*, 416 Md. 74, 86 (2010). A court restricts its inquiry to “the four corners of the agreement and ascribe[s] to the contract’s language its customary, ordinary, and accepted meaning.” *Id.* (Internal citations and quotations omitted). Here, the agreement expressly provides that Mr. Fisher and appellee “shall have the right to transfer or convey to the other any property or interest therein which may be lawfully conveyed or transferred during his or her lifetime or by Will.” The plain language of the agreement

thus permits what appellant claims it prohibits, and the circuit court did not err in dismissing his individual capacity claims.

## **II. Dismissal of Personal Representative Claims**

At the time the circuit court dismissed the appellant’s claims asserted as the personal representative of the Fisher estate, he had lost that status and had been replaced by his stepmother as a result of acceptance of the 2005 will. In fact, this was the sole basis for the circuit court’s rejection of those claims. However, the circuit court recognized that the stepmother would retain her status only “until a favorable resolution of Plaintiff’s appeal of the Orphan’s Court decision” This, of course, is exactly what has happened. The son has prevailed on that appeal, as a jury has invalidated the 2005 will appointing the stepmother as personal representative of the Fisher estate. As a result of that decision, which has become final by the voluntary dismissal of the stepmother’s appeal, the Orphan’s Court has reappointed the son as personal representative. This is such a significant change in the litigation between the parties that we cannot affirm the circuit court decision on the stated grounds.

We believe the proper course is to reverse this part of the circuit court’s dismissal and remand to the circuit court for resolution of those claims appellant has asserted as personal representative.



### III. Remaining Issues<sup>6</sup>

#### A. Striking Amended Complaint

Appellant next argues that the First Amended Complaint became “the sole operative Complaint” when it was filed. He asserts that appellee’s motion to strike the First Amended Complaint was not in compliance with the Maryland Rules because appellee “was required either to answer the superseding and operative First Amended Complaint . . . or file a motion pursuant to Md. Rule 2-322.”

Appellant first contends that the court’s dismissal of the initial complaint on June 18 “was without legal consequence” because the initial complaint was “superseded and non-operative.” Although appellant correctly observes that “the filing of an amended complaint supersedes the initial complaint, rendering the amended complaint the operative complaint,” *Gonzales v. Boas*, 162 Md. App. 344, 355 (2005), nowhere in Maryland case law is it suggested that the filing of an amended complaint removes consideration of the initial complaint from the jurisdiction of the circuit court.<sup>7</sup>

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<sup>6</sup> We consider the remaining issues only to the extent appellant’s argument challenges the circuit court’s dismissal of his individual claims.

<sup>7</sup> Indeed, the principle that an amended complaint supersedes the initial complaint is typically invoked only as it applies to a plaintiff, for example when considering the plaintiff’s request for relief, *see Chimes v. Michael*, 131 Md. App. 271, 295 (2000) (finding no request for child support when the amended complaint did not request child support and did not incorporate the initial complaint, which had included a request for child support), or for evidentiary purposes, *see MEMC Electronic Materials, Inc. v. BP Solar Intern., Inc.*, 196 Md. App. 318, 348 (2010) (considering whether “the contents of a superseded pleading” would be admissible in evidence or for the purposes of impeachment.”).

Regarding the motion to strike, Md. Rule 2-322(e) permits a court, on motion made by a party or on its own initiative, to “order any pleading that is late or otherwise not in compliance with these rules stricken in its entirety.” “The decision whether to grant a motion to strike is within the sound discretion of the trial court.” *First Wholesale Cleaners Inc. v. Donegal Mut. Ins. Co.*, 143 Md. App. 24, 41 (2002).

Appellant filed the First Amended Complaint on May 9, after the April 1 hearing on appellee’s motion to dismiss. In response to appellant’s First Amended Complaint, appellee filed a motion to strike on May 9, in which she argued that appellant “should not be permitted to file any amended complaint, if at all, until such time as the Court rules on Mrs. Fisher’s pending motion to dismiss.” She also asserted that “[t]he arguments forming the basis of Mrs. Fisher’s motion to dismiss and request for stay apply with equal force to the allegations of the First Amended Complaint.” The court granted the motion to dismiss on June 18 and granted the motion to strike on July 16.

We find no abuse of discretion in the circuit court’s decision to strike the First Amended Complaint. First, despite appellant’s arguments to the contrary, appellee was not required to file an answer or a motion under Md. Rule 2-322 in response to the First Amended Complaint. Md. Rule 2-341(a) expressly permits but does not require a party to file an answer to an amended pleading, and “[i]f no new or additional answer is filed within the time allowed, the answer previously filed shall be treated as the answer to the amendment.” Second, the court did not rule on the motion to strike until after it had considered and granted appellee’s motion to dismiss. A review of the initial complaint and the First Amended Complaint shows that the documents are very similar, with only a new

count added to the latter (Count 37, Undue Influence – Purported *Inter Vivos* Gifts). It was not an abuse of discretion to strike a complaint that was virtually similar to one that had already been dismissed. We therefore affirm the circuit court’s decision to strike the First Amended Complaint as to appellant’s individual claims.

**B. Leave to File Second Amended Complaint**

Appellant next argues that the circuit court erred by denying him leave to file a Second Amended Complaint. He contends that an unpublished decision from this Court, which dismissed his interlocutory appeal, “necessitated the preparation of the Second Amended Complaint” and that appellee would not be prejudiced by the filing of a Second Amended Complaint. Appellant summarizes the changes in the Second Amended Complaint as reflecting his argument that Mr. Fisher “at no time transferred any of his assets to Mrs. Fisher.” Appellant thus sought “the return of all the assets of the decedent’s transferred by Doris R. Fisher to Doris R. Fisher and/or to any third parties” during Mr. Fisher’s lifetime and after his death.

“If the court orders dismissal, an amended complaint may be filed only if the court expressly grants leave to amend.” Md. Rule 2-322(c). Although “leave to amend complaints should be granted freely to serve the ends of justice . . . , an amendment should not be allowed if it would result in prejudice to the opposing party or undue delay, such as where amendment would be futile because the claim is flawed irreparably.” *RRC Northeast, LLC*, 413 Md. at 673 (Internal citations omitted).

Even assuming the truth of all the well-pleaded allegations of the complaint, including the reasonable inferences that may be drawn from them, and reviewing the

complaint in the light most favorable to appellant, we have concluded that the individual claims in the complaint would not provide appellant with a judicial remedy. Appellant’s claims hinge on his argument that the agreement signed by his father and appellee prevents any and all commingling of assets. As we discussed above, the agreement unambiguously permitted his father and stepmother to transfer assets to each other, and the circuit court did not err in denying appellant leave to file a Second Amended Complaint.

**C. Motion for Reconsideration**

Finally, appellant argues that the court erred when it denied his motion for reconsideration. He provides no legal argument in support of his position and instead “incorporates by reference the entirety of his Motion for Reconsideration as if fully set forth herein.” Because “arguments not presented in a brief or not presented with particularity will not be considered on appeal,” *Klaenberg v. State*, 355 Md. 528, 551 (1999), we decline to reach this issue. *See also Anderson v. Litzenberg*, 115 Md. App. 549, 578 (1997) (“It is not our function to seek out the law in support of a party’s appellate contentions.”); Md. Rule 8-504(b)(6) (requiring an appellate brief to include “[a]rgument in support of the party’s position on each issue”).

For all of these reasons we affirm in part and reverse in part the judgment of the circuit court and remand for consideration of those claims advanced by appellant as personal representative of the Estate of Robert Fisher.

**JUDGMENT OF THE CIRCUIT COURT  
FOR ANNE ARUNDEL COUNTY  
AFFIRMED IN PART AND REVERSED IN  
PART. CASE REMANDED FOR  
FURTHER PROCEEDINGS CONSISTENT  
WITH THIS OPINION. COSTS TO BE  
EQUALLY DIVIDED BETWEEN THE  
PARTIES.**