

partial summary judgment, the trial court entered judgment insulating appellee wife and her marital community from liability for damages arising from a business transaction engaged in by her husband. For the reasons that follow, we conclude the trial court erred by denying appellants' motion for reconsideration. We further hold that Arizona community property law applies to resolve the motion for partial summary judgment. Consequently, we reverse and remand with instructions for the court to apply Arizona community property law to determine whether the appellees' marital community is liable to appellants.

BACKGROUND

¶2 In early 1996, Marvin Richmond ("Richmond"), an Arizona resident, told appellant James O. Ogle ("Ogle"), a Georgia resident, that Richmond could loan \$12.5 million to Ogle's company, Transact Resource Corporation ("TRC"), a New York corporation. Richmond represented that he had a family trust from which he would obtain the loan funds. TRC was to provide collateral for the loan in the form of an irrevocable letter of credit guaranteeing repayment of the loan.

¶3 Ogle and his mother executed the loan documents on behalf of TRC and returned them to Richmond along with a \$125,000 loan commitment fee. Richmond, however, did not sign the loan documents and did not establish an escrow account for the loan. Believing that TRC was not obligated to obtain a letter of credit until

Richmond deposited the loan funds into an escrow account, Ogle did not arrange any collateral for the loan.

¶4 Ogle demanded return of the loan commitment fee, and Richmond refunded \$21,500. Nearly two years later, Richmond, appearing *in propria persona*, sued Ogle, Ogle's mother, Marina, and TRC, alleging that Richmond had been willing and able to honor the loan commitment but that the defendants had refused to furnish the collateral necessary to consummate the transaction. Richmond later amended his complaint to also seek relief against Ogle's wife, Sylvia. Richmond sought specific performance of the agreement or, in the alternative, monetary damages.

¶5 Ogle and TRC filed a counterclaim against Richmond, dba The Eclectic Groupe, and asserted a third-party claim against Richmond's wife, Katherine Dane Woods Richmond, seeking return of the remainder of the \$125,000 and damages for lost investment opportunities, lost profits, emotional distress, aggravation, and embarrassment. Sylvia Ogle and Marina Ogle filed a motion for summary judgment as to Richmond's claims against them. Marina argued that she had been named a defendant in error, and Sylvia asserted that because she and her husband resided in Georgia, a non-community property state, she could not be liable for any debt incurred by TRC or Ogle. The trial court agreed and dismissed the claims against Sylvia and Marina.

¶6 Mrs. Richmond next filed a motion for partial summary

judgment on the third-party claims against her and the Richmonds' marital community. She argued that because the contract was executed in Georgia and was to be performed in Georgia, and because Georgia law applied to exempt Mrs. Ogle from any liability arising from the transaction, Mrs. Richmond and the Richmonds' marital community likewise could not be liable to the Ogles. She also asserted that The Eclectic Groupe was her husband's sole and separate property and, therefore, neither she nor the Richmonds' marital community was responsible for any debt owing to appellants.

¶7 Prior to the filing of this motion, the attorneys for Ogle and TRC had withdrawn from representing them. Ogle and TRC did not respond to Mrs. Richmond's motion within the time allowed for a response, and the trial court granted the motion without comment other than noting that Ogle and TRC had not responded to the motion.

¶8 The day after the court's order granting the motion was entered, the former attorneys for Ogle and TRC reappeared on their behalf and filed a pretrial statement and a motion to strike and/or summarily deny Mrs. Richmond's motion for partial summary judgment or, alternatively, for additional time to respond to the motion. The trial court denied the motion. Two days after the date of the court's minute entry denying the motion but three days before it was entered, Ogle and TRC filed a motion to reconsider the grant of Mrs. Richmond's motion, their response to that motion, and a cross-

motion for partial summary judgment. In the cross-motion, they argued that Arizona community property law should be applied to the Richmonds, and the court should therefore summarily rule that the Richmonds' marital community was liable for the damages to Ogle and TRC. The trial court denied the motion for reconsideration.

¶9 The remaining case went to trial. However, because Richmond failed to return to court after the first morning of trial, the court declared Richmond in default, struck his pleadings, and allowed Ogle and TRC to proceed to a default hearing. The court ultimately entered one judgment dismissing the claims against Mrs. Richmond and the Richmonds' marital community and entered another judgment dismissing the claims against Sylvia Ogle and Marina Ogle and awarding Ogle and TRC \$786,500 in compensatory damages, \$200,000 in punitive damages, and \$50,560 in attorneys' fees.

¶10 Richmond appealed from the judgment in favor of the Ogles and TRC, but he abandoned his appeal. Ogle and TRC appeal from the judgment in favor of Mrs. Richmond.

DISCUSSION

A. Denial of Motion for Reconsideration

¶11 Ogle and TRC argue the trial court erred by denying their motion to reconsider the grant of summary judgment in favor of Mrs. Richmond and the Richmonds' marital community. They maintain that failure by a party to respond to a motion for summary judgment does

not entitle the trial court to enter judgment in favor of the moving party when the motion misapplies the law and is not supported by the evidence.

¶12 We review a trial court's ruling on a motion for reconsideration for an abuse of discretion. *McGovern v. McGovern*, 201 Ariz. 172, 175, ¶ 6, 33 P.3d 506, 509 (App. 2001). The trial court has discretion to deem the failure to file a response to a motion for summary judgment as consent to the granting of the motion. Ariz. R. Civ. P. 7.1(b) (if the opposing party to a motion "does not serve and file the required answering memorandum . . . such non-compliance may be deemed a consent to the denial or granting of the motion, and the court may dispose of the motion summarily."). However, the court is not required to grant a motion solely because the opposing party failed to respond. See *Aranki v. RKP Investments, Inc.*, 194 Ariz. 206, 211, ¶ 23, 979 P.2d 534, 539 (App. 1999) (construing the similarly worded provision in Rule IV(b) of the Uniform Rules of Practice of the Superior Court of Arizona). Indeed, the court would abuse its discretion if it granted an unopposed motion grounded on improper factual or legal assertions. See *id.*

¶13 In general, cases should be determined on their merits. *Bowman v. Hall*, 83 Ariz. 56, 61, 316 P.2d 484, 487 (1957) (holding that trial court abused its discretion in declining to reopen case to hear additional testimony). It is the duty of the appellate

court "to interfere when a trial court exercised a discretion vested in it in such a manner that an injustice is done or substantial rights are lost through mere technicalities." *Id.* at 60, 316 P.2d at 486 (quoting *Rawls v. Brotherhood of R.R. Trainmen Ins. Dep't*, 35 So.2d 809, 810 (La. 1948)).

¶14 We conclude the trial court erred by denying the motion for reconsideration and thus declining to consider appellants' response to Mrs. Richmond's motion for partial summary judgment and their cross-motion for partial summary judgment. The court granted Mrs. Richmond's motion three days after the response was due. At that time, appellants were not represented by counsel and, they maintain, did not appreciate the importance of filing a timely response. Two days after the court granted the motion and one day after the minute entry order was entered, appellants filed a request for additional time to respond to the motion. Upon learning of the trial court's ruling, they immediately filed their motion for reconsideration. Thus, appellants did not waste any time in attempting to respond to the motion once they were able to re-engage their attorneys. Moreover, Mrs. Richmond was not prejudiced by the appellants' delay in responding to her motion. Conversely, appellants lost a substantial right by the grant of partial summary judgment for Mrs. Richmond as it impacted their ability to collect any judgment entered against Richmond. Under these circumstances, we conclude the trial court erred by declining

to reconsider its grant of summary judgment.

¶15 Because the parties did not have an opportunity to fully address the issues presented in Mrs. Richmond's motion for partial summary judgment, we cannot resolve that motion on appeal. Accordingly, we reverse the entry of judgment for Mrs. Richmond and remand for reconsideration of the grant of partial summary judgment in her favor after the parties have been afforded an opportunity to present arguments and evidence on the issues presented in the motion. However, we address the choice-of-law issue raised on appeal in order to guide the trial court on remand. See *State v. Castro*, 163 Ariz. 465, 467-68, 788 P.2d 1216, 1218-19 (App. 1989).

B. Choice of law

¶16 Appellants argue that Arizona community property law rather than Georgia non-community property law should apply to determine whether the Richmonds' marital community is liable for the debt arising from Richmond's transaction with TRC. Mrs. Richmond responds that Georgia law should apply, as it was applied to Mrs. Ogle, because the loan documents were executed in Georgia, and the documents did not form an Arizona contract, were not executed in Arizona (because Richmond never signed them), and were not to be performed in Arizona.

¶17 We are guided in choice-of-law questions by the Restatement of Conflict of Laws. *Lucero v. Valdez*, 180 Ariz. 313, 315, 884 P.2d 199, 201 (App. 1994) (citing *Bates v. Super. Ct.*, 156

Ariz. 46, 48, 749 P.2d 1367, 1369 (1988)). Restatement (Second) of Conflict of Laws § 6(1) (1971) ("Restatement") provides that "[a] court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law." Only absent such directives should courts consider specified factors to select the applicable rule of law.¹ Restatement § 6(2); see Restatement § 6(1) cmt. a ("The court must apply a local statutory provision directed to choice of law provided that it would be constitutional to do so.").

¶18 By enacting Arizona Revised Statutes ("A.R.S.") section 25-215(C) (2000), the legislature has directed our resolution of

¹ These factors include the following:

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.

Restatement § 6(2).

the choice-of-law issue presented in this appeal. As appellants point out, § 25-215(C) provides that "community property is liable for a spouse's debts incurred outside of this state during the marriage which would have been community debts if incurred in this state." Thus, regardless whether Georgia or Arizona law applies to the contract and tort principles underlying appellants' claims, our legislature has decided that Arizona community property law applies to decide whether an Arizona marital community is liable for debts incurred in other states. See also *Bainum v. Roundy*, 21 Ariz. App. 534, 536, 521 P.2d 633, 635 (1974) (holding Arizona couple's community property not immunized from liability incurred by husband executing promissory note in non-community property state). Adoption of Mrs. Richmond's contention that Georgia law applies to immunize the Richmonds' marital community from liability would effectively abrogate § 25-215(C). See Restatement § 6 cmt. b ("The court should give a local statute the range of application intended by the legislature when these intentions can be ascertained and can constitutionally be given effect. If the legislature intended that the statute should be applied to the out-of-state facts involved, the court should so apply it unless constitutional considerations forbid."). Consequently, and in accordance with the Restatement § 6(1), we conclude that Arizona law applies to decide whether the Richmonds' marital community is liable for the debt incurred by Richmond.

¶19 We are not persuaded by Mrs. Richmond's argument that we should reach a different decision in light of *Phoenix Arbor Plaza, Ltd. v. Dauderman*, 163 Ariz. 27, 785 P.2d 1215 (App. 1989). In *Phoenix Arbor*, this court selected the state law applicable to decide the liability of a California spouse who had failed to sign a guarantee executed in Arizona that secured the performance of an Arizona property lease. *Id.* at 27-28, 785 P.2d at 1215-16. The parties agreed that if Arizona law applied, the California couple's marital community was not liable for the guarantee because A.R.S. § 25-214(C) required both spouses to execute the guarantee in order to bind the community. *Id.* at 28, 785 P.2d at 1216. Conversely, because California did not have a law similar to § 25-214(C), if California law applied, the couple's marital community would be liable for the debt. *Id.*

¶20 After stating the principles enunciated in the Restatement § 194, applicable to choice of law involving guarantee agreements, the court held that "[w]hen it appears that the non-signing spouse's property rights are not restricted by the laws of the non-domiciliary state, the general principles set forth in § 194 would apply as well as those in § 6." *Id.* at 30, 785 P.2d at 1218. Because the factors outlined in Restatement § 6(2) and § 194 established Arizona law as the appropriate one to apply in the case, and application of that law did not restrict, reduce, or jeopardize the spouse's community property rights under California

law, the court held that Arizona law applied to immunize the marital community from liability. *Id.* at 30-31, 785 P.2d at 1218-19.

¶21 Mrs. Richmond contends that Georgia has the most significant interest in the transaction between Richmond and appellants, and because application of that law would not restrict her property rights, we should follow *Phoenix Arbor* and apply Georgia law to resolve the issues presented in her motion. We disagree because we find *Phoenix Arbor* distinguishable. As previously described, *supra* ¶ 18, the legislature has directed that we apply Arizona law to decide whether an Arizona marital community is liable for a debt incurred in another state. A.R.S. § 25-215(C). Consequently, we do not employ the Restatement § 6(2) factors to decide the law applicable to this issue. Restatement § 6(1); *id.* at cmt. b ("Provided that it is constitutional to do so, the court will apply a local statute in the manner intended by the legislature even when the local law of another state would be applicable under usual choice-of-law principles."). Conversely, the legislature had not directed the courts to apply any particular law to decide the issue presented in *Phoenix Arbor*: whether a non-Arizona marital community can be liable for a guarantee signed only by one spouse. Therefore, the *Phoenix Arbor* court necessarily employed the Restatement § 6(2) factors to decide the appropriate law to apply to resolve that issue. Because we do not address

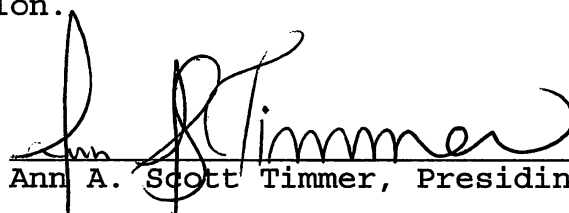
these factors to select the law applicable to decide this case, *Phoenix Arbor* is inapplicable.

¶22 In summary, we hold that Arizona law applies to decide whether the Richmonds' marital community is liable to appellants for the debt incurred by Richmond. On remand, the trial court should therefore determine whether Richmond's debt to appellants is a community obligation under Arizona law. A.R.S. § 25-215(C); see *Alberta Securities Comm'n v. Ryckman*, 200 Ariz. 540, 548, ¶ 33, 30 P.3d 121, 129 (App. 2001) (agreeing that judgment rendered against one spouse in non-community property jurisdiction enforceable against community property if obligation on which judgment based would have been a community obligation if incurred in Arizona and non-defendant spouse is joined in Arizona domestication action and has opportunity to contend judgment based on separate obligation under Arizona law).

¶23 Appellants request an award of attorneys' fees pursuant to the loan agreement and A.R.S. § 12-341.01. Mrs. Richmond did not sign the agreement and is therefore not bound by the attorneys' fee provision. Additionally, in light of our decision, no party is yet a "successful party" entitled to an award under § 12-341.01. We therefore deny appellants' request without prejudice to resubmit it to the trial court if appellants ultimately prevail on their claim against Mrs. Richmond. Appellants can recover their costs on appeal after complying with Ariz. R. Civ. App. P. 21(a).


CONCLUSION

¶24 For the foregoing reasons, we reverse the judgment entered in favor of Katherine Richmond and the Richmonds' marital community and remand for reconsideration of Mrs. Richmond's motion for partial summary judgment after the parties have been afforded an opportunity to fully brief the issues. Additionally, we hold that Arizona community property law governs the resolution of the issues raised in the motion.


Ann A. Scott Timmer, Presiding Judge

CONCURRING:


Susan A. Ehrlich, Judge


Jefferson L. Lankford, Judge