



SUPREME COURT

STATE OF ARIZONA



GOVERNOR'S OFFICE OF
**HIGHWAY
SAFETY**

Jury Trial

Intro to Jury Trials

Charles Adornetto
Wickenburg Town Magistrate

December 3, 2025



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Statutes, Rules, Resources and Eligibility



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Statutes

- **Title 12—Courts and Civil Proceedings**
- 12-1176 Eviction Jury Trials
- **Title 21—Juries**
- All aspects of jury trials
- **Title 22—Justice and Municipal Courts**
- 22-220: Justice Court Civil
- 22-320: Justice Court Criminal
- 22-425: Muni Court Criminal



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Criminal Rules

- Rules of Criminal Procedure
- Rule 18: Trial by Jury
- Rule 19: Trial
- Rule 20: Judgment of Acquittal
- Rule 21: Instructions
- Rule 22: Deliberations
- Rule 23: Verdict

Civil/Eviction Rules

- Justice Court Rules of Civil Procedure
- Rule 133: Getting a Trial Date; Trial By Jury or to a Judge
- Rules of Procedure for Eviction Actions
- Rule 12: Trial by Jury

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Resources

- **Limited Jurisdiction Benchbook**
- Chap 12: Waiver and Submission
- Chap 13: Criminal Pretrial Checklist
- Chap 15: Criminal Jury Trial
- Chap 16: Criminal Final Instructions
- **Limited Jurisdiction Reference Manual**
- Chap 21: Criminal Motions
- Chap 22: Formation of the Jury
- Chap 23: Criminal Jury Trial



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Jury Trial Eligibility

- Statute **OR**
- [Derendal v. Griffith](#), 209 Ariz. 416 (2005)
- Charge must have been jury eligible at common law (prior to and at the time of Arizona's statehood), or a modern offense of the same "character or grade" (**common law antecedent** "substantially similar" to modern offense) **OR**
- A "**serious offense**" = statutory, severe, direct, and uniformly applied consequences that show legislature considered the offense as "serious"

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Jury Eligible Misdemeanors

- Shoplifting/Theft
- Reckless Driving
- Aggressive Driving (Maricopa County)
- DUI/OUI
- Resisting Arrest
- Unlawful Imprisonment
- Indecent exposure
- Allegation of Sexual Motivation
- Contempt (>\$300, 6 mos)

And a newish one...

Causing death by a moving violation, § 28-672
(Not necessarily for serious physical injury)

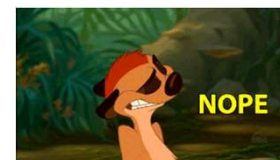
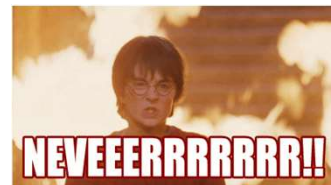
[Bridgeman v. Certa](#), 251 Ariz. 471 (Az. App. 2021)

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NOT Jury Eligible

- Drag Racing
- Domestic Violence
- Marijuana Possession
- Assault
- Interfering with Judicial Proceedings
- DUI Prior Convictions
- Contributing to Delinquency of Minor
- Child Abuse
- Obstructing a Highway
- False Reporting



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Civil Jury Trial Eligibility

- Justice Court Civil Rule 133b.
- Trial by jury or to a judge. A party may demand a trial by jury of any issue for which a right to a jury trial exists. The trial of the issues so demanded will be by a jury, unless all of the parties agree to a trial by a judge without a jury; or unless the court finds that there is not a right to a trial by jury as to some or all of the issues. A party must demand a jury trial at least ten (10) days before the start of trial. If a demand for trial by jury has not been timely made, the trial will be before the judge without a jury; but even if no party has demanded a jury, the court may order a trial by jury of any or all of the issues.

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Civil Jury Trial



- Contained at Civil Rule 134
- Form for SRLs in your materials
- Most civil juries: fender bender
- “Loss of value is the difference in the value of the car if it had never been in the accident less the value of the repaired car after the accident.”
- “In reaching your verdict, you should not consider or discuss whether a party was or was not covered by insurance. Insurance or the lack of insurance has no bearing on whether or not a party was at fault, or the damages, if any, a party has suffered.”

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No Unanimity for Civils



- ARS § 21-102:
- D. In a court not of record, a jury for trial of any case shall consist of six persons. The concurrence of all in a criminal case and all but one in a civil case shall be necessary to render a verdict.
- E. The parties in a civil case, and the parties with the consent of the court in a criminal case, may waive trial by jury, or at any time before a verdict is returned consent to try the case with or receive a verdict concurred in by a lesser number of jurors than that specified above.
- So can possibly proceed if not enough jurors show (or 1 doesn't return) ¹¹

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Eviction Jury Trial Eligibility

ARS § 12-1176. Demand for jury; trial procedure

- A. If a jury trial is requested by the plaintiff, the court shall grant the request. ... if the proceeding is in the justice court, the jury shall consist of six persons. The trial date shall be no more than five judicial days after the aggrieved party files the complaint.
- B. If the plaintiff does not request a jury, the defendant may do so on appearing and the request shall be granted.
- Ensure that the right has not been waived in the lease
- Ensure that you are only setting fact issues to jury trial
- [Montano v. Luff, 250 Ariz. 401 \(App. 2020\)](#)

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How to Timely Conduct Eviction Jury Trial?

- In counties of more than 2 million people, jury panel must come from precinct unless parties waive. A.R.S. § 21-302H
- Maricopa solution: agreement with Superior Court:
AO-2019-006

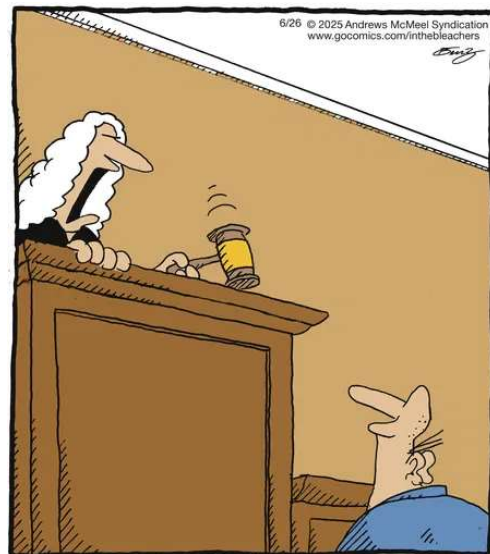
May order tenant to pay the undisputed amount of rent into the court (as a bond/litigant deposit) prior to trial. (See A.R.S. § 33-1365) (if can't—fact issue?)



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Pretrial Trial Management



“Counsel will wait until the verdict is read before singing, 'Na na na na, na na na na, hey, hey, hey, goodbye.'”

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Pretrial Conference

- Advise Defendant of possibility of *Trial in Absentia*.
- Review complaint, back-up citations, and allegation of DUI prior conviction with the parties.
- Parties tell Court what witnesses will be presented.
- Determine if discovery is complete. Advise parties to share exhibits with other side before trial.
- Determine if any pending motions, rule or set for hearing.
- Issue “Trial Date Notice” which sets Jury Trial Management Conference and jury trial dates and later issue a “Jury Trial Order”

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Trial Management Conference

- Confirm dates for jury trial and schedule witnesses (including expert witnesses) – confirm parties are ready to proceed.
- Set deadline for filing motions and proposed voir dire questions and jury instructions.
- Determine if breath test or blood case.
- Driving or Actual Physical Control (for jury instructions)?
- Inquire if any other matter needs to be discussed.
- Discuss your voir dire practice. Get questions for whole panel. **Set reasonable time limits for individual voir dire (if necessary).**
- **See Status Conference Checksheet**

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Motion Practice

- **Schedule:** If necessary, set briefing schedule. Set motion hearing before date of jury trial. Tell parties to ensure that necessary witnesses are scheduled.
- **Preparation:** Review case file, all pleadings, and applicable law.
- **Hearing:**
 - If multiple motions, advise parties which motion will be heard first (dispositive motion?).
 - Determine if any stipulations have been reached and narrow the issues. Get stipulations in writing.
 - During oral argument: Ask the parties to tell the Court what relief is sought and why. “Write” the decision.

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Motion/Hearing—Rule 16

- Parties must make all motions no later than 20 days before trial, except that lack of jurisdiction may be raised at any time
- The court may preclude any motion, defense, objection, or request not timely raised by motion unless the basis was not then known and could not have been known through reasonable diligence
- Always review 16.2 to determine procedure
- Preponderance of evidence
- Special duty to inform unrepresented defendant

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Motion/Hearing

- Evidence Rules do not apply to determine admissibility of evidence (ARE 104)
- 16.1(d): Finality of Pretrial Determinations. A court may not reconsider an issue previously decided in the case except for good cause or as these rules provide otherwise
- (If going to consider, Ariz. Rule of Civ. Pro 7.1(e) as a guide (can be summarily denied, but do not grant without opportunity to respond)
- Also familiarize yourself with Criminal Rule 1.9 re: requirements and timeframes

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Types of Motions

- Types of Motions filed in DUI Cases:
 - Discovery issues, including for deposition;
 - To Suppress (test results; def's statements / Miranda; corpus delicti);
 - To Admit / Preclude 911 calls.
 - To Dismiss (no RS for the stop; no PC for the arrest; etc.);
- Remember re: stops: 28-1594. Authority to detain persons
- A peace officer or duly authorized agent of a traffic enforcement agency may stop and detain a person as is reasonably necessary to investigate an actual or suspected violation of this title and to serve a copy of the traffic complaint for an alleged civil or criminal violation of this title.

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Listen to the Podcast and Review the Rule



2019 DUI Evidentiary Hearings and Motions in Limine

Aug 5 • 2:40:08

This episode has been published and can be heard everywhere your podcast is available.

An actual demonstrated DUI Evidentiary Hearing and argued Motions in Limine

Faculty:

- <https://creators.spotify.com/pod/profile/charles-adornetto/episodes/2019-DUI-Evidentiary-Hearings-and-Motions-in-Limine-e4rqsc/a-ak8hok>

Evidentiary Hearing on Motion to Suppress	14 days after sentence	<p>Crim 16.2(b): (1) Generally. Subject to (b)(2), State has BOP by a preponderance of the evidence the lawfulness in all respects of the acquisition of all evidence that the State will use at trial.</p> <p>(2) Defendant's Burden. If any of the conditions listed below are present, the State's BOP under (b)(1) arises only after Def alleges specific circumstances and establishes a prima facie case supporting the suppression of the evidence at issue: (A) the evidence involves a confession, identification, search, or seizure, and the defendant is entitled under Rule 15 to discover how the evidence was obtained; (B) defense counsel was present when the evidence was taken; or (C) the evidence was obtained under a warrant.</p>	No	<p>Ev 104(a): The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.</p>
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Expert Witnesses

- Parties must schedule their expert witness as soon as possible. Get names of expert witnesses.
- If requested, issue a subpoena or court order. (*Expert witness scheduled in two different courts*)
- At Jury Trial Management Conference, parties must confirm date and time for their expert witness.
- Calling expert witness out of order – procedure
- Include final jury instruction on “Expert Witness”

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Expert Witness Availability

- [State v. Thompson](#), 2004 WL 2607771 Sept. 2, 2004
- Trial court denies motion for continuance because of unavailability of expert witness (guess who)
- Had granted 3 earlier MTCs
- Case over 200 days old
- Michael D. Jones: This Court must review the trial court's order denying Appellant's Motion to Continue only for an abuse of discretion. There is no abuse of discretion unless the trial court's actions "substantially prejudiced the defendant."

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State v. Thompson

- "Appellant made no attempt to secure the attendance of another criminalist, who presumably could testify as to the same scientific principles and/or infirmities inherent in the breath analysis process."
- No subpoenas were issued, so counsel "not serious" in securing attendance at trial or not "essential to defense."
- "Finally, the particular facts of this case indicating that Appellant was literally "falling down drunk" and unable to stand unassisted, indicate that the testimony of an expert casting doubt on the Intoxilyzer machine would be of little trial utility..."

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Preliminary Jury Instructions

- Prepare your instructions before trial (include charge-specific instructions).
- Review proposed instructions on the record.
- Finalize Preliminary Jury Instructions – binder for each juror and for both parties. (*Binders stay with jurors during evidentiary portion of jury trial*)

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Newish: DUI Threshold

- **SB 1025**, effective 9/14/24
- Applies .04 BAC threshold to Uber/Lyft and taxi drivers (same as commercial drivers). May raise issues on determining whether a driver is "on the clock."

WHILE OPERATING A VEHICLE FOR HIRE AS DEFINED IN SECTION 28-9501 OR WHILE PROVIDING TRANSPORTATION NETWORK SERVICES AS DEFINED IN SECTION 28-9551 AS A TRANSPORTATION NETWORK COMPANY DRIVER AS DEFINED IN SECTION 28-9551

- 28-9501 2. "Vehicle for hire" means a taxi, livery (28-101.42) vehicle or limousine.

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Newish: Smith v Arizona, 144 S.Ct. 1785 (2024)

- Potentially impacts all cases where the same expert does not conduct all the tests
- If a forensic-testing expert conveys an out-of-court statement in support of his opinion, and the statement supports that opinion only if true, then the statement has been offered for the truth of what it asserts, as required for the admission of the statement to be barred by the Confrontation Clause (6th Amendment)
- The Confrontation Clause applies only to testimonial hearsay

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Submittal Proceedings

- Always go through with the Defendant on the record, and complete, a “Submittal Proceeding” form, as well as a “Waiver of Trial by Jury” form.

Deputy County Attorney

Defendant(s) Name / Address / Phone

SUBMITTAL PROCEEDING

The defendant appears in open court and desires to submit this case for a trial by submission on a stipulated record and the court finds as follows:

- ___ 1. Defendant understands the nature of the charge(s) as indicated:
- While under the influence of intoxicating liquor/toxic vapors/drugs, 28-1381A1, a class 1 misdemeanor.
 - With an illegal alcohol concentration .08 or more, 28-1381A2, a class 1 misdemeanor.
 - While any illegal drug or its metabolite is in the defendant's body, 28-1381A3, a class 1 misdemeanor.
 - With an alcohol concentration of .04 percent or more in a commercial vehicle, 28-1381A4, a class 1 misdemeanor.
 - With an extreme illegal alcohol concentration of .15 to .19 or more, 28-1382A1, a class 1 misdemeanor.

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Criminal Rule 17.7

- A. If a defendant and the State agree, the parties may submit a case to the court on a stipulated record. The court must address the defendant personally and inform the defendant...
- B. A court may accept an agreement to submit the case on a stipulated record only if it determines that the defendant has entered the agreement voluntarily and intelligently.

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The Trial



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Avoid This!



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Morning of Jury Trial

- Confirm parties are ready and witnesses are scheduled.
- Ensure exhibits for both sides are shared and marked marked before Opening Statements.
- Finalize Voir Dire questions. (*on the record*)
- Finalize Preliminary Jury Instructions. (*on the record*)
- Does Def must specifically request instructions re def not testifying, credibility?
- Party (or court) invoking the Rule?

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Voir Dire

- Swear in prospective jurors
- Do you solemnly swear or affirm that you will well and truly answer all questions concerning your qualifications to serve as a trial juror in the cause now on trial?"



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Juror Info

- **18.5(b) Explanation of Voir Dire.** At the beginning of any written or oral examination, the court **must** explain the purpose of voir dire, how the court and the parties will use the prospective jurors' information, and who may have access to the information prospective jurors provide.
- From Supreme Court Rule 123: (10) Juror Records. The home and work telephone numbers and addresses of jurors, and all other information obtained by special screening questionnaires or in voir dire proceedings that personally identifies jurors summoned for service, except the names of jurors on the master jury list, are confidential, unless disclosed in open court or otherwise opened by order of the court.
- **Make sure your script is updated!**

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Voir Dire

- **Rule 18.5(f).** In courts of record, voir dire examination must be conducted on the record. The court must conduct a thorough oral examination of the prospective jurors and control the voir dire examination. Upon request, the court must allow the parties **sufficient time, with other reasonable limitations**, to conduct a further oral examination of the prospective jurors. A party's failure to submit questions to the court prior to examination should not be grounds to deny a party the opportunity to conduct an oral examination. However, the court may limit or terminate the parties' voir dire on grounds of abuse. Nothing in this rule precludes submitting written questionnaires to the prospective jurors or examining individual prospective jurors outside the presence of other prospective jurors.

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Voir Dire

- **2022 Comment Rule 18.5(f).** When feasible, the court should permit liberal and comprehensive examination by the parties, refrain from imposing inflexible time limits, and use open-ended questions that elicit prospective jurors' views narratively. The court should refrain from attempting to rehabilitate prospective jurors by asking leading, conclusory questions that encourage prospective jurors to affirm that they can set aside their opinions and neutrally apply the law.

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Individual Voir Dire

- *State v. Forde*, 233 Ariz. 543, 560 (2014)– discretion to conduct individual voir dire when the prospective juror might be embarrassed to give their true answer in front of the group OR when the answer may color the entire jury's outlook
- *State v. Bible*, 175 Ariz. 549, 570 (1993) – In camera voir dire useful in cases involving sensitive subjects; designed to encourage full disclosure . . .

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Strikes for Cause

- **Rule 18.5(h)**. Challenges for cause must be on the record and made out of the hearing of the prospective jurors. The party challenging a juror for cause has the burden to establish by a **preponderance of the evidence** that the juror cannot render a fair and impartial verdict. In making its determination, the court must consider the totality of a prospective juror's conduct and answers given during voir dire.
- **Rule 18.4(b)** The court, on motion or on its own, must excuse a prospective juror or jurors from service in the case if there is a **reasonable ground to believe** that the juror or jurors cannot render a fair and impartial verdict. A challenge for cause may be made at any time, but the court may deny a challenge if the party was not diligent in making it.

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Strikes for Cause

- **Deleted comments to Rule 18.4:**
- A challenge for cause can be based on a showing of facts from which an ordinary person would imply a likelihood of predisposition in favor of one of the parties.
- A juror may be challenged who:
- ... (13) has a state of mind ... which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party;
- (15) does not understand the English language sufficiently well to comprehend the testimony offered at the trial.

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Case Law

- A “reasonable grounds” to believe that a juror cannot render a fair and impartial verdict ... may be shown by demonstrated bias or prejudice that renders the juror unable to listen to and evaluate the evidence presented.” *State v. Blackman*, 201 Ariz. 527, 533 ¶12 (2002)
- Juror holding “unqualified or fixed opinion” should be struck for cause. *State v. Johnson*, 247 Ariz. 166, 198 ¶ 113 (2006). But a “juror need not express her assurance of fairness and impartiality in absolute terms.” *State v. Ibanez*, 201 Ariz. 56, 58-59 ¶ 8 (App. 2001), *rev’d* 205 Ariz. 424 (App. 2003)
- “Unqualified” opinion is “fixed, settled and abiding conviction as to guilt or innocence of defendant, which juror believes is true and will consider in determining verdict. “Where the opinion is less strong it is qualified and the court will inquire into its strength and the information upon which it is founded.” *State v. Narten*, 99 Ariz. 116, 122 (1965).

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More cases

- “A juror’s preconceived notions or opinions do not necessarily render that juror incompetent to fairly and impartially sit in a case.” “If a juror is willing to put aside his opinions and base his decision solely upon the evidence, he may serve.” A juror can be rehabilitated through follow up questions. *State v. Martinez*, 196 Ariz. 451, 459 ¶ 28 (2000)
- *State v. Medina*, 193 Ariz. 504, 511 (1999) No abuse of discretion in the refusal to strike a juror who was not sure if he could follow the presumption of innocence but later acknowledged that he would not make up his mind until hearing all the evidence and that the state was required to prove guilt beyond a reasonable doubt.
- The elimination of peremptory challenges in Arizona did not alter the abuse-of-discretion standard of review. *State v. Colorado*, 256 Ariz. 97 (App. 2023).

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Objective—Open-ended Questions

- “We do not suggest that whenever a juror utters the words, ‘I think I can be fair,’ the trial judge should deny the motion to strike for cause. These issues are not resolved by ‘magic words.’ Nor do we suggest that, in order to avoid granting challenges for causes, trial judges should employ leading questions to prod doubt-ridden jurors to weakly pledge to attempt to be fair.” *State v. Smith*, 182 Ariz. 113, 115 (1995).
- Noting preference for further inquiry of “equivocal expression of impartiality such as ‘I will try to follow the law.’” Jurors should be struck for cause when answers demonstrate serious misgivings about ability to be fair and impartial. *State v. George*, 206 Ariz. 436, 444 ¶ 19 (App. 2003).

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Voir Dire

- Have a seating chart of potential jurors
- Don't let them answer sensitive Qs in big group—write down numbers and do it individually
- Bring back the jurors the attorneys want to see and allow attorneys to ask questions
- Have the attorneys attempt to rehabilitate—not the judge

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Specific Voir Dire Questions

- **Shoplifting:**
 - 1. Have you ever owned or worked in a store where you participated in the prosecution of alleged shoplifters?
 - 2. Have any of you ever worked as a check-out person in a retail store?
 - 3. Has anyone ever been employed by victim?
 - 4. Do any of you customarily shop at victim?
- **Evictions:** Attached

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Start the Trial

- Swear in the jurors
- 22-322, 18.6(b): “Do you swear or affirm that you will give careful attention to the proceedings, abide by the court's instructions and render a verdict in accordance with the law and evidence presented to you, so help you God.”
- Read the charges
- Preliminary Instructions (Jury gets copies)
- Opening Statements



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Trial—Exclusion of witnesses

- "The Rule of Exclusion of Witnesses is in effect and will be observed by all witnesses until the trial is over and a result announced. This means that all witnesses will remain outside the courtroom during the entire trial except when one is called to the witness stand. They will wait in the areas directed by the bailiff unless other arrangements have been made with the attorney who has called them. The rule also forbids witnesses from telling anyone but the lawyers what they will testify about or what they have testified to. If witnesses do talk to the lawyers about their testimony, other witnesses and jurors should avoid being present or overhearing."
- "The lawyers are directed to inform all their witnesses of these rules and to remind them of their obligations from time to time as may be necessary. The parties and their lawyers should keep a careful lookout to prevent any potential witness from remaining in the courtroom if they inadvertently enter."

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Trial—Juror Questions/Non-jury Charges

- **Before dismissing witnesses, check for juror questions**
- **18.6(e) Juror Questions.** Jurors must be instructed that they are permitted to submit to the court written questions directed to witnesses or to the court and that the court will give the parties an opportunity to object to those questions outside the jury's presence. Despite this general rule, the court may prohibit or limit the submission of questions to witnesses for good cause.
- See the Form
- If non-jury charges, get testimony during juror recesses before dismissing witnesses

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Trial—Bench Conferences

- "Members of the jury, sometimes it is necessary for the Court and the lawyers to confer privately regarding a matter of law. Please understand we are not trying to hide anything from you. But these conferences are an important part of the trial and help us present this case to you in a proper and legal manner."

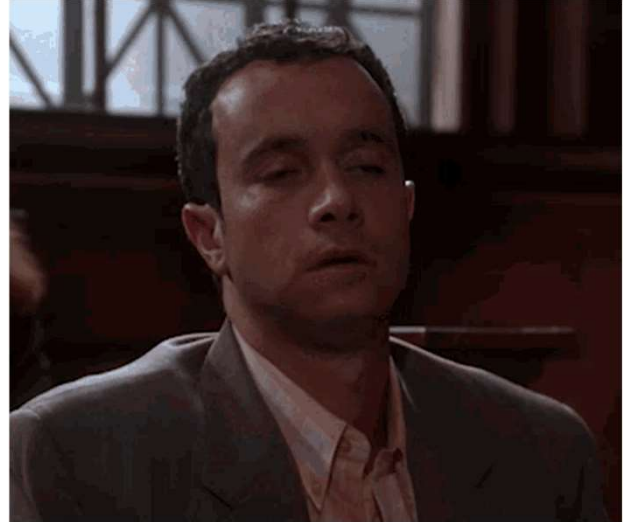


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Trial—Admonitions

- Recesses: Remind jurors about Admonition
- After recess, reconvene and note for the record the presence of the parties and the jury
- New “Driggs” jury admonition??
Do not drink alcoholic beverages or do drugs during your lunch break while serving on the jury!

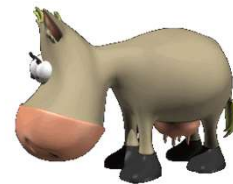


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Trial—Motion for Directed Verdict

- Mo for Judgment of Acquittal Pursuant to Rule 20
- No “substantial evidence” to warrant a conviction



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Trial—Offers of Proof

- Evidence Rule 103:
- **(a) Preserving a Claim of Error.** A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and: ...
 - (2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.
- **(b) Not Needing to Renew an Objection or Offer of Proof.** Once the court rules definitively on the record--either before or at trial--a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

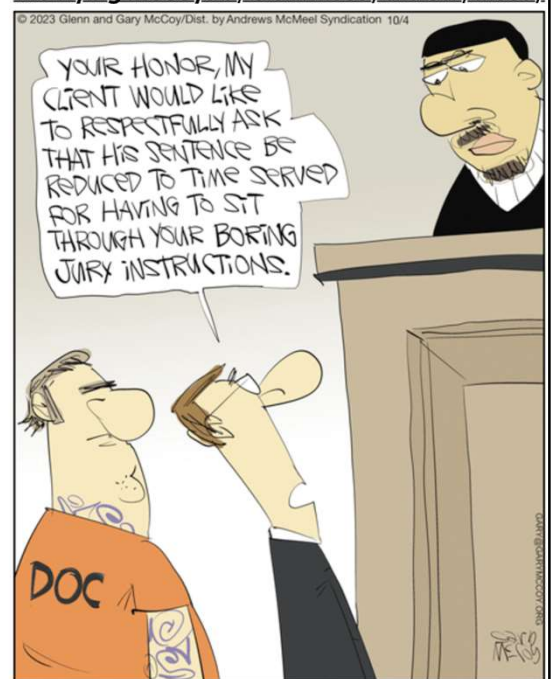
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Submitting Case to the Jury

- Recess
- Settle final jury instructions with attorneys 21.2 and 21.3
- Review proposed instructions (*and forms of verdict*) on the record.
- Finalize Final Jury Instructions – binder for each juror and for both parties. (*Final Instruction binders, verdict slips, jurors' notes, and admitted exhibits go into the deliberation room*)
- Select alternate juror
- Prepare Exhibits for the Jury

The Flying McCoys by Glenn McCoy and Gary McCoy



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Submitting Case to the Jury 2

- Reconvene
- Closing arguments; Jury instructions ** 19.1/jury instructions
- Read to jurors the forms of verdict 22.2
- Excuse alternate juror 18.5(h) "[Name of Alternate Juror], your name has been drawn by lot as an alternate juror. While you are physically excused from your service as a juror at this time, there remains a possibility you may be called back to court to deliberate should one of the other jurors be unable to do so. The bailiff/clerk will retain your notes [and notebook] for your use if you are called back. The Admonition continues to apply to you. Please do not discuss this case with anyone or let anyone talk to you about it until someone from the court notifies you a verdict has been reached."

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Submitting Case to the Jury 3

- Place the bailiff under oath to take charge of the jurors
- "Do you solemnly swear that you will take charge of this jury and conduct them to some private and convenient place and there keep them, that you will suffer no communication to be made to them pertaining to this case, nor make any yourself, except to ask if they have agreed upon a verdict, unless directed by the Court?"
- Bailiff waits OUTSIDE the jury room
- Admonish Defendant to wait for the verdict or waive his right to be present during the reading of the verdict

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While Jury Deliberating

- Rule on any non-jury counts
- Have sentencing paperwork prepared which includes mandatory minimums
- Restitution?
- Jury running long?
- 22.1 The court must not require a jury to deliberate after normal working hours unless the court, after consulting with the jury and the parties, determines that evening or weekend deliberations are necessary in the interest of justice and will not impose an undue hardship on the jurors.
- (Also—staff overtime considerations...)

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Taking the Verdict

- Reconvene
- “Has the jury reached a verdict. Who is the foreperson? Please hand forms of verdict to bailiff.”
- Have the defendant stand
- “I will now read and record the verdict.”
- Poll the jury if requested



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Jury Polling

- In a moment, I will ask each of you the following question: “Is this [Are these] your True Verdict[s]?” You need only answer “yes” or “no” to the question. The question is intended to determine whether you individually agree with the verdict[s] that [has][have] been announced here in court. If you now disagree for any reason with the verdict[s] that [has][have] been announced here in court, now is the time to tell me by answering “no” to the question. If you agree with the verdict[s] that [has][have] been announced, please answer “yes” when asked.
- Each juror: "Is this your true verdict?"

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Discharge the Jury

- “Members of the jury, on behalf of all the participants in the trial I want to thank you for your service to the community. The Admonition is now lifted and you are free to talk with anyone about the case. You are free to leave or remain to watch the rest of the trial.”
- If the verdict is guilty, set sentence date or sentence if waived
- Allow defendant to address court on sentencing (allocution)
- (Address prior conviction. Either trial to court or def admits on stand.)

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Trial of Prior Conviction

- To prove the allegation of prior conviction, the State must prove that:
 - 1. The prior conviction exists;
 - 2. Defendant is the person who was convicted; and,
 - 3. Defendant was represented by counsel [or waived representation by counsel] at the time of receiving the prior conviction.
- The State has the burden of proving each of these three elements by clear and convincing evidence.
- If the State proves each of the elements by clear and convincing evidence then enter a finding that the allegation of prior conviction is true.
- **Fingerprints?**

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Impasse in Deliberations

- "My bailiff tells me you are at a deadlock in your deliberations. I have some suggestions to help your deliberations, not to force you to reach a verdict. I am merely trying to be responsive to your apparent need for help. I do not wish nor intend to force a verdict. Each juror has a duty to consult with one another, to deliberate with a view to reaching an agreement if it can be done without violence to individual judgment. No juror should surrender an honest conviction as to the weight or effect of the evidence solely because of the opinion of other jurors or for the purpose of reaching a verdict."
- "However, you may want to identify areas of agreement and disagreement and discuss the law and the evidence as they relate to the areas of disagreement."

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Impasse in Deliberations 2

- "If you still disagree, you may wish to tell the attorneys and me which issues, questions, law or facts you would like us to assist you with. If you decide to follow this suggestion, please write down the issues, questions, law or facts on which we can possibly help. Please give your note to the bailiff. We will then discuss your note and try to help."
- [If it appears that the jurors are at an impasse, declare a mistrial - or have the jury continue to deliberate - depending on the response received and demeanor of the Presiding Juror (and other jurors) and your own evaluation of the situation.]

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Hung Jury

Bound and Gagged by Dana Summers



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Discharge of Hung Jury

- "Members of the jury, I'm sure you are disappointed that you were unable to reach a verdict, but don't feel badly about it. In some cases, the issues are more difficult to decide than others. It is not altogether surprising, therefore, that some jurors had an honest difference of opinion regarding the verdict in this case."
- "On behalf of all the participants in the trial I want to thank you for your service to the parties and to the community."
- [Add other comments, as appropriate for the case.]
- "The Admonition is now lifted. You are free to talk about the case with anyone or not talk about it, as you wish. If someone asks you about the case and you don't want to talk about it, just advise them of that fact and they will honor your request."
- "Please leave with us your juror badges and your notebooks. The Bailiff will destroy your notes, but the badges and the books will be used in other cases."
- "Thank you once again. Your jury service is now completed and you are excused."

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Concluding the Trial

- Sentence (allow allocution)
- If re-set, remind about fta/90 days **
- Appeal rights



****Don't reset: Time standards!!!**

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“Calculating Incarceration Credit”

- § 28-1446:
- A person who receives time served credit towards a mandatory term of incarceration for a violation of this chapter must serve at least eight consecutive hours for each day of credit.



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Ignition Interlock and Suspended Jail Time

- State v Stowe (Subsection I Sentencing)
- Must still sentence to jail time and monitor compliance.
- Suspend after compliance period after OSC or compliance review hearing at end of interlock period.
- ARS 28-1382(I)(5).
- MCJC Best Practice: Ignition Interlocks and Suspended Jail Time
- FYI: MVD will still require to have a CIID.
- If def drives a vehicle without a CIID, it is a crime; if convicted, MVD can extend CIID requirement for an additional year.

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Discussion/Tips

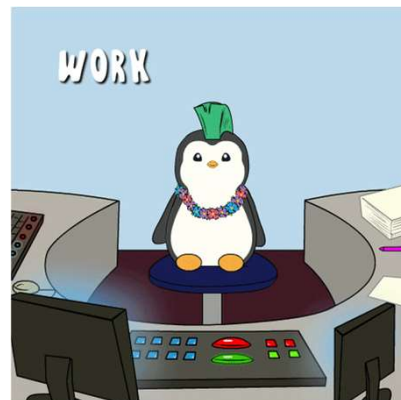
- Donald hearing (mand minimums)
- Handling breaks/jurors/witnesses (natural breaks; jealous of time)
- Stipulations
- Keeping jurors awake
- Negative inference for civil matters

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Materials

- 1 Info sheet for SRLs
- 2 Form for Juror Question
- 3 Jury Eligible List
- 4 State v. Thompson (Expert Continuance)
- 5 Eviction jury instructions/verdict forms
- 6 Eviction voir dire script
- 7 Montano v. Luff (Eviction Eligibility)
- 8 Maricopa AO 2019-006 (Timely Eviction)
- 9 Status Conference Checklist

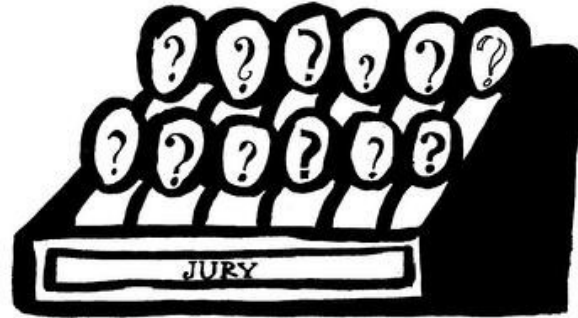


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- Jury instructions:
- <https://www.azbar.org/for-legal-professionals/communities/committees/criminal-jury-instructions-committee/>
- <https://www.azbar.org/for-legal-professionals/communities/committees/civil-jury-instructions-committee/>
- <https://azcourts.sharepoint.com/sites/wendell/SitePages/RAJIs.aspx>

Questions?



cadornetto@courts.az.gov

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Self-Represented Litigant
JURY TRIAL INSTRUCTIONS
AND CHECKLIST

**READ THESE INSTRUCTIONS BEFORE COMING TO COURT
FOR YOUR JURY TRIAL!**

The judge must conduct a jury trial in accordance with the Arizona Rules of Criminal Procedure and other applicable rules. These rules apply to both attorneys and parties representing themselves. Since you have elected to represent yourself at your jury trial, these instructions are meant to give you a brief outline of the different parts of that trial. You should not, however, consider these instructions as a substitute for an attorney. These instructions are not a complete catalog of all of your rights, and you should not consider these instructions as legal advice to you as to how to conduct your case. The court cannot offer you any legal advice, including on how to proceed or how to defend your case.

PART 1- JURY SELECTION

The jury selection process begins with a "panel" of approximately twenty (20) potential jurors. After a process of questioning and removing of certain jurors (by a process called "strikes"), a jury of six (6) members and possibly one alternate will be chosen to decide your case. The following checklist briefly describes the jury selection process.

The jury selection process begins with a "panel" of approximately twenty (20) potential jurors. After a process of questioning and removing of certain jurors (by a process called "strikes"), a jury of six (6) members and possibly one alternate will be chosen to decide your case. The following checklist briefly describes the jury selection process.

- The clerk brings into the courtroom the 20 member jury panel. Each member of the panel is given a number on the jury list.
- The judge asks questions designed to find out if each person on the panel can be fair to you and the prosecutor. (Note: If you have questions you think the judge should ask the panel, you must give those questions in writing to the judge BEFORE the panel enters the courtroom.)
- After all questioning is done, the parties may ask the judge to remove some members of the panel because they believe something the person said shows that the person cannot be fair. (This is called a "motion to strike for cause.")
- The judge decides each party's motions to strike for cause.

- All stricken members of the panel are excused from the courtroom.

- The first six jurors remaining on the list after any of the jurors have been removed (through the process described above) is sworn in as the trial jury. A seventh juror may be chosen to serve if it is anticipated that the trial will last more than one day.

PART 2 - PRELIMINARY JURY INSTRUCTIONS AND OPENING STATEMENTS

After the trial jury of six members is sworn in, the judge will give them preliminary instructions. These instructions are the rules the jury must follow while they are listening to the case. You will be given a written copy of the instructions before the judge reads them. After the judge reads the instructions, each party may make an "opening statement," with the prosecutor going first. An opening statement is meant only to tell the jury what the trial is about and give them a brief preview of what they may see and hear during the trial. You should not argue your innocence to the jury (you will be given a chance to do that later). You do not have to make an opening statement at all, or you can make it later before you present any of your own evidence or witnesses. It is totally up to you if and when you make an opening statement. Please remember that the judge will instruct the jury that nothing presented in an opening statement is testimony or evidence in the case. That means the jury will not use remarks made in the opening statement to decide your case. The jury will decide your case only from what they hear and see from the witness stand.

- You receive a copy of the judge's preliminary instructions to the jury.
- The judge reads the instructions to the jury.
- The prosecutor may make an opening statement to the jury.
- You may now make an opening statement to the jury or tell the judge you will make one later, or not make one at all.

PART 3 - THE PRESENTATION OF THE STATE'S EVIDENCE

After any opening statements are finished, the prosecutor will begin presenting the state's evidence. Evidence consists of witnesses' testimony and may also include other items such as documents and photographs. Although each party can offer evidence, the judge decides whether the evidence is "admitted," meaning whether the jury will be allowed to see or hear it and use it to decide the case. Admission of evidence is controlled by the Arizona Rules of Evidence, and the judge will follow those rules when each party offers evidence. After the prosecutor finishes with a witness, the judge will ask you whether you want to ask that witness any questions. (This is called "cross-examination.") It is totally up to you whether you want to cross-examine any of the prosecutor's witnesses. The purpose of cross-examination is to ask questions of the witness. It is not the time to make your own statements or argue with the witness.

- The prosecutor calls a witness.
- The witness is sworn to tell the truth. (Some judges have all the witnesses sworn in at the same time at the beginning of the trial.)
- The prosecutor asks the witness questions. (This is called "direct examination.")
- When the prosecutor is finished asking questions of the witness, the judge will ask you if you want to ask the witness any questions ("cross-examination"). If you do, then it is now your turn to ask questions of that witness.
- After you ask the witness questions, the prosecutor may ask the witness additional questions. (This is called "re-direct examination.")
- After the prosecutor finishes the redirect examination, you may ask the judge for permission to ask the witness more follow-up questions. (This is called "re-cross-examination.") The judge does not have to allow you any "re-cross" and will let you know whether you can or not.
- This process is repeated for each of the prosecutor's witnesses.

PART 4 - THE PRESENTATION OF YOUR EVIDENCE

After the prosecutor has finished calling all of the state's witnesses and presenting all of its evidence (such as documents, photographs and other items), the prosecutor will tell the judge that the state "rests." At this point and after deciding any legal issues, the judge will ask you whether you have any witnesses or evidence to present.

At this point, if you believe the state has not presented "substantial evidence" to support your guilt, you may move for a judgment of acquittal as allowed by Rule 20 of the Rules of Criminal Procedure. If the motion is denied, the jury trial will proceed.

You must decide whether to call any witnesses or present any evidence, including your own testimony. You do not have to call any witnesses or present evidence if you do not want to. The prosecutor must prove you guilty beyond a reasonable doubt with the state's own witnesses and evidence. You do not have to prove anything. You also have an absolute right to remain silent and not to testify, meaning neither the prosecutor nor the judge can make you testify. Also, the judge and the jury are NOT allowed to think you are guilty or have something to hide if you decide not to call any witnesses, testify yourself or present other evidence. If you do decide to call any witnesses, including

yourself, then the prosecutor will get the same opportunity to cross-examine your witnesses (including yourself) that you had to cross-examine the prosecutor's witnesses.

- You may call your first witness, including yourself.
- The witness (or you) will be sworn to tell the truth (unless all witness were sworn in earlier).
- You ask the witness questions. If you are testifying, then the judge will allow you to simply tell the jury what you believe the facts are.
- After you are finished questioning your witness or testifying yourself, then the prosecutor will have the opportunity to cross-examine the witness or you.
- After the prosecutor's cross-examination, you may ask the witness additional questions or provide additional testimony yourself.
- The prosecutor may ask the judge for permission to ask further questions. The judge will decide whether to allow these questions.
- This process repeats for each of your witnesses.
- When you have finished with all of your witness and/or other evidence, the judge will ask you if you have anything more to present. If you are done, tell the judge that you are finished presenting your case.

PART 5 - THE PROSECUTOR'S REBUTTAL WITNESSES

If you present witnesses or testify as described in Part 4, above, then the prosecutor has the opportunity to present "rebuttal" witnesses or evidence. The direct, cross and redirect examinations of these witnesses proceeds as described in Part 3, above.

- The judge asks the prosecutor if there is any rebuttal evidence.
- The prosecutor presents any rebuttal witnesses or evidence.
- The direct, cross and re-direct examination of the prosecutor's rebuttal witnesses proceeds as described in Part 3, above.

PART 6 – CLOSING ARGUMENTS

After both parties have completely finished with all of their witnesses, the judge will allow you and the prosecutor to argue the case to the jury. Argument is the opportunity to tell the jury why it should decide a case in a certain way. This is the opportunity to comment on the evidence, meaning what you think it showed or did not show. You may also comment on the believability of the witnesses, meaning why the jury should believe some witnesses and not others. You do not have to argue to the jury if you do not want to. The choice is totally up to you. Also, before either side argues to the jury, you should submit in writing any requests for final jury instructions to the judge (see Part 7, below).

- You must submit any requests for final jury instructions before the prosecutor makes a closing argument. (See Part 7, below.)
- The prosecutor may make his or her first closing argument.
- You may make a closing argument if you want to.
- The prosecutor may make a second and final closing argument.

PART 7 – FINAL JURY INSTRUCTIONS

After the closing arguments, the judge will read the jury its final instructions. These instructions are the rules of law the jury must follow when deciding the case. You will be given a copy of these instructions to follow along with while the judge is reading them to the jury. If you believe the jury should be instructed in a certain way, then you must submit the instruction to the judge in writing BEFORE closing arguments.

- You receive a copy of the jury's final instructions.
- The judge reads the final instructions to the jury
- The jury goes to a private room to decide the case.

PART 8 – NON-JURY COUNTS

At this point, a trial on any non-jury counts (such as prior convictions or civil traffic violations) may proceed.



Maricopa County Justice Courts, Arizona

Juror Question: *(Please do not sign your name)*

OBJECTIONS

Plaintiff: I do not object I object and wish to make a record

Defendant: I do not object I object and wish to make a record

COURT RULING

To be asked by: _____

JURY ELIGIBLE AND INELIGIBLE VIOLATIONS

I. JURY ELIGIBLE MISDEMEANOR VIOLATIONS

<u>STATE STATUTE</u>	<u>DESCRIPTION</u>	<u>CLASS</u>
13-118 [special allegation of sexual motivation]	Supreme Court held in <i>Fushek v State</i> : “We defer to the legislature's determination that misdemeanor crimes involving sexual motivation are serious offenses and hold that <u>when a special allegation of sexual motivation exposes a defendant to the possibility of sex offender registration, Article 2, Section 24 of our Constitution entitles the defendant to a trial by jury.</u> ” <i>Fushek v. State</i> 2008 WL 384376, *7 (Ariz.,2008)	
13-1303	Unlawful imprisonment “. . . common law false imprisonment is the direct antecedent of unlawful imprisonment pursuant to § 13–1303.” <i>Kaniowsky v. Pima County Consol. Justice Court</i> , 239 Ariz. 326, 329, ¶ 10, 371 P.3d 654, 657 (App. 2016)	1 (or Class 6 felony)
13-1402A	Indecent Exposure (jury eligible classification affirmed) see <i>Crowell v. Jejna</i> , 215 Ariz. 534, 161 P.3d 577 (Ariz.App. Div. 1,2007)	1
13-1403A1	Public Sexual Indecency	1
13-1403A2	Public Sexual Indecency	1
13-1403A3	Public Sexual Indecency	1
13-1403A4	Public Sexual Indecency	1
13-1406.01A	Sexual Assault of a Spouse	1
13-1802A1 thru A6	Theft: “... the unified statutory scheme of theft adopted by our legislature is a comparable and substantially similar crime to common-law larceny in that the foundation of both crimes is the unlawful deprivation of property. For that reason, one charged with violating the unified crime of theft is entitled to a jury trial, regardless of the degree of the offense or the nature of the property alleged to have been taken.” <i>State v. Kalauli (Kroll)</i> , 787 Ariz. Adv. Rep. 13 (CA 1, 3/20/18).	1
13-1803	Unlawful Use of a Means of Transportation	1
13-1805A1 thru A5	Shoplifting see <i>Bosworth v. Anagnost</i> , 234 Ariz. 453, 323 P.3d 736 (Ariz.App. Div. 1,2014) <i>Sulavka v. State</i> , 223 Ariz. 208, 221 P.3d 1022, (Ariz.App. Div. 1,2009)	1
13-1806	Failure to Return Rented Property	1
13-2406	Impersonating a Public Servant	1
13-2508	Resisting Arrest (jury eligible status affirmed) see: <i>State v LeNoble</i> , 164 P.3d 686 (Ariz.App. Div. 1,2007)	1 (or class 6 felony)
13-3208	Keeping or Residing in house of Prostitution	1
13-3214A	Prostitution	1
13-3613A	Contributing to the Delinquency of a Minor (jury eligible if State alleges sexual motivation pursuant to ARS 13-118) see <i>Fushek v. State</i> , 2008 WL 384376, 7 (Ariz.,2008)	1
13-3619	Child Neglect	1
28-672	Causing Death (not Serious Physical Injury) By Moving Violation	1
28-693A	Reckless Driving	2
28-695	Aggressive Driving see: <i>State v. Shaerzadeh, LC2012-135141-001 DT (Maricopa County Superior Court (2013) Appeal from Biltmore Justice Court, remanded for jury trial.</i>	1
28-1381A1	D.U.I.	1
28-1381A2	Driving With a Blood Alcohol Content of .08% or More	1
28-1381A3	D.U.I. Illegal Drugs	1
28-1381A4	Commercial Vehicle D.U.I.	1
28-1382	Extreme D.U.I.	1
28-8280	Reckless Flying	1
28-8282AI	D.U.I. Aircraft	1

II. MISDEMEANOR VIOLATIONS THAT ARE NOT JURY ELIGIBLE

<u>STATE STATUTE</u>	<u>DESCRIPTION</u>	<u>CLASS</u>
13-1502, 13-1503, or 13-1504	Criminal Trespass [third, second or first degree] “. . . common law criminal trespass is not an antecedent to modern criminal trespass, and no jury trial right attaches.” see: <i>State v. Willis</i> 218 Ariz. 8, 11, ¶ 12 (App. 2008).	3, 2, 1 or Class 6 felony
13-2906(A)	Obstructing a highway or other public thoroughfare; classification see: <i>Mack v Dellas</i> 235 Ariz. 64, 326 P.3d 331, 687 Ariz. Adv. Rep. 25, Ariz.App. Div. 1, May 22, 2014 (NO. 1 CA-CV 13-0492)	3
13-2510, 13-2511, or 13-2512	Hindering Prosecution see <i>Abuhl v. Howell</i> , 212 Ariz.513, 135 P.3d 68 (2006)	1
13-2810	Interfering with judicial proceedings. see <i>Ottaway v. Smith</i> , 210 Ariz. 490, 113 P3d 1247 (App. 2005)	1
13-2907	False Reporting to Law Enforcement Agency see <i>Abuhl v. Howell</i> , 212 Ariz.513, 135 P.3d 68 (2006)	1
13-3405B 1	Possession of Marijuana see <i>Stoudamire v. Simon</i> , 213 Ariz. 296, 141 P.3d 776 (2006)	1
13-3415	Possession of Drug Paraphernalia see <i>Stoudamire v. Simon</i> , 213 Ariz. 296, 141 P.3d 776 (2006)	1
13-3623(C) (Amended in 2000 to 13-3623B)	Misdemeanor child abuse; see <i>Bazzanella v. Tucson City Court</i> , 195 Ariz. 372, 988 P.2d 157 (Ariz.App. Div. 2, 1999)	Class 6 felony
28-661	Leaving the Scene of an Accident with Injuries see <i>Derendal v Griffith</i> , 209 Ariz. 416, 104 P.3d 147 (App. 2005)	1
28-662, 664, 665	Leaving the Scene of an Accident with Damage see <i>Derendal v Griffith</i>	2
28-672	Causing serious physical injury or death by a moving violation: “. . . the offense has no common law antecedent and is not a sufficiently serious offense to warrant a jury trial.” <i>Phoenix City Prosecutor's Office v. Nyquist</i> , 1 CA-CV 16-0170, 2017 WL 4054143, at *1 (App. Sept. 14, 2017)	3
28-3473(B) (ARS 2000)	Driving on a DUI-suspended driver's license was not jury eligible; <i>Benitez v. Dunevant</i> 198 Ariz. 90, 7 P.3d 99 (Ariz., 2000)	
S.C.C. 16-242(a); 16-247(d)	Scottsdale City Ordinance regulating “Adult Service Industry” violations that are not “indecent exposure” violations, are not jury eligible; <i>Crowell v. Jejna</i> , 215 Ariz. 534, 161 P.3d 577 (Ariz.App. Div. 1, 2007); see also <i>Buccellato v. Morgan</i> , 220 Ariz. 120, 203 P.3d 1180 (Ariz.App. Div. 1, 2008)	1

III. OTHER JURY ELIGIBILITY ISSUES

<u>STATE STATUTE</u>	<u>DESCRIPTION</u>	<u>CLASS</u>
	Defendant is not entitled to jury trial on an allegation of a prior conviction; <i>Newkirk v. Nothwehr</i> 210 Ariz. 601, 115 P.3d 1264 (Ariz.App. Div. 1, 2005)	
Various	Assault per Domestic Violence (Class 1 misdemeanor) Assault per Domestic Violence (Class 3 misdemeanor) Disorderly Conduct per Domestic Violence (Class 1 misdemeanor) Disorderly Conduct (Class 1 misdemeanor) Threatening or Intimidating per domestic violence (Class 1 misdemeanor) In a Court of Appeals case designated: “THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED.”	Various

	Case held “All of these Counts are misdemeanor charges, and none of the charges have a common law antecedent or are of such a serious nature requiring a jury trial.” <i>State v. Taylor</i> , 1 CA-CR 14-0224, 2014 WL 7338521, at *3 (App. Dec. 23, 2014)	
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2004 WL 2607771

Only the Westlaw citation is currently available.
Superior Court of Arizona.

STATE of Arizona

v.

William Joseph THOMPSON (001)

No. LC2004-000076-001 DT.

|

Sept. 2, 2004.

DOUGLAS W JANN

JONES, J.

TODD K COOLIDGE

GLENDALE JUSTICE COURT
REMAND DESK-LCA-CCC

RECORD APPEAL RULE / REMAND

*1 GLENDALE JUSTICE COURT

Cit. No. # 2826395

Charge: C) EXTREME DUI-BAC .15 OR MORE

DOB: 03/07/45

DOC: 12/05/02

This Court has jurisdiction of this criminal appeal pursuant to the [Arizona Constitution Article VI, Section 16](#), and [A.R.S. Section 12-124\(A\)](#).

This case has been under advisement since the time of oral argument. This decision is made within 60 days as required by Rule 9.9, Maricopa County Superior Court Local Rules of Practice. This Court has considered and reviewed the record of the proceedings from the Glendale Justice Court, and the memoranda and arguments submitted by counsel in this case.

Appellant, William Joseph Thompson, appeals from his conviction of the crime of Extreme DUI, a class 1

misdemeanor offense in violation of [A.R.S. Section 28-1382\(A\)](#). Thompson's case was tried to the court without a jury on August 1, 2003, based upon stipulated facts and evidence. Thompson was found guilty, and sentenced on September 10, 2003 to pay a fine and serve the mandatory jail-time. Thompson has filed a timely Notice of Appeal in this case.

The record reflects that Thompson was stopped by Department of Public Safety Officer Brett on December 5, 2002 at 9:10 p.m., at Milepost 205 on Interstate 17.¹ Officer Brett's attention was drawn to the Appellant's vehicle because of its high speed and the fact that he was weaving back and forth within his lane. Officer Brett commenced a DUI investigation after making a traffic stop, and smelling the strong odor of alcohol from Appellant's person, and after Appellant admitted that he had had several glasses of wine. Officer Brett explained that "for reasons of safety" he did not perform any field sobriety tests upon Appellant, because Appellant could not stand up unassisted.² The results of the two Intoxilyzer tests revealed blood alcohol contents of .198 and .186, respectively.

The first issue raised by the Appellant is his contention that the trial judge erred in denying his motion to continue the trial date of August 1, 2003. Citing [Rule 8.5\(G\), Arizona Rules of Criminal Procedure](#), Appellant contends that the trial court must continue a trial when "delay is indispensable to the interests of justice." Appellant had filed a Motion to Continue the trial of August 1, 2003, for the reason that its expert witness, Chester Flaxmayer, was unavailable on the trial date due to his attendance at a seminar out of state. The trial court denied this motion to continue. Appellant's trial counsel reurged the motion to continue at the time scheduled for trial on August 1, 2003. The trial judge denied the renewed motion.

It is appropriate that this Court review the trial court's denial of the continuance in this case, in the context of the case's history before the trial court.³ The case history reveals that the case was greater than 200 days old (as of August 1, 2003), and that three previous motions to continue had been granted at the request of Appellant's trial counsel. The age of the case and the number of the prior motions to continue were cited by the trial judge at the time he denied Appellant's renewed motion to continue the trial on August 1, 2003.⁴ The trial judge (the Honorable Quentin V. Tolby, Glendale Justice

of the Peace) succinctly and correctly concluded, when he denied Appellant's renewed Motion to Continue:

*2 The court doesn't believe that Mr. Flaxmayer is the only criminalist in the State of Arizona. And, I don't believe that Mr. Flaxmayer's (schedule) should be allowed to dictate trial scheduling....⁵

Rule 8.2(a)(2), *Arizona Rules of Criminal Procedure*, requires that criminal defendants released from custody *be tried within 180-days from the date of arraignment*. As this rule is not written as a suggestion, nor in the permissive sense, its requirements must be understood to be a mandatory directive to trial attorneys and judges. In fact, the only exception to this mandatory time limit is found in Rule 8.2(d), which authorizes continuances granted in accordance with Rule 8.5, *Arizona Rules of Criminal Procedure*. A trial court may only grant a continuance "... upon a showing that *extraordinary circumstances exists* and that *delay is indispensable to the interests of justice (emphasis added)*."⁶

Article II, Section 24 of the *Arizona Constitution*, guarantees the concept of a criminal defendant's right to a speedy trial. Article II, Section 2.1(A)(10) guarantees victims the right to a speedy trial. It is a trial judge's responsibility to balance these rights, keeping in mind the trial court's responsibility to control and effectively manage its docket and calendar.⁷ It is a criminal defendant's responsibility to subpoena and schedule the testimony of its expert witnesses. This may include having an alternative expert on-call. Where scheduling conflicts can be foreseen and avoided through the diligence of counsel, continuances may be avoided.⁸

In a similar case, the Arizona Supreme Court upheld a trial judge's ruling denying a criminal defendant's motion to continue a sentencing hearing, when its expert was not available:

There was no error in denying the continuance. The judge made it clear from the outset that defense counsel was responsible for insuring Dr. Tatro's presence when the State's expert testified. Defense counsel knew in advance that Dr. Tatro might not be available on the hearing's second day. He could have but

did not ask the court to schedule the first day's witnesses accordingly. Moreover, defense counsel requested a continuance of at least six days when Dr. Bayless was present and prepared to proceed. Considering all these factors, the judge acted well within the latitude that trial court's need to manage their dockets.⁹

This Court must review the trial court's order denying Appellant's Motion to Continue only for an abuse of discretion.¹⁰ There is no abuse of discretion unless the trial court's actions "substantially prejudiced the defendant."¹¹

This Court concludes that the trial judge did not err in denying Appellant's requested continuance. It is clear from the record that Appellant's arguments before the trial court (as well as those before this court) fall far short of establishing that Appellant was prejudiced by the denial of his requested continuance. Appellant argued to the trial judge that Chester Flaxmayer was a material and indispensable witness. Flaxmayer is a criminalist whom Appellant intended to call as a witness to cast doubt upon the reliability of the Intoxilyzer machine and the blood alcohol readings obtained from the machine. Appellant made no attempt to secure the attendance of another criminalist, who presumably could testify as to the same scientific principles and/or infirmities inherent in the breath analysis process. The record also reveals that no subpoenas were issued to compel the attendance of Chester Flaxmayer. This fact indicates that Appellant's trial counsel was not serious in securing Flaxmayer's attendance at trial, or that he was not essential to the defense. Finally, the particular facts of this case indicating that Appellant was literally "falling down drunk" and unable to stand unassisted, indicate that the testimony of an expert casting doubt on the Intoxilyzer machine would be of little trial utility, given the strength of Officer Brett's personal observations and Appellant's own admissions on the issue of guilt.

*3 The remaining issue raised by the Appellant concerns the sufficiency of the evidence to warrant the finding of guilt. Specifically, Appellant contends that insufficient evidence was submitted on the "(A)(2) charge".¹² However, the record reveals that Appellant was not found guilty, nor was a judgment of guilt entered, as to this charge. It was dismissed. A judgment of guilt was entered only as to the charge of

Extreme DUI. Even construing this argument as applying to the Extreme DUI charge, Appellant's trial counsel *stipulated* to the admission in evidence of the results of the Intoxilyzer, including the Intoxilyzer's two read-outs of .198 and .186. Given the substantial other evidence of Appellant's guilt, this Court finds clear and substantial evidence exists to support the finding of guilt, and no error.

IT IS THEREFORE ORDERED affirming the judgment of guilt and sentence imposed by the Glendale Justice Court in this case.













IT IS FURTHER ORDERED remanding this case back to the Glendale Justice Court for all further and future proceedings in this case.

IT IS FURTHER ORDERED designating this opinion for publication pursuant to Rule 9.11, Maricopa County Superior Court Local Rules of Practice.

All Citations

Not Reported in P.3d, 2004 WL 2607771

Footnotes

- 1 The record submitted to this court includes the stipulated evidence submitted to the trial judge and that evidence includes the departmental reports of Officer Brett, his narrative report, the alcohol influence report, and the intoxilyzer breath-test readings of .198 and .186.
- 2 Record on Appeal, Arizona Department of Public Safety Offense Report 2002-084415, at pages 1-2.
- 3  [State v. Lamar](#), 205 Ariz. 431, 437, 72 P.3d 831, 837 (2003);  [State v. Barreras](#), 181 Ariz. 516, 892 P.2d 852 (1995);   [State v. Amaya-Ruiz](#), 166 Ariz. 152, 800 P.2d 1260 (1990).
- 4 Record on Appeal, tape cassette of the proceedings of August 1, 2003.
- 5 *Id.*
- 6 Rule 8.5(b), Arizona Rules of Criminal Procedure.
- 7  [State v. Lamar](#), 205 Ariz. at 436, 72 P.3d at 836;  [State v. Barreras](#), 181 Ariz. at 520, 892 P.2d at 856.
- 8  [State v. Vasko](#), 193 Ariz. 142, 971 P.2d 189 (App.1998);  [State v. Heise](#), 117 Ariz. 524, 573 P.2d 924 (App.1977).
- 9  [State v. Barreras](#), 181 Ariz. at 520, 892 P.2d at 856.
- 10 *Id.*; [State v. Amaya-Ruiz](#), *supra*.
- 11  [State v. Barreras](#), 181 Ariz. at 520, 892 P.2d at 856, quoting  [State v. Clabourne](#), 142 Ariz. 335, 342, 690 P.2d 54, 61 (1984).
- 12  A.R.S. Section 28-1381(A)(2), Driving With a Blood Alcohol Content of .08 or Greater.

REVISED ARIZONA JURY INSTRUCTIONS (CIVIL), 4TH

RESIDENTIAL EVICTION ACTIONS

Introduction

These instructions apply to residential evictions governed by the Arizona Residential Landlord and Tenant Act. A.R.S. §§ 33-1301 – 33-1377. Additional guidance can be found in the Arizona Rules of Procedure for Eviction Actions (RPEA).

These instructions do not apply to all types of residential tenancies. The applicable law governing renting a mobile home or a space in a mobile home park is the Arizona Mobile Home Parks Residential Landlord and Tenant Act. A.R.S. §§ 33-1401 - 33-1501. The Recreational Vehicle Long-Term Rental Space Act controls evictions concerning recreational vehicles. A.R.S. §§ 33-2100 – 33-2148. Evictions concerning hotels, motels and short-term boarding houses are governed by A.R.S. §§ 33-301 - 33-302. Eviction actions in connection with a real estate sales agreement are governed in part by A.R.S. § 33-742, *et. seq.*

RESIDENTIAL EVICTION ACTIONS 1

Claims and Elements

I will give you detailed instructions of law later in these instructions. But now I will give you a statement of each claim in the case.

[*Plaintiff/landlord*] claims that [*defendant/tenant*] [*breached a lease/violated the Arizona Residential Landlord and Tenant Act*] and should be evicted. On this claim, the [*plaintiff/landlord*] must prove that there was a lease, that the [*defendant/tenant*] did not comply with the terms of that lease, that [*defendant/tenant*] was given the required written notice and that the [*plaintiff/landlord*] [*suffered monetary damages and*] is entitled to possession of the residence.

[*Defendant/tenant*] claims (insert any affirmative defenses or counterclaims). [*Defendant/tenant*] must prove (these defenses or counterclaims).

SOURCE: A.R.S. §§ 33-1368; Rules of Procedure for Eviction Actions, *hereinafter*, “RPEA,” REPA 5 – 8; RAJI (Civil) 5th (Contract 2, Claims and Elements). *See generally*, Williams, *Representing Residential Tenants in Eviction Actions*, Arizona Attorney, 12 (November 2011).

USE NOTE: Use the language in the third section in cases where the defendant asserts an affirmative defense or counterclaim.

RESIDENTIAL EVICTION ACTIONS 2

Written Notice

Before [plaintiff/landlord] can evict [defendant/tenant], [plaintiff/landlord] must first give [defendant/tenant] written notice.

[Plaintiff/landlord] can provide this notice in person or by registered or by certified mail to the [name of defendant/tenant's] last known residence. By law, notice occurs the date that it is actually received or five days after it is mailed, whichever occurs first.

In this case, [plaintiff/landlord] claims that the notice was provided to the tenant by [personal delivery, certified mail, registered mail]. [Defendant/tenant] claims that [he or she or they] never received this notice.

SOURCE: A.R.S. § 33-1368.

USE NOTE: This instruction would only need to be given if the tenant is claiming nonreceipt of the notice. The sufficiency of the notice is a question of law.

COMMENT: 1. Delivery of Notice. Every type of residential eviction action requires that the tenant first receive written notice and in most cases, an opportunity to cure. The landlord can provide this notice by hand delivery or by registered or certified mail to the tenant's last known residence. By law, notice occurs the date that it is actually received or five days after it is mailed, whichever occurs first. A.R.S. § 33-1313(B).

2. Types of Notices. The landlord must provide the tenant a five-day cure notice if the allegation is nonpayment of rent. A.R.S. § 33-1368(B). A five-day notice is also required if the landlord is alleging that the tenant committed a health or safety violation. A.R.S. § 33-1368(A). For something considered to be a material noncompliance (e.g. unauthorized occupants or pets), a ten-day notice is required. *Id.* If the landlord is requesting immediate possession due to allegations of a material and irreparable breach, then notice is still required but there is no cure period. *Id.* See also, A.R.S. § 33-1331 (Notice of foreclosure).

RESIDENTIAL EVICTION ACTIONS 3

Landlord Tenant Relationship

[*Plaintiff/landlord*] claims that [*defendant/tenant*] violated a lease. A lease is an oral or written contract where someone with a right to possess a residence allows another to occupy it in exchange for rent. On this claim, [*plaintiff/landlord*] must prove that there was a lease with [*defendant/tenant*] and that [*defendant/tenant*] violated it.

[*Defendant/tenant*] claims that there was no lease between the parties and that [*defendant/tenant*] [*was a guest, boyfriend or girlfriend, etc.*].

SOURCE: A.R.S. § 33-1310(6)(Landlord defined); A.R.S. § 33-1310(12)(Rental agreement defined); A.R.S. § 33-1310(16)(Tenant defined); A.R.S. § 33-1314(Terms and conditions of rental agreement); A.R.S. § 33-1377(Special detainer actions); RPEA 5.

USE NOTE: The second section of this instruction would not need to be given unless the tenant contends that the parties were not in a landlord and tenant relationship.

COMMENT: If the term of the lease is for less than one year (e.g. month to month), a lease agreement can be oral. A.R.S. § 44-101(6)(Statute of frauds). A lease can be created for some type of valuable consideration other than rent (e.g. performing maintenance at an apartment complex) and in such a case, this instruction would need to be so tailored.

RESIDENTIAL EVICTION ACTIONS 4

Basis for Eviction (Breach of Lease)

[*Plaintiff/landlord*] contends that [*defendant/tenant*] should be evicted. [*Plaintiff/landlord*] is requesting both money damages and possession of the residence.

On this claim, [*plaintiff/landlord*] must prove that [*defendant/tenant*] materially breached the lease by [*not paying the required rent on time, having an unauthorized occupant in the residence, etc.*].

In response, [*defendant/tenant*] [*denies the allegations, denies that the breach was material, etc.*].

SOURCE: A.R.S. § 33-1368(C)(Landlord's damages); A.R.S. § 33-1377(D)(Determining possession); RPEA 13(c)(2)(E)(Plaintiff's damages); RAJI (Civil) 4th (Contract 9; Failure of Consideration, Material Breach).

RESIDENTIAL EVICTION ACTIONS 5

Measure of Direct Damages for a Prevailing Landlord

If you find that [*defendant/tenant*] is liable to [*plaintiff/landlord*] for breaching the lease [*and/or for violating the Arizona Residential Landlord and Tenant Act*], you must then decide what amount of money to award [*plaintiff/landlord*]. A landlord may recover all reasonable damages resulting from the breach by the tenant with a rental agreement. To determine those damages, you should consider only the following:

The amount of any accrued rent; and

The amount of any accrued late fees; and

[*The amount of any accrued rental concessions*]; [*and*]

[*The amount of any unpaid utilities*; *and*]

[*Any other measurable damages caused by the defendant/tenant*].

[*A rental concession is a discount provided in the lease that becomes due and payable in the event the tenant violates the lease.*]

[*If the [plaintiff/landlord] requested to be compensated for damages to property, then [plaintiff/landlord] must prove that this damage was [defendant/tenant's fault]. This fault can be the result of an intentional action. This fault can also be the result of negligence. Negligence is the failure to act as a reasonably careful person would act under the circumstances. Negligence causes the damage if it helps produce the damage and if that damage would not have happened without the negligence.*]

SOURCE: A.R.S. § 33-1314.01(Utility charges); A.R.S. § 33-1368(C)(Landlord's damages); RPEA 13(c)(2)(E)(Plaintiff's damages); RPEA 13(d)(Rental concessions); RAJI (Civil) 5th (Fault 1 and Fault 2).

USE NOTE and COMMENT: The traditional measure for contract damages, putting the plaintiff in the position he would have been if the contract had been performed, does not apply in residential eviction actions in part because a landlord has a duty to mitigate damages by attempting to re-rent the dwelling. *Tempe Corp. Office Bldg. v. Arizona Funding Services, Inc.*, 167 Ariz. 394, 339, 807 P.2d 1130, 1135 (Ct. App. 1991)(Commercial lease). In addition, property damage claims usually cannot be determined until the landlord has possession of the residence again and then, any claim would be offset by the tenant's security deposit. A.R.S. § 33-1321 (Security deposits). There is an exception for property damages "when properly pled in the complaint and when such damages resulted from the breach giving rise to the eviction." RPEA 13(c)(2)(E).

RESIDENTIAL EVICTION ACTIONS 6

Tenant's Right to Reinstate the Lease

[*Defendant/tenant*] claims that the lease should continue because [*he/she*] paid [*or tendered payment in*] the required amount after *he/she* received a five-day notice. To establish this defense, [*defendant/tenant*] must prove *he/she* paid [*tendered*] the full amount due.

SOURCE: A.R.S. § 33-1368(B)(Sets forth requirements for a tenant to reinstate the lease upon receipt of the five-day notice and after an eviction action has been filed).

USE NOTE: Arizona is a “pay and stay” jurisdiction. In nonpayment of rent cases only, the tenant can pay all of the rent and any late fees any time before the lawsuit is filed and avoid eviction. If the eviction action has been filed, then the tenant must pay all past due rent, late fees, attorney’s fees and court costs. If the tenant does so literally anytime before a judgment is entered, he or she can avoid eviction. However, after a judgment has been entered, reinstatement of the lease is solely in the landlord’s discretion. A.R.S. § 33-1368(B); *Keenen v. Biles*, 199 Ariz. 266, 268, 17 P.3d 111, 113 (Ct. App. 2001).

RESIDENTIAL EVICTION ACTIONS 7

Bona Fide Lease Defense Following a Trustee's Sale

After a trustee's sale, the new owner is prohibited from evicting any existing tenants in certain situations. If an existing tenant wishes to keep possession of the property following a trustee's sale, the existing tenant must prove that a "bona fide" lease was in place at the time of the trustee's sale.

To qualify as a "bona fide" lease, [*defendant/tenant*] must prove:

1. That the lease was entered into before the trustee's deed is delivered;
2. That the tenant is not the defaulting borrower;
3. That the lease is the result of an arm's length transaction; and
4. That the lease requires an amount of rent that is not substantially less than the "fair market rent" for the property.

An arm's length transaction is an agreement between two parties who are not related to each other and who are not on close terms with each other.

SOURCE: The Protecting Tenants at Foreclosure Act of 2009 (PTFA), Pub.L. No. 111-22, Sec. 702, 123 Stat. 1660 (2009), 12 U.S.C. § 5220; *Bank of New York Mellon v. De Meo*, 227 Ariz. 192, 254 P.3d 1138 (Ariz. Ct. App. 2011)(Purchaser at trustee's sale was required to provide 90 days actual notice to vacate to tenant even though eviction action hearing did not occur until 97 days after five-day notice). Black's Law Dictionary, 103 (1999)(Arm's length transaction); *See also, Dewey v. Arnold*, 159 Ariz. 65, 70, 764 P.2d 1124, 1129 (1988)(Contains a discussion of arm's length transactions). An amendment to the PTFA provided that "the date of a notice of foreclosure shall be deemed to be the date on which complete title to a property is transferred to a successor entity or person as a result of an order of a court or pursuant to provisions in a mortgage, deed of trust, or security deed." Pub.L. 111-203, Title XIV, § 1484(1), 124 Stat. 2204 (2010); 12 U.S.C.A. § 5220, note.

COMMENT: Under the PFTA, if a "bona fide" lease exists, then the new owner is required to honor the lease unless the new owner intends to occupy the property as their primary residence. If the new owner intends to occupy the property as their primary residence, then the new owner must provide the tenant with 90-days notice to vacate. The effect of foreclosure on Section 8 tenancies is governed by amendments to the United States Housing Act of 1937. *See generally* 42 U.S.C. § 1437(f). *See also, Curtis v. Morris*, 186 Ariz. 534, 925 P.2d 259 (1996)(An eviction action can be used to obtain possession of property after a trustee's sale).

RESIDENTIAL EVICTION ACTIONS 8

Tenant's Counterclaim for a Diminution in Value

[*Defendant/tenant*] claims that [*he/she*] [*withheld rent or is due a refund from rent paid*] because [*plaintiff/landlord*] did something to diminish the rental value of the property. A tenant cannot withhold rent unless [*he/she*] can prove all of the following:

1. That [*plaintiff/landlord*] deliberately or negligently failed to supply [*running water, gas, electrical service, reasonable amounts of hot water or heat, air-conditioning or cooling or other essential service*]; and
2. That [*defendant/tenant*] gave notice of this condition to [*plaintiff/landlord*]; and
3. That [*plaintiff/landlord*] failed to cure this condition within five days; and
4. That this condition was not caused by the deliberate or negligent act or omission of [*defendant/tenant*], a member of the [*defendant/tenant's*] family or other person on the premises with the [*defendant/tenant's*] consent.

[*Negligence is the failure to act as a reasonably careful person would act under the circumstances. Negligence causes the damage if it helps produce the damage and if that damage would not have happened without the negligence.*]

SOURCE: A.R.S. § 33-1364(A)(2)(Diminution in value); A.R.S. § 33-1368(B)(Prohibits “rent strikes” by tenants); A.R.S. § 33-1364(A)(List of essential services); A.R.S. § 33-1364(H)(Notice requirement); A.R.S. § 33-1365(Landlord’s noncompliance as defense); RPEA 8; RAJI (Civil) 5th (Fault 1 and Fault 2).

USE NOTE and COMMENT: Tenants cannot withhold rent simply because they are having a disagreement with their landlord. A.R.S. § 33-1368(B). For minor repairs, a tenant can notify the landlord of his intention to repair the problem at the landlord’s expense. A.R.S. § 33-1363. If the landlord does not fix the condition within ten days from receiving the notice, the tenant can hire a licensed contractor, submit a repair bill to the landlord, and deduct the cost of the work from his rent. *Id.* For something that qualifies as an essential service, the tenant has several options, including finding substitute housing (e.g. a motel), during the period of the landlord’s noncompliance. A.R.S. § 33-1364. For an essential service, the landlord only has five days to fix the condition after receiving notice. A minor repair could be the basis of a counterclaim, but it could not be the basis for a diminution in value claim.

RESIDENTIAL EVICTION ACTIONS 9

Tenant's Counterclaim for Misconduct by Landlord

(Abuse of Access)

[Defendant/tenant] claims that [he/she] is entitled to damages because [plaintiff/landlord] abused his/her right of access by [wrongfully entering the residence without giving two days notice][making repeated demands for entry to the point that it had the effect of unreasonably harassing him/her].

If *[defendant/tenant]* proves this allegation, then *[defendant/tenant]* is entitled to damages in an amount that is at least equal to one month's rent.

SOURCE: A.R.S. §§ 33-1343D, 33-1376 (Tenant's remedies for abuse of access).

RESIDENTIAL EVICTION ACTIONS 10

Tenant's Counterclaim for Misconduct by Landlord

(Unlawful Ouster, Exclusion, Diminution of Services, Retaliatory Eviction)

[*Defendant/tenant*] claims that [*he/she*] is entitled to damages because [*plaintiff/landlord*] [*did one or more of the following*]:

[*Unlawfully prohibited access to the residence*] and/or

[*Willfully cut off electric, gas, or water services to the residence*] and/or

[*Retaliated because the tenant (1) Complained to a government agency about the landlord, (2) Complained to the landlord concerning a failure to maintain a fit premises, and/or (3) Joined a tenants' organization. Evidence of a complaint within six months before the alleged act of retaliation creates a presumption that the landlord's conduct was done in retaliation. This presumption does not apply if the tenant made the complaint after receiving notice that the lease was being terminated.*]

If [*defendant/tenant*] proves this allegation, then [*defendant/tenant*] is entitled to damages in an amount equal to two month's rent or twice the actual damages sustained, whichever is greater.

SOURCE: A.R.S. § 33-1367(Tenant's remedies for landlord's unlawful ouster, exclusion of services); A.R.S. § 33-1381(Retaliatory eviction).

COMMENT: While locking out a tenant is a common practice in commercial lease settings, there are substantial penalties for doing so in a residential context.

VERDICT FORM (RESIDENTIAL EVICTION ACTION)

JUDGMENT FOR LANDLORD – FORM 1

(Use if You Find for the Plaintiff and There is No Counterclaim)

We, the Jury, duly empaneled and sworn in the above entitled action, upon our oaths, do find in favor of [*name of plaintiff/landlord*] as follows:

That the full damages to be \$ _____; and

That [*name of plaintiff/landlord*] is entitled to possession of the rental property.

1. _____ 5. _____

2. _____ 6. _____

3. _____ 7. _____

4. _____ _____

FOREPERSON

VERDICT FORM (RESIDENTIAL EVICTION ACTION)

JUDGMENT FOR TENANT – FORM 2

(Use if You Find for the Tenant and There is No Counterclaim)

We, the Jury, duly empaneled and sworn in the above entitled action, upon our oaths, do find in favor of [*name of defendant/tenant*] and find that the [*name of defendant/tenant*] is entitled to possession of the rental property.

1. _____ 5. _____

2. _____ 6. _____

3. _____ 7. _____

4. _____

FOREPERSON

VERDICT FORM (RESIDENTIAL EVICTION ACTION)

JUDGMENT WITH COUNTERCLAIM – FORM 3

We, the Jury, duly empaneled and sworn in the above entitled action, upon our oaths, do find as follows:

That the full damages for the [*plaintiff/landlord*] to be \$_____ ; and

That the full damages for the [*defendant/tenant*] to be \$_____ ; and

That the landlord/the tenant (circle one) is entitled to possession of the rental property.

[Note: If the jury finds that a party should receive no amount of money, then put a zero in the above blank for that party].

1. _____ 5. _____

2. _____ 6. _____

3. _____ 7. _____

4. _____ _____

FOREPERSON

Evictions JURY TRIAL

1. Agree to Superior Court Random Jury List (if no, manually sort)
2. Any motions in Limine
3. Form of Verdict, initial jury instructions—
4. No speaking objections
5. No word “mistrial”
6. Start voir dire: Impanel 7

1. “Please be seated. Good morning ladies and gentlemen. The _____ Justice Court is now in session.

This is the time set for the trial of the case of Plaintiff v. Defendant. The Court notes the presence of the Plaintiff Pro- Per and Defendant and his attorney Attorney Is the Plaintiff ready? Is the Defendant ready?"

3. "Will all the prospective jurors seated in the courtroom please stand and be sworn?"

“Do you solemnly swear or affirm that you will well and truly answer all questions concerning your qualifications to serve as a trial juror in the cause now on trial?”

4. "Ladies and gentlemen, we are now going to begin the jury selection process in this case.
5. "You will now be asked a number of questions. They are not designed to pry unnecessarily into your private lives or affairs. They are asked to discover if you have any knowledge about this case, if you have any preconceived opinions which you might find difficult to lay aside, if you have had any personal or family experiences which might cause you to identify yourself with any of the parties, if there is anything going on in your life which might preclude your serving as a juror, and to assure each party that the jury will be fair and impartial."

6. "Please do not withhold information in order to be seated on this jury. Be straightforward in your answers rather than answering in the way you feel the [parties/lawyers] or I expect you to answer. If your answer to a question is "yes", please raise your hand so that additional questions may be asked. If your answer to a question is "no", you need do nothing."
7. "Before we go any further, let me introduce the courtroom personnel. The clerk is Clerk. Now let me introduce the lawyers and their clients:"
8. "The Plaintiff Plaintiff will be represent herself as pro-per. Will you please introduce yourself?" (Introduced.) "Thank you. Do any of you know the Plaintiff?"
9. "The Defendant is represented by Mr. Attorney, (who is a member of the firm of Law Offices of Attorney). Do any of you know Mr. Attorney or any member of the firm on a social or professional basis?" "Ms. Attorney, will you please introduce your client." (Client introduced.) "Thank you. Do any of you know the Defendant?"
10. "The case to be tried today is an Eviction Action case, not a criminal case."

Make a brief statement of the case:

"It involves a landlord who is suing to have the defendant evicted for failure to pay rent and wrongfully withholding possession of the property located. The defendant claims he does not owe rent.

"Have any of you ever seen, heard or read anything about this case, or have any of you ever heard anyone express an opinion about it?"

11. "Have you, any members of your family or close friends ever been involved in a case like this, or any other law suit which might affect your ability to fairly and impartially decide this case?"

(12. "I am going to read a list of witnesses who may be called during this trial. Please raise your hand if you know, or think you might know any of these persons." (Read list.) (If no hand raised,)

"Apparently none of you know any of the possible witnesses in this case." (If hand(s) raised,) "Yes, __ (Name of Juror(s)) __, which witnesses do you think you know? How well do you know _____? Would that affect your ability to be fair and impartial?")

13. "Ladies and gentlemen, I recognize jury service is probably an inconvenience to you, it takes you away from your jobs and families and interrupts your daily routine. However, jury duty is one of the most important duties citizens of this country are called upon to perform. For this reason, I know you will not take this duty lightly." "This case is expected to take 1 day. Our schedule will usually be as follows: A mid-morning recess; Lunch from noon to 1:00 p.m.; A mid-afternoon recess; Adjourn at 5:00 p.m.

13 (A) Would the length of the trial or our daily schedule pose a serious problem for any of you?"

13 (B) Do any of you have a health problem that might make it difficult for you to serve as a juror?"

13 (C) Is there any juror who does not have sufficient knowledge of the English language to understand a court trial?

13 (D) Is there any juror who has a hearing or any other impairment or disability that would affect his/her ability to participate?

14. a. "Ladies and gentlemen, there are some questions on the easel and on the back of your number card, which I am going to ask each of you to answer. One question asks about your jury service in other trials. Please indicate the type of case, civil or criminal.

15. "Ladies and gentlemen is there any about the nature of this case that would make it difficult for any of you to serve as a fair and impartial juror? (If yes, pursue on individual voir dire.)

16. "At the beginning of the case I will give you some instructions about the law and at the end of the case before you go to deliberate, I will give you additional instructions about the law. You may feel the law as I read it to you may be too strict or too lenient, or you may feel the law is different than what I read to you. Regardless of any personal opinion you may have about what the

law is, or should be, you must follow my instructions about the law as I give them to you.”

“Do any of you feel you could not follow my instructions about the law if a particular instruction conflicted with some personal belief you have about what the law is, or should be?” “I take it from your silence that you will all follow my instructions about the law as I give them to you.”

17. “Have any of you, or any members of your family, ever studied or practiced the law?”
18. “In deciding the facts of the case, the jury has to evaluate the testimony of the witnesses. Is there anyone who could not judge the testimony of each witness by the same standards and not give what one witness says more or less weight based on some factor like the person’s occupation?”
19. “If selected to sit on this case, would any of you be unable, or unwilling, to decide the case solely on the evidence presented at trial?”
20. “Do any of you know the other members of the jury panel?”
(Follow up during individual voir dire).
21. “Have any of you ever been a witness in any trial or deposition?”
22. “Ladies and gentlemen, is there anything you think the attorneys or I should know before we select those jurors who will serve in this case? If it is something you don't want to mention in open court, just raise your hand and it can be arranged for you to tell us about it privately.”
23. Have you or any member of your family previously or currently been a landlord?
24. If you or a member of your family were a landlord, were you ever involved in an eviction action?

25. Have you or any member of your family previously or currently been a tenant in a residence?
26. If you or a family member were a tenant, were you ever involved in an eviction action?
27. "Ladies and gentlemen, we will now take a short recess to complete the process of jury selection. Some of you may be called back individually for additional questions. Whether you are called or not is not a reflection on your ability to serve as a juror. Don't take it personally if you are not chosen to serve as a juror in this case because only 7 of you may be chosen. Please wait outside the courtroom and, while waiting, don't discuss the case or anything connected with it among yourselves or with anyone else. Thank you. We will call you back to the courtroom when we are ready."

(After panel of jurors has left the courtroom, call in and examine individually any jurors who had answers that need clarification, rule on any for cause challenges to individual jurors, then ask counsel if they pass the panel for cause and when passed, then ask "Are there any other motions or issues that need to be addressed outside of the jury's presence before we call them in for trial?" (If answer is yes, then resolve the issues.)

28. (Panel is called back, court reconvenes.) "The record will show the presence of all parties, counsel and the prospective jurors. Ladies and gentlemen, the clerk will now read the numbers of the jurors selected to try this case. As your number is read, please come forward and be seated in the jury box as directed by the clerk."
29. "Those of you who were not selected as jurors may return home. Thank you for assisting us today."
30. "Those of you who have been chosen as jurors will please stand and be sworn." (Clerk or Judge administers substantially the following oath:)

“Do you swear or affirm that you will give careful attention to the proceedings, abide by the court's instructions and render a verdict in accordance with the law and evidence presented to you.

31. “You have all received a juror binder. This contains instructions of law that you must follow in deciding this case. At the end of the case you may receive modified instructions, but until then this is your guide to the evidence you are about to hear. As I read the instructions please follow along.”

Conducting the Trial

Evidence

Motion for Directed Verdict or Dismissal

Recess: Members of the jury, we will now take our (morning/noon/afternoon) recess. Please remember the Admonition I gave you about not discussing this case or forming any conclusions about it until all the evidence is in and you begin your deliberations. Please be back in the jury room at __(time)__.”

35. (After each recess.) "The record will reflect the presence of all parties, counsel and the jury.

Settle final jury instructions with attorneys

Note that jury not unanimous: 5 of 6: ARS 21-102(D)

Settle jury verdict forms

Select alternate juror; finalize exhibits

36. (Parties rest) (Closing arguments)
“It is now time for closing arguments in this case. Does the Plaintiff want to give a closing argument?” (Plaintiff’s initial closing.)
(Defendant’s closing.) “Does the Defendant want to give a closing

argument?" (Plaintiff's final closing.) "Does the Plaintiff want to reply?" (If there are counterclaims continue with the parties being identified appropriately.)

37. (Final instructions.) (These may be delivered either before or after closing arguments. Better practice is to deliver afterward.)

"The instruction packet you have contains the final jury instructions that you must apply in deciding this case. There have/have not been changes made to your original packet." (Read instructions.)

PHYSICALLY EXCUSING ALTERNATE JURORS SCRIPT

"[Name of Alternate Juror], your name has been drawn by lot as an alternate juror. While you are physically excused from your service as a juror at this time, there remains a possibility you may be called back to court to deliberate should one of the other jurors be unable to do so. The bailiff/clerk will retain your notes for your use if you are called back. The Admonition continues to apply to you. Please do not discuss this case with anyone or let anyone talk to you about it until after 5:00 pm. Please leave your cellphone number with the bailiff.

38. **Jury to pick foreperson.** (The court explains the verdict forms to jury. Dismiss and thank any alternate jurors. Bailiff/clerk is sworn in by judge. Jury retires to deliberate.)

Judge places the bailiff under oath to take charge of the jurors

By the judge: "Do you solemnly swear that you will take charge of this jury and conduct them to some private and convenient place and there keep them, that you will suffer no communication to be made to them pertaining to this case, nor make any yourself, except to ask if they have agreed upon a verdict, unless directed by the Court?"

Admonish parties to wait for the verdict or waive their rights to be present during the reading of the verdict

39. (Taking jury verdict.) "The record will reflect the presence of counsel, (the parties if applicable) and the jury. Has the jury reached a verdict?" (Presiding Juror responds.) (If YES,)

"Would you please hand all forms of verdict to the bailiff/clerk."
(Bailiff/clerk then hands the verdict forms to the judge who reviews them silently and hands them to the clerk. "The clerk will please read and record the verdict, omitting the formal caption."
(Clerk reads verdict.)

"Does either counsel wish to poll the jury?" (If five out of six jurors answer yes, discharge the jury.) (If a sufficient number of jurors answer no, the court shall direct them to retire for further deliberations. [AZ.R.C.P. 49\(f\)](#))

40. "Members of the jury, on behalf of all the participants in the trial, I want to thank you for your service to the community. Since the verdict has been returned, you are now free to discuss the case with the [attorneys/parties] if you wish. Having such an opportunity is an educational experience for them. Should you choose not to discuss the case with them, simply tell them so and they will honor your request. Hand any notes you may have taken to the bailiff to be destroyed." "Thank you, and you are now excused."

EXCLUSION OF WITNESSES SCRIPT

"Would all non-party witnesses who are going to testify in this case please come forward. Would each of you, in turn please identify yourself?"

(Addressing all witnesses,)

"The rule of exclusion of witnesses has been invoked in this case. This means you cannot be in the courtroom during the trial except when you are called to testify. Do not discuss your testimony with any other witness until after the trial has been completed. You should also avoid being present when others may discuss the case. You may, however, discuss your testimony with the [parties/attorneys], so long as no other witness is present. The purpose of the rule is to

prevent what occurs in the courtroom from influencing your testimony. Do you understand what is required of you? Does either party have any witnesses whose presence in the courtroom is essential to presenting its case? (If so then decide if the person is critical to conducting the case and not just to provide testimony.) The remainder of you need to have a seat outside the courtroom."

BENCH CONFERENCES SCRIPT

"Members of the jury, sometimes it is necessary for the Court and the lawyers to confer privately regarding a matter of law. Please understand we are not trying to hide anything from you. But these conferences are an important part of the trial and help us present this case to you in a proper and legal manner."

DEPOSITIONS AND INTERROGATORIES SCRIPT

(Depositions)

"Members of the jury, during the trial you may hear the attorneys refer to a deposition or read testimony from a deposition. A deposition is out-of-court testimony which, like the testimony here in court, is given under oath with the attorneys present and is recorded by a court reporter."

(Interrogatories)

"During the trial, you may (also) hear the attorneys refer to interrogatories. Interrogatories are written questions answered by a person in writing and under oath."

PRIOR PROCEEDINGS SCRIPT

"Members of the jury, you may hear the attorneys or witnesses mention other proceedings involving this case. Do not speculate or guess about those other proceedings. Your responsibility is to consider the evidence presented during this trial and determine the facts from that evidence alone."

EVENING RECESS SCRIPT

(If jury is not deliberating,)

"You are reminded of the court's Admonition not to discuss the case with others, which includes family members and friends. This means you are not to discuss the evidence. When the trial is over and you

have been excused as a juror, you will then be free to discuss the case and your experience as a juror."

"We stand in recess."

ADVANCE ANNOUNCEMENT OF EVENING RECESS

(Jury deliberating.)

"Members of the jury, if you do not have a verdict at or near ____ p.m., you may recess at that time and return at ____ a.m. on (next trial day)."

"When you return, do not begin deliberating until all jurors are present. When all jurors are present in the jury room, please notify the Bailiff/clerk."

"Please remember the Admonition. Don't talk to anyone about the case; don't let anyone talk to you about it. Keep an open mind about the case."

REGULAR ANNOUNCEMENT OF EVENING RECESS

(Jury deliberating.)

[Jury is called back into court. Counsel and parties are either present or have waived presence. Court announces evening recess and gives jury directions on when to return, as in "Advance Announcement", above.]

HUNG JURY SCRIPT

"Members of the jury, you have been called back into the courtroom to discuss whether you can reach a verdict. Have you chosen a presiding juror?"

" _____ (Name of Presiding Juror), is there a reasonable probability the jury will reach a verdict within a reasonable time? Please answer simply 'Yes' or 'No', nothing else, and don't tell me how many are voting one way or the other."

(Presiding Juror answers.)

(To entire panel,)

"Do any of you disagree with what the presiding juror has said? If so please raise your hand."

(If no hands are raised, either declare a mistrial or have the jury continue their deliberations, as dictated by the presiding juror's response.)

(If one or more hands are raised, confer with counsel and exercise your discretion accordingly.)

ADMITTING EXHIBITS DURING TRIAL SCRIPT

(Although better practice is to mark exhibits in advance, if not yet marked. "I will mark the exhibit for identification as Plaintiff's/Defendant's exhibit (Number/Letter)." (Mark using exhibit stickers on bench.)

(To opposing party) "Are there any objections to admission of this exhibit?" (If so, hear the arguments at a sidebar conference and rule.)

"Exhibit (Number/Letter) will be/will not be admitted into evidence."

(If not admitted, then to jury: "The exhibit will not be admitted into evidence. You are not to guess about the reason for my decision and the exhibit is not to be considered in reaching your decision. Counsel please proceed.")

250 Ariz. 401

Court of Appeals of Arizona, Division 2.

Lawrence MONTANO, a Married Man as His
Sole and Separate Property, Plaintiff/Appellee,

v.

Richard LUFF and Phoebe Luff, Husband and Wife; Ian
Luff, an Unmarried Man; Andrew Diodati, an Unmarried
Man, Parties in Possession, Defendants/Appellants.

No. 2 CA-CV 2020-0025

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Filed December 21, 2020

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Review Denied July 30, 2021

Synopsis

Background: Purchaser of premises brought forcible entry and detainer action against occupants of premises. After determining that the occupants were guilty of forcible detainer, the Superior Court, Pinal County, No. CV201901680, [Stephen F. McCarville, J.](#), denied occupants' motions to set aside judgment and to quash writ of restitution. Occupants appealed.

Holdings: The Court of Appeals, [Espinosa, J.](#), held that:

[1] evidence supported a finding that occupants received written demand of possession by purchaser;

[2] purchaser was entitled to damages as part of judgment determining that occupants were guilty of forcible detainer;

[3] purchaser was not required to include particular information in complaint to establish claim for money damages other than rental value of property;

[4] substantial evidence did not support trial court's implicit finding that alleged occupant retained possession of premises;

[5] trial court considering whether to grant occupants' request for jury trial made implicit determination that there was no basis for a factual defense to the complaint;

[6] no fact questions were present such that jury trial was warranted; and

[7] purchaser of property was entitled to costs on appeal, but was not entitled to attorney's fees as a sanction.

Affirmed in part and vacated in part.

Procedural Posture(s): On Appeal; Motion to Set Aside or Vacate Order or Judgment; Motion to Quash; Motion for Attorney's Fees; Motion for Costs.

West Headnotes (12)

[1] **Forcible Entry and Detainer** 🔑 Requisites and sufficiency

Evidence supported a finding that occupants of premises received written demand of possession by purchaser of premises, as required to bring forcible entry and detainer action; evidence indicated that purchaser provided written demand of possession by letter left at door of premises, purchaser had knocked on the door and no one had answered, purchaser mailed a second demand letter by certified mail, which was also sent to one occupant via email, demand letters were attached to complaint validly served by alternate service, and occupants thereafter filed answer to complaint, demonstrating receipt of notice to vacate. [Ariz. Rev. Stat. Ann. § 12-1173.01\(A\)](#); [Ariz. R. Civ. P. 4.1\(k\)\(1\)](#); [Ariz. R. P. Evic. Act. 5\(e\)](#).

[2] **Forcible Entry and Detainer** 🔑 Damages

Purchaser of premises was entitled to damages as part of judgment determining that occupants of premises were guilty of forcible detainer, although purchaser had no landlord-tenant relationship with occupants; occupants' refusal to vacate premises denied purchaser the use of premises, either for his own enjoyment or to rent to a tenant, and damages consisted of fair market rental value of premises. [Ariz. Rev. Stat. Ann. § 12-1178\(A\)](#).

1 Case that cites this headnote

[3] Forcible Entry and Detainer 🔑 Requisites and sufficiency in general

Procedural rules requiring certain information be included in complaint seeking money damages arising from rental agreement did not apply to forcible-entry-and-detainer action that was brought by purchaser of premises, and thus purchaser was not required to include particular information in complaint to establish claim for money damages other than rental value of premises, where purchaser alleged that rent was owed as damages, not under a rental agreement. 📄 [Ariz. Rev. Stat. Ann. §§ 12-1175\(D\), 12-1178\(A\)](#); Ariz. R. P. Evic. Act. 5(c), 13(c).

[4] Forcible Entry and Detainer 🔑 Requisites and sufficiency in general

Even if purchaser of premises were required in its forcible-entry-and-detainer action to comply with procedural rules requiring certain information be included in complaint seeking money damages arising from rental agreement, purchaser's complaint, which sought rent as damages, was sufficient, where purchaser requested damages in form of per diem fair market value rent of \$100 for each day that occupants remained on premises. 📄 [Ariz. Rev. Stat. Ann. §§ 12-1175\(D\), 12-1178\(A\)](#); Ariz. R. P. Evic. Act. 5(c), 13(c).

[5] Forcible Entry and Detainer 🔑 Presumptions and burden of proof

The plaintiff has the burden of proof to support his claim of actual possession in a forcible entry and detainer action. [Ariz. Rev. Stat. Ann. § 12-1177\(A\)](#).

[6] Forcible Entry and Detainer 🔑 Weight and sufficiency

Substantial evidence did not support trial court's implicit finding that alleged occupant of premises retained possession of premises and thus did not support guilty verdict against him for forcible detainer, although alleged occupant stated in answer to complaint that he retained possession of premises; alleged occupant simultaneously asserted that he was not a resident of county where premises was located and that he no longer resided at premises, purchaser offered no evidence that alleged occupant ever retained possession of property, and uncontroverted testimony indicated that alleged occupant was not a resident of the premises. [Ariz. Rev. Stat. Ann. § 12-1177\(A\)](#).

[7] Abandoned and Lost Property 🔑 Intent to abandon

Abandonment of a claim of possession to a property occurs when the occupant vacates the premises with intent to relinquish all rights therein, and such intent can be shown by words or conduct.

1 Case that cites this headnote

[8] Jury 🔑 Actions for the recovery of money only or of specific real or personal property

Trial court considering whether to grant occupants' request for jury trial in forcible-entry-and-detainer action satisfied requirement to determine whether there was basis for legal defense to complaint; after initially questioning the only defendant to appear and reviewing answer, court found that case was not subject to jury trial, implicitly determining there was no basis for factual defense to complaint. Ariz. R. Proc. Evic. Act. 11(b).

4 Cases that cite this headnote

[9] Jury 🔑 Actions for the recovery of money only or of specific real or personal property

The right to trial in a forcible entry and detainer proceeding is not violated when the matter proceeds to a trial by the judge alone if there are no genuine issues of fact for a jury to consider.

Ariz. Rev. Stat. Ann. § 12-1176(B); Ariz. R. P. Evic. Act. 11(d).

2 Cases that cite this headnote

[10] Jury ➔ Actions for the recovery of money only or of specific real or personal property

No fact questions were present in forcible entry and detainer proceeding such that jury trial was warranted, although occupants claimed that alleged occupant did not retain possession of premises and that they did not receive written demand to surrender possession; there was no conflicting evidence regarding issue of whether alleged occupant retained possession of premises, whether occupants received demand for possession was predicate to bringing forcible entry and detainer action and would have been resolved prior to submitting case to jury, and right of actual possession, the only issue to be tried in forcible entry and detainer proceeding, was not contemplated by issue of receipt of demand for possession. Ariz. Rev. Stat. Ann. §§ 12-1173.01(A), 12-1177(A).

2 Cases that cite this headnote

[11] Forcible Entry and Detainer ➔ Costs

Purchaser of property was entitled to costs on appeal in forcible-entry-and-detainer action; although occupants prevailed on one issue on appeal, purchaser substantially prevailed on appeal. Ariz. Rev. Stat. Ann. § 12-341; Ariz. R. Civ. App. P. 21.

[12] Costs, Fees, and Sanctions ➔ Particular Cases

In forcible-entry-and-detainer action, purchaser of property was not entitled to award of appellate attorney fees as sanction under statute governing frivolous appeals, where occupants prevailed on one issue on appeal. Ariz. Rev. Stat. Ann. § 12-349.

1 Case that cites this headnote

****670** Appeal from the Superior Court in Pinal County No. CV201901680, The Honorable [Stephen F. McCarville](#), Judge. **AFFIRMED IN PART; VACATED IN PART**

Attorneys and Law Firms

King & Frisch P.C., Tucson By [James C. Frisch](#), John P. Christiansen, and Michael B. Resare Counsel for Plaintiff/Appellee

Law Firm of Richard Luff LLC, Tucson By [Richard R. Luff](#) In Propria Persona and Counsel for Defendants/Appellants

Judge [Espinosa](#) authored the opinion of the Court, in which Judge [Eckerstrom](#) and Judge [Staring](#) concurred.

OPINION

[ESPINOSA](#), Judge:

****671 *403 ¶1** In this forcible entry and detainer (FED) action, appellants Richard Luff, Phoebe Luff, Ian Luff, and Andrew Diodati challenge the trial court's entry of judgment in favor of Lawrence Montano. For the following reasons, we affirm in part and vacate in part.

Procedural Background


¶2 On November 5, 2019, Montano filed a FED action against Ada, Richard, Phoebe, and Ian Luff, alleging he was “entitled to immediate possession” of the premises he had purchased at a trustee's sale and the defendants had wrongfully withheld possession of the premises after twice being notified to vacate. The Luffs did not appear at the November 18 eviction hearing, which was reset to December 2, 2019. And because it appeared the defendants were avoiding service of process, the trial court granted Montano's request for alternative means of service.

¶3 On December 2, Richard, Phoebe, and Ian Luff, represented by Richard, and Andrew Diodati, in propria persona,¹ filed an answer to the complaint, denying Montano's right to possession of the premises, asserting Ada Luff was deceased, and demanding a jury trial. At the hearing the same day, none of the Luff defendants appeared in person, but Diodati did. Montano objected to the demand for a jury trial, arguing “there is no factual basis to deny [him] the ability to have his judgment today,” noting a jury trial is only


appropriate when there is a factual dispute. The trial court agreed the case was “not subject to a jury trial” and proceeded with the eviction action.

¶4 Montano testified that he had purchased the subject property at an auction and the deed had been recorded on October 9, 2019. Montano stated he had hired a certified process server to notify the Luffs to vacate the premises, and he later sent a certified letter informing them of the same. Diodati testified that although he had no ownership claim to the property, he had “current possession of the premises” because he would sometimes sleep in one of the bedrooms and operated an office out of the premises. He further stated he had never received either of the two notices to vacate and argued that because there was no evidence any defendant had received a written demand to vacate, eviction was improper.

¶5 At the conclusion of the hearing, the trial court found that the defendants had been properly served after Richard Luff evaded service; that Montano needed only demonstrate the notices had been mailed, not that they were received; that the Luffs had not filed a motion to continue and had failed to appear; and that the defendants were not entitled to a jury trial. The court then entered a guilty verdict against the Luff defendants.

¶6 The Luffs and Diodati thereafter filed a motion to set aside the judgment and a motion to quash the writ of restitution to be issued December 9, 2019. After hearing oral argument, the trial court denied both motions, noting that although the defendants contended ownership of the property was a “disputed fact” requiring a jury trial, they also “acknowledged that they are not the owners of the subject property and can make no legitimate claim to occupy the same.” The court also noted that Richard Luff had failed to appear and any challenges to the proceedings were legal ones, not factual. As to the defendants’ argument that notice to vacate the premises had not been received, the court disagreed that Montano had the burden to prove a written demand “was actually **672 *404 received,” reasoning “[i]f that were true, no plaintiff could ever prevail on an eviction action” because the “defendant could always claim they never received notice.” The Luffs and Diodati filed a joint notice of appeal from the trial court’s December 2 order and its subsequent denial of their motion to set aside the judgment. We have jurisdiction pursuant to  A.R.S. §§ 12-120.21(A)(1) and 12-1182.²

Written Demand of Possession

[1] ¶7 The Luffs and Diodati first contend Montano did not provide written demand of possession as required by A.R.S. § 12-1173.01(A) (permitting FED action against person “who retains possession of ... real property after he receives written demand of possession”). See *Alton v. Tower Cap. Co.*, 123 Ariz. 602, 604, 601 P.2d 602, 604 (1979) (“written demand to surrender” is prerequisite to filing FED action). The trial court determined Montano needed only show that he had sent written demand, not that the defendants actually received it. We have found no pertinent authority or published cases explicitly supporting this proposition.³ But we need not resolve that question here because the record nevertheless contains sufficient evidence to support a finding that the defendants received a written demand of possession. See  *State v. Childress*, 222 Ariz. 334, ¶ 9, 214 P.3d 422 (App. 2009) (“We will uphold the [trial] court’s ruling if legally correct for any reason supported by record.”); see also *Castro v. Ballesteros–Suarez*, 222 Ariz. 48, ¶ 11, 213 P.3d 197 (App. 2009) (we will not set aside trial court’s findings if “substantial evidence supports” them).

¶8 The record reflects that Montano provided written demand of possession by letter dated October 4, 2019, left at the door of the property, in which he asserted he had “knocked on [the] door and no one answered.” Montano also testified at trial that he had “hired a certified process server to take a copy of” the October 4 letter to the property. On October 23, 2019, Montano mailed another written demand letter by certified mail, which was also sent to Richard Luff via email. In addition, Montano attached a copy of both letters to his complaint, which was validly served on the Luff defendants on November 11 and November 21, 2019, by alternate service, having been “posted on [the] front door” of the property and sent by certified mail. See *Arizona Rules of Procedure for Eviction Actions (RPEA)* 5(e) (complaint may be served as provided by *Rule 4.1 of the Arizona Rules of Civil Procedure*); Ariz. R. Civ. P. 4.1(k)(1) (permitting alternate means of service). The defendants thereafter filed an answer to the complaint, demonstrating they had received the notice to vacate. Accordingly, the trial court had sufficient evidence upon which to find the defendants had received written demand of possession.

Judgment for Rent

[2] ¶9 Montano's complaint requested damages in the form of per diem fair market value rent of \$100 for each day after October 9, 2019, the defendants remained on the premises, which the trial court awarded when it found the defendants guilty of forcible detainer. The Luffs and Diodati contend there was no landlord-tenant relationship, so no rent was due. This argument, however, misunderstands the court's judgment. Rent was not owed to Montano because of any rental agreement, but as damages because their refusal to vacate the property denied Montano the use of his property, either for his own enjoyment or to rent to a tenant. **673

*405 Section 12-1178(A), A.R.S., provides that when a defendant is found guilty of forcible detainer, the trial court “shall give judgment for the plaintiff for restitution of the premises ... and for damages, attorney fees, court and other costs.” The court did not err in awarding Montano the fair market rental value of the property under the “damages” provision of § 12-1178(A).

[3] ¶10 The Luffs and Diodati also argue the award for rent was improper because Montano's complaint did not comply with RPEA 5(c) or 13(c). The former provision lists the information that must be in the complaint when monetary damages are sought, including the frequency of rent to be paid, the due date for each payment, and the amount due on each date. RPEA 13(c)(2) states that the court may not award damages or relief not specifically stated in the complaint, save for exceptions not applicable here.

[4] ¶11 The requirements of RPEA 5(c) and 13(c) are inapplicable to the situation at hand because rent was owed as damages, not under a rental agreement. Montano was not required to include any particular information in the complaint to establish his claim for money damages other than the rental value of the property. See A.R.S. § 12-1175(D) (court may not enforce rule or policy that “requires a mandatory or technical form” for pleadings); see also *Drew v. United Producers & Consumers*, 161 Ariz. 331, 333, 778 P.2d 1227, 1229 (1989) (Arizona is notice pleading jurisdiction which “does not require the use of ‘magic words’” in complaint). Moreover, even were those rules applicable, although it did not use the term “damages,” Montano's complaint substantially complied with their requirements, requesting “\$100.00 per day commencing on October 9, 2019 until the Defendants vacate the Premises.” Because Montano

identified the frequency of payment (daily), the due date (each day), and the amount due (\$100), the complaint was sufficient even under the rule's requirements. It follows that the court did not violate RPEA 13(c)(2) because the award was for damages specifically stated in the complaint.⁴

Possession by Ian Luff

[5] ¶12 The Luffs and Diodati next argue the judgment must be vacated as it relates to Ian Luff because the verdict against him was “unsupported by any evidence.” In a FED action, the only issue to be determined is the right of actual possession. A.R.S. § 12-1177(A). And the plaintiff has the burden of proof to support his claim. See *Harvey v. Aubrey*, 53 Ariz. 210, 213, 87 P.2d 482 (1939).

[6] [7] ¶13 We agree that judgment against Ian Luff must be vacated. Although Ian stated in his answer that he “retain[s] possession of the premises,” he simultaneously asserted he is not a resident of Pinal County (where the premises is located) and “no longer resides at the premises,” thus, the allegation was not unequivocally admitted.⁵ See *Bank of Yuma v. Arrow Constr. Co.*, 106 Ariz. 582, 585, 480 P.2d 338, 341 (1971) (“Allegations in pleadings are not evidence; they are statements of facts which the pleader must prove unless admitted by the opposing party.”). At trial, Montano presented no evidence that Ian Luff retained possession of the premises. Diodati testified, and his testimony was uncontroverted, that Ian Luff “is not a resident of the residence in question.” Because there was no substantial evidence supporting the trial court's implicit factual finding that Ian Luff possessed the property, the guilty verdict against him must be vacated.

**674⁶ *406 See *In re Estate of Pouser*, 193 Ariz. 574, ¶ 13, 975 P.2d 704 (1999) (“In reviewing a trial court's findings of fact, we do not reweigh conflicting evidence or redetermine the preponderance of the evidence, but examine the record only to determine whether substantial evidence exists to support the trial court's action.”).

Denial of Jury Trial

[8] ¶14 The Luffs and Diodati additionally maintain the trial court erred by refusing their request for a jury trial. We first address their assertion that the court “didn't ‘determine whether there is a basis for a legal defense’ under RPEA, Rule 11(b), or ‘inquire and determine the factual issues to be

determined by the jury,' under RPEA, Rule 11(d)." Rule 11(b) (1) states in relevant part,

If the defendant appears and contests any of the factual or legal allegations in the complaint or desires to offer an explanation, the judge should determine whether there is a basis for a legal defense to the complaint either by reviewing a written answer filed pursuant to Rule 7 or by questioning the defendant in open court.

Contrary to appellants' contention, the record reflects that the court, after initially questioning Diodati—the only defendant to appear—and reviewing the answer, found “this is not subject to a jury trial,” thus implicitly determining there was no basis for a factual defense to the complaint. *See City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, ¶ 65, 181 P.3d 219 (App. 2008) (“We defer to the trial court with respect to any factual findings explicitly or implicitly made, affirming them so long as they are not clearly erroneous.” (quoting *John C. Lincoln Hosp. & Health Corp. v. Maricopa County*, 208 Ariz. 532, ¶ 10, 96 P.3d 530 (App. 2004))).

¶15 Appellants also argue there is “an inherent conflict” between A.R.S. § 12-1176(B), which states that when a FED defendant requests a jury trial, “the request shall be granted,” and RPEA 11(d), which provides, if a jury trial has been demanded but “no factual issues exist for the jury to determine, the matter shall proceed to a trial by the judge alone.” Appellants assert that the trial court's ruling “on the fly at an initial appearance” “eviscerate[s] the statutorily created right to a jury trial, violates the separation of powers and diminishes the due process rights of litigants.”


[9] ¶16 Although the statute's mandatory language may be at odds with the discretionary language of RPEA 11(d) permitting a bench trial and summary disposition, the two provisions are readily harmonized if there are no factual issues for a jury to decide. *See Rosner v. Denim & Diamonds, Inc.*, 188 Ariz. 431, 433, 937 P.2d 353, 355 (App. 1996) (“If a rule and a statute appear to conflict, the rule is construed in harmony with the statute.”). The approach authorized by RPEA 11(d) is analogous to the summary

disposition of civil cases authorized under [Rule 56, Ariz. R. Civ. P.](#), notwithstanding a party's demand for a jury trial. Just as “the granting of summary judgment does not deprive a plaintiff of his constitutional rights to a jury trial,” in relation to that rule, the right to trial in this context is not violated when “there are simply no genuine issues of fact for a jury to consider.” *Cagle v. Carlson*, 146 Ariz. 292, 298, 705 P.2d 1343, 1349 (App. 1985). We therefore reject the Luffs' and Diodati's argument that the trial court erred because it had “no power to deny a timely demanded jury trial in a forcible detainer case.”

[10] ¶17 The Luffs and Diodati lastly contend that even if a trial court can refuse a jury trial, the court erred because “fact questions were manifest,” including whether Ian Luff was in possession of the property and whether the defendants received a written demand to surrender possession. As noted [**675](#) [*407](#) above, because there was no conflicting evidence on the issue of Ian Luff's possession, it was not a factual question to be resolved by a jury. *See* RPEA 11(d) (if “no factual issues exist for the jury to determine, the matter shall proceed to a trial by the judge alone”). And while the issue of whether a defendant received written demand is a mixed question of fact and law, we conclude it is not a question for a jury to resolve for two reasons. First, a defendant's receipt of written demand for possession is a predicate to bringing a FED action, and thus should be resolved before the matter would be submitted to a jury. *See* § 12-1173.01(A) (forcible detainer may only be brought against “a person ... who retains possession ... after he receives written demand of possession”). And second, it is well established the only issue to be tried in a FED action is “the right of actual possession”; a defendant's receipt of written demand is not contemplated by that issue. § 12-1177(A); *Olds Bros. Lumber Co. v. Rushing*, 64 Ariz. 199, 204, 167 P.2d 394 (1946); *see AU Enters. Inc. v. Edwards*, 248 Ariz. 109, n.4, 458 P.3d 113, n.4 (App. 2020) (Arizona's statutory scheme focuses on right of possession “without any procedural delay arising from the litigation of peripheral issues”). Accordingly, the court did not err in proceeding without a jury.

Attorney Fees and Costs on Appeal

[11] [12] ¶18 Montano requests an award of attorney fees and costs on appeal pursuant to A.R.S. §§ 12-341, 12-349, and [§ 12-1178\(A\)](#). [Section 12-1178\(A\)](#) addresses the components of a trial court's judgment and neither expressly

authorizes nor compels attorney fees on appeal. See  *Bank of N.Y. Mellon v. Dodev*, 246 Ariz. 1, ¶ 40, 433 P.3d 549 (App. 2018). Because the Luffs have prevailed on one issue in this appeal, we decline to award Montano attorney fees as a sanction pursuant to § 12-349. However, because Montano has substantially prevailed on appeal, we award him his appellate costs upon his compliance with Rule 21, Ariz. R. Civ. App. P.⁷ See § 12-341.


Disposition

¶19 For the foregoing reasons, the trial court's judgment is affirmed in part and vacated in part.

All Citations

250 Ariz. 401, 34 Arizona Cases Digest 6, 480 P.3d 669

Footnotes

- 1 Andrew Diodati had not been named as a defendant by Montano, but signed the answer as a defendant, claiming to be a “part time occupant of the premises.”
- 2 Montano challenges Diodati's appearance in this appeal. Citing Rule 4(c), Ariz. R. Civ. App. P., Montano argues that because Diodati did not personally sign the opening brief and Richard Luff has not filed a notice of appearance on his behalf, he is not a party to the appeal. But Rule 4 does not require an attorney to file a notice of appearance to represent a party on appeal, and Diodati signed the notice of appeal, complying with Rule 8(c)(5), Ariz. R. Civ. App. P.
- 3 Multiple unpublished memorandum decisions of this court support the trial court's reasoning that requiring a plaintiff to prove a written demand “was actually received” would make it near impossible for a plaintiff to prevail in an eviction action. See *Ally Bank v. Thomas*, No. 1 CA-CV 16-0551, 2017 WL 6376357, ¶ 10 (Ariz. App. Dec. 14, 2017) (mem. decision); *BMO Harris Bank, N.A. v. Thruston*, No. 1 CA-CV 15-0279, 2016 WL 5219856, ¶¶ 6-9 (Ariz. App. Sept. 22, 2016) (mem. decision); *Deutsche Bank Nat. Tr. Co. v. Clinksale*, No. 1 CA-CV 09-0019, 2010 WL 396093, ¶¶ 6, 12-14 (Ariz. App. Feb. 4, 2010) (mem. decision).
- 4 Citing RPEA 13(c)(2)(A), the Luffs and Diodati also claim the damages award must be amended because it awarded rent incurred after the judgment had been entered, “commencing on October 9, 2019 until the Defendants vacate the Premises.” But they have cited no authority, nor are we aware of any, that limits the rental damages award to the date of the judgment. By its own terms, RPEA 13(c)(2)(A) does not prohibit damages after the judgment; rather it simply permits—but does not require—a plaintiff to seek rent incurred after judgment in a civil action. RPEA 13(c)(2)(A) (“If the plaintiff is entitled to rent incurred after the judgment has been entered, then the plaintiff *may* seek that amount in a separate civil action.” (emphasis added)).
- 5 The remaining defendants admitted they retained possession of the premises without contradiction. And at trial, Diodati testified that only he, Richard Luff, and Phoebe Luff retained possession.
- 6 Montano contends that judgment against Ian Luff was proper because he had not and has not abandoned his claim to possession, but the record reflects otherwise. Abandonment occurs when the occupant vacates the premises “with intent to relinquish all rights therein,” and such intent “can be shown by words or conduct.”  *Gangadean v. Erickson*, 17 Ariz. App. 131, 133, 495 P.2d 1338 (1972). Here, Ian Luff's intent to relinquish his previous possession was demonstrated by his answer in which he stated he no longer lived at the premises and his subsequent arguments both below and on appeal that he claims no possession to the premises.

- 7 The Luffs and Diodati also request attorney fees on appeal “pursuant with [Rule 21\(a\)](#).” Providing no basis or authority for an award, we deny their request. See [Ariz. R. Civ. App. P. 21\(a\)\(2\)](#) (“A claim for fees ... must specifically state the statute, rule, decision law, contract, or other authority for an award of attorney[] fees.”); see also [Bed Mart, Inc. v. Kelley](#), 202 Ariz. 370, ¶ 24, 45 P.3d 1219 (App. 2002) (declining party’s request for attorney fees on appeal citing only [Rule 21](#) as basis).

**IN THE JUSTICE COURTS OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA**

IN THE MATTER OF EVICION JURY TRIALS <hr style="width: 100%;"/>)))))	ADMINISTRATIVE ORDER NO. 2019-006
---	-----------------------	--------------------------------------

WHEREAS Bench Policy Directive 1.1.1, Bench Governance and Policy-Making Authority authorizes the Presiding Justice of the Peace to manage the operation and administration of the justice court system; and

WHEREAS parties are entitled to a jury trial in eviction actions and Rule 11(c), Rules of Procedure for Eviction Actions, requires that trials be scheduled within three court days in justice court unless both parties agree to a longer setting; and

WHEREAS current summoning practices for the Justice Courts do not result in pools of on-call jurors available to each Justice Court each court business day; and

WHEREAS, the Superior Court Jury Office has agreed to assist the Justice Courts in facilitating jury trials in such matters.

IT IS ORDERED that the Justice Court consider the following options when scheduling a matter for a jury trial in an eviction action:

A. When the parties have agreed to waive time:

The Justice Court shall contact the Superior Court Jury Office (email Jury Contacts) immediately to discuss summoning jurors with less than the normal time for notice (currently four weeks). In these instances, the Justice Court should recognize that decreasing the timeframe for summoning may result in significantly smaller juror pools that may not yield an appropriate panel.

B. When the parties have not agreed to waive time:

1. For Justice Courts that are located at a regional court facility, the Justice of the Peace may inquire with the co-located courts if they have jurors available on call that the trial court may use. Similarly, the Justice of the Peace may inquire of other Justice Courts located in the county as to whether they have jurors available on call that the trial court may use, keeping in mind that the trial will need to be held at the facility to which the jurors are summonsed. In these instances, the parties must agree to waive ARS § 21-302H; or
2. The trial may be held by the Justice of the Peace or a pro tem judge at the downtown Superior Court complex, provided a courtroom is available. This would allow the Justice of the Peace to utilize jurors already summonsed to the

downtown Superior Court location and proceed with the trial in a timely fashion. The Justice Court will contact the Jury Office (email Jury Contacts) to request a venire panel and request assistance in securing an available courtroom. In these instances, the parties must agree to waive ARS § 21-302H; or

3. The trial may be transferred to an available Superior Court judicial officer, for a trial date within the prescribed time limits. The Justice Court will contact the Jury Office (email Jury Contacts) for facilitation of the transfer. Upon transfer, the Presiding Civil Judge will appoint a judicial officer (JO) by minute entry. Once the case is assigned, the assigned JO will send out a minute entry indicating the date and time of the trial. The Justice Court shall provide the assigned JO a scanned copy of the case file and send via interoffice mail the case file to the assigned JO. The jury trial shall then be held under the direction of the assigned Superior Court JO.

ALL JUSTICE COURTS ARE REMINDED, The Rules of Procedure for Eviction Actions Rule 11(c) denote there are different timeframes for eviction in Superior Court for trial dates and continuances, please see below:

c. Continuances. Whenever possible, the trial should be held on the initial return date. The court may order the continuance of a trial date by up to three court days in justice court or ten days in superior court on the request of a party for good cause shown or to accommodate the demands of the court's calendar, but the court nevertheless shall give priority to hearing and resolving alleged "immediate and irreparable" evictions. No continuance of more than three court days in justice courts or ten days in superior courts may be ordered unless both parties are in agreement.

If a jury trial is transferred to Superior Court the trial date should be set by Superior Court; not Justice Court.

Rule 12 (a) would appear to say setting a jury trial for the day after it has been determined the case is eligible for a jury trial may be inappropriate, since it could lead to litigants losing their ability to submit written voir dire questions to the court.

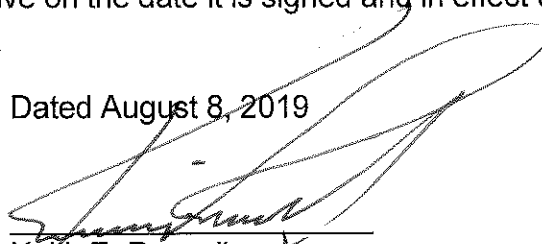
ALL JUSTICE COURTS ARE REMINDED, The Rules of Procedure for Eviction Actions Rule 11(d) outline when a jury trial is appropriate and when a bench trial is appropriate, please see below:

d. Trial Settings. Contested detainer matters shall be set for a trial by a judge alone unless a jury trial is demanded by the plaintiff in the complaint or by the defendant at or before the initial appearance. Failure to request a jury trial at or before the initial appearance shall be deemed a waiver of that party's right to a jury trial. At the initial appearance, if a jury trial has been demanded, the court shall inquire and determine the factual issues to be determined by the jury. If no factual issues exist for the jury to determine, the matter shall proceed to a trial by

the judge alone regarding any legal issues or may disposed of by motion or in accordance with these rules, as appropriate.

This Administrative Order is effective on the date it is signed and in effect until rescinded or amended.

Dated August 8, 2019



Keith E. Russell
Presiding Judge, Maricopa County Justice Courts

cc: Justices of the Peace, Maricopa County Justice Courts Bench
Court Managers and Deputy Court Managers
Jim Morrow, Maricopa County Justice Courts Administrator
Scott Davis, Maricopa County Justice Courts PIO (for posting)


Status Conference Checklist

State v. _____, Case # _____

Prosecutor(s):

Defense: (how do they want to be introduced)

	STATE	DEFENSE
Discovery and disclosure status		
Review charges/how to handle civil charges		
Motions: Hear and resolve pending motions In limine motions		
Jury Instructions – deadline for submitting final Settle preliminaries		
Voir Dire Statement of case, no mini opening		
Time for Trial and schedule Reasonable time limits.		
Witnesses List of names		
Additional Voir Dire/special DUI questions		
Any special equipment needs? Any special issues? (Security, interpreters, media)		
Is there a victim? Will V and/or advocate attend? Does V need interpreter? V rights complied?		



Pit Stops and
Detours in Jury Trial
Preparation

Michelle.luesang@chandleraz.gov

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1

**Time
Standards**

- 85% of DUI cases are to be resolved within 180 days
- 93% of DUI cases are to be resolved within 240 days
- Measurement is from the filing of the complaint to disposition, not from arraignment.

2

Pre-Trial Conferences

Set PTC in 21 rather than 30 days.

Scheduling conflicts are legitimate reasons to continue but continue for the shortest time.

Get involved after the first two PTCs and find out why the case is not moving along. Talk to the parties. What is the holdup and how can the Court help to move the case?

Discovery? Interviews?

3

TYPES OF MOTIONS



Motion for Deposition



Motion to Compel



Motion for Sanctions



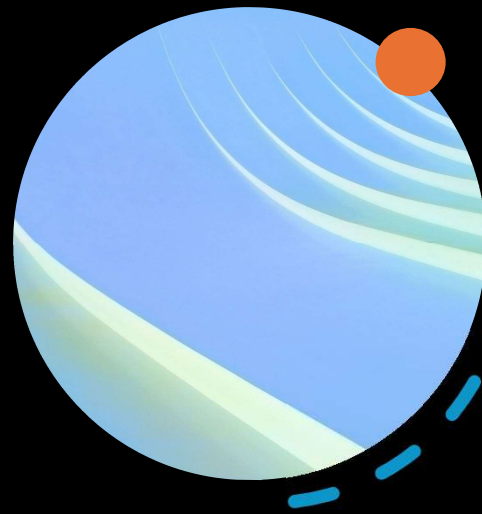
Motion to Suppress



Motion to Dismiss.



Motions In Limine



4

Motion For Deposition

- Rule 15.3 of the Arizona Rules of Criminal Procedure
- Read the rule.



5

Motion to Compel

A Motion to Compel may be filed if either party does not comply with the disclosure rules . Become familiar with the rules. .

Request for Disclosure is how attorneys notify the Court they have made the request. Rule 15.1(e) All requests for disclosure must be made to the opposing party. If the request is complied with, the Court does not get involved.

6

Rule 15.7. Disclosure Violations and Sanctions

- **(a) Motion.** Any party may move to compel disclosure or request an appropriate sanction for a disclosure violation of Rule 15 or both. Any motion to compel disclosure or for sanctions must include a separate statement that the moving party has personally consulted with opposing counsel and has made good faith efforts to resolve the matter. Any motion filed without the separate statement will not be heard or scheduled for a hearing.

7

Motion for

SANCTIONS

- **Rule 15.7(c)-(c) Sanctions.** In considering an appropriate sanction for nondisclosure or untimely disclosure, a court must determine the significance of the information not timely disclosed, the violation's impact on the overall administration of the case, the sanction's impact on the party and the victim, and the stage of the proceedings when the party ultimately made the disclosure

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8



9

Motions to Suppress

- No reasonable suspicion for the .
- No probable cause for the arrest.
- Read the cases cited by the parties.
- Rule 16.2. Procedure on Pretrial Motions to Suppress Evidence

10



11

Motion to Dismiss-With or without prejudice?

- Once defendant began talking to counsel, he had a right to confidentiality so long as it did not impair the investigation or the accuracy of a subsequent breath test. *State v. Holland*, 147 Ariz. 453, 711 P.2d 592 (Ariz. 1985).
- When the state unreasonably interferes with a DUI suspect's ability to gather exculpatory evidence on the issue of intoxication, "[d]ismissal of the case with prejudice is the appropriate remedy because the state's action foreclosed a fair trial" the evidence is no longer available. *McNutt*, 133 Ariz. at 10, 648 P.2d at 125
- Once a suspect invokes his right to counsel, police must take "reasonable steps" to "provide the suspect with reasonable means of contacting a lawyer." *Penney*, 229 Ariz. at 36, ¶ 15, 270 P.3d at 863.
- Suppression or Dismissal
- With or without prejudice
- *State v. Keyonnie*, 181 Ariz. 485, 892 P.2d 205 (Ariz. App. 1995)

In sum, the situation presented is one where the defendant's right to counsel was admittedly violated but his ability to gather exculpatory evidence was not hindered. Accordingly, the appropriate remedy for such a violation is suppression of the breath test results. The trial court erred in dismissing the charges with prejudice.

12

Motions In Limine

- A motion in limine is a formal, pretrial request to a judge to exclude specific evidence, testimony, or arguments from being presented during a trial, or to allow for its inclusion. The term "in limine" means "at the start" or "on the threshold" in Latin, indicating the motion addresses issues at the beginning of the trial. The main purpose is to prevent potentially prejudicial, irrelevant, or inadmissible information from influencing the jury and to ensure a fair trial based on proper evidence.



2025 JURY TRIAL ACADEMY,
MESA, ARIZONA

Motions *in Limine* & Motions to Suppress

Hon. Michelle Lue Sang, Chandler Municipal Court

Hon. Thomas Parascandola, Peoria City Court

Hon. Craig Jennings, Avondale City Court

1

1

Presentation Goals

- Describe Motions *in Limine* & Motions to Suppress
- Compare & Contrast These Motions
- Discuss What Trial Judges Should Do in Handling These Motions

2

2

Motions *in* *Limine*

3

3

In Limine - Defined

“On or at the threshold; at the very beginning; preliminarily”

Black’s Law Dictionary, 5th ed., p. 708,
West Publishing Company, 1979

4

4

Motion *In Limine* - Defined

“A written motion which is usually made before or after the beginning of a jury trial for a protective order against prejudicial questions and statements.”

~Black’s Law Dictionary, 5th ed., p. 714, West Publishing Company, 1979, (internal citation & 2nd sentence omitted added).

5

5

Motion *In Limine* - Described

“A request for an advance admissibility determination”

- Hon. Sam Thumma, Arizona Court of Appeals

6

6

Within reasonable limits,
motions *in limine* can be
a trial judge's friend.

Although one can't conduct the
entire trial *in limine*,
some advance notice as to the
evidentiary issues
can be helpful.

7

7



8

Benefits to Judge:

Motions *in limine* can help maximize efficiency and minimize the possibility of error.

9

9

Benefits to Litigants:

A motion *in limine* which articulates a specific objection and is ruled upon, preserves that objection for appellate review even without an objection at trial.

~ *State v. Burton*, 144 Ariz. 248, 251, 967 P.2d 331, 333 (1985).

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Rules for Motions in Limine

- Arizona Rules of Civil Procedure, Rule 7.2
- Justice Court Rules of Civil Procedure (JCRCP), Rule 132(c)

* Not mentioned in the Arizona Rules of Criminal Procedure (but see, Ariz. R. Crim. Pro. 16.2, motions to suppress evidence).

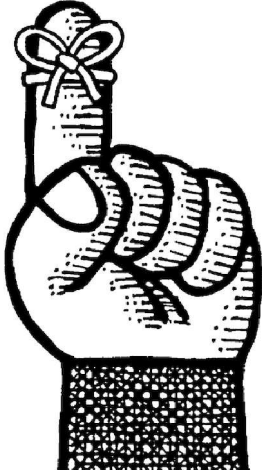
11

In civil justice court cases,
motions *in limine* must be filed
30 days before trial and a
response may be filed within **10** days
of service of the motion *in limine*.
Replies are not allowed.

~JCRCP 132(c)

12

12



Under the JCRCP,
just like the
general civil rules,
the parties have a
duty to confer
before filing
motions *in limine*.

~ JCRCP 132(c)

13

13

Motions *in limine* are permitted but
not mandatory.

Failure to file a motion *in limine*
**“is not a waiver of the right to
object to evidence at trial.”**

~JCRCP 132(c)

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Because there is always a right to object at trial, the rules' time limits and numerical limits on motions *in limine* are nearly meaningless.

15

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Motions *in Limine* in Criminal Cases:

“[I]n criminal cases, a ‘motion *in limine*’ is nothing more than a motion to suppress specifically authorized under Rule 16, Arizona Rules of Criminal Procedure.”

~*State v. Rodriguez*, 126 Ariz. 28, 30,
612 P.2d 484, 486 (1980)

16

16

- Modern usage of motions *in limine* has expanded, and even in criminal cases such motions can legitimately be used to guide preparation for trial by clarifying admissibility of many kinds of evidence.
- The court doesn't have to take the bait, however. Rulings on motions *in limine* can be deferred pending objections at trial if there is not enough in the motion to support a clear ruling in either direction.

17

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Ariz. Rule Crim. Pro. 16.1(b) mandates that **“Parties must make all motions no later than 20 days prior to trial... The court may modify motion deadlines”**

“No later than 10 days after service, another party may file and serve a response” within which to respond, ... If no response is filed, the court may deem the motion submitted on the record” Ariz. Rule Crim. Pro. 1.9(b)

*[a reply may be filed within 3 days under Ariz. Rule Crim. Pro. 1.9(b) unless one follows the civil rules, in which case no reply].

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Ariz. Rule Crim. Pro. 16.1(c) goes on to state that **“the court may preclude any motion, defense, objection, or request not timely raised... unless the basis was not then known and could not have been known through reasonable diligence, and the party raises it promptly after the basis is known.”**

--But this doesn't mean that evidence is automatically admitted. It only means the court doesn't have to entertain a formal motion.

19

19

Can Trial Courts Hear Untimely Motions
in Limine?

“Implicitly, if a court in its discretion may extend the time for filing motions, it has the discretion to hear late motions. Such a hearing is, in effect, an extension of time for filing.”

~ *State v. Vincent*, 147 Ariz. 6, 8, 708 P.2d 97, 99 (App.1985)

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Should Trial Courts Hear Untimely
Motions in Limine Criminal Cases?

***“It would ill serve sound judicial
administration to preclude such
motions so as to proceed to a trial in
which a conviction would be
defeasible for ineffective assistance of
counsel.”***

**~ *State v. Vincent*, 147 Ariz. 6, 8, 708
P.2d 97, 99 (App.1985)**

21

21

***“Preclusion is not the right of the
prosecutor seeking to avoid the
resolution of a questions on the merits.***

***Rather, it is a judicial remedy designed
to protect judicial interests.”***

**~ *State v. Vincent*, 147 Ariz. 6, 8, 708 P.2d
97, 99 (App.1985)**

22

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“Given the sometimes devastating impact of preclusion, its use should be limited to those instances where it will fairly serve the interest in judicial administration by punishing those who for tactical reasons seek to subvert that interest.”

~ *State v. Vincent*, 147 Ariz. 6, 8, 708 P.2d 97, 99 (App.1985)

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Ariz. Rule Crim. Pro. 1.2

“These rules are intended to provide for the just and speedy determination of every criminal proceeding. Courts, parties, and crime victims should construe these rules to secure simplicity in procedure, fairness in administration, the elimination of unnecessary delay and expense, and to protect the fundamental rights of the individual while preserving the public welfare.”

24

24

“Pedantry and mastery are opposite attitudes toward rules. To apply a rule to the letter, rigidly, unquestioningly, in cases where it fits and in cases where it does not fit, is pedantry... To apply a rule with natural ease, with judgment, noticing the cases where it fits, and without ever letting the words of the rule obscure the purpose of the action or the opportunities of the situation, is mastery.”

-George Polya, professor of mathematics (1887-1985)

25

25

How are Motions *In Limine* Different from Motions to Suppress?

The trial court need not rule on motions *in limine* because some admissibility determinations are better considered at trial.

(make sure the record is clear)

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How are Motions *In Limine* similar to
Motions to Suppress?

Possibility of
an Evidentiary Hearing

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Trial courts have the discretion to hold
a pretrial evidentiary hearing if needed.

*~Ariz. State Hosp./Ariz. Cmty. Prot. & Treatment Ctr. V.
Klein, 231 Ariz. 467, ¶¶31-32, 296 P.3d 1003, 1010
(App.2013)*

Tip: When a court makes credibility determinations at an
evidentiary hearing, affirmance becomes more likely.

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Trial courts have the discretion not to hold a pretrial evidentiary hearing if not needed.

~*State v. Perez*, 233 Ariz. 38, ¶ 19, 308 P.3d 1189, 1194 (App.2013)

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Motions to Suppress

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Timelines Under the Rules 16.1(b)

- Motion to Suppress must be filed no later than **20** days before trial. Rule 16.1(b)
- Response may be filed within **10** days of motion. Rule 1.9(b)
- Reply may be filed within **3** days of response. Rule 1.9(b)

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Procedure on Pretrial Motions to Suppress Evidence

If Defendant is self-represented, court must inform Defendant that:

1. Defendant may, but need not testify at the hearing.
2. If Defendant testifies, Def. will be subject to cross-examination.
3. Testifying at the hearing is not a waiver of the right to remain silent at trial.
4. Defendant's testimony at the hearing, including the fact that the testimony occurred, will not be disclosed to the jury unless the Defendant testifies at trial concerning the same matters.

~ Ariz. Rule Crim. Pro. 16.2(c)

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Burden of Proof on Pretrial Motions to Suppress Evidence

“... the State has the burden of proving by a preponderance of the evidence the lawfulness in all respects of the acquisition of all evidence that the State will use at trial.”

~ Ariz. Rule Crim. Pro. 16.2(b)(1)

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Burden of Proof on Pretrial Motions to Suppress Evidence

“If any of the conditions listed below are present, the State's burden of proof under (b)(1) arises only after the defendant alleges specific circumstances and establishes a prima facie case supporting the suppression of the evidence at issue:”

~ Ariz. Rule Crim. Pro. 16.2(b)(2)

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Burden of Proof on Pretrial Motions to Suppress Evidence

- (A) the evidence involves a confession, identification, search or seizure, and the defendant is entitled under Rule 15 to discover how the evidence was obtained;
- (B) defense counsel was present when the evidence was taken; or
- (C) the evidence was obtained under a warrant.

~ Ariz. Rule Crim. Pro. 16.2(b)(2)

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At the Hearing: Who Goes First?



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Arizona Follows the Federal Warrant/No Warrant Test

“We therefore hold that a motion under rule 16.2(b) to suppress evidence taken under the authority of a valid arrest warrant requires a criminal defendant to make a prima facie case for suppression.”

~ State v. Hyde, 186 Ariz. 252, 268, 921 P.2d 655, 671 (1996).

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Arizona Follows the Federal Warrant/No Warrant Test

“If the challenged evidence was obtained without a warrant, the state carries the entire evidentiary burden.”

~ State v. Hyde, 186 Ariz. 252, 270, 921 P.2d 655, 673 (1996).

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What is Required for Defendants to Meet the Burden of Going Forward?

“[A] defendant who establishes that evidence was seized pursuant to a warrantless search has satisfied the burden of going forward under the rule and has triggered the State's burden of proving the lawfulness of the acquisition of the challenged evidence.”

~ Rodriguez v. Arellano, 194 Ariz. 211, 215, ¶ 12, 979 P.2d 539, 543 (App1999)

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Defendants can establish “through the state’s concession, the uncontested fact that the evidence urged to be suppressed was the product of a warrantless search.”

~ Rodriguez v. Arellano, 194 Ariz. 211, 213, ¶ 3, 979 P.2d 539, 540 (App1999)

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At the Hearing on the Motion to Suppress:



***Arizona Rule of Evidence 104 (a): “the court is not bound by evidence rules, except those on privilege”**

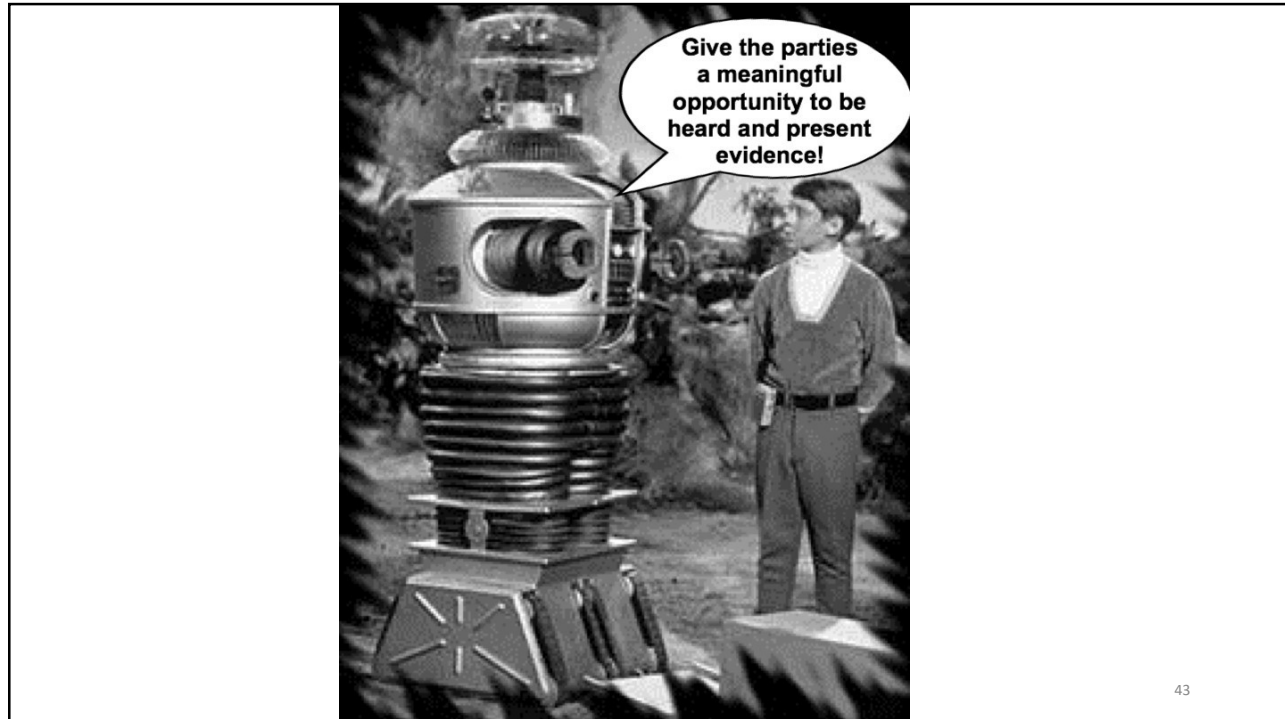
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- No Ruling on the Pleadings.
- No Ruling on the Documents.
- No Trial (hearing) by Affidavit.
- No Trial (hearing) by Avowal.
- Even if Parties Agree to Proceed by Avowal, the Court Should Be Wary Because Avowals are Not Stipulations and Often Conflict.

44

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Possible to proceed by stipulation to submit to court on stipulated facts but that requires two stipulations:

1. Stipulation to Submit on Stipulated Facts, and
2. Stipulated Facts

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“[T]he crush of busy caseloads can lead to a creeping perception that full evidentiary presentations are neither warranted nor possible in seemingly routine matters on high-volume calendars.

Procedural due process, however, requires the court to afford litigants adequate time to present their evidence.”

~Volk v. Brame, 235 Ariz. 462, 468, ¶ 19, 333 P.3d 789, 795 (App.2014)

46

46

“Though the court may impose time limits that appear reasonable in advance of a proceeding, those limits become unreasonable if they prove insufficient to allow a substantive hearing.

If...it becomes apparent that the court lacks sufficient time to receive adequate testimony, then the court must allow reasonable additional time or continue the hearing to permit it to perform its essential tasks.”

~Volk v. Brame, 235 Ariz. 462, 468, ¶ 21, 333 P.3d 789, 795 (App.2014)

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“When the court allows no time to hear testimony, or when the time available for each necessary witness does not allow for meaningful direct testimony and efficient but adequate cross-examination, the court violates the parties' due process rights.”

~Volk v. Brame, 235 Ariz. 462, 468, 333 P.3d 789, 795 (Ct. App. 2014)

49

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“It is no grace to a judge...to show quickness of conceit in cutting off evidence or counsel too short; or to prevent information by questions, though pertinent.”

~Francis Bacon, (1561–1626)

Of Judicature, Essays, Civil and Moral, The Harvard Classics (1909-14).

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Maricopa County Superior Court's website has Minute Entry Rulings on Many Commonly Seen Motions

The screenshot shows the website for the Maricopa County Superior Court. The main heading is 'The Judicial Branch of Arizona Maricopa County'. Below this, there are navigation links for 'Home', 'Superior Court', 'Adult Probation', and 'Juvenile Probation'. A search bar is located to the right of these links. The main content area is titled 'Lower Court And Admin Appeals' and contains a disclaimer: 'The opinions contained within this database are not published opinions capable of being cited as authority, and no opinion is intended to serve as a definitive rule for any of the issues presented and analyzed.' Below the disclaimer is a search bar and a list of topics under 'Criminal' and 'Civil' categories. A 'Download Forms from Self-Service Center' button is also visible.

<http://www.superiorcourt.maricopa.gov/SuperiorCourt/LowerCourtAndAdminAppeals/index.asp>

51

51

- Superior Court Minute Entries are Not Precedential (but cite precedential cases)
- They Are Only a Convenient Place to Start Your Research
- Each Case is Factually Unique and the Analysis May Turn on One Fact
- Higher Courts May Not Agree With the Analysis But if It was Never Reviewed, You Would Never Know
- You Make the Call. You Do the Research.



52

52

No Motions for Reconsideration

“A court may not reconsider an issue previously decided in the case except for good cause or as these rules provide otherwise.”

~Ariz. Rule Crim. Pro. 16.1(d)

53

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What If You Get a Motion for Reconsideration?

- Reasonable to adopt Ariz. Rule of Civ. Pro 7.1(e) as a guide.
- Submitted without oral argument.
- No response to be filed unless court directs otherwise.
- No reply to be filed unless court directs otherwise.
- Review motion for reconsideration for “**good cause.**”
- May be summarily denied (without response).
- Motion for Reconsideration **may not be granted** without providing opportunity for response.

54

54

A Brief Digression on Being Appealed & Explaining Rulings

55

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The Zen of Being Appealed

- It's not personal. It's business.
- We want to know the right answer.
- We want to keep injustice from infecting our cases and affecting people's lives.
- The judge can't have a vested interest in the outcome of the case on any level (pride and personal feelings are vested interests).

56

56

The Zen of Being Appealed

Sometimes the law is unclear
and an appeal provides clarification.

And that clarification can help litigants
and judges all over the state.

57

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Efficiency:

“We want to do it right
because we want to do it once.”

~Judge Thumma

58

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In Praise of Explaining Rulings

Our Supreme Court says it's a good idea:

“In failing to indicate the grounds on which it denied defendant’s motion to suppress, the trial court has, intentionally or not, significantly added to this Court’s appellate burden. We strongly urge trial courts to include in the record the reasons for their decisions so that appellate court may review those decisions in a more directed and efficacious manner.”

~ *State v. Fisher*, 141 Ariz. 227, 236, 686 P.2d 750, 759, FN.1 (1984).

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61

In Praise of Explaining Rulings

Our Supreme Court says it's a good idea:

“While trial judges generally are not required to give reasons for discretionary rulings, some explanation, however brief, greatly assists in appellate review, and may prevent unnecessary reversal where facts are close and support for the ruling is not patent from the record.”

~ *City of Phoenix v. Geyler*, 144 Ariz. 323, 329, 697 P.2d 1073, 1079, FN.3 (1985).

62

62

In Praise of Explaining Rulings

Our Court of Appeals says it's a good idea.

Trial courts are encouraged ***“to state on the record their reasons for their decisions in criminal cases to lessen the appellate burden”*** by avoiding ***“massive confusion and errors”*** in the record.

~*State v. West*, 173 Ariz. 602, 608, 845 P.2d 1097, 1103 (App.1992) (citing *State v. Fisher*).

63

63

In Praise of Explaining Rulings

Our Court of Appeals says it's a good idea.

“We reiterate that a better practice is for the [trial court] to explain its decisions.”

~*Hart v. Seven Resorts Inc.*, 190 Ariz. 272, 284, 947 P.2d 846, 858 (App.1997) (citing *City of Phoenix v. Geyler*).

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In Praise of Explaining Rulings

- It helps the parties understand how you arrived at your decision and helps them understand that it was not for some inappropriate reason.
- Shows that you are upholding your oath and are obedient to the law as opposed to making imperial proclamations.
- Some rules of court require explanation of rulings [e.g. ARPOP 38(g)(4), Ariz. R. Crim. Pro. 16.4(c)].

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Explanation Need Not Be Elaborate to be Effective

Possible Areas of Explanation include:

- Burden of Proof
- Legal Standard Applied
- Findings of Fact / Operant Facts
- Credibility Determinations
- Stipulations or Concessions of the Parties
- Equitable Considerations
- References to theories/assertions/defenses and why persuasive or not

66

66

Secret Related to Appellate Review



67

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“The fact that the trial judge came to the proper conclusion for the wrong reason is irrelevant. We are obliged to affirm the trial court's ruling if the result was legally correct for any reason.”

~State v. Perez, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984)

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2025 JURY TRIAL ACADEMY,
MESA, ARIZONA

Motions *in Limine* & Motions to Suppress

Hon. Michelle Lue Sang, Chandler Municipal Court

Hon. Thomas Parascandola, Peoria City Court

Hon. Craig Jennings, Avondale City Court

Thank You!!

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