AZ JUDICIAL CONFERENCE

How to Handle a Lower Court Appeal

HOW TO HANDLE LOWER COURT APPEALS

Handling LCA Appeals: A Practical Roadmap Under SCRAP

Who are we?

Honorable Julie A LaFave

Comm. LaFave was appointed to the Maricopa County Superior Court in July 2025 after a 15-year career practicing primarily business and general civil litigation. She appeared in a limited jurisdiction court only once in that time…and lost badly. Comm. LaFave spent her first 6 years on a criminal bench (and therefore has been appealed plenty) and has been serving on LCA since April 2021.

Honorable Alicia Skupin

Judge Skupin has served as a judge for 13 years and is the Presiding Judge of the Chandler Municipal Court. Before joining the bench, she practiced criminal defense for 12 years. She has been actively involved in judicial leadership and education and currently chairs the Committee on Limited Jurisdiction Courts. She also serves on the Arizona Judicial Council, the Commission on Technology, and the Commission on Diversity, Equality, and Justice in the Judiciary. Earlier in her career, Judge Skupin clerked for the Honorable Dan A. Barker at the Arizona Court of Appeals—so she has seen appeals from every angle… first helping decide them, and now occasionally being reminded of them.

Who are you?

Thank you

Plan for the day

Everyone got practice guide as materials-feedback appreciated

Three sections-if we get that far

1. Walk through the SCRAP rules and proposed changes to them
2. Talk about the process for appeals to Superior Court
3. Discuss rules for specific types of cases

Part 1

What happens before the Appeal reaches you?

- Notice of Appeal Reviewed for Completeness and fee payment
- Appeal entered into a tracking system and monitored manually
- Appellant memorandum deadline calculated (74 days from judgment)
- Initial appeal letter sent with instructions and deadlines
- Transcript requirement determined (based on 90-minute rule)
- Appellant Memo filed w/in 60 days & Response calendared 30 days.
- Timeline disputes decided by LJPJ judge, not staff
- Case monitored for compliance before any transmission.

Where do I start?

Is there a final judgment R 1(f)

- Must be written and signed by court
- For Criminal, sometimes under A.R.S. § 13-4032 or A.R.S. §13-4033
- If there is a Motion for New trial, Motion to set aside or Motion to vacate, TC must rule on that first—that is the subject of your appeal.
  - If LLC filed-must have attorney
  - If oral record is different, that one controls

A.R.S. 13-4032

An appeal may be taken by the state from:

1. An order dismissing an indictment, information or complaint or count of an indictment, information or complaint.
2. An order granting a new trial.
3. A ruling on a question of law adverse to the state when the defendant was convicted and appeals from the judgment.
4. An order made after judgment affecting the substantial rights of the state or a victim, except that the state shall only take an appeal on an order affecting the substantial rights of a victim at the victim's request.
5. A sentence on the grounds that it is illegal, or if the sentence imposed is other than the presumptive sentence authorized by § 13-702, § 13-703, § 13-704 or § 13-706, subsection A.
6. An order granting a motion to suppress the use of evidence.
7. A judgment of acquittal of one or more offenses charged in an indictment, information or complaint or count of an indictment, information or complaint that is entered after a verdict of guilty on the offense or offenses.

A.R.S. 13-4033

An appeal may be taken by the defendant only from:

1. A final judgment of conviction or verdict of guilty except insane.
2. An order denying a motion for a new trial.
3. An order made after judgment affecting the substantial rights of the party.
4. A sentence on the grounds that it is illegal or excessive.
5. An order that denied the defendant's eligibility to petition the court to seal the defendant's case records pursuant to § 13-911 if the sole basis for the appeal is the defendant's eligibility to petition the court.

What do I do if there isn't a written final judgment?

- You do not have jurisdiction
- Send back --If you get back that there isn't a final written judgment, they can issue one then based on record.
- Proposed rule change-We will see in August

PROPOSED RULE CHANGE TO RULE 1

(a) These rules govern the procedures in all civil appeals, except as provided otherwise by law, taken to the Superior Court from a~~n~~ written order or the final judgment signed by ~~of~~ a justice court pursuant to [A.R.S. § 22-261](), or municipal court pursuant to [A.R.S. § 22-425(B)](), including but not limited to Orders of Protection, Injunctions Against Harassment, and other civilly sanctioned cases.

(f) “Entry of judgment,”~~,~~ as used in these rules, ~~shall~~ means a judgment ~~which has been~~ signed by the judge and filed with the court.

Appeal Attrition at the Limited Jurisdiction Level

- Abandoned – No memo filed by appellant
- Dismissed – Failure to complete requirements (fees, transcript, untimely)
- Withdrawn – Appellant elects not to proceed
- Only perfected appeals are transmitted to Superior Court
- Significant volume of appeals end at the municipal/JP court level.

Is It timely?

a. 14 days for Notice of Appeal-5 for Eviction actions

    i. Cannot extend time

b. Brief due 60 from date NOA was due (not date when filed)

    i. TC can extend this time but must ask **<u>first</u>**

    ii. Response due but not required. Non-filing is not a concession on appeal.

except…

In all cases other than evictions, filing of Motion to set aside, vacate, etc…stays deadline and notice of appeal deadline is 14 days from that ruling.

- TC often denies these as moot because the litigant also files the NOA. They are not. They must be ruled on by the TC
- In evictions, they must be ruled on in 3 days (no rule on permitting responses) and the time for appeal is NOT affected.

Motions to Dismiss/Motions to set aside/ Motions to Vacate

a. A denial of a motion to dismiss is not an appealable order- the case is still going on

b. A motion filed under other JCRAP rules (to set aside, to vacate, for a new trial) must be ruled on first.

c. The superior court does not have jurisdiction over these cases.

PROPOSED RULE CHANGE TO Rule 4 (E)

(e) Except in forcible and ~~special detainer~~special detainer (eviction) cases, when any of the following motions, if permitted by ~~applicable justice court or municipal court~~ the trial court rules, are timely filed, the time for appeal ~~for all parties~~ is extended, and the times set forth in this rule must~~shall~~ be computed from the entry of any of the following orders:

1. Granting or denying a motion for judgment as a matter of law;
2. Granting or denying a motion to amend or make additional findings of fact, whether or not granting the motion would alter the judgement;
3. Granting or denying a motion to alter or amend the judgment;

Rule 4 (E) cont…

4. Denying a motion for a new trial.
5. <u>Denying a motion to set aside judgement</u>

If more than one of the foregoing motions is timely filed, the ~~expiration of the~~ time for appeal is ~~to be~~ computed from the entry of the order that disposes of the last remaining motion. When a motion to amend or make additional findings of fact is granted, the time does not start to run until the amendment or addition has been accomplished by court order. The same applies to the granting of a motion to alter or amend the judgment. For the purposes of this subdivision, entry of an order occurs when a signed written order is filed with the clerk of that court.

The state of the record

a. If audio-must be 90 minutes or less

   i. These come up in all sorts of ways

   ii. If you cannot decipher it, you can send back for trial de novo in the TC

   iii. If it is incomplete but you can decipher it, you must decide in favor of the TC decision for incomplete parts

b. If over 90-send back for written transcript

   i. Who manages during this time?

      1. TC with directions to dismiss if they do not file the written TS

      2. You can if you choose

How the Record is Actually Created

- All documents must be individually scanned and labelled
- Incorrect labelling can result in rejection by the Superior Court
- Exhibits included only if admitted at trial (but maybe new rule?)
- Audio is copied to CD/other and sent snail mail.
- Superior Courts do not have direct access to city/JP court systems.
- "If something appears missing or unclear, it is often a limitation of the transmission process, not the underlying case."

Are there Rule 8 violations?

a. Not filed as a Proc Motion (will address later)

b. If there is no reference to the record, no citation to law, and/or no request for relief (or relief outside the scope of the appeal) consider dismissing for that failure rather than ruling substantively

   i. If you can figure out what they "mean", consider doing so. Rulings on the merits are best.

   ii. My "test"-am I finding the argument or making it? If I am making it, dismiss.

To hear or not to hear-the Oral Argument conundrum

a. Only required on misdemeanors

b. Maricopa County Local Rule limits to 15 minutes each side

(highly recommend if you have a similar rule)

Fees and Costs/Rehearing Requests

a. Fees usually in eviction actions-LL entitled under law as lease is a contract

b. Rehearing in 14 days

c. Rule, do not do final Rule 54 language, give 10/14 days to file

i. If <u>no</u> fee app or rehearing, do final MEO remanding with Rule 54 language

In Maricopa County, that is what triggers the clerk to remand and take off your docket

When you are done…stop

a. Rule 54 language

IT IS ALSO ORDERED that, because the issue of attorneys' fees and costs remain pending, this ruling is not a final decision of this Court for purposes of Sup.Ct.R. App. P.-Civil R. 12(d).

OR

IT IS ALSO ORDERED that no further matters remain pending between the parties and this ruling constitutes this Court's final decision for purposes of Sup.Ct.R. App. P.-Civil R. 12(d).

IT IS ALSO ORDERED remanding this matter to the ___________ Court for any further proceedings.

IT IS ALSO ORDERED signing this ruling as a formal order of the Court.

b. Parties will continue to call, file things, direct them back to trial court

c. We have jurisdiction one court at a time…but do we?

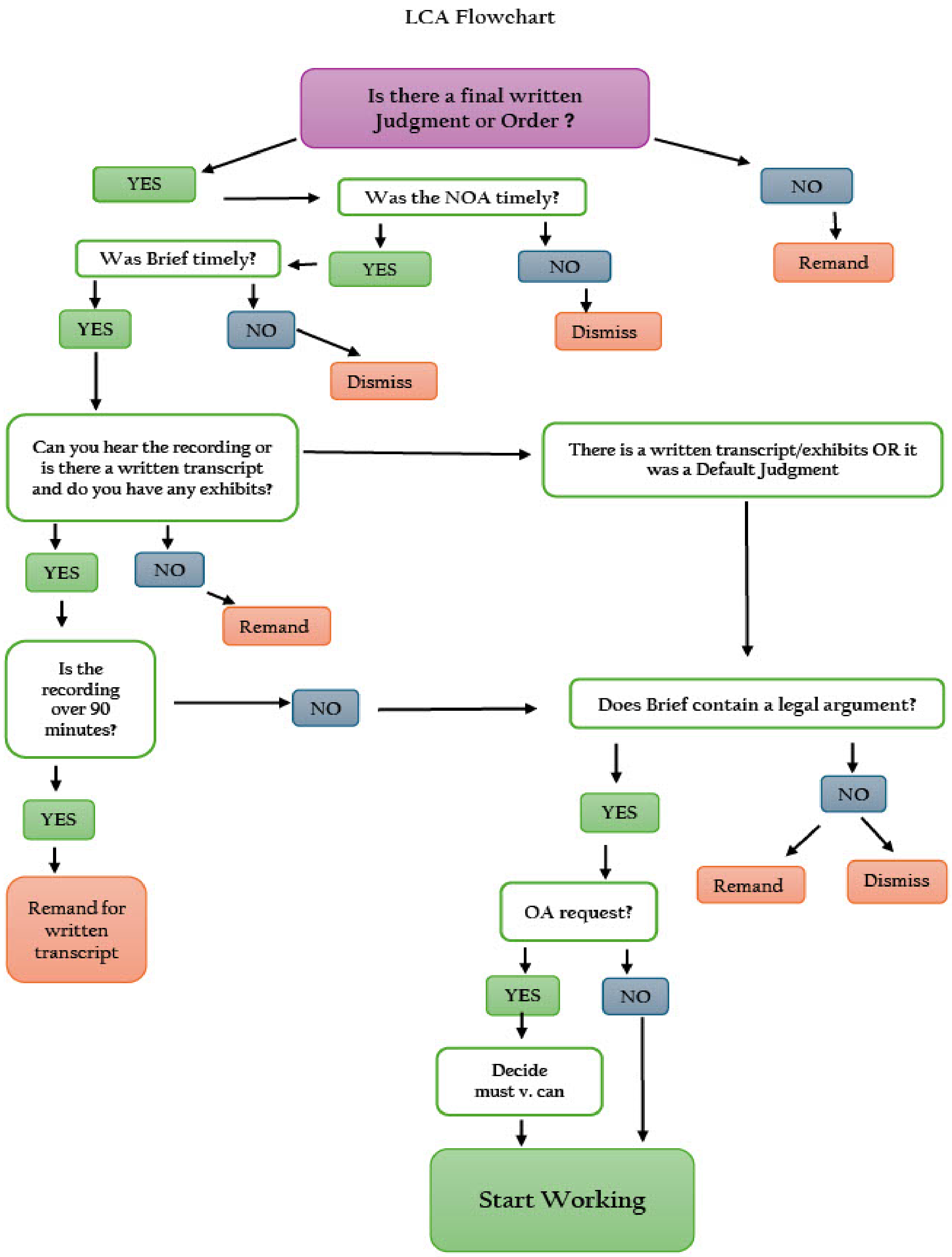
BONDS

- Civil (non-traffic) Supersedeas bond required to stay, otherwise judgment continues
- Civil traffic – most courts require full payment of the fine; No pay = no stay.
- Criminal – No bond; Appeal triggers a stay. Restitution is NOT stayed.
- Protective Orders – No bond, no stay.
- Evictions – Money Judgment and/or Possession; $250 (MCJP), or affidavit of inability to post bond (need more info) "you can appeal without posting a bond, but you cannot stay in the property without one."
- Defendants can request that the bond be waived or reduced (financial hardship)
- $17 appeal fee at city court. (Other courts?)
- New bill: HB2574 Stay on Appeal??

After You Rule: What Happens Next?

- Superior Court ruling received and reviewed by LJ court
- Notice of Final Disposition prepared and issued to Appellant
- Case Status updated in CMS
- Case routed for further proceedings (if remanded)
- File reconstructed and returned to normal case flow.
- “Your ruling triggers a second full workflow at the municipal court level, especially in remand situations.”

Flowchart


LCA Flowchart
Is there a final written Judgment or Order ?
YES
NO
Was the NOA timely?
Remand
Was Brief timely?
YES
NO
YES
NO
Dismiss
Dismiss
Can you hear the recording or is there a written transcript and do you have any exhibits?
There is a written transcript/exhibits OR it was a Default Judgment
YES
NO
Remand
Is the recording over 90 minutes?
NO
Does Brief contain a legal argument?
YES
YES
NO
Remand
Dismiss
Remand for written transcript
OA request?
YES
NO
Decide must v. can
Start Working

Common Pitfalls in Limited Jurisdiction Appeals

What goes wrong before the appeal gets to you?

- No final written judgment at time of appeal.
- Appeal filed while post-trial motions are still pending.
- Incomplete or unclear record (especially audio)
- Confusion regarding transcript requirements.
- Procedural defects leading to dismissal or abandonment.

PART 2

Procedural Motions

a. Decide IF the appeal can proceed

b. Can be made "<u>any time</u>"…define "any"

c. Timeframes stop until you rule

d. Once you rule, remand it back to TC-current conflict in Rules

e. Where possible, if TC did not use its Rule 9 authority, remand with instructions to use it so that things do not go back and forth

Procedural Motions

a. Must include the subject of the motion (attach Brief usually)

b. If is really a R. 7 or R. 9 motion, remand to TC to decide

  i. Or rule but remand to monitor

c. Inconsistency in current rule and proposed rule change~~.~~

Not yet at superior court. Remand and wait. Should be removed from your docket.

Sometimes they come back, often they do not.

PROPOSED CHANGES TO RULE 8

Upon the filing of a procedural motion, and after the time to file any response has expired, the trial court ~~shall~~must send the motion and response to the Superior Court along with the notice of appeal and/or cross-appeal. If the notice of appeal and/or cross appeal is untimely, the trial court must dismiss the appeal pursuant to Rule 9 of these rules rather than transmit the procedural motion for ruling by the Superior Court. The Superior Court ~~shall~~must notify the parties regarding payment of applicable appeal filing fees in the Superior Court in a manner as provided in Rule 10 of these rules. ~~Upon non-payment of an appellant's or cross-appellant's appeal~~If the fee is not paid, the appeal or cross-appeal ~~shall be~~is deemed abandoned, and the Superior Court ~~shall so~~must notify the trial court. The appeal or cross-appeal that is abandoned ~~shall~~must be dismissed by the trial court pursuant to Rule 9(b) of these rules. Upon disposition of the procedural motion, the Superior Court ~~shall~~must enter appropriate orders and instruct the trial court and the parties as to the disposition of the motion, transmittal of the record on appeal, and when any ~~appellate memoranda~~supplemental brief or response is ~~are~~ due. The trial court may modify these dates in its discretion once the case is remanded to the trial court. After ruling, the Superior Court ~~shall~~must remand the case to the trial court to complete the requirements of perfection and transmit once compliant or dismiss if the case is not perfected pursuant to these rules.. ~~If the Superior Court ruling allows the appeal or cross-appeal to proceed, any necessary appellate memoranda, and any subsequent papers, shall be filed in the Superior Court.~~

Who does what?
Rules 7-8-9

Rule 7 is the TC purview.

a. This includes managing if TS gets filed.

b. This also includes a review of the recording or record and if insufficient, ordering a new trial without transmitting.

c. **Sufficiency of Record on Appeal; Trial de Novo.** If it appears to the trial court that the record is insufficient for an appeal on the record, the trial court may, on its own motion or on motion of a party, reset the matter for a new trial within 45 days from such determination. Upon such order from the Superior Court, the trial court may modify the schedule for the new trial or hearing in its discretion or upon request of a party. In the~~such~~ event of a remand for new trial or hearing, any appeal rights ~~shall~~ begin to run from the entry of a judgment or order following the new trial. ~~In cases where it appears that the record is insufficient, the preference shall be for a new trial at the trial court level. Notwithstanding the foregoing, cases summarily transferred to the superior court for trial de novo or determined by the superior court to have an insufficient record may be remanded to the original trial court for a new trial or hearing in lieu of a trial de novo in the superior court. Unlike the parties in a trial de novo held in the superior court, the~~The parties in a case remanded pursuant to this rule for a new hearing or trial in the ~~original~~ trial court ~~shall~~ have the rights of appeal as provided by statute or rule for all litigants following a trial or the entry of an appealable judgment or order.

Inconsistency in the rule: New trial is always in TC

Rule 8(a) is also for TC

a. Allowing extension of time

Rule 8(c) are procedural motions to be referred to Superior Court

a. But is it really?

Often get procedural motions to strike brief because no written TS. Who handles?

Rule 9

a. TC only
    i. Also mentions transcripts-so TC can dismiss under Rule 9 for failure to get one.
b. Can dismiss if untimely
    i. TC Judges: Please consider looking and doing so
    ii. Exposes parties to further attorney fee requests

General Appellate Standards

Dismissing an appeal that is not a procedural motion

a. No legal argument made

b. Lack of Jurisdiction

   i. Too early or too late

What am I reviewing?

Granting a Motion to Dismiss - assuming cannot just refile, Denying Motion to Set Aside, Defaults or rulings on MSJs

a. The appeal is whether there was error in these rulings, not the substance of the case

Part 3

EVICTION ACTIONS

Rule 5- Complaint shall include a copy of Notice, Lease, etc. Often, the trial court transmits the record in a way that is difficult to determine compliance. If you find the Complaint was not compliant, you can remand to dismiss based on insufficiency of the Complaint.

a. If you can find it in the transmittal at all, that might be enough because it may well have been filed properly and separated.

Rule 5(f)- If the Defendant appears at the initial hearing, they waive any objection to service unless they assert an objection at the initial hearing.

a. If they raised it at the initial hearing, TC must have inquired as that is a defense, and you may need to remand for the trial court to set a hearing with the process server testifying to determine proper service.

Rule 8- Counterclaims

a. Must be statutory

b. Must be in writing

c. Must be ruled on-Judgment requires offset.

   i. You can remand to the trial court to address the counterclaim. Rule 13(c)(2)(F).

Rule 11- Initial appearances. Defendant must enter a plea (much like a criminal proceeding) at this hearing. Rule 11(c)(1).

a. If there is any legal basis for Defense, must set trial

i. If for CC arguments but not filed, must have ruled without trial

ii. Good one for service complaint.

b. Rules of evidence apply

i. If IA morphs into a trial, Tenant has trial rights (biggest one is cross examination)

Rule 15(a)- Motions to Set Aside Eviction actions, if they affect possession, are deemed emergency filings and must be filed and decided within 3 days.

Often, a Defendant files a Motion to Set Aside Eviction and a NOA at the same time. If there was a Motion to Set Aside filed, make sure that motion was ruled on.

Your appeal is then on the Motion to Set Aside, not the substantive underlying issue.

Rule 17- The appeal does not stay the judgment unless you order it to. It stays the writ unless they fail to pay rent during the proceeding.

In this way, you and the TC might both be managing the case. And your ruling may have little effect in the long run. Unsure what would happen then.

Essentially there is an extrajudicial proceeding that triggers the writ.

ORDERS OF PROTECTION

Rule 5- Make sure the protected parties are appropriate. Petitioners often add adult children, romantic partners who are not involved, etc. .

. . Also make sure there is evidence for the need to include appropriate protected persons in the record.

Rule 10- Often the trial court hears the “dueling” Petitions against each other at the same hearing. Make sure you are only referencing and considering material from the case appealed.

Rule 34- If granting the Petition affects a custody agreement, the trial court must refer to the family court. If the trial court ruled on it, and you now know it affected custody, the OOP is still valid.

You can affirm but need to remand with instructions to refer to the superior court for any further proceedings.

Rule 38- The trial court often handles the questioning at contested hearings because the parties are not represented. Make sure the trial court gave each side the opportunity to cross-examine directly.

Sometimes you will get an appeal that argues the judge did not allow me to speak or ask questions and you find that to be true. If so, it must be remanded for a new hearing.

The trial court can guide the parties but cannot refuse to allow direct questioning.

Brady issues- Often people ask for Brady to apply, and Defendant surrender a weapon. This only applies when the parties are connected in a domestic violence defined relationship and then there must be a finding. Without one, Brady cannot apply.

Civil Cases

The Justice Court Rules of Civil Procedure (JCRCP) are essentially a commonsense version of the Arizona Rules of Civil Procedure ("ARCP").

Often, the big issue you see on civil matters is the granting of MSJs where there really was a question of fact or law. Trial courts sometimes jump to ruling on the merits at this juncture. Remember at this stage you are not deciding which side "wins," just if there is enough there for a trial.

a. If an MSJ is granted, the appeal is NOT the substance. It is whether the MSJ should have been granted.

ACCESS TO JUSTICE ISSUE -
BUT CAN WE DO ANYTHING ABOUT IT?

There are a lot of issues with legal fees in these cases.

By way of example, the Plaintiff is awarded a judgment and then substantial fees. Make sure there was a fee application filed, and the other side got a chance to respond.

Often there is a prevailing party and then the judgment is filed with the fees requested.

Often there is no ability of the opposing party to respond and there is always a question of whether those are properly awarded. That said, there is rarely an appeal on this issue.

CIVIL TRAFFIC

Rule 10.2- A request for documentary hearing only. If requested by the defendant, they need to submit all their materials prior to the hearing and the trial court needs to make a record of what is provided before making a finding. The defendant does not have to appear at the hearing.

Rule 12- The State does not need to be present (and usually it is not). The officer or a representative from the photo radar company is sufficient.

Remember, they are not an attorney. The trial court asks the questions.

The Defendant still must be given the opportunity to cross-examine that the State’s witness.

The witness should not be permitted to ask questions of the Defendant.

Rule 16- The State may send a witness (photo radar administrator, police officer, etc.), but the witness may not be permitted to question the defendant.

Rule 17- The Rules of Evidence do not apply. There is no disclosure obligation.

Rule 21- If the State fails to send a witness of any sort, the case must be dismissed unless good cause is found to continue the hearing.

Rule 35- Do not set an oral argument unless you want to or if a party requests it, and you agree. You can simply deny that request.

CRIMINAL

LCA criminal uses the same criminal rules as Superior Court

Note: only entitled to counsel if liberty interest is contemplated- so if they could do jail time, even if not sentenced to it, must appoint/waive/hire counsel both for underlying matter and on appeal per Ariz. R. Crim. P. 6.1

This issue has arisen several times this year.

DUI/Suppression Hearings

Head ready to explode?

Always happy to answer questions

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2026

Lower Court Appeals Practice Guide

MARICOPA COUNTY SUPERIOR COURT

HON. JULIE A. LAFAVE

Table of Contents

Roadmap for the Case and Superior Court Rules of Appellate Procedure ("SCRAP")[1] Initial Considerations

When you get a Lower Court of Appeals ("LCA") case, ask yourself these questions before starting on the substantive review:

1. Is there a final judgment?

Rule 1(f)

- This can sometimes be on the record only, written on the docket sheet, or handwritten on a filing. You must decide what you will accept as a "final" ruling. You can issue a MEO to the trial court to get a final, written ruling.
  - Rule says final written judgment or order.
  - Some criminal appeals where the party is appealing from a ruling contemplated by A.R.S. § 13-4032 or A.R.S. § 13-4033 will not have final orders. Others might have a written order; or the judgment might just be on the record (transcript or recording).

Practice Notes:

- Often there is an appeal filed either while a motion for a new trial or relief from a Motion for Summary Judgment ("MSJ") is still pending. The trial court may transmit the briefs to you anyway. Check that they ruled on the pending motion first. If not, send it back for that ruling.[2] The subject of the appeal is whether the Motion to Set Aside (default or judgment) was properly denied, not the substance of the underlying issue. Under Rule 3(d), the appellant must first file a Motion to Set Aside Default. If no ruling has issued, there is no final judgment. You must remand for that ruling.
- Limited Liability Company ("LLC") must have counsel in superior court, even if they did not in trial court.
  - In Arizona, an LLC may not represent itself in the superior court but must be represented by an attorney. *Boydston v. Strole Development Co.*, 193 Ariz. 47, 49, ¶ 7 (1998). Corporations and other business entities may be represented by corporate officers or managing members in justice or police courts. Rules 31.2, 31.3, Rules of the Supreme Court of Arizona. That permission, however, does not apply in superior court. *Id.* Instead, an attorney authorized to practice law in Arizona must sign the notice of appeal on behalf of the company. *Boydston*, 193 Ariz. at 50, ¶ 14 (However, if the

[1] References are to the SCRAP-Civil. Double check in criminal cases. The rules are much the same but sometimes the section numbers are different.
[2] See No Jurisdiction Template

Notice is signed by a party, the party should be given the opportunity to cure prior to dismissal).

- If the oral record is different than the written final judgment, the oral record governs.
    - Oral pronouncement in open court controls over the minute entry. *State v. Hanson,* 138 Ariz. 296, 304–05, (App.1983) (holding in the criminal context that "[w]here there is a discrepancy between the oral sentence and the written judgment, the oral pronouncement of sentence controls"); *United States v. Munoz-Dela Rosa,* 495 F.2d 253 (9th Cir.1974)("In cases where there is a direct conflict between an unambiguous oral pronouncement of sentence and the written judgment and commitment, this Court has uniformly held that the oral pronouncement, as correctly reported, must control.")
    - When a discrepancy exists between the trial court's oral pronouncement of a sentence and the written minute entry can be clearly resolved by looking at the record, the "[o]ral pronouncement in open court controls over the minute entry." *State v. Ovante*, 231 Ariz. 180, 188 (2013); *quoting State v. Whitney*, 159 Ariz. 476, 487 (1989).

2. Is it timely?

<u>Rule 1(g): Time for filing</u>

- If Saturday or Sunday or court is closed, next business day.
- Response calculation is the day after filed. Ex: Motion filed on Monday. Tuesday is day one of any calculation period, not Monday.

<u>Rule 4</u>

- 14 days to file Notice of Appeal ("NOA") in most cases/5 days in evictions Rule 4(a) or 14 days from when Motion to Set Aside determined. No extension on NOA time in eviction cases, even when Motion to Set Aside is filed.

<u>Practice Notes</u>:

- In Eviction actions Motions to Set Aside must be ruled on within three days in eviction actions but often are not.
    - In some cases, the trial court will deny a Motion to Set Aside as "moot" because a NOA has been filed. That is incorrect. You must remand for a ruling on the Motion to Set Aside and new briefing on that ruling, not on the substance.
- Appellate memorandum is due 60 days from the deadline for NOA, not 60 days from when the NOA is filed. Ex: Notice of appeal due January 15 but filed January 10. Appellate Brief due March 15 not March 10.

- If the NOA or Appellant Brief is not timely, you MUST (not may) dismiss the case. Rule 9(b).[3] You may not waive this requirement. The trial court should dismiss but this does not always happen. You also must dismiss it if payment is not made. This is handled administratively in Maricopa County although it does appear in the rules for you to follow if that does not happen.
- Calendar days include all days of the week whereas business days are only those generally considered Monday through Friday. *State v. Miguel*, 209 Ariz. 338, 339 (App. 2004); *Bohart v. Hanna,* 213 Ariz. 480, 482 (2006) (holding that a five-calendar-day limitation to challenge an election matter "includes weekends and holidays").
    - "In computing any period of time prescribed or allowed by these rules, by any local rules, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. When the period of time prescribed or allowed, including any additional time allowed under subdivision (e) of this rule, is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall not be included in the computation. When that period of time is 11 days or more, intermediate Saturdays, Sundays, and legal holidays shall be included in the computation." *Corbet v. Superior Ct. In & For Cnty. of Maricopa*, 165 Ariz. 245, 247, (App. 1990); *citing Arizona Rules of Civil Procedure Rule 6*.

3. Is the oral record more than 90 minutes?

Transcripts: Needed if more than 90 minutes. Local Rule 9.4(b); Supreme Court Rule 30. Objection can be raised as procedural motion (although really should be determined by the trial court) or you can issue Minute Entry Order ("MEO") upon receipt.[4]

3a. If the oral record is less than 90 minutes, can you understand it?

The record may be insufficient if you cannot decipher what is being said. If that is the case, you may remand for a trial de novo if the record cannot be heard/deciphered. SCRAP Rule 7(e). In order to remand things back to the trial court, you must add language to your minute entry that "It is ordered remanding the matter to the trial court" so that the clerk will take it off your docket.

<u>Practice Notes:</u>

- If the record is incomplete, but you can decipher its contents, you must decide in support of the trial court decision. If the first portion of the recording is not "included in the record on appeal, the missing portion of the record is presumed to support the decision of the trial court." *State v. Mendoza*, 181 Ariz. 472, 474 (App.

[3] See Untimely NOA Template

[4] See Procedural Motion #5

1995); *State ex rel. Baumert v. Superior Court*, 118 Ariz. 259, 260-61 (1978) ("[f]aced with an incomplete transcript . . . the Superior Court abused its discretion by not affirming the municipal trial court").

- Local Rule authorizes this Court to review the sufficiency of the trial court record and to remand for a de novo trial when it determines that the record is insufficient to allow for meaningful appellate review. Rule 9.10(c), Superior Court Local Rules
- If it appears to the trial court that the record is insufficient for an appeal on the record, the trial court may, on its own motion or on motion of a party, reset the matter for a new trial within 45 days from such determination. In such event, any appeal rights shall begin to run from the entry of a judgment or order following the new trial. In cases where it appears that the record is insufficient, the preference shall be for a new trial at the trial court level. SCRAP Rule 7(e) (emphasis added).

4. Are there Rule 8 violations?

Often, the Appellant has failed to cite any law or reference the record. Sometimes it is difficult to ascertain even what the argument is. Other than the Rule 9 requirements, you can waive any defects in the Brief "in the interest of justice" under Rule 8(a)(5) and 2. This is up to you. If you cannot determine what they are asking, or if what they are asking exceeds your jurisdiction, you can dismiss on the grounds that they haven't stated a claim for relief that you can grant.[5]

5. Did they request oral argument ("OA")?

You may set an oral argument upon request or on your own motion. Rule 11. Only criminal misdemeanors require you to hold OA if requested. Rule 11(a). You may do a MEO setting or declining to set OA, or add the denial to your substantive ruling.[6]

Practice Note:

- Local Rule 9.7 limits OA to 15 minutes per side unless there is a specific different requirement or if approved by you.

6. Did a party seek attorney fees?

Usually, these will be in eviction actions where they are entitled to them. The party still must file an affidavit, and you must decide reasonableness, etc. Rule 13. Where fees are awarded pursuant to a provision of a contract between the parties which calls for the non-prevailing party to pay "reasonable" fees and costs, the trial court has greater discretion to determine reasonableness than when a contract calls for the non-prevailing party to pay all attorney fees. *Geller v. Lesk*, 230 Ariz. 624, 628 ¶¶ 8-10 (App. 2012). However, "when the

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[5] See No Argument Template
[6] See Oral Argument Request Denied Template

parties have agreed on an amount for attorneys' fees, such as a definite amount or a percentage of an amount due on a note, the stipulated amount will be enforced only to the extent that it provides for a reasonable attorneys' fee for services actually rendered in accordance with its terms." *Id*. at ¶ 10 (cleaned up).

If you award fees, the ruling you make is not final until that issue is fully briefed so hold the ruling open until that time expires.

"A party entitled to costs may, *within ten days after entry of judgment*, file *in the Superior Court* a sworn itemized statement of costs on appeal . . . When attorneys' fees are recoverable by statute or contract, the claim for such fees in connection with the prosecution or defense of an appeal may be included in the statement of costs prescribed by this rule." SCRAP Rule 13(a) and (b) (emphasis added).

Practice Notes:

- Even if they do not file for fees, do a MEO after the time to do so has passed indicating the matter is now final and remand the entire case back to the trial court.
- Often you will see the trial court has granted fees with no chance given for response to the request.
  - But the appeal usually does not include that issue.

7. Is someone seeking a rehearing or reconsideration?

The party has 14 days to file for a rehearing or reconsideration.

Practice Notes:

- Often what the party gives you is a copy of a filing for the Court of Appeals ("COA"), even though they can only appeal to the COA in limited circumstances. You may consider a MEO that there was a filing but not addressed to you and you will take no further action.
- If it appears to be a Motion for rehearing/reconsideration but filed with the Superior Court, consider treating it as such even if it calls itself an appeal. If there is a file stamp from the COA, do not keep issuing rulings on it.[7]

8. Once remanded…stop

Make sure your Final Order, either in the Ruling or after the attorney fees issues are resolved has the final language.[8]

Parties will continue to call. Direct them back to the trial court.

[7] See No Further Action Template
[8] See Did Not File for Fees Template

Procedural Motions

Procedural Motions are motions filed in the trial court asking the superior court to rule that the case cannot proceed.

- These are filed under Rule 8(c)(1). Filed in trial court with a caption stating, "Procedural Motion-Refer to Superior Court." Rule 8(c)(2). Filing should include the Motion that is the subject of the filing (i.e., insufficient brief etc.), Rule 8(c)(2).
- Trial courts may do MEO to get supporting documents before transmitting[9] but if not, you can remand to the trial court until the information you need is provided, or deny the motion on the failure to provide.[10]
- Can be made at "any time" under the rule. However, Appellees often use the Response Memorandum as a Motion to Strike. The rules support declining to consider Rule 8 arguments in an Appellate response.[11]
- The lower court proceeding stops until you rule (although issues related to the release of rent in an eviction etc. do not). Rule 8(c)(3).
- Once you rule, the case is remanded to the trial court to collect any briefing and take any action related to your ruling. If perfected, it is transmitted back to LCA for assignment and determination on the merits. Rule 8(c)(4). The 60-day rule starts once assigned for determination on the merits.
  - There is some conflict in the Rules. Rule 8(c)(4) suggests if you allow the matter to proceed, any additional filings are to be to the superior court. However, only the memorandum and motion to strike get sent at this stage so superior court cannot really accept additional filings as it does not have the record. Also, in some cases, there are filings still happening in the trial court (motions to release rent, etc....). You can direct the matter be transmitted immediately to you and then have the Response filed in Superior Court. Common practice is to remand with instructions for the trial court to continue to monitor the case if the superior court permits the party to correct any error and then transmit once perfected.

Practice Notes:

- You will often see these procedural motions to strike when the Appellant's brief makes no legal argument. You may strike it and give them time to correct the issue if you want. You can order Appellee to not have to respond until they correct it.[12] It can

[9] See Procedural Motion-Document not Attached Template
[10] See Order for Supplement to Record Template
[11] See Improper Procedural Motion Filed in Appellee Memorandum Template
[12] See Order Granting Procedural Motion Template

be a good idea to remind the trial court that it has the authority to dismiss the action under Rule 9 if a compliant brief is not filed, rather than send it back to superior court.

  - Remember, you only rule on issues related to whether the matter can proceed. Anything else should be ruled on by the trial court until transmitted.

- We get procedural motions when the record is over 90 minutes and a transcript is necessary. In that case, you can remand it on those grounds. But often a procedural motion is not filed, and the matter is sent to superior court with a non-compliant recording. In that case, you should remand for compliance before issuing your substantive ruling.[13] You can remand to the trial court to manage collecting the transcript (and perhaps supplemental briefs with proper citations) and then ask the trial court to transmit back once done or dismiss but that usually creates more work. If it comes as a procedural motion, the file is still with the trial court so consider ordering the transcript filed in the trial court and that the case be transmitted once perfected under Rule 9. If already transmitted for assignment, usually easier to order the transcript produced to you in a certain number of days, track compliance, and dismiss the appeal if not.
- Motions filed under Rule 7 are determined by the trial court, not Superior Court.[14] Rarely but sometimes there is a motion filed that needs to be remanded to be determined.

Rule 8 allows the superior court to determine the matters that can be identified. Practice supports trying to identify the issues rather than remanding. Rules 8 and 2. That said, you cannot waive the requirements of Rule 9. If the NOA or Appellant Brief is not timely filed, you must dismiss (and trial court should have already done so). Parties can seek leave for an extension to file briefs, which the trial court handles. Rule 9(a).[15] **You must dismiss an appeal for this reason even if no request to do so is filed.**

[13] See Order Requiring Transcript Template

[14] See Order Appeal Dismissed-Remanded Template

General Appellate Standards of Review

Case References

General failure to properly raise or support argument

- When a party fails to raise an issue at the trial court level, it is deemed waived on appeal. *K.B. v. State Farm Fire & Cas. Co.,* 189 Ariz. 263, 267-68 (App. 1997); *MacMillan v. Schwartz*, 226 Ariz. 584, 591, ¶33 (App. 2011) ("Opening briefs must present significant arguments, supported by authority, setting forth the appellant's position on the issues raised.").
- Generally, matters not raised below, including constitutional issues, will not be considered on appeal. *Norcor of America v. Southern Arizona Int'l Livestock Ass'n*, 122 Ariz. 542, 544–45 (App.1979).
- "Thus, although Arizona appellate courts have the discretion to hear arguments first raised on appeal, we rarely exercise that discretion." *Harris v. Cochise Health Systems*, 215 Ariz. 344, 349 (App. 2007).
- The Court's jurisdiction is generally limited to matters presented to the trial court. Courts may, where justice requires, review issues that were not first raised at trial. *McDowell Mountain Ranch Land Coal. v. Vizcaino*, 190 Ariz. 1, 5 (1997) (implying that although issues " not properly raised below" are normally not considered, exceptions for issues of "state-wide importance and significance" may call for "such extraordinary relief").
- Merely mentioning an argument in an appellant's opening brief is insufficient. *Polanco v. Indus. Comm'n*, 214 Ariz. 489, 491-492 n.2, ¶6 (App. 2007).
- Factual assertions in an appellate memorandum without citations to the record can be disregarded. *State v. One Single Family Residence at 1810 East Second Ave., Flagstaff, Ariz.,* 193 Ariz. 1, 2 n.2 (App. 1997). (Disregarding the appellant's statement of facts because it was not supported by appropriate references to the record); *Matter of Estate of Killen*, 188 Ariz. 562, 563 n.1 (App. 1996). (recognizing that an unsworn and unproven assertion in a legal memorandum is not a fact that a court considers); *Woerth v. City of Flagstaff*, 167 Ariz. 412, 420 (App. 1991).
- Because appellate courts "are inclined to decide cases on their merits rather than punish litigants because of counsel's inaction," appellate courts may, on their own initiative, review the evidence in the record. *Drees v. Drees*, 16 Ariz. App. 22, 23 (1971); *accord Clemens v. Clark*, 101 Ariz. 413, 414 (1966).

Deficiencies in Brief/Procedural Deficiencies in Memoranda

- “In Arizona, opening briefs must present significant arguments, supported by authority, setting forth an appellant’s position on the issues raised. Failure to argue a claim usually constitutes abandonment and waiver of that claim.” *State v. Carver*, 160 Ariz. 167, 175 (1989).
- Appellate courts do not "consider evidence offered for the first time on appeal." *State v. Carter*, 216 Ariz. 286, 291, ¶24 (App. 2007) *State v. Varela*, 245 Ariz. 91, 95 n.2, ¶10 (App. 2018); *McDowell Mountain Ranch Land Coalition v. Vizcaino*, 190 Ariz. 1, 5 (1997)
- “Errors not made at the trial court cannot be asserted on appeal." *Trantor v. Fredrikson,* 179 Ariz. 299, 300 (1994).
- Declining to consider facts stated in Appellant's brief that were not supported by citations to the record. *Matter of Estate of Killen*, 188 Ariz. 562, 563 n.1 (App. 1996).
- “It is presumed that a trial judge, aware of the rules of evidence, will not consider inadmissible evidence in making his ruling.” *State v. Fierro*, 166 Ariz. 539, 548, (1990).
- This court cannot be either party’s advocate and cannot search the record to ascertain whether an asserted contention is supported. *Adams v. Valley Nat’l Bank*, 139 Ariz. 340, 343 (App. 1984).
- This court is mindful that Arizona law prefers cases to be decided on the merits rather than on procedural grounds. *Adams v. Valley Nat’l Bank*, 139 Ariz. 340, 342 (App. 1984).
- "It is not incumbent upon the court to develop an argument for a party.” *Ace Auto. Prods., Inc. v. Van Duyne*, 156 Ariz. 140, 143 (App. 1987).
- Recognizing that a court has no obligation to "scour the record, research any legal theory that comes to mind, and serve generally as an advocate for the appellant.” *In re Oleh R. Tustaniwsky,* 758 F.3d 179, 184 (2d Cir. 2014).
- Arguments "offered without elaboration or citation to any . . . legal authority" are not considered on appeal. *In re U.S. Currency in Amount of $26,980.00*, 199 Ariz. 291, 299, (App. 2000); *Ness v. Western Sec. Life Ins. Co.,* 174 Ariz. 497, 503 (App. 1992) (stating that "[a]rguments unsupported by any authority will not be considered on appeal").
- The Court of Appeals found that when the State relied heavily on a mistaken theory, and the trial court did not correct same, it was possible to assume that was the legal theory accepted by the trial court. *State v. Alvarado* 178 Ariz. 539, 543 (App. 1994).

De Novo

- Questions of law, such as the interpretations of statutes, rules, and regulations, are reviewed de novo. *Tornabene v. Bonine ex rel. Arizona Highway Dept.*, 203 Ariz. 326, 332 (App. 2002); *State v. Salazar-Mercado*, 234 Ariz. 590, 592 (2014); *Naslund v. Indus. Comm'n of Ariz.*, 210 Ariz. 262, 264 (App. 2005).
- In a *de novo* review, no deference is owed to the decision under review, regardless of how supported it might have been. *McMurren v. JMC Builders, Inc.,* 204 Ariz. 345, 348 (App. 2003).
- The facts of any case, even in a de novo review, are determined by the trial court. *Miller v. Indus. Comm'n of Ariz.*, 240 Ariz. 257, 259 (App. 2016) (appellate court defers to the trial court for a determination of disputed facts supported by reasonable evidence) Then this court applies an independent standard of review to determine if those facts create a question of law for a de novo review. *McDowell Mountain Ranch Land Coalition v. Vizcaino*, 190 Ariz. 1, 5 (1997).
- Mixed questions of fact and law are also reviewed de novo. *State v. Bonillas*, 197 Ariz. 96, 96 (App. 1999).
- Review of the granting of a motion to dismiss under Arizona Rules of Civil Procedure 12(b)(6) is de novo. *Coleman v. City of Mesa*, 230 Ariz. 352 (2012). The corresponding Motions to Dismiss are governed by the JCRCP Rule 116(a)(2) and Arizona Rules of Civil Procedure Rule 12(d).
- The calculation of the amount of prejudgment interest is a matter of law reviewed *de novo*. *Dawson v. Withycombe*, 216 Ariz. 84, 113, ¶ 99 (App. 2007).
- Denial of a motion to compel arbitration is reviewed de novo. *Sun Valley Ranch 308 Ltd. v. Robson,* 231 Ariz. 287, 291, ¶ 9 (App. 2012); *National Bank of Ariz. v. Schwartz*, 230 Ariz. 310, 311, ¶ 4 (App. 2012); *City of Tucson v. Clear Channel Outdoor, Inc.,* 218 Ariz. 172, 178, ¶ 5 (App.2008) (statutory construction is a matter of law); *Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, 593, ¶ 9 (App.2009) (contract interpretation is a matter of law).
- This Court reviews de novo the sufficiency of the evidence to support a conviction. *State v. Meeds*, 244 Ariz. 454, 460 (App. 2018).

Constitutional issues

- Constitutional issues are reviewed de novo. *State v. Moody,* 208 Ariz. 424, 445 (2004). *In re Marriage of Friedman & Roels*, 244 Ariz. 111, 114, ¶11 (2018) ("We review… constitutional issues de novo."); *Hall v. Elected Officials' Ret. Plan*, 241 Ariz. 33, 38, (2016).

- The determination of whether a charge is duplicitous is a legal question to be reviewed de novo by the appellate court. *State v. Ramsey*, 211 Ariz. 529, 535 ¶ 5 (App. 2005) (citing *State v. Carrasco*, 201 Ariz. 220 ¶ 10 (App. 2001)).
- Determinations of whether the jury was properly instructed are reviewed de novo. *State v. Orendain*, 188 Ariz. 54, 56 (1997) (citing *United States v. Sterner*, 23 F.3d 250, 252 (9th Cir. 1994)).
- “We will not reach a constitutional question if a case can be fairly decided on non-constitutional grounds.” *R.L. Augustine Const. Co., Inc., v. Peoria Unified School Dist. No. 11*, 188 Ariz. 368, 370 (1997).
- Outlining avoidance factors appellate courts apply when approaching multiple issues on appeal, including avoiding constitutional issues unnecessary to the appeal and avoidance of overbroad statutory interpretations that can result in a constitutional conflict. *Hayes v. Cont’l Ins. Co.*, 178 Ariz. 264, 272-73 (1994); *Mountain Sales Tel. & Tel. Co. v. Ariz. Corp. Comm’n*, 160 Ariz. 350, 354 (1989).
- “We avoid [the appellant’s] constitutional arguments and decide the present case on a narrow basis.” *Falcone Brothers & Assoc., Inc., v. City of Tucson*, 240 Ariz. 482, 487 ¶ 11 (App. 2016).
- “Courts should decide cases on non-constitutional grounds if possible, avoiding resolution of constitutional issues, when other principles of law are controlling and the case can be decided without ruling on the constitutional questions.” *U.S. Currency in the Amount of $315,900.00*, 183 Ariz. 208, 211 (App. 1995).
- Holding that “because trial court incorrectly allowed inadmissible evidence over . . . objection, [review was] for harmless error.” *State v. Hardwick*, 183 Ariz. 649, 653 (App.1995).
- “Error, be it constitutional or otherwise, is harmless if we can say, beyond a reasonable doubt, that the error did not contribute to or affect the verdict”. *State v. Bible*, 175 Ariz. 549, 588 (1993)(*citing State v. Lundstrom*, 161 Ariz. 141, 150 & n. 11 (1989).
- Violations of a party’s due process rights that are raised at trial are reviewed for harmless error. *State v. Henderson*, 210 Ariz. 561, 564 (2005).

Statutory Interpretation

- The validity and enforceability of a contract and arbitration clause are mixed questions of fact and law, subject to de novo review. *Estate of DeCamacho ex rel Guthrie v. La Solana Care & Rehab, Inc.*, 234 Ariz. 18, 20, ¶ 9 (App. 2014).
- When construing statutory meaning, Arizona courts give effect to the drafter’s intent. The single best indicator of that intent is a statute’s plain language. If that language is unambiguous, courts apply it without resorting to further

interpretative principles. *Glazer v. State*, 244 Ariz. 612, 614, ¶¶ 9–10 (2018). This court must take the plain meaning of a statute when it is clear on its face. *State ex rel. Montgomery v. Woodburn ex rel. County of Maricopa*, 231 Ariz. 215, 216, ¶ 5 (App. 2012) ("When interpreting a statute, we follow the rules of statutory construction and first look to the statutory language"). *State v. Williams*, 175 Ariz. 98, 100 (1993); *Patterson v. Mahoney*, 219 Ariz. 453, 456, ¶ 9 (App. 2008) ("If the language is clear and unequivocal, it is determinative") (internal quotation omitted).

- A statute's plain language is ambiguous when it is "open to multiple reasonable interpretations" and "when its meaning is not evident after examining the statute's text as a whole or considering statutes relating to the same subject or general purpose." *Glazer v. State*, 244 Ariz. 614, ¶ 12 (2018).
- A court interprets an ambiguous statute by considering "the statute's history, context, consequences, and purpose." *Gordon v. Arizona Registrar of Contractors*, 247 Ariz. 146, 149, ¶ 8 (App. 2019) (internal quotation omitted).
- "We review de novo a trial court's ruling on a Rule 20 motion." *State v. Boyston*, 231 Ariz. 539, 551, (2013)(*citing State v. West*, 226 Ariz. 559, 551 ¶ 59 (2011).
- "Whether acts which resulted in a conviction in another state would violate Arizona law is a question we review de novo." *State v. Colvin*, 231 Ariz. 269, 271 ¶ 5 (App. 2013) (citing *State v. Heath*, 198 Ariz. 83 ¶ 4 (2000)).
- "We review the interpretation of court rules de novo and apply principles of statutory construction when doing so." *State v. Vargas*, 249 Ariz. 186, 189 ¶9, (2020); *quoting State v. Winegardner*, 243 Ariz. 482, 484 ¶ 5(2018).
- Arizona courts "construe statutes to give effect to the legislature's intent. The best indicator of that intent is the statute's plain language and when that language is unambiguous, [courts] apply it without resorting to secondary statutory interpretation principles." *Glazer v. State*, 244 Ariz. 612, 614 (2018) (cleaned up).
- "If the statute is subject to only one reasonable interpretation" courts apply it without resorting to further interpretative principles. *Arizona Citizens Clean Elections Comm'n v. Brain,* 234 Ariz. 322, 325, ¶ 11 (2014).
- It is only "when the body of an act is ambiguous in its meaning, we may take into consideration the title." *Garrison v. Luke*, 52 Ariz. 50, 56 (1938).
- We attempt to determine legislative intent by interpreting the statute as a whole, and consider "the statute's context, subject matter, historical background, effects and consequences, and spirit and purpose." *Calik v. Kongable*, 195 Ariz. 496, 500 ¶ 16 (1999).

- "[T]he best and most reliable index of a statute's meaning is its language and, when the language is clear and unequivocal, it is determinative of the statute's construction." *State ex rel. Montgomery v. Harris*, 237 Ariz. 98, 100 ¶ 8 (2014); *quoting State v. Hansen, 215 Ariz*. 287, 289 ¶ 7 (2007).
- "'We construe statutes to give effect to the legislature's intent." *State ex rel. DES v. Pandola*, 243 Ariz. 418, 419 ¶ 6 (2018) (internal quotation marks omitted).
- "The best indicator of that intent is the statute's plain language … and when that language is unambiguous, we apply it without resorting to secondary statutory interpretation principles." *SolarCity Corp. v. Ariz. Dep't of Revenue*, 243 Ariz. 477, 480 ¶ 8 (2018); *See also Glazer v. State*, 244 Ariz. 612, 614 (2018)

Abuse of Discretion

- The trial court's factual findings must be accepted on appeal unless they are clearly erroneous. Factual findings are not clearly erroneous if substantial evidence supports them, and [s]ubstantial evidence is evidence which would permit a reasonable person to reach the trial court's result. *Davis v. Zlatos*, 211 Ariz. 519, 523-24 ¶ 18 (App. 2005) (internal quotations and citations omitted). The testimony of a single witness, if believed by the trial court, is sufficient proof to sustain the judgment. Cf. *State v. Montano*, 121 Ariz. 147, 149 (App. 1978) ("one witness, if relevant and credible, is sufficient to support a conviction").
- "Implied in every judgment, in addition to express findings made by the [trial] court, is any additional finding that is necessary to sustain the judgment, if reasonably supported by the evidence, and not in conflict with the express findings." *Coronado Co., Inc. v. Jacome's Dept. Store, Inc.*, 129 Ariz. 137, 139 (App. 1981).
- This Court reviews the trial court's judgment regarding admission of evidence for an abuse of discretion. *State v. Stanley*, 156 Ariz. 492, 494 (App. 1988).
- Even if the trial court's reasoning was incorrect, but the ruling was correct, it will be upheld. *State v. Harris*, 152 Ariz. 150, 151 (App. 1986).
- *State v. Windsor*, 224 Ariz. 103, 104, ¶4 (App. 2010)("We will not reverse a conviction unless the state has failed to present substantial evidence of guilt").
- "We will reverse a defendant's convictions only if 'there is a complete absence of probative facts to support [the jury's] conclusion. " *State v. Lopez*, 230 Ariz. 15, 17 (App. 2012) (internal quotation marks and citation omitted).
- Although a mistake of law can constitute an abuse of discretion, *State v. Bernstein,* 237 Ariz. 226, 228 ¶ 9 (2015), an appellant must show prejudice from any non-structural trial error before this Court can find the trial court abused its

discretion with respect to an evidentiary ruling. *State v. Hudson,* 152 Ariz. 121, 124 (1986); *State ex rel. Montgomery v. Miller,* 234 Ariz. 289, 297 (App. 2014).

- "When considering whether a verdict is contrary to the evidence, this court does not consider whether it would reach the same conclusion as the jury or court, but whether there is a complete absence of probative facts to support its conclusion." *State V. Mauro* 159 Ariz. 186, 206 (1988).
- Error is harmless if an appellate court can conclude beyond a reasonable doubt that the error did not contribute to or affect the verdict. *State v. Lundstrom*, 161 Ariz. 141, 150 (1989) (citing *State v. McVay*, 127 Ariz. 450, 453 (1981)).
- "[W]e review the trial court's choice of remedy for the violation of [a defendant]'s rights for an abuse of discretion." *State v. Rosengren*, 199 Ariz. 112, 116 (App. 2000) (citing *State v. Pecard*, 196 Ariz. 371, 380 (App. 1999)).
- "The trial court has broad discretion admitting evidence, and we will not disturb its decision absent clear abuse of discretion and prejudice." *Pima Cnty. v. Gonzalez*, 193 Ariz. 18, 22 ¶ 14 (App. 1998) (citing *Thompson v. Better-Bilt Aluminum Prod. Co.*, 187 Ariz. 121 (App. 1996)).
- This Court reviews an award of attorneys' fees for an abuse of discretion. *Geller v. Lesk*, 230 Ariz. 624, 627 ¶ 8 (App. 2012). It views the facts in the light most favorable to upholding the trial court's ruling. *Tucson Estates Prop. Owners Ass'n, Inc. v. McGovern*, 239 Ariz. 52, 54 ¶ 3 (App. 2016). "An abuse of discretion occurs when there is no evidence to support a holding, or the [trial] court commits an error of law when reaching a discretionary decision." *Dowling v. Stapley*, 221 Ariz. 251, 266 ¶ 45 (App. 2009). Trial courts are presumed to know the law and apply it when making their determinations. *Fuentes v. Fuentes*, 209 Ariz. 51, 58 ¶ 32 (App. 2004).
- When reviewing the trial court's ruling for an abuse of discretion, "where there is room for two opinions, the action is not arbitrary or capricious if exercised honestly, and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." *Tucson Pub. Schools, Dist. No. 1 of Pima Cnty. v. Green*, 17 Ariz. App. 91, 94 (1972).
- When reviewing a trial court judgment reached after a bench trial, the reviewing court views "the evidence in a light most favorable to sustaining the verdict." *Castro v. Ballesteros-Suarez*, 222 Ariz. 48, 51–52 (App. 2009). This Court does not "reweigh the evidence or substitute [its] evaluation of the facts" for that of the trial court.
- If the testimony supports two inconsistent factual conclusions, there is substantial evidence for whichever conclusion is made. *Garcia v. Ariz. St. Liquor*

Bd., 21 Ariz.App 456 (1974); *Petras v. Ariz. St. Liquor Bd.*, 129 Ariz. 449, 452 (App. 1981).

- A "court abuses its discretion when it makes an error of law in reaching a discretionary conclusion or when the record, viewed in the light most favorable to upholding the trial court's decision, is devoid of competent evidence to support the decision." *Michaelson v. Garr*, 234 Ariz. 542, 544 (App. 2014).

Credibility

- "[T]he trial court, not this court, determines the credibility of the witnesses". *State v. Estrada*, 209 Ariz. 287, 288 (App. 2004).
- Trial courts must determine credibility issues. *Estate of Zaritsky*, 198 Ariz. 599, 601, ¶5 (App. 2000).
- It is the function of trial courts to determine "witnesses' credibility and the weight to give to conflicting evidence." *Gutierrez v. Gutierrez*, 193 Ariz. 343, 347-48 ¶13 (App. 1999).
- "The weight to be given conflicting evidence is for the trier of fact, not a reviewing court." *United Cal. Bank v. Prudential Ins. Co. of Am.,* 140 Ariz. 238, 287 (App. 1983).
- "It is the function of the trial court, not the appellate court, to judge the credibility of witnesses and the reviewing court is bound by that decision." *State v. Christopher*, 10 Ariz. App. 169, 172 (1969).
- The trial court was in the best position to determine the credibility of the witnesses. "We do not reweigh evidence or determine the credibility of witnesses." *Clark v. Kreamer*, 243 Ariz. 272, 276, ¶14 (App. 2017).
- "The credibility of witnesses and the weight to be given to their testimony, whether the witness be lay or expert, is a question for the determination of the jury." *State v. Tucker*, 113 Ariz. 475, 477 (1976).
- "A review and a weighing of the possible effect of the evidence… is not within our domain." *City of Glendale v. Bradshaw*, 114 Ariz. 236, 238 (1977).

Deference to Trial Court

- It is a long-standing principle of law that the appellate court does not stand as the trier of fact. *Clark v. Kreamer*, 243 Ariz. 272, 276, ¶14 (App. 2017).
- Thus, this Court "does not reweigh the evidence to decide if it would reach the same conclusions as the trier of fact." Reviewing the sufficiency of the evidence does not mean this Court substitutes its judgment for that of the trial court. *State v. Barger*, 167 Ariz. 563, 568 (App. 1990).

- This Court must presume that the trial court was "aware of the relevant law and applie[d] it correctly in arriving at its rulings." *State v. Moody*, 208 Ariz. 424, 443 (2004); *Fuentes v. Fuentes*, 209 Ariz. 51, 58 (App. 2004). *State v. Guerra,* 161 Ariz. 289, 293 (1989).
- The purpose of requiring a party to make a specific objection in the trial court proceeding gives that court an opportunity to rule before an appellant claims error on appeal. *Palmer v. City of Phoenix*, 242 Ariz. 158, 165, ¶26 (App. 2017).
- Whether a court should review a question raised here for the first time depends upon the facts and circumstances disclosed by the particular record. It undoubtedly has the power but ordinarily will not exercise it. *Town of South Tucson v. Board of Sup'rs of Pima County*, 52 Ariz. 575, 582 (1938).
- "We view the evidence in the light most favorable to upholding the trial court's decision" *Double AA Builders, Ltd. v. Grand State Const. L.L.C.*, 210 Ariz. 503, 506, ¶9 (App. 2005).
- In all criminal prosecutions, the state has the burden of proof beyond a reasonable doubt. *State v. Rhome*, 235 Ariz. 459, 460 (App. 2014).
- The trial court has "broad discretion" regarding its management of the manner in which trial will be conducted and has a duty to exercise that discretion." *State v. Wassenaar*, 215 Ariz. 565, 573 (App. 2007); *State v. Cornell*, 179 Ariz. 314, 332(1994); *United States v. Johnson*, 618 F.2d 60, 62 (9th Cir.1980); *Pool v. Superior Court,* 139 Ariz. 98, 103–04 (1984).
- The trial court was under no obligation to believe only what the officers testified. A trier of fact may accept all, some, or none of what a witness says. *Callender v. Transpacific Hotel Corp.,* 179 Ariz. 557, 562 (App. 1993); *Smethers v. Campion*, 210 Ariz. 167, 172 (App. 2005).
- "The trial court exercises considerable discretion in determining the proper extent of cross-examination, and we will not disturb the court's ruling absent a clear showing of prejudice." *State v. Doody*, 187 Ariz. 363, 374 (App. 1996).

Evidence

- This court may not consider evidence not provided to the trial court. *MacMillan v. Schwartz*, 226 Ariz. 584, 591, ¶33 (App. 2011); *State v. Conner,* 249 Ariz. 121, ¶ 22 (App. 2020.)
- In Arizona, "the law makes no distinction between circumstantial and direct evidence." The burden of proof may be satisfied with other evidence. *State v. Harvill*, 106 Ariz. 386, 389 (1970).

Sufficiency of Evidence

- "When the sufficiency of evidence to support a judgment is questioned on appeal, an appellate court will examine the record only to determine whether substantial evidence exists to support the action of the court below." *Whittemore v. Amator*, 148 Ariz. 173, 175 (1986).
- "Even though conflicting evidence may exist, we affirm the trial court's ruling because substantial evidence supports it." *Double AA Builders, Ltd. v. Grand State Constr. L.L.C.*, 210 Ariz. 503, 511 (App. 2005).
- This court must presume that the trial court found every fact necessary to support its judgment. *Cross v. Elected Officials Ret. Plan,* 234 Ariz. 595, 607, ¶ 44 (App. 2014).
- "A review and a weighing of the possible effect of the evidence... is not within our domain." *City of Glendale v. Bradshaw*, 114 Ariz. 236, 238 (1977).
- "We will not reweigh the evidence or substitute our evaluation of the facts." *Castro v. Ballesteros-Suarez*, 222 Ariz. 48, 52, ¶11 (App. 2009).
- "We do not reweigh the evidence or determine the credibility of witnesses." *Brown v. U.S. Fid. & Guar. Co.*, 194 Ariz. 85, 92, ¶36 (App. 1998).
- Evidence is substantial if it is sufficient to support a conclusion "even if the record also supports a different conclusion." *JHass Group L.L.C. v. Arizona Dep't of Fin. Inst.,* 238 Ariz. 377, 387, ¶37 (App. 2015).
- "If two inconsistent factual conclusions could be supported by the record, then there is substantial evidence to support an administrative decision that elects either conclusion." *DeGroot v. Arizona Racing Comm'n,* 141 Ariz. 331, 336 (App. 1984).
- Substantial evidence is evidence that "could lead reasonable persons to find the ultimate facts sufficient to support [the decision under review]." *Gonzales v. City of Phoenix*, 203 Ariz. 152, 153, ¶2 (2002).
- This court does not substitute its judgment for that of the trial court if there is sufficient evidence for that decision. *Arnold v. Knettle, 10 Ariz. App. 509, 511 (1969*) ("if the trial court was correct in its ruling for any reason, the reviewing court is bound to affirm"); *Glaze v. Marcus, 151 Ariz. 538, 540 (App. 1986)* (appellate court "will affirm the trial court's decision if it is correct for any reason, even if that reason was not considered by the trial court"); *City of Tucson v. Morgan, 13 Ariz. App. 193, 195 (1970)* ("if the trial court based its ruling upon wrong reasons but was correct in its ruling for any reason, the appellate court is bound to affirm").

Reasonable Person Standard

- The “reasonable person” standard in the harassment statute is a direction to courts not to issue injunctions merely because a particular plaintiff has a negative reaction to the actor’s conduct. Instead, it directs courts to use an objective standard. *State v. Brown*, 207 Ariz. 231, 235, ¶ 10 (App. 2004).
- Whether a person’s conduct is “objectively reasonable” is typically considered a question of law and reviewed *de novo* (reviewing *de novo* whether officers’ reliance on search warrant was “objectively reasonable”). *Cf. United States v. Johns*, 948 F.2d 599, 602 (9th Cir. 1991).
- “Objective reasonableness is a question of law reviewed de novo.” *United States v. Stewart*, 93 F.3d 189, 192 (5th Cir. 1996).
- “Because the court's findings are supported by the record and reflect no errors, we review de novo whether it was objectively reasonable for the police to believe that Nelson had the authority to consent to the search.” *State v. O'Donnell*, 210 A.3d 815, 823 (Me. 2019).
- Even if an alternative conclusion could be reached, if the one reached by the trial court is reasonable, this court will not substitute that judgment for its own. That this court may have reached a different conclusion based on the facts presented does not make the ruling erroneous. *Ontiveros v. Arizona Department of Transportation*, 151 Ariz. 542, 543 (App.1986).
- Even when two inconsistent factual conclusions could be supported by the record, there is substantial evidence to support either conclusion. *Kuznicki v. Arizona Department of Transportation,* 152 Ariz. 381, 382 (App.1986).

Judicial Bias

- In an adversarial process, it is not uncommon for the party who does not prevail to believe the trial court might have preferred the prevailing side. But in Arizona, such a feeling is insufficient to raise the claim of judicial bias. There is a legal presumption of the trial judge’s impartiality, and any party seeking to impeach that impartiality must prove by a preponderance of the evidence facts that overcome that presumption. *State v. Carver*, 160 Ariz. 167, 172 (1989). (“Bare allegations of bias and prejudice, unsupported by factual evidence, are insufficient to overcome the presumption of impartiality . . .”).
- “[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion.” *Liteky v. United States*, 510 U.S. 540, 555 (1994); *see also State v. Greenway*, 170 Ariz. 155, 162 (1991) (“It is generally conceded that the bias and prejudice necessary to disqualify a judge must arise from an extra-judicial source ....”).

- To succeed on a claim of bias, a defendant needs to show that the judge was in fact biased by a preponderance of the evidence. *State v. Ramsey,* 211 Ariz. 529, 541 (App. 2005).
- Expressions of "impatience, dissatisfaction, annoyance, and even anger" do not meet the burden of judicial bias. *Liteky v. United States*, 510 U.S. 540, 555 (1994). Rather, "a specific basis for the claim" must be articulated. *State v. Cropper*, 205 Ariz. 181, 185 (2003).

Failure to swear-in witness

- Arizona law is consistent with most jurisdictions finding that a party may waive their right to object to a nonexistent or defective oath. ". . . irregularity in failing to swear a witness is waived where he is permitted to testify without objection. This is because an alleged error in swearing can easily be cured if the objection is raised at the time. *State v. Navarro*, 132 Ariz. 340, 342 (App. 1982).
- "It is generally held that where a witness testifies without having been sworn, the verdict will be set aside if the error is not discovered until after the verdict. Where, however, a witness is permitted to testify without having been previously sworn, and that fact is known at the time, the defect must be taken advantage of at once, and a failure to do so is such acquiescence in the testimony as will preclude objection after verdict." *People v. Duffy*, 110 Cal. App. 631, 294 P. 496 (1930).

Attorney fees and costs

- Appellee's Rule 13 filing also "must disclose the terms of any fee agreement for the services for which the claim is made."

Dismissing an Appeal that is not Handled as a Procedural Motion

Case References

No Legal Argument Made

- As a threshold matter, issues outside the scope of the trial court are not considered on appeal. *McDowell Mountain Ranch Land Coalition v. Vizcaino*, 190 Ariz. 1, 5 (1997) (stating that issues not raised in the proceedings below are not considered on appeal).
- Issues not raised in the proceedings are not considered on appeal. *National Brojer Assocs., Inc. v. Marlyn Nutraceuticals, Inc.,* 211 Ariz. 210, 216, ¶30 (App. 2005).
- "As a rule, arguments not made at the trial court cannot be asserted on appeal." *City of Tempe v. Fleming*, 168 Ariz. 454, 456 (App. 1991).

Lack of Jurisdiction

- An appellate court has an independent duty to determine its own jurisdiction. *Baker v. Bradley*, 231 Ariz. 475, 478 ¶ 8 (App. 2013). The right to appeal is strictly a creature of statute and court rule. *Svendsen v. Arizona Dept. of Transp., Motor Vehicle Div.*, 234 Ariz. 528, 531, ¶ 5 (App. 2014). A tardy filing results in a lack of subject-matter jurisdiction and the appellant's loss of her right to appeal. *M-11 Limited P'ship v. Gommard*, 235 Ariz. 166, 168 ¶ 2 (App. 2014). Parties cannot confer such jurisdiction on this Court by not objecting to the lack of jurisdiction. *Chang v. Siu*, 234 Ariz. 442, 446 ¶ 13 (App. 2014) ("[P]arties may not by agreement create appellate jurisdiction where it otherwise would not exist.").
- This Court has an independent duty to determine its jurisdiction over matters on appeal. *Ghadimi v. Soraya*, 230 Ariz. 621, 622, ¶ 7 (App. 2012). Parties cannot confer such jurisdiction on this Court by not objecting to the lack of jurisdiction. *Chang v. Siu*, 234 Ariz. 442, 446, ¶ 13 (App. 2014) ("[P]arties may not by agreement create appellate jurisdiction where it otherwise would not exist.").
- This court's appellate jurisdiction is defined, and limited, by the legislature. *Brumett v. MGA Home Healthcare, L.L.C.*, 240 Ariz. 420, 426, ¶ 4 (App. 2016). A dismissal for lack of prosecution is a dismissal without prejudice. *Ariz. R. Civ. P. 38.1(d)(2).* Generally, an order dismissing a case without prejudice is neither final nor appealable because "the plaintiff can refile the action and therefore 'ha[s] nothing to appeal.'" *Workman v. Verde Wellness Ctr., Inc.*, 240 Ariz. 597, 600, ¶ 7 (App. 2016) (*citation omitted*). However, at least one exception to that principle exists, as recognized by our Supreme Court long ago. *State v. Boehringer*, 16 Ariz. 48, 51 (1914) (stating that an order dismissing a case without

prejudice is not a final determination on the merits but that an appeal may be pursued "under [the 1913 Civil Code] when such order in effect determines the action and prevents final judgment from which an appeal might be taken").

- A notice of appeal is premature if it is filed before the trial court enters a final judgment or order. *Ghadimi v. Soraya, 230 Ariz. 621, 622, ¶ 8 (App. 2012)*. "If a notice of appeal is premature, [the appellate court] lack[s] jurisdiction to hear the action unless the narrow exception created" by the Arizona Supreme Court is applicable. *Id.* (*citing Barassi v. Matison*, 130 Ariz. 418 (1981)). The *Barassi* exception only applies when "no decision of the court could change and the only remaining task is merely ministerial." *Id.*; *quoting Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 415, ¶ 37 (2006). There is no doubt that the *Barassi* exception is "limited." *Craig* v. *Craig*, 227 Ariz. 105, 106, ¶ 9 (2011).

Untimely

- The more typical situation involving "untimely" filed notices of appeals are those notices that are filed too late. *M-11 Limited P'ship v. Gommard*, 235 Ariz. 166, 168, ¶ 2 (App. 2014). However, the Arizona Supreme Court also instructs that "prematurely" filed notices of appeals cannot confer jurisdiction on the appellate court. *Craig v. Craig*, 227 Ariz. 105, 107, ¶ 13 (2011) ("In *all* other cases, a notice of appeal filed in the absence of a final judgment, or while any party's time-extending motion is pending before the trial court, is 'ineffective' and a nullity.") (*emphasis in original*). Other than dismissing an untimely appeal, any action taken by this Court without jurisdiction also would be a nullity and void. *Edwards v. Young*, 107 Ariz. 283, 284 (1971); *Martin v. Martin*, 182 Ariz. 11, 15 (App. 1994). That a party is self-represented does not excuse any lack of compliance with applicable court rules. *Flynn v. Campbell*, 243 Ariz. 76, 83–84 ¶ 24 (2017).
- "A decision becomes moot for purposes of appeal where as a result of a change of circumstances before the appellate decision, action by the reviewing court would have no effect on the parties." *Hormel v. Maricopa Cnty.,* 224 Ariz. 454, 460(App. 2010)(*citing Vinson v. Marton & Assocs*., 159 Ariz. 1, 4 (App.1988); *Ariz. State Bd. of Dirs. for Junior Colls. v. Phoenix Union High Sch. Dist.*, 102 Ariz. 69, 73 (1967).
- The timely filing of a notice of appeal is a jurisdictional prerequisite for appellate review. *In re Marriage of Dougall,* 234 Ariz. 2, 5, ¶ 7 (App. 2013).
- As a matter of judicial restraint, Arizona courts will not "issue advisory opinions, address moot cases, or deal with issues that have not been fully developed by true adversaries." *Home Builders Ass'n of Cent. Ariz. v. Kard,* 219 Ariz. 374, ¶ 9 (App. 2008); *City of Tucson v. Pima County,* 199 Ariz. 509, ¶ 11 (App. 2001) (standing in Arizona based on judicial restraint, not jurisdictional rule). Similarly, a case

becomes moot if an event occurs that ends the underlying controversy and transforms the litigation into "an abstract question which does not arise upon existing facts or rights." *Contempo–Tempe Mobile Home Owners Ass'n v. Steinert,* 144 Ariz. 227, 229 (App. 1985); *Arpaio v. Maricopa Cty. Bd. of Supervisors,* 225 Ariz. 358, ¶ 7 (App. 2010). *Workman v. Verde Wellness Ctr., Inc.*, 240 Ariz. 597, 603 (App. 2016).

Appeals from Non-Substantive Rulings

Case References

Motions to Dismiss

- Justice Court Rules of Civil Procedure (“JCRCP”) permit granting a motion to dismiss only on “terms and conditions that the court deems are fair and proper.” *JCRCP 144(d)*.
- The superior court’s review is limited to whether the trial court properly dismissed the lawsuit under governing Arizona law. Rule 4(e)(1).
- Dismissal of an action at the pleadings stage is only appropriate when “as a matter of law plaintiff would not be entitled to relief under any interpretation of the facts susceptible of proof.” *Coleman v. City of Mesa*, 230 Ariz. 352, 356 (2012)(*citing Fid. Sec. Life Ins. Co v. State Dep’t of Ins.,* 191 Ariz. 222, 224 (1998).
- Dismissals without prejudice are not appealable orders. “The trial court's denial of [a party’s] motion to dismiss [is] an interlocutory, non-appealable order.” *Nataros v. Superior Court of Maricopa County,* 113 Ariz. 498, 499 (1976); A.R.S. § 12-2101.
- “Because it is not a final judgment, ‘[a] dismissal without prejudice is not appealable and for that reason alone [an] appeal of [such an] order should be dismissed.’” *L.B. Nelson Corp. of Tucson v. W. Am. Fin. Corp.,* 150 Ariz. 211, 217 (App.1986).
- This court's appellate jurisdiction is defined, and limited, by the Legislature. *Brumett v. MGA Home Healthcare, L.L.C.*, 240 Ariz. 420, 426, ¶ 4 (App. 2016). A dismissal for lack of prosecution is a dismissal without prejudice. *Ariz. R. Civ. P. 38.1(d)(2).* Generally, an order dismissing a case without prejudice is neither final nor appealable because “the plaintiff can refile the action and therefore ‘ha[s] nothing to appeal.’” *Workman v. Verde Wellness Ctr., Inc.*, 240 Ariz. 597, 600, ¶ 7 (App. 2016) (*citation omitted*). However, at least one exception to that principle exists, as recognized by our Supreme Court long ago. *State v. Boehringer*, 16 Ariz. 48, 51 (1914) (stating that an order dismissing a case without prejudice is not a final determination on the merits but that an appeal may be pursued “under [the 1913 Civil Code] when such order in effect determines the action and prevents final judgment from which an appeal might be taken”).

Motions for Summary Judgment

- This Court reviews a grant of summary judgment de novo to determine “whether there are any genuine issues of material fact and whether the trial court erred in applying the law”. *Wells Fargo Bank, N.A. v. Allen*, 231 Ariz. 209, 213, ¶ 14 (App.

2012). In so doing, this Court views "the facts in the light most favorable to the non-moving party." *Id*.

- If the party moving for summary judgment meets its "burden of demonstrating the absence of a genuine issue of material fact as to each element of its claim and each defense," the burden then "shifts to the opposing party to produce sufficient competent evidence to show that there is an issue of material fact as to one or more elements of the claim or defense at issue." *Vig v. Nix Project II P'ship*, 221 Ariz. 393, 396 ¶ 11 (App. 2009).
- "In determining whether the court properly granted summary judgment, we apply the same standard a trial court uses in ruling on a summary judgment motion." *Modular Mining Systs., Inc. v. Jigsaw Technologies, Inc.*, 221 Ariz. 515, 518 ¶ 9 (App. 2009).
- "[A] plaintiff may only obtain summary judgment if it submits undisputed admissible evidence that would compel any reasonable juror to find in its favor on every element of its claim." *Comerica Bank v. Mahmoodi*, 224 Ariz. 289, 293 ¶ 20 (App. 2010).
- Where the facts are undisputed, this Court is free to draw its own legal conclusions and substitute its judgment for that of the trial court. *Gries v. Plaza Del Rio Mgmt. Corp.*, 236 Ariz. 8, 12 ¶ 15 (App. 2014); *SAL Leasing, Inc. v. State ex rel. Napolitano*, 198 Ariz. 434, 438 ¶ 13 (App. 2000). This Court reviews *de novo* the trial court's interpretation of court rules. *Cuellar v. Vettorel*, 235 Ariz. 399, 401 ¶ 4 (App. 2014).
- A trial court may grant summary judgment to a party when that party establishes with admissible evidence that "the record before the court shows that there is no genuine issue as to a material fact, and that the moving party is entitled to judgment as a matter of law." Arizona *Justice Court Rules of Civil Procedure* ("JCRCP")129(d)*; Tilley v. Delci*, 220 Ariz. 233, 236, ¶ 7 (App. 2009). *Cf. Rule 56(a), Arizona Rules of Civil Procedure.*
- Once the moving party makes this showing with admissible evidence, the respondent must demonstrate the existence of a disputed material fact by pointing to the existing record or offering their own admissible evidence. *JCRCP Rule 129(c)* (non-movant response must include a statement of facts supported by admissible evidence). *Cf. Civil Rule 56(e); Ruelas v. Staff Builders Pers. Services, Inc.,* 199 Ariz. 344, 346, ¶ 7 (App. 2001)
- "[U]ncontroverted evidence favorable to the movant, and from which only one inference can be drawn, will be presumed to be true provided such evidence would be admissible at a trial on the merits." *Pitzen's Wig Villa v. Pruitt*, 11 Ariz. App. 332, 334 (1970).

- Facts must be viewed most favorably to the party against whom summary judgment was entered. *United Bank of Arizona v. Allyn*, 167 Ariz. 191, 193, (App. 1990); *State ex rel. Corbin v. Challenge, Inc.*, 151 Ariz. 20 (App.1986). "Mere speculation or insubstantial doubt as to the facts will not suffice, but where the evidence or inferences would permit a jury to resolve a material issue in favor of either party, summary judgment is improper." *Allyn* at 195; *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574(1986).
- "In ruling on a party's motion for summary judgment, the trial court should consider those facts that would be admissible in evidence . . . [A]n unsworn and unproven assertion in a memorandum is not such a fact." *In re 1996 Nissan Sentra*, 201 Ariz. 114, 117 ¶ 6 (App. 2001) (citation and internal quotations omitted).
- Even if no response is filed, a motion for summary judgment cannot be granted unless the moving party establishes both the absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. *Schwab v. Ames Constr*., 207 Ariz. 56, 59 ¶ 15 (App. 2004) ("A failure to respond to a motion for summary judgment…cannot, by itself, entitle the moving party to summary judgment.").
- Arizona law requires a jury or other trier of fact to determine what is reasonable. When there are supportable differences in opinion on any issue, it is not an issue for summary judgment. *McLeod By & Through Smith v. Newcomer*, 163 Ariz. 6 (App. 1989).

Motions to Set Aside Judgment

- This court has no jurisdiction to determine a Motion to Set Aside Judgment but reviews the denial of a Motion to Set Aside Judgment for an abuse of discretion. It is "an abuse of discretion for a trial court to act arbitrarily or make decisions unsupported by fact or law." *Norwest Bank (Minnesota), N.A. v. Symington,* 197 Ariz. 181, 184, ¶ 11 (App. 2000).
- Thus, the scope of the appeal is limited to the issues raised in the motion to set aside. *Goglia v. Bodnar*, 156 Ariz. 12, 16 (App. 1987).
- "The scope of an appeal from a denial of a [motion to set aside a judgment] is restricted to the questions raised by the motion to set aside and does not extend to a review of whether the trial court was substantively correct in entering the judgment from which relief was sought. *Hirsch v. Nat'l Van Lines, Inc.*, 136 Ariz. 304, 311 (1983). This Court reviews the trial court's decision with respect to such a motion for an abuse of discretion. *Gonzalez v. Nguyen*, 243 Ariz. 531, 533 ¶ 8

(2018). Because a motion to set aside a judgment involves balancing two competing policy goals – deciding cases on their merits and the finality of proceedings – the trial court retains "extensive discretion" when deciding such motions. *Id.* at 534 ¶ 11. Accordingly, this Court will sustain the trial court's decision unless "undisputed facts and circumstances require a contrary ruling." *Sign Here Petitions LLC v. Chavez*, 243 Ariz. 99, 108 ¶ 35 (App. 2017) (internal quotation omitted).

- "In reviewing a trial court's decision on a motion to set aside a judgment this court must determine whether there has been a clear abuse of discretion." Goglia *v. Bodnar,* 156 Ariz. 12, 16 (App.1987). "A court abuses its discretion if it commits an error of law in reaching a discretionary conclusion, it reaches a conclusion without considering the evidence, it commits some other substantial error of law, or 'the record fails to provide substantial evidence to support the trial court's finding.' " *Flying Diamond Airpark, L.L.C. v. Meienberg,* 215 Ariz. 44, 50, ¶ 27 (App.2007) (*quoting Grant v. Ariz. Pub. Serv. Co.,* 133 Ariz. 434, 456 (1982))
- It is the trial court's duty, using its discretion, to determine the credibility of an excusable neglect argument made by Appellant. *Schering Corporation v. Cotlow*, 94 Ariz. 365, 370(1963).

Default Judgments

- It is well established that to justify vacating a default and its judgment, the moving party must show both excusable neglect and a meritorious defense. *Dart v. Valley Nat'l Bank of Ariz.,* 5 Ariz. App. 365, 367(App. 1967); *Wellton-Mohawk Irrigation and Drainage District v. McDonald,* 1 Ariz.App. 508, 509(1965).
- "The trial court has broad discretion in deciding whether to vacate a default judgment, and this court will not disturb the trial court's ruling absent a clear abuse of discretion." *BYS Inc. v. Smoudi*, 228 Ariz. 573, 577(App. 2012), *as amended* (Mar. 13, 2012). This court considers only the Appellants' argument that the Motion was improperly denied. Thus, the scope of the appeal is limited to the issues raised in that Motion. *Goglia v. Bodnar*, 156 Ariz. 12, 16 (App. 1987).
- A default judgment may be vacated "when, but only when, the moving party has made an adequate showing of each of the following elements: (1) that it acted promptly in seeking relief from the default judgment, (2) that its failure to file a timely answer was excusable under one of the six subdivisions of Rule 60(c); and (3) that it had a meritorious defense. *United Imports and Exports, Inc. v. Superior Court*, 134 Ariz. 43, 45 (1982) (*emphasis added*). To vacate a judgment, the trial court must find "some legal justification for the exercise of the power, some

substantial evidence to support it." *United Imports and Exports, Inc. v. Superior Court*, 134 Ariz. 43, 45 (1982)(*citing Richas v. Superior Court, 133* Ariz. 512 (1982).

- Arizona Rule of Civil Procedure 60(b) is identical in substance to JCRCP Rule 141(c).
- "A default judgment may be entered against a party who was served with a complaint, counterclaim, crossclaim, or third-party complaint, and who failed to file an answer or otherwise respond within the time allowed by these rules. [ARCP 55(a), (d)]." *JCRCP Rule 140(a)*.
- "The ten (10) day period [for a party claimed to be in default to file with the court a written answer or other response] begins the day after the application is filed with the court; the ten (10) day period does not include Saturdays, Sundays, or holidays, and no additional time is added for service by mail. [ARCP 55(a)]." *JCRCP Rule 140(d).*
- A default is to be set aside if an Answer is filed, with only one exception: "If the default is not set aside as provided in this section, judgment may only be entered after a default judgment hearing." JCRCP Rule 140(j).

Judgment on the Pleadings

- "After the pleadings have been filed, any party may file a motion for judgment on the pleadings. The motion will be granted if, for purposes of the motion only, all of the allegations in the opposing party's pleadings are considered to be true, and the party who filed the motion would be entitled to judgment on the pleadings in their favor as a matter of law. If matters outside the pleadings are presented to the court, the court will treat the motion as a motion for summary judgment under Rule 129. [ARCP 12(c)]" *JCRCP Rule 128(g)*.
- A court may properly grant a Judgment on the Pleadings if the complaint sets forth a claim for relief and the answer fails to assert a legally sufficient defense. *Walker v. Estavillo*, 73 Ariz. 211 (1952); *Pac. Fire Rating Bureau v. Ins. Co. of North America*, 83 Ariz. 369 (1958).

Evictions

Notes on the Rules

- **Rule 5**- Complaint shall include a copy of Notice, Lease, etc. Often, the trial court transmits the record in a way that is difficult to determine compliance. If you find the Complaint was not compliant, you can remand to dismiss based on insufficiency of the Complaint.
- **Rule 5(f)**- If the Defendant appears at the initial hearing, they waive any objection to form or manner of service unless they assert an objection at the initial hearing. If they raised it at the initial hearing, the trial court must have inquired as that is a defense, and you may need to remand for the trial court to set a hearing with the process server testifying to determine proper service.
- **Rule 8**- Counterclaims. They must have a statutory basis. They also must be in writing. If not, they should have been stricken or dismissed without prejudice. Judgments must also address any counterclaim award, if there is one (or rule that the counterclaim award is zero). Even if the Counterclaim lacked merit, if it is pending without a ruling (it is often ignored during the underlying matter), you may be prohibited from deciding the appeal, as any monetary judgment would necessarily be offset by any award. You cannot assume the counterclaim was offset by any award. You can remand to the trial court to address the counterclaim. Rule 13(c)(2)(F).
- **Rule 11**- Initial appearances. Defendant must enter a plea (much like a criminal proceeding) at this hearing. Rule 11(c)(1). If there was any legal basis for a defense, a trial must be conducted. That burden, however, must be met with proof that is competent and admissible under the Arizona Rules of Evidence. RPEA Rule 11(e)(2) ("All evidence taken at trial, or which is attached as an exhibit to a motion, shall be subject to the Arizona Rules of Evidence.") Often, the trial court sets at trial when the case perhaps should have been dismissed at the initial hearing, or the initial hearing becomes the trial. The Defendant has some trial rights, including requesting a jury trial, at the initial hearing Rule 11(e). The right to a jury trial is not absolute and may be denied. Rule 11(e). Make sure the trial took place per the rules and the Defendant was given the chance to present evidence and address any counterclaims, if not dismissed at the initial hearing etc.
- **Rule 15(a)**- Motions to Set Aside Eviction actions, if they affect possession, are deemed emergency filings and must be filed and decided within 3 days. Often, a Defendant files a Motion to Set Aside Eviction and a NOA at the same time. If there was a Motion to Set Aside filed, make sure that motion was ruled on. Your appeal is then on the Motion to Set Aside, not the substantive underlying issue. (*See* above).

- **Rule 17**- The appeal does not stay the judgment unless you order it to. So, the writ might still be issued (for example if they fail to pay rent during the proceeding), and the person might still have to vacate.

Case References

Burden of Proof

- An eviction proceeding is a civil action with the burden of proof by a preponderance of the evidence on the party seeking possession. *Harvey v. Aubrey*, 53 Ariz. 210, 213–14 (1939). *Aileen H. Char Life Interest v. Maricopa County*, 208 Ariz. 286, 291 (2004).
- The preponderance standard "essentially allocates the risk of error equally between the parties involved." *Gila River Indian Community. v. Dep't of Child Safety*, 238 Ariz. 531, 536–37 (App. 2015)
- Proof by "a preponderance of the evidence" is "proof which leads the trier of fact to find that the existence of the contested fact is more probable than its nonexistence." *William L.,* 211 Ariz. 236, 238 ¶ 6 (App. 2005).

Trial

- The fact that eviction trials are summary in nature does not make them something less than trials. They are "summary" in the sense that the cognizable issues are limited, the time frames are short, and discovery is highly discretionary with the court. Rule 8 (limiting counterclaims); Rule 11(d) (limiting continuances); Rule 10 (disclosure). But this summary nature aside, once it is determined that a trial shall be held, the Rules of Procedure for Eviction Actions envision a trial with all the typical attributes common to trials in our courts. Specifically, the parties have to know they are in a trial.
- Trial procedures commonly include opening statements, presentation of evidence by witnesses, and argument. Rule 12(c). Witnesses must testify under oath. Rule 11(e)(1). Jury trials are available on proper demand. Rule 11(e). The Arizona Rules of Evidence apply to all eviction trials. Rule 11(e)(2). Those rules specifically provide for cross-examination of adverse witnesses. Rule 611(b), Arizona Rules of Evidence.
- The right to cross-examine actual, adverse witnesses is a fundamental trial right, even in civil cases. *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses".) Eviction cases, although summary in nature, must still comport with due process for all parties served.

Material Non-compliance – No Cure Necessary [A.R.S. § 33-1361(A)]

- Landlord has a "duty of due care . . . to a tenant throughout the lease period to maintain premises free from unreasonably dangerous instrumentalities that

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could potentially cause injury." *McLeod By & Through Smith v. Newcomer*, 163 Ariz. 6, 8 (App. 1989) (cleaned up).

Tenant Damages/Retaliation

- The Arizona Landlord and Tenant Act permits an aggrieved party to recover "damages" for violations of different sections of the act. The key to determining the type of damages contemplated is to analyze the type of harm in the setting of a normal residential rental transaction that can reasonably be said to lie within the contemplation of the protections afforded by the Act. *Thomas v. Goudreault*, 163 Ariz. 159, 165 (App. 1989).

Waiver by Accepting Payment [A.R.S. § 33-1371]

- Acceptance of rent which had accrued prior to the time the grounds for forfeiture arose did not affect the liability for such rent and did not operate as a waiver of the landlord's right to forfeit the lease. *Riverside Development Company v. Ritchie,* 103 Idaho 515, 650 (1982).
- Acceptance of rent does not preclude Landlord from moving to evict tenants for their later breach. "Landlord's consent to or approval of any act shall not constitute a continuing consent to or approval of any subsequent act by Tenant." *Purcell v. Williamson*, No. 1 CA-CV 19-0486, 2020 WL 1158657 ¶17 (Ariz. Ct. App. March 10, 2020).

Holdover Tenants- month to month [A.R.S. § 33-342]

- If the lease has expired or is no longer valid, tenant becames a month-to-month tenant. A.R.S. § 33-342 ("When a lessee holds over and retains possession after expiration of the term of the lease without express contract with the owner, the holding over shall not operate to renew the lease for the term of the former lease, but thereafter the tenancy is from month to month."). As a month-to-month tenant, Tenant is obligated to give notice and return possession to the landlord. "A tenant from month to month shall give ten days' notice, and a tenant on a semimonthly basis shall give five days' notice, of his intention to terminate possession of the premises. Failure to give the notice renders the tenant liable for the rent for the ensuing ten days." A.R.S. § 33-341.
- In Arizona, a landlord "may terminate a month-to-month tenancy by a written notice given to the other at least thirty days prior to the periodic rental date specified in the notice." A.R.S. § 33-1375(B).

New Lease

- "To constitute a valid 'novation' there must be an extinguishment of a previously valid obligation, and an agreement of all parties to a new valid contract." *United Sec. Corp. v. Anderson Aviation Sales Co*., 23 Ariz. App. 273, 275 (1975).
- When the parties entered into Lease 2, the obligations of Lease 1 were extinguished. The parties made a new agreement. Appellee could not sue for eviction for any waivers that had occurred under Lease 1. However, the balance owed on the account may be carried over. *Food for Health Co., Inc. v. 3839 Joint Venture*, 129 Ariz. 103, 108 (App. 1981).

Minors are Tenants/Occupants

- In *Presson v. Mountain States Properties, Inc.,* the plaintiff was a nine-year-old who was burned by a faulty water heater. 18 Ariz. App. 176, 177 (App. 1972)(landlord owed the child the duty previously set forth in *Cummings v. Prater, 95 Ariz. 20 (1963)*.
- Injured twelve-year-old plaintiff in was owed the same duty as that owed a tenant. *McFarland v. Kahn*,123 Ariz. 62, 62–63 (1979); *See also McLeod By & Through Smith v. Newcomer,* 163 Ariz. 6, 9 (App. 1989).
- Arizona law defines a tenant as "a person entitled under a rental agreement to occupy a dwelling unit to the exclusion of others." A.R.S. § 33–1310(17). Minor occupants of a home are considered tenants in their own right. *Udy v. Calvary Corp*, 162 Ariz. 7 (1989) (reversing summary judgment in favor of a landlord when the minor son of a tenant was injured on the property).

Dispute About Ownership

- If Tenant does not claim a possessory interest in the property but denies Landlord does, that alone is insufficient to cast doubt on ownership such that the eviction cannot be granted. "[A]lthough 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.'" *Montano v. Luff*, 250 Ariz. 401, 403, ¶ 6 (App. 2020).
- It is insufficient for Tenant to merely deny Landlord's ownership without proof by admissible evidence to establish a genuine dispute in the ownership of the property. *State ex rel. Corbin v. Sabel*, 138 Ariz. 253, 256 (App. 1983).

Emotional Support Animals and Caregivers – Federal Law

- Live-in aide means a person who resides with one or more elderly persons, or near-elderly persons, or persons with disabilities, and who:

(1) Is determined to be essential to the care and well-being of the persons;

(2) Is not obligated for the support of the persons; and

(3) Would not be living in the unit except to provide the necessary supportive services.

24 .F.R. § 5.403.

- "a) A family that consists of disabled persons may request that the PHA approve a live-in aide to reside in the unit and provide necessary supportive services for a family member who is a person with disabilities. The PHA must approve a live-in aide if needed as a reasonable accommodation in accordance with 24 CFR part 8 to make the program accessible to and usable by the family member with a disability." (See § 982.402(b)(6) concerning the effect of live-in aide on family unit size.) 24 C.F.R. § 982.316 (emphasis added).

Counterclaims

Only permitted if statutory and if the tenant followed statute

- A.R.S. § 33-1364(A) permits a tenant to recover damages where a landlord "deliberately or negligently fails to supply running water, gas or electrical service, or both if applicable, and reasonable amounts of hot water or heat, air conditioning or cooling . . ."
- Because the counterclaim may have offset any monetary judgment, the trial court needs to determine, even if just dismissing, as part of the judgment.
- The court shall not award any amount for damages or categories of relief not specifically stated in the complaint or counterclaim. The amounts awarded in the judgment must be consistent with the amounts sought in the complaint or counterclaim, although the judgment may also include additional rent, late charges, fees, and other amounts that have accrued since the filing of the complaint, if appropriate . . . Damages and/or offsets shall be awarded by the court if a defendant prevails on a counterclaim or defense. Rule 13(c)(2).

Orders of Protection (“OOP”)

Notes on the Rules

- **Rule 5**- Make sure the protected parties are appropriate. Petitioners often add adult children, romantic partners who are not involved, etc. . . . Also make sure there is evidence for the need to include appropriate protected persons in the record.
- **Rule 10**- Often the trial court hears the “dueling” Petitions against each other at the same hearing. Make sure you are only referencing and considering material from the case appealed.
- **Rule 34**- If granting the Petition affects a custody agreement, the trial court must refer to the family court. If the trial court ruled on it, and you now know it affected custody, the OOP is still valid. You can affirm but need to remand with instructions to refer to the superior court for any further proceedings.
- **Rule 38**- The trial court often handles the questioning at contested hearings because the parties not represented. Make sure the trial court gave each side the opportunity to cross-examine directly. Sometimes you will get an appeal that argues the judge did not allow me to speak or ask questions and you find that to be true. If so, it must be remanded for a new hearing. The trial court can guide the parties but cannot refuse to allow direct questioning.
- *Brady* issues- Often people ask for *Brady* to apply, and Defendant surrender a weapon. This only applies when the parties are connected in a domestic violence defined relationship and then there must be a finding. Without one, *Brady* cannot apply.

Case References

Burden of Proof

- To sustain an OOP after a contested hearing, Appellant's burden of proof was by a preponderance of the evidence. The preponderance standard allocates the risk of an erroneous decision equally between the parties because a plaintiff need only show that the asserted facts are more likely true than not. *Kent K. v. Bobby M.*, 210 Ariz. 279, 284-285 ¶ 25 (2005).
- Appellate courts review a trial court's granting or continuing a protective order under a clear abuse of discretion standard. *Mahar v. Acuna*, 230 Ariz. 530, 534, ¶ 14 (App. 2012). *See also Cox v. Johnson*, No. 1 CA-CV 25-0080 FC, 2025 WL 2506498, at *2 (Ariz. Ct. App. Sept. 2, 2025) ("We review the superior court's decision to continue an OOP for an abuse of discretion, *Flynn v. Flynn*, 257 Ariz. 1, 3, ¶ 7 (App. 2024), viewing the facts in the light most favorable to upholding the ruling, *see Shah v. Vakharwala*, 244 Ariz. 201, 204, ¶ 11 (App. 2018)).Under the clear abuse of discretion standard, an OOP will be upheld if there "is any reasonable evidence in the record to sustain it." *State v. Morris*, 215 Ariz. 324, 341 ¶ 77 (2007).

General

- "We review an order of protection for an abuse of discretion. *See Cardoso v. Soldo*, 230 Ariz. 614, 619, ¶ ¶ 15–16 (App.2012). A trial court abuses its discretion when it makes an error of law in reaching a discretionary conclusion or "when the record, viewed in the light most favorable to upholding the trial court's decision, is devoid of competent evidence to support the decision." *Mahar v. Acuna*, 230 Ariz. 530, 534, ¶ 14 (App.2012) (internal quotation marks omitted)." *Savord v. Morton*, 235 Ariz. 256, 259 (App. 2014)
- In order to find a series of actions to uphold an Injunction Against Harassment, the trial court must find at least two incidents of conduct alleged in the Petition and from the same defendant. *Wood v. Abril*, 244 Ariz. 436, 438 (App. 2018).

Series of Acts for Harassment

- A.R.S. § 12-1809 defines "harassment" as a "series of acts" over a period of time that is directed at a specific person. A series of acts, under Rule 25(b) "means at least two events", "a single incident is insufficient to support a finding of harassment…." *Wood v. Abril*, 420 P.3d 220, 222 (Ariz. App. 2018).
- "At a minimum, the 'series of acts' condition requires two incidents." No series of events if only one act is directed at Plaintiff. While two incidents may be alleged

if only one is found, there is no series of acts "required for injunctive relief. *LaFaro v. Cahill*, 203 Ariz. 482 (App. 2002).

- While space and time are not specifically defined by statute, the plural nature of the statute (A.R.S. § 12-1809(C)(3)) requires that there be two "specific acts of harassment."

Free speech argument

- "As a general matter . . . in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." *Madsen v. Women's Health Center, Inc*., 512 U.S. 753, 774 (1994).
- "We reject the breathtaking proposition that courts may control political speech through the imposition of some duty of fairness. The remedy for 'unfair' speech is more speech, not the silencing of the speaker . . ." *Tucson Elec. Power Co. v. Round Valley Unified School Dist. No. 10*, 163 Ariz. 532, 534 (App.1990).

Civil

Notes on the Rules

- The Justice Court Rules of Civil Procedure (JCRCP) are essentially a commonsense version of the Arizona Rules of Civil Procedure ("ARCP").
- Often, the big issue you see on civil matters is the granting of MSJs where there really was a question of fact or law. Trial courts sometimes jump to ruling on the merits at this juncture. Remember at this stage you are not deciding which side "wins," just if there is enough there for a trial.
- If an MSJ is granted, the appeal is NOT the substance. It is whether the MSJ should have been granted. You will often get appeals arguing the merits when the appeal should be regarding whether the MSJ should have been granted or the case permitted to proceed. *See* earlier section re: MSJ.
- There are a lot of issues with legal fees in these cases. By way of example, the Plaintiff is awarded a judgment and then substantial fees. Make sure there was a fee application filed, and the other side got a chance to respond. Often there is a prevailing party and then the judgment is filed with the fees requested. Often there is no ability of the opposing party to respond and there is always a question of whether those are properly awarded. That said, there is rarely an appeal on this issue.

Case References

Service

- A trial court may authorize service by means other than personal service if personal service is shown to be "impractical." Rule 4.1(k), Arizona Rules of Civil Procedure. "Impractical" does not mean impossible. *Bank of New York Mellon v. Dodev*, 246 Ariz. 1, ¶ 31 (App. 2018), review denied (Apr. 22, 2019). "Service of process can be impeached only by clear and convincing evidence." *Gen. Elec. Capital Corp. v. Osterkamp*, 172 Ariz. 191, 194 (App. 1992).
- "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.,* 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950). Thus, even where the conditions specified in the Rule are present, service by publication must also satisfy due process standards of being the best means of notice practicable under the circumstances and reasonably calculated to apprise interested parties of the institution and/or pendency of the proceedings.
- In Arizona, [P]roper, effective service on a defendant is a prerequisite to a court's exercising personal jurisdiction over the defendant. *Koven v. Saberdyne Sys., Inc*., 128 Ariz. 318, 321(App.1980).
- Until a Defendant is served, a trial court has no jurisdiction over it. Thus, without proper service, [a Defendant is] not subject to a Default Judgment. *Kadota v. Hosogai*, 125 Ariz. 131, 134(App.1980).
- "Before resorting to service by publication, a party must file an affidavit setting forth facts indicating it made a due diligent effort to locate an opposing party to effect personal service." *Sprang v. Petersen Lumber, Inc.,* 165 Ariz. 257, 261 (App. 1990*), citing Omega II Investment Co. v. McLeod*, 153 Ariz. 341, 342, (App.1987); Rule 4(e)(3), Arizona Rules of Civil Procedure. "A 'due diligent effort' requires such pointed measures as an examination of telephone company records, utility company records, and records maintained by the county treasurer, county recorder, or similar record keepers." *Sprang* at 261; *Preston v. Denkins*, 94 Ariz. 214, 222–23(1963).
- One personal service attempt, without attempts at other contact, via phone or email is not reasonable. *Master Fin., Inc. v. Woodburn*, 208 Ariz. 70, 71, (App. 2004), as amended (June 7, 2004) (Plaintiff made five separate attempts at personal service over two months. "After concluding that personal service was not possible, MFI obtained an order from the trial court authorizing service by publication").

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- If the affidavit fails to indicate that due diligence was exercised to locate the defendant, the default judgment is void on its face for lack of jurisdiction. *Cooper v. Commonwealth Title*, 15 Ariz. App. 560, 564(1971); *Wells v. Valley Nat. Bank*, 109 Ariz. 345, 346 (1973); *Sprang v. Petersen Lumber, Inc., 165 Ariz. 257, 262 (App. 1990)*.

Arbitration

- Because of this strong public policy in favor of arbitration, "the burden is heavy on the party seeking to prove waiver of an agreement to arbitrate." *In re Estate of Cortez*, 226 Ariz. 207, 210, ¶ 3 (App. 2010). In fact, when a party files a motion to compel arbitration, "[T]he trial court's review on a motion to compel arbitration is limited to the determination as to whether an arbitration agreement exists." *National Bank of Ariz. v. Schwartz*, 230 Ariz. 310, 311, ¶ 4 (App. 2012).
- "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983).
- "If a party makes a motion to the court to order arbitration, the court on just terms shall stay any judicial proceeding that involves a claim alleged to be subject to the arbitration until the court renders a final decision under this section." *ARS § 12-3007(F) (emphasis added); A.R.S. § 12-1502 (*setting forth requirements for a trial court once "an application" has been made to refer to arbitration).
- The rules of contract interpretation apply equally in the context of arbitration clauses. "Although it is commonly said that the law favors arbitration, it is more accurate to say that the law favors arbitration of disputes that the parties have agreed to arbitrate." *Estate of DeCamacho ex rel Guthrie v. La Solana Care & Rehab, Inc.*, 234 Ariz. 18, 22, ¶ 15 (App. 2014); quoting *S. Cal. Edison Co v. Peabody Western Coal Co.,* 194 Ariz. 47, 51 (1999). When contract language is clear, it is to be applied as written. *DeCamacho* at 23, *United Cal. Bank v. Prudential Ins. Co.*, 140 Ariz. 238, 259 (App.1983).
- Conduct inconsistent with an intent to arbitrate by itself is not sufficient to establish waiver; at a minimum, the court also must consider whether the party opposing arbitration has suffered prejudice by the other party's inconsistent acts. *Compare Richards v. Ernst & Young, LLP,* 744 F.3d 1072, 1074 (9th Cir. 2013) (waiver requires showing of prejudice), with *Zuckerman Spaeder, LLP v.*

Auffenberg, 646 F.3d 919, 922 (D.C. Cir. 2011) (potential prejudice is among circumstances to be considered).

- The public policy of Arizona strongly favors arbitration. Because of this, arbitration clauses are construed liberally and any doubts about whether a matter is subject to arbitration are resolved in favor of arbitration. *City of Cottonwood v. James L. Fann Contracting, Inc.,* 179 Ariz. 185, 189 (App. 1994).
- A party challenging a motion to compel arbitration has the option to raise either legal or equitable defenses to the arbitration agreement or to show that the arbitration clause itself has been repudiated. *City of Cottonwood v. James L. Fann Contracting, Inc.*, 179 Ariz. 185, 190 (App. 1994).
- An allegation of repudiation based on unreasonable delay must include clear evidence of 1) prejudice suffered by the other party and 2) a demand for arbitration so egregiously untimely and inconsistent with an intent to assert the right to arbitrate that an intentional relinquishment can be inferred. *City of Cottonwood v. James L. Fann Contracting, Inc.*, 179 Ariz. 185, 192 (App. 1994).
- An agreement to arbitrate is "valid, enforceable and irrevocable." *A.R.S. § 12-1501*.
- Private parties can and in fact often do, limit their own access to the courts. That is the general purpose of arbitration. The concern of cases finding such clauses unenforceable is not the avoidance of access to the civil process, but rather ensuring the language waiving such rights by the parties is "conspicuous" and "express." *Broemmer v. Abortion Services of Phoenix, Ltd.,* 173 Ariz. 148(1992).

Interest

- "Under Arizona law, prejudgment interest on a liquidated claim is a matter of right and not a matter of discretion." *Employers Mut. Cas. Co. v. McKeon*, 170 Ariz. 75, 78 (App. 1991). A judgment creditor is entitled to prejudgment interest beginning from the date the claim becomes liquidated. *Schade v. Diethrich*, 158 Ariz. 1, 14 (1988). A "liquidated" claim is one where "the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion." *Id.* (internal quotations omitted). "As a general rule, the trial judge should calculate prejudgment interest from the date the claim becomes due." *Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 508 (1996). A party to a contract, however, "can waive strict performance which waives prior defaults," and, thus, changes the date from which prejudgment interest should be calculated. *AOR Direct L.L.C. v. Buteo, LLC*, 2017 WL 1150671, ¶ 34 (Ariz. App. mem. dec.), *review denied* (2017) (cited pursuant to Rule 111(c)(1)(C), Rules of the Supreme Court of Arizona).

- Maximum rates of interest for title loans are given in A.R.S. § 44-291(G).

Damages

- A failure to mitigate may “negate and reduce damages” but does not preclude a finding of liability. *Hull v. Daimler Chrysler Corporation*, 209 Ariz. 256, 259 (App. 2004).

Contracts

- To the extent there are any ambiguities or unenforceable positions in a contract, those are construed against the drafter. *United California Bank v. Prudential Ins. Co. of Am*., 140 Ariz. 238, 258 (App. 1983).
- “What states [courts] may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal ‘footing’ directly contrary to the Act's language and Congress' intent.” *Harrington v. Pulte Home Corp.*, 211 Ariz. 241, 245(App. 2005).
- Generally speaking, “[u]nless legislation precludes enforcement of a contract term, our courts will uphold it unless ‘the term is contrary to an otherwise identifiable public policy that clearly outweighs any interests in the term's enforcement.’” *Zambrano v. M & RC II LLC*, 254 Ariz. 53, (2022); quoting *1800 Ocotillo, LLC v. WLB Grp., Inc*.

Vicious Animals

- In Arizona “‘Vicious animal’ means any animal of the order carnivora that has a propensity to attack, to cause injury to or to otherwise endanger the safety of human beings without provocation, or that has been so declared after a hearing before a justice of the peace or a city magistrate.” *A.R.S. § 11-1001*.
- “If the justice of the peace or city magistrate determines that the animal is vicious, the justice of the peace or city magistrate may order that the animal be forfeited to the officer or agent for transfer to a legally incorporated humane society, county animal shelter or approved rescue agency and be made available for adoption or humane euthanasia.” *A.R.S. § 11-1029(B)*.

Animals as Property

- In an animal seizure matter, the burden of proof is by a preponderance of the evidence. *A.R.S. § 13-4281(B)*.

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- If an animal owner is found to violate A.R.S. § 13-2910, Arizona's cruelty to animals statute, law enforcement may "lawfully seize" the animal. A.R.S. § 13-4281(A).
- Warrantless seizures inside a home are presumptively unreasonable. *Brigham City v. Stuart*, 547 U.S. 398, 403 (1943). The presumption may be overcome when "the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable." *Kentucky v. King*, 563 U.S. 452 (2011) (internal quotation and punctuation omitted). The recognized exceptions to the warrant requirement include: 1) response to an emergency, 2) hot pursuit, 3) probability of destruction of evidence, and 4) the possibility of violence. *State v. Ault*, 150 Ariz. 459, 463 (1986).
- Where a Fourth Amendment violation occurs, any subsequent evidence that was found as a result of the violation must be suppressed. *Wong Sun v. U.S.*, 371 U.S. 471, 487-488 (1963) (where evidence is obtained "by the exploitation" by the "illegal actions of the police," the evidence "may not be used against" defendant); *State v. Hackman*, 189 Ariz. 505, 508 (App. 1997) ("The appropriate remedy for a violation" of the Fourth Amendment "includes not only suppression of all evidence directly obtained through governmental misconduct, but also suppression of all evidence that can properly be designated fruits of that conduct."). Where evidence was suppressed, the case may be dismissed for lack of probable cause instead of remanding for a new trial. *Frimmel Management, LLC v. U.S.*, 897 F.3d 1045 (9th Cir. 2018).
- Arizona law defines animals as personal property. *Roman v. Carroll*, 127 Ariz. 398 (App. 1980); *Kaufman v. Langhofer*, 223 Ariz. 249 (App. 2009). Thus, any taking of an animal must be lawful under the Fourth Amendment.

Standing

- "A party has standing to sue in Arizona if, under all circumstances, the party possesses an interest in the outcome of the litigation." *Strawberry Water Co. v. Paulsen*, 220 Ariz. 401, 406 (App. 2008); *citing Alliance Marana v. Groseclose*, 191 Ariz. 287, 289 (App.1997).
- Standing generally requires an injury in fact, economic or otherwise, caused by the alleged conduct which results in a distinct and palpable injury giving the plaintiff a personal stake in the controversy's outcome. *Aegis of Ariz., L.L.C. v. Town of Marana*, 206 Ariz. 557, 562–63, ¶ 18 (App.2003).

Business Records

- For a record to qualify as a "business record" pursuant to Ariz. R. Evid. 803(6), "either the custodian of records or other qualified witness" must "testify that the record was made 1) contemporaneously, or nearly so, with the underlying event; 2) by, or from information transmitted by, a person with first-hand knowledge acquired in the course of a regularly conducted business activity; 3) completely in the course of that activity; and 4) as a regular practice for that activity." *State v. McCurdy*, 216 Ariz. 567, 571-72 ¶ 9 (App. 2007) (citation and internal quotations omitted).
- In order to establish the admissibility of the records, the custodian or other witness must establish that he or she has reviewed the records and is familiar with the manner in which they were prepared. *State v. Johnson*, 184 Ariz. 521, 524 (App. 1994) ("In the context of computer-generated reports and exhibits submitted in support of motions for summary judgment, competency to testify must be established by evidence of the offeror's familiarity with the preparer or the manner in which the documents were prepared."). *US Bank Nat'l Ass'n v. Findsen*, 2019 WL 438809 at *3 (Ariz. App., Div. 1, Feb. 5, 2019) (because affiant "failed to state that she reviewed the attached exhibits, or that she was familiar with the preparer of the documents or the manner in which the documents were prepared," affiant "did not demonstrate her competency to testify as to the amounts due and owing[.]").

Civil and Criminal Traffic

Notes on the Rules

- **Rule 10.2**- A request for documentary hearing only. If requested by the defendant, they need to submit all their materials prior to the hearing and the trial court needs to make a record of what is provided before making a finding. The defendant does not have to appear at the hearing.
- **Rule 12**- The State does not need to be present (and usually it is not). The officer or a representative from the photo radar company is sufficient. Remember, they are not an attorney. The trial court asks the questions. The Defendant still must be given the opportunity to cross-examine that the State's witness. The witness should not be permitted to ask questions of the Defendant.
- **Rule 16**- The State may send a witness (photo radar administrator, police officer, etc.), but the witness may not be permitted to question the defendant.
- **Rule 17**- The Rules of Evidence do not apply. There is no disclosure obligation.
- **Rule 21**- If the State fails to send a witness of any sort, the case must be dismissed unless good cause is found to continue the hearing.
- **Rule 35**- Do not set an oral argument unless you want to or if a party requests it, and you agree. You can simply deny that request.

Case References

Burden of Proof

- In [a] civil traffic matter, the State [has] the burden of proof by a preponderance of the evidence. A.R.S. § 28-1596(D); Rule 17(b).
- The preponderance standard is less stringent than the burden of proof used in a criminal case – "beyond a reasonable doubt." The preponderance standard "essentially allocates the risk of error equally between the parties involved." *Gila River Indian Community. v. Dep't of Child Safety*, 238 Ariz. 531, 536–37 (App. 2015) (internal quotation omitted). A witness' testimony, if believed by the trial court, is sufficient proof to sustain a verdict and judgment. *Cf. State v. Montano*, 121 Ariz. 147, 149 (App. 1978) ("one witness, if relevant and credible, is sufficient to support a conviction").

Hearings

- Rule 15 only permits a continuance "if it appears that the interests of justice so require." *Rule 15.*
- Rule 10.2 permits a Defendant to "file a written request for a documentary hearing." Rule 10.2(a). Once requested, the trial court is required to "set the matter and notify the defendant, the citing officer, and any counsel in the case of the date, time and place for the hearing." Rule 10.2(c). Appellant is required to submit any statements or physical evidence prior to the hearing. Rule 10.2(d). Any failure to appear <u>or</u> file that statement will result in a default. Rule 10.2 (e).
- "If a defendant requests a documentary hearing, the defendant waives the following rights: to personally appear to present evidence to review evidence before the hearing (Rule 13(b)); to compel; production of any citing officer notes (Rule 13(c)); to testimony under oath (Rule 16(a)); to cross examine the State's witnesses (Rule 16(c)); to present rebuttal evidence (Rule 19(d)); to present a closing argument (Rule 19(e)); and to immediate delivery of written notice of appeal following judgment and imposition of civil sanction or penalty (Rule 25(a))." *Rule 10.2(f)*.
- At the hearing, the trial court is required to review the statement and evidence presented and determine the matter on the merits. Rule 10.2(g). A defendant requesting a documentary hearing and providing materials as required by the rule cannot be found in default.
- The State need not have counsel present at the hearing. Rule 12. It may simply send a witness who may be questioned by the trial court. Rule 16(b).

Motions to Set Aside Judgment

- In civil traffic cases, the trial court may set aside a default judgment for failure to appear " . . . for good cause or any other reason necessary to prevent a manifest injustice. . . " Rule 23. This standard is much lower than that for other jurisdictions and gives the trial court broad discretion in setting aside default judgments to permit determination on the merits.

Evidence

- Discovery is not generally permitted in civil traffic cases "absent extraordinary circumstances." *Rule 13(a).*
- Rule 29(b) permits new material to be submitted to this court but only "other certified documents contained in the case file deemed relevant to the appeal."
- Rule 13(b) states: "Immediately prior to the hearing, both parties shall produce for inspection any pre-prepared exhibits and written or recorded statements of any witness. Failure to comply with this rule may result, in the court's discretion, in the sanction of granting a recess or continuance to permit such inspection or denying admission of the evidence not so exchanged."

Speed

- "A person shall not drive a vehicle on a highway at a speed greater than is reasonable and prudent under the circumstances, conditions and actual and potential hazards then existing. A person shall control the speed of a vehicle as necessary to avoid colliding with any object, person, vehicle or other conveyance on, entering or adjacent to the highway in compliance with legal requirements and the duty of all persons to exercise reasonable care for the protection of others." *A.R.S. § 28-701(A)*.
- "A. In a charge of violating a speed restriction in this article, the *complaint* shall specify all of the following: 1. The speed at which the defendant is alleged to have driven and the maximum speed applicable within the district or at the location; 2. The identification of the defendant; 3. The date and time of the alleged violation; 4. The location of the alleged violation." *A.R.S. § 28-707(A) (emphasis added).*
- A.R.S. § 28-702.04(B) states: A person shall not drive a motor vehicle at a speed in excess of the maximum speed limit prescribed by this section.

License and Registration

- "A court *shall dismiss* an action brought under this section if the defendant obtains the appropriate license plates or registration after violating this section. A court may decide not to impose a civil penalty against a defendant for a violation of this section if the defendant was an operator but was not the owner of the motor vehicle, trailer or semitrailer." *A.R.S. § 28-2532(B) (emphasis added)*.

Stop Signs

- A.R.S. § 28-773 states: The driver of a vehicle shall stop in obedience to a stop sign as required by § 28-855 and then proceed with caution yielding to vehicles that are not required to stop and that are within the intersection or are approaching so closely as to constitute an immediate hazard.

Emergency Vehicles

- "A. Except when otherwise directed by a police officer, on the immediate approach of an authorized emergency vehicle that is equipped with at least one lighted lamp exhibiting a red or red and blue light or lens visible under normal atmospheric conditions from a distance of five hundred feet to the front of the vehicle and that is giving an audible signal by siren, exhaust whistle or bell, the driver of another vehicle shall: 1. Yield the right-of-way; 2. Immediately drive to a position parallel to and as close as possible to the right-hand edge or curb of the roadway clear of any intersection; 3. Stop and remain in the position prescribed in paragraph 2 of this subsection until the authorized emergency vehicle has passed." *A.R.S. § 28-775(A)*.

Roads

- Under A.R.S. § 28-644(A)(2), a " ' gore area' means the area that is between a through roadway and an entrance ramp or exit ramp and that is defined by two wide solid white lines that guide traffic entering or exiting a roadway. The Gore area does not include a safety zone.
- "23. "Safety zone" means the area or space that *is both*: (a) Officially set apart within a roadway *for the exclusive use of pedestrians*; (b) *Protected or either marked or indicated by adequate signs* as to be plainly visible at all times while set apart as a safety zone." *A.R.S. § 28-601(23) (emphasis added)*.

Parking

- "It is unlawful for a person to stop, stand or park in a restricted parking area any vehicle that displays a placard that is altered, forged or counterfeited." *Phoenix City Code 36-149(D)*.
- "No person shall stop, stand, or park a vehicle, or permit a vehicle to be parked, in a restricted parking area unless the vehicle has displayed thereon the international symbol of access special plates that are currently registered to the

vehicle or a valid placard issued pursuant to state law, and is transporting a person who has been issued a valid placard or international symbol of access special plates." *Phoenix City Code 36-149(A)*.

- "No person shall stop, stand or park a vehicle, except when necessary to avoid conflict with other traffic or in compliance with law or the directions of a police officer or traffic control device, in any of the following places . . . Where prohibited by official signs or where the curb is painted red." *Phoenix City Code 36-134*.

Criminal

Notes on the Rules

- LCA criminal uses the same criminal rules as the superior court
- Note: only entitled to counsel if liberty interest is contemplated- so if they could do jail time, even if not sentenced to it, must appoint/waive/hire counsel both for underlying matter and on appeal per Ariz. R. Crim. P. 6.1

Case References for All Criminal Actions

General

- In order to prevail on appeal, Appellant must prove "a complete absence of probative facts to support the conviction." *State v. Soto-Fong*, 187 Ariz. 186, 200 (1996).
- The fact that this court might have reached a different conclusion [as the jury] is not legal grounds to reverse the conviction. *State v. Mauro,* 159 Ariz. 186, 206 (1988).

Rule 20

- In deciding a motion for judgment of acquittal, a trial judge must (1) give full credence to the right of the jury to determine credibility; (2) weigh evidence; and (3) draw justifiable inferences from which a reasonable person could fairly conclude that a defendant is guilty beyond reasonable doubt. *State v. Clifton*, 134 Ariz. 345, 348 (App. 1982).
- The trial court must grant a judgment of acquittal sua sponte if it believes it is appropriate. "After the close of evidence on either side, and on motion or on its own, the court must enter a judgment of acquittal on any offense charged in an indictment, information, or complaint if there is no substantial evidence to support a conviction." Ariz. R. Crim. P. 20(a)(1).
- "Where the evidence raises a question of fact for the jury and the evidence, if believed, would be sufficient to sustain a conviction, it is not only proper to deny a motion for a directed verdict of acquittal, but it is error to grant the motion 'when the evidence is such that reasonable minds could differ on the inferences to be drawn therefrom.'" *State v. Just*, 138 Ariz. 534, 545 (App. 1983) (quoting *State v. Hickle*, 129 Ariz. 330, 331 (1981)).

Evidentiary Issues – Admission or Preclusion

- A trial court "will not be considered to have abused its discretion [in granting a motion to reopen] unless the defendant has been prejudiced and . . . to constitute prejudice it must appear that the defendant was deprived of a substantial right." *State v. Cota*, 99 Ariz. 237, 241 (1965).
- For purposes of a motion to suppress, the reviewing court must "consider only the evidence presented at the suppression hearing and view the facts in the light most favorable to sustaining the trial court's ruling." *State v. Maciel*, 240 Ariz. 46, 49 ¶ 9 (2016).
- "[W]hen considering whether substantial evidence exists, we resolve conflicts in the evidence against the defendant and view the facts in the light most favorable

to sustaining the verdict. *State v. Pena*, 235 Ariz. 277, ¶ 5 (2014)." *State v. Rios,* 255 Ariz. 124, 130 (App. 2023), *review denied* (Sept. 12, 2023), *cert. denied*, 144 S. Ct. 1077 (2024)

- Where there is an erroneous denial of a motion to suppress, this Court assesses the denial for harmless error. *State v. Davolt*, 207 Ariz. 191, 205 ¶ 39 (2004); citing *State v. Castaneda*, 150 Ariz. 382, 387 (1986).
- The proper remedy for violation of right to counsel is suppression of evidence rather than dismissal of case. *State v. Keyonnie*, 181 Ariz. 485, 487 (App. 1995).

Probable Cause

- An arresting officer has probable cause if he "has reasonably trustworthy information of facts and circumstances which are sufficient to lead a reasonable man to believe an offense has been committed and that the person to be arrested is committing or did commit it." *State v. Nelson*, 129 Ariz. 582, 586 (1981).
- "Probable cause may not rest on mere suspicion but neither must it rest on evidence sufficient to convict." *State v. Superior Court in and for Cochise County* (Blakey), 149 Ariz. 269, 275 (1986). An arresting officer has probable cause if he "has reasonably trustworthy information of facts and circumstances which are sufficient to lead a reasonable man to believe an offense has been committed and that the person to be arrested is committing or did commit it." *State v. Nelson*, 129 Ariz. 582, 586 (1981).
- The preponderance standard allocates the risk of an erroneous decision equally between the parties because a plaintiff needs only to show that the asserted facts are more likely than not (describing allocation of risk). *Kent K. v. Bobby M.*, 210 Ariz. 279, 284-85, ¶ 25 (2005).
- Defining preponderance of the evidence standard as "more likely than not." *State v. Rojers*, 216 Ariz. 555, 559, ¶ 19 (App. 2007).
- Probable cause exists when facts known to a law enforcement officer "would warrant a person of reasonable caution in the belief that. . . evidence of a crime is present." *Florida v. Harris*, 568 U.S. 237, 243 (2013). *State v. Hoskins*, 199 Ariz. 127, 137-138 ¶ 30 (2000).
- A police officer has probable cause when reasonably trustworthy information and circumstance would lead a person of reasonable caution to believe that a suspect has committed an offense. *State v. Hoskins*, 199 Ariz. 127, 138 (2000), *supplemented*, 204 Ariz. 572 (2003). Probable cause thus "requires only a probability or substantial chance of criminal activity," and even "innocent

behavior" may "provide the basis for a showing of probable cause." *State v. Sisco*, 239 Ariz. 532, 536 ¶ 15 (2016) (cleaned up).

- For purposes of making a stop, reasonable suspicion is something short of probable cause, but it must be more than an inchoate and unparticularized suspicion or hunch. *State v. Sweeney*, 224 Ariz. 107 (App. 2010).
- Even hearsay evidence opined by law enforcement officers can be considered for purposes of determining value for a criminal damage allegation. *State v. Printz*, 125 Ariz. 300, 302–03 (1980).
- "Information sufficient to raise a suspicion of criminal behavior by definition need not pass tests of admissibility under our rules of evidence. It has long been the rule that an arresting officer has probable cause if he has reasonably trustworthy information sufficient to lead a responsible person to believe an offense has been committed and that the person to be arrested committed it." *State v. Super. Ct. in and for Cochise Cnty. (Blakey)*, 149 Ariz. 269, 275 (1986).
- "In dealing with probable cause… we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable [people], not legal technicians, act." *Brinegar v. U.S.*, 338 U.S. 160, 175 (1949).
- Probable cause for an arrest is a lower standard than what is required for a conviction. "Probable cause is a flexible, nontechnical, and practical concept." *State v. Keener*, 206 Ariz. 29, 33 (App. 2003); citing *Gerstein v. Pugh*, 420 U.S. 103, 112 (1975).
- The collective knowledge of law enforcement officers may be considered when they arrest an individual. "If the collective knowledge of law enforcement officers may be considered when they arrest an individual for a felony offense, we see no reason not to consider that collective knowledge when the warrantless arrest is for a misdemeanor offense." *State v. Keener*, 206 Ariz. 29, 33 ¶ 16 (App. 2003).
- In Arizona, a probable cause determination may be made on only the suggestion of consumption. Impairment is not necessary to begin the DUI investigation. *State v. Howard* 163 Ariz. 47, 50 (App. 1989).
- The mere odor of alcohol, coupled with an accident, can be sufficient for probable cause. *State v. Aleman*, 210 Ariz. 232 (App. 2005).

Prosecutorial Misconduct

- A defendant must demonstrate regarding a prosecutor's misconduct that "(1) misconduct is indeed present (2) a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying defendant a fair trial." *State v.*

Murray, 250 Ariz. 543, 548 ¶ 13 (2021); *quoting State v. Anderson (Anderson II),* 210 Ariz. 327, 340 ¶ 45 (2005).

- "A defendant claiming cumulative error based on prosecutorial misconduct need not separately assert prejudice since a successful claim necessarily establishes the unfairness of a trial." *State v. Vargas*, 251 Ariz. 157, 164 (App. 2021).

Defendant's Right to be Present/Absentia

- "[A] defendant's voluntary absence waives the right to be present at any proceeding." Arizona Rule of Criminal Procedure 9.1. "Rule 9.1 permits the inference that a defendant is voluntarily absent from a proceeding (thus waiving his or her rights to confrontation and due process) if the defendant had personal notice of (1) the time of the proceeding, (2) the right to be present at it, and (3) a warning that the proceeding would go forward in his or her absence." *State v. Sainz*, 186 Ariz. 470, 472–73(App. 1996).
- The trial court did not make a specific finding of continuing in absentia, which the court was not required to make absent a request to do so. *State v. Sainz*, 186 Ariz. 470, 472–73(App. 1996).
- Addressing the right to be present: "[A] trial court may rely on counsel's waiver of a defendant's right to be present" in certain circumstances. Unless the circumstances are exceptional, a defendant is bound by his counsel's waiver of his constitutional rights." *State v. Rose*, 231 Ariz. 500, 504 ¶¶ 9–10(2013).
- "A defendant has the right to be present at his own trial. U.S. Const. amend. VI; Ariz. Const. art. II, § 24. However, a defendant may voluntarily absent himself, which allows the proceeding to continue in his absence. *See State v. Reed*, 196 Ariz. 37, ¶ 3 (App. 1999). Under Rule 9.1 of the Arizona Rules of Criminal Procedure, a court 'may infer that a defendant's absence is voluntary if the defendant had actual notice of the date and time of the proceeding, notice of the right to be present, and notice that the proceeding would go forward in the defendant's absence.'" *State v. Vallejo*, No. 2 CA-CR 2024-0165, 2025 WL 1699867, at *1 (Ariz. App. June 18, 2025).
- It is the Appellant's burden to establish that his absence was involuntary. *State v. Suniga*, 145 Ariz. 389, 391-92 (App. 1985).
- The trial court may infer that a defendant's absence is voluntary if the defendant had personal knowledge of the time of the proceeding, his right to be present, and the warning that the proceeding would take place in his absence if he failed to appear. *State v. Muniz-Caudillo*, 185 Ariz. 261, 262 (App. 1996).
- "The trial court did not err by conducting the pretrial proceedings outside Forde's presence after her attorney waived her presence." *State v. Forde*, 233 Ariz. 543, 560 (2014).

- “We conclude, under the Sixth and Fourteenth Amendments to the United States Constitution, and article II, sections 4 and 24 of the Arizona Constitution, that criminal defendants, under all but exceptional circumstances, are entitled as a matter of constitutional right to be physically present for the return of jury verdicts. The question, therefore, is not whether the right exists, but rather, on the record before us, whether it must yield to the discretionary actions of counsel . . . Thus, counsel acting alone may make decisions of strategy pertaining to the conduct of the trial. In various instances involving protected constitutional rights, criminal defendants have been bound by counsel’s strategy decisions, the consequences of which have resulted in an erosion or loss of those rights.” *State v. Levato*, 186 Ariz. 441, 444 (1996) (citing *State v. Lee*, 142 Ariz. 210, 215 (1984)).

Right to Counsel

- “A defendant has the right to be represented by counsel in any criminal proceeding. The right to be represented by counsel includes the right to consult privately with counsel, or the counsel’s agent, as soon as feasible after a defendant has been taken into custody, at reasonable times after being taken into custody, and sufficiently in advance of a proceeding to allow counsel to adequately prepare for the proceeding.” Ariz. R. Crim. P. 6.1(a).
- “[A]n accused is always entitled to counsel, if requested, for custodial interrogation.” *State v. Lee*, 184 Ariz. 230, 232 (App. 1995).
- Only when the suspect “ha[s] expressed” his wish for the sort of legal assistance that is the subject of *Miranda* does the question of what efforts law enforcement made to secure (or obstruct) access to counsel attach. *Edwards v. Arizona*, 451 U.S. 477, 484 (1981).
- To evoke his right to counsel, at a minimum, Appellant was required to make “some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney *in dealing with custodial interrogation by the police*.” *McNeil v. Wisconsin.*, 501 U.S. 171, 178 (1991) (emphasis in original).
- For a nexus to exist between the violation and the obtained evidence, the conduct must be flagrant and in furtherance of gathering the evidence which is later suppressed. *Herring v. U.S.*, 555 U.S. 135 (2009).
- Arizona law favors suppression of blood results when a criminal defendant requests counsel and is denied that access prior to deciding to consent to the blood draw. *State v. Rumsey*, 225 Ariz. 374, 380 (App. 2010); citing *State v. Juarez*, 161 Ariz. 76, 81 (1989).

- Once a warrant was served, the denial of counsel until the blood could be obtained was reasonable. *State v. Rumsey*, 225 Ariz. 374 (App. 2010).
- "[W]hen a defendant is deprived of counsel at this point in the investigation, the defendant lacks counsel's advice about whether to submit to a breath or blood sample." *State v. Rumsey*, 225 Ariz. 374, 380 (App. 2010) (citing *Mack v. Cruikshank*, 196 Ariz. 541 ¶ 11 (App. 1999).
- To invoke their right to counsel, a suspect must articulate the desire clearly enough that a reasonable police officer would understand that request. Questioning must stop if a request for counsel is made. It is the trial court that must "determine whether the accused *actually invoked* his right to counsel." *Davis v. U.S.*, 512 U.S. 452, 458-59 (1994) (citing *Edwards v. Ariz.*, 451 U.S. 477, 484 (1981)).
- "[I]n determining whether dismissal is required, the pertinent cases primarily have focused on whether the violation of right to counsel has foreclosed a fair trial by preventing the defendant from collecting exculpatory evidence no longer available." *State v. Rosengren*, 199 Ariz. 112, 118 ¶ 19 (App. 2000) (quoting *McNutt v. Super. Ct.*, 133 Ariz. 7, 10 (1982)) (internal quotation marks and alterations omitted).

Due Process

- "Under the rational basis test, [the court] must uphold a law or regulation against a claim that it violates substantive due process if it does not transgress 'some basic and fundamental principle,' or if it is not arbitrary, capricious, or unreasonable and if the means selected have a real and substantial relation to the goals sought to be obtained." *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 131-32 (App. 2000).
- "The criminal defendant's due process rights include the right to a fair identification procedure." *State v. Nieto*, 118 Ariz. 603, 605 (App.1978); *State v. Bracy*, 145 Ariz. 520, 530 (1985).
- "The Due Process Clause of the Fourteenth Amendment requires us to ensure that any pretrial identification procedures are conducted in a manner that is fundamentally fair and secures the suspect's right to a fair trial." *State v. Leyvas*, 221 Ariz. 181, 185(App. 2009) (*citing State v. Lehr,* 201 Ariz. 509, 520 (2002).
- Plaintiff has a constitutional right to know the nature of the charges against them. *Hamling v. United States*, 418 U.S. 87, 117 (1974).
- The question is whether a defendant has "sufficient notice to reasonably rebut the allegation", not that he is given the State's legal theories for trial. *State v. Rivera*, 207 Ariz. 69, 72 (App. 2004).

- Due process requires a defendant be given "notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge." *State v. Blakley*, 204 Ariz. 439, ¶ 47(2003); *quoting Cole v. Arkansas*, 333 U.S. 196, 201(1948).
- "The indictment itself need not inform the defendant of the theory by which the state intends to prove that charge so long as the defendant receives sufficient notice to reasonably rebut the allegation." *State v. Rivera, 207 Ariz. 69, 74 (App. 2004).*
- Violations of a party's due process rights that are raised at trial are reviewed for harmless error. *State v. Henderson*, 210 Ariz. 561, 567 (2005).
- Due process is satisfied if either blood or breath is collected for testing. *State v. Sanchez*, 192 Ariz. 454, 457 ¶ 9 (App. 1998).
- The Arizona Supreme Court held that due process requires the State to take multiple samples of a DUI suspect's breath for independent testing. Unlike blood, when a breath sample is collected and then tested, the breath sample is destroyed by the analysis. *Baca* held that because the breath is destroyed by testing, the State must take and preserve a separate sample so that a defendant has access to a scientific means of contesting the test results. "[W]hen requested, the police must take and preserve a separate sample for the suspect by means of a field collection unit." *Baca v. Smith*, 124 Ariz. 353 (1979).
- "A defendant's due process rights are violated only where 1) the state either suppresses or destroys evidence favorable to the defendant, and he is prejudiced thereby, or 2) the state fails to preserve evidence of which it is aware, and which is obviously material and reasonably within its grasp." *State v. Havatone*, 159 Ariz. 597, 599 (App. 1989); *citing State v. Rivera*, 152 Ariz. 507, 511 (1987).
- Due process requires only that a defendant be given a "reasonable opportunity" to obtain exculpatory evidence. *Van Herreweghe v. Burke ex rel. County of La Paz*, 201 Ariz. 387, 390 ¶ 10-11 (App. 2001) (holding that DUI defendant's constitutional and statutory right to a reasonable opportunity to obtain exculpatory evidence does not require his immediate release from jail)
- Police are not obligated to provide privacy unless it is requested by a defendant. *Mun. Ct. of City of Phx. In & For Maricopa Cnty. v. Waldron*, 157 Ariz. 90, 92-93 (App. 1988); *State v. Holland*, 147 Ariz. 453 (1985).
- A defendant who requests that he consult with his counsel in private must be allowed to do so. *State v. City Ct. of Tucson*, 150 Ariz. 379, 380 (App.1986); citing *State v. Holland*, 147 Ariz. 453 (1985).
- When evaluating a due process violation, it is the law that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve

potentially useful evidence does not constitute a denial of due process of law." *State v. Youngblood*, 173 Ariz. 502, 503–04 (1993); *quoting Arizona v. Youngblood*, 488 U.S. 51, 58 (1988)).

Searches and Seizures

- "Whether police conduct constitutes a seizure turns on the extent of the interference with the defendant's possessory interest in his property." *State v. Milan*, 185 Ariz. 398 (App. 1995); *citing U.S. v. England*, 971 F.2d 419, 420 (9th Cir. 1992).
- A person has been seized within the meaning of the Fourth Amendment, only if in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. *State v. Gonzalez*, 235 Ariz. 212, 214 ¶ 8 (App. 2014); *citing U.S. v. Mendenhall*, 446 U.S. 544, 554 (1980).
- The reasonable person standard is an objective standard. *State v. Ahumada*, 225 Ariz. 544, 546 ¶ 7 (App. 2010); *citing Florida v. Jimeno*, 500 U.S. 248, 251 (1991).
- Voluntary or "consensual" encounters between police and citizens are not considered seizures under the Fourth Amendment. *State v. Serna*, 235 Ariz. 270, 272 ¶ 8 (2014)(citing *Florida v. Bostick*, 501 U.S. 429, 434 (1991); *Terry v. Ohio*, 392 U.S. 1, 19 (1968).
- Generally, an officer may approach an individual in a public place and ask questions, as long as "a reasonable person would feel free to disregard the police and go about his business." *Florida v. Bostick*, 501 U.S. 429, 434 (1991).
- For consent to be valid, consent must be voluntarily given and whether the consent was voluntary "is a question of fact to be determined from the totality of the circumstances." Consent must "not be coerced, by explicit or implicit means, by implied threat or covert force." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227-228 (1973).

Jurisdiction

- Jurisdictional arguments, such as the one made here, can be raised at any time, including for the first time on appeal. *Bruce v. State*, 126 Ariz. 271, 272 (1980).
- In criminal prosecutions such as this, the State has the burden of proving jurisdiction beyond a reasonable doubt. *Lay v. Nelson in and for County of Yuma,* 246 Ariz. 173, 178 (App. 2019); *State v. Flores*, 218 Ariz. 407, 409-410 (App. 2008).
- Where there is a statute that is more specific to a case than a general one, the more specific of the statutes governs. *Carter Oil Company, Inc. v. Ariz. Dep't of Revenue*, 248 Ariz. 339, 345 (App. 2020).

- "When there is conflict between two statutes, 'the more recent, specific statute governs over the older, more general statute.'" *In re Estate of Winn*, 214 Ariz. 149, 152 (2007); *quoting In re Guardianship/Conservatorship of Denton,* 190 Ariz. 152, 157 (1997).
- Although *Shah v. Vakharwala*, 244 Ariz. 201 (App. 2018) argues that a communication must either originate or be received in Arizona for the court to have subject matter jurisdiction, "[i]t is a settled principle of law that an order issued by a court with jurisdiction over the subject matter must be obeyed by the parties until that order is reversed by orderly and proper proceedings." *State v. Chavez*, 123 Ariz. 538, 540 (App. 1979) (citation omitted).
- *State v. Chacon*, 221 Ariz. 523, 525 (App. 2009)("Subject matter jurisdiction is the power of a court to hear and determine a controversy.").

Juror Issues

- "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." Ariz. R. Crim. P. 18.4(b).
- "A prospective juror may be disqualified if he is biased for or against defendant, if he holds an unqualified opinion, or if his opinion will prevent him from acting with entire impartiality. If his opinion is based upon rumor or news reports about the truth of which he has expressed no opinion, he is competent to be a juror if he swears he can fairly render a verdict and the court is satisfied of the truth of such statement." *State v. Clayton*, 109 Ariz. 587, 591 (1973).
- "A prospective juror need not be disqualified unless his opinion is unqualified. Such an opinion is defined as a fixed, settled and abiding conviction as to the guilt or innocence of the defendant. 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. That the juror will carry an opinion into the jury box or that it will take evidence to remove it are not, in themselves, grounds for disqualification . . . The trial court decides during the voir dire whether a juror's opinion is fixed and will influence his decision. The determination depends, in large part, upon an observation of the prospective juror's demeanor and the tenor of his answers. Therefore, we have long held that a ruling upon a motion challenging a juror for bias or partiality is left largely within the sound discretion of the trial court whose decision will not be overturned in the absence of a clear showing of an abuse of that discretion." *State v. Clayton*, 109 Ariz. 587, 592

(1973); citing *Leigh v. Territory*, 10 Ariz. 129 (1906) and *State v. Brady*, 66 Ariz. 365 (1948).

- A party must show the potential juror is unable to lay aside preconceived notions and render a fair and impartial verdict based on the evidence presented at trial. *State v. Clabourne*, 142 Ariz. 335, 344 (1984); citing *State v. Tison*, 129 Ariz. 526, 533 (1981)); *State v. Clayton*, 109 Ariz. 587 (1973) (no error in court's refusal to strike a juror who stated she would "try" to follow the court's instructions on self-defense).
- "A juror with preconceived notions may be rehabilitated during voir dire if an ability and willingness to be impartial is demonstrated." *State v. Comer*, 165 Ariz. 413, 426 (1990); citing *State v. Clabourne*, 142 Ariz. 335, 344 (1984).
- Stipulation to Remove a Prospective Juror for Cause. "The court may excuse a prospective juror upon stipulation of the parties that, in their good faith belief, the prospective juror cannot render a fair and impartial verdict." Ariz. R. Crim. P. 18.5(i).
- Fundamental error occurs when an impermissible theory of guilt is proffered to the jury without corrective action. "Fundamental error is present when a trial judge fails to instruct on matters vital to a proper consideration of the evidence." *State v. Rea,* 145 Ariz. 298, 300 (App. 1985) (quoting *State v. Schad*, 142 Ariz. 620 (1984)).

Duplicitous Charges

- "When the text of an indictment refers only to one criminal act, but multiple alleged criminal acts are introduced to prove the charge, our supreme court has sometimes referred to this problem in shorthand as a duplicitous charge rather than a duplicitous indictment." The verdict need not specify under which theory the jury found a defendant guilty if there is ample evidence to support each theory. *State v. Klokic*, 219 Ariz. 241, 244 ¶ 12 (App. 2008).
- "Of course, a person who drives a vehicle actually physically controls it; driving is a subset of actual physical control." *State v. Rivera*, 207 Ariz. 69, 73 ¶ 11 (App. 2004) (citing *State ex rel. O'Neill v. Brown*, 182 Ariz. 525, 527 (1995)).
- "To highlight the distinction between 'continuing offenses' and 'several distinct acts,' we defined a 'continuing offense' as 'a continuous, unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long a time it may occupy, [or] an offense which continues day by day, [or] a breach of the criminal law, not terminated by a single act or fact, but subsisting for a definite period and intended to cover or apply to successive

similar obligations or occurrences.'" *State v. Ramsey*, 211 Ariz. 529, 534-35 (App. 2005); quoting *State v. Rabago*, 103 Haw. 236 (2003)) (alterations in original).

- "Although § 28-1381(A) is written in the disjunctive, this case illustrates the peril of treating driving and actual physical control as two offenses rather than as two ways of committing a single offense." *State v. Rivera*, 207 Ariz. 69, 73 ¶ 11 (App. 2004).
- "If the statute creates a single element, a 'series,' in respect to which individual violations are but the means, then the jury need only agree that the defendant committed at least three of all the underlying crimes the Government has tried to prove. The jury need not agree about which three. On the other hand, if the statute makes each 'violation' a separate element, then the jury must agree unanimously about which three crimes the defendant committed. "Where, for example, an element of robbery is force or the threat of force, some jurors might conclude that the defendant used a knife to create the threat; others might conclude he used a gun. But that disagreement—a disagreement about means—would not matter as long as all 12 jurors unanimously concluded that the Government had proved the necessary related element, namely that the defendant had threatened force." *Richardson v. U.S.*, 526 U.S. 813, 817-818 (1991) (citing *McKoy v. North Carolina*, 494 U.S. 433, 449 (1990)).
- Failing to provide Appellant notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge may potentially present the same problems as a duplicitous indictment. Depending upon the context, it can deprive the defendant of "adequate notice of the charge to be defended," create the "hazard of a non-unanimous jury verdict, or make it impossible to precisely plead prior jeopardy in the event of a later prosecution. *State v. Davis*, 206 Ariz. 377, 389 ¶ 54 (2003).
- The State need not present all its theories to survive a duplicitous charge challenge. "The indictment itself need not inform the defendant of the theory by which the state intends to prove that charge so long as the defendant receives sufficient notice to reasonably rebut the allegation." *State v. Rivera*, 207 Ariz. 69, 73 ¶ 12 (App. 2004) (citing *State v. Arnett*, 158 Ariz. 15, 18 1988)).
- The rule requiring the court to take remedial measures such as instructing the jury that it must choose which theory was the basis of the conviction does not apply . . . '. "where a series of acts form part of one and the same transaction, and as a whole constitute but one and the same offense." *State v. Counterman*, 8 Ariz. App. 526, 531 (App. 1968); quoting *People v. Jefferson*, 266 P.2d 564 (1954).
- This court may consider either or both reasons to be deficient under the law and review each without the need for a jury to have articulated its choice. *State v.*

Tarr, 235 Ariz. 288, 290-91 ¶ 4 (App. 2014) ("Because both driving and actual physical control were presented to the jury, we do not know upon which basis the jury convicted. We must therefore consider Tarr's arguments that the jury instruction defining 'actual physical control' was deficient and constituted reversible error.").

- "'[T]he defendant is not entitled to a unanimous verdict on the precise manner in which the act was committed' as long as there is substantial evidence to support each of the charged means of commission." *State v. Millis*, 242 Ariz. 33, ¶ 21 (App. 2017); quoting *State v. Herrera*, 176 Ariz. 9, 16 (1993)).
- The jury may reach a verdict "based on a combination of alternative findings." *State v. Dann*, 220 Ariz. 351 (2009); citing *State v. Gomez*, 211 Ariz. 494, 498 n.3 ¶ 16 (2005)).
- The jury need not unanimously agree on a theory so long as it unanimously agrees on a verdict. *State v. Rivera*, 207 Ariz. 69, 73 ¶ 12 (App. 2004).

Evidence

- "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." *Ariz. R. Evid. 901*.
- At an evidentiary hearing, if the evidence was obtained under a warrant, ". . . 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. R. Crim. P. 16.2(b)(2).
- "[A] person suspected of driving while intoxicated [can] be forced to provide a blood sample, because that sample was 'real or physical evidence' outside the scope of the privilege and the sample was obtained in a manner by which 'petitioner's testimonial capacities were in no way implicated.'" *Pa. v. Muniz*, 496 U.S. 582, 591 (1990); quoting *Schmerber v. Cal.*, 384 U.S. 757, 765 (1966).
- Miranda protection for criminal defendants is limited to "testimonial or communicative evidence [that] 'reveals the subjective knowledge or thought processes of the subject.'" *State v. Lee*, 184 Ariz. 230, 233 (App. 1995) (quoting *State v. Theriault*, 144 Ariz. 166, 167 (App. 1984)).
- Only "[w]hen the state unreasonably interferes with a DUI suspect's ability 'to attempt to gather evidence exculpating him on the issue of intoxication,'" is dismissal or suppression appropriate. *State v. Rosengren*, 199 Ariz. 112, 116 ¶ 13 (App. 2000); quoting *McNutt v. Super. Ct.*, 133 Ariz. 7, 10 (1982)).
- "Police officers are not required to take the initiative or even assist in procuring any evidence on behalf of a defendant." *State v. Storholm*, 210 Ariz. 199, 201 ¶ 14

(2005); quoting *Van Herreweghe v. Burke ex rel. Cnty. of La Paz*, 201 Ariz. 387, 390 ¶ 11 (App. 2001) (internal quotation marks omitted).

- A defendant has no right to refuse to comply with a warrant. *State v. Clary*, 196 Ariz. 610, 613 (App. 2000) ("defendant had no right to resist service of a court order authorizing extraction of his blood").
- Evidence need not be suppressed when "the connection between the lawless conduct of the police and the discovery of the challenged evidence has 'become so attenuated as to dissipate the taint.'" *Wong Sun v. U.S.*, 371 U.S. 471, 487 (1963); quoting *Nardone v. U.S.,* 308 U.S. 338, 341 (1939).
- Suppression is required "only when a causal connection exists between a constitutional violation and the government's obtaining of [the] evidence." *State v. Rosengren*, 199 Ariz. 112 ¶ 22 (2000); citing *Nix v. Williams*, 467 U.S. 431, 441-47 (1984).
- "Only evidence 'tainted' by the police misconduct should be suppressed." *State v. Rosengren*, 199 Ariz. 112 (2000); citing *Murray v. U.S.*, 487 U.S. 533, 537 (1988).
- "To avoid additional evidentiary hurdles, the police typically need to have the blood sample drawn within two hours of the arrest." *State v. Stanley*, 217 Ariz. 253, 258 (App. 2007); citing A.R.S. § 28-1381(A)(2).
- "If the sample is drawn after the two-hour mark, an expert must use retroactive extrapolation to determine the blood alcohol content." *State v. Stanley*, 217 Ariz. 253, 258 (App. 2007); citing *State v. Claybrook*, 193 Ariz. 588, 590 ¶ 14 (App. 1998).
- A suspect's request for counsel may be reasonably delayed in furtherance of an investigation. "The Arizona Supreme Court has made it clear that 'in a criminal DUI case, the accused has the right to consult with an attorney, if doing so does not disrupt the investigation.'" *State v. Stanley*, 217 Ariz. 253, 256 ¶ 12 (App. 2007) (quoting *State v. Juarez*, 161 Ariz. 76, 80 (1989)).
- "It is only when the exercise of that right [to counsel under Rule 6.1] will hinder an ongoing investigation that the right to an attorney must give way in time and place to the investigation by the police." *Kunzler v. Super. Ct.*, 154 Ariz. 568, 569 (1987); citing *McNutt v. Super. Ct.*, 133 Ariz. 7 (1982).
- "We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence

does not constitute a denial of due process of law. *Ariz. v. Youngblood*, 488 U.S. 51, 58 (1988).

- "When evidence in a criminal case is destroyed, special scrutiny must be undertaken to ascertain whether defendant's right to due process has been violated. A three-pronged examination is in order: First, was the evidence material to the question of guilt or the degree of punishment; second, was the defendant prejudiced by its destruction; and third, was the government acting in good faith when it destroyed the evidence?" *State v. Cruz*, 123 Ariz. 497, 500 (App. 1979); citing *U.S. v. Picariello*, 568 F.2d 222 (1st Cir. 1978).
- It is not a violation of due process to not videotape DUI testing or other gathering of chemical evidence. *State v. Havatone*, 159 Ariz. 597, 600 (App. 1989).

Substantial Evidence

- This court is therefore left to determine if the ruling is supported by substantial evidence, gleaning not from the trial court's assessment of same, but from the record itself. *State v. West*, 226 Ariz. 559, 562, ¶14 (2011).
- "The standards for ruling on pre- and post-verdict motions for judgment of acquittal under Rule 20 are the same. On either motion, the controlling question is solely whether the record contains 'substantial evidence to warrant a conviction.' Ariz. R.Crim. P. 20(a)." *State v. West*, 226 Ariz. 559, 562 (2011).
- Substantial evidence is evidence that reasonable persons could accept as adequate and sufficient to support a conclusion of the defendant's guilt beyond a reasonable doubt. *State v. Stroud*, 209 Ariz. 410, 411–12 (2005).
- "Even if the record supports inconsistent conclusions, neither we nor the superior court may substitute our judgment for that of the ALJ because conflicting evidence can still be 'substantial.'" *Troutman v. Valley Nat'l Bank of Ariz.*, 170 Ariz. 513, 518 (App. 1992).
- The inferences made by the trial court are supported in the record and are inferences that a reasonable person might make. If reasonable men may fairly differ as to whether certain evidence establishes a fact in issue then such evidence must be considered as substantial." *State v. Collins*, 104 Ariz. 449, 450 (1969).
- "Substantial evidence is more than a mere scintilla and is such proof that reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt." *State v. Mathers,* 165 Ariz. 64, 67 (1990) (internal citation and quotation marks omitted)."; *State v. Ellison*, 213 Ariz. 116, 134 (2006) (cleaned up).

Constitutional Issues

- This Court reviews evidentiary rulings that implicate the Confrontation Clause, de novo. *State v. Ellison*, 213 Ariz. 116, 129 (2006); *Lilly v. Virginia*, 527 U.S. 116, 137 (1999).
- Similarly, an issue which "involves analysis and interpretation of those criminal procedure rules, issues subject to our de novo review." *Nordstrom v. Leonardo*, 214 Ariz. 545, 548 (App. 2007); *Smith v. Mitchell*, 214 Ariz. 78, ¶ 5 (App.2006); *Fragoso v. Fell*, 210 Ariz. 427, ¶ 7 (App. 2005).
- Trial courts have independent duties to address constitutional issues raised. *State v. Hein*, 138 Ariz. 360, 368 (1983).
- "Failure of an objection to state 'distinctly the matter objected to and the grounds of the objection' precludes appeal on that issue." The State is correct that a defendant's relevant objection could properly preserve an objection on appeal. *Rodriguez v. Schlittenhart*, 161 Ariz. 609, 617 (App. 1989).
- However, the State is incorrect in that Appellant waived his allegation of fundamental error. *State v. Moreno-Medrano,* 218 Ariz. 349, 354 ¶ 17 (App. 2008). The Arizona Supreme Court disapproved of *Moreno-Medrano,* holding that Appellants are not required to "explicitly argue" fundamental error for each assertion of error to preserve appeal.
- Because a defendant can raise a claim for relief for the first time on appeal, this court must consider it only for fundamental error in the trial proceedings. *State v. Herrera*, 176 Ariz. 9, 15 (1993); *State v. Thomas*, 130 Ariz. 432, 435 (1981); *State v. Ibeabuchi*, 248 Ariz. 412, 418 (App. 2020).
- Justice requires the court to consider an issue on appeal because "erroneous deprivation of the right to counsel of choice, 'with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as structural error' and thus cannot be waived…" *State v. Aragon*, 221 Ariz. 88, 91 (App. 2009); *United States v. Gonzalez–Lopez*, 548 U.S. 140, 150 (2006); *Sullivan v. Louisiana*, 508 U.S. 275, 282, (1993).

Prior Inconsistent Statements/Impeachment

- Impeachment testimony is not permitted "where witness acknowledged all prior inconsistencies while testifying, . . . inconsistencies were patent, and witness was impeached severely on other grounds." *State v. Woods* 141 Ariz. 446, 453 (1984).
- Refusing to permit defense counsel to impeach state's witness with a tape recording of prior inconsistent statement that had been recorded by defense counsel was not an error in murder prosecution, where defense counsel was

able to have witness read prior statement to court." *State v. Mauro*, 159 Ariz. 186 (1988).

- "In *Allred* . . . our supreme court held that a statement otherwise admissible under Rule 801(d)(1)(A) should be excluded under Rule 403 if "its probative value is substantially outweighed by the danger of prejudice, confusion or misleading the jury." 134 Ariz. at 278. The court further listed five factors to be considered in assessing the danger of unfair prejudice . . . [including whether] . . . 1) the witness being impeached denies making the impeaching statement . . ." State v. Sucharew, 205 Ariz. 16, 23 (App. 2003).

Fundamental Error vs. Harmless Error

- The first step is to determine whether a trial error exists, and if so, whether that error is fundamental. To establish a fundamental error a defendant must show that (1) the error goes to the foundation of the case, (2) the error deprived the defendant of a right essential to his or her defense, or (3) the error prevented the defendant from receiving a fair trial. If either of the first two prongs is established, the defendant must make a separate showing of prejudice — a fact-intensive inquiry. If the third prong has been established, both fundamental error and prejudice are satisfied, and a new trial is granted. *State v. Escalante*, 245 Ariz. 135, 142 (2018); *State v. Henderson*, 210 Ariz. 561, 608, ¶ 23 -26 (2005).
- Non-structural errors use fundamental error review. *State v. Ibeabuchi*, 248 Ariz. 412, 418 (App. 2020).
- Trial errors require the appellate court to consider whether the error was harmless beyond a reasonable doubt and, if so assessed, the verdict entered is upheld. *State v. Ring*, 204 Ariz. 534, 552, (2003); *State v. Ibeabuchi*, 248 Ariz. 412, 418 (App. 2020).
- "Error, be it constitutional or otherwise, is harmless if we can say, beyond a reasonable doubt, that the error did not contribute to or affect the verdict. The inquiry is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. The State has the burden of convincing us that any error was harmless." *State v. Anthony*, 218 Ariz. 439, 446 (2008) (cleaned up).
- "Before we may engage in a fundamental error analysis, however, we must first find that the trial court committed some error." *State v. Lavers*, 168 Ariz. 376, 385, (1991).

- Defendant did not raise the Confrontation Clause issue at trial and therefore must prove the error, if found, was fundamental. *State v. Alverez*, 213 Ariz. 467, 469 (App. 2006); *State v. Escalante*, 245 Ariz. 135, 140, ¶ 12 (2018).

Confrontation Clause

- Violation of the Confrontation Clause may be a harmless error. *Delaware v. Van Arsdall,* 475 U.S. 673 (1986).
- "[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witnesses' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall,* 475 U.S. 673, 679 (1986).
- "The correct inquiry is whether, assuming the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." *State v. Salazar,* 182 Ariz. 604, 610 (App.1995) (*quoting Van Arsdall*, 475 U.S. at 684); *State v. Bronson*, 204 Ariz. 321, 327 (App. 2003).
- A defendant's Confrontation Clause rights are violated when a witness provides testimony which the defendant does not have the opportunity to confront. *Crawford v. Washington*, 541 U.S. 36, 42-45 (2004). "Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id*. at 68.
- Only had the victim failed to appear at trial would a defendant have even a facially appropriate Confrontation Clause argument. *State ex rel. Montgomery v. Karp*, 236 Ariz. 120, 123 (App. 2014).
- To trigger a violation of a defendant's Confrontation Clause rights that are asserted, two material things would have to occur which are not present here: the victim would have had to fail to appear, and the statements would have had to be testimonial in nature. The analysis necessary ended when the victim took the stand as the law requires both. *California v. Green*, 399 U.S. 149, 158 (1970).
- There is no Confrontation Clause violation if a witness testifies, and is subject to cross-examination, even if the witness cannot recall the details of the offense. *United States v. Owens*, 484 U.S. 554, 557 (1988).
- "That a piece of evidence may become 'relevant to later criminal prosecution' does not automatically place it within the ambit of 'testimonial.' . . . [Otherwise,] any piece of evidence which aids the prosecution would be testimonial and subject to Confrontation Clause scrutiny." *United States v. Mendez,* 514 F.3d 1035, 1046 (10th Cir.2008).

- The right of confrontation guarantees that the fact finder had an "adequate opportunity to assess the credibility of the witnesses." *Berger v. California,* 393 U.S. 314, 315 (1969)
- If a Sixth Amendment constitutional right to confront an accuser is not raised the trial court may review only for fundamental error. *State v. Forde*, 233 Ariz. 543, 560 (2014).

911 Calls

- 911 calls are an exception to the Confrontation Clause as they are generally not considered to be testimonial in nature. Statements and nonverbal conduct are generally considered testimonial except under a limited exception. In this case, the 911 call served the primary purpose of meeting an "ongoing emergency." *Davis. v. Washington*, 547 U.S. 813, 821 (2006).
- First, as recognized in *Davis v. Washington*, 9-1-1 calls must be analyzed on a case-by-case basis to determine whether the statements made during the call qualify as testimonial. Second, 9-1-1 calls that are primarily "loud cries for help" are nontestimonial. These nontestimonial statements are usually made in the context of immediate danger either from physical injury or threat of injury or harm. In such cases, it cannot be said that the caller would reasonably expect his statements to be used prosecutorially nor that the 9-1-1 operator is primarily gathering evidence for an investigation and prosecution. Third, 9-1-1 calls that are made for the primary purpose of identifying a suspect or reporting evidence in an alleged crime that has already occurred will usually be testimonial. Therefore, because 911 calls are primarily "loud cries for help," the court concluded that they do not fall within the Crawford meaning of testimonial. *State v. King,* 212 Ariz. 372, 377 78 (App. 2006).
- When 911 is contacted for the purposes of seeking help, rather than providing statements for prosecution of crimes which have already occurred, those statements are not testimonial in nature. *Michigan v. Bryant*, 562 U.S. 344 (2011).

Hearsay Exceptions with 911 calls/confrontation clause issues

- Statements can be excluded from the rule against hearsay under certain circumstances including:

1) Present Sense Impression. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

(2) Excited Utterance. A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused. Ariz. R. Evid. 803(1) and (2).

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5th Amendment Rights of Victim/Witness

- Defendant argues the victim's inability to assert her Fifth Amendment rights prejudiced him in some manner. *Alderman v. United States*, 394 U.S. 165, 172.
- Defendant lacks standing to raise a Fifth Amendment argument on behalf of a victim; either in the context of what the testimony may have been or any prejudice that testimony is alleged to have created. *Bowman v. United States*, 350 F.2d 913, 916 (9th Cir. 1965).

Notice

- "A defect may be considered formal or technical when its amendment does not operate to change the nature of the offense charged or to prejudice the defendant in any way." *State v. Freeney*, 223 Ariz. 110, 113 (2009); *citing State v. Bruce*, 125 Ariz. 421, 423 (1980).
- A violation of Rule 13.5(b) does not necessarily equate to an infringement of a defendant's Sixth Amendment rights. For Sixth Amendment purposes, when a defendant does not receive constitutionally adequate notice of the charges against him, he is necessarily and actually prejudiced. *State v. Freeney*, 223 Ariz. 110, 113 (2009).
- "Permissible Rule 13.5(b) amendments, for example, have corrected dates, names, addresses, *and even a statutory section number* . . .". *State v. Freeney*, 223 Ariz. 110, 113 (2009); *citing State v. Sustaita*, 119 Ariz. 583, 591 (1978); *State v. Johnson*, 198 Ariz. 245, 247 ¶ 7 (App. 2000).

Self-defense

- "Whether a defendant must act solely based on the belief that self-defense is necessary to prevent immediate physical harm is an issue of statutory interpretation, which we review de novo." *State v. King*, 225 Ariz. 87, 89 (2010); *State v. Gomez*, 212 Ariz. 55, 56(2006).
- A person is justified in using physical force against another, and does not commit a crime, "when and to the extent a reasonable person would believe that physical force is immediately necessary to protect himself against the other's use or attempted use of unlawful physical force." A.R.S. §§ 13–205(A) –404(A). These provisions use objective standards that depend on the beliefs of a "reasonable person" in the defendant's circumstances rather than the defendant's subjective beliefs. "A defendant is entitled to a self-defense instruction if the record contains the 'slightest evidence' that he acted in self-defense." *State v. Carson*, 243 Ariz. 463, 465(2018) (*internal citations omitted); quoting State v. King,* 225 Ariz. 87, 90 (2010).

- Prior to *State v. Carson,* 243 Ariz. 463, 465 (2018), a defendant could not raise self-defense/justification defense without admitting to the commission of the offense. In *Carson*, the Arizona Supreme Court held that required admission alleviated the State's burden of proving the elements of the crime. Since *Carson*, once a defendant raises the issue of self-defense or justification and provides the "slightest evidence" of acting in self-defense, the State then must prove she did not. *Carson* at 465.

Damage Violation/Restitution

- "When determining value, the jury [trier of fact] should be permitted to utilize its common sense." *State v. Printz*, 125 Ariz. 300, 304 (1980).
- A defendant's cause of damages that exceed the $1,000 necessary to satisfy the statutory threshold for a class six felony under § 13-1602(B)(4) can be determined from a jury's findings. *State v. Printz*, 125 Ariz. 300, 304 (1980).
- While restitution does not help the State prove the elements of the offense, had the testimony at that hearing not supported the verdict, the trial court could have modified the same prior to sentencing. *State v. Fancher*, 169 Ariz. 266, 267-68 (App. 1991).
- While the state has the burden of proof in damages, general testimonies that items were destroyed and damaged is sufficient to allow the trial courts in its discretion to determine the range of value. *State v. Brockell*, 187 Ariz. 226, 227 (App. 1996).
- A defendant can be sentenced for a class one misdemeanor only when there is sufficient evidence presented about the value of the items damaged. *State v. Mabes*, No. 2 CA-CR 2017-0372, 2018 WL 2113362, at *1 (Ariz. Ct. App. May 8, 2018) ("On appeal, Mabes contends, and the state concedes, the trial court committed fundamental error when it sentenced him to a class one misdemeanor on count four rather than a class two misdemeanor. . . . After the state presented its case to the jury and rested, it admitted it did not have sufficient evidence of the specific value of the property damage in count four. . . . Mabes contends that by failing to designate count four as a class two rather than a class one misdemeanor and sentence him accordingly, the trial court committed fundamental error. We agree."). Secondary evidence presented can also satisfy the burden of proof. *State v. Hyde*, 133 Ariz. 35, 37 (App. 1982).
- Unlike other criminal proceedings, in which the applicable burden of proof is the "beyond a reasonable doubt" standard, the burden of proof applicable to restitution proceedings is proof by a preponderance of the evidence. *In re Stephanie B.*, 204 Ariz. 466, 469-470, ¶ 15 (App. 2003).

- The Court of Appeals has recently provided guidance on the determination of the value of item damages or stolen for purposes of classification of the offense as well as restitution without specific testimony regarding the same. *State v. Jiminez*, No. 2 CA-CR 2019-0273, 2021 WL 955130, at *3 (Ariz. Ct. App. Mar. 12, 2021).
- An order of restitution in favor of a person does not preclude that person from bringing a separate civil action and proving in that action damages in excess of the amount of the restitution order that is actually paid. *A.R.S. § 13-807*.
- Consequential damages that do not flow directly from the criminal activity are not properly included in a restitution award. *See A.R.S. § 13-105(16); State v. Wilkinson*, 202 Ariz. 27, 29 (2002) ("As the court of appeals noted, however, 'but for' causation does not suffice to support restitution, for if it did, restitution would extend to consequential damages. Yet our criminal code expressly provides the contrary. By eliminating consequential damages, the statutory scheme imposes a third requirement: the criminal conduct must directly cause the economic loss" (cleaned up)
- "Economic loss" means any loss incurred by a person as a result of an offense. Economic loss includes lost interest, *lost earnings*, and other losses that would have been incurred but for the offense. *A.R.S. § 13-105(16)*.
- In Arizona, a loss is recoverable as restitution if: 1) the loss is economic; 2) the loss is one the victim would not have incurred but for the criminal conduct, and 3) the criminal conduct directly caused the economic loss. *State v. Lewis,* 222 Ariz. 321, 324 (App. 2009).
- "Consequential damages are such as are not produced without the concurrence of some other event attributable to the same origin or cause; such damage, loss or injury does not flow directly and immediately from the action of the party, but only from the consequences or results of such act. The term may include damage which is so remote as not to be actionable." *State v. Sexton*, 176 Ariz. 171, 172-173 (App. 1993).
- Arizona's statutory scheme has three requirements for restitution: (1) the loss must be economic, (2) the loss must be one that the victim would not have incurred but for the defendant's criminal offense, and (3) the criminal conduct must directly cause the economic loss. *State v. Wilkinson*, 202 Ariz. 27, 29 (2002).
- A defendant carries the right to recover economic losses, including lost wages, as part of the criminal restitution proceedings. The State has a burden of proof by a preponderance of the evidence to show that a defendant had suffered such economic losses. *State v. Wideman*, 165 Ariz. 364, 366-367 (App. 1990).

- A $100,000 settlement agreement is contemplated by a person's full compensation for any damages and thus they are precluded from additional recovery in a criminal restitution hearing. *State v. Iniguez*, 169 Ariz. 533, 537 (1991).
- A loss of a benefit, such as sick time, "is a real economic loss tied to wages earned." *In re Ryan A.*, 202 Ariz. 19, 26 (App. 2002).

Corpus Delicti

- A defendant may not be convicted of a crime based on an uncorroborated confession without independent proof of the corpus delicti, or the "body of the crime." *State v. Gillies*, 135 Ariz. 500, 506 (1983).
- The purpose of the corpus delicti rule is to prevent a defendant from being convicted based on a coerced or otherwise untrue confession. *Smith v. United States*, 348 U.S. 147 (1954); *State v. Gerlaugh,* 134 Ariz. 164 (1982).
- Arizona cases permit a corroborated confession to be used to establish proof of an element of the crime. *State v. Flores*, 202 Ariz. 221, ¶ 5 (App. 2002),
- A confession of information related only to punishment is not an element of the offense and therefore corpus delicti does not apply. *State v. Flores*, 202 Ariz. 221, ¶ 5 (App. 2002).

Disorderly Conduct

- Arizona courts have recognized that, depending on the type of victim, the state must satisfy differently its burden of proof under § 13–2904. First, when a defendant is charged with disorderly conduct for disturbing the peace of a particular person, the state is required to prove that the defendant knowingly disturbed the victim's peace*, In re Julio L.*, 197 Ariz. 1, ¶ 8(2000), or that the defendant intended to do so. *State v. Miranda*, 200 Ariz. 67, ¶ 5 (2001).
- When a defendant is charged with disrupting the peace of a neighborhood, "evidence of actual disturbance is not required." *In Re: Julio L., 197 Ariz. 1* (2000); citing *State v. Johnson*, 112 Ariz. 383 (1975).
- Three behaviors that might result in a disorderly conduct conviction as related to a particular victim: 1) fighting; 2) violence; or 3) conduct liable to provoke that response in others. *In Re: Julio L.*, 197 Ariz. 1 (2000).
- "When the State identifies a specific victim of seriously disruptive behavior charged under A.R.S. § 13-2904. A.1, *Julio* controls the analysis." *Prosise v. Kottke*, 249 Ariz. 75, 77-78 this (App. 2020); *In Re: Nickolas S.*, 226 Ariz. 182 (2011); *In Re: Julio L.*, 197 Ariz. 1 (2000).

- The State can meet its burden of proof for disorderly conduct against a neighborhood in any number of ways, including loud or unusual noise (S*tate v. Johnson*, 112 Ariz. 383 (1975)(smashing a car window). *State v. Clayborn*, 2016 WL 4140848).
- If a defendant is charged with disorderly conduct for disturbing the peace of a neighborhood, the defendant's conduct may be measured against an objective standard, and the state need not prove that any particular person was disturbed. *State v. Burdick*, 211 Ariz. 583, 585 (App. 2005).
- Our inquiry must determine whether the [conduct] would disturb a person of ordinary sensitivities; that is, the "language or conduct is to be adjudged to be disorderly, not merely because it offends some supersensitive or hypercritical individual, but because it is, by its nature, of a sort that is a substantial interference with (our old friend) the reasonable man." *State v. Johnson*, 112 Ariz. 383 (1975); *People v. Harvey*, 307 N.Y. 588 (1954).

Consolation/Severance

- When most of the evidence is admissible to prove two cases, consolidation is typically appropriate. *State v. Williams*, 183 Ariz. 368, 377 (1995).
- Appellate courts strictly apply the waiver provisions of Rule 13.4(c), particularly the explicit requirement that motions for severance be renewed during trial. *State v. Laird*, 186 Ariz. 203, 206 (1996).

Harassment

- The harassment statute contains both subjective and objective components, requiring the harassing conduct to be focused on "a specific person" and of a type that not only "in fact seriously alarms, annoys or harasses [that] person" but also "would cause a reasonable person to be seriously alarmed, annoyed or harassed." § 13–2921(E). *State v. Brown*, 207 Ariz. 231, 235, ¶ 10 (App. 2004).
- The evidence supports the trial court's finding that the harassing conduct was not continuous, but rather was engaged in over time, with separation and re-engagement, and in different and distinct conduct. The "reasonable person" standard in the harassment statute is a direction to courts not to issue injunctions merely because a particular plaintiff has a negative reaction to the actor's conduct. Instead, it directs courts to use an objective standard. *State v. Brown*, 207 Ariz. 231, 235, ¶ 10 (App. 2004).

Numerous Ways to Commit a Single Offense

- If there are numerous ways to commit a single offense, but each is not a separate violation, the jury [or trial court] is not tasked with unanimously agreeing as to which "way" the offense was committed. *Richardson v. U.S.* 526 U.S. 813, (1991).

- A defendant's argument that two subsections of the charge were materially different because "they are separate and distinct crimes" fails to suffice. *State v. Rivera*, 226 Ariz. 325; 328 (App. 2011); *citing State v. Freeney*, 223 Ariz. 110, 110 (2009)("[W]hen the elements of one offense materially differ from those of another—even if the two are defined in subsections of the same statute—they are distinct and separate crimes. "[B]ecause the elements of the amended charge differ from those of the original charge.")

Notice of Judge

- Allegations of interest or prejudice that prevent a fair and impartial hearing or trial that arise after the commencement of the hearing or trial may be preserved for appeal by making an appropriate motion. *Ariz. R. Crim. P. 10.1(b)(1)*.
- Rule 10.1 "procedures would be rendered meaningless and effectively circumvented if permission to question a judge's partiality rested not on concrete facts and specific allegations but on mere speculation, suspicion, apprehension, or imagination." *State v. Rossi*, 154 Ariz. 245, 248 (1987).
- Under Rule 10.1(a), a defendant is entitled to a new judge "if a fair and impartial hearing or trial cannot be had by reason of the interest or prejudice of the assigned judge." *State v. Ellison*, 213 Ariz. 116, 129 (2006).

Identification Issues

- This Court can order the minute entry corrected if the record clearly identifies the intended sentence. *State v. Whitney*, 159 Ariz. 476, 487 (1989); *State v. Hanson*, 138 Ariz. 296, 304(App. 1983).
- An identification can be valid even if only one photograph is shown in a photographic lineup. *Manson v. Brathwaite*, 432 U.S. 98, 115-16 (1977); *See also State v. Dessureault,* 104 Ariz. 380 (1969).

Case References for Evidentiary/Suppression Issues

Criminal Suppression Hearing (Exclusion/Suppression of Evidence)

- This Court reviews the trial court's suppression rulings for an abuse of discretion. *State v. Livingston*, 206 Ariz. 145, 146 (App. 2003). For purposes of a motion to suppress, the reviewing court must "consider only the evidence presented at the suppression hearing and view the facts in the light most favorable to sustaining the trial court's ruling" *State v. Maciel,* 240 Ariz. 46, 49, (2016).

- Whether evidence should have been excluded as the result of a deprivation of counsel is "a mixed question of fact and law implicating constitutional questions. As such [the court's determination] is reviewed de novo." *State v. Hackman*, 189 Ariz. 505, 508 (App. 1997); *citing Ornelas v. United States,* 517 U.S. 690 (1996).

Case References for DUI criminal matters

Traffic Stops

- A police officer need only have reasonable suspicion that a person is engaged in criminal activity or has violated a traffic law to conduct a stop of a vehicle. *State v. O'Meara*, 198 Ariz. 294, ¶ 5 (2000); *State v. Acosta*, 166 Ariz. 254 (App. 1990).
- "On all roadways of sufficient width, a person shall drive a vehicle on the right half of the roadway..." A.R.S. § 28-721(A).
- Under this reasonable suspicion standard, the officer must possess, based on the "totality of the circumstances," "a particularized and objective basis for suspecting that the particular person stopped" had committed criminal acts. *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118 (1996) ; quoting *U.S. v. Cortez*, 449 U.S. 411, 417-18 (1981) (internal quotation marks omitted).
- "Under the Fourth Amendment of the United States Constitution, an investigatory stop of a motor vehicle constitutes a seizure. However, because a traffic stop is less intrusive than an arrest, it requires only reasonable suspicion on the part of the investigating officer. Thus, while an officer needs a particularized and objective basis for suspecting an individual has violated the law, he is not required to determine if an actual violation has occurred prior to stopping a vehicle for further investigation." *State v. Nevarez*, 235 Ariz. 129, 132–33 ¶ 7 (App. 2014); citing *State v. Gonzalez-Gutierrez*, 187 Ariz. 116 (1996) and *State v. Vera*, 196 Ariz. 342, ¶ 6 (App. 1999).

Foreign Conviction for Sentencing Enhancement

- The law requires clear and convincing evidence in determining if an out-of-state prior conviction may be used as sentencing enhancement in Arizona. *State v. Cons*, 208 Ariz. 409, 414-15 ¶ 15 (App. 2004).
- In Arizona, the existence of a DUI conviction within the eighty-four months prior to the current conviction enhances the punishment by requiring a defendant serve mandatory additional jail time; increases fines and assessments; requires community service; revocation of driving privileges for one year; the possibility a defendant may be ordered to equip any motor vehicle they operate with a certified ignition interlock device; and the need to attend and successfully

complete an approved traffic survival school course. A.R.S. §§ 28-1381(K) and 28-1382(E).

- "[A] defendant may seek to disqualify a prior conviction before trial, as a matter of law, on the ground the prior criminal act would not have violated Arizona's DUI laws had it been committed in this state." *State v. Moran*, 232 Ariz. 528, 534 ¶ 15 (App. 2013); citing *State v. Colvin*, 231 Ariz. 269 (App. 2013).
- In Arizona, "a conviction from a jurisdiction outside of Arizona, 'which if committed within this state would be punishable as a felony . . . is subject to the provisions of this [A.R.S. § 13-604(I)].'" *State v. Ault*, 157 Ariz. 516, 520 (1988); quoting *State v. LeMaster*, 137 Ariz. 159, 167 (App. 1983).
- Before the Court may use a foreign conviction to enhance a sentence in Arizona, it must "conclude that the foreign conviction includes 'every element that would be required to prove an enumerated Arizona offense.'"
- "[T]he foreign conviction must entail a finding by the former trier of fact, beyond a reasonable doubt, of all the elements necessary for a specified Arizona offense . . . A charging document or judgment of conviction may be used only to narrow the statutory basis of the foreign conviction, not to establish the conduct underlying it." *State v. Moran*, 232 Ariz. 528, 534 (App. 2013).

Traffic Lanes

- *State v. Livingston*, 206 Ariz. 145 (App. 2003) cites numerous cases in which crossing a shoulder line twice or even three times, or crossing a "fog" line, was not a violation. *Rowe v. Maryland*, 363 Md. 424 (Md. Ct. Spec. App. 2001); *Crooks v. Florida*, 710 So.2d. 1041 (Fla. Dist. Ct. App. 1998); *Montana v. Lafferty*, 291 Mont. 157 (1998).

Deprivation Period

- "Deprivation period" means at least a 15-minute period immediately prior to a duplicate breath test during which period the subject has not ingested any alcoholic beverages or other fluids, eaten, vomited, smoked, or placed any foreign object in the mouth. Arizona law requires that prior to a breath test, the suspect have a 15-minute "deprivation period." Ariz. Admin. Code R13-10-101.
- "Duplicate breath test" means two consecutive breath tests that immediately follow a deprivation period, agree within 0.020 AC of each other and are conducted at least five and no more than 10 minutes apart. Ariz. Admin. Code R13-10-101.
- "(A). The results of a breath test administered for the purpose of determining a person's alcohol concentration are admissible as evidence in any trial, action or

proceeding on establishing the following foundational requirements: ... (4). The operator who conducted the test followed an operational checklist approved by the Department of Health Services or the Department of Public Safety for the operation of the device used to conduct the test. The testimony of the operator is sufficient to establish this requirement." A.R.S. § 28-1323(A)(4).

- "Compliance with subsection A of this section is the only requirement for the admission in evidence of a breath test result." A.R.S. § 28-1323(B).

Breath tests

- "If a law enforcement officer administers a duplicate breath test and the person tested is given a reasonable opportunity to arrange for an additional test pursuant to subsection C of this section, a sample of the person's breath does not have to be collected or preserved." A.R.S. § 28-1388(B).
- "The person tested shall be given a reasonable opportunity to arrange for any physician, registered nurse or other qualified person of the person's own choosing to administer a test or tests in addition to any administered at the direction of a law enforcement officer. The failure or inability to obtain an additional test by a person does not preclude the admission of evidence relating to the test or tests taken at the direction of a law enforcement officer." A.R.S. § 28-1388(C).

Independent Testing

- A defendant has "a reasonable opportunity to arrange for a competent person to draw an independent sample of the defendant's blood and analyze that sample regardless [of] whether the State has collected, analyzed, and preserved a portion of the defendant's blood." *State v. Olcan*, 204 Ariz. 181, 184 ¶ 11 (App. 2003); citing A.R.S. § 28-1388(C).
- The right to independent testing can be waived by a failure to exercise it. *State ex rel. Dean v. City Ct. of City of Tucson*, 163 Ariz. 510, 514-15 (1990).
- DWI suspects must be informed of their right to an independent chemical alcohol test. . . ." *Montano v. Super. Ct. in and for Pima Cnty.*, 149 Ariz. 385, 389 (1986) ("Our decision that DWI suspects must be informed of their right to an independent chemical alcohol test at their own expense when the state chooses not to invoke the implied consent statute is a logical step in the evolution of DWI cases.")

Driving vs. Actual Physical Control

Arizona law permits a finding of actual physical control under a myriad of situations: *State v. Webb*, 78 Ariz. 8 (1954) (defendant passed out or asleep blocking traffic near an intersection).

- *State ex rel. McDougall v. Super. Ct. (Schrader)*, 173 Ariz. 582 (App. 1992) (defendant asleep in a car in a parking lot with the engine running).
- *State v. Vermuele*, 160 Ariz. 295 (App. 1989) (reversing dismissal of prosecution when police found an intoxicated driver illegally parked with keys in ignition but engine off).
- *State v. Super. Ct. (Goseyun)*, 153 Ariz. 119 (App. 1987) (intoxicated defendant parked ten to twenty feet from road with engine running and headlights on while he slept in car).
- *State v. Love*, 182 Ariz. 324, 326 (1995) (defendant physically present in vehicle but likely unable to drive).

- If the appellate court determines driving or actual physical control can be alleged in the alternative, the proper arbiter of whether Appellant was driving or was in actual physical control of the vehicle is the trial court and/or the jury. The determination of the credibility of the witnesses, and the weighing of the evidence remains for the trier of fact. *E.g.*, *Clark v. Kreamer*, 243 Ariz. 272, 276 ¶ 14 (App. 2017).
- "Except as otherwise provided in this chapter, the operation of autonomous vehicles with or without a human driver is subject to all applicable federal and state laws." A.R.S. § 28-9702(A).
- With that control, a defendant is subject to all Arizona laws, including those precluding intoxicated driving. Arizona law does not require that a person be physically present in the vehicle to have physical control over it. A.R.S. § 28-9702.
- "'Operator'" means a person who drives a motor vehicle on a highway, who is in actual physical control of a motor vehicle on a highway or who is exercising control over or steering a vehicle being towed by a motor vehicle. A.R.S. § 28-101(58).
- Arizona law considers a person operating a vehicle in any manner if they are "exercising control" over it. A.R.S. § 28-101(58).
- In addition, actual physical control in Arizona doesn't itself require "physical" presence. It requires that the trier of fact consider the totality of circumstances to determine "whether the defendant's current or imminent control of the vehicle presented a real danger." *State v. Zaragoza*, 221 Ariz. 49, 54 ¶ 21 (2009).
- An intoxicated person in control of a vehicle, whether by driving or with the imminent possibility of driving, poses the same risk to others near the vehicle. The intoxicating substance would have the same effect on the person's ability to control the vehicle

from wherever he was. Physical control under Arizona law, is not physical possession. *State v. Zaragoza*, 221 Ariz. 49 (2009).

Field Sobriety Tests

- In Arizona, "HGN test results are admissible both to corroborate a chemical test and as evidence a suspect was under the influence." They just cannot be used in lieu of a chemical test to suggest a chemical test result. *State ex rel. Hamilton v. City of Mesa*, 165 Ariz. 514, 516 (1990).
- "Generally, the results of FSTs [field sobriety tests] are admissible as relevant evidence of a defendant's impairment." *State v. Campoy*, 214 Ariz. 132, 134 ¶ 8 (App. 2006); citing *State ex rel. Hamilton v. City of Mesa*, 165 Ariz. 514, 518 (1990).
- "The primary restriction on FST evidence concerns the test results' use in establishing a defendant's blood alcohol concentration (BAC).... FST results may not be used to quantify an accused's BAC. This restriction extends to HGN test results, which, although the test satisfies the *Frye* standard of scientific reliability, cannot be used to quantify or estimate BAC in the absence of a chemical test." *State v. Campoy*, 214 Ariz. 132, 134-35 ¶ 9 (App. 2006) (citing *State v. Super. Ct. (Blake)*, 149 Ariz. 269, 280 (1986) and *State ex rel. Hamilton v. City of Mesa*, 165 Ariz. 514, 518 (1990)).
- "The proper use of HGN test results is as evidence 'relevant to show[ing] whether a person [was] under the influence of alcohol... in the same manner as... other field sobriety tests.'" *State v. Campoy*, 214 Ariz. 132, 134-35 (App. 2006); quoting *State ex rel. Hamilton v. City of Mesa*, 165 Ariz. 514, 518 (1990) (alterations in original).
- "Although we held in *Blake* that HGN test results are admissible to confirm or challenge the accuracy of a chemical analysis of BAC and as evidence that a driver was under the influence, we emphasized that 'it is *not admissible* in any criminal case as direct independent evidence to *quantify* blood alcohol content." *State ex rel. Hamilton v. City of Mesa*, 165 Ariz. 514, 516 (1990)*;* quoting *State v. Super. Ct. (Blake)*, 149 Ariz. 269, 280 (1986)(emphasis in original).
- "Police officers may testify about the 'manner in which [a defendant] performed the [FSTs].'" *State v. Campoy*, 214 Ariz. 132, 134 ¶ 8 (App. 2006); quoting *Fuenning v. Super. Ct.*, 139 Ariz. 590, 599 (1983)(alterations in original).
- Police officers may testify that they administered an FST in "*an attempt to determine whether* [a defendant] *is, in fact*, intoxicated and was intoxicated while he was driving the car." *State v. Askren*, 147 Ariz. 436, 437 (App. 1985) (emphasis in original).

Slightest Degree

- "It is a truism that a person who is even to the slightest extent 'under the influence of liquor,' in the common and well-understood acceptation of the term, is to some degree at least less able, either mentally or physically or both, to exercise the clear judgment and steady hand necessary to handle as powerful and dangerous a mechanism as a modern automobile with safety to himself and the public. With the increasing number and speed of automobiles on our highways and the appalling number of accidents resulting therefrom, it is not strange that the lawmaking power determined that any person, who of his own free will voluntarily lessened in the slightest degree his ability to handle such vehicles by the use of intoxicating liquor, should, while in such condition, be debarred from their use. The legislature has placed no limitation on the extent of the influence required, nor can we add to their language." *Hasten v. State*, 35 Ariz. 427, 431 (1929).
- The California standard of "an appreciable degree" of impairment also encompassed the lesser term "to the slightest degree" and thus it was possible for a defendant to be impaired in Arizona "to the slightest degree" without being so impaired as to be "appreciable." *State v. Colvin*, 231 Ariz. 269, 273 ¶ 10 (App. 2013); citing *People v. Crane*, 48 Cal. Rptr. 3d 334, 338 (2006) (concluding impairment to the slightest degree less stringent standard than impairment to appreciable degree).

Attorney Fees

Case References

General

- Trial judges must consider a myriad of factors when exercising their discretion regarding attorneys' fees awards. *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 568 (1985). *Schweiger v. China Doll Rest., Inc.,* 138 Ariz. 183 (App. 1983). These factors include but are not limited to (1) the merits of the claim or defense presented by the unsuccessful party, (2) the litigation could have been avoided or settled and the successful party's efforts were completely superfluous in achieving the result, (3) assessing fees against the unsuccessful party would cause an extreme hardship, and (4) the successful party did not prevail with respect to all of the relief sought. *Associated Indem. Corp.*, 143 Ariz. at 570. The trial court may also consider whether counsel has demonstrated the use of any "billing judgment" regarding the fee application in any particular case. *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983).
- "In order for the court to make a determination that the hours claimed are justified, the fee application must be in sufficient detail to enable the court to assess the reasonableness of the time incurred." *Schweiger v. China Doll Rest.*, Inc. 138 Ariz. 183 (App. 1983).
- If a conscientious review of the trial court record, fails to disclose a reasonable basis for the fee award, then this Court may remand to the trial court for reconsideration of the fee request. *Grand Real Estate, Inc. v. Sirignano*, 139 Ariz. 8, 13–15 (App. 1983).
- If Appellee contends that this Court is required to award reasonable attorneys' fees due to a provision of a contract between the parties, its SCRAP-Civil Rule 13 filing must either supply the contractual provision requiring the award of fees or specifically identify where in the existing record that provision can be found. *Bennett Blum, M.D., Inc. v. Cowan*, 235 Ariz. 204, 206 (App. 2014). Landlord's filing also "must disclose the terms of any fee agreement for the services for which the claim is made." Rule 54(g)(4), Ariz. R. Civ. P.*; Jerman v. O'Leary*, 145 Ariz. 397, 403 (App. 1985) ("[I]t is vital to know what the agreement was between appellees and their lawyer.").
- Contract provisions governing the award of attorneys' fees to prevailing parties are enforced according to the terms of the parties' contract. *Heritage Heights Home Owners Ass'n v. Esser*, 115 Ariz. 330, 333 (App. 1977).

Prevailing Party

- A trial court has "substantial discretion" to determine who is a successful party in litigation. *Fulton Homes Corp. v. BBP Concrete*, 214 Ariz. 566, 572 ¶ 25 (App. 2007). The trial court has great latitude to decide which party "prevailed" in a settlement and that decision should be deferred to the trial court and affirmed unless there is an abuse of discretion in the finding. *Id.* The prevailing party cannot be determined until the case is dismissed (or fully resolved). *Britt v. Steffen*, 220 Ariz. 265, 270-71 (App. 2008).
- In order to determine if attorneys' fees are awardable, the trial court must first decide who prevailed. Although not mandated in this situation, appellate courts have "encouraged the trial court to state the reasons for its denial of attorney's fees on the record. *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 571 (1985) ("Although the statute does not require it, we agree that it is the better practice to have a record which reflects the justification for the trial court's denial of fees").
- Where fees are awarded pursuant to a provision of a contract between the parties which calls for the non-prevailing party to pay "reasonable" fees and costs, the trial court has greater discretion to determine reasonableness than when a contract calls for the non-prevailing party to pay all attorneys' fees. *Geller v. Lesk*, 230 Ariz. 624, 628 ¶ 11 (App. 2012). That would also be the case when the language is permissive rather than absolute regarding any award at all.
- *Fulton Homes Corp. v. BBP Concrete*, 214 Ariz. 566, 572 (App. 2007)("the trial court may award costs to the defendant as a "successful party" pursuant to A.R.S. § 12–341 when a complaint is dismissed because of a plaintiff's failure to prosecute)(*emphasis added*); *Britt v. Steffen*, 220 Ariz. 265, 268 (App. 2008)("a defendant against whom a contract action is dismissed without prejudice for lack of prosecution is the "successful party" in that action and qualifies for a possible award of attorney's fees pursuant to A.R.S. § 12–341.01(A)).

Dismissals

- [E]ntry of [a] settlement agreement and dismissal of the matter [is] a final judgment of the case. *4501 Northpoint LP v. Maricopa County,* 212 Ariz. 98, 101 ¶ 16-17 (2006) (Taxpayer was permitted to recover attorneys' fees because the settlement agreement and subsequent judgment prevented either party from re-litigating the claims involved). A dismissal may also be a final judgment from which attorney fees may be sought. *Vicari v. Lake Havasu City*, 222 Ariz. 218, 225 ¶ 29 (App. 2009).

Templates for Introductory Paragraphs

EVICTION TEMPLATE

Appellant/Defendant/Tenant, **INSERT NAME**, appeals from an eviction judgment entered against **HIM/HER** in the **INSERT TRIAL COURT** in favor of Appellee/Plaintiff/Landlord, **INSERT NAME**. This Court has jurisdiction pursuant to Ariz. Const. art. VI, § 16; A.R.S. §§ 12-124, 22-261; and Rule 17, Rules of Procedure for Eviction Actions ("RPEA"). For the following reasons, the trial court's judgment is **AFFIRMED/VACATED/IN PART**.

PROTECTIVE ORDER TEMPLATE

Appellant/Defendant, **INSERT NAME**, appeals from **INSERT TRIAL COURT**'s issuance of an Order of Protection ("OOP") **OR** Injunction Against Harassment ("IAH"). The trial court found in favor of Plaintiff/Appellee, **INSERT NAME**, and upheld the OOP following a contested hearing. This Court has jurisdiction pursuant to Ariz. Const. art. VI, § 16; A.R.S. §§ 12-124(A) and 22-425(B); and Rule 42, Rules of Protective Order Procedure ("RPOP"). For the following reasons, the trial court's judgment is **AFFIRMED/VACATED/IN PART**.

CIVIL TEMPLATE

Appellant/Defendant, **INSERT NAME**, appeals from a civil judgment entered against **HIM/HER** in the **INSERT TRIAL COURT** in favor of Appellee/Plaintiff, **INSERT NAME**. This Court has jurisdiction pursuant to Ariz. Const. art. VI, § 16 and A.R.S. §§ 12-124, 22-261. For the following reasons, the trial court's judgment is **AFFIRMED/VACATED/IN PART**.

CIVIL TRAFFIC TEMPLATE

Appellant/Defendant, **INSERT NAME**, appeals from a judgment of the **INSERT TRIAL COURT**. The trial court found Defendant responsible for violating **INSERT STATUTE WITH BRIEF EXPLANATION OF VIOLATION**. This Court has jurisdiction pursuant to Article VI, Section 16 of the Arizona Constitution; A.R.S. §§ 12-124(A) and 22-425(B); and Rule 26, Rules of Court Procedure for Civil Traffic, Boating, Marijuana, and Parking and Standing Violations. For the following reasons, the trial court's judgment is **AFFIRMED/VACATED/IN PART**.

CRIMINAL TEMPLATE

Appellant/Defendant, **INSERT NAME**, appeals from a judgment of conviction entered against **HIM/HER** in the **INSERT TRIAL COURT**. The trial court found **INSERT NAME** guilty of violating **INSERT STATUTES**. This Court has jurisdiction pursuant to Ariz. Const.

art. VI, § 16 and A.R.S. §§ 12-124(A), **INSERT OTHER STATUTES**. For the following reasons, the trial court's judgment is **AFFIRMED/VACATED/IN PART**.

Templates for Minute Entry Orders

1. MEO TRIAL COURTS CAN USE TO GET ALL DOCUMENTS PRIOR TO TRANSMITTING PROCEDURAL MOTION

A procedural motion has been filed. Pursuant to Superior Court Rules of Appellate Procedure—Criminal/Civil ("SCRAP") Rule 8(c) the filing party must "attach such documents as support the motion or response." This includes the Memorandum which is the subject matter of the Procedural Motion.

IT IS THEREFORE ORDERED that if not attached to the initial filing, Appellee file with this Court not later than fourteen days (14) from the issuance of this Order, any supporting documents necessary to be transmitted to the Maricopa County Superior Court for determination of the pending motion.

IT IS FURTHER ORDERED that Appellant shall file any response to the pending motion not later than fourteen (14) days from the issuance of this Order. SCRAP Rule 8(c).

The parties are reminded that no replies are permitted absent request from the Superior Court SCRAP Rule 8(c).

2. MEO SUPERIOR COURT CAN USE IF ALL DOCUMENTS RELATED TO PROCEDURAL MOTION ARE NOT PROVIDED

ORDER FOR SUPPLEMENT TO RECORD—PROCEDURAL MOTION

On **INSERT DATE**, Appellee filed its Motion to Dismiss Appeal or Strike Brief, which was referred to this Court for determination. Appellee argues that this Court should dismiss the appeal, or in the alternative, strike Appellant's Memorandum on appeal because it fails to state a claim for which this Court could grant relief. Appellant filed a Response on **INSERT DATE**.

Because the matter has not yet been perfected, this Court does not have access to Appellant's Memorandum on Appeal or to the Judgment entered. Therefore, it is material that the Court have a copy of those materials prior to determining this procedural motion.

Accordingly,

IT IS ORDERED that the clerk of the trial court transmit to the clerk of this Court a true and accurate copy of Appellant's Memorandum and [insert description of **ANYTHING ELSE NEEDED].**

IT IS FURTHER ORDERED that the trial court clerk transmit this item no later than twenty-one (21) calendar days from the filing date of this minute entry.

3. MEO RE: IMPROPER RULE 8 PROCEDURAL MOTION AS PART OF APPELLATE RESPONSE

As a threshold matter, Landlord spends much of its time on appeal arguing that Tenants' Memorandum on Appeal ("Brief") should be stricken for its failure to comply with Rule 8, Superior Court Rules of Appellate Procedure—Civil ("SCRAP"). This Court notes a procedural motion may be filed "at any time after the filing of the notice of appeal." SCRAP Rule 8(c)(1). The purpose of SCRAP Rule 8 is specifically to "determine if the appeal should go forward." (emphasis added). While the rule allows for filing at any time, it is possible that by failing to raise the issue in a procedural motion prior to perfection of appeal under SCRAP Rule 9, Landlord has conceded that the appeal can go forward and has no legal authority for seeking procedural relief after transmittal to Superior Court. In essence, one cannot argue the appeal should not go forward without trying to stop that very process in a timely manner. SCRAP Rule 8 provides that a procedural motion, not an appellate brief, is the proper format for any argument that an appeal should be dismissed as there is no right to same.

By combining its request for a dismissal of the appeal with its Response, Landlord asks this Court to circumvent all requirements of SCRAP Rule 8(c)(2) in permitting Tenants the opportunity to respond substantively and/or to cure the alleged defect, prior to perfection of the appeal. In addition, Tenant(s) may have incurred attorneys' fees and costs in preparing a substantive response unnecessarily. Assuming that is Landlord's position, the Court does not understand why Landlord does not seek relief under SCRAP Rule 8, rather than attempt to "determine" the issues on appeal.

It is judicially inefficient at this juncture to remand the matter for compliance with Rule 8 when it has been perfected and transmitted. It may well also be procedurally impossible as the time for responding to the same has expired. *See* SCRAP Rule 8(c)(2). Therefore, in the interest of justice, this court will use its discretion under SCRAP-Civil to suspend the requirements of the rule and decide this case on its merits.

4. MEO RE: PROCEDURAL MOTION TO CITE TO RECORD AND/LAW

A Notice of Appeal has been filed in this matter. On **INSERT DATE**, Appellee filed a Procedural Motion which was referred to this Court for determination ("Motion"). In it, Appellee argues that Appellant filed a memorandum which fails to reference the audio or transcribed record and lacks any citation to legal authority. The State seeks the memorandum be stricken for failure to comply with Superior Court Rules of Appellate Procedure-Civil ("SCRAP") Rule 8 (a)(3).

The Court has confirmed that the Memorandum on Appeal does not comply with SCRAP Rule 8 in many material ways. As a result, it will be stricken. In the interest of justice, Appellant will be given additional time to file a compliant brief. The State need not respond until that compliant brief is filed.

Accordingly,

IT IS ORDERED granting the Motion to Strike Appellant's Memorandum.

IT IS FURTHER ORDERED Appellant must file a brief which complies with ACRAP Rule 8 within thirty (30) days of issuance of this Order.

IT IS FURTHER ORDERED Appellee must file its Memorandum on appeal, should it choose to, no later than thirty (30) days from the filing of Appellant's compliant brief.

IT IS FURTHER ORDERED the trial court may modify these timelines upon request and in its discretion.

5. MEO RE: NEED WRITTEN TRANSCRIPT

Pending before the Court is the appeal in this matter. The Record on Appeal includes the recording of the proceedings. The total time for the hearing exceeded 90 minutes.

Because the trial court proceeding took 90 minutes or more, the Record on Appeal in this case must include a "certified transcript" of that proceeding. Rule 9.4(b), Superior Court Local Rules—Maricopa County; Rule 7(b)(10), Superior Court Rules of Appellate Procedure—Civil. A certified transcript must be prepared by an "authorized transcriber." Rule 30(a), Rules of the Supreme Court of Arizona; Rule 7(b), Superior Court Rules of Appellate Procedure—Civil. The authorized transcriber must prepare the transcript in full compliance with the requirements of section 1-603, Arizona Code of Judicial Administration.

IT IS THEREFORE ORDERED Appellant shall file with the clerk of this Court a transcript prepared by a certified transcriber that complies with the standards in the Arizona Code of Judicial Administration § 1-603 within 45 days from the filing date of this order.

IT IS FURTHER ORDERED, within 30 days of the filing with this Court of that certified transcript, the parties shall file any amended memoranda necessary to comply with the citations from that transcript.

IT IS FURTHER ORDERED, any amended memoranda should only change citations to the record, if any. No supplements are permitted.

IT IS FURTHER ORDERED that if the Appellant fails to file a certified written transcript that complies with the Code of Judicial Administration § 1-603, the appeal may be considered abandoned and dismissed pursuant to Rule 9(b), Superior Court Rules of Appellate Procedure—Civil, without further notice to Appellant.

IT IS FURTHER ORDERED the trial court may modify these timelines upon request and in its discretion.

IT IS FURTHER ORDERED the matter to be transferred to Superior Court for decision upon compliance with SCRAP Rule 9,

6. MOTION REMANDED TO TRIAL COURT FOR DETERMINATION (RULE 7 AND 9 MOTIONS GO BACK TO TRIAL COURT TO DECIDE)

On **INSERT DATE**, Appellee filed a Motion for Determination of Sufficiency of Record ("Motion") asking the trial court to "make the threshold determination on whether an adequate record exists in this case to proceed on appeal pursuant to Rule 7, Superior Court Rules of Appellate Procedure" ("SCRAP"). There does not appear to have been a response filed, although it is possible that a response was not provided to this Court. The Motion was transmitted to this Court along with Appellant's Memorandum on appeal on **INSERT DATE**. This Court does not have jurisdiction to determine a Motion brought under SCRAP Rule 7(g):

If it appears to the trial court that the record is insufficient for an appeal on the record, the trial court may, on its own motion or on motion of a party, reset the matter for a new trial within 45 days from such determination. In such event, any appeal rights shall begin to run from the entry of a judgment or order following the new trial. In cases where it appears that the record is insufficient, the preference shall be for a new trial at the trial court level.

SCRAP Rule 7.

The matter was inadvertently referred to this Court for determination. Only motions filed pursuant to SCRAP Rule 8 are to be referred to this Superior Court for determination. The Motion seeks a ruling from the trial court. This Court will take no further action.

IT IS ORDERED remanding the matter to the **INSERT TRIAL COURT** for ruling pursuant to SCRAP Rule 7(g).

7. MEO: ORDER APPEAL DISMISSED AS UNTIMELY NOTICE OF APPEAL (EVICTION)

The notice of appeal shall be filed with the trial court within 14 calendar days after the entry of the order, ruling, or judgment appealed from, *except that in forcible and special detainer cases, the time limit shall be five calendar days*.

Superior Court Rules of Appellate Procedure-Civil ("SCRAP") Rule 4(a) (emphasis added).

Calendar days include all days of the week whereas business days are only those generally considered Monday through Friday. *See State v. Miguel*, 209 Ariz. 338, 339 (App. 2004); *See also Bohart v. Hanna*, 213 Ariz. 480, 482 (2006) (holding that a five-calendar-day limitation to challenge an election matter "includes weekends and holidays").

SCRAP Rule 8(a)(5) permits this Court to waive the requirements of Rule 8: "The Superior Court may modify or waive the requirements of this rule to ensure a fair and just determination of the appeal." However, SCRAP does not permit the waiver of an untimely filing under Rule 9. An appeal is not to be transmitted to this Court under Rule 9(a) unless it has been perfected. A perfected appeal requires a timely notice of appeal and the filing of appellant's memorandum. See SCRAP Rule 9(a). It also requires that "A party that fails to perfect the appeal shall be deemed to have abandoned the appeal, and the disposition appealed from shall stand as if no appeal had been taken." SCRAP Rule 9(b).

This Court does not have the discretion on the issue of a timely filing as it might with other procedural issues contemplated by SCRAP Rule 8. Waiver of the requirements of Rule 8 do not cure the fatal flaw of this appeal under Rule 9. This Court has no discretion to waive that the appeal was not perfected, and no extension was sought prior to the expiration of time to do so. Based on the filing of the Judgment, Appellants were required to file the Notice of Appeal no later than **INSERT DATE**. They failed to do so.

Accordingly,

IT IS THEREFORE ORDERED dismissing this appeal.

8. MEO: DISMISSING APPEAL IF PREMATURE/NO JURISDICTION

Pending before the Court is the appeal in this matter. Appellant **INSERT NAME**, seeks to appeal from a judgment (eviction action) entered in the **INSERT COURT**. Appellate jurisdiction is controlled by Ariz. Const. art. VI, § 16 and A.R.S. §§ 12-124, 22-261. For the reasons stated below, this Court concludes that it lacks appellate jurisdiction and dismisses the appeal.

This Court has an independent duty to determine its jurisdiction over matters on appeal. *Ghadimi v. Soraya*, 230 Ariz. 621, 622, ¶ 7 (App. 2012). The timely filing of a notice of appeal is a jurisdictional prerequisite for appellate review. *See, e.g.*, *In re Marriage of*

Dougall, 234 Ariz. 2, 5, ¶ 7 (App. 2013). In forcible entry and detainer appeals from a justice court, the notice of appeal must be filed within five calendar days "after entry" of the judgment being appealed. Rule 4(a), Superior Court Rules of Appellate Procedure—Civil ("SCRAP—Civil"). "Entry of judgment" means the judgment has been signed by the trial judge and filed with the trial court. Rule 1(f), I*d*.

In the alternative, an appellant may file a Motion to Set Aside pursuant to AREP Rule 15(a). If such a motion is filed and determination of same effects possession of the property, it "shall be treated as an emergency matter and decided within three days." *Arizona Rule of Eviction Procedure ("AREP") Rule 15(c).*

The more typical situation involving "untimely" filed notices of appeals are those notices that are filed too late. *See*, *e.g.*, *M-11 Limited P'ship v. Gommard*, 235 Ariz. 166, 168, ¶ 2 (App. 2014). However, the Arizona Supreme Court also instructs that "prematurely" filed notices of appeals cannot confer jurisdiction on the appellate court. *Craig v. Craig*, 227 Ariz. 105, 107, ¶ 13 (2011) ("In *all* other cases, a notice of appeal filed in the absence of a final judgment, or while any party's time-extending motion is pending before the trial court, is 'ineffective' and a nullity.") (emphasis in original). Other than dismissing an untimely appeal, any action taken by this Court without jurisdiction also would be a nullity and void. *See, e.g.*, *Edwards v. Young*, 107 Ariz. 283, 284 (1971); *Martin v. Martin*, 182 Ariz. 11, 15 (App. 1994).

A notice of appeal is premature if it is filed before the trial court enters a final judgment or order. *Ghadimi v. Soraya, 230 Ariz. 621, 622, ¶ 8 (App. 2012)*. "If a notice of appeal is premature, [the appellate court] lack[s] jurisdiction to hear the action unless the narrow exception created" by the Arizona Supreme Court is applicable. *Id.* (citing *Barassi v. Matison*, 130 Ariz. 418 (1981)). The *Barassi* exception only applies when "'no decision of the court could change and the only remaining task is merely ministerial.'" *Id.* (*quoting Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 415, ¶ 37 (2006)). There is no doubt that the *Barassi* exception is "limited." *Craig*, 227 Ariz. at 106, ¶ 9.

The trial court did not await a response or permit a reply to the Motion to Set Aside. This court accepts the trial court may have viewed the motion to set aside as one filed pursuant to AREP Rule 15(d). However, denying the motion as "moot" is not a substantive final ruling for which an appeal may be taken. Appeals are taken "from a final order affecting a substantial right…in an action after judgment." *A.R.S. § 12-2101(A)(4).*

The trial court failed to substantively address the pending Motion to Set Aside. When a Motion to Set Aside is filed with the trial court, this court's review jurisdiction is limited to the determination of that motion, not of the underlying Judgment. This Court reviews the denial of a Motion to Set Aside Judgment for an abuse of discretion. *See Norwest Bank*

(Minnesota), N.A. v. Symington, 197 Ariz. 181, 184, ¶ 11 (App. 2000). It is "an abuse of discretion for a trial court to act arbitrarily or make decisions unsupported by fact or law." *Id*.

The trial court has not yet ruled on whether the Motion to Set Aside had a valid legal basis. Only that substantive determination can be appealed. That determination is substantive and does not meet the ministerial nature of the *Barassi* exception. The Judgment entered is not a final one. *See* SCRAP-Civil Rule 1(a). "Appellate Courts will dismiss for lack of jurisdiction the case where a litigant attempts to appeal where a motion is still pending in the trial court or where there is no final judgment." *Barassi* at 422.

Appellant's notice of appeal was premature and, thus, "ineffective and a nullity." It was filed prior to (or the same day as) the Motion to Set Aside which was never substantively addressed. As a result, because a portion of the case remains pending, this Court lacks jurisdiction over the appeal and has authority only to dismiss it. The parties are advised this dismissal takes no position on the merits of the Motion to Set Aside or suggests any manner in which it should be determined. Only that this appeal is premature at this time.

Accordingly,

IT IS THEREFORE ORDERED dismissing this appeal.

IT IS ALSO ORDERED remanding this matter to the **INSERT COURT** for any further appropriate proceedings.

IT IS ALSO ORDERED signing this minute entry as a formal order of the Court.

9. MEO RE: DISMISSAL OF APPEAL IF CANNOT DETERMINE ARGUMENT

Pending before the Court is the appeal in this matter. Appellant **INSERT NAME**, appeals from a judgment of the **INSERT TRIAL COURT.** The trial court found Defendant responsible for violating **INSERT CHARGES**, a civil traffic violation. This Court has jurisdiction pursuant to Article VI, Section 16 of the Arizona Constitution; A.R.S. §§ 12-124(A), 22-425(B); and Rule 26, Rules of Court Procedure for Civil Traffic, Boating, Marijuana, and Parking and Standing Violations. For the following reasons, the appeal is dismissed.

Appellant's Memorandum on appeal restates the facts of the case with respect to the movement of his car and other car involved in the accident. *Id*. His Memorandum violates Rule 8 of the Superior Court Rules of Appellate Procedure-Civil ("SCRAP"). This Court had broad discretion to waive applicable rules when just requires it to do so. SCRAP Rule 2("These rules shall be liberally construed in the furtherance of justice."), and Rule

8(a)(5). It is often appropriate to invoke this discretion when memoranda do not comply with SCRAP 8 requirements which govern the requirements of an opening brief.

SCRAP-Civil Rule 8(a)(3) and (5) state:

(3) Memoranda shall include a short statement of the facts with reference to the record, a concise argument setting forth the legal issues presented with citation of authority, and a conclusion stating the precise remedy sought on appeal.

(5) The Superior Court may modify or waive the requirements of this rule to ensure a fair and just determination of the appeal.

Appellant's Brief cites no legal authority. Nor does it cite the record. While these deficiencies might be waived by suspending the SCRAP-Civil Rule 8 in the interest of justice, what this Court cannot do is serve as an advocate for any party or search the record to ascertain whether an asserted contention is supported. *Adams v. Valley Nat'l Bank of Ariz.,* 139 Ariz. 340, 343 (App. 1984) ("We are not required to assume the duties of an advocate and search voluminous records and exhibits to substantiate appellant's claims"); *Hubbs v. Costello*, 22 Ariz. App. 498, 501 (1974) ("This Court is not under any obligation to search voluminous records to ascertain if [evidence supporting appellant's claim] exists"); *see also Ace Auto. Prods., Inc. v. Van Duyne*, 156 Ariz. 140, 143 (App. 1987) ("It is not incumbent upon the court to develop an argument for a party").

Appellant was found responsible for failing to drive in a manner that would have avoided the accident that occurred. The appeal raises no legal argument that the finding was not sufficient under the law. As a result, this court can do nothing but dismiss the appeal.

Accordingly,

IT IS THEREFORE ORDERED dismissing this appeal.

IT IS ALSO ORDERED that no further matters remain pending between the parties and this ruling constitutes this Court's final decision for purposes of SCRAP Rule 12(d).

IT IS ALSO ORDERED remanding this matter to **INSERT COURT** for further appropriate proceedings, if any.

IT IS ALSO ORDERED signing this minute entry as a formal order of the Court.

10. MEO DENYING ORAL ARGUMENT-CAN ISSUE ALONE WHEN ASSIGNED OR MAKE PART OF THE RULING

Pending before this Court is the appeal of this matter. Oral argument was requested. However, the Court is of the opinion that the parties have fully and amply briefed the issue(s) on appeal and, therefore, oral argument would not assist the Court. This Court is limited to determining if the trial court erred. It cannot hear new evidence. It cannot "re-try" the case. It cannot substitute its judgment for that of the trial court. If the trial court made a ruling that is supported in the evidence, it must be upheld. Therefore, pursuant to Rule 11(a), Superior Court Rules of Appellate Procedure-Civil, this Court in its own discretion, will resolve the appeal without oral argument.

11. MEO RE: NO FURTHER ACTION-USED WHEN APPEALED TO COURT OF APPEALS

On **INSERT DATE**, this Court issued its ruling in the above referenced matter. On **INSERT DATE**, Appellant filed a document titled "Notice of Appeal" giving Notice that the matter had been appealed to the Arizona Court of Appeals. Attached to that filing was Appellant's "Petition for Review" addressed to the Arizona Supreme Court. On **INSERT DATE**, a "Notice of Filing/Notice of Appeal' was docketed by the Superior Court.

As none of these filings seek relief from this Court, but rather are directed to other jurisdictions, this Court will take no further action.

12. MEO RE: NO FEE REQUEST FILED, MATTER IS FINAL NOW.

In its **INSERT DATE** Ruling, this Court ordered Landlord to file any request for attorneys' fees and costs pursuant to R. 13, Superior Court Rules of Appellate Procedure-Civil. As of the date of this Order, Landlord has not filed any request and the time to do so has now expired. No matters remain pending in connection with this appeal.

Accordingly,

IT IS ORDERED remanding the matter to the trial court.

This is a final order. *See* Sup. Ct. R. App. P. 12(c), 12(d), 14(b), and Ariz. R. Civ. 54(c).

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LCA Flowchart