

**SUPREME COURT OF ARIZONA**

ROY MCALISTER, KATHLEEN  
MCALISTER and MCALISTER  
TECHNOLOGIES, an Arizona corporation,

Petitioners,

v.

LOEB & LOEB LLP, a California limited  
liability partnership,

Respondent/Cross-Petitioner.

Arizona Supreme Court  
No. CV-24-0048

Arizona Court of Appeals,  
Division One  
No. 1 CA-CV 23-0212

Maricopa County Superior Court  
No. CV2018-012158

**CROSS-PETITION FOR REVIEW OF THE  
MEMORANDUM DECISION  
OF THE COURT OF APPEALS**

FENNEMORE CRAIG, P.C.  
Amy Abdo (No. 016346)  
Jessica L. Post (No. 027468)  
Brett C. Gilmore (No. 034598)  
2394 E. Camelback Road, Suite 600  
Phoenix, Arizona 85016-3429  
Telephone: (602) 916-5000  
Email: amy@fennemorelaw.com  
Email: jpost@fennemorelaw.com  
Email: bgilmore@fennemorelaw.com

*Attorneys for Respondent/Cross-Petitioner  
Loeb & Loeb LLP*

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## I. INTRODUCTION

This appeal raises several important issues of Arizona jurisprudence, including the distinction between lost profits and lost revenue, and the legal principles governing the recovery of lost profit damages for a new or unestablished business. For much of Arizona's history, such damages were unavailable because they were deemed too speculative. In 1984, in *Rancho Pescado, Inc. v. Nw. Mut. Life Ins. Co.*, 140 Ariz. 174 (App. 1984), the Arizona Court of Appeals reversed course and held that such damages might be recoverable but only if proved with reasonable certainty. *Rancho Pescado* held that "reasonable certainty" required a "reasonable methodology" and an individualized factual assessment to establish that revenues would exceed expenses, i.e., that there were in fact lost profits.

This Court has not weighed in on these important issues in the 50 years since *Rancho Pescado*, and this case illustrates why such guidance is needed. Appellants Roy McAlister ("McAlister"), Kathleen McAlister, and McAlister Technologies ("MT") (McAlister and MT together, "Plaintiffs") sought lost profits in connection with an idea, not even a new business. They, and their damages expert, identified no specific product, no market, no business plan, no executed contracts, no employees, and no customers. While affirming the trial court's exclusion of the insufficient expert opinion, the Court of Appeals nevertheless allowed for the recovery of lost profit damages by a new business based upon a third-party's

uncertain and contradictory testimony that he would've agreed to pay an upfront \$5 million licensing fee to this as yet unformed business, *had* the third-party and McAlister resolved their disagreement about when the significant \$20 million annual payments were due—pre-revenue, as demanded by McAlister, or post-revenue, as required by the third-party. The Court of Appeals reached its conclusion despite Plaintiffs' own expert conceding, as well as the trial court's finding, that the contradictory testimony between McAlister and the third-party about the unresolved payment terms rendered it speculative to assume that Plaintiffs and the third party would have ever reached a final agreement. Regrettably, the Court of Appeals allowed Plaintiffs to surprise Appellees with this individualized "\$5 million licensing" damages theory at oral argument after failing to raise it in the trial court or even argue it in their appellate briefs.

The Court of Appeals erred by ignoring the waiver and preservation rules governing appeals, as well as the Ariz. R. Civ. P. 26.1(a)(7) requirement that a plaintiff disclose all damages theories and computations during discovery. The Court of Appeals also erred in concluding that Plaintiffs' scant and unreliable evidence met the *Rancho Pescado* "reasonable certainty" standard, and in broadly expanding the scope of a claim for trespass to chattels. *See* ARCAP 23(d)(3). This Court's review, as well as its clarification and refinement of these guiding principles, is critical in light of the recurring nature of these legal issues.

## **II. ISSUES FOR REVIEW**

1. Did the Court of Appeals err by failing to require lost profits be proven with “reasonable certainty” by using a reasonable methodology and instead relying on speculative assumptions belied by the undisputed evidentiary record and common sense?

2. Did the Court of Appeals err when it reversed the trial court based on an argument and a damages theory Plaintiffs never raised in the trial court or in their Opening Brief and did not present until oral argument?

3. Did the Court of Appeals err by broadly expanding a claim for trespass to chattels, which requires contact with a physical tangible object (a chattel), to include the “electronic touching” of an intangible patent application?

## **III. BACKGROUND**

McAlister, Kathleen McAlister, and MT claimed over \$100 million in lost profit damages from licensing deals with four individuals (the “Potential Licensees”) they allegedly lost because Appellee Loeb & Loeb LLP’s (“Loeb”) filed patent documents on behalf of a Loeb client, claiming rights to such patents and allegedly “clouding” McAlister’s patents. Plaintiffs allege as much even though McAlister, an inventor in the green energy sector, had never developed a product capable of being commercialized and all prior efforts to commercialize a product utilizing MT’s

patents with McAlister's former employer, Advanced Green Technologies ("AGT"), had failed (following the expenditure of \$100 million).

As the record below demonstrates, the genuineness and authenticity of these alleged draft licensing agreements was never established. IOR.278. There is not a single contemporaneous email between McAlister and the Potential Licensees discussing a license agreement with these terms. IOR.209, 32-33. Instead, in 2019—after filing this lawsuit—McAlister began sending email after email to the Potential Licensees, attaching what he claimed were the draft license agreements from five-plus years earlier and coaching them to provide an explanation that blamed Loeb for their decision not to enter into the licensing agreements. IOR.278. McAlister also suggested to these witnesses that they might attempt to explain the absence of contemporaneous emails by repeating the story that they had previously exchanged drafts of the license agreements by flash drive in order to avoid detection by AGT. IOR.209, 23-26.

In the trial court, Plaintiffs relied exclusively upon the damages theory of their expert, Ron Epperson, as evidence of their damages. IOR.561. Although Epperson opined, based upon facts he assumed, that Plaintiffs lost \$101 million in profits from these four licensing opportunities, he did not undertake even the most basic steps necessary for a lost profits analysis (analyzing the marketplace and explaining how the product's revenue would exceed expenses). Mem. Op., ¶¶19, 22. At the heart

of Epperson's report was his assumption that the Potential Licensees and McAlister would have agreed to terms and executed license agreements—an assumption contradicted by the evidence. McAlister testified that he would have entered into licensing agreements with these individuals only if they began making \$20 million payments immediately on signing (i.e., before a product was commercialized). IOR.317, 127. However, three of the four Potential Licensees testified that the \$20 million payments would have been due only after a facility had been constructed and was generating revenue, requiring commercialization of an unknown product and construction of a \$600 million facility to manufacture the unknown product. IOR.361, 3:13-22; IOR.363, 66:11-24, 117:1-18. At his deposition, Epperson admitted that he did not know if the Potential Licensees would have entered into the draft agreements, an agreement with different terms, or no agreement at all. IOR No. 317, 111-112.

The trial court properly excluded Epperson's opinion under Rules 702, 402, and 403, expressly stating it was speculative to assume McAlister and the Potential Licensees would have reached final terms on license agreements and that any of the entities would be profitable: "Given the[] enormous, recognized risks, the Court finds it speculative both that the parties would have ultimately reached terms and that any of these entities would be profitable." IOR.570, at 5. The trial court

separately granted summary judgment for Loeb on Plaintiffs' lost profit damages for the same reasons, and also on Plaintiffs' claim for trespass to chattels.

In their Opening Brief to the Court of Appeals, Plaintiffs relied on Epperson's opinion to argue that the trial court erred by granting summary judgment on their lost profits claim. Not until their Reply brief (when Appellees had no chance to respond) did Plaintiffs even suggest there was evidence, apart from Epperson's opinion, of lost profits. At oral argument, Plaintiffs argued for the first time that they had a standalone claim for \$5 million in lost profits based solely upon the deposition testimony of one of the four Potential Licensees, Donal O'Flynn ("O'Flynn").

The Court of Appeals correctly upheld the trial court's exclusion of Epperson's lost profits opinion and the trial court's order granting summary judgment on the \$20 million annual royalty payments. However, the Court of Appeals erred by speculating, against the weight of evidence, that O'Flynn and McAlister would have agreed to a licensing agreement with a \$5 million upfront fee. Without specifically addressing *Rancho Pescado's* reasonable certainty requirement, the Court of Appeals held that O'Flynn's deposition testimony was sufficient evidence under *Orme Sch. v. Reeves*, 166 Ariz. 301 (1990), to foreclose summary judgment.

#### IV. THE COURT SHOULD GRANT REVIEW OF LOEB'S CROSS PETITION

##### A. The Court Of Appeals Misapplied Arizona Law On Lost Profits.

A claim for lost profits must be established “with reasonable certainty.” *Rancho Pescado*, 140 Ariz. at 183. “The loss of future profits depends on the individual circumstances of each case.” *Id.* “[R]easonable certainty may be provided when the plaintiff devises some reasonable method of computing [the party’s] *net* loss.” *Id.* at 184 (emphasis added). To have a “net loss”—*i.e.*, lost profits—a party must prove with reasonable certainty that revenues exceed costs. *Id.* at 184-85; *see also Sawyers v. FMA Leasing Co.*, 722 P.2d 773, 775 (Utah 1986) (upholding directed verdict on lost profits claim when “[p]laintiffs . . . presented evidence on gross profit losses only”).

Under *Orme School*, a motion for summary judgment may be granted when the trial court concludes that “the facts produced in support of the claim . . . have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent.” 166 Ariz. at 309. Providing a “scintilla” of evidence, or the slightest of doubts, is insufficient to defeat a motion for summary judgment. *Id.*

Plaintiffs’ newly concocted claim that they lost \$5 million in profits from a licensing “deal” with O’Flynn suffered fatally from its own internal contradictions. Under *Rancho Pescado* and *Orme School*, no reasonable person could conclude,

based upon the evidence presented, that it was reasonably certain that Plaintiffs lost \$5 million in profits.

First, the *only* way O’Flynn would have made the \$5 million payment was if he and McAlister reached a finalized licensing agreement. The trial court correctly found, however, based on the evidentiary record, that it was speculative to assume that McAlister and O’Flynn would have reached final terms. IOR.570, at 5. On the one hand, O’Flynn testified that he would have entered into a license agreement with a \$5 million initial payment only if the agreement also provided the resulting \$20 million annual royalty payments must be made *after* the new business was generating revenue. IOR.317, at 127. In direct conflict, McAlister repeatedly testified that “he wouldn’t give a license without” a full \$20 million payment “at the beginning of the license” and each year thereafter. IOR.361 at 3:13-22; IOR.363 at 66:11-24, 117:1-18. In addition, McAlister testified that he required immediate payment of \$20 million, but O’Flynn testified that he was only willing to make an initial payment of \$5 million, and the purported O’Flynn draft license agreement required \$20 million royalty payments and mentioned nothing about a \$5 million payment. IOR.220 at 59-72. In describing the likelihood of McAlister and any of the Potential Licensees (including O’Flynn) reaching final terms, Epperson stated: “[W]e’re in a land that we just don’t know.” IOR.538 at 13:18-20; IOR.539, Ex. 4-A at 136:4-9.

Plaintiffs did not put forth the quantum of evidence required under *Rancho Pescado* and *Orme School* to establish with reasonable certainty that O’Flynn and McAlister would have agreed on payment terms, let alone finalized payment terms requiring an upfront \$5 million payment. Nevertheless, the Court of Appeals considered in isolation O’Flynn’s statement that he would have agreed to make a \$5 million upfront payment, but ignored that this purported agreement was *contingent* on McAlister and O’Flynn reaching a written agreement as to other material terms, which they had plainly had not. By reversing the trial court on this issue, the Court of Appeals diluted the *Rancho Pescado* standard and opened the door to lost profits claims premised upon speculation and dubious evidence. This is in marked contrast to other decisions granting summary judgment on lost profit damages where there was insufficient evidence that the parties would have entered a contract with particular terms. *See, e.g., S. Union Co. v. Sw. Gas Corp.*, 180 F. Supp. 2d 1021, 1050-51 (D. Ariz. 2002) (applying Arizona law, including *Rancho*, and granting summary judgment as on lost profit damages because the plaintiff “offered insufficient evidence to establish the terms of a consummated merger” and that “such a showing is an essential starting point to any *reasonable* computation of alleged lost profits”); *AZZ Inc. v. Morgan*, 462 S.W.3d 284, 295-96 (Tex. App. 2015) (rejecting lost-profits claim based on the “loss of a mere hope” of future business “despite the lack of a contractual relationship”); *Malissa Co., Inc. v. United States*, 11 Cl. Ct.

389, 392 (1986) (dismissing a lost profits claim “based on loss of a future contract” because “[l]ost profits on future contracts are too speculative in nature”); *Douglass Fertilizers Chem., Inc. v. McClung Landscaping, Inc.*, 459 So. 2d 335, 337 (Fla. App. 1984) (holding lost profits based on future business from third party with whom plaintiff did not have a binding contract were too speculative); *see also Springwell Dispensers, Inc. v. Hall China Co.*, 419 S.E.2d 112, 113 (Ga. App. 1992) (affirming summary judgment on claim for lost profit damages based upon a “a new business with no history of profits” because such a claim is “too remote and speculative to sustain an award of damages”).

Second, although not every claim for lost profit damages requires an expert, the Court of Appeals erred by allowing Plaintiffs’ claim for lost profits to survive without one. Here, there was no established business, no product, no market, no identification of competitors or products, no business plan, no customers, no management team, and no evidence that the Potential Investors had the funds to make the investments. Even the \$5 million upfront licensing fee was premised on there being a real business. And even the purported license agreements support that these payments were for a business, not just gifts to McAlister. IOR.220 at 59-72. Epperson testified that it would have cost \$600 million to construct a manufacturing facility and that McAlister would bear the costs of commercializing the unknown

product. But AGT spent \$100 million trying to commercialize a product using McAlister's patents and went bankrupt doing so. Mem. Op., ¶5; IOR.363, at 137.

McAlister's claim that the \$5 million payment from O'Flynn to his "new business" would had been "all profit" and not merely revenue (*i.e.*, that McAlister would have no expenses or costs) was never established or tested because it was never presented to the trial court. Such a position also defies common sense. Any licensing payment was necessarily premised upon the licensor's development of a commercialized product, which would have cost hundreds of millions of dollars. Yet at no time did Plaintiffs present, nor did the Court of Appeals require, any reasonable cost assessment and methodology necessary to demonstrate a "reasonable method of computing [a] net loss." In other words, the Court of Appeals allowed Plaintiffs to proceed on a lost-revenue claim masquerading as a claim for lost profits.

**B. The Court Of Appeals Abused Its Discretion By Reversing The Trial Court On A Damages Theory Not Raised During The Trial Court Proceedings Or In Appellant's Opening Brief.**

Plaintiffs never timely disclosed that they had a standalone damages claim separate and apart from Epperson's opinion. Indeed they stated the opposite. Arizona courts have made clear that "damages must be disclosed with some specificity long before trial." *Estate of Brady v. Tempe Life Care Village, Inc.*, 519 P.3d 707, 712 ¶ 23 (Ariz. App. 2022). Rule 26.1 requires disclosure of "a

computation and measure of each category of damages . . . [and] the documents and testimony upon which such computation and measure are based.” Ariz. R. Civ. P. 26.1(a)(7).

Plaintiffs’ Rule 26.1(a)(7) disclosure as to damages expressly states that their damages would be set forth exclusively in an expert’s report:

**“VII. DAMAGES”:**

Within the next forty five (45) days, Plaintiffs will disclose a damages report from a damages expert. Plaintiffs are claiming compensatory damages, punitive damages and pre and post judgment interest, in sums that will be set forth in the report.

IOR.561. Plaintiffs subsequently disclosed reports from Epperson containing a lost-profits opinion and never disclosed any additional damages. *Id.* In the extensive summary judgment and dispositive motion briefing, Plaintiffs never argued that they had lost profits damages other than the \$101 million calculation described in Epperson’s opinion. Mem. Op., ¶14. Loeb relied upon Plaintiffs’ disclosure statements in preparing its dispositive motions.

Nor did Plaintiffs argue their standalone theory of \$5 million in lost profits damages in their Opening Brief to the Court of Appeals. Mem. Op., ¶14. As a result, Loeb’s Answering Brief addressed only the issue of why the trial court’s exclusion of Epperson and resulting grant of summary judgment due to the absence of damages was correct. Yet, despite affirming the trial court’s exclusion as to Epperson, the Court of Appeals nevertheless reversed the grant of summary judgment as to

Plaintiffs' newly minted and undisclosed new damages theory.

An appellate courts' discretion to consider arguments not raised in the trial court is limited to a handful of scenarios, and all require "compelling reasons" not present here:

[The] discretion [to consider new arguments] is appropriately exercised only in cases in which a constitutional issue is raised, the question is one of statewide importance, there is clearly a wrong to be redressed, or the unraised issue will dispose of the case on appeal and avoid the futility of returning it to the trial court to produce the same result.

*Aldrich & Steinberger v. Martin*, 172 Ariz. 445, 447-48 (App. 1992) (internal citations omitted). Additionally, appellate courts may have discretion to consider newly raised arguments when "the facts are fully developed, undisputed, and the issue can be resolved as a matter of law." *State ex rel. Horne v. Campos*, 226 Ariz. 424, 428 n.5 (App. 2011). But this exception is also inapplicable here; the "facts are [not] fully developed" because Plaintiffs never raised the argument at the trial court level.

Fundamental fairness requires exclusion of arguments raised for the first time in a reply brief, much less at oral argument. *See, e.g., Ramos v. Nichols*, 252 Ariz. 519, 523 (App. 2022). As this Court has emphasized, an "argument simply comes too late when made for the first time in [the] appellant's reply brief." *Grant v. Ariz. Pub. Serv. Co.*, 133 Ariz. 434, 444 (1982).

This is particularly true where, as here, “the prevailing party below is . . . deprived of the opportunity to fairly respond.” *Evans Withycombe, Inc. v. W. Innovations, Inc.*, 215 Ariz. 237, 240 ¶ 15 (App. 2006). Here, after being sandbagged with Plaintiffs’ new theory during oral argument, Loeb requested supplemental briefing to address Plaintiffs’ new \$5 million payment theory. The Court of Appeals denied that request, however, and ruled against Loeb on an argument Loeb never had the opportunity to brief at the trial or appellate court levels.

**C. The Appellate Court Erred By Expanding Claims For Trespass To Chattels To “Electronic Touching” Of Intangible Property.**

The Restatement, and thus pre-existing Arizona law, expressly requires a tangible, physical object for a claim of trespass to chattels. Section 217 of the Restatement provides that “[a] trespass to chattel may be committed by intentionally . . . *dispossessing* another of the chattel, or . . . using or *intermeddling* with a chattel in the *possession* of another.” Restatement (Second) of Torts § 217 (emphasis added). *Possession* in this context requires “*physical control* of the chattel,” *id.* § 216 (emphasis added), and *intermeddling* “means intentionally bringing about *physical contact* with the chattel,” *id.* § 217 cmt. e (emphasis added).

Courts in other jurisdictions widely conclude that “trespass to chattels cannot be predicated on [intermeddling with] intangible information” and “must be based upon some tangible form of property.” *Pestco, Inc. v. Associated Prods., Inc.*, 880

A.2d 700, 708 (Pa. 2005); *accord, e.g., Intel Corp. v. Hamidi*, 71 P.3d 296, 309 (App. 2003) (rejecting claim for trespass to chattels in the absence of contact that “physically damaged [the plaintiff’s computer] servers”); *Sch. of Visual Arts v. Kuprewicz*, 771 N.Y.S.2d 804, 808 (Sup. 2003) (distinguishing between electronic trespass claims involving harm to physical computer systems, which are permitted, and those that do not involve such harm, which are impermissible). In other words, although “electronic touching” can support a claim for trespass to chattels, this is so only when the “electronic touching” has a harmful effect on a tangible object. Thus, the Court of Appeals’ decision is flawed because, contrary to the Restatement, it expands Arizona tort law beyond these established confines to encompass “electronic touching” of intangible electronic information, in this case a patent application. The unforeseen consequences of such a decision are enormous; it potentially transforms, for example, every copyright or trademark infringement claim into one for trespass to chattels.

The Court of Appeals Decision is also flawed because, citing *Miller v. Hehlen*, 209 Ariz. 462 (App. 2005), the court incorrectly assumed that *electronic* patent applications are tangible documents representing definitive property interests. Mem. Op. at 13 ¶ 40. In *Miller*, the Court of Appeals explained that intermeddling with a document into which property rights are “merged in, or identified with” may support a claim for trespass to chattels. 209 Ariz. at 472 ¶ 35. A patent application by itself

does not, however, represent a “merged” property right and merely initiates the process by which patent rights *might* be awarded to the applicant. *See, e.g., Figueroa v. United States*, 57 Fed. Cl. 488, 502 (Fed. Cir. 2003) (stating one “does not have a recognizable property interest” before having “satisfied all mandatory conditions” of the application process and being awarded a patent); *Display Research Labs., Inc. v. Telegen Corp.*, 133 F. Supp. 2d 1170, 1175 (N.D. Cal. 2001). The Court of Appeals acknowledged this by describing patent applications as “represent[ing] . . . *future contingent ownership*” of patent rights. Mem. Op. at 13 ¶ 40 (emphasis added). Thus, even assuming a patent application is a tangible object (it is not), the application is not “merged” with any property rights, and so there can be no “dispossession” or “intermeddling” as is required for a claim of trespass to chattels.

## **V. THE COURT SHOULD DENY REVIEW OF PLAINTIFFS’ PETITION**

Plaintiffs appear to be arguing that they have a standalone damages claim of \$20,000,000, one sufficient to survive summary judgment, because Haver signed an affidavit in 2019 attesting that he would have “invested” \$20 million in 2015 and confirmed as much at his deposition. Petition at 2.<sup>1</sup> Plaintiffs’ argument appears to be that Haver would have paid Plaintiffs an “investment” of \$20 million in 2015, which would have been 100% profit to Plaintiffs, but would not have done so in

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<sup>1</sup> The affidavit does not use the phrase “investment,” but that is the word Plaintiffs repeatedly use in the Petition.

2016 (or presumably any year thereafter). Plaintiffs do not explain why the alleged payment would occur only in 2015, but, presumably, it would be because after the first payment Haver would have realized that McAlister was engaging in fraud by keeping 100% of the “investment” funds for himself rather than using them to build a business and commercialize a product. Plaintiffs are not challenging the trial court’s or the Court of Appeals’ conclusion that it is speculative to assume that any of the Potential Licensees would have made \$20 million royalty payments from revenue generated by a yet-to-be commercialized product.

The Court should deny the Petition because: (1) Plaintiffs’ argument relies on numerous speculative assumptions and does not meet the requirement that lost profits be proved by reasonable certainty; and (2) the argument is untimely and waived because Plaintiffs first raised it in Plaintiffs’ Motion for Reconsideration in the Court of Appeals.

**A. Plaintiffs Fall Far Short Of Proving With Reasonable Certainty That They Lost \$20 Million In Lost Profits.**

The trial court correctly concluded that a trier-of-fact would have to engage in speculation to conclude that the Potential Licensees and McAlister would have reached final terms on an agreement. IOR.570, at 5. Here, Haver’s testimony fully corroborates the trial court’s conclusion. Haver testified that he and McAlister had not even agreed on the type of agreement (i.e., whether it would be a license agreement or a “joint-venture”) that would be the governing transactional document:

**Q:** Okay. Was there ever any type of agreement entered into between you and McAlister Technologies with respect to the carbon extraction that you had discussed?

**A:** Not formally, but we had a framework, you know, licensing agreement.

**Q:** What was the framework?

**A:** It was more of an equitable, you know, joint venture relationship than a licensing. If I agreed to raise the capital, that Richard and Roy and I would have shared in, you know, the upside, and then I'd also have the opportunity to be a licensee for the state of Texas, which would have been the mother lode of areas in a licensing agreement structure. So it would have been really good for me if we'd have kicked it off the ground because I would have been able to share on the – kind of the licensing side and then on the distributor side.

IOR.363, at 144-45. Not only did Haver not execute any agreement with McAlister, but, according to Haver, they were still in the brainstorming session about whether “[i]t was more of an equitable . . . joint venture relationship than a licensing” deal. *Id.* Haver even testified that it was premature to begin drafting any type of agreement. IOR.363, at 145.

Haver also repeatedly testified that MT would only receive payment after the new business commercialized a product and began to generate revenue:

**Q:** And would *all* monies that would have gone to McAlister Technologies be -- would they all come from revenues generated from the commercialization?

**A:** Yeah. That's how McAlister Technologies gets paid.

IOR.363, at 146 (emphasis added). Haver reiterated his position:

Money would have to come in the door, you'd have to complete the development of the technology, and then you'd have to deploy the technology into a commercial environment and generate revenue. Then those revenues would go toward covering licensing or royalty or distribution or whatever the agreement was, and that's when McAlister would get paid.

IOR.363, at 147. As discussed above, in direct conflict to Haver's testimony, McAlister unequivocally testified that he would only ever enter into licensing agreements that provide for \$20 million per-year payments that began in the first year. IOR.361, at 3:13-22; IOR.363, at 66:11-24, 117:1-18.

Under these factual circumstances, it is speculative to assume that Haver and McAlister would have reached final terms on an agreement. As a result, lost profits, which are required to be proven with reasonable certainty, are unavailable. *See* Section IV.A above for citations to the legal authority on this issue.

Despite Haver's on-point testimony about when, if ever, he would pay MT, Plaintiffs argue that "[i]n a lengthy deposition, Haver strongly reiterated the assertion in his sworn affidavit that he was going to make that \$20 million

investment in 2015.” Petition at 2. Plaintiffs further claim that “[t]here was clear evidence that Haver had both the capacity and the opportunity to make the \$20 million investment” and that “[t]here was virtually nothing contradicting Haver’s testimony.” First, Plaintiffs’ argument ignores Haver’s testimony cited in the preceding paragraphs and misstates his testimony about his 2019 affidavit. The follow-up questions confirm that, at best, there was no real understanding of the nature of the agreement between Haver and McAlister because Haver again refers to a joint venture and a distributorship agreement and not even a licensing agreement. IOR.449, at 11-14. Second, Haver’s affidavit refers to what his “funding group,” and not Haver individually, would have paid. IOR.449, at 11-12. Plaintiffs take great liberty with the facts by transforming a statement about Haver’s “funding group” into one in which Haver personally would have paid \$20 million. There is zero evidence that Haver had \$20 million of his money sitting in a bank available to invest in 2015 or that he would have done so.

As discussed above, and as recognized by the Court of Appeals, the only damages Plaintiffs are seeking in this lawsuit are lost profits, and so Plaintiffs must establish with reasonable certainty—utilizing a reasonable methodology to show a net loss—that 100% of Haver’s “investment” would be profit. This requires layers upon layers of speculative assumptions. For example, in addition to assuming that McAlister and Haver would have reached final terms on a licensing, joint venture,

or distributorship agreement in which Haver personally agreed to make a \$20 million payment in 2015, the trier of fact would also need to assume that Haver's \$20 million "investment" to MT would be 100% profit. That assumption, in turn, requires assuming Plaintiffs would have essentially committed fraud by receiving a \$20 million "investment" and not spending a single dollar of it to establish a business or commercialize a product.

Moreover, even Haver's testimony confirms his understanding that, as part of the yet-to-be-agreed-upon venture, McAlister could not merely sit back and cash "investment" checks and must establish a viable business with a commercialized product:

**Q:** And as I understood from your testimony earlier today, it would have been a joint venture arrangement with more of a split rather than payment –

**A:** Well, I was going to get part of the royalty fee and then I would be a distributor and have exclusivity in the state of Texas. You said, well, I might not have exclusivity because there could be other parties. And I said, well, that's not what Ken Losch told me. *But anyway, yeah, I would have been getting paid on a royalty deal with Roy and Richard for helping to set up the company*, but then I would have had the distributorship for Texas, which would have been the home run because that's where I think two-thirds of the nation's refineries reside.

IOR.449, 13-14 (emphasis added). This testimony confirms what common sense already establishes—any “investment” is not pure profit, and the speculative venture McAlister and Haver discussed was premised on McAlister creating a business and commercializing a product.

In short, Plaintiffs’ new claim that Haver would have made a \$20,000,000 “investment” that would have been pure profit falls far short of establishing, with reasonable certainty, that Plaintiffs lost \$20,000,000 in profits. Plaintiffs also completely fail to devise a reasonable methodology showing a net loss. Claiming that a \$20,000,000 investment is pure profit defies common sense.

**B. Plaintiffs Waived Their Lost-Investment Argument Involving Haver by Failing to Raise It Before their Motion for Reconsideration in the Court of Appeals.**

The Court should not consider Plaintiffs’ lost-investment argument involving Haver because they did not raise it until their motion for reconsideration in the Court of Appeals. *See, e.g., Ramsey v. Yavapai Family Advocacy Ctr.*, 225 Ariz. 132, 137, ¶ 18, 235 P.3d 285, 290 (App. 2010) (“Generally, we do not consider arguments raised for the first time in a motion for reconsideration.”); *Evans Withycombe, Inc. v. W. Innovations, Inc.*, 215 Ariz. 237, 240 ¶ 15 (App. 2006) (same). Indeed, during the four-plus years litigating this case before the trial court, Plaintiffs never asserted a standalone claim for \$20 million in damages for an “investment” Haver allegedly would have made in 2015. This is apparent from Plaintiffs’ disclosure statements,

which do not mention this theory at all, including in the damages section as would be required under Ariz. R. Civ. P. 26.1(a)(7). IOR.561. Instead, as discussed above, Plaintiffs relied on Epperson's report for all of their damages. IOR.561.

Plaintiffs also did not raise this argument in any of the hundreds of pages of briefing in the trial court and Court of Appeals. Plaintiffs' arguments at the summary judgment stage were limited to Epperson's lost-profits analysis, and Plaintiffs even represented to the trial court that their damages are limited to lost-profit damages. IOR.598, at 1:23-25. Thus, because Plaintiffs did not raise a lost investment (i.e., lost revenue) argument, which is distinct from lost profits, Plaintiffs expressly did not raise—and indeed disclaimed—their lost-investment argument in the trial court. That argument is waived on appeal. *See, e.g., Trantor v. Fredrikson*, 179 Ariz. 299, 300 (1994) (“Because a trial court and opposing counsel should be afforded the opportunity to correct any asserted defects before error may be raised on appeal, absent extraordinary circumstances, errors not raised in the trial court cannot be raised on appeal.”).

At the Court of Appeals level, Plaintiffs did not raise the argument in their Opening Brief, in their Reply, or even at oral argument. Instead, Plaintiffs raised the argument for the first time in a Motion for Reconsideration they filed after the Court of Appeals issued its memorandum decision. As discussed, however, absent limited circumstances not present here, Arizona's appellate courts do not consider

arguments raised in a motion for consideration. *Ramsey*, 225 Ariz. at 137, ¶ 18; *Evans Withycombe*, 215 Ariz. at 240 ¶ 15.

This approach to waiver is not bare adherence to procedural formalities; it is rooted in fundamental fairness. “[W]hen a new argument is raised for the first time in a motion for reconsideration, the prevailing party below is routinely deprived of the opportunity to fairly respond.” *Evans Withycombe*, 215 Ariz. at 240 ¶ 15; *accord Ramsey*, 225 Ariz. at 137 ¶ 18. This is particularly true when, as here, the court merely denies the motion before the opposing party files a response. *Evans Withycomb*, 215 Ariz. at 240 ¶ 15. The Court should adhere to these principles of fundamental fairness and decline Plaintiffs’ invitation to consider their newly raised lost-investment argument involving Haver.

## **VI. CONCLUSION**

This Court should accept review of Loeb’s cross-petition, vacate that portion of the Decision of the Court of Appeals reversing the grant of summary judgment, and affirm the judgment entered by the Superior Court. The Court should also deny review of Plaintiffs’ Petition.

DATED this 15<sup>th</sup> day of April, 2024.

FENNEMORE CRAIG, P.C.

By */s/ Jessica L. Post* \_\_\_\_\_

Amy Abdo  
Jessica L. Post  
Brett C. Gilmore  
*Attorneys for Respondent/Cross-  
Petitioner Loeb & Loeb LLP*

NOTICE: NOT FOR OFFICIAL PUBLICATION.  
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION ONE

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ROY MCALISTER, et al., *Plaintiffs/Appellants*,

*v.*

LOEB & LOEB, LLP, *Defendant/Appellee*.

No. 1 CA-CV 23-0212  
FILED 2-1-2024

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Appeal from the Superior Court in Maricopa County  
No. CV2018-012158  
The Honorable M. Scott McCoy, Judge

**AFFIRMED IN PART; REVERSED AND REMANDED IN PART**

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COUNSEL

The Entrekin Law Firm, Phoenix  
By B. Lance Entrekin  
*Co-Counsel for Plaintiffs/Appellants*

Ahwatukee Legal Office P.C., Phoenix  
By David Abney  
*Co-Counsel for Plaintiffs/Appellants*

Fennemore Craig P.C., Phoenix  
By Jessica Post, Amy Abdo, Brett Gilmore  
*Counsel for Defendant/Appellee*

**MEMORANDUM DECISION**

Presiding Judge Jennifer B. Campbell delivered the decision of the Court, in which Judge Kent E. Cattani and Judge Anni Hill Foster joined.

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**C A M P B E L L**, Judge:

¶1 Plaintiffs Roy and Kathleen McAlister, and McAlister Technologies, L.L.C. (MT), appeal from the superior court’s exclusion of their lost-profits damages expert, and its entry of summary judgment for defendant Loeb & Loeb L.L.P. on damages as well as on the plaintiffs’ trespass to chattel and slander of title claims. We hold that the court appropriately excluded the expert’s opinions regarding damages because they were based on speculation and unreliable methodology. We therefore affirm the expert’s exclusion and summary judgment on damages in major part.

¶2 But we hold that summary judgment was not warranted as to a portion of the claimed damages premised on a proposed initial payment from a potential investor, or as to the trespass to chattel and the slander of title claims. We therefore reverse and remand the summary judgment on damages to address the proposed initial-payment portion only, and we reverse and remand the summary judgment on the trespass to chattel and the slander of title claims.

**BACKGROUND**

¶3 Roy McAlister is a green-energy scientist and inventor. In 2009, he formed MT for the purpose of holding and licensing his patents. Around the same time, he also helped form Advanced Green Technologies, LLC, (AGT) for the purpose of commercializing his innovations.<sup>1</sup> He was a minority owner of AGT and its chief technology officer.

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<sup>1</sup> The parties sometimes refer to a company called Advanced Green Innovations (AGI). According to McAlister and MT, AGI is an operating company and investment vehicle for AGT. We refer herein to both companies as AGT.

**I. McAlister and MT's Dealings with AGT**

¶4 Soon after their formation, MT and AGT entered a "License Agreement" whereby AGT obtained an interest in much of McAlister's green-energy intellectual property for the purpose of developing it for commercial use. (The exact nature of the interest obtained by AGT was later disputed.)

¶5 Through an affiliate, AGT entered at least one distributorship agreement for a yet-to-be-commercialized injector that would run on either natural gas, hydrogen, or another listed fuel. But AGT was never able to commercialize any product in more than five years of operation, and it eventually declared bankruptcy.

¶6 In late 2014, AGT replaced its outside patent-prosecution counsel (which also represented MT) with the law firm of Loeb & Loeb. Though McAlister also contemplated changing MT's counsel to Loeb & Loeb, he ultimately continued to retain the previous joint counsel.

¶7 Conflict between McAlister and AGT arose. Ultimately, AGT decided to abandon its efforts to commercialize McAlister's inventions and, consequently, its prosecution of his intellectual property. In April 2015, AGT agreed to make a one-time payment to preserve some of MT's patent applications with looming renewal deadlines. Patent prosecution work was pursued in May and June.

¶8 In late May, McAlister notified AGT that it had materially breached the "License Agreement" by abandoning patent prosecution without proper notice. When AGT did not respond, McAlister sent a letter to AGT in late June stating that he and MT were terminating the agreement immediately.

¶9 According to AGT, and disputed by McAlister and MT, the "License Agreement" gave AGT non-terminable ownership rights to the patents. So, in August, AGT directed Loeb & Loeb to replace MT's name with AGT's on numerous patent applications. Loeb & Loeb complied.

¶10 Meanwhile, McAlister, believing he owned the patents, began talking to potential investors about licensing the patent portfolio. McAlister alleges that when he and the potential investors discovered that the intellectual property was held by AGT following the re-naming, the potential investors declined to move forward with any of the prospective deals.

## II. AGT Litigation

¶11 McAlister and MT thereafter brought an action against AGT regarding the ownership of the intellectual property. In 2019, after years of litigation, the parties stipulated to a dismissal of that case with no resolution of the substantive issue.

## III. Loeb & Loeb Litigation

¶12 In 2018, McAlister and MT filed this suit against Loeb & Loeb for breach of fiduciary duty, negligent supervision, aiding and abetting, trespass to chattel, and slander of title.<sup>2</sup> The plaintiffs proffered Ron Epperson as their expert on damages. As the case evolved, Epperson prepared multiple reports (a preliminary one in 2014, a second one in 2019, and a supplemental one in 2021) and was deposed by opposing counsel.

¶13 The superior court first granted Loeb & Loeb's motions for summary judgment on the trespass to chattel and slander of title claims, and then granted its motions for Epperson's exclusion (on the basis that his opinions were speculative and unreliable) and for summary judgment on damages. McAlister and MT thereafter admitted that they sought no damages other than lost profits, so the superior court entered a case-dispositive judgment in Loeb & Loeb's favor. The plaintiffs then brought this appeal challenging the summary-judgment and expert rulings.

## DISCUSSION

### I. Waiver

¶14 We first address Loeb & Loeb's contention that the plaintiffs have waived arguments related to the entry of summary judgment on damages. In the proceedings below (and in their opening brief on appeal), the plaintiffs focused their defense to summary judgment on the validity of Epperson's opinions. In their reply brief and at oral argument the plaintiffs asserted that summary judgment was inappropriate, even with the preclusion of Epperson's opinions, because the evidence underlying those

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<sup>2</sup> Earlier in 2018, McAlister and MT brought an action in California federal court against Loeb & Loeb for professional negligence, slander of title, and trespass to chattel. According to Loeb & Loeb, that action was dismissed for lack of subject matter jurisdiction.

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opinions—in particular, one of the potential investors’ testimony that he was willing to make a contingency-free initial payment—created a genuine issue of material fact regarding lost profits.

¶15 “On appeal from a summary judgment, parties are not allowed to advance new theories or raise new issues in order to secure a reversal.” *Contempo Constr. Co. v. Mountain States Tel. & Tel. Co.*, 153 Ariz. 279, 282 (App. 1987). But as a matter of law, expert testimony is not required to show lost profits that are easily calculable. *E.g., Meaux Surface Protection, Inc. v. Fogelman*, 607 F.3d 161, 170–71 (5th Cir. 2010) (holding under Texas law that unless highly technical issues are involved, expert testimony is not required to show reasonably certain lost profits). The plaintiffs did not previously focus on the evidence of damages separate from Epperson’s analysis, or focus on the portion of the evidence regarding the one investor’s willingness to make an initial payment. But by advancing that legal principle now, the plaintiffs are not changing their damages theory or raising new issues—they are relying on the same evidence, just without the expert’s imprimatur. Even though they did not emphasize the “initial payment” testimony in the proceedings below, Epperson not only described this potential payment in the body of his report, but he also credited it in his calculations. Because evidence of the potential “initial payment” was before the court, we decline to find that the plaintiffs have waived the argument that this evidence alone precluded summary judgment.

¶16 We are unpersuaded by Loeb & Loeb’s contention that the plaintiffs disclaimed the “initial payment” argument when they acquiesced to Loeb & Loeb’s post-summary-judgment motion in limine. The motion in limine called for the preclusion of “evidence of any damages *other than* the purported lost-profits theory.” (Emphasis added.) The plaintiffs filed a notice of non-opposition in which they stated that they would “not seek to offer at trial evidence of damages outside of the lost profits damages,” but they expressly stated that they were *not* waiving any objection to Epperson’s exclusion or to the grant of summary judgment on lost-profit damages. We conclude that a lost-profits inquiry must necessarily include consideration of the potential “initial payment,” an allegedly non-speculative payment that was not contingent on any future development, production, or productivity measures.

## II. Exclusion of Lost-Profits Damages Expert

¶17 Under Arizona law, a party may recover lost profits from a new venture if the circumstances show that lost profits were reasonably

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certain to occur – with the fact of lost profits (at issue here) requiring more rigorous proof than the secondary issue of their amount. *Rancho Pescado, Inc. v. Nw. Mut. Life Ins. Co.*, 140 Ariz. 174, 184, 186 (App. 1984). We review the court’s rulings on the admissibility of expert testimony for abuse of discretion, even when they intersect with summary-judgment questions. *Baker v. Univ. Physicians Healthcare*, 231 Ariz. 379, 387, ¶ 30 (2013).

¶18 When considering whether a venture would have been profitable, the claimant’s industry history may be relevant. *See Short v. Riley*, 150 Ariz. 583, 586 (App. 1986) (holding that jury could consider lost profits where restaurateur plaintiff had significant industry experience and had previously operated the at-issue restaurant); *Felder v. Physiotherapy Assocs.*, 215 Ariz. 154, 163, ¶¶ 41–43 (App. 2007) (holding that fact of damages was proved because personal-injury plaintiff had an active career in professional baseball, albeit as a minor-leaguer).<sup>3</sup> The chief consideration appears to be probable market success, as shown by general market conditions or by evidence of realistic third-party commitments. *See Great W. Bank v. LJC Dev., LLC*, 238 Ariz. 470, 474, 479, 481–82, ¶¶ 7, 30, 41–42 (App. 2015) (holding evidence sufficient where market reports showed that construction borrower would have completed a profitable development had lender not wrongfully terminated financing); *County of La Paz v. Yakima Compost Co.*, 224 Ariz. 590, 607–08, ¶ 54 (App. 2010) (holding evidence sufficient where customer had previously made and performed on oral commitment, and reached terms with plaintiff’s successor and a similar company); *Weiner v. Ash*, 157 Ariz. 232, 235 (App. 1988) (holding evidence insufficient where general data showed a lucrative market, and plaintiffs showed financial wherewithal to continue participation in the market, but no evidence showed they would have made the same profitable deals as others); *Rancho Pescado*, 140 Ariz. at 185–86 (holding evidence insufficient where plaintiff proposed entering inherently risky industry with an underdeveloped execution plan and inadequate marketability evidence); *U.S. Fid. & Guar. Co. v. Davis*, 3 Ariz. App. 259, 260–62 (1966) (holding evidence sufficient where buyer had made oral commitment).

¶19 Many litigants hire experts to assist in demonstrating a venture’s lost profits. McAlister and MT offered Ron Epperson for this

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<sup>3</sup> Though McAlister and MT cite *Felder’s* discussion of the evidence regarding the plaintiff’s major-league prospects, *Felder* made clear that this evidence pertained not to the fact of the plaintiff’s damages but to their amount. *See* 215 Ariz. at 163–65, ¶¶ 44–51. McAlister and MT have also moved us to take judicial notice of certain baseball statistics in connection with its reliance on *Felder*. We deny that motion.

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purpose. In each of Epperson's expert reports, he relied on differing payment arrangements and arrived at differing damages amounts. In the 2014 preliminary report, Epperson opined that Loeb & Loeb's alleged misconduct caused approximately \$8 million in damages because of a lost profit- and royalty-sharing opportunity with Donal O'Flynn. In the 2019 report, Epperson opined that the plaintiffs had incurred approximately \$125 million in damages because of lost licensing deals with O'Flynn and three other potential investors: Chris Haver, Bernie Karl, and Peter Burns. In the 2021 report, Epperson estimated the lost profits on the licensing deals to be approximately \$101 million.

¶20 Epperson based his estimates on conversations with and declarations from the various investors, as well as on their deposition testimony. He also relied on information provided by McAlister, including unsigned license agreements that referred only generally to MT intellectual property as their subject. Each agreement described a minimum-royalty fee to be paid annually, with the agreements for O'Flynn, Karl, and Burns defining the fee as \$20 million and the agreement for Haver containing blank lines. But O'Flynn, Karl, and Burns each testified that they did not anticipate paying any royalty fees for years, until operations were underway and commercialization was achieved, and Burns testified that he had no knowledge as to when he would incur a responsibility to pay.

¶21 Epperson acknowledged that each proposed deal was in the early stages of negotiation and did not include a business plan or market analysis explaining how commercialization leading to the claimed lost profits would be achieved. Epperson acknowledged "[t]he McAlister technology has never been practiced at the scale envisioned in the license agreement (a \$400 M plus per year revenue business)," and that "[t]he capital cost of production facilities using new technology are unknown, and it is unknown if [the potential investors] have the ability to fund those capital costs."

¶22 Epperson testified that he did not consider the marketplace in terms of competitors or a specific client base. He stated that though he knew McAlister had been trying to commercialize his technologies for decades, he did not know whether the technologies worked or could be commercialized. He acknowledged, "[i]t's possible that [potential investors and McAlister] would have not reached an agreement on terms or they might have reached an agreement on different terms," explaining that "we're in a land that we just don't know."

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¶23 To account for this uncertainty, Epperson assumed near-immediate minimum royalty payments by the potential investors but applied discount rates of 60–75%. He explained, without citing any authority, that “[w]hen analyzing a new venture, it is typical practice to apply a discount rate to the cash flows” to “account[] for both the time value of money . . . as well as risk factors such as technology, markets, execution risk, etc.,” and “a business venture that is in the very early stages may be assigned a discount factor from 40–80%.”<sup>4</sup> He opined that venture or angel investors often use high discount rates to account for the fact that many deals fail.

¶24 Loeb & Loeb moved to exclude Epperson’s testimony and opinions, arguing that they “lack a reliable methodology, rely on demonstrably and [sic] inaccurate assumptions, and are speculative.” Loeb & Loeb also moved for summary judgment on damages, reiterating its attack on Epperson’s methodology and arguing that there was insufficient evidence that the potential investors could or would have made the deals.

¶25 The superior court granted both motions, describing Epperson’s lost-profits model as “wildly speculative, irrelevant and misleading.” The court found it “speculative that both the parties would have ultimately reached terms and that any of these entities would be profitable,” and therefore concluded that “[t]he gap in this case . . . between ‘planning’ to license technology and a profitable business, is simply too wide to span without wild speculation” and “[p]rojecting profits in such circumstances ‘involve[s] more the talents of a conjurer than those of [an economist].’”

¶26 In reaching its decision, the court emphasized the “enormous, recognized risks” of the proposed deals; the court noted that McAlister had no history of successful commercialization or profitability, there were no signed contracts, no meaningful financial projections, no market analysis, no business plans, no technology proven beyond the laboratory, no management team, and no production capability. The court observed that Epperson did not consider the nature of any marketplace, the product that would be produced, or the amount or allocation of expenses. The court also found that Epperson’s use of high discount rates did not “save the day”

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<sup>4</sup> The plaintiffs later provided a finance-journal article stating that venture capitalists typically use discount rates of 30–70%.

because that approach “guarantees lost profits to any new business that can establish *any revenue*.”

¶27 Deeming Epperson’s opinions’ deficiencies too pervasive to be curable by cross-examination, the court excluded them under Arizona Rule of Evidence (Rule) 702. The court alternately excluded the opinions under Rule 403 as unduly prejudicial and potentially misleading, and went on to grant summary judgment on lost-profits damages.

#### A. Exclusion Pursuant to Rule 702

¶28 Arizona’s Rule 702 is based on its federal counterpart and the principles espoused by *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993); Ariz. R. Evid. 702 cmt. (2012); *State ex rel. Montgomery v. Miller*, 234 Ariz. 289, 297 (App. 2014). We may therefore look to the federal rule and federal caselaw for guidance. *State v. Bernstein*, 237 Ariz. 226, 228, ¶ 9 (2015). The rule “recognizes that trial courts should serve as gatekeepers in assuring that proposed expert testimony is reliable and thus helpful to the jury’s determination of facts at issue,” though the “gatekeeping function is not intended to replace the adversary system” or “to supplant traditional jury determinations of credibility and the weight to be afforded otherwise admissible testimony.” Ariz. R. Evid. 702 cmt. (2012). Where expert testimony is “shaky” but admissible, its deficiencies should be addressed not by exclusion but by cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof. *Id.*; *Bernstein*, 237 Ariz. at 229, ¶ 22. The burden of proof is on the testimony’s proponent, by a preponderance of the evidence. *State v. Salazar-Mercado*, 234 Ariz. 590, 593–94, ¶ 13 (2014).<sup>5</sup>

¶29 Assuming an expert is qualified, a court’s first inquiry under Rule 702 is relevancy and reliability. *Daubert*, 509 U.S. at 597. The testimony must relate to an issue in the case and constitute more than unsupported speculation. *Miller*, 234 Ariz. at 298, ¶ 21; *Daubert*, 509 U.S. at 591, 597. Testimony offered “to plug evidentiary holes . . ., to speculate, and to

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<sup>5</sup> A revised version of Rule 702 took effect in January 2024. *See* 2023 Arizona Court Order 0023. The revised rule states that the proponent of expert testimony must establish the rule’s requirements by a standard of “more likely than not,” and changes the “has reliably applied” requirement to “reflects a reliable application.” *Id.* A comment to the amendment explains that the changes reflect those made to the federal rule in 2023 and are intended to clarify the standard of proof and confirm that “cold” experts are permissible. *Id.* cmt. (2024).

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surmise” should be excluded because such cannot be helpful to the factfinder. *In re Aluminum Phosphide Antitrust Litig.*, 893 F.Supp. 1497, 1506–07 (D. Kan. 1995).

¶30 The court must then decide “whether the expert obtained enough information or data to make the proffered opinion reliable.” *Miller*, 234 Ariz. at 298, ¶ 22. This inquiry is purely quantitative, and an expert’s use of inadmissible, hypothetical, or disputed facts does not require his exclusion. *Id.*; see also Fed. R. Evid. 702, advisory committee’s note to 2000 amendment. The expert may make projections, *Elosu v. Middlefork Ranch Inc.*, 26 F.4th 1017, 1025 (9th Cir. 2022), and in doing so may rely on “hypothetical facts that are supported by the evidence,” Fed. R. Evid. 702, advisory committee’s note to 2000 amendment. But his testimony may not be “wholly speculative or unfounded.” *Elosu*, 26 F.4th at 1025. He may not rely on assumptions that are unrealistic or plainly contradicted by the facts. *Boucher v. U.S. Suzuki Motor Corp.*, 73 F.3d 18, 21–22 (2d Cir. 1996); see also *Boyar v. Korean Air Lines Co.*, 954 F.Supp. 4, 8–9 (D.D.C. 1996); *In re Aluminum Phosphide Antitrust Litig.*, 893 F.Supp. at 1507. Nor may he arbitrarily cherry-pick the facts. See *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 424 (5th Cir. 1987).

¶31 The court must then determine if the expert was able “to explain how his methods, reasoning and opinions are based on ‘an accepted body of learning or experience,’” and whether he applied the methods reliably. *Miller*, 234 Ariz. at 298–99, ¶¶ 23–26. Scientific certainty is not required for this fact-specific inquiry, which may involve consideration of factors such as whether the methods employed are generally accepted, whether they have been tested and peer-reviewed, and the known or potential error rate. *Id.* at ¶¶ 23–24. And admission is favored in close cases. *Bernstein*, 237 Ariz. at 229–30, ¶¶ 17–18. But the “court may conclude that there is simply too great an analytical gap between the data and the opinion offered.” *Miller*, 234 Ariz. at 299, ¶ 26 (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)). Where, for example, a lost-profits expert must rely on “a multitude of assumptions . . . to establish projections of profitability over the life of [a] contract” and those assumptions “require speculation and conjecture,” it may be “beyond the capability of even the most sophisticated procedures to satisfy the legal requirements of proof with reasonable certainty.” *Kenford Co. v. Erie Cnty.*, 493 N.E.2d 234, 236 (N.Y. App. 1986). The court should exclude testimony “that is connected to existing data only by the *ipse dixit* of the expert.” *Joiner*, 522 U.S. at 146.

¶32 Based on the foregoing, the superior court acted within its discretion by excluding Epperson’s opinions as speculative and unreliable

under Rule 702. To reach his opinions, Epperson speculated about critical facts (particularly regarding the minimum-royalty payments), inexplicably ignored expenses, and without adequate explanation used an algorithm that assumed profitability based on (speculative) revenue alone. There was “simply too great an analytical gap between the data and the opinion proffered” – the only connection was Epperson’s *ipse dixit*. See *Joiner*, 522 U.S. at 146; see also *Miller*, 234 Ariz. at 299, ¶ 26. The superior court correctly acted as the gatekeeper in precluding this expert’s opinion.

### B. Exclusion Pursuant to Rule 403

¶33 The superior court also properly excluded Epperson’s opinion under Rule 403. Rule 403 permits the court to exclude otherwise-admissible evidence if its probative value is substantially outweighed by the danger of unfair prejudice or misleading the jury. *Salazar-Mercado*, 234 Ariz. at 594, ¶ 13. The court has considerable discretion here. *State v. Cooperman*, 232 Ariz. 347, 351, ¶ 17 (2013). In view of the multiple deficiencies in Epperson’s opinions and the power of an expert’s imprimatur, even if the opinions could be characterized as “shaky but admissible” under Rule 702, the court acted well within its discretion by excluding them under Rule 403.

### III. Entry of Summary Judgment on Damages

¶34 We next address the plaintiffs’ argument that the damages evidence forestalled summary judgment even given the exclusion of Epperson’s analysis. We review the grant of summary judgment *de novo*, viewing the facts in the light most favorable to the non-moving party. *Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12 (2003). Summary judgment should be granted “if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law.” Ariz. R. Civ. P. 56(a). Summary judgment is warranted “if the facts produced in support of the claim . . . have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim.” *Orme Sch. v. Reeves*, 166 Ariz. 301, 309 (1990). The mere existence of a “scintilla” of evidence that creates the “slightest doubt” is insufficient to withstand a motion for summary judgment. *Id.*

¶35 In the context of Epperson’s opinions, the evidence was inadequate to permit a non-speculative finding of lost profits with respect to royalty payments. Like Epperson, a factfinder would have to engage in speculation to conclude that the plaintiffs would have received those

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payments. The factfinder would have to speculate either that the potential investors would have reversed their unwillingness to make immediate royalty payments, or that the unknown technologies would have been successfully commercialized despite the plaintiffs' history and the numerous, enormous uncertainties and risks. With respect to the royalties, this was a case where a "multitude of assumptions . . . requir[ing] speculation and conjecture" placed a reasonably certain determination of lost profitability "beyond the capability of even the most sophisticated procedures." See *Kenford*, 493 N.E.2d at 236. There was simply too large a gap to create a factual question precluding summary judgment regarding most of the plaintiffs' claimed lost profits.

¶36 But the potential initial payment from O'Flynn raises a different issue. O'Flynn indicated in his 2020 deposition that he "was fine" with paying "5 million upfront" to the plaintiffs—with no specified contingencies. To be sure, this testimony's credibility is called into doubt by the fact that O'Flynn did not consistently affirm this commitment in his multiple declarations over the course of this litigation.<sup>6</sup> But summary judgment cannot be granted based on credibility determinations. *Orme Sch.*, 166 Ariz. at 309. "[S]ummary judgment should not be used as a substitute for jury trials simply because the trial judge may believe the moving party *will* probably win the jury's verdict, nor even when the trial judge believes the moving party *should* win the jury's verdict." *Id.* at 310. Though O'Flynn's testimony provides sparse grounds for a finding of lost profits, we cannot say that it was insufficient to forestall summary judgment.

¶37 Based on the foregoing, we must conclude that though the superior court's entry of summary judgment on damages was largely proper, the plaintiffs were entitled to have the factfinder assess whether there is credible evidence that O'Flynn would have made an initial payment of \$5 million with no specified contingencies.

#### IV. Entry of Summary Judgment on Trespass to Chattel

¶38 We next address the plaintiffs' argument that the superior court erroneously entered summary judgment on the trespass to chattel claim. The plaintiffs assert that Loeb & Loeb deprived them of using their intellectual property rights by re-titling the patent applications. The

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<sup>6</sup> We note that though a party cannot defeat summary judgment by submitting a sham affidavit contradicting his previous sworn testimony, *Perdue v. La Rue*, 250 Ariz. 34, 39–40, ¶ 17 (App. 2020), those are not the facts here.

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superior court held because there was no evidence of physical interference—actual physical contact with chattel—the claim was physically impossible. We hold that was error.

¶39 Arizona law defines trespass to chattel consistent with the Restatement (Second) of Torts (“Restatement”) § 217 (1965): “intentionally dispossessing another of the chattel or using or intermeddling with a chattel in the possession of another.” *Koepnick v. Sears Roebuck & Co.*, 158 Ariz. 322, 330–31 (App. 1988). Dispossession occurs when chattel is taken from another’s physical control, Restatement § 221, and intermeddling occurs when physical contact is brought about with chattel in another’s possession, Restatement § 217 cmt. e.

¶40 First, we hold that trespass to chattel may be based on interference with patent applications. In conversion cases, which differ from trespass to chattel cases mainly in degree, *see* Restatement § 222A cmt. a, we have expressly held that claims may involve “intangible property that is merged in, or identified with, some document,” such as “a stock certificate or an insurance policy,” *Miller v. Hehlen*, 209 Ariz. 462, 472, ¶ 35 (App. 2005). The Restatement explains that liability exists “[w]here there is conversion of a document in which intangible rights are merged,” or where “[o]ne . . . effectively prevents the exercise of intangible rights of the kind customarily merged in a document . . . , even though the document is not itself converted.” Restatement § 242. Intangible rights are “merged” in a document “when by the appropriate rule of law, the right to the immediate possession of a chattel and the power to acquire such possession is represented by a document.” Restatement § 242 cmt. a. Properly filed patent applications represent, at minimum, future contingent ownership rights “to exclude all others from making, using, or selling the protected invention[s].” *Paradigm Alliance, Inc. v. Celeritas Techs., LLC*, 659 F.Supp. 2d 1167, 1189 (D. Kan. 2009). Their fraudulent assignment therefore can support a conversion claim, *Harris v. Coleman*, 863 F.Supp. 2d 336, 344–45 (S.D.N.Y. 2012), and, logically, the lesser claim of trespass to chattel.

¶41 We hold that in the modern digitized world, electronic touching may suffice. Consistent with that view, courts have recognized trespass to chattel claims where a party contacts another’s computer network via spam emails or search-robot software. *See Register.Com, Inc. v. Verio, Inc.*, 356 F.3d 393, 438 (2d Cir. 2004) (search-robot software); *America Online, Inc. v. Nat’l Health Care Discount, Inc.*, 121 F.Supp.2d 1255, 1259 (N.D. Iowa 2000) (spam emails); *see also* Dan B. Dobbs et al., *The Law of Torts* (“Dobbs”), at § 60 (2000) (recognizing tort’s extension to bulk emails and hacking). To the extent that our decision in *Mobilisa, Inc. v. Doe* suggests that

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remote contact is insufficient, we reject that suggestion. *See* 217 Ariz. 103, 106-07, 113-14, ¶¶ 3-4, 34-39 (App. 2007) (denying summary judgment on trespass to chattel and other claims based on unauthorized access of an email, emphasizing that absence of hacking evidence supported inference that defendant used plaintiff's physical computers).

¶42 We conclude that the superior court erred by entering summary judgment on the trespass to chattel claim based on the evidence and the tort's elements. But our inquiry does not end here. Loeb & Loeb made secondary summary-judgment arguments that the court did not address. We examine those arguments because we may affirm a grant of summary judgment based on arguments raised but not expressly considered below. *See Zuck v. State*, 159 Ariz. 37, 42 (App. 1988).

¶43 First, Loeb & Loeb argued that it could not be liable because it only acted as AGT's agent. But Loeb & Loeb provided no legal authority in support of this argument – and we note that “[i]t is well-established law that an agent will not be excused from responsibility for tortious conduct because he is acting for his principal.” *Griffith v. Falz*, 162 Ariz. 599, 600-01 (App. 1990). We therefore will not affirm the entry of summary judgment on agency grounds.

¶44 Loeb & Loeb next argued that liability for trespass to chattel is measured in terms of fair market value, and that the plaintiffs presented no evidence of the same. We need not address whether the plaintiffs presented evidence of a loss or diminution in the intellectual property's fair market value because they waived all damage claims except for lost profits. We hold that lost profits may be recoverable for trespass to chattel. Though damages for loss of use of a chattel traditionally are measured by reference to the chattel's market value (as we have recognized, *see State v. Pearce*, 156 Ariz. 287, 289 (App. 1988)), under the modern view, damages may be measured by lost profits if the plaintiff needed the chattel to conduct his business. *E.g.*, Dobbs at §§ 60 (describing modern view applicable where trespass to chattel involves dispossession or physical harm), 73 (describing recovery in conversion cases). Accordingly, in view of O'Flynn's testimony regarding an initial payment, sufficient evidence precluded entry of summary judgment on the trespass to chattel claim on damages grounds. We thus reverse the entry of summary judgment on the trespass to chattel claim.

**V. Entry of Summary Judgment on Slander of Title**

¶45 Finally, we address the plaintiffs' argument that the superior court erroneously entered summary judgment on the slander of title claim by applying the one-year limitations period of A.R.S. § 12-541(1) "for injuries done to the character or reputation of another by libel or slander" rather than the two-year limitations period of A.R.S. § 12-542(3) for actions "[f]or trespass for injury done to the estate or the property of another."

¶46 Slander of title occurs when there is a "publication of a false statement disparaging another's property rights in land, chattels or intangible things, that the publisher should recognize as likely to result in pecuniary harm to the other through the conduct of third persons in respect to the other's interests in the property." Restatement § 624. A statement is disparaging "if it is understood to cast doubt upon the . . . existence or extent of [one's] property in" his chattels. Restatement § 629. The false and disparaging statement must be made with malice, which "means acting 'from improper motives or without reasonable belief in the efficacy of the claim.'" *SWC Baseline & Crismon Invs., L.L.C. v. Augusta Ranch Ltd. P'ship*, 228 Ariz. 271, 287, ¶ 63 (App. 2011) (citation omitted). Damages may be recovered for "pecuniary loss," Restatement § 623A, which may include lost profits, Restatement § 633 cmt. h, illustration 1.

¶47 Loeb & Loeb relies on *Gee v. Pima County*, in which this court declined to resolve the parties' dispute regarding whether A.R.S. § 12-541(1) or A.R.S. § 12-542(3) applied to slander of title but stated that "[t]he majority of the courts that have considered the issue have held that the statute of limitations for libel governs actions for slander of title," and "we do not see any reason to vary the statute of limitations because property rather than a person is defamed." 126 Ariz. 116, 116 (App. 1980). Loeb & Loeb's reliance on *Gee* is misplaced. First, *Gee's* discussion of the applicable limitations period is non-binding dicta. See *Canas v. Bay Entertain., LLC*, 252 Ariz. 117, 120, ¶ 15 (App. 2021) (holding that statements not necessary to a case's decision are not binding precedent, and at most may have persuasive value). Second, in considering that discussion, we note few courts have decided the issue, the relevant statutes are not uniform between jurisdictions, and there is no "overwhelming majority and no clear trend." See 1A American Law of Torts § 5:40 (2023); 131 A.L.R. 837 (2023). We examine the issue independently.

¶48 Limitations defenses are disfavored, and the longer of two limitations periods should be used where there is substantial doubt as to which applies. *Drug, Cosmetic & Beauty Trade Servs., Inc. v. McFate*, 14 Ariz.

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App. 7, 9 (1971). Slander of title “is not a true defamation action, being historically an action on the case for special damages arising from a falsehood.” *Stewart v. Fahey*, 14 Ariz. App. 149, 150 (1971); *see also* Dobbs at § 656 (“Trade libel is not libel and slander of title is not slander.”). Slander of title is of fundamentally different character than defamation—defamation harms a person’s reputation, whereas slander of title harms a property interest. *See, e.g.*, Restatement §§ 559, 623A, 624. Based on this difference and the general policy disfavoring limitations defenses, we hold that the court erred by applying the one-year limitations period “for injuries done to the character or reputation of another by libel or slander.” *See* A.R.S. § 12-541(1). We need not resolve whether the three-year period “[f]or trespass for injury done to the estate or the property of another” prescribed by A.R.S. § 12-542(3) was the correct fit, because in any event the claim was timely under the four-year catch-all period established by A.R.S. § 12-550.

¶49 We conclude that the entry of summary judgment on limitations grounds was error. But again, our inquiry does not stop there because Loeb & Loeb raised additional arguments below that the superior court did not expressly address. *See Zuck*, 159 Ariz. at 42.

¶50 First, Loeb & Loeb argued that the plaintiffs could not show, as necessary elements of slander of title, that statements asserting AGT’s ownership of the intellectual property were false and malicious. But the ownership issue was hotly debated, and the plaintiffs put forth evidence—including an email in which a Loeb & Loeb attorney described AGT as a “licensee” to a patent examiner, and provisions of the “License Agreement” stating that AGT “will own all Proprietary Rights in any patentably distinct Inventions and/or Improvements” except “McAlisterTech will retain all ownership in all Patent Rights” – to support their position AGT licensed rather than owned the intellectual property. In view of that evidence, we will not affirm the entry of summary judgment based on insufficient proof of falsity or malice.

¶51 Next, Loeb & Loeb argued that the plaintiffs had not pled, disclosed, or otherwise identified special damages. As opposed to general damages, which “are such as the law implies and presumes to have occurred from the wrong complained of,” special damages are “those which are the natural but not the necessary consequence of the act complained of and usually stem from the particular circumstances of the case.” *S. Ariz. Sch. for Boys, Inc. v. Chery*, 119 Ariz. 277, 280 (App. 1978). Slander of title requires proof of special damages, *SWC Baseline & Crismon Invs.*, 228 Ariz. at 287, ¶ 63, which “must be specifically stated,” Ariz. R. Civ. P. 9(g). The plaintiffs argue that their claimed lost-profits damages

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were excepted from the specific-pleading requirement under *Drew v. United Producers & Consumers Coop.*, 161 Ariz. 331, 333-34 (1989), which held that “[e]ven in tort cases in those jurisdictions requiring special allegations before lost profits may be recovered, lost profits that are the ‘natural, necessary and logical’ result of the defendant’s actions, need not be specifically pleaded.”

¶52 But even assuming that a specific allegation was required, that standard is met “when [a pleading] notifies the defendant of the nature of the claimed damages even though it does not delineate them with ‘as great precision as might be possible or desirable,’” *S. Ariz. Sch. for Boys*, 119 Ariz. at 281 (citation omitted). That is the case here, where the plaintiffs alleged in their complaint that “[b]ecause this cloud [on title to MT’s intellectual property] prevented MT from raising investment funds off these patents, proprietary rights in a significant portion of these patents have been irretrievably lost.” We will not affirm the entry of summary judgment based on the damages pleading standard. We reverse the entry of summary judgment on the slander of title claim as unwarranted on any grounds raised.

CONCLUSION

¶53 We affirm in part and reverse in part. We affirm the exclusion of the plaintiffs’ damages expert as unreliable. We largely affirm the entry of summary judgment on damages, except we reverse and remand regarding summary judgment related only to damages for a potential lost initial payment from O’Flynn. We reverse and remand on the entry of summary judgment on the trespass to chattel and slander of title claims, subject to the limitation on alleged damages.



AMY M. WOOD • Clerk of the Court  
FILED: AA