

**APPLICATION FOR NOMINATION TO JUDICIAL  
OFFICE**

**SECTION I: PUBLIC INFORMATION  
(QUESTIONS 1 THROUGH 65)**

**PERSONAL INFORMATION**

1. Full Name:

Robert James Higgins

2. Have you ever used or been known by any other name? Yes. If so, state name:

Bob Higgins

3. Office Address:

P.O. Box 667, Holbrook, Arizona 86025

4. How long have you lived in Arizona? 34 years. What is your home zip code?  
85929

5. Identify the county you reside in and the years of your residency.

Navajo County, 26 years

6. If nominated, will you be 30 years old before taking office?  yes  no

If nominated, will you be younger than age 65 at the time the nomination is sent to  
the Governor?  yes  no

Filing Date: August 31, 2020  
Applicant Name: Robert J. Higgins  
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7. List your present and any former political party registrations and approximate dates of each:

Republican 1976 – 2010  
Independent 2010 – 2012  
Democrat 2012 - Present

(The Arizona Constitution, Article VI, § 37, requires that not all nominees sent to the Governor be of the same political affiliation.)

8. Gender: Male

Race/Ethnicity: Caucasian

### EDUCATIONAL BACKGROUND

9. List names and locations of all post-secondary schools attended and any degrees received.

B.A. Santa Clara, 1980  
M.A. ASU, 1988  
J.D. Santa Clara, 1992

10. List major and minor fields of study and extracurricular activities.

Major: English  
Extracurricular Activities: Baseball, 1 year; Resident Assistant, 2 years;  
Santa Clara Community Action Program, 3 years

11. List scholarships, awards, honors, citations and any other factors (e.g., employment) you consider relevant to your performance during college and law school.

College: Full scholarship based on academics and need.

Law School: Evergreen Community College Adjunct Faculty, English

Clerkships:

May to October, 1991- Walkup, Shelby, Bastian, Kelly, Eccheverria and Link  
San Francisco, CA- Personal Injury, Wrongful Death Firm

May To October, 1992- Archer, McComas and Lageson  
Walnut Creek, CA- Insurance Defense Firm, Construction Law, Medical  
Malpractice Law, Personal Injury, Wrongful Death Defense

<b>PROFESSIONAL BACKGROUND AND EXPERIENCE</b>
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12. List all courts in which you have been admitted to the practice of law with dates of admission. Give the same information for any administrative bodies that require special admission to practice.

Arizona- 1994  
U.S. District Court of Arizona- 1999

13. a. Have you ever been denied admission to the bar of any state due to failure to pass the character and fitness screening? No. If so, explain.
- b. Have you ever had to retake a bar examination in order to be admitted to the bar of any state? Yes. If so, explain any circumstances that may have hindered your performance.

In the Fall of 1993, I did not pass the Bar. In the Spring of 1994 I passed it. In the Fall of 1993, my wife Laura and our three young children moved back to Arizona from Santa Clara, California. Our oldest child was four years old, our middle child was three years old, and our youngest was eight months old. I was working for the firm of Kleinman, Carol, Lesselyong and Novak as a clerk and looking back on it, I just had too many outside things going on in my first attempt and did not pass. The second time, I took two weeks off, went to a cabin in Flagstaff and dedicated all of my time to the Bar exam and passed.

14. Describe your employment history since completing your undergraduate degree. List your current position first. If you have not been employed continuously since completing your undergraduate degree, describe what you did during any periods of unemployment or other professional inactivity in excess of three months. Do not attach a resume.

EMPLOYER	DATES	LOCATION
Navajo County Superior Court Judge	2012 to present	Holbrook/ Show Low, AZ
Navajo County Presiding Judge	2016 to present	Holbrook/ Show Low, AZ
Barker, Higgins and Hesse, P.C.	2010 to 2012	Pinetop, AZ
Higgins, Hitchcock and Hesse, P.C.	2008 to 2010	Pinetop, AZ
Higgins Law Firm, L.L.C.	2001 to 2008	Pinetop, AZ
Higgins, Carlyon and Shaffery, L.L.C.	1998 to 2001	Pinetop, AZ
Higgins and Carlyon, L.L.C.	1997 to 1998	Pinetop, AZ
Deputy Navajo County Attorney	1994 to 1997	Holbrook, AZ
Adjunct Faculty Northland Pioneer College, Paralegal Program	1994 to 1997	Holbrook, AZ
Adjunct Faculty Northland Pioneer College, Police Academy, Criminal Law Procedure	1994 to 1997	Snowflake, AZ
Clerk- Kleinman, Lesselyong and Novak	1993 to 1994	Phoenix, AZ
Volunteer Clerk- Maricopa County Attorney's Office	1993 (a few months)	Phoenix, AZ
Clerk- Archer, McComas and Lageson	May to October 1992	Walnut Creek, CA
Clerk- Walkup, Bastian, Kelly, Eccheverria and Link	May to October 1991	San Francisco, CA
Adjunct Faculty, Evergreen Valley College, English	1989 to 1992	San Jose, CA
Brophy College Preparatory, English Teacher, Coach	1982 to 1989	Phoenix, AZ

Volunteer English Teacher and  
Coach, Ponape Agriculture and  
Trade School

1980 to 1982

Ponape, E. Caroline  
Islands, Micronesia

15. List your law partners and associates, if any, within the last five years. You may attach a firm letterhead or other printed list. Applicants who are judges or commissioners should additionally attach a list of judges or commissioners currently on the bench in the court in which they serve.

Judge Dale P. Nielson, Division III  
Judge Ralph E. Hatch, Division I  
Judge Michala M. Ruechel, Division IV  
Judge Pro Temp/ Commissioner Jon H. Saline

16. Describe the nature of your law practice over the last five years, listing the major areas of law in which you practiced and the percentage each constituted of your total practice. If you have been a judge or commissioner for the last five years, describe the nature of your law practice before your appointment to the bench.

My law practice before my appointment to the bench consisted of civil litigation, personal injury and wrongful death, family law, wills and trusts, contracts and leases, and some probate law. My partners were Jack Barker (now deceased) and George Hesse. Mr. Barker had a general practice and Mr. Hesse practiced primarily in Indian Law.

17. List other areas of law in which you have practiced.

Criminal Law Prosecutor: 1994 – 1997

School Law Attorney: 1999 – 2003 Theodore Roosevelt School

Cellular One Corporate Counsel: 2006 - 2010

18. Identify all areas of specialization for which you have been granted certification by the State Bar of Arizona or a bar organization in any other state. N/A

19. Describe your experience as it relates to negotiating and drafting important legal documents, statutes and/or rules.

I have negotiated and drafted settlement documents in personal injury and wrongful

death claims; dissolution of marriage settlements involving millions of dollars in assets, wills and small trusts.

20. Have you practiced in adversary proceedings before administrative boards or commissions? Yes. If so, state:

a. The agencies and the approximate number of adversary proceedings in which you appeared before each agency.

Registrar of Contractors, 3 appearances  
Navajo Nation Labor Relations Board, 1 appearance

b. The approximate number of these matters in which you appeared as:

Sole Counsel: 4

Chief Counsel: \_\_\_\_\_

Associate Counsel: \_\_\_\_\_

21. Have you handled any matters that have been arbitrated or mediated? Yes. If so, state the approximate number of these matters in which you were involved as:

Sole Counsel: 10

Chief Counsel: \_\_\_\_\_

Associate Counsel: \_\_\_\_\_

22. List at least three but no more than five contested matters you negotiated to settlement. State as to each case: (1) the date or period of the proceedings; (2) the names, e-mail addresses, and telephone numbers of all counsel involved and the party each represented; (3) a summary of the substance of each case; and (4) a statement of any particular significance of the case.

1. Mike M. v. Carquest

(1) 2010

(2) Defense counsel- Jones, Skelton and Hochuli

(3) My client, Mr. M was hit by a Carquest truck while on his motorcycle.

He suffered severe injuries, including a broken wrist and hand, fractured pelvis, crush injuries to his ankle and foot, and a few fractured ribs.

(4) The case settled for \$600,000.00 in 2010. The mediator, Paul McGoldrick, told us it was in the top 5 percent of settlements that year.

Mediator- Paul McGoldrick, 1232 E. Missouri Ave., Phoenix, AZ 85014, (602) 230-5400.

Defense attorneys- Jones, Skelton and Hochuli, (602) 263-4437. I believe the attorney at mediation was Josh Barnes. I primarily dealt with the insurance adjuster.

2. C.G. v. Ponderosa Bowling Alley

(1) 2007 – 2008

(2) Defense counsel for the bowling alley was Robert Mackenzie of Junker and Shiaras, P.C., 3004 N. 68<sup>th</sup> St., Scottsdale, AZ 85251, (480) 505-2600.

(3) My client, C. G. suffered a serious brain injury when a bowling alley employee picked him up and twirled him around, ultimately losing her grip and dropping him on his head to a concrete floor in the lounge.

The issues were whether the employee was acting as an agent of the bowling alley, and damages. The insurance company initially denied liability saying the employee was acting outside the scope of her duties.

Through negotiation, the case was ultimately settled for the policy limits of \$300,000.00 with a structured annuity which amount to 1.2 million dollars over the Plaintiff's lifetime.

(4) Th case presented significant issues:

(a) Liability;

(b) Indian Health Services medical equivalency statements/ liens;

(c) Reduction through negotiation of other significant medical bills/ liens; and

(d) Probate approval.

3. R.E. v R.E.

(1) 2002-2012

Co-counsel Philip May, [pmay@maypotenza.com](mailto:pmay@maypotenza.com), (602) 252-0101.

Co-counsel Kevin Tucker, [kevint@tucker-miller.com](mailto:kevint@tucker-miller.com), (602) 870-5511.

(2) Defense counsel David Engelman, [dwe@eblawyers.com](mailto:dwe@eblawyers.com), (602) 271-9090.

(3) My client, R.E., a minor, was molested for a number of years by her father. The father had significant assets which he fraudulently transferred during the pendency of the personal injury case. After obtaining a \$1.6 million judgment, another suit had to be filed to unwind the fraudulent transfers.

(4) The case was significant as the fraudulent transfer suit was complex. Assets were in shell companies both in and out of the country. My co-counsel and I were successful in unwinding the fraudulent transfers and negotiating a settlement.

23. Have you represented clients in litigation in Federal or state trial courts? Yes. If so, state:

The approximate number of cases in which you appeared before:

Federal Courts: 1

State Courts of Record: Hundreds

Municipal/Justice Courts: In private practice less than ten

The approximate percentage of those cases which have been:

Civil: 90 percent

Criminal: 10 percent

The approximate number of those cases in which you were:

Sole Counsel: Several hundred

Chief Counsel: \_\_\_\_\_

Associate Counsel: \_\_\_\_\_

The approximate percentage of those cases in which:

You wrote and filed a pre-trial, trial, or post-trial motion that wholly or partially disposed of the case (for example, a motion to dismiss, a motion for summary judgment, a motion for judgment as a matter of law, or a motion for new trial) or wrote a response to such a motion:

5 percent or less

You argued a motion described above

5 percent or less

You made a contested court appearance (other than as set forth in the above response)

20 percent (mostly Family Law)

You negotiated a settlement:

70 percent

The court rendered judgment after trial:

10 percent or less

A jury rendered a verdict: \_\_\_\_\_

The number of cases you have taken to trial:

Limited jurisdiction court:  
50 to 00 (as a prosecutor)

Superior court:  
more than 50 (mostly Family Law cases)

Federal district court 0

Jury:  
Approximately 30 (1994 to 1997)  
as a prosecutor

Note: If you approximate the number of cases taken to trial, explain why an exact count is not possible.

The cases were from 1994 to 2012.

24. Have you practiced in the Federal or state appellate courts? No. If so, state:

The approximate number of your appeals which have been:

Civil: \_\_\_\_\_

Criminal: \_\_\_\_\_

Other: \_\_\_\_\_

The approximate number of matters in which you appeared:

As counsel of record on the brief:

Personally in oral argument:

25. Have you served as a judicial law clerk or staff attorney to a court? No. If so, identify the court, judge, and the dates of service and describe your role.

26. List at least three but no more than five cases you litigated or participated in as an attorney before mediators, arbitrators, administrative agencies, trial courts or appellate courts that were not negotiated to settlement. State as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency and the

name of the judge or officer before whom the case was heard; (3) the names, e-mail addresses, and telephone numbers of all counsel involved and the party each represented; (4) a summary of the substance of each case; and (5) a statement of any particular significance of the case.

1. Mike M. v. Carquest, see number 22, mediation.
2. V. v. V., post-dissolution child custody trial.
  - (1) 1997-1998
  - (2) Navajo County Superior Court, Judge Thomas L. Wing.
  - (3) Defense counsel no longer practices.
  - (4) Three-day child custody trial involving expert testimony from several psychologists and medical doctors all retained by the other side. I did the case pro bono. My client was awarded sole legal decision-making authority and the primary residential parent.
3. S. v. M. , binding arbitration.
  - (1) 2002 to 2004
  - (2) Robert E. Schmitt, Arbitrator, (928) 445-6860.
  - (3) Defense counsel Gail Hornstein, Doyle, Berman & Boyack, P.C., (602) 240-6711.
  - (4) This was a complex personal injury case where the insurance company and counsel denied liability. My client won policy limits of \$100,000.00 and \$25,000.00 and then was successful in claiming an underinsured limit of \$100,000.00.

27. If you now serve or have previously served as a mediator, arbitrator, part-time or full-time judicial officer, or quasi-judicial officer (e.g., administrative law judge, hearing officer, member of state agency tribunal, member of State Bar professionalism tribunal, member of military tribunal, etc.), give dates and details, including the courts or agencies involved, whether elected or appointed, periods of service and a thorough description of your assignments at each court or agency. Include information about the number and kinds of cases or duties you handled at each court or agency (e.g., jury or court trials, settlement conferences, contested hearings, administrative duties, etc.).

Navajo County Superior Court Judge 2012 to present  
Presiding Judge, Navajo County 2016 to present  
Presiding Juvenile Judge, Navajo County 2016 to October, 2019  
Presiding Drug Court Judge, Navajo County 2012 to present

Appointed by Governor Brewer to serve the remaining term of retired Judge Carolyn Holliday, took the bench, March, 2012.

Elected in November, 2012 to a four year term.

Elected in November, 2016 to a four year term.

28. List at least three but no more than five cases you presided over or heard as a judicial or quasi-judicial officer, mediator or arbitrator. State as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) the names, e-mail addresses, and telephone numbers of all counsel involved and the party each represented; (4) a summary of the substance of each case; and (5) a statement of any particular significance of the case.

3 to 5 cases presided over

1. State v. Valencia; CR201101039  
(1) December, 2011  
(2) Division II, Navajo County Superior Court  
(3) Prosecutor Patrick Zinicola, Navajo County Attorney's Office, (928) 524-4026, patrick.zinicola@navajocountyaz.gov.

Defendant counsel Leonard Brown, Navajo County Public Defender's Office, (Deceased).

(4) 1<sup>st</sup> degree murder trial involving 404(b) and other pretrial evidentiary issues upon which I had to rule.

(5) Due to the nature of the murder, and its aggravating circumstances, Mr. Valencia received life in prison without the possibility of parole.

2. State v. Schreckengost; CR201100179  
(1) May, 2012  
(2) Division II, Navajo County Superior Court  
(3) Prosecutor Robert Edwards, Navajo County Attorney's Office, (928) 524-4026, robert.edwards@navajocountyaz.gov.

Defendant counsel Leonard Brown, Navajo County Public Defender's Office, (Deceased).

(4) This four-day jury trial involved several pretrial motions in limine and 404(b) rulings. The original trial ended in a deadlocked jury and mistrial. A few months later the defendant pled to two counts of attempted sexual conduct with a minor and one count of perjury.

(5) The case was significant because the defendant likely caused the mistrial by perjuring himself on the stand.

3. C. v. C.; DO201900392

I am enclosing an extensive ruling I issued recently which contains all of the information requested. This was a dissolution where potentially over a million dollars was at issue.

29. Describe any additional professional experience you would like to bring to the Commission's attention.

**BUSINESS AND FINANCIAL INFORMATION**

30. Have you ever been engaged in any occupation, business or profession other than the practice of law or holding judicial or other public office, other than as described at question 14? Yes. If so, give details, including dates.

Ponape Agriculture and Trade School 1980- 1982  
Ponape, E. Caroline Islands, Micronesia

Taught English as a second language to high school students from all over the Pacific at a boarding school.  
Coached varsity basketball and baseball

Teacher/ Coach Brophy College Preparatory 1982- 1989

Taught English 1982-1989  
English Department Choir 1986-1989  
Coach, Freshman Football 1982-1985  
Coach, Freshman, J.V., Assistant Varsity baseball, 1982 – 1987  
Coach, Varsity Golf 1997-1988- 1988 State Champions

31. Are you now an officer, director, majority stockholder, managing member, or otherwise engaged in the management of any business enterprise? Yes. If so, give details, including the name of the enterprise, the nature of the business, the title or other description of your position, the nature of your duties and the term of your service.

I am the founder and President of the Board of St. Anthony School in Show Low, Arizona. I am also the President of the White Mountain Tuition Support Foundation.

Do you intend to resign such positions and withdraw from any participation in the management of any such enterprises if you are nominated and appointed? No. If not, explain your decision.

My avocation is education, particularly helping kids who would not have the chance to obtain a high-quality education. In the White Mountains, we have the Apache Reservation and St. Anthony School has had the privilege of educating many of their children. In Whiteriver, the level of unemployment, drug and alcohol addiction, and gang affiliation is high. St. Anthony School offers families an opportunity to escape poverty and achieve better results in life. As an example, our first Apache graduate attended Brophy College Preparatory and is now a Junior at Creighton

graduate attended Brophy College Preparatory and is now a Junior at Creighton University. His younger sister, also a St. Anthony graduate, is a freshman at Xavier College Preparatory.

If a case involving tuition tax credits or Catholic education come before the Court, I would recuse myself.

32. Have you filed your state and federal income tax returns for all years you were legally required to file them?\_Yes. If not, explain.
33. Have you paid all state, federal and local taxes when due? Yes. If not, explain.
34. Are there currently any judgments or tax liens outstanding against you? No. If so, explain.
35. Have you ever violated a court order addressing your personal conduct, such as orders of protection, or for payment of child or spousal support? No. If so, explain.
36. Have you ever been a party to a lawsuit, including an administrative agency matter but excluding divorce? Yes. If so, identify the nature of the case, your role, the court, and the ultimate disposition.

In the election this year in Navajo County, my opponent challenged my petitions. I hired counsel, asked Judge Nielson to find a visiting judge (a Judge from Mojave County took the case), and I prevailed.

37. Have you ever filed for bankruptcy protection on your own behalf or for an organization in which you held a majority ownership interest? No. If so, explain.
38. Do you have any financial interests including investments, which might conflict with the performance of your judicial duties? No. If so, explain.

<b>CONDUCT AND ETHICS</b>
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39. Have you ever been terminated, asked to resign, expelled, or suspended from employment or any post-secondary school or course of learning due to allegations

of dishonesty, plagiarism, cheating, or any other "cause" that might reflect in any way on your integrity? No. If so, provide details.

40. Have you ever been arrested for, charged with, and/or convicted of any felony, misdemeanor, or Uniform Code of Military Justice violation? No.

If so, identify the nature of the offense, the court, the presiding judicial officer, and the ultimate disposition.

41. If you performed military service, please indicate the date and type of discharge. If other than honorable discharge, explain. N/A

42. List and describe any matter (including mediation, arbitration, negotiated settlement and/or malpractice claim you referred to your insurance carrier) in which you were accused of wrongdoing concerning your law practice.

Finch v. Finch, Apache County. Ms. Finch, my client, was unhappy with the settlement she agreed to on the record. She sued me. My malpractice carrier decided to settle it for a minimal amount and found no wrongdoing on my part.

43. List and describe any litigation initiated against you based on allegations of misconduct other than any listed in your answer to question 42.

None.

44. List and describe any sanctions imposed upon you by any court.

None.

45. Have you received a notice of formal charges, cautionary letter, private admonition, referral to a diversionary program, or any other conditional sanction from the Commission on Judicial Conduct, the State Bar, or any other disciplinary body in any jurisdiction? No. If so, in each case, state in detail the circumstances and the outcome.

46. During the last 10 years, have you unlawfully used controlled substances, narcotic drugs or dangerous drugs as defined by federal or state law? No. If your answer is "Yes," explain in detail.

47. Within the last five years, have you ever been formally reprimanded, demoted, disciplined, cautioned, placed on probation, suspended, terminated or asked to resign by an employer, regulatory or investigative agency? No. If so, state the circumstances under which such action was taken, the date(s) such action was taken, the name(s) and contact information of any persons who took such action, and the background and resolution of such action.
48. Have you ever refused to submit to a test to determine whether you had consumed and/or were under the influence of alcohol or drugs? No. If so, state the date you were requested to submit to such a test, type of test requested, the name and contact information of the entity requesting that you submit to the test, the outcome of your refusal and the reason why you refused to submit to such a test.
49. Have you ever been a party to litigation alleging that you failed to comply with the substantive requirements of any business or contractual arrangement, including but not limited to bankruptcy proceedings? No. If so, explain the circumstances of the litigation, including the background and resolution of the case, and provide the dates litigation was commenced and concluded, and the name(s) and contact information of the parties.

**PROFESSIONAL AND PUBLIC SERVICE**

50. Have you published or posted any legal or non-legal books or articles? No. If so, list with the citations and dates.
51. Are you in compliance with the continuing legal education requirements applicable to you as a lawyer or judge? Yes. If not, explain.
52. Have you taught any courses on law or lectured at bar associations, conferences, law school forums or continuing legal education seminars? Yes. If so, describe.
- July 18, 2019 Federal Bankruptcy Judge Dan Collins, Federal Judge Humetewa, Federal Magistrate Camille Bibles, Navajo County Judge Dale Nielson and I conducted a continuing legal education program called "CLE in the Pines, a conversation with the bench about Northern Arizona State and Federal Practice."
53. List memberships and activities in professional organizations, including offices held and dates.

National Conference of Teachers of English 1982 to 1989

Gave keynote address with Fr. Anton Renna, S.J., to National Conference in 1986.

Have you served on any committees of any bar association (local, state or national) or have you performed any other significant service to the bar? Yes.

List offices held in bar associations or on bar committees. Provide information about any activities in connection with pro bono legal services (defined as services to the indigent for no fee), legal related volunteer community activities or the like.

Committee on Juvenile Courts 2016 to October, 2019.

Pro bono legal services:

Arts Alliance of the White Mountains  
White Mountains Montessori  
Hospice of the White Mountains  
Lion's Camp Tatiyee  
The Church

54. Describe the nature and dates of any relevant community or public service you have performed.

Please see pro bono work above.

Founder, Board President St. Anthony School

Founder, Board President, White Mountain Tuition Support Foundation.

55. List any relevant professional or civic honors, prizes, awards or other forms of recognition you have received.

Distinguished Service Award- from Chief Justice, Arizona Supreme Court 2020.

Navajo County Distinguished Judicial Service Award 2017.

National Association of Drug Court Professionals 2017 Equity and Inclusion Award.

Ignatian Award 2013- Santa Clara University's highest alumni award (See youtube: Honorable Robert J. Higgins).

President's Award- Jesuit High School Outstanding Graduate Over-All, 1976.

56. List any elected or appointed public offices you have held and/or for which you have been a candidate, and the dates.

Appointed to Navajo County Superior Court, Division II, by Governor Brewer, March 2012. Elected November, 2012 and November, 2016, Navajo County Superior Court, Division II.

Appointed Presiding Judge, Navajo County Superior Court by Arizona Supreme Court, 2016 and December, 2019.

Have you ever been removed or resigned from office before your term expired? No. If so, explain.

Have you voted in all general elections held during the last 10 years? Yes. If not, explain.

57. Describe any interests outside the practice of law that you would like to bring to the Commission's attention.

In the late 1990's, I formed a 501(c)(3) corporation to begin the process of starting a Catholic school in the White Mountains. After several years of golf tournaments and other charitable events, over \$250,000.00 was raised thanks to a group of like-minded individuals who formed our first Board. We began the school in the Fall of 2006 with a pre-k, kindergarten, and first grade. We had thirty-four students. We then added one grade per year until we reached Eight grade. Last year we had 160 students and we have had seven graduating classes. Our alumni are doing well in the high schools and colleges they attend. The school is making a positive impact in the White Mountains.

I mention this because it shows dedication to a purpose, perseverance and leadership. I am still the Board President and have been active with St. Anthony School since 1998. Because of my Superior Court position, I have refrained from directly fundraising. Instead, we hired a Development Director, and our White Mountain Tuition Support Foundation is managed by my wife, Laura. The school and the Foundation are thriving and growing.

HEALTH
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58. Are you physically and mentally able to perform the essential duties of a judge with or without a reasonable accommodation in the court for which you are applying? Yes.

## ADDITIONAL INFORMATION

59. The Arizona Constitution requires the Commission to consider the diversity of the state's population in making its nominations. Provide any information about yourself (your heritage, background, life experiences, etc.) that may be relevant to this consideration.

Although I am a Caucasian male, I believe my background is somewhat unique. I grew up in Carmichael, California with two wonderful parents and a younger sister and brother. Reflecting on my background, I realize that I am the product of four grandparents who did not even graduate from high school, two of whom did not graduate from grade school. My maternal grandfather had a third-grade education. At fourteen years old he served in World War I in the trenches of France. He went on to be a copper miner in Magna, Utah.

I mention all of this because from these humble circumstances, my parents realized education is the key to a better future. My siblings and I all graduated from good universities (Santa Clara, Loyola Marymount and Gonzaga). I was able to obtain a master's degree and law degree, and my sister has a master's degree.

It strikes me that with a story like my family's, to go from poverty to solid middle class through hard work and determination, shows that the American ideal of self-determination is still alive and beautiful.

60. Provide any additional information relative to your qualifications you would like to bring to the Commission's attention.

The qualities of a good judge, I believe, are fairness, diligence, and even temperament, an appreciation for the law, and a willingness to apply the law to the facts impartially in every case. Also important is a steady character with a fidelity of purpose, willing to make hard decisions when called to do so.

In my nine years on the bench, I have done my best to uphold these ideals. As a trial court judge, difficult decisions must be made constantly- which parent will be the primary residential parent, who wins in a civil suit, whether a defendant should be given probation or be imprisoned. In good conscience I can say that I have done my utmost to be fair, impartial and diligent in every case for nine years. As to steadiness of character, I have been married 34 years, have raised three daughters, who are doing well, and have been faithful in taking St. Anthony School from an idea in the 1990s to the thriving school it is today. Fidelity to a purpose and making good decisions have been key to all of these aspects of my life – family, work and volunteerism.

61. If selected for this position, do you intend to serve a full term and would you accept rotation to benches outside your areas of practice or interest and accept assignment to any court location? Yes. If not, explain.

62. Attach a brief statement explaining why you are seeking this position.

In early August I was defeated in seeking my third term as a Navajo County Superior Court Judge. I am 62 years old and feel like I have more to give to public service. I have 26 years' experience as a lawyer and judge. My experience is broad as I have heard cases in criminal, civil, probate, family law, juvenile law and mental health law for nine years. Before that, my small-town general practice from 1997 to 2012 exposed me to nearly every type of law. I feel I could be an asset to the Appellate Court if chosen. My background with English undergraduate and master's degrees lends itself to research, writing and attention to detail which would be helpful in appellate work.

63. Attach two professional writing samples, which you personally drafted (e.g., brief or motion). **Each writing sample should be no more than five pages in length, double-spaced.** You may excerpt a portion of a larger document to provide the writing samples. Please redact any personal, identifying information regarding the case at issue, unless it is a published opinion, bearing in mind that the writing sample may be made available to the public on the commission's website.

1. Plaintiff's Arbitration Statement

2. Complaint

64. If you have ever served as a judicial or quasi-judicial officer, mediator or arbitrator, attach sample copies of not more than three written orders, findings or opinions (whether reported or not) which you personally drafted. **Each writing sample should be no more than ten pages in length, double-spaced.** You may excerpt a portion of a larger document to provide the writing sample(s). Please redact any personal, identifying information regarding the case at issue, unless it is a published opinion, bearing in mind that the writing sample may be made available to the public on the commission's website.

Criminal Law sample

Family Law sample

Civil Law excerpt

65. If you are currently serving as a judicial officer in any court and are subject to a system of judicial performance review, please attach the public data reports and commission vote reports from your last three performance reviews. N/A

1 Robert J. Higgins, Esq.  
Robert J. Higgins Law Firm, P.C.  
2 1630 E. White Mountain Boulevard  
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3 Pinetop, Arizona 85935  
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6 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
7 **IN AND FOR THE COUNTY OF NAVAJO**  
8

9 STEVEN and EMILIA ~~SPENCER~~, )  
husband and wife, )  
10 Plaintiffs, )  
11 vs. )  
12 BARBARA ~~MILTON~~, JOHN DOE )  
13 ~~MILTON~~ and JANE and JOHN )  
DOES I-X, )  
14 Defendants. )  
15

Case No. ~~CV2002-0009~~  
**PLAINTIFFS' ARBITRATION STATEMENT**

16 **Factual Background**

17 On April 1, 2000, at approximately 1:35 a.m., Plaintiffs Steven and Emilia ~~Spencer~~ were driving  
18 eastbound on State Route 260 west of Show Low, Arizona. The ~~Spencers~~ were returning home to  
19 Pinetop from a trip to Phoenix. As they approached milepost 321.5 near Linden, the ~~Spencers~~ noticed  
20 another car which was either slowing down or stopped in the westbound lane. State Route 260 at  
21 that point is a narrow two lane highway with guard rails on either side. Mr. ~~Spencer~~ slowed from 50  
22 miles per hour, to approximately 40 miles per hour. As he passed the car coming westbound he  
23 glanced to his left and saw a male driver in that car. Almost immediately, he saw what he thought  
24 was a piece of furniture in the road. He hit the piece of furniture, applied his brakes, and swerved to  
25 the right. Directly in front of him was a fog bank, which was at the end of the narrow bridge. Almost  
26 immediately upon entering the fog bank he saw what he described as a "grayish-black square" in front  
27 of him. He hit the square, which he later found out was defendant ~~Milton's~~ overturned truck in the  
28 middle of the road. (Please see pages 25 and 26 of Mr. ~~Spencer's~~ deposition.)

1 Plaintiff Mrs. ~~Speers~~'s testimony in her deposition closely parallels her husband's testimony  
2 recounted immediately above. Investigating Officer Hale of the Department of Public Safety testified  
3 that he estimated Mr. ~~Speers~~'s speed at 40 miles an hour (please see Officer Hale's deposition, page  
4 56, line 4), which is also consistent with Mr. Speer's testimony.

5 Mr. ~~Speers~~ suffered serious injuries as a result of the accident, including a severe laceration  
6 to the forehead and scalp which required at least 65 stitches, a closed head injury involving post-  
7 concussive syndrome and positional vertigo, a fractured wrist, dizziness, neck pain, fractures of the  
8 index, long, and ring fingers of the right hand, and avulsion amputations of the finger tissue pad of  
9 the third and fourth fingers of the left hand resulting in loss of sensation and a loss of dexterity in both  
10 hands. His orthopedic surgeon, Dr. Wylie rates his orthopedic injuries alone as a 15 per cent total  
11 body impairment according to the AMA Guidelines.

12 Mrs. ~~Speers~~ suffered severe bruising and a fractured rib. She recovered relatively quickly  
13 whereas Mr. Speer still has residual problems from his injuries. Mrs. ~~Speers~~'s doctors have told her  
14 that the severe hematoma to her chest put her at an increased risk for breast cancer. (Please see  
15 photographs of both ~~Speers~~, in Arbitrator's Notebook #1, Tab 4 and Tab 6.)

### 16 Liability

17 Liability is clear in this case. It is uncontested that defendant Barbara ~~Melton~~ lost control of  
18 her vehicle and caused it to overturn in the roadway. No other cars on State Route 260 overturned  
19 in the roadway that night. Ms. ~~Melton~~ testified that she did not see any other cars on the road that  
20 night fishtail or have any trouble on the roadway. (Please see page 74 of Ms. ~~Melton's~~ deposition.)  
21 Were it not for Ms. ~~Melton's~~ negligence in overturning her truck on the roadway, this accident would  
22 not have happened and the Speers would not have been injured.

23 Ms. ~~Melton~~ testified in her deposition that she was "going the speed limit" of 65 miles per  
24 hour. (Please see Ms. ~~Melton's~~ deposition, page 40, lines 10 through 12.) Ms. ~~Melton~~ also testified  
25 that the back wheels of her car just began to swerve back and forth (please see page 42 of Ms.  
26 ~~Melton's~~ deposition), apparently on their own. After that, Ms. ~~Melton~~ said "she steered to the right  
27 and to the left" (please see Ms. ~~Melton's~~ deposition, page 42), and that she just "Prayed and steered"  
28 (*id* at 42). Ms. ~~Melton~~ estimated her car turned over on the road five to seven times. (Please see Ms.

1 ~~Melton~~'s deposition, page 30.) Ms. ~~Melton~~ testified that she was "just driving" and that her "wheels  
2 were just taking over" and that she did not do anything at all to cause her loss of control. (Please  
3 see Ms. ~~Melton's~~ deposition, page 79, lines 12 through 20, and page 80, lines 2 through 24.)

4 Ms. ~~Melton~~ testified that when she saw Mr. ~~Speer's~~ car coming over the same road within  
5 a few moments of her overturning her truck, his car did not fishtail or lose control at any time.  
6 (Please see pages 66 and 67 of Ms. ~~Melton's~~ deposition.) She admitted that a pallet was in the back  
7 of her truck for a week or so, and that she did not know if it was secured in any way. She also  
8 admitted that she did not turn on her hazard lights after her accident, walked to the side of the road  
9 with an unknown woman and watched the Speer car come down the hill and hit her truck. (Please  
10 see Ms. ~~Melton's~~ deposition, page 67, lines 1 and 2.)

11 Department of Public Safety Officer Chad Hale testified that he has driven the stretch of road  
12 where the accident occurred over 1,000 times over thirteen years on patrol. (Please see Officer  
13 Hale's deposition, page 65, line 25.) Officer Hale strongly felt that ~~Mr. Speer~~ did all he could to  
14 avoid an accident, given the foggy conditions, the lack of visibility, the car coming toward him with  
15 its headlights on, and the narrowness of the road where Ms. ~~Melton's~~ truck was blocking it. (Please  
16 see Officer Hale's deposition, pages 64 through 68.) Officer Hale testified that ~~Ms. Melton~~ violated  
17 "State Law 701(A)" which requires drivers to maintain control of their vehicles on state roads.  
18 Officer Hale further testified that Mr. ~~Speer~~ did maintain control of his vehicle and was in "his right  
19 of way lane eastbound". (Please see Officer Hale's deposition, page 64, lines 9 through 16.) Finally,  
20 Officer Hale summarized his investigation of the collision, "It is my opinion that if vehicle number one  
21 [Ms. ~~Melton's~~ truck] would not have been in the roadway, no collision would have occurred."  
22 (Please see Officer Hale's deposition, page 64, lines 17 through 19.) Officer Hale also offered the  
23 opinion that Ms. ~~Melton~~ might have prevented oncoming motorists from hitting her overturned truck  
24 by turning on her hazard lights. (Please see Officer Hale's deposition, page 58, lines 8 through 13.)  
25 Officer Shelton of the Arizona Department of Public Safety also expressed his opinion that  
26 the cause of Ms. ~~Melton's~~ accident was "driver error". (Please see Officer Shelton's deposition,  
27 pages 34 and 35.) As Officer Shelton put it, "It is usually driver error because vehicles don't usually  
28 lose control by themselves". (Please see Officer Shelton's deposition, page 35, lines 10 through 12.)

1 Officer Shelton said it would be reasonable and prudent to go slower than the speed limit in foggy  
2 conditions. (Please see Officer Shelton's deposition, page 43, lines 8 through 10.) He also testified,  
3 as did Officer Hale and both of the ~~Spears~~ that it was foggy in the area of the accident that night. Ms.  
4 ~~Melton~~ testified that there was no fog that night . (Please see Ms. ~~Melton~~'s deposition, page 39, line  
5 10.)

6 Officer Shelton testified that if he had to do the accident investigation over again, he would  
7 have cited ~~Ms. Melton~~ for the accident because he has more experience now than he did at the time  
8 of the investigation. (Please see Officer Shelton's deposition, page 54, lines 20 through 25 and page  
9 55, line 1.)

10 Officer Shelton testified that road signs warning of icy or slippery conditions are posted on  
11 State Route 260, and that he is sure some of those signs were out that night. (Please see Officer  
12 Shelton's deposition, page 37, lines 4 and 5.) Thus, even though Ms. ~~Melton~~ testified that she did  
13 not see any fog or ice, there were warning signs on the roadway that evening. (Please see Ms.  
14 ~~Melton~~'s deposition, page 39, lines 10 through 12.)

15 Finally, investigating Officer Shelton testified that he did not find any evidence at the scene  
16 which would have made Ms. ~~Melton~~ fishtail on the road. (Please see Officer Shelton's deposition,  
17 page 41, lines 5 through 8.) Officer Shelton also said that if someone loses control on the ice it means  
18 that they were traveling too fast, "If you weren't going that fast, you wouldn't lose control on it".  
19 (Please see Officer Shelton's deposition, page 34, lines 23 through 25.)

20 Expert accident reconstructionist Joe W. Simmons analyzed the accident by reading the police  
21 reports and depositions of Officers Hale and Shelton, Mr. and Mrs. ~~Spears~~, and Ms. ~~Melton~~. Mr.  
22 Simmons looked at the Department of Public Safety photographs and went to the scene of the  
23 accident himself.

24 Mr. Simmons concluded that Mr. ~~Spears~~ "had little or no opportunity available to avoid  
25 colliding with a totally unexpected situation such as a vehicle upside down in his travel path and based  
26 on the available information it does appear that he did, from his own words, slow his vehicle in  
27 response to the west bound vehicle appearing to slow or stop as he approached. The obvious major  
28 circumstance in this accident was the fact that the defendant's vehicle went out of control striking the

1 guard rail and ultimately coming to rest upside down in the east bound [lane] of State Route 260.”

2 Mr. Simmons, like Officers Hale and Shelton, felt that Mr. ~~Speer~~ reacted appropriately to  
3 unexpected circumstances and that the obvious cause of the accident was Ms. ~~Melton's~~ loss of  
4 control of her truck which blocked a narrow, foggy road with ice on it. Ms. ~~Melton's~~ driver error  
5 caused the accident and Mr. ~~Speer~~ reacted prudently by braking and swerving when confronted with  
6 those unusual circumstances.

7 **Damages: Steven ~~Speer~~**

8 Mr. ~~Speer~~ was seriously injured in the accident. He had a severe laceration to his forehead  
9 and scalp which was stitched up by emergency room physician Robert Yost, M.D. Mr. ~~Speer~~  
10 estimates he had at least 65 stitches that night and relates that he lost a lot of blood. When the  
11 ~~Speer's~~ car hit Ms. ~~Melton's~~ overturned pick-up, Mr. ~~Speer~~ believes the tailgate of the pick-up  
12 crashed through the windshield and struck him in the head. All of the following injuries are a direct  
13 result of the accident:

- 14 1. Closed head injury, resulting in post-traumatic positional vertigo.
- 15 2. Neck injury, resulting in chronic neck pain, multiple bulging cervical discs at C4-5,  
16 C5-6, C6-7, and right C4-5 foramina impingement.
- 17 3. Right wrist fracture resulting in residual loss of range of motion and grip strength.
- 18 4. Fractures of the right 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> fingers at the distal interphalangeal joints,  
19 resulting in chronic stiffness, loss of grip strength, and pain.
- 20 5. Avulsion/Amputation of the fingertip tissue pads of left 3<sup>rd</sup> and 4<sup>th</sup> fingers, resulting  
21 in loss of sensation, loss of dexterity, and friable skin with painful tissue breakdown.
- 22 6. Forehead and scalp laceration resulting in scarring.
- 23 7. Residual total body impairment of 15% with regard to the orthopedic injuries.

24 All of these injuries are described in treating orthopedic surgeon Robert Wylie's letter of  
25 March 13, 2002, which is enclosed in Arbitrator's Notebook #1, Tab 9. The injuries are further  
26 described in Dr. Wylie's deposition of April 13, 2004.

27 Dr. Wylie's deposition describes post-traumatic positional vertigo in his deposition as a  
28 "specific neurological condition that most people would classify as dizziness. In fact, it means that  
the person senses that the room is spinning at certain times when their head is in certain positions."  
(Please see Dr. Wylie's deposition, page 36, lines 18 through 22.)

Dr. Wylie said that Mr. ~~Speer's~~ positional vertigo is a direct result of the car accident and that  
Dr. Wylie was able to replicate the positional vertigo in his physical examination of Mr. ~~Speer~~

1 (Please see Dr. Wylie's deposition, page 37, lines 2 through 8.)

2 Dr. Wylie also described Mr. ~~Speers~~ several orthopedic injuries which impair Mr. ~~Speers~~'s  
3 ability to perform even mundane daily tasks like playing golf, which Mr. ~~Speers~~ enjoyed doing before  
4 the accident, but has trouble with now, or picking up objects like hot coffee or tea (please see Dr.  
5 Wylie's deposition, pages 40 and 41), or things like screwing on a cap on a toothpaste tube.

6 Before the accident Mr. ~~Speers~~ was a teacher. He had also been a probation officer prior to  
7 teaching. Dr. Wylie testified that the types of injuries Mr. ~~Speers~~ suffered would functionally impair  
8 him for those occupations. (Please see Dr. Wylie's deposition, page 42, lines 8 through 11.)

9 It is worth noting that none of the defendant's doctors ever examined Mr. ~~Speers~~, and that Dr.  
10 Gauntt's recent opinion was only disclosed within the past week. Dr. Wylie, on the other hand,  
11 treated Mr. ~~Speers~~ several times. Mr. Speer is presently under Dr. Wylie's care.

12 Mr. ~~Speers~~ also saw neurologist William H. Dunn, M.D. Dr. Dunn wrote the following in a  
13 letter dated September 22, 2000:

14 Mr. ~~Speers~~ is a 52 year old, right handed, white male with symptoms of paroxysmal  
15 vertigo and cognitive difficulties following head trauma. The patient's neurological  
16 examination is remarkable for a lateralizing Weber test to the left and provoked  
17 subjective symptoms and objective nystagmus with positional maneuvers. This  
18 patient's deficits are referable to the eighth cranial nerve, as well as the hemispheres  
19 diffusely ... (Please see Dr. Dunn's letter of September 22, 2000, enclosed in  
20 Arbitrator's Notebook #1, Tab 9.)

21 Both Dr. Wylie and Dr. Dunn directly relate the positional vertigo to the car accident. Dr.  
22 Wylie relates all of the orthopedic injuries, including the neck injury to the car accident. Dr. Wylie  
23 said that the neck injury is consistent with a blow to the head like the one Mr. ~~Speers~~ suffered.

24 Mr. ~~Speers~~ has also been through physical therapy and has undergone several diagnostic tests.

25 Mr. ~~Speers~~'s medical bills are approximately \$21,000.00 and he is unable to work in his areas  
26 of experience and training.

27 **Damages: Emilia ~~Speers~~**

28 Emilia ~~Speers~~ suffered a fractured rib and severe hematomas on her body (please see  
photographs in Arbitrator's Notebook #1, Tab 6). She underwent a CT Scan of her abdomen and  
pelvis the night of the accident, and x-rays of her chest and ribs. In addition to the fractured rib, Mrs.  
~~Speers~~ suffered contusions, lacerations and swelling. The night of the accident, Emilia, who is a nurse,

1 was concerned about internal bleeding because of the swelling. Thankfully, her injuries resolved over  
2 time with rest and medication. Mrs. Spear has been warned by her physicians that she is at greater  
3 risk of developing breast cancer due to the injuries to her chest.

4 Mrs. Spear's medical bills are \$7,071.87.

5 **Conclusion:**

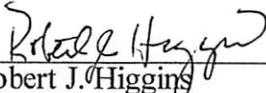
6 Liability is clear in this accident as Ms. Melton's negligence caused her truck to overturn on  
7 the road. Mr. Spear could not have avoided the accident as Ms. Melton's truck came to rest in a fog  
8 bank on a narrow, icy stretch of road. Mr. Spear attempted to avoid the collision when he braked  
9 and swerved, but he did not have time for more evasive action. Mr. Spear, Officers Hale and Shelton,  
10 and expert accident reconstructionist Joe Simmons all agree that Ms. Melton was the cause of this  
11 accident. If her car had not been overturned on the highway the accident would not have occurred.

12 As a result of the accident, Mr. Spear suffered severe injuries which plague him to this day.  
13 The injuries are both orthopedic and neurological. Mrs. Spear suffered less serious injuries, but had  
14 a fractured rib and hematomas.

15 **Length of Time for Arbitration:**

16 Plaintiffs anticipate that the arbitration should not take more than three hours. All of the  
17 medical records have been stipulated to as evidence, as well as the police reports, the depositions, the  
18 photographs, and the experts' opinions. It is anticipated that the only live witnesses will be the parties  
19 themselves.

20 RESPECTFULLY SUBMITTED this 25<sup>th</sup> day of May, 2004.

21  
22  
23   
Robert J. Higgins  
Robert J. Higgins Law Firm, P.C.  
Attorneys for Plaintiffs

24 Foregoing sent this 25<sup>th</sup> day of  
25 May, 2004 by facsimile (without  
binders) and original mailed  
with binders to:

26 Robert E. Schmitt, Esq.  
27 Murphy, Lutey, Schmitt & Beck, P.L.L.C.  
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8 *J. M. O'Driscoll*

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MAR 27 2002

SUPERIOR COURT  
JUANITA MANN CLERK

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5 **IN SUPERIOR COURT OF THE STATE OF ARIZONA**  
6 **IN AND FOR THE COUNTY OF NAVAJO**

7 **STEVEN and EMILIA ~~SPEAR~~,** )  
8 **Husband and Wife,** )

9 Plaintiff, )

10 vs. )

11 **BARBARA ~~MELTON~~, JOHN** )  
12 **DOE ~~MELTON~~ and JANE** )  
13 **and JOHN DOES I-X,** )

13 Defendant. )

Case No. CV 2002 0098

COMPLAINT

(Tort - Motor Vehicle)

14 Plaintiffs, by and through their counsel undersigned, hereby bring their Complaint against  
15 Defendants and allege as follows:

- 16 1. Plaintiffs Steven ~~Spear~~ and Emilia ~~Spear~~ are husband and wife and are residents of the  
17 County of Navajo, State of Arizona.
- 18 2. Upon information and belief, Defendant Barbara ~~Melton~~ is a resident of the County of  
19 Navajo, State of Arizona.
- 20 3. Upon information and belief, Defendant Barbara ~~Melton~~ was acting within the scope  
21 of and in furtherance of her marital community at the time of the subject accident. The identity of  
22 her spouse is unknown at this time. Once this information is discovered, Plaintiffs will seek leave  
23 of the Court to amend their Complaint accordingly.
- 24 4. The subject accident occurred within the County of Navajo, State of Arizona, and  
25 jurisdiction and venue are proper in this Court.
- 26 5. On April 1, 2000, at approximately 1:35 a.m. Plaintiffs were traveling in the eastbound  
27 lane on State Route 260 when he observed Defendant's vehicle lying on its top directly in front of  
28 him in the eastbound lane. Plaintiff hit his brakes and slid into the rear of Defendant's vehicle.



**FILED**

**March 30, 2018**

NAVAJO COUNTY SUPERIOR COURT

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
IN AND FOR THE COUNTY OF NAVAJO**

STATE OF ARIZONA,

Plaintiff,

vs.

~~CRYSTAL BONNER,~~

Defendant.

Case No.: ~~CR201600794~~

**ORDER**

On November 11, 2016, the Winslow Police Department received a report of shoplifting at the Flying J truck stop. The report indicated that the suspect had a knife. The suspect was described as a black female wearing black clothing and a black beanie. She was last seen hiding in the bushes near the Flying J in an area described as the "Old 911 Memorial." Two officers located a suspect fitting the description hiding in the bushes. When twice ordered to show her hands, she refused to comply. The officers ordered her to stand up. When she did so, a curved bar in her black leather jacket sleeve fell to the ground. The Defendant was cuffed and Officer ~~Begody~~ asked her where the knife was. She replied "What knife?" Officer ~~Begody~~ then asked for her name and she said "~~Crystal Chavez.~~"

Officer ~~Begody~~ asked the suspect if he could pat her down for weapons for his safety and hers. She consented. At the hearing, Ms. ~~Bonner~~ denied giving consent, but the Court did not find her to be a credible witness. Pursuant to the pat down search officer ~~Begody~~ found an "ice pick" type of object and a black tire iron inside her pants on her left hip. The suspect again denied having

a knife on her when asked by Officer Begody. Officer Begody then placed the suspect in his car.

Other officers arrived at the scene and searched the area for the knife which had been reported by the store manager and described as a 4 inch knife with a silver blade and a black handle.

The store manager told Officer ~~Calnimpicwa~~ that the suspect had stolen a beer and placed it under coat. She then went to the counter, paid for some other items, and attempted to leave the store. When confronted by the manager, she pulled a knife on him. He slapped it out of her hand. She picked up the knife, fled to the area of the Old 911 Memorial and hid under the bushes. The manager saw where she went, called 911, and kept watch until police arrived. No one else entered or left the area.

Officers ~~Calnimpicwa~~ and ~~Tolliver~~ at the scene found an unopened can of beer, a syringe, a black beanie, and a knife which matched the description the manager had reported –an approximately 4 inch silver blade with a black handle. The manager identified the knife as the one the black female had pointed at him. A later check revealed that the suspect had given them a false name and her real name was ~~Crystal Bonner~~.

Based on the foregoing, the Court finds and rules as follows:

The officer had reasonable suspicion to detain ~~Bonner~~ when they located her hiding where the witness had indicated she had gone. ~~Bonner~~ was dressed in all black as described by the witness and was a black female. The witness had provided information that the black female pointed a knife at him and took items from the Flying J.

An officer may frisk a suspect if he has an articulable reason to fear for his safety. *State v. Garcia*, 169 Ariz. 530, 801 P.2d 191 (App. 1991); *Terry v. Ohio*, 392 U.S. 1 (1968) (“Any reasonable fear for safety is enough to conduct a frisk under *Terry*.”) The officer need not be

absolutely certain that the individual is armed; the issue is whether a reasonably prudent person in the circumstances would be warranted in the belief that his safety or that of others was in danger. *Terry*, 392 U.S. at 27. Here Officer [REDACTED] responded to a call of an armed robbery with a knife. The store manager watched the person hide in the bushes by the Old 911 Memorial. Officers located the described black female wearing black hiding in the bushes by the Old 911 Memorial. Officer [REDACTED] could under *Terry*, perform a frisk for officer safety based upon the totality of the information he had. The lawfulness of a search is determined by examining the totality of the circumstances. *State v. Primous*, 239 Ariz. 394, 372 P.3d 338 (App. 2016) However, Officer [REDACTED] asked for consent to search for weapons before performing the pat down on [REDACTED]. [REDACTED] consented to this search. An officer may ask a person for consent to search, even without reasonable suspicion. If the person consents, the frisk is permissible. *State v. Watkins*, 204 Ariz. 562, 88 P.3d 1174 (App.2004).

During the *Terry* authorized frisk that [REDACTED] also consented to Officer [REDACTED] found an ice pick and a black tire iron. The frisk of [REDACTED] was legal and the weapons recovered during the search were legally seized.

The officers had not only reasonable suspicion but also probable cause to believe that “[REDACTED]” was the black female who pointed the knife at the store manager when she fled the store with items of merchandise she had not paid for concealed in her coat. Based upon the information the officers had they had probable cause to believe that an armed robbery had occurred, among other potential crimes, and they had probable cause to believe that “[REDACTED]” had committed the crimes. Therefore, the officers were justified in arresting the Defendant.

Since the Defendant consented to the search, the search is permissible under *State v. Watkins* above.

A seizure or detention may ripen in a de facto arrest. The test: “Whether an arrest has occurred for Fourth Amendment purposes turns on an evaluation of all the surrounding circumstances to determine whether a reasonable person, innocent of any crime, would reasonably believe that he was being arrested.” *State v. Navarro*, 201 Ariz. 292, 298, 34 P.3d 971, 976 (App. 2001). “Significant factors in this analysis include the officer’s display of authority, the extent to which the defendant’s freedom is curtailed, and the degree and manner of force used.” *State v. Acinelli*, 191 Ariz. 66, 952 P.2d 304 (App. 1997); See also, *State v. Mitchell*, 204 Ariz. 216, 62 P.3d 616 (App. 2003) it is irrelevant what an officer or defendant may have believed. Whether an arrest occurred is an objective test. *Stansbury v. California*, 511 U.S. 318 (1994).

Here the officers were searching in the dark in the bushes when they located the Defendant hiding. She was asked to show her hands and did not comply. Officer ~~Bebody~~ and Officer ~~Calhoun~~ placed the Defendant in handcuffs. During this process Officer ~~Bebody~~ was asking the Defendant where the knife was and if she had a knife. A reasonable person in this situation may very well believe they were under arrest.

A person can be searched incident to arrest in areas under his immediate control, which would include his person. See *Chimel v. California*, 395 U.S. 752 (1969). The search must also be contemporaneous with the arrest. *State v. Beasley*, 205 Ariz. 334, 70 P.3d 463 (App. 2003). Regardless of whether there was a de facto arrest or an actual arrest, Officer ~~Bebody~~ had probable cause to arrest and therefore the search of the Defendant was legally incident to arrest. An officer may search a person the moment he has probable cause to arrest, not only when the person is formally arrested. *State v. Weinstein*, 190 Ariz. 306, 947 P.2d 880 (App. 1997); *State v. Bonillas*, 197 Ariz. 96, 98, 3 P.3d 1016 (App. 1999). An arrest is complete when the suspect’s liberty of

movement is interrupted and restricted by the police. Whether an arrest has occurred is based on an objective view of the evidence, not the subjective beliefs of the parties. Indeed, a certain set of facts may constitute an arrest whether or not the officer intended to make an arrest and despite his disclaimer that an arrest occurred. The issue turns upon an evaluation of all the surrounding circumstances to determine whether a reasonable person, innocent of any crime, would reasonably believe that he was being arrested. A significant factor in determining whether an arrest has occurred is the extent that freedom of movement is curtailed and the degree and manner of force used. Another significant factor is the display of official authority, such that a reasonable person would not feel free to leave. Handcuffing a suspect is an indicia of arrest. *State v. Snyder*, 240 Ariz. 551, 555, 382 P.3d 109, 113 (App. 2016) citing *State v. Winegar*, 147 Ariz. 440, 447-48, 711 P.2d 579, 586-87 (1985); and quoting, *Taylor v. Arizona*, 471 F.2d 848j, 851 (9<sup>th</sup> Cir. 1972).

In summary, the search of the Defendant was legal whether justified as a *Terry* frisk for weapons, or by consent of the Defendant, or as a search incident to arrest. Therefore, the evidence was legally seized and is not suppressed.

The Defendant seeks to suppress the statement from the Defendant when she gave them a false name "~~Crystal Chavez~~". Defendant has not identified any other statements that should be suppressed. Defendant claims this statement must be suppressed because she had not been Mirandized. Recall that Defendant claims she was not under arrest. If she was not under arrest than *Miranda* does not apply. *Miranda* warnings are only required for in custody interrogation. *Florida v. Bostick*, 501 U.S. 429, 434-35 (1991) (Police are free to ask questions of a person who is not in custody without having to give the person any warnings under *Miranda*). Therefore, if Defendant was not in custody then her statement is admissible because there was no *Miranda* violation.

Police officers may question an individual in custody without giving *Miranda* warnings when their questions are directed to a defendant's identity and are "clearly neutral, non-accusatory in nature, and in furtherance of proper preliminary investigation." *Sate v. Landrum*, 112 Ariz. 555, 559, 544 P.2d 664, 668 (1976). Requesting general booking information does not constitute an "interrogation" for *Miranda* purposes, even if the information later proves incriminating. *State v. Jeney*, 163 Ariz. 293, 298, 737 P.2d 1089, 1094 (App. 1989). Here, Officer [REDACTED] asked the Defendant what her name was. This was clearly a neutral, non-accusatory question asked in the furtherance of the preliminary investigation. The fact that the Defendant provided a false name which proved to be incriminating because now she is charged with "criminal impersonation" does not render the statement of the false name inadmissible.

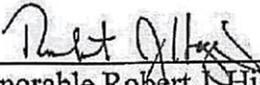
If the Defendant was not under arrest *Miranda* does not apply and the statement providing a false name to the police is admissible. If the Defendant was in custody the officer's neutral non-accusatory question asked in the furtherance of the investigation soliciting the false name from the Defendant is not protected under *Miranda*. Therefore, the statement of the false name is admissible.

The search of the Defendant was legal as either a *Terry* frisk for weapons, as consented to by the Defendant or as a search incident to arrest and the evidence seized is admissible.

The Defendant's response to the officer's question regarding what was her name is admissible either because she was not in custody and *Miranda* would not apply or because it was not a question intended to solicit incriminating evidence but instead was neutral non-accusatory question in the furtherance of the investigation.

WHEREFORE, based upon the foregoing facts and law, the Defendant's Motion to Suppress statements and evidence is denied.

Done this 12<sup>th</sup> day of March, 2018.

  
\_\_\_\_\_  
Honorable Robert J. Higgins  
Navajo County Superior Court

Copies of the foregoing mailed/delivered  
this 30<sup>th</sup> day of March, 2018 to:

Lee White

Ron Wood

Case Flow Manager



DOCKETED

JUN 08 2020

SUPERIOR COURT

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
IN AND FOR THE COUNTY OF NAVAJO

RANDY DON ~~CROW~~,  
Petitioner,

vs.

DIANA JANE ~~CROW~~,  
Respondent.

Case No.: ~~DC201900392~~

DECREE OF DISSOLUTION

After a final hearing, a review of the pleadings and exhibits, and the entire case file, the Court submits the following Decree of Dissolution:

FINDINGS OF FACT

1. Petitioner ~~Randy Crow~~ and Respondent ~~Diana Crow~~ (the parties) were married on February 14, 2019.
2. The parties were separated in October, 2019 and a Petition for Dissolution of Marriage was filed on November 15, 2019.
3. There are no minor children born of this marriage.
4. The parties acquired community property and debt during marriage.
5. The parties resided in Arizona for the requisite period before filing for a dissolution of marriage.
6. Respondent Ms. ~~Crow~~ is not currently pregnant.
7. Spousal maintenance of \$6,000 has been paid and is no longer an issue.
8. The marriage is irretrievably broken and there is no reasonable prospect of

reconciliation.

9. This Court has jurisdiction in this matter and venue is proper.
10. The Court finds that the jurisdictional elements have been met.
11. Issues to be resolved consist of an equitable distribution of assets and debts acquired during marriage and attorney's fees.

12. The property acquired during marriage is as follows:

- A. Residence at 1880 S. Canyon Ridge Trail, Show Low, Arizona.
- B. Real property under construction located in Tonto Forest Subdivision, Mesa, Arizona.
- C. 2019 Ford F-350.
- D. 2019 Cadillac CTS-V.
- E. Appliances, furniture and other items used to decorate Show Low house.

13. Testimony revealed that Petitioner ~~Mr. Crow~~ paid for all of the above assets from his sole and separate funds. Respondent ~~Ms. Crow~~ did not contest the source of the funds and did not contribute any money toward the purchase of the assets.

14. Undisputed testimony revealed, and the Court finds that ~~Mr. Crow~~ paid \$451,094.21 with a check from his sole and separate account for the Show Low residence.

15. ~~Ms. Crow~~ did not contribute any funds toward the Show Low house. She testified that she "improved the value of the Show Low house" by "trimming trees, weeding, going to the dump, decorating the home" and that she "was in it" with ~~Mr. Crow~~ "the whole way."

16. ~~Mr. Crow~~ paid for the Mesa, Arizona real property entirely. At the time of trial, the house had not been completed, but ~~Mr. Crow~~ had paid approximately eighty percent of the total purchase price.

17. The marriage apparently "went south" according to ~~Ms. Crow~~ shortly after the wedding when ~~Ms. Crow~~ testified she "saw something" on ~~Mr. Crow's~~ iPad which "caused her to lose respect for him."

18. By all accounts the marriage was in trouble shortly after it began. ~~Mr. Crow~~ testified that ~~Ms. Crow~~ said she did not love him two weeks after they got married. He said that he offered to go to marriage counseling, but ~~Ms. Crow~~ refused.

19. The 62-year old ~~Mr. Crow~~ married the 52-year old ~~Ms. Crow~~ after meeting her on the Internet. ~~Mr. Crow's~~ first marriage ended after the death of his first wife. That marriage lasted over thirty years. ~~Mr. Crow~~ testified that he placed the houses and cars in joint name because he

anticipated a long-term marriage. He paid cash of \$112,000.00 for the Cadillac and placed ~~Ms. Crow's~~ name on the title.

20. The Court finds that ~~Ms. Crow~~ had previously been married "three or four times" (~~Mr. Crow's~~ testimony), is a hairdresser, had a modest income before marriage, and lived with her adult son in a rented duplex. Prior to marriage she owned a "piece of property" in the White Mountains which is sole and separate. She also owned some furniture from her rented duplex, and a car. The equity in her car was \$9,000.00, and she owed approximately \$11,500.00 on her car. She traded in her car (with a debt of approximately \$2,500.00) for ~~Mr. Crow's~~ purchase of the Cadillac.

21. ~~Mr. Crow~~ traded in a previously owned car and paid cash from his sole and separate funds for his 2019 Ford F-350.

#### DISCUSSION AND ORDER

The general rule in Arizona for equitably distributing community property is that any property acquired during marriage is characterized as community property. The exceptions to this rule are when the property is acquired by gift, devise or descent. A.R.S. § 25-211(A). There is a presumption that any property acquired by either spouse during marriage is community property, unless demonstrated otherwise by clear and convincing evidence. See *Sommerfield v. Sommerfield*, 121 Ariz. 575, 528, 592 P.2d 771, 774 (1979). Generally, a court shall divide community property equitably, although not necessarily in kind without any regard to marital misconduct. A.R.S. § 25-318(A).

As a general presumption, equitable division requires that community property be divided substantially equally. See *Toth v. Toth*, 190 Ariz. 218, 221, 946 P.2d 900, 903 (1997).

The rare exception to the general rule of dividing the community property substantially equally is when one spouse contributed disproportionate separate funds compared to the other's contribution. See *Toth v. Toth*, 190 Ariz. 221, 946 P.2d 900, 903; *Flower v. Flower*, 223 Ariz. 531, 531, 225 P.3d 588, 588 (Ct. App. 2010).

Equitable division should be substantially equal "absent facts to support a contrary result." *In re marriage of Inboden*, 223 Ariz. 542, 225 P.3d 599 (2010). In *Inboden*, the Court lists factors to consider in the analysis of whether a division should be equal. The factors are: (1) the length of marriage, (2) contributions of each spouse to the property, financial or otherwise, (3) source of funds used to acquire the property and, (4) debt allocated. The Court may consider any other significant factor. After consideration of those factors, if a court finds reason to depart from the general rule, it is within its discretion to do so.

Applying the factors enumerated in *Inboden*, the Court finds this to be a short-term marriage of eight months to the date of separation and nine months from the date of marriage to the filing of the petition for dissolution of marriage. Secondly, there is no dispute that ~~Mr. Crow~~ contributed all of the funds to acquire both homes, both vehicles, and the furniture in the Show Low residence and the couple's temporary house they rented. Similarly, there is no dispute that

the source of Mr. Crow's funds used to acquire the property are Mr. Crow's sole and separate funds. Finally, any remaining debt on the Mesa property must be entirely allocated to Mr. Crow as Ms. Crow has no ability to pay the debt. At the time of trial, the debt was approximately \$200,000.00 to \$300,000.00 on the Mesa property.

The Court noted in its findings that Ms. Crow did contribute effort or some "sweat equity" with regard to the Show Low residence. She was "all in" with Mr. Crow in selecting the furniture and decorations, pulling weeds and going to the dump. Ms. Crow did not contribute any funds to any property acquired during marriage.

The Flowers court noted that gifts in a context like the present case are given with the expectation of a permanent relationship, so they are not irrevocable. See *Flower*, 223 Ariz. At 536 (citing *Toth*, 190 Ariz. at 221). As a result, Ms. Crow does not have a permanent one-half interest since this marriage was short-lived.

This Court finds, based on consideration of all the relevant factors that Ms. Crow is not entitled to a one-half interest in the properties acquired solely with Mr. Crow's sole and separate funds during marriage. Therefore, this Court must consider a fair and equitable distribution and Orders:

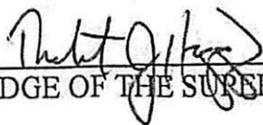
1. The marriage is dissolved.
2. Each party shall retain their sole and separate property to include any businesses, trusts, retirement accounts, and any separate real property acquired before marriage.
3. Mr. Crow is awarded the Show Low residence at 1880 S. Canyon Ridge Trail. Mr. Crow is awarded the furniture in the Show Low residence, with an approximate value of \$15,000.00.
4. Mr. Crow is awarded the Mesa, Arizona property located in the Tonto Forest subdivision. He is also awarded any debt thereon.
5. Mr. Crow is awarded the 2019 Ford F-350.
6. Ms. Crow is awarded the 2019 Cadillac CTS-V.
7. The 2018 Redwood 5<sup>th</sup> wheel is affirmed as Mr. Crow's sole and separate property.
8. For her efforts to improve the Show Low property, Ms. Crow is awarded \$15,000. This money, together with the value of the furniture, approximates the roughly \$30,000.00 salary she gave up to marry Mr. Crow. The car Mr. Crow bought for Ms. Crow during marriage is a generous replacement to her previous car.
9. If there is any money left in the Chase joint bank account number ending in [REDACTED], the money should be equally divided (it is approximately \$400.00).

10. ~~Ms. Crow~~ former name of ~~Diana Jane Jones~~ is restored.

11. Based on the disparity of the parties' financial resources, the Court awards ~~Ms. Crow~~ \$2,500 in attorney's fees.

FINAL APPEALABLE ORDER. Pursuant to *Arizona Rules of Family Law Procedure*, Rule 78(c), this is a final judgment/ decree. No further matters remain pending.

DATED this 13<sup>th</sup> day of June, 2020.

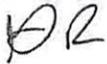
  
\_\_\_\_\_  
JUDGE OF THE SUPERIOR COURT

Copies of the foregoing mailed  
this 8<sup>th</sup> day of June, 2020 to:

Michael Ellsworth

Joan Bundy

Case Flow Manager



Excerpt

Ariz. R. Civ. P. 56(a). "Summary judgment should be granted if the facts produced in support of a claim or defense 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 or defense." *Deutsche Credit Corp. v. Case Power & Equipment Co.*, 179 Ariz. 155, 158, 876 P.2d 1190 (Ariz. App. 1994) (citation omitted).

"A defendant moving for summary judgment 'need merely point out by specific reference to the relevant discovery that no evidence exists to support an essential element of the claim.' *Orme School v. Reeves*, 166 Ariz. 301, 310, 802 P.2d 1000 (1990). The burden then shifts to the plaintiff to produce sufficient evidence of a genuine issue of material fact as to one or more essential elements of the claim . . . in order to defeat summary judgment. *Id.*; Ariz. R. Civ. P. 56(c)(3)." *DBT Yuma, L.L.C. v. Yuma County Airport Authority*, 236 Ariz. 372, 374, 340 P.3d 1080 (Ariz. App. 2014), *aff'd in part, vacated on other grounds in part*, 238 Ariz. 394, 361 P.3d 379 (2015).

#### DISCUSSION

In their complaint, plaintiffs allege claims against ~~Energy~~ sounding in both direct and vicarious liability. ~~Energy's~~ motion requests summary judgment on the entirety of plaintiffs' claims against it, contending that "Plaintiffs have disclosed no facts in any pleading or discovery document to support a theory of recovery against ~~Peabody Energy~~ or any other remote parent company of ~~Peabody Western~~." (MSJ page 2 ll. 19-21.) Plaintiffs bear the burden of proof and production of evidence with respect to each of the theories of recovery discussed below.

#### A. CLAIMS ASSERTING DIRECT LIABILITY.

In its motion ~~Energy~~ contends that, despite its request and supplemental request for the factual basis for their claims of direct liability, plaintiffs have failed to provide any information that would support those claims. (MSJ page 3 ll. 4-10.) In their Response plaintiffs completely

ignored this contention and devoted their attention exclusively to the issue of ~~Energy's~~ vicarious liability. Moreover, in his affidavit filed May 18, 2015, plaintiffs' attorney stated:

"5. All [plaintiffs'] claims against ~~Peabody Energy~~ are based on their vicarious liability for the actions and omissions of ~~Kent Courtney~~, EMT, and of ~~Peabody Western Coal Company~~"

Exhibit 1 to Plaintiff's Notice of Filing Exhibit 1, etc., filed May 18, 2015, page 2 ll. 1-2. And, in their Addendum (Exhibit 1 page 1, last two paragraphs), plaintiffs apparently affirm that they

"withdraw[ ] any of Plaintiff's claims that Defendants ~~Peabody~~ and ~~Courtney~~ were negligent in their administration of the clinic or that they were negligent in the hiring, training, supervision, and retention of ~~Mr. Courtney~~."

The Court's finds no genuine issue of material fact that might lead a jury to find ~~Energy~~ directly liable for ~~Mr. Harvath's~~ injury or death. On the basis of the information summarized above, plaintiffs have effectively abandoned their claims of direct liability with respect to ~~Energy~~. ~~Energy's~~ motion is GRANTED with respect to plaintiffs' direct-liability claims.

#### B. CLAIMS ALLEGING VICARIOUS LIABILITY

The undisputed evidence shows that ~~Western~~ is ~~Courtney's~~ employer. Support Statement of Facts Exhibits 2 through 4; ~~Energy~~ is ~~Western's~~ great-grandparent. ~~Energy~~ owns the investment company that owns the holding company that owns ~~Western~~. Support Statement of Facts Exhibit 4; Addendum Exhibit 1, "~~Peabody Holding Company~~, LLC Organizational Chart -- March 31, 2011."

Ownership of a corporation, however, does not entail liability for the corporation's negligence. "A corporation is not liable for the acts of its subsidiary simply because it is wholly owned. The concept of a corporation as a separate entity is a legal fact not fiction." *Washington National Corp. v. Thomas*, 117 Ariz. 95, 101, 570 P.2d 1268 (Ariz. App. 1977), disapproved on other grounds, *Greenfield v. Cheek*, 122 Ariz. 57, 593 P.2d 280 (1979). Plaintiffs' claims that

~~Energy~~ is vicariously liable for wrongdoing resulting in ~~Mr. Heron's~~ death necessarily rest in part on the factual relationship between ~~Energy~~ and ~~Western~~. Four possibilities are presented: (1) ~~Energy~~ is successor to ~~Western's~~ vicarious liability; (2) ~~Energy~~ is defendant ~~Courtney's~~ employer; (3) ~~Energy~~ and ~~Western~~ are in a principal-agent relationship or joint venture; (4) ~~Western~~ is controlled so extensively by ~~Energy~~ that, relevant to the claims made in this lawsuit, ~~Western~~ has lost its independent corporate identity.

1. Plaintiffs have not shown that ~~Energy~~ is successor-in-interest to ~~Western~~ or its liabilities.

~~Energy~~ has provided evidence that ~~Energy~~ and ~~Western~~ are distinct Delaware corporations. [See Support Statement of Facts Exhibits 4.] Plaintiffs do not claim ~~Energy~~ is simply another name for ~~Western~~, or vice-versa. Plaintiffs do not claim that ~~Energy~~ is merely ~~Western's~~ successor-in-interest. Compare *A.R. Teeters & Associates, Inc. v. Eastman Kodak Co.*, 172 Ariz. 324, 836 P.2d 1034, 1039-40 (Ariz. App. 1992), discussed in *Warne Investments, Ltd. v. Higgins*, 219 Ariz. 186, 191-94 and 197-98, 195 P.3d 645 (Ariz. App. 2008). Plaintiffs' evidence tends to confirm that ~~Energy~~ and ~~Western~~ are distinct corporate entities. [See Counter-Statement Exhibits 6, 7; Addendum Exhibit 1, "Statement of Change of Registered Agent and/or Registered Office."]

Reasonable people could not conclude that ~~Energy~~ is ~~Western's~~ successor-in-interest, or is simply another name for ~~Western~~. *Deutsche Credit Corp.*, supra, 179 Ariz. at 158, 876 P.2d 1190. Accordingly, the "successor-in-interest" doctrine cannot, as a matter of law, provide a basis for ~~Energy's~~ vicarious liability.

2. Plaintiffs have not shown that ~~Energy~~ is ~~Courtney's~~ employer.

Plaintiffs assert that ~~Energy~~ is defendant ~~Courtney's~~ employer and thus is vicariously liable for ~~Courtney's~~ negligence through the doctrine of respondeat superior. See Response, page 6, ll.

16-18. Yet they provide no evidence whatever that ~~Courtney~~ could possibly have been ~~Energy's~~ employee. ~~Energy~~, on the other hand, has provided substantial evidence that ~~Courtney~~ was ~~Western's~~ employee. See Support Statement of Facts, Exhibits 2-4. Indeed, plaintiffs have made no attempt to respond to the affidavit of ~~Kenneth Wagner~~, Vice President of both ~~Energy~~ and ~~Western~~, that "~~Peabody Energy Corporation~~ does not employ ~~Mr. Courtney~~. ~~Peabody Energy Corporation~~ has no employees." Id., Exhibit 4, no. 8.

Reasonable people could not agree with plaintiffs' assertion that ~~Energy~~ was ~~Courtney's~~ employer. *Deutsche Credit Corp.*, supra, 179 Ariz. at 158, 876 P.2d 1190. Accordingly, "respondeat superior" cannot, as a matter of law, provide the predicate for plaintiffs' claim of vicarious liability against ~~Energy~~.

3. ~~Energy~~ is not principal in an agency relationship with ~~Western~~.

"At the very least," plaintiffs assert, ~~Energy~~ and ~~Western~~ "are joint venturers." (Response, page 7 ll. 16-18.) In Arizona, joint venturers are treated as both partners and agents of each other with respect to their business or social enterprise, and are vicariously liable for each other's acts. See *Sparks v. Republic National Life Ins. Co.*, 132 Ariz. 529, 540, 647 P.2d 1127 (1982) (affirming trial court's instruction on joint venture for two defendants, and reversing that instruction for a third).

*Agency.* As previously discussed, no evidence supports the theory that ~~Courtney~~ is ~~Energy's~~ agent. Nor does the evidence support the theory that ~~Western~~ is ~~Energy's~~ agent, either in the operation of the Kayenta Mine's medical clinic or more generally. ~~Energy's~~ formal relationship with ~~Western~~ is that of distant corporate investor and corporate coal-mine owner-operator. No evidence suggests ~~Energy~~ and ~~Western~~ have assented to the relationship of principal and agent. No evidence suggests ~~Western~~ has fiduciary duties to act on ~~Energy's~~ behalf. Compare

Restatement (Third) of Agency §§ 1.01, 1.03 (2006).

*Joint Venture.* The Court notes the inconsistency between this theory and other theories of vicarious liability suggested by plaintiffs, as one cannot be in a joint venture -- an ad hoc partnership -- with oneself, or one's agent, or one's alter ego. To qualify as a joint venture, a relationship must satisfy four elements: (1) agreement, (2) common purpose, (3) community of interest, and (4) equal right of control. See *West v. Soho*, 85 Ariz. 255, 261, 336 P.2d 153 (1959).

The parties have not provided any authority defining or distinguishing the "common purpose" and "community of interest" elements of this definition; nor has the Court's independent research revealed Arizona authority that defines these elements or the differences between them. (But cf. *West*, 85 Ariz. at 262: "There can be no doubt from the evidence in this case that defendants had a common purpose, and perhaps a community of interest, in making the trip to Nogales on the day in question. . . .") No evidence suggests ~~Energy~~ and ~~Western~~ had "operating a medical clinic" as their common purpose or as a specific part of their community of interest. For purposes of this discussion, the Court assumes these two vague elements in the "joint tenancy" doctrine would be satisfied by reference to ~~Energy's~~ and ~~Western's~~ general engagement together in something like "making money in the coal mining industry (as investor and miner)."

Arizona case law is clear that "common purpose" and "community of interest" must be referable to an agreement that confers on the parties the right of equal control of the venture. As stated in *West v. Soto*, supra, 85 Ariz. at 261-62, 336 P.2d 153,

"A joint adventure whether it be for business or social purposes must rest upon an agreement, either express or implied between the parties thereto. Whatever the common purpose or community of interest may be, it must appear as a part of the agreement either expressly or by necessary implication, that each of the parties to such joint adventure has authority to act for all in respect to the control of the means or agencies employed to execute such common purpose."

In arguing for "joint venture," plaintiffs fail to specify the "agreement" creating the venture,

let alone any agreement that would make the operation of a medical clinic the venture, or include the clinic within its scope. See Plaintiffs' Response, page 7 ll. 17-25; Plaintiff's Counter-Statement of Facts in Support of Plaintiff's Response filed June 19, 2015, including Exhibits 1 through 11.

Nor do plaintiffs provide any factual support for the suggestion ~~Energy~~ and ~~Western~~ had rights of equal control over ~~Western's~~ medical clinic or its after-hours employees, or even over the Kayenta mine operation with which the clinic was affiliated. Indeed, the only evidence about the medical clinic in the record indicates that ~~Western~~ has established it, runs it, and takes responsibility for it. See "PWCC Clinic Operation," unnumbered sub-exhibit attached to Addendum Exhibit 1. See *Garcia v. City of South Tucson*, 131 Ariz. 315, 318, 640 P.2d 1117 (Ariz. App. 1981) (affirming trial court's finding of no joint venture because, despite agreement, common purpose, and community of interest, "[a]ppellant had no control over the method used by the City of Tucson police to accomplish the desired result"); *West, supra*, 85 Ariz. at 262, 336 P.2d 153 (reversing finding of joint venture because "there is not a scintilla of evidence in the transcript from which an implication could arise that West had an equal right to control the manner in which the car was being operated"). Compare *James Weller, Inc. v. Hansen*, 21 Ariz. App. 217, 223, 517 P.2d 1110 (1973) (affirming trial court's finding of sufficient equality of control for a joint venture, because "[b]y the contract each delegated to the other the appropriate area of expertise").

The evidence before the Court does not support claims of "agency" or "joint venture." Reasonable people could not agree with plaintiffs' assertion that ~~Energy~~ and ~~Western~~ were engaged in a joint venture relevant to this lawsuit. *Deutsche Credit Corp.*, *supra*, 179 Ariz. at 158, 876 P.2d 1190. Accordingly, "joint venture" cannot, as a matter of law, provide the predicate for plaintiffs' claim of vicarious liability against ~~Energy~~.

4. Plaintiffs do not show ~~Western's~~ activities are controlled by ~~Energy~~.

Plaintiffs assert: "Defendant ~~Peabody Western Coal~~ Company is effectively simply a corporate shell operated by ~~Defendant Peabody Energy~~. . . ." Response page 7 ll. 5-7. In the alternative, plaintiffs assert that ~~Energy~~ controlled ~~Western~~ to such an extent that "[i]f Defendant ~~Peabody Western Coal~~ Company is responsible for Defendant ~~Courtney~~ . . . then it is Defendant ~~Peabody Energy~~ that is in control and should be held responsible." Response page 7 ll. 8-10.

Plaintiffs support these assertions with several undisputed exhibits showing that (1) ~~Western~~ is a sub-subsidiary of ~~Energy~~ (see Counter-Statement, Exhibit 6); (2) the boards of directors of ~~Energy~~ and ~~Peabody~~ Investments -- a different subsidiary of ~~Energy~~ and corporate grandparent of ~~Western~~ -- have several officers and directors in common (see id., Exhibits 2, 3, and 5); (3) an officer of ~~Energy~~ (~~Richard A. Navarre~~) is also a director of ~~Western~~ (see id., Exhibits 3 and 7); and (4) ~~Energy~~ has affirmed its ownership either of ~~Western~~ or of the Kayenta mine on its website and in various publications. See, e.g., Counter-Statement Exhibits 8-9, 11; Addendum Exhibit 1, "Statement of Change of Registered Agent," ~~Peabody~~ "Kayenta Mine" webpages, and third-party webpages on ~~Peabody Energy~~). Plaintiffs then argue that ~~Energy~~ has "reap[ed] the benefits and grandeur bestowed by Arizona Agencies and the Kayenta mine operations" that, as a matter of corporate formality, are to be associated with ~~Western~~. Response page 8 ll. 6-7. ~~Energy~~ replies that none of these undisputed facts and allegations, nor all of them combined, are sufficient to create a genuine issue whether ~~Energy~~ sufficiently controlled ~~Western~~ or ~~Courtney~~ to give rise to vicarious liability.

"A corporation is not liable for the acts of its subsidiary simply because it is wholly owned." *Washington National Corp.*, supra, 117 Ariz. at 101, 570 P.2d 1268. Arizona courts provide two theories -- "alter ego" and "instrumentality" -- that, with proper factual support, might justify a "control" based imposition of vicarious liability. Plaintiffs mention each of these theories in their

motion papers but provide little development of any of them. See generally Response; Supplemental Citation [attaching *Gatecliff v. Great Republic Life Insurance Co.*, 170 Ariz. 34, 821 P.2d 725 (Ariz. 1991)]; Addendum. ~~Emergo~~ retorts that plaintiffs "set forth no clear legal or factual theory for recovery." Reply page 1 l. 24.

Plaintiffs rely heavily on the *Gatecliff* decision in support of these two theories for vicarious liability. The issue in *Gatecliff* was whether the plaintiffs had "introduce[d] evidence sufficient to create a genuine issue of material fact regarding Great Republic's liability under the alter ego, instrumentality or direct liability theories." *Gatecliff*, supra, 170 Ariz. at 36. Plaintiffs claimed that they had executed an insurance contract with a "Great Republic Life Insurance Company," and that the company had denied coverage under one policy and had revoked plaintiffs' entitlement to another policy, in breach of contract and in bad faith. The court pointed out that "Great Republic" referred to either Great Republic Washington (GRW), or to Great Republic California (GRC), or to both of them. *Id.* at 38. GRW was licensed to do insurance business in Arizona, while GRC was not. When plaintiffs sued GRW in Arizona's courts, GRW claimed the policy was GRC's not GRW's, that GRC and GRW "operated separate and apart" from each other, and therefore that the Arizona courts lacked jurisdiction over plaintiffs' suit. In reversing the Court of Appeals' affirmance of the trial court's summary judgment for GRW, the Arizona Supreme Court recounted the extensive evidence presented by plaintiffs that the allegedly unrelated companies were not unrelated at all:

- (1) GRC was a subsidiary of GRW. The two companies were bound by an "administrative services agreement" under which "GRW performed virtually every service necessary for GRC's operation." *Gatecliff*, supra, 170 Ariz. at 37.
- (2) "A person doing business with Great Republic might never know that he or she was

doing business with one of two 'separate' companies and could reasonably assume that Great Republic was only one company." Id. at 38.

(3) The insurance policies themselves referred simply to "Great Republic Life Insurance Company" without distinguishing between GRW and GRC. Id.

(4) The two companies used the same letterhead, the same logo, and the same California post office box. Correspondence was between plaintiffs and "Great Republic Life Insurance Company," not between plaintiffs and either GRW or GRC. Id.

(5) The two companies featured the same person as vice president and general counsel. Id. at 36.

If similar evidence of the relationship between ~~Energy~~ and ~~Western~~ were before the court, the case could be made for disregarding the corporate independence of these two defendants. As previously noted, however, the record before the Court does not reveal strong evidence of this sort.

In addition, the evidence in *Gatecliff* that supported conjoining the two insurance companies related directly to the claim in the lawsuit: that "Great Republic Life Insurance Company" had reneged on a contract of insurance. In the case at bar, the claim is that the corporate investor in a coal mining company is liable for the medical malpractice of the coal company's employee.

*Alter ego.* "A basic axiom of corporate law is that a corporation will be treated as a separate entity unless sufficient reason appears to disregard the corporate form." *Arizona Public Service Co. v. Arizona Corporation Comm'n*, 155 Ariz. 263, 267, 746 P.2d 4 (Ariz. App. 1987) [citing *Standage v. Standage*, 147 Ariz. 473, 475, 711 P.2d 612, 614 (Ariz. App. 1985)], vacated on other grounds, 157 Ariz. 532, 760 P.2d 532 (1988) (reversing trial court's holding that holding company was a "public service corporation" because it owned a public service corporation). In general,

The courts have conditioned recognition of corporateness on compliance with two requirements: (1) business must be conducted on a corporate and not a personal basis; (2) the enterprise must be established on an adequate financial basis. Henn, Law of Corporations 2nd Ed., § 147 (1970).

*Ize Nantan Bagowa, Ltd. v. Scalia*, 118 Ariz. 439, 442, 577 P.2d 725 (Ariz. App. 1978) (reversing trial court's judgment against individual defendant based on "piercing the corporate veil").

Plaintiffs contend "~~Defendant Peabody Western~~ Coal Company is effectively simply a corporate shell operated by Defendant ~~Peabody Energy~~ . . ." Response page 7 ll. 5-7. This contention, if supported by evidence in the record, would furnish part of the support needed to disregard the individuality of ~~Western~~ and to expose ~~Energy~~ to vicarious liability under the alter-ego theory. "The alter ego status is said to exist when there is such a unity of interest and ownership that the separate personalities of the corporation and the owners cease to exist." *Ize Nantan Bagowa*, supra, 118 Ariz. at 442, 577 P.2d 725 (Ariz. App. 1978) [citing, inter alia, *Dietel v. Day*, 16 Ariz. App. 206, 492 P.2d 455 (1972)]. See *Bischofshausen, Vasbinder, & Luckie v. D.W. Jaquays Mining & Equipment Contractors Co.*, 145 Ariz. 204, 208-09, 700 P.2d 902 (Ariz. App. 1985) (quoting *Ize Nantan Bagowa* in affirming trial court's order granting summary judgment to defendants on plaintiff's alter-ego claim, while reversing and remanding on other grounds); *Gatecliff*, discussed supra, 170 Ariz. at 38, 821 P.2d 725.

Courts will consider the following evidence of "unity of interest and ownership" in determining whether to disregard the independence of corporation and owner:

common officers or directors; payment of salaries and other expenses of subsidiary by parent (or of corporation by shareholders); failure to maintain formalities of separate corporate existence; similarity of corporate logos; plaintiff's lack of knowledge of separate corporate existence; owners' making of interest-free loans to corporation; maintaining of corporate financial records; commingling of personal and corporate funds; diversion of corporate property for shareholders'

personal use; observance of formalities of corporate meetings; intermixing of shareholders' actions with those of corporation; and filing of corporate income tax returns and ACC annual reports.

Deutsche Credit Corp., supra, 179 Ariz. at 158, 876 P.2d 1190 [citing Gatecliff, supra, 170 Ariz. 34, 821 P.2d 725; Standage, supra, 147 Ariz. 473, 711 P.2d 612; and Honeywell, Inc. v. Arnold Construction Co., 134 Ariz. 153, 654 P.2d 301 (Ariz. App. 1982), while affirming the trial court's order granting summary judgment to secured creditor against defendant purchaser who defended on the basis of an alter-ego theory]. See also DBT Yuma, L.L.C. v. Yuma County Airport Authority, supra, 236 Ariz. at 375, 340 P.3d 1080 (citing Gatecliff, supra, 170 Ariz. at 37, 821 P.2d 725, while rejecting plaintiffs' alter-ego theory for recovery).

The Court finds no evidence of these "alter ego" factors. The record shows that ~~Energy~~, a public corporation, owned the stock, not of ~~Western~~, but instead of the investment company that owned the stock in the holding company that owned the stock in ~~Western~~. The record supports the contention that ~~Western~~ is an ~~Energy~~ "operation," but otherwise contains no indication that either ~~Energy~~ or ~~Western~~ fails to realize they are distinct corporate entities or that ~~Energy~~ conducts ~~Western's~~ business on a "personal basis."

The record does not disclose interlocking boards of directors of ~~Energy~~ and ~~Western~~, but rather indicates the contrary. The record contradicts any notion that either ~~Energy~~ or ~~Western~~ ignored corporate formalities or failed to file ACC annual reports, and fails to reveal any information about corporate tax returns.

No evidence has been presented indicating that ~~Energy~~ financed ~~Western~~ -- other than perhaps by indirectly financing the acquisition of its stock by another, albeit affiliated, corporation -- or paid ~~Western's~~ expenses or employees. There is no evidence of interest-free loans between the two corporate entities, or commingling of assets or liabilities. There is no evidence that