

APPLICATION FOR NOMINATION TO JUDICIAL OFFICE

This original application, 16 double-sided copies and one (1) single-sided copy must be filed with the Human Resources Department, Administrative Office of the Courts, 1501 W. Washington, Suite 221, Phoenix, AZ, 85007, not later than 3:00 p.m. on August 8, 2016. Read the application instructions thoroughly before completing this application form. The fact that you have applied is not confidential, responses to Section I of this application are made available to the public, and the information provided may be verified by Commission members. The names of applicants, interviewees and nominees are made public, and Commission files pertaining to nominees are provided to the Governor for review. This entire application, including the confidential portion (Section II), is forwarded to the Governor upon nomination by the Commission.

SECTION I: PUBLIC INFORMATION (QUESTIONS 1 THROUGH 71)

PERSONAL INFORMATION

1. Full Name:

Pamela S. Frasher Gates

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

Pamela S. Frasher; Pamela S. Gates

3. Office Address:

**175 West Madison, Suite 13401
Phoenix, Arizona 85003**

Filing Date: _____
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4. When have you been a resident of Arizona?

I have resided in Arizona since 1996.

5. What is your county of residence and how long have you resided there?

I have resided in Maricopa County since 1996.

6. Age:

45

(The Arizona Constitution, Article VI, §§ 22 and 37, require that judicial nominees be 30 years of age or older before taking office and younger than age 65 at the time the nomination is sent to the Governor.)

7. List your present and former political party registrations and approximate dates of each:

Republican (1992 – present)
Democrat (1990 – 1992)

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

8. Gender:

Female

Race/Ethnicity: White
 Hispanic or Latino (of any race)
 Black or African American
 American Indian or Alaska Native
 Asian
 Native Hawaiian/Pacific Islander
 Other: _____

(The Arizona Constitution, Article VI, §§ 36 and 41, requires the Commission to consider the diversity of the state's or county's population in making its nominations. However, the primary consideration shall be merit.)

EDUCATIONAL BACKGROUND

9. List names and locations of schools attended (college, advanced degrees and law), dates attended and degrees.

Drake University, Des Moines, Iowa (1989 – 1993). Bachelor of Arts, *cum laude* (graduated with college honors).

University of Iowa College of Law, Iowa City, Iowa (1993 – 1996). Juris Doctorate, *with distinction*.

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

Drake University (1989 – 1993)

Majors:

- Political Science
- History

Extracurricular activities:

- American Mock Trial Association Intercollegiate Mock Trial
 - 1991 Regional Champion, 3rd Place Nationals
 - 1992 Regional Champion, 3rd Place Nationals
 - 1993 Regional Champion, National Champion
- Coach, Dowling High School Mock Trial Team
 - 1992 Iowa State Champion, 12th Place Nationals
 - 1993 Iowa State Tournament, 4th Place
- Speaker, Iowa Department of Education, traveled to schools throughout Iowa speaking on leadership, 1989 – 1990
- Iowa Federation of College Republicans, Elected Secretary, 1992 – 1993
- State Vice-President – Future Farmers of America, 1989 – 1990

University of Iowa College of Law (1993 – 1996)

Extracurricular activities:

- National Trial Advocacy Team – American College of Trial Lawyers, American Bar Association Section of Litigation, Texas Trial Lawyers Association, 5th Place, 1995 – 1996
- Criminal Justice Trial Advocacy Tournament, 5th Place, 1995 – 1996

- **University of Iowa Stephensen Trial Advocacy Team, 1st Place, 1995**
- **President, Trial Advocacy Board, 1995 – 1996**

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

Drake University (1989 – 1993)

Scholarships, awards, and honors:

- **Merit scholarship**
- **Dean’s List**
- **Honors Program**
 - **Honors thesis evaluated the potential impact of race on criminal prosecutions**
- **Law Clerk, Vernon Lawyer Law Firm, responsible for gathering, reviewing, and summarizing medical records, preparing exhibits for mediations, arbitrations, and trials**
- **Intern, Office of General Counsel for Governor Terry Branstad, responsible for processing applications for restoration of civil rights**
- **Volunteer, Assisted Living Facility**
- **Sales Associate, The Buckle**

University of Iowa College of Law (1993 – 1996)

Scholarships, awards, and honors:

- **Merit scholarship**
- **University of Iowa College of Law Outstanding Advocate Award**
- **Award for Commitment to Trial Advocacy**
- **American College of Trial Lawyers Medal for Excellence in Advocacy**
- **Member, University of Iowa Law Review (published)**
 - ***Fulfilling Batson and its Progeny: A Proposed Amendment to Rule 24 of the Federal Rules of Criminal Procedure to Attain a More Race- and Gender-Neutral Jury Selection Practice*, 80 Iowa L. Rev. 1327**
 - ***Toward a Model Expert Witness Act: An Examination of the Use of Expert Witnesses and a Proposal for Reform* (assisted in drafting the Model Act and co-authored the first Minority Report), 80 Iowa L. Rev. 1269**
- **University of Iowa Legal Clinic, represented men in the**

maximum security prison in Fort Dodge, Iowa (argued *Long v. Nix*, 86 F.3d 761 (8th Cir. 1996))

- Intern, Washington County Attorney's Office, assisted with investigations and trial preparation
- Intern, United States Attorney's Office, District of Arizona, prepared memoranda and motions
- Summer associate, O'Connor, Cavanagh, conducted legal research and prepared memoranda and motions

PROFESSIONAL BACKGROUND AND EXPERIENCE

12. List all courts in which you have been admitted to the practice of law with dates of admission. Give the same information for administrative bodies, which require special admission to practice.

Arizona Supreme Court, 1996

United States Court of Appeals, Ninth Circuit, 2009

United States District Court, District of Arizona, 1996

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 take a bar examination more than once in order to be admitted to the bar of any state? **No**. If so, explain.

14. Indicate your employment history since completing your formal education. List your current position first. If you have not been employed continuously since completing your formal education, 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
• Superior Court of Arizona Judge	2009 – present	Phoenix, Arizona
• Bryan Cave Partner	2004 – 2009	Phoenix, Arizona
Associate	1997 – 2004	Phoenix, Arizona

Another responsibility involves reviewing applications and affidavits for interception of telephonic communications (wire, electronic, stored wire and oral and text messaging) for alleged drug trafficking organizations.

As the Associate Presiding Criminal Judge, I also have administrative responsibilities, including assessing increased efficiencies in processing criminal cases to ensure compliance with constitutional rights, meeting with the Adult Probation Department to analyze issues, and implementing immediate changes in our system as necessary to comply with new appellate decisions.

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

- Family court (judge)
- Lower court appeals (judge)
- Environmental – both litigation and regulatory (lawyer)
 - Toxic tort litigation
 - Cost recovery actions
 - Insurance coverage
 - Enforcement defense
 - Regulatory counseling
- *Pro bono* service regarding injunctions against harassment (individually and as supervising lawyer)
- Insurance defense (lawyer)
- Trademark infringement (lawyer)
- Product liability (lawyer)
- Common law including nuisance and trespass (lawyer)
- Bankruptcy (lawyer)
- Corporate transactions (lawyer)
- Contract and lease disputes (lawyer)
- Prepared policies and programs for numerous resort day care facilities (lawyer)
- Violation of non-compete agreements (lawyer)
- Employment, including gender discrimination defense (lawyer)

18. Identify all areas of specialization for which you have applied or been granted certification by the State Bar of Arizona.

Not applicable.

19. Describe your typical clients.

Not currently applicable. In private practice, my clients were local, national, and international businesses. Earlier in my practice, my clients were often individuals who faced lawsuits seeking damages as a result of personal injury or property damage. The clients were typically individuals or married couples who were unfamiliar with the judicial system. I also worked with victims of domestic violence. In that capacity, my clients were typically women who were or had been, in violent relationships.

20. Have you served regularly in a fiduciary capacity other than as a lawyer representing clients? **No.** If so, give details.

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

As a judge I write important legal decisions. The documents range from pretrial rulings in capital cases to modifications of parenting time schedules. My pretrial decisions are important to the parties, the safety of their children, their financial stability, the suppression of evidence, victim's rights, and the defendant's liberty. I strive to draft clear, concise orders, giving the lawyers and parties clear directions and decisions. I also try to ensure that my decisions explain the reasons for my rulings.

I also serve on numerous statewide committees that are responsible for revising or restyling various legal rules. Currently, I serve on the Criminal Rules Task Force and the Advisory Committee on the Arizona Rules of Evidence.

Throughout my 13 years in practice, I wrote thousands of legal pleadings, including motions, complaints, answers, discovery pleadings, appellate briefs, special actions, petitions for review, and settlement agreements. I also negotiated various documents, including agreements of no-contact and corporate transactional documents.

As a lawyer I also actively monitored and participated in state and federal rulemaking. I attended stakeholder meetings and provided written comments regarding proposed rules, particularly rules related to environmental quality. In February 2007, I was featured in the Arizona Capital Times as a business leader who affected Arizona rules and public policy.

22. Have you practiced in adversary proceedings before administrative boards or commissions? **No**. If so, state:

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

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

Sole Counsel: _____

Chief Counsel: _____

Associate Counsel: _____

23. 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: **1**

Chief Counsel: **5**

Associate Counsel: **3**

24. List not more than three contested matters you negotiated to settlement. State as to each case: (1) the date or period of the proceedings; (2) the names, addresses (street and e-mail) 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. You may reveal nonpublic, personal, identifying information relating to client or litigant names or similar information in the confidential portion of this application.

Each case below is a matter of public record.

**1. State v. Elwood Moreno
CR2012-156080-001**

**A. Two settlement conferences and sentencing
January 2014 – May 2015**

**B. Neha Bhatia
Deputy County Attorney
301 West Jefferson
Phoenix, Arizona 85003
Telephone: (602) 506-5999**

Filing Date: _____
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bhatian@mcao.maricopa.gov
Counsel on behalf of the State of Arizona

Michael Lee
Alcock & Associates P.C.
2 North Central Avenue, Floor 26
Phoenix, Arizona 85004
Telephone (602) 404-6000
mlee@alcocklaw.com
Defense counsel for Mr. Moreno

- C. Mr. Moreno was charged in the murder of his step-mother and father. Mr. Moreno is seriously mentally ill. At the time of the offense, he was on intensive probation, having recently been released from prison for his sixth felony. After he was released from custody, Mr. Moreno's step-mother and father agreed that Mr. Moreno could live with them. Concerned about Mr. Moreno's mental health, they tried to get him help. On October 21, 2012 Mr. Moreno stabbed his step-mother and father to death. Using their blood he wrote on the walls of the house, stabbed himself, drove off in his family's car, and crashed the car in an attempt to kill himself.

The family was devastated. Both settlement conferences were emotional and difficult. Although Mr. Moreno believed a sentence of between 6 and 8 years was appropriate, he ultimately pled guilty to two counts of second degree murder. I sentenced Mr. Moreno to 35 years in prison.

The settlement conference was not focused on whether Mr. Moreno committed the crimes – he did. The settlement conference focused on whether Mr. Moreno truly wanted to exercise his constitutional right to go to trial or whether he wanted to accept responsibility for his actions and plead guilty.

Mr. Moreno was scared of spending the rest of his life in prison alone – without one single person to write him or care about him. When defendants enter my courtroom, they almost always look over their left shoulders to see if any friends and family have come to court. Most often, I see their shoulders drop, just slightly, when they fail to see a single friend or family member. Mr. Moreno was no different. Although the courtroom contained a number of people, they all sat on the side of the victims. Mr.

Moreno's side was always empty. The family wanted to know that Mr. Moreno was sorry and that he was remorseful. Mr. Moreno was scared and unwilling to take a plea that sent him to prison for potentially the rest of his life. Mr. Moreno eventually accepted the plea agreement.

- D. I highlight this case because the lawyers and mitigation specialist underscored that justice can be administered with kindness, professionalism, integrity, and compassion. Having emotion and compassion does not mean offering or imposing unjust or lenient sentences.

As judges we follow the law dispassionately, unaffected by sympathy or emotion. Occasionally, I will stand in a crowd of colleagues, listening to their tips on how to divorce our emotions from our cases. I have chosen a different route. I feel. In acknowledging my emotions, I can be acutely aware of and prevent responding based on a reason other than the pure neutrality and objective application of the law. Whether I impose the maximum sentence, the minimum sentence, or a sentence in between, I impose every sentence with a strict application of the law and intellectual honesty. And each sentence I impose is with compassion and an understanding of the gravity of my decision and power judges hold.

After this case was over, I received an email from the mitigation specialist that was meaningful to me. With Ms. Prusak's permission, I include the text of her e-mail below:

Over the years that I have been a mitigation specialist, I have been fortunate enough to sit in the courtrooms of some very special judges, and I consider you one of them.

I felt such a strong need to tell you how touched I was at your compassion, empathy and kindness to Elwood at his sentencing. You made sure that he knew you cared about him and that it was important that he make the best decision for the victim's family and, more importantly, the best decision for himself. I know your words will remain with him and help him through his years in prison.

Your heart resonates throughout the atmosphere of your courtroom, and witnessing your exchange with Elwood was a blessing for me to experience.

Thank you so very much for letting your light shine on the victims, the defendants and the system.

2. **State v. Elizabeth Ball-Busse,
CR2015-130921-001
CR2009-159270-001
CR2003-013086-001**

A. **January 22, 2016**

B. **Ryan Joseph McCarthy
Deputy County Attorney
301 West Jefferson
Phoenix, Arizona 85003
Telephone: (602) 506-1145
mccarr01@mcao.maricopa.gov
Counsel on behalf of the State of Arizona**

**Emily Downs
620 West Jackson, Suite 4015
Phoenix, Arizona 85003
downse@mail.maricopa.gov
Telephone: (602) 506-7711
Defense counsel for Ms. Ball-Busse**

- C. **Ms. Ball-Busse was charged with one count of animal cruelty, a class 6 felony, and one count of animal cruelty, a class one misdemeanor. Before conducting settlement conferences I always meet with the lawyers to discuss the cases, learn more about the facts and legal issues, and evaluate how the lawyers believe I can assist them. Both lawyers were exceptionally compassionate and prepared for the settlement conference.**

Ms. Ball-Busse quit school after 8th grade. She had cognitive limitations and was diagnosed as seriously mentally ill. Her pets were the most important part of her life, with an adult Chihuahua named Iron Man acting as a service dog due to her anxiety and mental health issues. On the date of the offense, Ms. Ball-Busse and her husband, Mr. Busse, went to a movie. Ms. Ball-Busse told her husband she wanted to move the dogs indoors before they left, but her husband would not allow the delay. On July 6, 2015, temperatures reached 109°. The two dogs tied outside tangled their leashes and were unable to reach water or shade. Iron Man died. The other

Chihuahua, Pippy, lived but was severely overheated.

Ms. Ball-Busse had prior felony convictions. One conviction occurred after she and Mr. Busse fought over who would keep their cat during a separation, and the second conviction arose from Ms. Ball-Busse's attempt in 2003 to sell an undercover officer two ounces of methamphetamine. As a result of her criminal history, if a jury convicted Ms. Ball-Busse of animal cruelty for Iron Man's death, the sentencing requirements mandated a prison sentence with a presumptive sentence of 3.75 years in the Department of Corrections.

Ms. Ball-Busse was incredibly emotional during the settlement conference. She struggled to admit that her actions constituted animal cruelty. Under Arizona law, a person is guilty of animal cruelty if: 1) the person knowingly subjected an animal under the person's control to cruel neglect defined as failing to provide the animal with necessary food, water, or shelter; and 2) the failure caused serious physical injury or death to the animal.

After talking to her for almost an hour, Ms. Ball-Busse agreed to the terms of the plea agreement. Following the stipulations in the plea agreement, I placed Ms. Ball-Busse on probation.

- D. Every case we touch is important. Often lawyers will call my division to schedule a settlement conference and inquire about the types of cases I will accept for settlement conferences. Although perhaps tempting to only accept settlement conferences in high-profile, serious cases, my team is instructed not to ask about the nature of the charges. We set settlement conferences in all types of cases. Our judicial system, from justice court to the Supreme Court, is meant to be accessible to everyone. As judges, we fairly, with patience and professionalism, perform our services in every case, hopefully knowing that each case before us is important to the parties and requires the impartial and consistent application of the Rule of Law.

3. State v. Kenneth Reinhart
CR2014-001290-001

A. April 29, 2016

**B. Julia Vanhelder
Deputy County Attorney
301 West Jefferson
Phoenix, Arizona 85003
Telephone: (602) 506-3411
vanheldj@mcao.maricopa.gov
Counsel on behalf of the State of Arizona**

**V. Tyler Harrison
Law Office of V. Tyler Harrison, PLLC
7702 East Doubletree Ranch Rd., Suite 300
Scottsdale, Arizona 85258
Telephone: (602) 561-3100
tyler@vthlaw.com
Defense counsel for Mr. Reinhart**

C. Mr. Reinhart was convicted of sexual assault in California in 1981. At the time of his offense, Mr. Reinhart was not required to register as a sex offender if living in California. However, when Mr. Reinhart moved to Arizona, Section 13-3821 of the Arizona Revised Statutes required that he register as a sex offender in this state.

After his move to Arizona, Mr. Reinhart was charged with failure to register as a sex offender. He did not want to admit guilt because he did not believe the application of sex offender registration to his California conviction was constitutional. Ultimately, Mr. Reinhart entered the plea agreement.

D. Lawyers and judges sometimes lose track of their audience. Of course, lawyers, academicians, and judges are consumers of legal opinions, but so are the individuals who are bound by our laws and decisions.

As the first of my family to graduate from college, I watched as my family members often expressed reluctance to communicate with people they referred to as “book smart.” Presumably a lawyer, judge, or justice is “book smart”; however, they should have the wisdom and common sense to communicate a decision concisely, accurately, and understandably to all.

In this case, Arizona, as a sovereign state, has the right to pass laws regarding where people convicted of certain sex offenses can live, and it can enact sex offender notification requirements different from any other state.

Mr. Reinhart grappled with this concept, and he struggled to understand why Arizona's law was not an *ex post facto* law forbidden by the United States and Arizona Constitutions. I explained the concepts to him, and to help him understand I printed cases and let him take them back to the jail to read. Mr. Reinhart wanted and deserved to understand the law that applied to his charges.

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

The approximate number of cases in which you appeared before:

Federal Courts:	20
State Courts of Record:	155
Municipal/Justice Courts:	5

The approximate percentage of those cases which have been:

Civil:	98
Criminal:	2*

***Number represents cases where civil matter proceeded with pending or threatened criminal indictment.**

The approximate number of those cases in which you were:

Sole Counsel:	8% or approximately 14
Chief Counsel:	45% or approximately 81
Associate Counsel:	47% or approximately 85

The approximate percentage of those cases in which:

You conducted extensive discovery ¹ :	95%
You wrote and filed a motion for summary judgment:	40%

¹Extensive discovery is defined as discovery beyond standard interrogatories and depositions of the opposing party.

You wrote and filed a motion to dismiss:	30%
You argued a wholly or partially dispositive pre-trial, trial or post-trial motion (e.g., motion for summary judgment, motion for a directed verdict, motion for judgment notwithstanding the verdict):	45%
You made a contested court appearance (other than as set forth in above response)	30%
You negotiated a settlement:	98%
The court rendered judgment after trial:	1-2%
A jury rendered verdict:	1-2%
Disposition occurred prior to any verdict:	0%

The approximate number of cases you have taken to trial:

Court **3****

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

Jury **0****

**** In addition to the three bench trials listed above, I prepared numerous cases for trial, many of which settled on the eve of trial or were continued immediately prior to the trial.**

The most significant lawsuit of my practice, which had been in litigation for 17 years, was prepared for trial three times. Each time the trial was continued as a result of motions. The matter involved week-long evidentiary hearings and was on interlocutory appeal for the second time when I was appointed to the bench.

26. Have you practiced in the Federal or Arizona appellate courts? **Yes.** If so, state:

The approximate number of your appeals which have been:

Civil: **10**

Criminal: **0**

The approximate number of matters in which you appeared:

As counsel of record on the brief: AZ **3** U.S. **2**

Personally in oral argument: AZ **0** U.S. **1**

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27. Have you served as a judicial law clerk or staff attorney to a court? **No**. If so, state the name of the court and dates of service, and describe your experience.
28. List not more than five cases you litigated or participated in as an attorney before mediators, arbitrators, administrative agencies, trial courts or appellate courts. 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 presiding judge or officer before whom the case was heard; (3) the names, addresses (street and e-mail) 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. You may reveal nonpublic, personal, identifying information relating to client or litigant names or similar information in the confidential portion of this application.

Each case below is a matter of public record.

1. ***The Pinal Creek Group, consisting of Phelps Dodge Miami, Inc. Inspiration Consolidated Copper Company, and BHP Copper Inc. v. Newmont Mining Corporation, CanadianOxy Offshore Production Company and Atlantic Richfield Company***

A. **1991 – 2009**

B. **United States District Court, District of Arizona
The Honorable David Alan Ezra
Magistrate Judge Lawrence O. Anderson
Magistrate Judge Mark E. Aspey**

C. **I represented BHP Copper Inc., a wholly-owned subsidiary of BHP Billiton, one of the largest natural resource companies in the world. During the 20 year history of this litigation, many lawyers appeared for various parties and participated in different segments of the case. The counsel listed below were the lawyers primarily responsible for the litigation:**

**William W. Pearson
Pearson Law Group LLC
1221 East Osborn Rd., Suite 101
Phoenix, Arizona 85014
Telephone: (602) 688-6680
wink@pearsonlg.com
Counsel for BHP Copper Inc.**

**John D. Burnside
Snell & Wilmer LLP
One Arizona Center
400 East Van Buren Street, Suite 1000
Phoenix, Arizona 85004
Telephone: (602) 382-6287
jburnside@swlaw.com
Counsel for BHP Copper Inc.**

**Maribeth M. Klein
Snell & Wilmer LLP
One Arizona Center
400 East Van Buren Street, Suite 1000
Phoenix, Arizona 85004
Telephone: (602) 382-6287
mmklein@swlaw.com
Counsel for BHP Copper Inc.**

**Shane R. Swindle
Perkins Coie LLP
2901 N. Central Avenue, Suite 2000,
P.O. Box 400
Phoenix, Arizona 85001
Telephone: (602) 351-8384
sswindle@perkinscoie.com
Counsel for Newmont Mining Corporation**

**Tawn Thornton (formerly Pritchette)
Deputy County Attorney
Maricopa County Attorney's Office
Civil Services Division
222 North Central Avenue, Suite 1100
Phoenix, Arizona 85003
Telephone: (602) 506-1739
thorntot@mcao.maricopa.gov
Counsel for Newmont Mining Corporation**

**Ernest J. Getto (Retired)
Latham & Watkins LLP
Current information unavailable
Counsel for CanadianOxy Offshore Production Company**

**Michael Romey
Latham & Watkins LLP
355 South Grand Avenue
Los Angeles, California 90071
Telephone: (213) 485-1234**

Michael.rome@lw.com
Counsel for CanadianOxy Offshore Production Company

Damon Mamalakis
Armbruster, Goldsmith & Delvac
12100 Wilshire Blvd., Suite 1600
Los Angeles, California 90025
Telephone: (310) 209 -8800
damon@agd-landuse.com
Counsel for CanadianOxy Offshore Production Company

Nicholas Wallwork
125 N. 2nd Street, Suite 110-125
Phoenix, Arizona 85004
Telephone: (602) 445-9800
nicolas@wallwork.pro
Counsel for Phelps Dodge Miami, Inc. and Inspiration
Consolidated Copper Company

Frederic Bellamy
Ryley Carlock & Applewhite
One North Central Avenue, Suite 1200
Phoenix, Arizona 85004
Telephone: (602) 440-4835
fbellamy@rcalaw.com
Counsel for Phelps Dodge Miami, Inc. and Inspiration
Consolidated Copper Company

Mindy K. Brinker
Steptoe & Johnson
201 East Washington Street, Suite 1600
Phoenix, Arizona 85004
Telephone: 602) 257-5248
mbrinker@steptoe.com
Counsel for Phelps Dodge Miami, Inc. and Inspiration
Consolidated Copper Company

Kevin E. O'Malley
Gallagher & Kennedy
2575 East Camelback Road
Phoenix, Arizona 85012
Telephone: (602) 530-8430
kevin.omalley@gknet.com
Counsel for Phelps Dodge Miami, Inc. and Inspiration
Consolidated Copper Company

**J. Stanton Curry
Gallagher & Kennedy
2575 East Camelback Road
Phoenix, Arizona 85012
Telephone: (602) 530-8222
jsc@gknet.com
Counsel for Phelps Dodge Miami, Inc. and Inspiration
Consolidated Copper Company**

**Wm. Charles Thomson
Gallagher & Kennedy
2575 East Camelback Road
Phoenix, Arizona 85012
Telephone: (602) 530-8513
wct@gknet.com
Counsel for Phelps Dodge Miami, Inc. and Inspiration
Consolidated Copper Company**

**Paul L. Stoller
Gallagher & Kennedy
2575 East Camelback Road
Phoenix, Arizona 85012
Telephone: (602) 530-8220
paul.stoller@gknet.com
Counsel for Phelps Dodge Miami, Inc. and Inspiration
Consolidated Copper Company**

- D. For more than 100 years, mining operations released acidic metal-laden solutions into the Pinal Creek drainage basin in Gila County. Clean-up of the area may take more than 100 years and cost more than \$500 million. The total amount of metals released into the drainage basin exceeded 1.61 billion pounds, which is equivalent to the weight of 4,000 Boeing 747s. This lawsuit is one of the largest and most complicated environmental cases in Arizona history. The case focused on allocating the significant costs of cleaning up the Pinal Creek drainage basin among several mining companies.**

For judicial efficiency, the court divided the case into three trial phases. The parties prepared one phase for trial three times. Before the last trial setting, the United States Supreme Court and Ninth Circuit issued two decisions, arguably calling into question the Ninth Circuit's prior ruling in the case regarding the inapplicability of joint and several liability. Immediately before my appointment to the bench, the case was on interlocutory appeal to the

Ninth Circuit, addressing whether a change in controlling law would result in a claim for joint and several liability being reinstated after 10 years of litigation.

- E. Cooperative writing was an essential skill in this litigation. At times we drafted motions and appellate briefs aligned with the interests of the other plaintiffs. Other times, our client was unified with certain defendants based on historical operations or hydrogeochemical fingerprints.

On behalf of BHP, I frequently drafted and revised our pleadings, making sure I communicated my points persuasively without losing the support of my co-counsel and the other joining parties. I also needed to be sensitive to the impact or chain reaction of one statement in a brief, pleading, or a court's decision on the parties' fragile and ever-changing alliances.

I also practiced the invaluable art of simplifying complex statutes and technical concepts.

2. *Merlin C. Long v. Crispus C. Nix, et al.*

- A. 1996
- B. United States Court of Appeals, Eighth Circuit
The Honorable Pasco M. Bowman
The Honorable James B. Loken
The Honorable David R. Hansen
- C. John Whiston (Retired)
College of Law, The University of Iowa
290 Boyd Law Building
Iowa City, Iowa, 52242
Telephone: (319) 335-9023
john-whiston@uiowa.edu
Supervising lawyer

William A. Hill
Current information unavailable
- D. Merlin Long was serving a life sentence at the Iowa State Penitentiary for murder. He filed a lawsuit, seeking treatment for his gender identity disorder and requesting damages for the defendants' alleged deliberate indifference to his serious medical need.

This case challenged me emotionally and taught me important lessons. In 1964, Mr. Long murdered and dismembered a young woman. He was convicted of first degree murder.

Throughout his life, he expressed a strong dislike of all women and demanded a male lawyer. Contrary to his request, I was assigned to the case. I was asked to sign all letters as P. Frasher (my maiden name) to avoid confirmation of my gender, and all phone calls went through my male supervising lawyer.

As I prepared for my Eighth Circuit argument, I discussed the case with my supervising lawyer, who looked at me and stated, “You don’t believe in your case and the court will know that. You must find a way to believe in your case and your client.” I spent hours reviewing the factual record, determined to better understand Mr. Long and his situation.

Mr. Long suffered torturous abuse as a child. For nine years he was raised as a girl. At age nine, his parents moved, they cut his hair, and told him he was a boy. When he would return home from school and attempt to play “dress up” in his mother’s clothing, he was beaten severely. Throughout his life he struggled with gender identification. At times in prison he was allowed to wear women’s clothing. At other times, the prison officials confiscated his women’s clothing, causing severe anxiety and depression.

At the time of the oral argument, Mr. Long was 63 years old. He was in administrative segregation, and he was asking for treatment to reduce the feelings of anxiety that tortured him since childhood.

- E. Mr. Long’s case taught me the importance of analyzing, valuing, and understanding both sides of every issue. In valuing both sides, often I am able to help others better understand my position and provide necessary support for my conclusions.**

I also included this case because it received significant media attention. Over 150 people observed the oral argument. Numerous newspapers and radio stations covered the case. Learning early that ceding to public opinion and ridicule has no place in the judicial branch

has served me well throughout my time as a judge. I am often assigned controversial cases and have experienced the consequences of harsh articles and public comments. Justice does not arise from the consensus of public opinion; rather, the application of law.

3. *Jeffrey Scheinrock and Rosalyn Scheinrock, a husband and wife, v. Wickenburg Inn Tennis and Guest Ranch, Inc., et al.*

A. 1996 – 1997

B. Superior Court of Arizona, Yavapai County
The Honorable Raymond Weaver, Jr.

C. Laurence G. Tinsley
United States Attorneys Office
Two Renaissance Square
40 N. Central Avenue, Suite 1200
Phoenix, Arizona 85004-4408
Telephone: (602) 514-7500
laurence.tinsley@usdoj.gov
Counsel for Jeffrey and Rosalyn Scheinrock

Jennifer Bligh
Graif Barrett & Matura PC
1850 North Central, Suite 500
Phoenix, Arizona 85004
Telephone: (602) 792-5700
jbligh@gbmlaw.com
Counsel for the Wickenburg Inn

Robert Shely
Bryan Cave LLP
Two North Central, Suite 2200
Phoenix, Arizona 85004
Telephone: (602) 364-7000
rwshely@bryancave.com
Counsel for Fantastic Sports Promotion and Dakota Productions

D. Mr. Scheinrock was bucked off a horse. He and his wife sought damages for his alleged injury and her loss of consortium. We represented Fantastic Sports and Dakota Productions. After conducting discovery, the parties filed various motions for summary judgment. The judge granted our motion

for summary judgment.

As a civil lawyer, I counseled clients regarding the strength of the plaintiff's case, the law, and the probable outcome. As a judge, I have often heard colleagues discuss the probability of a reversal if they grant a motion summary judgment. The possibility of a reversal by an appellate court should never dissuade a judge from assessing the facts and law and entering a correct decision.

- E. Whether a case is a "typical" horse fall case or a massive toxic tort case, every party has the right to a correct application of the law and the confidence of the judge to render a decision, regardless of the possibility of reversal.

4. *A.L. Expansion dba Advanced Labor v. Nautilus Insurance Company*

- A. 1997 – 1998
- B. Superior Court of Arizona, Maricopa County
The Honorable Michael O'Melia
Arizona Court of Appeals
- C. Steven Goodrich
Current information unavailable
Counsel for A.L. Expansion

Troy Froderman
Polsinelli PC
1 East Washington Street, Suite 1200
Phoenix, Arizona 85004
Telephone: (602) 650-2000
tfroderman@polsinelli.com

- D. This case involved an insured who sought a defense and indemnification from our client, Nautilus Insurance Company. We filed a motion for summary judgment and prevailed. Plaintiff filed a successful appeal. We filed a petition for review, asserting that the court of appeals ignored the plain language of the insurance policy and created coverage where none existed. The Arizona Supreme Court denied our petition for review.

- E. This matter is significant to me because it illustrates the importance of legal certainty to businesses. Following the court of appeals' decision, our client was left with a sense of doubt regarding its insurance policy. If the Arizona Supreme Court had accepted review (whether it affirmed or reversed the court of appeals' decision), the ruling from Arizona's highest court would have provided our client with certainty regarding the enforceability of its insurance contract.

This case is also significant to me because of the conduct of my opposing counsel. After the trial court granted our motion for summary judgment, Mr. Goodrich called to compliment me on my brief and oral argument. Throughout my career, I have recalled how I felt when I received that call as a young lawyer, and I have tried to mirror Mr. Goodrich's magnanimous behavior.

5. *Jose Escalante and Maria Magdalena Escalante v. Bondex Int'l Inc.*

- A. 2007
- B. Superior Court of Arizona, Pima County
The Honorable Leslie Miller
- C. See Attachment B
- D. Mr. Escalante was diagnosed with mesothelioma, a form of cancer caused by asbestos exposure. We represented BHP Copper Inc., Mr. Escalante's employer. After deposing Mr. Escalante we filed a motion for summary judgment alleging lack of subject matter jurisdiction because workers' compensation was Mr. Escalante's exclusive remedy. The trial court granted our motion and dismissed the case against our client.
- E. The case is significant because it is representative of my work with toxic torts. Discovery in these cases is emotional. Deposing a dying person who blames your client (and often you) is always challenging. The life expectancy of a person with mesothelioma is approximately 12 to 15 months. There is no known cure for mesothelioma.

Being a judge or lawyer requires that our personal views or emotions yield to our responsibilities. As a lawyer, our responsibilities are to our clients, the court, and compliance with our ethical obligations. As judges, our responsibilities include upholding our oath to support the United States and Arizona Constitutions and laws of the State of Arizona, complying with the Arizona Code of Judicial Conduct, and faithfully and impartially discharging our duties as judges. This case helped equip me for the emotional challenges of serving as a judicial officer.

29. 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.).

I was appointed a judge of the Superior Court of Arizona by Governor Brewer in 2009. Initially, I assumed a family court calendar.

In family court matters, an overwhelming majority of litigants are self-represented. Many are unfamiliar with the court process and the law. Parents routinely request emergency or temporary orders to ensure stability as the parents transition into separate households. I discovered that upon initial filing, some families would wait 90 days or more for a decision on temporary legal decision-making and parenting time.

I immediately made case management changes. In my division, families seeking temporary orders were set for a hearing typically within two weeks. At the beginning of the hearing, I would explain the applicable law and discuss the decisions that the court would make if the parents were unable to reach agreement. Together we discussed areas of agreement and memorialized the agreements as temporary orders. In disputed areas, I received evidence and testimony. In virtually every case, I entered immediate temporary orders from the bench, explaining the basis for my decision. I found that this process reduced the disruption for the children and families and often helped the parents reach final agreement on the terms of their dissolution.

After a brief period as a family court judge, I was asked to serve as the Associate Presiding Family Court Judge for the downtown divisions. In this position, I continued to look for improvements to the family court. We partnered with schools around Maricopa County – charter, private, and public – for a roundtable discussion about family court issues.

Schools are often left to interpret court orders, trying to determine whether a parent or the parent's new boyfriend or girlfriend can pick up the child from school, whether to allow a parent with restricted parenting time to volunteer in the classroom, and how to minimize the public humiliation for children when courts set parenting time exchanges for high-conflict parents at school, in the presence of a child's peers. The judges, teachers, school administrators, and the lawyers for various school districts candidly discussed common problems and identified solutions to help the schools address issues that arise with court orders.

Another initiative involved minimizing the trauma to children who were the victims of abuse and attempting to improve the information available to the judges who are making decisions regarding temporary orders. For example, if a parent sought an emergency temporary order based on allegations of physical or sexual abuse, the judge was often left only assessing the credibility of two parents with no other information. Routinely, the court would order an interview of the child by the court's Conciliation Services. However, in cases in which criminal charges may be brought, the child could be subjected to multiple traumatic interviews and claims that the court's interviewer affected the reliability of the child's disclosure or testimony. We formed a task force to create a process for judges to refer children to ChildHelp or a similar organization for a forensic interview with law enforcement.

In family court, I also conducted hundreds of trials, settlement conferences, temporary orders, dissolution proceedings, paternity orders, entered child support orders, and handled post-dissolution matters for the families on my calendar.

In January 2014, I rotated to the criminal bench where I presided over jury trials, managed criminal cases, and heard pretrial motions regarding alleged violations of a defendant's or victim's constitutional rights. After two years, I was asked to accept the position as Associate Criminal Presiding Judge. In this assignment, I manage the court's finite judicial resources and assign cases to trial. Although this requires a significant amount of time and critical assessment, this job is enormously rewarding and challenging.

In my role as Associate Criminal Presiding Judge I am always looking for ways to improve our court's efficiency. One example is our "settlement conference on demand program." This program allows lawyers to set a conference with a judge to help resolve a criminal case prior to trial. Previously, due to administrative challenges, lawyers could not secure a criminal settlement conference "on demand" for three to four weeks. As a result, judges were holding settlement conferences in cases that were not properly postured for a discussion about pretrial resolution, and the demand for conferences eclipsed the number of judges available to conduct the conferences.

Working together with court administration, court technology, prosecutors, and defense lawyers, we overhauled the program. Now lawyers can request a settlement conference as soon as the next business day. The changes gained efficiencies in administration, eliminating the need for a full-time employee who was promptly reassigned other responsibilities. Since inception of the program, the court has not vacated a settlement conference for lack of judicial officers in over seven months.

30. List not 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, addresses (street and e-mail) 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. You may reveal nonpublic, personal, identifying information relating to client or litigant names or similar information in the confidential portion of this application.

1. ***State of Arizona v. Keishaun Green***
CR2013-004868-001
CR2013-428030-001

A. **January – May 2016**

B. **Superior Court of Arizona, Maricopa County**

C. **James Seeger**
Deputy County Attorney
301 West Jefferson
Phoenix, Arizona 85003
Telephone: (602) 506-5999
seegerj@mcao.maricopa.gov
Counsel on behalf of the State of Arizona

**Jeremy Bogart
Maricopa County Legal Defenders Office
222 North Central Avenue, Suite 8100
Phoenix, Arizona 85004
Telephone (602) 506-8800
jeremy.bogart@old.maricopa.gov
Defense counsel for Mr. Green**

- D. On May 31, 2013, within a matter of seconds, an individual entered a Valero convenience store, interacted with the clerk, pulled out a gun, and shot the clerk. The store's video surveillance captured the murder and continued to record as the victim suffered and struggled for help. The victim was transported to the hospital and died.**

At trial, the case focused on who shot the victim. The jury convicted Mr. Green of felony murder and attempted armed robbery.

After conviction, Mr. Green entered a plea agreement for a second murder that occurred on June 15, 2013. In that case, Mr. Green and a co-defendant agreed to buy \$140.00 of marijuana from the victim's son. The deal ended with Mr. Green and the victim exchanging gun fire. The victim was killed. Mr. Green entered a plea agreement, admitting guilt for one count of second degree murder. I sentenced Mr. Green to a natural life sentence for the Valero murder with a consecutive 25 year sentence for the second murder.

- E. A year before trial, I conducted a settlement conference with Mr. Green, and we talked about the advantages of the State's plea offer. I informed Mr. Green that if he was convicted at trial, he would face a natural life sentence for the Valero murder and a possible consecutive sentence for the murder that occurred during the drug deal. Mr. Green rejected the State's plea offer and exercised his constitutional right to go to trial.**

I value each person's constitutional rights. I would not take any action during a settlement conference to exert undue influence or to pressure a defendant to waive his or her constitutional rights based on falsely inflated beliefs about post-trial sentences. In this case, both counsel and Mr. Green waived conflict and agreed that I would serve as the trial judge. I also highlight this case because the preparedness and professionalism of the lawyers was

exceptional.

**2. Steve Urke v. Delena Urke (nka Delena Tubb)
FC2010-002844-001**

A. 2010 – 2011

B. Superior Court of Arizona, Maricopa County

**C. Steve Serrano
Burch & Cracchiolo PA
702 E. Osborn Road, Suite 200
P.O. Box 16882
Phoenix, Arizona 85011
Telephone: (602) 234-8786
smserrano@bcattorneys.com
Counsel for the Petitioner Steve Urke**

**Josephine Cuccurullo
Law Offices of Jodie D. Cuccurullo
4715 North 32nd Street, Suite 101
Phoenix, Arizona 85018
Telephone: (602) 274-9371
christie@jdclawaz.com
Counsel for Respondent Ms. Urke**

D. Steve and Delena Urke were dissolving their marriage and dividing their assets and debts. Due to the significant assets and business valuation, the case was complex. Family court lawyers simplify their cases and try complex trials in time slots of three hours or day-long trials. The area of family court has limited guidance from higher courts. Much of a trial court's decision is based on the judge's independent assessment of the best interests of the children and appropriate financial support. Prior to starting the Urke trial, we engaged in lengthy settlement discussions. With Herculean effort, the case was resolved and memorialized in a Consent Decree.

E. I include this case because it illustrates my ability to help educate and bring consensus to people committed to an alternative outcome.

**3. State v. Mariano Ramos Martinez
CR2012-133962-001**

A. September 2014 – January 2015

B. Superior Court of Arizona, Maricopa County

**C. Yigael Cohen
Deputy County Attorney
301 West Jefferson
Phoenix, Arizona 85003
Telephone: (602) 506-1131
coheny@mcao.maricopa.gov
Counsel on behalf of the State of Arizona**

**Kenneth Countryman
Kenneth Countryman PC
P.O. Box 11077
Tempe, Arizona 85284
Telephone: (602) 258-2928
kenneth@countrymanlaw.com
Counsel on behalf of Mr. Ramos Martinez**

D. Mr. Ramos Martinez faced twelve counts of sexual conduct with a minor, five counts of molestation, one count of public indecency to a minor, and one count of attempted sexual misconduct with a minor. The victims were the granddaughters of Mr. Ramos Martinez.

The family was divided over the charges. Some family members supported the victims while others supported the defendant and believed the victims were lying. The victims emotionally struggled during the trial with many of their cousins, aunts, uncles, and grandmother seated behind the defendant during the trial in an expression of support for him. After the jury was unable to reach a unanimous agreement on the verdict, Mr. Ramos Martinez entered a no contest plea agreement.

E. My father was killed during this trial. After one month of emotional testimony we recessed for the weekend. On Sunday night, my brother called to tell me that during evening chores on our farm, a grain bin collapsed on my father pinning him against the tractor. My stepmother, who was not raised on a farm and unable to drive the tractor, called for help, but it came too late.

The day following my dad's death, my stepmother had a heart attack. Uncertain when the funeral would occur, I could not bring myself to return to work and look at the Ramos Martinez family and tell them I did not have the

strength to continue presiding over their trial. The thought of putting that family through another trial due to my issue was inconceivable. I explained my situation to the lawyers, asked that they respect my privacy, and informed them the trial would continue until I had to return to Iowa. The lawyers were remarkable. They probed carefully to ensure that I was emotionally and mentally able to continue in light of the recent events, but they moved forward with absolute efficiency to try to preserve the trial. The trial lasted longer than the jurors originally expected because I returned to Iowa for the funeral. The jurors and lawyers made accommodations to complete the trial. Although the jury was unable to reach a unanimous verdict on any count, the trial ultimately allowed the parties to negotiate a plea agreement to resolve the case.

4. ***State v. Anthony Benard Primous***
CR2012-005697-001

A. **March 3, 2015**

B. **Superior Court of Arizona, Maricopa County**

C. **Ashelee Weeks**
Weeks Law, PLLC
P.O. Box 72116
Phoenix, Arizona 85050
Telephone: (602) 714-7530
weekslawaz@gmail.com
Counsel on behalf of the State of Arizona

Josephine Hallam
Kristin M. Wrobel
620 West Jackson, Suite 4015
Phoenix, Arizona 85003
hallamj@mail.maricopa.gov
kristin.wrobel@mail.maricopa.gov
Telephone: (602) 506-7711
Defense counsel for Mr. Primous

D. **Mr. Primous was charged with one count of possession or use of marijuana. Initially, the trial court granted the State's request to defer prosecution to enable Mr. Primous to participate in the deferred prosecution program. After he repeatedly failed to attend drug counseling or complete drug testing, the County Attorney moved forward with the prosecution. Before trial, Mr. Primous moved to suppress**

the marijuana found in his pocket.

The initial consensual encounter began when two officers walked up to a group of four men sitting outside an apartment, in a public area. The apartment had exterior cameras, allowing people inside the apartment to watch the interaction.

The officers were looking for someone with an outstanding arrest warrant for felony drug and weapons charges. As three more officers walked up to the group, one of the four men looked nervous and fled. Three officers ran after the man, leaving only two officers with the group. The officers discovered that one of the three remaining men had a baggie of marijuana in his shorts.

After learning of the marijuana, an officer performed a pat down of Mr. Primous to check for weapons. During the pat down, the officer felt a baggie of marijuana in Mr. Primous' pocket. Immediately able to identify the plain feel of the item as a baggie of marijuana that was identical to the one found minutes earlier, the officer seized the marijuana in Mr. Primous' pocket.

The Fourth Amendment of the United States Constitution embodies the right of people to be secure in their houses and to be protected from unreasonable searches. The Arizona Constitution, which grants privacy rights and freedoms beyond the United States Constitution, provides that no person shall be disturbed in his private affairs, or his home invaded, without authority of law.

Based on the facts of this case, I found that the pat down of Mr. Primous was not an unconstitutional search and was appropriate for officer safety. Specifically, at the time of the pat down, the officer knew: he was in a dangerous neighborhood looking for a violent individual who allegedly dealt drugs and weapons; one member of Mr. Primous' group fled without reason when the officers walked up; officers were in view of cameras positioned on the outside of the apartment complex when an officer learned that one of the men had marijuana; and the officers were now out-numbered.

In a published opinion, the court of appeals affirmed my ruling.

E. Although to some this case may seem less significant than the capital cases I handle, I include this case because it demonstrates how important constitutional issues arise in many different types of cases.

5. *State v. Benny Gibson*
CR2011-141134-002

A. February – March 2016

B. Superior Court of Arizona, Maricopa County

C. Jeanine Sorrentino
Deputy County Attorney
301 West Jefferson Street, Suite 800
Phoenix, Arizona 85003
Telephone: (602) 506-8556
sorrenti@mcao.maricopa.gov
Counsel for the State of Arizona

Kellie Sanford
Law Offices of Kellie Sanford PLLC
120 West Osborn Road, Suite A
Phoenix, Arizona 85013
Telephone: (602) 973-8422
ksanfordlaw@gmail.com
Advisory counsel for Mr. Gibson

D. Mr. Gibson waived his right to a lawyer and represented himself. He was charged with nine counts of child abuse, four were class two felonies and five were class four felonies. In this case, the child died.

After the child's biological mother entered a plea agreement for ten years in prison, Mr. Gibson entered into a plea agreement, pleading guilty to three counts of attempted child abuse. The plea agreement stipulated that for two counts Mr. Gibson would be placed on probation for a term to be determined by the court and for one count he would serve seven-and-a-half years in prison.

At the time of the change of plea, Mr. Gibson admitted that he knowingly pushed the child, not intending to cause injury, but causing the child's head to hit a wall or door thereby risking serious physical injury. Mr. Gibson also admitted that he knowingly failed to take the child to

obtain medical treatment, and that he knowingly failed to protect the child when the child's biological mother failed to feed the child properly.

I first became involved with this case at the time of the change of plea and then for sentencing.

- E. Here, as the State advised at sentencing, "the only reason that the State was forced into entering this plea is – basically comes down to the fact that [the biological mother] was refusing to testify." The State also explained that the plea took into account Mr. Gibson's two surviving daughters and the State's desire to protect the children from Mr. Gibson during his term of probation. At sentencing, the State requested that the court impose two additional one-year terms of jail after the stipulated term of seven-and-a-half years in prison.

When the trial court enters a plea agreement, the court makes a finding that the plea is a knowing, intelligent, and voluntary waiver of the a defendant's constitutional rights. In this case, neither the express terms of the plea agreement nor my discussion with Mr. Gibson adequately advised him that his sentence could exceed seven-and-a-half years in prison. This case received media attention, with articles calling for a longer sentence.

Although one could easily bow to the pressures of the public, a judge must also protect the rights of a defendant. Given the State's concerns regarding the biological mother's refusal to testify at trial, I understood the reasons for the State's plea offer. An easy approach for judges is to be swayed by public uproar and avoid difficult or controversial decisions; however, such an approach is exactly what our founding fathers entrusted the judicial branch to protect against.

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

Although I did not practice either family or criminal law before taking the bench, in both rotations I was quickly asked to serve as the Associate Presiding Judge of each department and asked to train our new judges. In both departments, I worked with our technology group to find efficiencies for the judges and our staff.

I have also participated in numerous county and statewide committees, programs, and initiatives to improve our judicial system. At the state level, I serve on the Advisory Committee on the Arizona Rules of Evidence, the Court Leadership Institute of Arizona, the Steering Committee on Arizona Case Processing Standards, the Committee on Time Periods for Electronic Display of Superior Court Case Records, and the Task Force on the Arizona Rules of Criminal Procedure. I also chaired the Superior Court Records Retention Schedule Revision Committee.

In addition, I served on the Arizona Superior Court committee to develop the electronic sentencing module for the criminal department in Maricopa County. As a result of e-sentencing, our court has electronically distributed over 50,000 documents and now maintains sentencing data electronically for analysis and evaluation.

I have also served on numerous committees for the Arizona Superior Court, including chairing the court's education day and helping develop a program to reform the court's resource center. Through a grant from the Governor's office, the court's resource center has been improved to include the services of 37 college students who help provide legal information to self-represented litigants who are attempting to obtain orders of protection and others who are trying to navigate through the judicial system without a lawyer. For example, in our Order of Protection Center individuals who are terrified often try to complete the necessary paperwork. As they struggle through the forms, they are overcome with insecurity and self-doubt. The process feels overwhelming. If they complete the necessary forms, they are left to navigate through the courthouse to find the filing counter and eventually their designated courtroom. Many do not complete the process. Through our new AmeriCorps program, we train college students to provide individualized legal information and help physically escort individuals around the courthouse. Often, that extra help is enough to give the party the strength to complete the order of protection to secure their safety and the safety of their children, providing law enforcement with the tools to help keep them safe. Wait times to assist individuals has dropped to zero. Our AmeriCorps students also help individuals find resources in the community such as domestic violence shelters, food banks, and bus tickets.

I am also an active member of our county and statewide community outreach programs. The statewide committee, Our Courts Arizona, focuses on developing outreach programs to help individuals learn about our justice system and judges. We developed interactive presentations including programs on the Bill of Rights, the Rule of Law, and how judges are accountable. I have presented to numerous groups

ranging from church groups to Inns of Court. Helping individuals understand how and why judges make decisions and how to hold us accountable is critical to ensuring the public confidence in our judiciary.

BUSINESS AND FINANCIAL INFORMATION

32. 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? **No.** If so, give details, including dates.
33. Are you now an officer, director or majority stockholder, or otherwise engaged in the management, of any business enterprise? **No.** 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.
- Is it your intention to resign such positions and withdraw from any participation in the management of any such enterprises if you are nominated and appointed? **Not applicable.** If not, give reasons.
34. Have you filed your state or federal income tax returns for all years you were legally required to file them? **Yes.** If not, explain.
35. Have you paid all state, federal and local taxes when due? **Yes.** If not, explain.
36. Are there currently any judgments or tax liens outstanding against you? **No.** If so, explain.
37. Have you ever violated a court order, including but not limited to an order for payment of child or spousal support? **No.** If so, explain.
38. Have you ever been a party to a lawsuit, including bankruptcy but excluding divorce? **Yes.** If so, identify the nature of the case, your role, the court, and the ultimate disposition.

1. **Shortly before our wedding, our caterer breached her contract with us. She locked the doors of the reception hall and refused to**

Filing Date: _____

return our telephone calls. After our wedding, we filed a lawsuit alleging breach of contract. Defendant caterer failed to appear and Jones County Court (Iowa) entered a default judgment in our favor. We subsequently reached an agreement for payment; however, payment was never made. We chose not to collect on the judgment because the defendant was a single mother who continues to live in my small hometown.

2. In 2007, after taking a sofa cushion in for alterations, the alterations business lost our cushion cover. We repeatedly attempted to reach settlement; however, the defendant refused to pay. We filed a lawsuit in Dreamy Draw Justice Court. The court granted judgment in our favor in the amount of \$1,014.78.

39. Do you have any financial interests, investments or retainers that might conflict with the performance of your judicial duties? **No.** If so, explain.

CONDUCT AND ETHICS

40. Have you ever been terminated, expelled, or suspended from employment or any school or course of learning on account of dishonesty, plagiarism, cheating, or any other "cause" that might reflect in any way on your integrity? **No.** If so, give details.

41. a. Have you ever been charged with, arrested for, or convicted of any felony, misdemeanor, or violation of the Uniform Code of Military Justice? **No.** If so, identify the nature of the offense, the court, and the ultimate disposition.

b. Have you, within the last 5 years, been charged with or cited for any traffic-related violations, criminal or civil, that are not identified in response to question 41(a)? If so, identify the nature of the violation, the court, and the ultimate disposition.

I believe I may have received a citation and paid a fine for exceeding the posted speed limit in the past five years.

42. If you performed military service, please indicate the date and type of discharge. If other than honorable discharge, explain.

Not applicable.

43. List and describe any litigation (including mediation, arbitration, negotiated settlement and/or malpractice claim you referred to your insurance carrier) concerning your practice of law.

None.

44. List and describe any litigation involving an allegation of fraud in which you were or are a defendant.

None.

45. List and describe any sanctions imposed upon you by any court for violation of any rule or procedure, or for any other professional impropriety.

None.

46. To your knowledge, has any formal charge of professional misconduct ever been filed against you by the State Bar or any other official attorney disciplinary body in any jurisdiction? **No.** If so, when? How was it resolved?

47. Have you received a notice of formal charges, cautionary letter, private admonition or other conditional sanction from the Commission on Judicial Conduct or any other official judicial disciplinary body in any jurisdiction? **No.** If so, in each case, state in detail the circumstances and the outcome.

48. During the last 10 years, have you unlawfully used controlled substances, narcotic drugs or dangerous drugs as defined by Federal and State laws? **No.** If your answer is "Yes," explain in detail. (Unlawful use includes the use of one or more drugs and/or the unlawful possession or distribution of drugs. It does not include the use of drugs taken under supervision of a licensed health care professional or other uses authorized by Federal law provisions.)

49. In the past year, have you ever been reprimanded, demoted, disciplined, placed on probation, suspended, cautioned or terminated by an employer as a result of your alleged consumption of alcohol, prescription drugs or illegal use of drugs? **No.** If so, state the circumstances under which such action was taken, the name(s) of any persons who took such action, and the background and resolution of such action.

50. Within the last five years, have you ever been formally reprimanded, demoted, disciplined, cautioned, placed on probation, suspended or terminated by an employer? **No.** If so, state the circumstances under which such action was taken, the date(s) such action was taken, the name(s) of any persons who took such action, and the back ground and resolution of such action.
51. Have any of your current or former co-workers, subordinates, supervisors, customers or clients ever filed a complaint or accusation of misconduct against you with any regulatory or investigatory agency, or with your employer? **No.** If so, state the date(s) of such accusation(s), the specific accusation(s) made, and the background and resolution of such action(s).
52. 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 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.
53. Within the last five years, have you failed to meet any deadline imposed by a court order or received notice that you have not complied with the substantive requirements of any business or contractual arrangement? **No.** If so, explain in full.
54. 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 in full.

PROFESSIONAL AND PUBLIC SERVICE

55. Have you published any legal or non-legal books or articles? **Yes.** If so, list with the citations and dates.
- ***Fulfilling Batson and its Progeny: A Proposed Amendment to Rule 24 of the Federal Rules of Criminal Procedure to Attain a More Race- and Gender-Neutral Jury Selection Practice, 80 Iowa L. Rev. 1327 (1995)***
 - ***Toward a Model Expert Witness Act: An Examination of the Use of Expert Witnesses and a Proposal for Reform, University of***

Iowa Law Review, Co-author, Minority Report, 80 Iowa L. Rev. 1269 (1995)

- ***Environmental Insurance: Just an Expense or a Real Solution to Pollution?*, Co-author, ENRLS Update, approximately 2001**
- ***Criminal Liability for Environmental Violations*, Co-author, *The Most Commonly Asked Questions in Environmental Law*, published by the Maricopa County Bar Association, 2005**

56. Are you in compliance with the continuing legal education requirements applicable to you as a lawyer or judge? **Yes.** If not, explain.

57. 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.

I am a frequent speaker. I have taught many programs on the Rules of Evidence to lawyers and judges.

While on family court, I presented at numerous continuing legal education seminars on family court issues. I organized an education roundtable between judges and school officials to discuss relevant issues at the intersection of judicial decision-making and school operation.

Similarly, I am a frequent speaker regarding issues related to criminal law, including conducting settlement conferences. I spoke at the National Forensic Witness Conference regarding the use of expert witnesses in criminal and civil courts. I have presented on case processing standards and calendar management. I have also spoken around the state on how judges make decisions and the importance of the Rule of Law and the Bill of Rights in our constitutional democracy.

Prior to becoming a judge, I spoke on trial advocacy and various environmental topics at conferences and provided hazardous materials manager training at Gateway Community College.

58. List memberships and activities in professional organizations, including offices held and dates.

- **National Chair, Environmental Energy and Natural Resource Committee, American Bar Association Young Lawyers Division,**

2002 – 2003

- **Regional Coordinator for the Arizona High School Mock Trial Tournament, co-sponsored by the Arizona Foundation for Legal Services and Education and the Young Lawyers Division of the Arizona State Bar, 2000 – 2012**
- **Member of Executive Council and Treasurer, Arizona State Bar Environment and Natural Resources Law Section, 2002 – 2003 (Member); 2003 – 2005 (Treasurer); 2006 – 2007 (Programs Chair)**

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.**

I served as a co-chair of the 2009 Arizona State Bar Convention along with Commissioner Wendy Morton.

Historically, a number of lawyers and I wrote the case material for the Arizona High School Mock Trial Tournament. We chose a topic that was timely and challenged students to understand both sides of a difficult issue, including a religious discrimination case, wrongful death from a student's use of performance enhancing drugs, and a murder case arising from death caused by forest fire. We also drafted the 2011 high school mock trial national case material involving alleged nuisance and trespass caused by a mine on Indian land.

As a regional coordinator of the Arizona High School Mock Trial Program, I recruited new schools, connecting volunteer attorney coaches with schools, and recruited judges for the competition. I also helped coordinate the competitions.

Throughout my career, I also provided instruction to judges, lawyers, teachers, police officers, and probation officers on how to bring law-related education into the classroom through various programs sponsored by the Arizona Foundation for Legal Services and Education and the Young Lawyers Division of the Arizona State Bar.

As noted above, I served as the National Chair of the Environment, Energy and Natural Resource Committee of the American Bar Association Young Lawyers Division. During that term, we published newsletters and provided additional services to the members. I also served on the Executive Council of the Environment and Natural Resource Section of the Arizona State Bar.

I also presented numerous speeches at various organizations through

the Arizona State Bar Speakers' Bureau.

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.

Introducing young people to careers in the law is important to me. Since I was five years old, I wanted to be a lawyer. However, I wasn't certain that our legal system had a place for the daughter of a hog farmer, ignorant about trial skills, but who worked hard and learned fast. In college, a local prosecutor and plaintiffs' lawyer gave me a coveted position on the Drake University mock trial team. They convinced me that I had a place in our legal system. I am committed to bringing that opportunity to Arizona's youth.

After 12 years as a regional coordinator for the Arizona High School Mock Trial Program, I returned to coaching high school students last year. Before our first competition, I told the students to dress professionally, advising the young men to wear a suit or a sport coat. As we entered the courthouse on the day of the competition, one of the nervous, wide-eyed students asked me about his clothing. This young man had a suit coat on and under his coat was a Nike jacket. Innocently, with nerves racing he asked which jacket I preferred, his suit coat or his "sport coat." Reassuring him that his suit coat was absolutely perfect, I agreed to hold his "sport coat" until we finished the day. Over the summer, this young man joined my husband and another lawyer to teach trial skills to the young men attending Boys State. Today, this young man knows that there is a place for him in our legal system. Although unavailable this year due to my trial schedule, I have provided trial instruction in 2008 and 2015 for American Legion Boys State at N.A.U.

In addition to mock trial, I previously represented victims of domestic violence in injunctions against harassment and orders of protection. I also supervised various associates in our firm in their work with indigent clients.

I also coached the Arizona State University Intercollegiate Mock Trial Team that placed 2nd at the American Mock Trial Association National Tournament in 2000.

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

I previously served on the Executive Board of UMOM New Day Centers, Arizona's largest homeless shelter for families, and assisted with the Bryan Cave Mother's Day Gala, which raised more than \$600,000.00 for UMOM. My husband and I co-chaired the event in 2006 raising \$250,000.00.

I also assisted in establishing the John and Sandra Day O'Connor Award, which honored one Arizona woman each year who successfully balanced professional success, family, and philanthropic endeavors.

Early in my practice I also helped establish two 501(c)(3) non-profit organizations. While I was involved with these organizations, the entities:

- Provided backpacks and school supplies to over 100 children in homeless shelters, domestic violence centers, and children who were affected by HIV;**
- Filled 75 Easter baskets for children at a domestic violence center;**
- Created birthday boxes and welcome kits for women and children at domestic violence shelters;**
- Hosted annual silent auctions, raising tens of thousands of dollars for various organizations;**
- Adopted over 200 individuals, providing each family with new and gently used clothing, toys, household items, furniture, beds, bikes, a gift certificate for groceries, a gift certificate to Target, Christmas trees, and decorations;**
- Led a diaper drive for Children's Crisis Nursery;**
- Facilitated a food drive for the St. Vincent de Paul Society;**
- Raised thousands of dollars for the American Cancer Society and Making Strides Against Breast Cancer; and**
- Assisted in a clothing drive for Harbor Light, a drug and alcohol rehabilitation facility sponsored by the Salvation Army.**

Restrictions of the Arizona Code of Judicial Conduct prevent me from participating in certain fundraising activities as a judge. However, now I have the opportunity to support our children as they find their true passion for community and public service. We have picked up trash in local washes and parks, served food at local food banks, collected water for the homeless, and walked dogs at the Humane Society. Our fifteen year old daughter is currently volunteering at a hospital, and our twelve year old daughter is counting the days until she can volunteer at a local hospice.

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

- **Charter 100 Member, an organization of approximately 200 Arizona women leaders from diverse fields including the arts, education, politics, government, business, and science, 2015 – present**
- **Phoenix Business Journal’s Forty Under 40, 2009**
- **Mark J. Santana Law-Related Education Award from the Arizona Foundation for Legal Services and Education, which recognizes exceptional contributions of Arizona attorneys to law-related education, 2008**
- **Recognized as one of the top 50 women business leaders – Phoenix Business Journal, 2007 & 2008**
- **Featured as a business leader who affects Arizona rules and public policy, Arizona Capitol Times, February 2007**
- **Finalist for the Greater Phoenix Chamber of Commerce’s Athena Award, which recognizes professional excellence, community service, and an active commitment to helping women attain professional success, 2006**
- **Arizona Woman’s Golden Heart of Business Finalist, 2006**

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

- **Precinct Committeeman, Arizona Republican Party, 1998 – 2009.**

Have you been registered to vote for the last 10 years? **Yes.**

Have you voted in all general elections held during those years? **Yes.** If not, explain.

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

My family is the center of my life – my husband and our two daughters.

Also at the center of my life is my faith. Previously active with St. Francis Xavier Catholic Church, we moved parishes and joined St. Paul's Catholic Church in Moon Valley. For many years I enjoyed sharing the word of God as a lector, but during one training session years ago a member of our church admonished the lectors that our presentation can influence whether the other individuals in the church have a positive or negative experience. On one occasion while serving as a lector I looked into the audience and saw a litigant. In that moment I felt like my presence deprived him of an experience he deserved. Although I love to lector, I have stopped.

HEALTH

63. Are you physically and mentally able to perform the essential duties of a judge in the court for which you are applying? **Yes.**

ADDITIONAL INFORMATION

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

My mom was deaf. I often watched as people underestimated her. Growing up in rural Iowa, I watched her doubt her own ability to work off the farm. I saw that although she was a strong woman she was often reluctant to request or expect equal rights. The challenges that my mom faced motivated me to become the first person in my family to graduate from college.

I also have been exposed to unequal treatment of the mentally challenged. My aunt was mentally challenged. As a child, I recall the feelings of shock and disappointment the first time I observed others treat her with disrespect or devalue her as a person. After my grandmother died, my father helped care for her. When he was unexpectedly killed, my brother and I stepped in. Complications following a stem cell transplant altered the quality of her life, and finding consistent care too hard to ensure while she lived in Iowa, we moved her to Phoenix. Making the decision to discontinue her active treatment and focus on palliative care was one of the most difficult

Filing Date: _____

decisions of my life.

When I moved to Phoenix and saw our homeless population I tried to learn more about the problem and how I could help. My husband and I started working with UMOM New Day Center. We took our children to the Center to help with improvements and work along with the residents to paint walls and pick weeds. We also worked to raise money.

I believe my role as a female partner in a large law firm is also relevant to the consideration of diversity. Although women now make up over 50% of law school graduates, women are significantly under-represented in large law firms and on some courts.

Also, I understand the diversity of small and large jurisdictions. As a lawyer I practiced in many jurisdictions around the state. As a judge, I serve as a trial judge in the fourth largest court in the country. I know how our judicial system functions and can appreciate the efficiencies and challenges of a court's size.

Although I work and live in Phoenix, at my roots I am a small-town girl. To give perspective, in my hometown of Anamosa, Iowa a city councilman was elected with two votes – both write-ins, one from his wife and the other from his neighbor. Granted, 1,400 people lived in the voting district, but only 58 were eligible to vote because the remaining residents were housed in the prison located in the center of my town.

65. Provide any additional information relative to your application or qualifications you would like to bring to the Commission's attention at this time.

As judges, we must respect the primacy of the United States and Arizona Constitutions and the system of separation of powers and checks and balances. It is our responsibility to put the Rule of Law above the political issues of the day. The judiciary must determine whether a law enacted by the legislature or an administrative action taken by the executive branch violates a constitutional provision, but courts should not re-write laws or administrative rules.

Although judges do not legislate, we are not prohibited from innovating and leading within our own branch of government. Like the members of the other branches of government, we are servants of the people. And as servant leaders, we should constantly be looking to improve access to justice and judicial efficiencies.

Moreover, we are uniquely positioned to identify problems and bring together groups of individuals to help propose solutions to problems that impact our judiciary and the parties who access our courts. Whether working with schools to help teachers and principals better understand court orders, improving efficiencies for parties to resolve cases prior to trial, or partnering with colleges to use students to provide individualized legal information, as judges we can improve the judiciary and our community's access to justice.

66. If you were selected by this Commission and appointed by the Governor to serve, are you aware of any reason why you would be unable or unwilling to serve a full term? **No.** If so, explain.
67. If selected for this position, do you intend to serve fully, including acceptance of rotation to areas outside your areas of practice or interest? **Yes.** If not, explain.
68. Attach a brief statement explaining why you are seeking this position.

See Attachment C.

69. Attach three professional writing samples, which you personally drafted (e.g., brief or motion). The samples should be no more than a few pages in length.

See Attachment D.

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.

70. If you have ever served as a judicial or quasi-judicial officer, mediator or arbitrator, attach sample copies of not more than two written orders, findings or opinions (whether reported or not) which you personally drafted. The writing sample(s) should be no more than a few pages in length. 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.

See Attachment E.

71. 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 two performance reviews.

See Attachment F.

**-- INSERT PAGE BREAK HERE TO START SECTION II
(CONFIDENTIAL INFORMATION) ON NEW PAGE --**

ATTACHMENT A

**THE CURRENT JUDGES AND COMMISSIONERS
OF THE SUPERIOR COURT OF ARIZONA IN
MARICOPA COUNTY**

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

IN THE MATTER OF DESIGNATION)
OF DIVISION NUMBERS)
_____)

ADMINISTRATIVE ORDER
NO. 2016-065

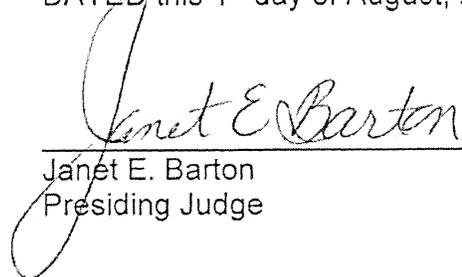
IT IS ORDERED, effective July 31, 2016, establishing division numbers for the respective Judges of the Superior Court as follows:

<u>DIVISION</u>	<u>JUDGE</u>	<u>DIVISION</u>	<u>JUDGE</u>
1.	Robert H. Oberbillig	36.	Joseph C. Welty
2.	Peter C. Reinstein	37.	Dean M. Fink
3.	David M. Talamante	38.	Hugh E. Hegyi
4.	Alfred M. Fenzel	39.	Joseph C. Kreamer
5.	Arthur T. Anderson	40.	Roger E. Brodman
6.	Warren J. Granville	41.	Susanna Pineda
7.	Karen L. O'Connor	42.	Daniel G. Martin
8.	Janet E. Barton	43.	Dawn M. Bergin
9.	Colleen A. McNally	44.	Samuel J. Myers
10.	John R. Ditsworth	45.	Randall H. Warner
11.	Cari A. Harrison	46.	Aimee L. Anderson
12.	Sherry K. Stephens	47.	Edward W. Bassett
13.	Andrew G. Klein	48.	Susan M. Brnovich
14.	Teresa A. Sanders	49.	David Bruce Gass
15.	David K. Udall	50.	M. Scott McCoy
16.	Connie Contes	51.	James P. Beene
17.	Margaret R. Mahoney	52.	David J. Palmer
18.	George H. Foster, Jr.	53.	Pamela S. Frasher Gates
19.	Sally S. Duncan	54.	Christopher A. Coury
20.	John Rea	55.	Daniel J. Kiley
21.	Rosa Mroz	56.	Peter A. Thompson
22.	Jeanne M. Garcia	57.	Douglas Gerlach
23.	Michael W. Kemp	58.	Mark H. Brain
24.	Bruce R. Cohen	59.	Danielle J. Viola
25.	Kristin C. Hoffman	60.	James T. Blomo
26.	Jo Lynn Gentry	61.	Michael J. Herrod
27.	Timothy J. Ryan	62.	Cynthia J. Bailey
28.	Michael D. Gordon	63.	Katherine M. Cooper
29.	Paul J. McMurdie	64.	Jay M. Polk
30.	John R. Hannah, Jr.	65.	Janice K. Crawford
31.	Lisa Daniel Flores	66.	Pamela Hearn Svoboda
32.	Jose S. Padilla	67.	Bradley Astrowsky
33.	Karen A. Mullins	68.	David Cunanan
34.	Christopher T. Whitten	69.	Joan M. Sinclair
35.	William L. Brotherton, Jr.	70.	Suzanne E. Cohen

<u>DIVISION</u>	<u>JUDGE</u>	<u>DIVISION</u>	<u>JUDGE</u>
71.	Jay R. Adleman	85.	Jeffrey A. Rueter
72.	Joseph P. Mikitish	86.	Stephen M. Hopkins
73.	Kathleen Mead	87.	Joshua D. Rogers
74.	Rodrick J. Coffey	88.	Ronee Korbin Steiner
75.	Patricia A. Starr	89.	Kerstin G. LeMaire
76.	Lori Horn Bustamante	90.	Alison S. Bachus
77.	Timothy J. Thomason	91.	Howard D. Sukenic
78.	Geoffrey Fish	92.	Roy C. Whitehead
79.	Frank Moskowitz	93.	Gregory S. Como
80.	Jennifer Ryan-Touhill	94.	Laura M. Reckart
81.	Jennifer Green	95.	Kristin R. Culbertson
82.	Dewain D. Fox	96.	VACANT
83.	James D. Smith	97.	VACANT
84.	Theodore Campagnolo	98.	VACANT

IT IS FURTHER ORDERED terminating Administrative Order No. 2016-055.

DATED this 1st day of August, 2016



 Janet E. Barton
 Presiding Judge

Original: Clerk of the Superior Court

ATTACHMENT B

**NAMES, ADDRESSES, AND TELEPHONE
NUMBERS OF ALL COUNSEL INVOLVED IN
*JOSE ESCALANTE AND MARIA MAGDALENA
ESCALANTE V. BONDEX INT'L INC.***

ATTACHMENT B

**Lloyd Rabb III
Rabb & Rabb, PLLC
4570 North First Avenue, Suite 120
Tucson, Arizona 85718
Telephone: (520) 888-6470
Email unknown
Counsel for Plaintiffs**

**Troyce G. Wolf
Wolf & Zacharopoulos LLP
2911 Turtle Creek Boulevard, Suite 300
Dallas, Texas 75219
Telephone: (214) 599-8320
twolf@wolfzachlaw.com
Counsel for Plaintiffs**

**Russell B. Stowers PLLC
La Paloma Corporate Center
3573 East Sunrise Drive, Suite 215
Tucson, Arizona 85741
Telephone: (520) 209-2777
Email unknown
Counsel for Defendants TH Agriculture & Nutrition LLC and Philips
Electronics North America Corporation**

**Judge Sean Brearcliffe
Arizona Superior Court in Pima County
110 West Congress Street
Tucson, Arizona 85701
Telephone: (520) 724-3029
Counsel for Defendant Rite-Way Ventilating Company**

**Tamara Cook
Renaud Cook Drury Mesaros PA
One North Central, Suite 900
Phoenix, Arizona 85004
Telephone: (602) 256-3055
tcook@rcdmlaw.com
Counsel for Defendant Kelly-Moore Paint Company, Inc.**

John C. Lemaster
Riley, Carlock & Applewhite
One North Central Avenue, Suite 1200
Phoenix, Arizona 85004
Telephone: (602) 440-4831
jlemaster@rcalaw.com
Counsel for Defendant Georgia-Pacific Corporation

James Madonado
Information not currently available
Counsel for Defendant Garlock Sealing Technologies, LLC

Bradley Petersen
Slattery Petersen PLLC
2828 North Central Avenue, Suite 1111
Phoenix, Arizona
Telephone: (602) 507-6108
bpetersen@slatterypetersen.com
Counsel for Defendants General Motors Corporation and Electro-Motive Diesel

John Hendricks
Meagher & Geer PLLP
8800 North Gainey Center Drive, Suite 261
Scottsdale, Arizona 85258
Telephone: (480) 624-8569
jhendricks@meagher.com
Counsel for Defendant Crane Company

Donald Myles
Jones Skelton & Hochuli PLC
Two Renaissance Square
40 North Central Avenue, Suite 2700
Phoenix, Arizona 85004
Telephone: (602) 263-1700
dmyles@jshfirm.com
Counsel for Defendant Bondex International, Inc. and RPM International, Inc.

Brenda Radmacher
Information not currently available
Counsel for Defendant State Drywall, Inc.

**Amy Samberg
Foran Glennon
One East Washington Street, Suite 500
Phoenix, Arizona 85004
Telephone: (602) 777-6230
asmaberg@fgppr.com
Counsel for Defendants Kaiser Gypsum and Kaiser Cement**

**Mary Price Birk
Barker Hostetler
1801 California Street, Suite 4400
Denver, Colorado 80202
Telephone: (303) 764-4041
mbirk@bakerlaw.com
Counsel for Defendant Cooper Industries**

ATTACHMENT C

**A BRIEF STATEMENT EXPLAINING WHY I AM
SEEKING THIS POSITION**

ATTACHMENT C

I believe the Arizona Supreme Court would benefit from the addition of an intelligent justice who is committed to textualism and who is loath to legislate. I believe the justice should have a forceful, congenial personality. The person should work hard and have an unwavering confidence when right. The person should be a skilled, cooperative writer who can communicate a decision with precision, spot-on analysis, and clarity. The person should have a breadth of experience and an appropriate judicial temperament. And the person should understand the court's limited role within our system of government. As I shrug off the cloak of humility my grandmother tried to wrap around my shoulders throughout my life, I state with confidence that I am a person with those qualities.

Few who know me could avoid the description that I have a forceful, congenial personality, and a resolute commitment to my judicial philosophy and beliefs. I also understand the power and value of the majority. A dissenter may be principled, but with persuasion, cooperation, and a well-supported analysis, the lone voice can become a majority. Working in an international law firm, virtually every motion or brief I submitted to the court was written with the involvement of a team of lawyers. I understand how to bring the strength of my voice and analysis to a written product while preserving the approval of many different, equally strong opinions.

As a lawyer, I worked on a wide range of cases, from technical environmental matters, trademark, to non-compete agreements. I served as a family court judge for over three years, and I have served as a criminal trial judge for almost four years. During my time on the bench, I have handled matters from capital cases to grandparent visitation with an appropriate and approachable judicial temperament. Because many of the cases the Arizona Supreme Court reviews involve factual determinations from trial courts, my perspective as a trial court judge would be valuable.

Finally, I am committed to improving our judiciary, not by attempting to make law or trying to divine the collective societal conscience, but by improving access to justice and making our justice system more efficient.

ATTACHMENT D

THREE PROFESSIONAL WRITING SAMPLES

ATTACHMENT D

This writing sample is an excerpt from a brief filed with the Ninth Circuit Court of Appeals

II. PARTY A AND B’S EXCLUSIVE CERCLA REMEDY IS A CONTRIBUTION ACTION FOR EQUITABLE ALLOCATION UNDER SECTION 113(f).

Having been sued under section 107 by the State and settled their liability with the State in the Consent Decree, Party A and B have the exclusive remedy of a CERCLA section 113(f) contribution claim against Party C. *See* CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1) (“Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title.”); CERCLA § 113(f)(3)(B), 42 U.S.C. § 9613(f)(3)(B) (“A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially-approved settlement may seek contribution from any person who is not party to a settlement . . .”).

Congress specifically included the right to contribution as the remedy under section 113(f)—rather than the right to joint and several liability—recognizing that parties seeking recovery under section 113(f) would share a common liability. *See Atl. Research*, 551 U.S. at 138-39. By definition, contribution is a “‘tortfeasor’s

right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share, the shares being determined as a percentage of fault.” *Id.* (quoting *Black’s Law Dictionary* 353 (8th ed. 1999)).

By using the term “contribution”, Congress intended that responsible parties would determine their liability equitably through a judicial allocation process in which the court would “allocate response costs among [the] liable parties using such equitable factors as the court determines are appropriate.” CERCLA § 113(f)(1), 42 U.S.C. § 113(f)(1). Allowing Party A and B to opt out of their statutory contribution remedy and pursue joint and several liability under section 107(a) would frustrate Congress’ intent as manifested in the plain language of section 113(f).

- A. The plain language and structure of CERCLA limits Party A and B to a claim for contribution under CERCLA section 113(f).

Party A and B argue that this Court should determine their CERCLA remedy after simply reading section 107(a). However, rules of statutory construction require a court interpreting a statute to look at the statute as a whole and “not look merely to a particular clause in which general words may be used, but . . . take in connection with it the whole statute . . . and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature.” *Kokoszka v. Belford*, 417 U.S. 642, 650

(1974) (internal citations omitted); *see also Atl. Research*, 551 U.S. at 135 (embracing holistic reading of CERCLA).

As confirmed by the Supreme Court, when looking at CERCLA as a whole, section 107(a) and section 113(f) work together as complementary, yet distinct remedies for parties in different procedural circumstances. *Atl. Research*, 551 U.S. at 138 & 139 (noting that CERCLA’s section 107(a) and section 113(f) remedies, although complementary, are “clearly distinct”); *see also Cooper Indus.*, 543 U.S. at 163 n.3; *Kotrous*, 523 F.3d at 932. In *Atlantic Research*, the Supreme Court noted that unlike section 107(a), section 113(f) was enacted for parties who share a common liability—parties who were sued under section 107 or settled their liability with the State. 551 U.S. at 138-39.

Without ruling out the possibility that section 107(a) and section 113(f) may occasionally overlap, the Supreme Court advised that the choice of remedies between section 107(a) and section 113(f) simply does not exist. *Atl. Research*, 551 U.S. at 139 n.6, 140; *see also Kotrous*, 523 F.3d at 932 (“A PRP cannot choose remedies, but must proceed under § 113(f)(1) if the party has paid to satisfy a settlement agreement or a court judgment pursuant to an action instituted under § 106 or § 107.”) In fact, in affirming the Eighth Circuit, the Supreme Court approved that court’s reasoning that PRPs cannot choose remedies: “PRPs that ‘have been subject to §§ 106 or 107 enforcement actions are still required to use §

113, thereby ensuring its continued vitality.’” *Atl. Research*, 551 U.S. at 134 (quoting *Atlantic Research Corp. v. United States (Atlantic Research I)*, 459 F.3d 827, 836-37 (8th Cir. 2006)). Therefore, following the Supreme Court’s statements in *Atlantic Research* and reviewing CERCLA in its entirety, this Court should conclude that parties, such as Party A and B, who have claims for contribution under section 113(f) should not be able to elect a different remedy and thereby avoid Congress’ requirement of equitable allocation among joint tortfeasors.

Contrary to Party A and B’s assertions, the plain language of CERCLA grants settling PRPs a contribution claim for costs incurred pursuant to a consent decree. Specifically, section 113(f)(3)(B) grants the right of contribution to a PRP that has resolved its liability to the United States or a State “for some or all of a response action” or “for some of all of the costs of such action.” The first phrase (“for some or all of a response action”) refers to the expenses incurred in the course of a liable party’s direction of a site’s cleanup while the second phrase (“for some of all of the *costs* of such action”) refers to reimbursement of cleanup costs incurred under the government’s hegemony. *United Technologies Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 102 (1st Cir. 1994).

If election of remedies were permissible (a concept the Supreme Court flatly rejected), a PRP who settles its liability with the United States or a State and incurs

costs in performing the agreed upon cleanup would always forego its contribution claim and instead elect to pursue recovery of its costs under section 107(a). Such an outcome would render meaningless Congress' specific grant of contribution to PRPs that resolve their liability "for some or all of a response action." Such an interpretation violates a cardinal principle of statutory construction: A statute must be interpreted to give effect to all of its terms. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001); *Twentieth Century Fox Film Corp. v. Entm't Distrib.*, 429 F.3d 869, 885 (9th Cir. 2005) (stating that courts must give "every word in a statute meaning. To do otherwise would be to violate the long standing principle of statut[ory] interpretation that statutes should not be construed to make surplusage of any provision" (internal quotations omitted)).

In addition to the rules of statutory construction mentioned above, the Supreme Court and this Court have long embraced the principle that statutes should be interpreted to avoid an unjust or absurd result. *See, e.g., Hagggar Co. v. Helvering*, 308 U.S. 389, 394 (1940); *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315, 333 (1938); *Arizona State Bd. for Charter Schools v. U.S. Dep't of Educ.*, 464 F.3d 1003, 1008 (9th Cir. 2006) ("[W]ell-accepted rules of statutory construction caution us that statutory interpretations which would produce absurd results are to be avoided." (internal citations and quotations omitted)).

Party A and B's distorted interpretation of CERCLA, if accepted, would allow them, as sued and settled PRPs, to attempt to shift the totality of their costs to Party C and, at the same time, attempt to invoke contribution protection under CERCLA section 113(f)(2) to deflect any contribution counterclaim. This absurd and unjust result—that CERCLA would permit a PRP that has admitted its liability to the State in a judicially-approved consent decree to bring a separate lawsuit and use contribution protection to avoid their financial responsibility—is at odds with CERCLA's plain language, structure, policy, and legislative history.

Bryan Cave LLP
Two North Central Avenue, Suite 2200
Phoenix, Arizona 85004-4406

1 BRYAN CAVE LLP, #00145700
2 Pamela S. Gates, #017234, Pima Co. #86275
3 Anthony W. Merrill, #022598, Pima Co. #85593
4 Two North Central Avenue, Suite 2200
5 Phoenix, Arizona 85004-4406
6 Telephone: (602) 364-7000
7 Fax: (602) 364-7070

6 BRYAN CAVE LLP
7 Robert E. Boone III, California Bar # 132780 (admitted *pro hac vice*)
8 120 Broadway, Suite 300
9 Santa Monica, California 90401-2386
10 Telephone: (310) 576-2100
11 Facsimile: (310) 576-2200
12 Attorneys for Defendant BHP Copper Inc.

11 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
12 **IN AND FOR THE COUNTY OF PIMA**

13 JOSE ESCALANTE and MARIA
14 MAGDALENA ESCALANTE,

15 Plaintiffs,

16 vs.

17 BONDEX INTERNATIONAL, INC.; et al.,
18 Defendants.

No. C2006-5790

**BHP COPPER INC.'S MOTION
FOR SUMMARY JUDGMENT**

(Assigned to the Hon. Leslie Miller)

(Oral Argument Requested)

19 Pursuant to Ariz. R. Civ. P. 56 and Local Rule 3.2, Defendant BHP Copper Inc.
20 (“BHP”), formerly known as Magma Copper Company, moves for summary judgment
21 against Plaintiffs Jose and Maria Escalante (collectively “Plaintiffs”). The exclusive remedy
22 provisions of Arizona’s Workers’ Compensation Act bar Plaintiffs’ claims. See A.R.S.
23 §23-1022(a); accord Gamez v. Brush Wellman, Inc., 201 Ariz. 266, 269, 34 P.3d 375, 378
24 (Ct. App. 2001) (upholding grant of summary judgment against employee-plaintiff because
25 “work-related injury claims are generally redressed exclusively under Arizona’s workers’
26 compensation scheme”); Ringling Bros. and Barnum & Bailey Combined Shows, Inc. v.
27 Superior Court, 140 Ariz. 38, 680 P.2d 174 (Ct. App. 1983).
28

1 Plaintiffs’ asbestos personal injury action alleges that BHP, Mr. Escalante’s former
2 employer, created workplace conditions that proximately caused Plaintiffs’ injuries. (See
3 Separate Statement of Facts, filed concurrently herewith (“SOF”) ¶¶ 1, 15). During Mr.
4 Escalante’s deposition, he specifically stated that all of the work he performed in BHP’s
5 locomotive shop, or at other mine-related facilities, that allegedly exposed him to asbestos
6 was done as a part of his employment with BHP. (See SOF ¶¶ 2-8, 15).

7 Throughout Mr. Escalante’s employment, BHP maintained workers’ compensation
8 insurance in accordance with A.R.S. § 23-961. (Id. at ¶¶ 16-21). Mr. Escalante did not
9 reject his right to benefits under Arizona’s workers’ compensation system prior to his
10 alleged injury. (Id. at ¶¶ 18-21). Consequently, this Court lacks subject matter jurisdiction
11 over Plaintiffs’ tort claims against BHP. The appropriate avenue for Mr. Escalante to have
12 sought compensation for his alleged work-related injury is through the workers’
13 compensation system. See A.R.S. § 23-906, 23-1022(a); Gamez, 201 Ariz. at 271, 34 P.3d
14 at 380; accord Swichtenberg v. Brimer, 171 Ariz. 77, 82, 828 P.2d 1218, 1223 (Ct. App.
15 1992) (holding that the exclusivity provisions of the workers’ compensation scheme prevent
16 the Superior Court from exercising subject matter jurisdiction over a tort action against an
17 employer by an employee injured in the course of his employment).

18 BHP supports its Motion for Summary Judgment with the following Memorandum of
19 Points and Authorities, the accompanying Arizona Rule of Civil Procedure 56(c)(2)
20 Separate Statement of Undisputed Facts, and the deposition of Plaintiff Jose Escalante.

21 **MEMORANDUM OF POINTS AND AUTHORITIES**

22 **I. FACTUAL BACKGROUND**

23 BHP employed Plaintiff Jose Escalante from approximately May 15, 1974 until
24 May 31, 1985. (See SOF ¶¶ 2-4, 8). BHP re-hired Mr. Escalante on or about September 16,
25 1985. He continued to work in BHP’s employ until approximately December 2, 1994.
26 (SOF ¶ 8). All the work Mr. Escalante performed for BHP was within the scope and course
27 of his employment. (See SOF ¶ 15).

1 Mr. Escalante worked primarily as a mechanic for BHP. Initially Mr. Escalante
2 worked for BHP as a pipe-fitter's helper. (SOF ¶ 2). As a pipe-fitter's helper, Mr.
3 Escalante assisted the pipe-fitter in replacing valves, repacking valves, changing out pipes,
4 and other related-work. (SOF ¶ 3). Mr. Escalante claims to have breathed in "dust" from
5 gaskets and pipes while working in that capacity for BHP. (Id.) Other BHP employees in
6 the pipe shop performed the same tasks as Mr. Escalante. (SOF ¶ 13).

7 In October 1974, Mr. Escalante transferred to BHP's locomotive repair shop. (SOF ¶
8 4). Mr. Escalante worked in the locomotive shop until May 31, 1985. During this
9 timeframe, his job titles included Mechanic's Helper, Locomotive Mechanic Apprentice,
10 and Journeyman Mechanic. (Id.) Mr. Escalante claims to have also breathed in "dust"
11 while working as a mechanic in BHP's locomotive division. His work mostly involved
12 replacing brake shoes on locomotive cars or wrapping exhaust systems. (Id.) Other
13 mechanics in the locomotive shop performed these same tasks. (SOF ¶ 13). Mr. Escalante
14 never complained about his job or filed a grievance with his union. (SOF ¶¶ 9, 12).

15 At no time during his employment with BHP did any of Mr. Escalante's co-workers
16 intentionally injure him. (SOF ¶ 10). No one from BHP forced Mr. Escalante to perform
17 tasks that he did not want to perform. (SOF ¶ 11). Mr. Escalante never complained to
18 anyone at BHP about the tasks he was asked to perform. (SOF ¶ 12). BHP provided Mr.
19 Escalante with safety training. In fact, BHP discussed safety items at weekly meetings
20 attended by Mr. Escalante. (SOF ¶ 14).

21 During Mr. Escalante's employment, BHP maintained workers' compensation
22 insurance. (See SOF ¶¶ 16-17). Mr. Escalante did not opt out of the workers' compensation
23 system while employed by BHP. (SOF ¶¶ 18-21). To the contrary, Mr. Escalante signed no
24 less than three separate Industrial Commission of Arizona claim forms as an "injured
25 worker" seeking "all benefits to which [he] may be entitled under the law." (Id.) In fact,
26 Mr. Escalante submitted an Industrial Commission of Arizona claim form for an eye injury
27 related to "dust" from a brake repair job. (SOF ¶ 21). BHP, or its insurance carrier, even
28 paid \$78.64 to treat Mr. Escalante for a work-related injury to his foot. (SOF ¶ 19).

1 **II. ARIZONA’S WORKER’S COMPENSATION EXCLUSIVE REMEDY RULE**

2 Arizona law firmly establishes that the right to recover workers’ compensation
3 constitutes an employee’s exclusive remedy against an employer for injuries sustained
4 within the scope of employment. See A.R.S. § 23-1022(a); Gamez, 201 Ariz. at 271, 34
5 P.3d at 380. The Arizona legislature, like those of every other state, enacted the workers’
6 compensation system to require employers to provide employees guaranteed access to
7 benefits for workplace injuries. See A.R.S. §23-961. The employer must provide such
8 benefits regardless of fault. The policy underlying the exclusive remedy provision of the
9 Act serves to afford the employee relatively swift and certain benefits to relieve the effects
10 of industrial injury without having to prove fault. In exchange, the employee gives up the
11 wider range of damages potentially available in tort. Thus, the employee’s right to
12 guaranteed benefits as his exclusive remedy is “part of the *quid pro quo* in which the
13 sacrifices and gains of employees and employers are to some extent put in balance.” Diaz v.
14 Magma Copper Co., 190 Ariz. 544, 549, 950 P.2d 1165, 1170 (Ct. App. 1997) (citing 2A
15 Arthur Larson, The Law of Workmen’s Compensation § 65.11 at 12-1, 12-12 (1996)). The
16 cornerstone of the workers’ compensation system is the employer’s assumption of liability
17 without fault “in exchange for immunity from lawsuits arising out of employment injuries.”
18 Id. at 550, 950 P.2d at 1171; accord Dugan v. American Express Travel Related Servs. Co.,
19 185 Ariz. 93, 99, 912 P.2d 1322, 1328 (Ct. App. 1995) (“If an employee does not, prior to
20 an injury, file a notice rejecting workers’ compensation coverage, the employer’s immunity
21 takes precedence over the employee’s right to sue the employer in a civil tort.”).

22 The exclusivity provision of the Act is essential to the integrity of the workers’
23 compensation system. Id. Indeed, Arizona law **presumes** that workers’ compensation
24 constitutes an employee’s exclusive remedy for workplace injuries. See A.R.S. § 23-
25 1024(a); Dugan, 185 Ariz. at 99, 912 P.2d at 1328 (noting that plaintiffs bear the burden of
26 proving that an exception to the exclusive remedy rule allows the trial court to exercise
27 subject matter jurisdiction over the work-related injury claim); Bonner v. Minico, Inc., 159
28 Ariz. 246, 254, 766 P.2d 598, 607 (1988). Removing this bar would improperly open the

1 floodgates to extensive litigation on the very claims workers' compensation is intended to
2 cover.

3 Consequently, Arizona's worker's compensation statute recognizes only two
4 extremely narrow exceptions to the exclusivity rule. One of these rarely applicable
5 exceptions, codified at A.R.S. § 23-1022(a), allows an employee to forego the workers'
6 compensation remedy in favor of an action at law only if the injury resulted from the
7 employer's willful misconduct, done knowingly and purposefully with the direct object of
8 injuring the employee. See Gamez, 201 Ariz. at 269, 34 P.3d at 378.¹ However, as set
9 forth in more detail below, this exception does not apply here as a matter of law.

10 **III. STANDARD OF REVIEW**

11 A trial court should grant summary judgment if "there is no genuine issues as to any
12 material fact and . . . the moving party is entitled to a judgment as a matter of law. See
13 Gamez, 201 Ariz. at 269, 34 P.3d at 269 (citing Ariz. R. Civ. P. 56(c); accord Orme Sch. v.
14 Reeves, 166 Ariz. 301, 305, 802 P.2d 1000, 1004 (1990)). The non-moving party cannot
15 rely on mere allegations, denials, or hopes that a jury will simply reject the undisputed facts
16 in favor of the party opposing the motion – that party must come forth with specific material
17 facts showing that a genuine dispute exists that precludes summary judgment. See Ariz. R.
18 Civ. P. 56(e); Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986) ("the burden on the
19 moving party may be discharged by 'showing' . . . that there is an absence of evidence to
20 support the non-moving party's case.").

21 Here, numerous facts are uncontested: (1) Mr. Escalante was BHP's employee; (2)
22 BHP maintained workers' compensation coverage during Mr. Escalante's employment; (3)
23 Mr. Escalante claims that he was injured as a result of employment-related exposure to
24

25 _____
26 ¹ A.R.S. § 23-1022(A) also includes an exception to the exclusive remedy provision if
27 a plaintiff proves that the employer failed to post and keep posted the notice to all
28 employees of the election regarding compensation under the Act. Plaintiffs have not alleged
that BHP failed to properly post workers' compensation notices. See A.R.S. § 23-906(E).

1 asbestos.² Therefore, absent Plaintiffs proving that BHP knowingly and purposefully
2 injured Mr. Escalante, summary judgment is proper because this Court lacks subject matter
3 jurisdiction over a workers' compensation claim. See Dugan, 185 Ariz. at 98, 912 P.2d at
4 1327 (noting that applicability of an exception to the exclusive remedy provision concerns
5 the trial court's jurisdiction over the plaintiff's tort claims and that the burden of proof for
6 the applicability of the exception rests with the plaintiff).

7 Plaintiffs' only attempt to prove that workers' compensation is not their exclusive
8 remedy is found in the general, unsubstantiated allegations of the Complaint. See
9 Complaint XXVIII (claiming that BHP knowingly and purposefully injured Mr. Escalante).
10 However, during his deposition, Mr. Escalante admitted that this statement is untrue.
11 Specifically, he confirmed that no one at BHP intended to injury him. (SOF ¶ 10).

12 **IV. ARGUMENT**

13 A.R.S. § 23-1022(a) allows an employee to forego the workers' compensation
14 remedy in favor of an action at law only if the injury resulted from the employer's willful
15 misconduct, done knowingly and purposefully with the direct object of injuring the
16 employee. See Gamez, 201 Ariz. at 269, 34 P.3d at 378. The present action fails against
17 BHP because Mr. Escalante alleges nothing more than a injury occurring during the course
18 of his employment. (SOF ¶¶ 1, 15).

19 No genuine issue of fact exists pertaining to Mr. Escalante's status as an employee of
20 BHP. (See SOF ¶¶ 2-8, 15). Similarly, BHP's workers' compensation insurance policies
21 confirm that BHP had a workers' compensation system in place during Mr. Escalante's
22 employment. (SOF ¶¶ 16-17). Mr. Escalante also sought benefits under that system for
23 work-related injuries. (Id. at 18-21).

24 Plaintiffs cannot show that BHP ever deliberately intended to harm Mr. Escalante.
25 (SOF ¶ 10). It is undisputed that BHP did not act knowingly and purposefully with the

26 _____
27 ² BHP denies liability for Mr. Escalante's injuries; however, for purposes of this
28 Motion, BHP acknowledges that Plaintiffs *claim* that Mr. Escalante was injured as a result
of employment-related exposure to asbestos while working for BHP.

1 direct objection of injuring Mr. Escalante. (Id. at ¶¶ 10-15). Therefore, Plaintiffs cannot
2 maintain their causes of action against BHP. See, e.g., Gamez, 201 Ariz. at 271, 34 P.3d at
3 380; Diaz v. Magma Copper Co., 190 Ariz. 544, 550, 950 P.2d 1165, 1171 (Ct. App. 1997)
4 (holding that exclusivity provision in the workers' compensation statutes foreclosed an
5 action of law by employee and any dependent family member regardless of allegations of
6 intentional failure to warn employees and/or negligent disregard for employee safety);
7 Lowery v. Universal Match Corp., 6 Ariz. App. 98, 430 P.2d 444 (1967) (same); Johnson v.
8 Kerr-McGee Corp., 129 Ariz. 393, 397, 631 P.2d 548, 552 (Ct. App. 1981) (holding that an
9 employee cannot maintain a tort action alleging harm from misrepresentations of the
10 employer). Consequently, the Court should grant summary judgment in favor of BHP and
11 deny all of Plaintiffs' claims against BHP in this action with prejudice.

12 Workers' compensation constitutes Mr. Escalante's sole recourse against BHP for his
13 claimed work-related injuries. See A.R.S. § 23-1022(a). Mr. Escalante failed to reject the
14 workers' compensation system prior to his injury. In fact, he relied on that system in
15 connection with other work-related injuries. Thus, Mr. Escalante cannot sustain the present
16 legal action against BHP. (SOF ¶¶ 18-21).³

17 **A. Plaintiffs Cannot Maintain Their Causes of Action Against BHP.**

18 Count One of Plaintiffs' Complaint does not apply to BHP, but rather to the
19 Manufacturer and Supplier Defendants. (See Plaintiffs' Complaint, filed October 24, 2006
20 at Count One). Plaintiffs' next allegation concerns a conspiracy wherein Defendants harm
21 Mr. Escalante by "misrepresenting and suppressing the truth as to the risk and dangers"
22 associated with asbestos exposure and by encouraging negligent acts. (Id. at Counts Two &
23 Six). These allegations, if true, would have necessarily preceded and contributed to Mr.
24 Escalante's workplace injury, as opposed to causing any separate injury. Therefore,
25 Plaintiffs cannot maintain these causes of action against BHP. See Johnson, 129 Ariz. at

26
27 ³ Occupational disease is covered under the workers' compensation system. See Globe
28 Indem. Co. v. Indus. Comm'n, 24 Ariz. App. 49, 535 P.2d 1053 (Ct. App. 1975); Ford v.
Indus. Comm'n of Ariz., 154 Ariz. 509, 514, 703 P.2d 453, 458 (1985); A.R.S. § 23-901.01.

1 397, 631 P.2d at 552 (holding that employee cannot maintain tort actions alleging harm
2 from misrepresentations of the employer).

3 Counts Three, Four, and Seven allege liability theories of negligence and gross
4 negligence on the part of BHP. Specifically, Plaintiffs claim that BHP:

- 5 • Failed to provide Mr. Escalante with safe equipment;
- 6 • Failed to provide adequate safety measures and protection against “dust”;
- 7 • Failed to warn of the inherent dangers of asbestos contamination;
- 8 • Failed to maintain a safe place to work;
- 9 • Failed to follow certain guidelines pertaining to asbestos;
- 10 • Committed gross negligence through a negligent pattern of practice; and
- 11 • Committed negligence *per se* by violating certain unspecified regulations.

12 (See Complaint, ¶¶ XXVII – XXX, XXXVI-XXXVIII). These allegations are facially
13 insufficient to support a cause of action against BHP, Mr. Escalante’s employer.

14 Even if proven, Plaintiffs’ claims against BHP are barred by the exclusivity
15 provisions of workers’ compensation. See Gamez, 201 Ariz. at 269, 34 P.3d at 378 (holding
16 that gross, wanton, willful, deliberate, intentional, reckless, culpable, or malicious
17 negligence, breach of statute, or other misconduct of the employer is insufficient to escape
18 the exclusivity provisions of the workers’ compensation scheme). Negligence of any kind is
19 an insufficient basis for a civil action by an employee against an employer for a workplace
20 injury. Id.

21 Plaintiffs’ Complaint parrots the wording of the willful misconduct exception and
22 claims that BHP’s actions “were done knowingly and purposefully with the direct object” of
23 injuring Mr. Escalante. (See Complaint at ¶ XXVIII). Plaintiffs’ allegations, however,
24 derive from nothing more than unfounded speculation, as opposed to any actual disputed
25 evidence. Empty speculation without evidentiary support does not create a disputed issue of
26 fact sufficient to defeat a motion for summary judgment. To the contrary, the absence of
27 evidence to support Plaintiffs’ claims confirms the lack of any genuine disputed facts
28 precluding summary judgment. See Celotex Corp., 477 U.S. at 325; S.W. Cotton Co. v.

1 Pope, 25 Ariz. 364, 374, 218 P. 152, 155 (1923) (holding that plaintiffs must prove the
2 “specific act” alleged).

3 Here, Mr. Escalante admits that no one at BHP ever intentionally injured him. (SOF
4 ¶ 10). He also confirmed that he performed only those duties that other like-situated
5 employees performed. (SOF ¶¶ 13, 15). There is no evidence to support Plaintiffs’ hollow
6 assertion that BHP acted with the “direct object” of injuring Mr. Escalante. As a result, the
7 “willful misconduct exception” to the exclusivity provisions of Arizona’s workers’
8 compensation scheme does not allow Mr. Escalante to avoid the exclusive remedy of
9 workers’ compensation.

10 **B. BHP Did Not Knowingly and Purposefully Injure Mr. Escalante.**

11 Plaintiffs cannot pursue their work-related injury claims against BHP in this Court.
12 A.R.S. § 23-1022(A) specifically states that:

13 The right to recover compensation pursuant to this chapter for injuries
14 sustained by an employee or for the death of an employee is the exclusive
15 remedy against the employer or any employee acting in the scope of his
16 employment, and against the employer’s workers’ compensation insurance
17 carrier or administrative service representative . . . except that if the injury is
18 caused by the employer’s willful misconduct . . . and the act causing the injury
19 is the personal act of the employer . . . and the act indicates a willful disregard
20 of the life, limb or bodily safety of employees, the injured employee may
21 either claim compensation or maintain an action at law for damages against the
22 person or entity alleged to have engaged in the willful misconduct.

23 The statute defines “willful misconduct” as “an act done knowingly and purposefully with
24 the direct object of injuring another.” A.R.S. § 23-1022(B).

25 Plaintiffs have failed to establish affirmatively that their injuries arose out of BHP’s
26 “willful misconduct” as evidenced by any act done knowingly and purposefully with the
27 direct object of injuring Mr. Escalante. See A.R.S. §23-1022(A) & (B). Plaintiffs cannot
28 prove any such misconduct by BHP. The undisputed facts, construed in a light most
favorable to Mr. Escalante, show, at best, that he sustained his work-related injuries due to
simple negligence. Indeed, Mr. Escalante has conceded that BHP only asked him to
perform the routine work that other like-situated employees performed. (See SOF ¶ 13).

1 To avoid the exclusive remedy of workers' compensation and maintain a tort action
2 against BHP, Plaintiffs must establish each of the following four elements:

- 3 • The employer's willful misconduct caused the employee's injury;
- 4 • The willful misconduct was done knowingly and purposely with the direct object of
5 injuring another;
- 6 • The act that caused the injury consisted of a personal act of the employer; and
- 7 • The act reflected a willful disregard of the life, limb, or bodily safety of employees.

8 See Ariz. Const. art. XVIII § 8; Gamez, 201 Ariz. at 269, 34 P.3d at 378 (citing Serna v.
9 Statewide Contractors, Inc., 6 Ariz. App. 12, 429 P.2d 504 (1967)). The facts simply do not
10 support any assertion of willful misconduct by BHP. (SOF ¶ 10). BHP never acted with
11 the direct intent of injuring Plaintiffs. (Id.)

12 Gross negligence is not sufficient to establish the willful misconduct necessary to
13 avoid the exclusive remedy of workers' compensation. See Gamez, 201 Ariz. at 269, 34
14 P.3d at 378 (citing Serna, 6 Ariz. App. 12, 429 P.2d 504 (1967)). Rather, the employer must
15 act with the "direct object" to injure another. See Allen v. S.W. Salt Co., 149 Ariz. 368, 718
16 P.2d 1021 (Ct. App. 1986). An employer's liability cannot be stretched to include
17 accidental injuries caused by the "gross, wanton, willful, deliberate, intentional, reckless,
18 culpable, or malicious negligence, breach of statute, or other misconduct of the employer
19 short of a conscious and deliberate intent directed to the purpose of inflicting an injury."
20 Gamez, 201 Ariz. at 269, 34 P.3d at 378 (citing 6 Arthur Larsen & Lex K. Larsen, Larsen's
21 Workers' Compensation Law § 1.03.03 at 103-07 (2001)).

22 Moreover, even if the employer's conduct exceeds aggravated negligence, including
23 such elements as "knowingly permitting a hazardous work condition to exist, knowingly
24 ordering employees to perform an extremely dangerous job, willfully failing to furnish a
25 safe place to work, willfully violating a safety statute, . . . or withholding information about
26 work site hazards," the conduct still falls short of the actual intent to injure necessary to
27 escape the exclusive remedy provisions of Arizona's workers' compensation statutes. Id.
28 Accord Mosakowski v. PSS World Medical, Inc., 329 F. Supp. 2d 1112, 1130-31 (D. Ariz.

1 2003) (holding that Arizona’s workers’ compensation statutes precluded employee’s
2 negligent supervision claim).

3 For example, in Gamez v. Brush Wellman, Inc., 201 Ariz. 266, 34 P.3d 375 (Ct. App.
4 2001), the appellate court upheld the trial court’s grant of summary judgment in favor of the
5 defendant-employer and rejected the plaintiff’s claims of willful misconduct. The plaintiff
6 alleged that his former employer acted knowingly and maliciously in disregarding the
7 dangers its employees faced when working with beryllium. Id. at 268, 34 P.3d at 377.
8 Plaintiff claimed that defendant intentionally failed to warn its employees of the substantial
9 certainty of developing chronic beryllium disease from exposure to beryllium on the job
10 site. Id. Indeed, plaintiff further alleged that defendant sacrificed the safety of its
11 employees for higher profits. Id.

12 The Arizona Court of Appeals Division Two reasoned that the plaintiff had asserted
13 claims of gross negligence against his employer. The Appellate Court confirmed the trial
14 court’s holding that gross negligence, even if proven, is not sufficient to establish willful
15 misconduct by an employer. Id. at 269, 34 P.3d at 379. Therefore, the plaintiff was not
16 entitled to maintain proceedings in a court of law against his employer. Id.

17 In order to constitute willful misconduct such that an employee may seek redress
18 other than workers’ compensation, the direct object of the employer’s action must have been
19 to injure another. Id. In upholding the lower court’s grant of summary judgment, the
20 appellate court reiterated that in Arizona “there must be a genuine intentional injury
21 comparable to an intentional left jab to the chin.” Id. at 271, 34 P.3d at 380 (citing Allen,
22 149 Ariz. at 371, 718 P.2d at 1024 (holding that although the employer may have been
23 guilty of gross negligence, the requisite intent required to escape the exclusive remedy of
24 workers’ compensation was not available).

25 Here, Plaintiffs similarly allege that BHP failed to warn Mr. Escalante against the
26 dangers of working in close proximity with a potentially harmful substance. Moreover,
27 Plaintiffs claim that BHP disregarded the safety of its employees. As in Gamez, however,
28 Plaintiffs cannot establish that the direct object of BHP’s actions was to injure Mr.

1 Escalante. Therefore, the Court should grant BHP’s Motion for Summary Judgment. Id. at
2 269, 34 P.3d at 378 (finding the absence of willful misconduct as a matter of law).

3 Furthermore, Lowery v. Universal Match Corporation, 6 Ariz. App. 98, 100, 430
4 P.2d 444, 446 (Ct. App. 1967), established that an employer’s actions in failing to take
5 proper safety precautions and provide safety devices knowing that its employees would be
6 exposed to dangerous chemicals and gases failed to rise to the level of willful intent required
7 by the statute. In that case, a former employee of defendant alleged that the defendant
8 required him to perform routine maintenance functions on equipment containing ortho
9 chlorobenzylidene malonitrile material and other chemicals and gases while employed as a
10 mechanic. Id. at 99, 430 P.2d at 445.

11 The Court of Appeals concluded that the employer had not engaged in any conduct
12 that would have satisfied the willful intent required to maintain an action at law. Id. at 100,
13 430 P.2d 446. The employer’s actions in failing to take proper safety precautions and
14 provide safety devices amount to nothing more than negligence. Even though the employer
15 may have known that its employees were exposed to hazardous chemicals, the employer did
16 not act with the direct object to injure the plaintiff. Id.; see also Diaz, 190 Ariz. at 551, 950
17 P.2d 1172 (finding that although the employer either intentionally failed to warn its
18 employees of hazards and/or negligently disregarded safety warnings, it did not act with the
19 requisite willful misconduct and intent to injure).

20 Here, as a matter of law, BHP’s alleged conduct does not rise to the level of willful
21 misconduct. Mr. Escalante affirmatively states that at no time during his employment with
22 BHP did anyone intentionally injure him. (SOF ¶ 10). Mr. Escalante claims only that he
23 inhaled certain amounts of “dust” while working as an employee of BHP. (SOF ¶¶ 3-4).
24 Plaintiffs’ allegations, if proven, amount to no more than simple negligence. Much like the
25 plaintiff in Lowery, Mr. Escalante can only establish that he performed routine maintenance
26 on equipment allegedly containing harmful material. (SOF ¶¶ 3-4, 13). As in Lowery, this
27 act does not rise to the level of willful misconduct necessary for Mr. Escalante to maintain
28 the present action against BHP. See 6 Ariz. App. at 100, 430 P.2d at 446.

1 During his employment with BHP, Mr. Escalante did not complain to anyone about
2 the tasks he was asked to perform. (SOF ¶ 12). Mr. Escalante simply performed the same
3 jobs that his co-workers performed. (SOF ¶ 13). There is no evidence to show that BHP
4 ever acted knowingly and purposefully with the direct object of injuring Mr. Escalante. To
5 the contrary, BHP held safety meetings and discussed safety items at weekly meetings
6 attended by Mr. Escalante. (SOF ¶ 14). Moreover, upon learning of the potential for harm,
7 BHP forbade its employees from using insulation potentially containing asbestos or gloves
8 containing asbestos. (SOF ¶¶ 6-7). BHP replaced its employees' asbestos-containing
9 gloves with gloves free of that material. (*Id.*) Thus, BHP's actions do not show any
10 deliberate intention to harm Mr. Escalante, and Mr. Escalante's action at law against his
11 former employer is improper. The Court should grant summary judgment.

12 **C. Workers' Compensation Constitutes Mr. Escalante's Exclusive Remedy.**

13 A.R.S. § 23-1022(a) confirms that workers' compensation represents Mr. Escalante's
14 sole remedy for occupational injuries sustained as an employee of BHP. If Mr. Escalante
15 intended to reject the workers' compensation program, he was obligated to notify BHP in
16 writing of his decision to "opt out" of the program. See A.R.S. § 23-906(B). An employee
17 who accepts any form of workers' compensation waives his right to pursue an action at law
18 against his employer. See A.R.S. § 23-1024(A).

19 Here, no evidence exists to suggest that Mr. Escalante ever "opted out" of the
20 workers' compensation scheme while employed by BHP. It was not Mr. Escalante's custom
21 to do so. (SOF ¶ 18). Moreover, Mr. Escalante signed at least three separate Industrial
22 Commission of Arizona claim forms. (SOF ¶¶ 18-21) In signing each form as an "injured
23 worker," Mr. Escalante sought "all benefits to which [he] may be entitled under the law."
24 (*Id.*) In fact, Mr. Escalante even received compensation for an injury related to a lacerated
25 foot. (SOF ¶ 19).

26 Indeed, Mr. Escalante already sought worker's compensation for an employment-
27 related injury related to "dust." (SOF ¶ 21). Although it is unclear whether he qualified for
28 compensation, it is undisputable that he signed a claim form seeking benefits for harm

1 arising out of the same conditions he alleges in the present litigation. (Id.) As a matter of
2 law, Mr. Escalante cannot pursue his present action at law against BHP.

3 **D. Because Mr. Escalante’s Personal Injury Claims Against BHP Are**
4 **Barred, Mrs. Escalante Cannot Maintain Her Derivative Loss of**
5 **Consortium Claims.**

6 Count V of Plaintiffs’ Complaint alleges a loss of consortium claim by Mr.
7 Escalante’s wife. Mrs. Escalante cannot maintain her derivative loss of consortium claim
8 against BHP. See Douglas A. Blaze & Jefferson L. Lankford, The Law of Negligence in
9 Arizona § 5.02(2)(h)(iii) (3d ed. 2005). Indeed, Arizona’s workers’ compensation scheme
10 evidences a clear bar to “any common law right-of-action which might possibly flow from a
11 work-related injury.” Diaz, 190 Ariz. at 548, 950 P.2d at 1169 (citing Mardian Constr. Co.
12 v. Superior Court, 157 Ariz. 103, 754 P.2d 1378 (Ct. App. 1988). As such, the Court should
13 also grant summary judgment in favor of BHP on her claim.

14 Arizona defines spousal consortium as spousal companionship, conjugal affection,
15 and assistance. See, e.g., City of Glendale v. Bradshaw, 108 Ariz. 582, 584, 503 P.2d 803,
16 805 (1972). Plaintiffs generally obtain a remedy when they demonstrate that (1) the
17 defendant is liable for the spouse’s injury and (2) the injury severely damaged the marital
18 relationship. See Blaze & Lankford, The Law of Negligence in Arizona § 5.02(2)(h)(iii).

19 As a prerequisite to maintaining a loss of consortium claim, a party must first
20 establish that a defendant is liable for bodily injuries sustained by that party’s spouse. Id.
21 Accordingly, the exclusivity provision of the workers’ compensation scheme not only bars
22 Mr. Escalante’s tort claims against BHP, but also those of his wife. “[A]nything that tends
23 to erode the exclusiveness of either the liability or the recovery [of workers’ compensation]
24 strikes at the very foundation of statutory schemes of this kind.” Mardian, 157 Ariz. at 106,
25 754 P.2d 1381. Therefore, the Court should also grant summary judgment in favor of BHP
26 with respect to Mrs. Escalante’s derivative claim.

27 **IV. CONCLUSION**

1 For the reasons set forth above, BHP respectfully requests that the Court grant
2 summary judgment in its favor. Plaintiffs cannot show that BHP committed any willful
3 misconduct with the direct objective of harming Mr. Escalante. Therefore, the Arizona
4 Workers' Compensation Act prevents Plaintiffs from bringing a civil tort action against
5 BHP for Plaintiffs' alleged injuries arising from work-related exposure to asbestos.

6 DATED this 27th day of April, 2007.

7 BRYAN CAVE LLP

8 By _____

9 Pamela S. Gates
10 Anthony W. Merrill
11 Two North Central Avenue, Suite 2200
12 Phoenix, Arizona 85004-4406

13 &

14 Robert E. Boone III (admitted *pro hac vice*)
15 120 Broadway, Suite 300
16 Santa Monica, California 90401-2386
17 Attorneys for Defendant BHP Copper Inc.

18 Original of the foregoing filed
19 this 27th day of April, 2007 with
20 the Pima County Superior Court

21 Copy of the foregoing hand-delivered
22 This 27th day of April, 2007, to:

23 The Hon. Leslie Miller
24 Judge of the Pima County Superior Court
25 110 W. Congress
26 Tucson, AZ 85701
27
28

Bryan Cave LLP
Two North Central Avenue, Suite 2200
Phoenix, Arizona 85004-4406

1 Copies of the foregoing mailed this
27th day of April, 2007, to:

2
3 Lloyd L. Rabb III, Esq.
4 James B. Penny, Esq.
5 THE RABB PENNY LAW FIRM, PLLC
6 3320 North Campbell, Suite 150
7 Tucson, AZ 85719
8 Attorneys for Plaintiffs

9
10 Troyce G. Wolf, Esq.
11 WATERS & KRAUS
12 3219 McKinney Avenue, Suite #3000
13 Dallas, TX 75204
14 Attorney for Plaintiffs

15
16 Russell B. Stowers
17 Law Office of Joel L. Herz, Esq.
18 LA PALOMA CORPORATE CENTER
19 35732 E. Sunrise Drive, Suite 215
20 Tucson, Arizona 85718-3206
21 rstowers@joelherz.com
22 Fax (520) 529-8077
23 Attorney for Defendants TH Agriculture & Nutrition LLC
24 and Philips Electronics North America Corporation

25
26 Sean E. Brearcliffe, Esq.
27 RUSING & LOPEZ
28 6262 N. Swan Road, Suite 200
Tucson, Arizona 85718-2201
sbrearcliffe@rusingandlopez.com
Fax (520) 529-4262
Attorney for Defendant Rite-Way Ventilating Company

1 Tamara N. Cook, Esq.
2 Carol M. Romano, Esq.
3 RENAUD COOK DRURY MESAROS, PA
4 Phelps Dodge Tower
5 One N. Central Avenue, Suite 900
6 Phoenix, Arizona 85004-4417
7 tcook@rdmlaw.com
8 cromano@rdmlaw.com
9 Fax (520) 307-5853
10 Attorneys for Defendant Kelly-Moore Paint Company, Inc.

1 John C. Lemaster, Esq.
RYLEY, CARLOCK & APPLEWHITE
2 One Central Avenue, Suite 1200
Phoenix, Arizona 85004
3 jlemaster@rcalaw.com
4 Fax (602) 257-9582
Attorney for Defendant Georgia-Pacific Corporation

5
6 Larry Crown, Esq.
James Maldonado, Esq.
7 JENNINGS, HAUG & CUNNINGHAM
2800 N. Central Avenue, Suite 1800
8 Phoenix, Arizona 85004
9 ljc@jhc-law.com
jmm@jhc-law.com
10 Fax (602) 277-5595
Attorneys for Defendants Garlock Sealing Technologies, LLC

11
12 Bradley W. Petersen, Esq.
Sara M. Vrotsos, Esq.
13 SNELL & WILMER
One Arizona Center
14 400 E. Van Buren Avenue
Phoenix, Arizona 85004
15 svrotsos@swlaw.com
bpetersen@swlaw.com
16 Fax (602) 382-6070
Attorneys for Defendants General Motors Corporation and Electro-Motive Diesel

17
18
19 John C. Hendricks, Esq.
MEAGHER & GEER, PLLP
20 8800 N. Gainey Drive, Suite 261
Scottsdale, Arizona 85258
21 jhendricks@meagher.com
22 Fax (480) 607-9780
Attorney for Defendant Crane Company

23
24 Donald Myles, Jr., Esq.
JONES SKELTON & HOCULI
25 2901 n. Central Avenue, Suite 800
Phoenix, Arizona 85012
26 dmyles@jshfirm.com
27 Fax (602) 200-7842
Attorney for Defendant Bondex International, Inc. and RPM International, Inc.

1 Brenda K. Radmacher
Elizabeth J. Zanon
2 WOOD SMITH HENNING & BERMAN LLP
2525 E. Camelback Road, Suite 720
3 Phoenix, AZ 85016
Elizabeth.Zanon@azbar.org
4 Attorneys for Defendant State Drywall Inc.
5

6 Amy M. Samberg
Collin Sult
7 SNELL & WILMER
One South Church Avenue, Suite 1500
8 Tucson, AZ 85701
asamberg@swlaw.com
9 csult@swlaw.com
10 Fax: (520) 882-1294
Attorneys for Defendant Kaiser Gypsum Kaiser Cement
11

12 Mary Price Birk, Esq.
BAKER & HOSTETLER LLP
13 303 East 17th Avenue, Suite 1100
Denver, CO 80203-1264
14 Attorneys for Defendant Cooper Industries
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Bryan Cave LLP
Two North Central Avenue, Suite 2200
Phoenix, Arizona 85004-4406
DL No. 11-11111-11111-11111

1 William W. Pearson, SBN 012845
2 Pamela S. Gates, SBN 017234
3 BRYAN CAVE LLP, #00145700
4 Two North Central Avenue, Suite 2200
5 Phoenix, Arizona 85004-4406
6 Telephone: (602) 364-7000
7 Fax: (602) 364-7070
8 E-mail: wwpearson@bryancave.com
9 E-mail: psgates@bryancave.com
10 Attorneys for Plaintiff BHP Copper Inc.

11
12
13
14
15
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17
18
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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

The Pinal Creek Group, consisting of Phelps
Dodge Miami, Inc., Inspiration Consolidated
Copper Company and BHP Copper Inc.,

Plaintiffs,

vs.

Newmont Mining Corporation, Occidental
Petroleum Corporation, CanadianOxy
Offshore Production Company, and Atlantic
Richfield Company,

Defendants.

No. CIV 91-1764 PHX DAE (LOA)

**BHP COPPER INC.'S MOTION IN
LIMINE NUMBER 1 TO LIMIT THE
TESTIMONY AND SCOPE OF
STATEMENTS MADE BY THOMAS
D. McWATERS**

Oral Argument Requested

Pursuant to Federal Rules of Evidence 801 and 802, as well as Local Rule 7.2 of the Federal Rules of Civil Procedure, BHP Copper Inc. (“BHP”) moves the Court for an order limiting the testimony and scope of statements made by lay witness, Thomas D. McWaters (“McWaters”).

The U.S. Supreme Court has defined a motion in limine as “any motion whether made before or during trial to exclude anticipated prejudicial evidence before the evidence is actually offered.” Luce v. United States, 469 U.S. 38, 40 n.2 (1984); accord State v. Superior Court, 108 Ariz. 396, 397, 499 P.2d 152, 153 (1972) (holding that the primary purpose of a motion in limine is to avoid disclosing prejudicial matters that may compel a mistrial). Allowing testimony and documentary evidence regarding the

Bryan Cave LLP
Two North Central Avenue, Suite 2200
Dulles, Virginia 20146

1 propriety of the methodology used to reclaim the No. 2 Tailings would violate the Rules
2 of Evidence, unduly prejudice BHP, and invite a mistrial.

3 Phelps Dodge Miami, Inc. (PDMI”) and Inspiration Consolidated Copper
4 Company (“Inspiration”) intend to solicit testimony from McWaters regarding historic
5 hydromining at Property B, “beginning with development of plans, through cessation,
6 including its effect on the environment.” See Excerpt of PDMI and Inspiration’s List of
7 Witnesses at 1, Exhibit A. Evidently, PDMI and Inspiration are attempting to use
8 McWaters, a disgruntled former employee, as an improper expert witness to opine on the
9 environmental impacts of the Miami No. 2 Tailings Removal and Reprocessing Project
10 (“TRRP”). McWaters was not disclosed as an expert and lacks the necessary training,
11 education, expertise, or personal experience to qualify him to testify on technical
12 environmental matters. Thus, he should not be permitted to opine on any issue related to
13 the environmental impact of the TRRP.

14 Furthermore, documents authored by McWaters during the operation and cessation
15 of the TRRP are inadmissible hearsay. By McWaters’ own admission, he was not
16 involved in the operation of the TRRP. See Excerpt of Thomas D. McWaters’
17 Deposition (“McWaters Deposition”), May 21, 2003 at 45:25-48:22, Exhibit B. In fact,
18 McWaters was no longer employed by BHP in July 2001, when BHP ceased operation of
19 the TRRP. See McWaters Deposition at 16:12-14, Exhibit B. The operation (and
20 cessation) of the TRRP was outside the scope of McWaters’ former employment and
21 agency. Thus, past statements by McWaters, written and oral, regarding the operation of
22 the TRRP through its cessation are not party admissions binding on BHP. Rather, the
23 statements constitute inadmissible hearsay. See Exhibit C for a list and description of the
24 documents identified as potential exhibits by PDMI and Inspiration that contain
25 inadmissible hearsay statements by McWaters.

26 Consequently, BHP asks the Court to limit the scope of McWaters’ anticipated
27 trial testimony by excluding: 1) testimony regarding the alleged environmental impacts
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1 of the TRRP; 2) McWaters' past statements, written and oral, concerning matters outside
2 the scope of his employment; and 3) exhibits that contain inadmissible hearsay, including
3 the exhibits listed on Exhibit C.

4 BACKGROUND

5 McWaters began work in the engineering department for Cities Service Company
6 in 1973. See McWaters Deposition at 15:1-16:11, Exhibit B. McWaters worked as a
7 civil engineer for various mining companies associated with Property B until his
8 retirement from BHP in April 2000. See Exhibit B at 15:1-17:25. McWaters'
9 employment positions with the mining companies involved solely the engineering
10 department (with titles such as mine engineer, senior staff engineer, etc.). Id. at 15:1-
11 20:2. McWaters never held an official management position with any of the Property B
12 mining companies that employed him. Id.

13 Although McWaters, as an employee of Cities Service Company, participated in
14 the initial conception and development of the hydromining project, any responsibility he
15 had for the project ceased in January 1988 and possibly as early as late 1987. See
16 McWaters Deposition at 15:1-16:11, 31:21-32:18, 185:19-25, Exhibit B. Thus, by
17 McWaters' own admission, the scope of his duties at BHP (f/k/a Magma Copper
18 Company) never involved the operation of the TRRP, which began in 1989. Id. at 31:7-
19 32:18, Exhibit B.

20 Moreover, McWaters had no responsibility for constructing or operating the
21 TRRP. See McWaters Deposition at 45:25-48:22, Exhibit B. As implemented, the
22 TRRP differed from the operation originally conceived by McWaters. Id. at 49:6-23.
23 McWaters, however, was virtually unaware of several important operational changes with
24 respect to the TRRP. Id. at 103:13-104:2.

25 Due to his loss of control over the TRRP, McWaters became extremely bitter and
26 antagonistic towards his employer BHP. Id. The employment relationship deteriorated
27 to a situation where he was "virtually at odds" with BHP. Id. In fact, outside the course
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Two North Central Avenue, Suite 2200
Duluth, Minnesota 55811-4406

1 of his employment duties, McWaters drafted several memoranda and papers critiquing
2 the TRRP. See McWaters Deposition at 71:23-72:6, 97:5-7, Exhibit B. BHP did not
3 solicit or request the documents; thus, it appears that McWaters drafted his critiques
4 solely to spite his employer. Id.

5 **ARGUMENT**

6 **I. McWaters Cannot Testify As To the Alleged Environmental Impact of the**
7 **TRRP.**

8 Federal Rules of Evidence 701 allows fact witnesses to testify only to those
9 opinions or inferences which are “rationally based on the perception of the witness . . .
10 and not based on scientific, technical or other specialized knowledge.” Here, McWaters
11 has no relevant knowledge or personal experience regarding the environmental impact of
12 the TRRP. See McWaters Deposition at 184:15-20, Exhibit B. Additionally, the
13 environmental impact of the TRRP clearly falls under the designation of “scientific,
14 technical or other specialized knowledge.” Fed. R. Evid. 701. In fact, PDMI and
15 Inspiration have two expert witnesses who have opined regarding the alleged impact of
16 the TRRP. Consequently, McWaters, a lay witness, cannot testify to the alleged
17 environmental effects, if any, of the TRRP. See U.S. v. Henderson, 409 F.3d 1293, 1300
18 (11th Cir. 2005) (holding that Rule 701(c) expressly prohibits lay testimony from
19 crossing over into the realm of experts); Brandon v. Village of Maywood, 179 F. Supp.
20 2d 847, 859 (N.D. Ill. 2001).

21 Furthermore, PDMI and Inspiration have failed to disclose McWaters as an expert
22 witness under Federal Rule of Civil Procedure 26(a) and failed to qualify him as such
23 under Federal Rule of Evidence 702. Therefore, McWaters cannot offer expert testimony
24 concerning environmental issues. See Williams v. Fenix & Scisson, Inc., 608 F.2d 1205,
25 1209 (9th Cir. 1997) (holding that the district court has authority to exclude testimony of
26 expert witness for violation of the disclosure requirements of Rule 26(a)). Compliance
27 with Federal Rule of Civil Procedure 26(a) and Federal Rule of Evidence 702 constitutes
28 a condition precedent for the use of expert testimony at trial. See Yeti by Molly Ltd. v.

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Two North Central Avenue, Suite 2200
Duluth, Minnesota 55814-4406

1 Deckers Outdoor Corp., 259 F.3d 1101, 1106 (9th Cir. 2001) (forbidding the use at trial
2 of undisclosed information required to be disclosed under Rule 26).

3 The law does not allow PDMI and Inspiration to “sneak” into evidence expert
4 testimony concerning environmental matters through the lay testimony of McWaters,
5 especially on matters as technical and scientific as environmental contamination.
6 Consequently, the Court should prohibit McWaters from testifying to any alleged
7 environmental impact of the TRRP.

8 **II. Because Statements Regarding BHP’s Operation of the TRRP Through**
9 **Cessation Exceed the Scope of McWaters’ Employment or Agency, this**
10 **Court Should Exclude His Statements as Inadmissible Hearsay.**

11 BHP did not include the operation of the TRRP as part of McWaters’ employment
12 duties. Similarly, BHP did not authorize McWaters to draft numerous memoranda
13 regarding the TRRP. PDMI and Inspiration have not, and cannot, establish a proper
14 foundation demonstrating that McWaters drafted the proposed exhibits at issue at BHP’s
15 direction or within the scope of his employment. See Exhibit C and its accompanying
16 attachments.

17 **A. McWaters’ Statements on the Operation of the TRRP Through Its**
18 **Cessation, as well as the Alleged Environmental Impact of the TRRP**
19 **Exceed the Scope of McWaters’ Employment.**

20 Under Rule 801(d)(2)(D), an out-of-court statement is not hearsay if it is “offered
21 against a party and is...a statement by the party's agent or servant concerning a matter
22 within the scope of the agency or employment, made during the existence of the
23 relationship.” Rule 801(d)(2)(D) hinges on the assumption that the employee-declarant’s
24 relationship with the employer keeps the declarant from making false or devious
25 comments that could harm the employer. See Young v. James Green Mgmt, Inc., 327
26 F.3d 616, 622-623 (7th Cir. 2003).

27 For example, in Young, plaintiffs brought a Title VII action against their former
28 employer alleging wrongful termination on account of race. The Seventh Circuit
affirmed the district court’s ruling that a supervisor’s accusatory statement contained in a

1 resignation letter did not constitute a party admission, but rather inadmissible hearsay.
2 Id. at 622. The Seventh Circuit reasoned that the supervisor made the out-of-court
3 statement in the context of an adversarial relationship between the employee and the
4 employer. Id. at 623. Accordingly, because the declarant was not “inhibited by [his]
5 relationship with the principal from making erroneous or underhanded comments which
6 could harm the principal,” the Seventh Circuit found that the justification for Rule
7 801(d)(2)(D) did not apply. Id. (quoting Hernandez Escalante v. Municipality of Cayey,
8 967 F. Supp. 47, 51 (D.P.R. 1997)). Therefore, because the supervisor’s statement did
9 not constitute a party admission binding on his employer, the Seventh Circuit affirmed its
10 exclusion. Id.

11 Here, the policy underlying Rule 802(d)(2)(D) has no application to the
12 relationship between McWaters and his employer during the operation of the TRRP. At
13 the time of the TRRP, McWaters and BHP clearly had an adversarial relationship. See
14 McWaters Deposition at 71:23-72:6, 97:5-7, Exhibit B. In fact, McWaters testified that
15 his relationship with his employer deteriorated from the moment he lost control of the
16 project in 1988. Id.

17 McWaters contends that his relationship with BHP actually reached a point where
18 he was “forced” to retire in April 2000. Id. at 16:12-17:25, Exhibit B. McWaters clearly
19 “had no love for Magma.” Id. As such, he continued to draft negative memoranda
20 regarding the business operations of his employer, specifically the operation of the
21 TRRP. Id. at 71:23-72:6, 97:5-7, 103:13-104:2, Exhibit B. Nothing in this dysfunctional
22 employment relationship prohibited McWaters from making erroneous or underhanded
23 comments that could harm BHP. As a result, his statements regarding the
24 implementation of the TRRP and its alleged environmental impact fail to meet the
25 standards for party admissions.

26 Furthermore, any statement made by McWaters regarding the TRRP and its
27 claimed environmental effect exceeded the scope of his employment. For example, in
28

1 Oki America, Inv. v. Microtech Int'l., Inc., 872 F.2d 312 (9th Cir. 1989), the Ninth
2 Circuit affirmed the district court's grant of summary judgment on a breach of contract
3 claim. To establish its breach of contract claim, Microtech unsuccessfully attempted to
4 offer the testimony of a third party regarding comments made by an Oki sales manager.
5 Id. at 314.

6 Although conceded as hearsay, Microtech submitted the statement as a party
7 admission under Rule 801(d)(2)(D). The sales manager, however, testified that
8 "Microtech was not in my geography. I knew nothing about Microtech as a customer
9 with regard to anything." Id. As such, because the sales manager's statement regarding
10 the alleged breach of contract did not concern a matter within the scope of his
11 employment, his statement did not constitute a party admission imputed to his employer.
12 Id.

13 Similarly, McWaters, a civil engineer, was not involved in the operation, cessation
14 or environmental aspect of the TRRP. See Exhibit A; McWaters Deposition at 184:15-
15 20, Exhibit B. McWaters's employment duties never concerned the implementation of
16 the project. See McWaters Deposition at 184:15-20, Exhibit B. Therefore, any statement
17 made by McWaters regarding the operation, cessation or environmental impact of the
18 TRRP exceeded the scope of his employment. See Oki, 872 F.2d at 314. Therefore, the
19 Court should not admit any such statements contained in the documents listed on
20 Exhibit C, and attached thereto, under the guise of "party admissions."

21 **B. McWaters' Statements on BHP's Reclamation Activities and Alleged**
22 **Environmental Impacts Exceed the Scope of His Agency.**

23 Under Rule 801(d)(2)(C), a court may only admit statements authorized by a
24 party, expressly or impliedly, as admissions of that party. The proponent of the statement
25 must establish through foundational evidence that the declarant who made the out-of-
26 court statement had express or implied speaking authority to make the declarations on
27 behalf of the party opponent. See 5 Weinstein 2d § 801.32; accord Reid Bros. Logging

Bryan Cave LLP
Two North Central Avenue, Suite 2200
Dulles, Virginia 20146

1 Co. v. Ketchikan Pulp Co., 699 F.2d 1292, 1306-07 (9th Cir. 1983) (holding that an
2 “agent” must have an extreme level of involvement in a particular project in order to
3 make admission on behalf of his principal).

4 The Court, however, cannot consider the contents of the alleged agent’s statements
5 alone to establish an agency relationship. See Fed. R. Evid. 801(d)(2); see also Bourjaily
6 v. United States, 483 U.S. 171 (1987). Instead, the Court should consider the statement
7 in connection with other evidence, including circumstances surrounding the statement, to
8 determine if an agency relationship existed at the time the alleged agent made the
9 statement. See Glen Weissenberger & James J. Duane, Federal Rules of Evidence:
10 Rules, Legislative History, Commentary and Authority § 801.21 (2001) (citing Bourjaily
11 v. United States, 483 U.S. 171 (1987)).

12 Federal Rule of Evidence 801(d)(2)(D) does not define the term “agent.” Instead,
13 federal courts refer to general common law principles of agency in assessing whether an
14 agency relationship existed for purposes of party admissions. See Community for
15 Creative Non-Violence v. Reed, 490 U.S. 730, 109 S. Ct. 2166, 2172-73 (1998); City of
16 Tuscaloosa v. Harcos Chemicals, Inc., 158 F.3d 548, 558 n.9 (11th Cir. 1998); United
17 States v. Saks, 964 F.2d 1514, 1523-24 (5th Cir. 1992). As such, “agency” depends on
18 the existence of certain factual elements, including: (1) the manifestation by the principal
19 that the agent shall act for him; (2) the agent’s acceptance of the undertaking; and (3) the
20 understanding of the parties that the principal is to be in control of the undertaking. See
21 Restatement of the Law (Second) Agency § 1, cmt. b (1958).¹

22 For example, in City of Long Beach v. Standard Oil Company of California, 46
23 F.3d 929 (9th Cir. 1995), the plaintiff sought to admit a document consisting of the
24 handwritten notes of the defendant’s senior planning coordinator. The notes allegedly set
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26 ¹ “Agency is the fiduciary relation which results from the manifestation of consent
27 by one person to another that the other shall act on his behalf and subject to his control,
28 and consent by the other so to act.” Restatement of the Law (Second) Agency § 1 (1958).

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Two North Central Avenue, Suite 2200
Duluth, Minnesota 55804-4406

1 forth the defendant's knowledge of industry values in connection with an alleged
2 conspiracy to fix and maintain uniform, non-competitive prices for crude oil produced
3 from an oil field. Id. at 936. The Ninth Circuit, however, sustained the district court's
4 exclusion of the document as hearsay.

5 The Ninth Circuit concluded that the declarant's agency did not include the setting
6 or establishment of crude oil prices. Therefore, any statement regarding that topic
7 exceeded the scope of the declarant's agency. Id. at 937. Accordingly, because the
8 proponent of the evidence failed to lay the proper evidentiary foundation demonstrating
9 that the declarant acted as an agent of the defendant, the statement was not a party
10 admission. Id.

11 Similarly, PDMI and Inspiration have failed to establish that McWaters' role as a
12 civil engineer for BHP made him BHP's agent for purposes of discussing the operation,
13 cessation or environmental impact of the TRRP. Indeed, as described above, BHP never
14 consented to McWaters acting on its behalf with regard to controlling the TRRP.
15 Consequently, McWaters' statements regarding the same do not qualify as party
16 admissions under Rule 801(d)(2)(C), but rather inadmissible hearsay.

17 **CONCLUSION**

18 BHP respectfully asks the Court to issue an order prohibiting McWaters from
19 testifying as to environmental matters, including but not limited to the alleged
20 environmental impact of the TRRP. Moreover, McWaters' employment and agency did
21 not include the operation of the TRRP or any associated environmental issues.
22 Therefore, BHP also requests that the Court prohibit the classification of any statements,
23 whether written or oral, made by McWaters with respect to the same as party admissions.

24
25 RESPECTFULLY SUBMITTED this ___ day of August 2008.

26 BRYAN CAVE LLP
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Bryan Cave LLP
Two North Central Avenue, Suite 2200
Phoenix, Arizona 85004-4406

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23
24
25
26
27
28

By: _____
William W. Pearson
Pamela S. Gates
Two North Central Avenue, Suite 2200
Phoenix, AZ 85004-4406
Attorneys for BHP Copper Inc.

Bryan Cave LLP
Two North Central Avenue, Suite 2200
Phoenix, Arizona 85004-4404

CERTIFICATE OF SERVICE

1
2 I hereby certify that on this ___ day of August, 2008, I caused the attached
3 document to be electronically transmitted to the Clerk’s Office using the CM/ECF
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5 CM/ECF Registrants:

6
7 Frederic D. Bellamy, Esq.
8 Steptoe & Johnson LLP
9 201 E. Washington Street, 16th Floor
10 Phoenix, Arizona 85004-2382
11 Attorneys for Phelps Dodge Miami, Inc.
12 and Inspiration Consolidated Copper Co.

13
14 J. Stanton Curry, Esq.
15 Gallagher & Kennedy, PA
16 2575 East Camelback Road
17 Phoenix, Arizona 85016-9225
18 Attorneys for Phelps Dodge Miami, Inc.

19
20 Shane R. Swindle, Esq.
21 Perkins Coie Brown & Bain, P.A.
22 2901 North Central Avenue
23 P.O. Box 400
24 Phoenix, Arizona 85004-0400
25 Attorneys for CanadianOxy Offshore Production Co.

26
27 Michael G. Romey, Esq.
28 Latham & Watkins LLP
633 W. Fifth Street, Suite 4000
Los Angeles, California 90071-2007
Attorneys for CanadianOxy Offshore Production Co.

29 I hereby certify that on this ___ day of August, 2008, I caused the attached
30 document to be hand delivered and/or electronically transmitted to the following:

31
32 The Honorable David A. Ezra
33 United States District Court for the District of Hawaii
34 300 Ala Moana Blvd., Room C-400
35 Honolulu, Hawaii 96850

Bryan Cave LLP
Two North Central Avenue, Suite 2200
Phoenix, Arizona 85004-1404

1 The Honorable Lawrence O. Anderson
2 United States District Court
3 Sandra Day O'Connor U.S. Courthouse, Suite 322
4 401 West Washington Street, SPC 11
5 Phoenix, Arizona 85003-2154

6 By: _____
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ATTACHMENT E
TWO JUDICIAL DECISIONS

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
02/03/2016 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2015-103569-001 DT

01/22/2016

HON. PAMELA GATES

CLERK OF THE COURT
A. Olson
Deputy

STATE OF ARIZONA

MARISCHA H GILLA
LOUIS T GIAQUINTO
CHRISTOPHER B DUPONT
JESSICA ANN GATTUSO

v.

APOLINAR ALTAMIRANO (001)

JOEL T BROWN
STEVE WARREN MCCARTHY

CAPITAL CASE MANAGER

ORDER ENTERED

The Court has considered Crime Victims' Motion for a Protective Order Re: Video and/or Audio Depicting Grant Ronnebeck's Murder. The Court has also considered the State's Joinder, Defense's Response, and the letter submitted by the Sinclair Broadcast Group. The Crime Victims, Steve Ronnebeck, Sandy Kempf, and Shaelyn Leckington (hereinafter collectively referred to as "Victims") request a protective order that prevents the dissemination of surveillance video and/or audio of the alleged crime in the above-captioned case.

With limited exceptions, records in the custody of law enforcement are open to inspection by any person. See A.R.S. §39-121.01(D)(1). As noted in *Phoenix New Times, L.L.C., v. Arpaio*, the "core purpose of the public records law, ... is ... 'to allow the public access to official records and other government information so that the public may monitor the performance of government officials and their employees.'" 217 Ariz. 533, 541, ¶27, 177 P.3d 275,284 (App. 2008)(citing *Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. 344, 351, ¶33, 35 P.3d 105, 112 (App. 2001); see also *McKee v. Peoria Unified School Dist.*, 236 Ariz. 254, 257-58, ¶13, 338 P.3d 994, 997-98 (2014) ("The public records law 'open[s] agency action to the light of public scrutiny' and ensures that citizens are 'informed about what their government is

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2015-103569-001 DT

01/22/2016

up to.’”) (*citing Scottsdale Unified Sch. Dist. No. 48 v. KPNX Broad. Co.*, 191 Ariz. 297, 302-03, ¶21, 955 P.2d 534, 539-40 (1998)). However, the Court may restrict rights of citizens to access public records when privacy and confidentiality concerns exist or the release of records is contrary to the best interests of the state. *See Carlson v. Pima County*, 141 Ariz. 487, 687 P.2d 1242 (Ariz. 1984); *A.H. Belo Corp. v. Mesa Police Dept.*, 202 Ariz. 184, 42 P.3d 615 (Ariz. 2002).

Here, the Victims, the State and Defendant have asserted specific interests that they claim justify withholding the video and/or audio of Mr. Grant Ronnebeck’s murder. Specifically, the Victims, through their lawyer, argue that pretrial dissemination of the audio and/or video of Mr. Ronnebeck’s murder would have a significantly negative emotional impact on the Victims’ healing and subject them to witnessing the death of Mr. Ronnebeck by inadvertently turning on the television. The Court conducted an *in camera* review of the video at issue. The video clearly depicts Mr. Ronnebeck’s interacting with customers in the moments before he is shot. The video also contains Mr. Ronnebeck’s exchanges with the alleged perpetrator and includes a graphic depiction of Mr. Ronnebeck’s death. Given the depiction of Mr. Ronnebeck throughout the video coupled with the graphic nature of Mr. Ronnebeck’s death, the Court agrees that pretrial dissemination of the video in its entirety would likely cause private harm to the Victims and would violate their right to privacy and healing. *Champlin v. Sargeant*, 192 Ariz. 371, 375, ¶6, 965 P.2d 763, 767 (1998)(“The Victims’ Bill of Rights, Ariz. Const. art. 2, §2.1, was adopted and its statutory implementation enacted (A.R.S. §13-4433(A)) to provide crime victims with ‘basic rights of respect, protection, participation and healing of their ordeals.’”)(*citing* 1991 Ariz. Sess. Laws ch. 229, §2; *see also Carlson*, 141 Ariz. 487, 687 P.2d 1242; *A.H. Belo*, 202 Ariz. 184, 42 P.3d 615; *.cf The New York Times Co. v. City of New York Fire Dept.*, 829 N.E.2d 269-271 (N.Y. Ct. App. 2005)(concluding that the public interest in the words of the 911 callers during the aftermath of the terrorist attack on the World Trade Towers was outweighed by the interest in privacy of those family members and callers who prefer that those words remain private).

However, in light of the statutory policy in favor of disclosure, the Court is also is asked to balance the Victims’ rights with production of the video through alternative means. *See A.H. Belo*, 202 Ariz. at 619, ¶18, 42 P.3d at 188. (“When it is asserted that the presumptive public interest in the accessibility of a particular public record is outweighed by considerations of confidentiality, privacy, or the best interests of the State, it is relevant to inquire whether the information within the record is available through alternative means.”). Here, the Sinclair Broadcast Group requests production of the video, or alternatively, production of portions of the video or stills from the video. In light of the statutory policy favoring disclosure, the Court is herein ordering the production of two stills from the video. *See Schoeneweiss v. Hamner*, 223 Ariz. 169, 171, ¶2, 221 P.3d 48, 50 (App. 2009)(“When . . . records concern the discovery or investigation of a death caused by potential criminal conduct, privacy concerns must yield to the

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2015-103569-001 DT

01/22/2016

extent necessary to inform the public of the government's investigation of criminal conduct and its efforts to protect other victims of that conduct."'). The stills do not depict the face of the Victim nor the actually shooting. The stills depict the suspect standing at the counter of the convenience store before the shooting and show the scene of the crime without portraying the graphic nature of the murder or Mr. Ronnebeck's face and/or reactions.

Prior to ordering the production of the stills from Exhibit 4,¹ the Court also considered the Defendant's due process rights. The Court does not find that the production of the two stills from Exhibit 4 will taint the jury pool or interfere with Defendant's right to a fair and impartial jury. In this case, the jury will very likely see the video during the trial, and any potential impact of a prospective juror's exposure to the images of the stills can be fully explored during voir dire.

IT IS ORDERED granting the Crime Victims' Motion for a Protective Order in part. Specifically, the Court is granting the protective order to prevent the pretrial production of the surveillance video recording of Exhibit 2 and/or Exhibit 4, which videos depict Mr. Ronnebeck's death.

IT IS ORDERED denying the Motion for Protective Order as it relates to images depicted at 0:50 seconds and 2:17 of Exhibit 4. Copies of the images have been prepared and are available for pick-up in this Division by the State, counsel for the Victims, and counsel for Defendant. Copies of the stills are also filed under seal as Exhibit 5.

¹ The State marked and the Court admitted, under seal, Exhibit 2. Despite significant effort, the Court has been unable to view the videos. The State produced one CD in a viewable format, which is marked and admitted as Exhibit 4. Exhibit 4 is admitted under seal.

Excerpt from Order of Annulment

Michael K. Jeanes, Clerk of Court

*** Filed ***

7/5/12; 8AM

SUPERIOR COURT OF ARIZONA MARICOPA COUNTY

FN 2010-004133

07/02/2012

HON. PAMELA GATES

CLERK OF THE COURT
V. Stevens
Deputy

IN RE THE MARRIAGE OF
LYDIA OPRITESCU

KENNETH A WINSBERG

AND

CATALIN ION OPRITESCU

ZACHARY EVAN MUSHKATEL

ORDER OF ANNULMENT

The initial trial in this matter convened and concluded on March 23, 2012. A second hearing was held on June 26, 2012. Also before the Court is Respondent's Emergency Petition for Order to Show Cause and Appear in re: Contempt, Petitioner's Response, Respondent's Reply, Petitioner's Motion for Entry of Decree, and Respondent's Response thereto. Since the close of evidence, the Court has carefully considered the evidence and testimony, including the credibility of Lydia Opritescu, Catalin Opritescu, and their witnesses. Based on the foregoing, and in consideration of the arguments of counsel, the Court makes the following findings and rulings.

BACKGROUND

On or about November 16, 2010, Ms. Opritescu filed a Petition for Dissolution of Marriage Without Children. Mr. Opritescu was served on November 17, 2010 with a Summons and the Petition for Dissolution of Marriage Without Children. Mr. Opritescu filed a Response to the Petition on November 29, 2010.

Thereafter, on August 15, 2011, Ms. Opritescu filed a Motion for Amendment of Petition to a Petition for Annulment, alleging that she "recently learned that [Mr. Opritescu] had not been divorced as of the date of the parties' marriage, April 16, 2002." See Motion for Amendment.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

FN 2010-004133

07/02/2012

After briefing, the Court granted the Motion, allowing Ms. Opritescu to amend her Petition and seek an annulment based on the position that the marriage between Mr. Opritescu and Ms. Opritescu was a void marriage. Ms. Opritescu filed her Amended Petition on or about November 1, 2011. Mr. Opritescu filed his Response on or about November 7, 2011.

ANNULMENT

Mr. Opritescu was married in Romania to Alexandrina Opritescu on August 16, 1985. Lydia Opritescu and Catalin Opritescu participated in a ceremonial marriage in Phoenix, Arizona on April 16, 2002. Therefore, the question before the Court was whether Mr. Opritescu was legally divorced from Alexandrina Opritescu at the time of his ceremonial marriage with Lydia Opritescu.

To determine the status of Mr. Opritescu's marriage to Alexandrina Opritescu on April 16, 2002, the Court analyzed Romanian law in effect on April 16, 2002. *See Hack v. Industrial Commission*, 74 Ariz. 305, 248 P.2d 863 (1952) (upholding the Industrial Commission's decision to deny the decedent's second wife death benefits because the decedent was still married under the laws of Wisconsin at the time of his Arizona wedding to his second wife). During the March 23, 2012 trial, the Court received into evidence the 2002 version of Article 39 of the Romanian Family Code, which was translated by the Office of the Court Interpreter (hereinafter referred to as "Article 39").¹

The English translation prepared by the Office of the Court Interpreter was filed and provided to the parties, allowing each party an opportunity to file an objection to the translation. Mr. Opritescu filed an objection to the translation on May 17, 2012. He filed a supplement to his objection on May 18, 2012. The Court set a hearing, which was held on June 26, 2012.

The Court translator determined that the proper English translation of Article 39 is:

The marriage is dissolved on the day the divorce judgment has become final and binding.

Under circumstances set forth in Art. 38[], the marriage is dissolved on the day the divorce certificate has been issued.

To third parties, the patrimonial effects of a marriage shall become null on the day an annotation regarding the divorce or, depending on the case, regarding the divorce certificate, has been entered on the marriage certificate or from the date they [the third parties] were notified about the divorce in a different manner.

¹ For purposes of this Decree, citations to the Romanian Family Law Code refer to the 2002 version.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

FN 2010-004133

07/02/2012

The Court translator also reviewed and translated the letter from Judge Mihnea Adrian Tanase, President of the Bucharest 5th District Court. The Court translator determined that the letter from Judge Tanase stated, in relevant part:

[A]fter having checked the documents on file, we found that the civil judgment no. 1457, which was pronounced on 3/20/2002 by the Bucharest 5th District Court in the matter no. 1879/2002, having as object the [“]dissolution of marriage + divorce settlement regarding the goods accrued during the marriage” of the Petitioner Alexandrina Opritescu and the Respondent Ion Catalin Opritescu, became final and binding on 04/30/2002, since no appeal has been filed. (emphasis in original).

The Court heard considerable argument regarding the translation of the Romanian verb “a rămas,” particularly when used with the Romanian word “irevocabilă.” Mr. Opritescu argued that his divorce became final and irrevocable upon issuance of the divorce certificate and “remained irrevocable” upon expiration of the time for appeal. The Court finds Mr. Opritescu’s proposed English translation of the letter from Judge Tanase is linguistically and logically flawed.

When translating the verb “a rămas” in the context of Article 39 and Judge Tanase’s letter, the Court translator chose to use the English verb “became” rather than the verb “remains” or “remained” because “remains” or “remained” was less logical when translated from Romanian to English. *See* Exhibit 8 (June 26, 2012 hearing). The Court found the testimony of the Court translator credible and compelling.

To support the translation of the Court translator, Ms. Opritescu offered the testimony of Julieta Paulesc. Specifically, Ms. Paulesc determined that Judge Tanase’s letter stated that the divorce between Catalin Opritescu and Alexandrina Opritescu “**became** final and irrevocable on April 30th, 2002, since ne [sic] appeal have [sic] been filled [sic].” *See* Exhibit 2 (June 26, 2012 hearing)(emphasis added).² Ms. Paulesc testified persuasively that “a rămas” is not consistently translated to mean “to remain” or “remained”; rather, the verb is often properly translated to mean “to become” or “became.”

In entering its decision, the Court also reviewed the construction of Article 39. The first sentence of Article 39 states that a “[marriage is dissolved on the date the divorce judgment] a rămas irevocabilă.” *See* Exhibit 119. The time of dissolution set forth in the first sentence of

² The Court expressly disregards the portion of Exhibit 2 that purports to rely on an answer provided from Gabriel Mihai; however, Ms. Paulesc testified that her translation would remain the same without reliance on the statement from Ms. Mihai.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

FN 2010-004133

07/02/2012

Article 39 (i.e., when the divorce judgment a rămas irevocabilă) is distinctly different than the time for dissolution set forth in the second sentence of Article 39, which applies if the circumstances of Article 38 are met. *Id.* The undisputed English translation of the second sentence of Article 39 states, “[u]nder the circumstances set forth in Art[icle] 38[], the marriage is dissolved on the day the divorce certificate has been issued.” *Id.* Neither party argued that Article 38 of the Romanian Family Code applied to the dissolution between Catalin Opritescu and Alexandrina Opritescu.

After considering the evidence and testimony, the Court finds under the applicable Romanian Law, Catalin Opritescu and Alexandrina Opritescu’s divorce judgment became final and binding on April 30, 2002. Therefore, the Court finds that under Romanian Law, Catalin Opritescu was legally married when he attempted to marry Lydia Opritescu.³ Consequently, as a married man, Mr. Opritescu lacked the capacity to marry Lydia Opritescu on April 16, 2002. Accordingly, the marriage between Catalin Opritescu and Lydia Opritescu is void. *See Hodges v. Hodges*, 118 Ariz. 572, 578 P.2d 1001 (Ct. App. 1978). As a void marriage, the parties may not ratify the marriage and the Court shall enter a Decree of Annulment.⁴ *See State v. Demetz*, 212 Ariz. 287, 130 P.3d 986 (Ct. App. 2206)(“In Arizona, a ‘void’ marriage is one prohibited by A.R.S. § 25-101, never comes into existence, and cannot be ratified.”)(citations omitted).

IT IS ORDERED that the marriage existing between Catalin Opritescu and Lydia Opritescu is annulled.

In entering this Order, the Court finds that at least one of the parties has been domiciled in the State of Arizona for at least ninety (90) days immediately preceding the filing of the Petition for Dissolution (as amended during the proceeding to state a claim for annulment), that the conciliation provisions of A.R.S. § 25-381.09, and the domestic relations education provisions of A.R.S. § 25-352, either do not apply or have been met, that this is not a covenant marriage, that Ms. Opritescu is not pregnant, and that a legal impediment exists sufficient to render the marriage void.

SPOUSAL MAINTENANCE

³ The Court does not find that Mr. Opritescu knowingly entered into a bigamous marriage; rather, the Court finds that Mr. Opritescu believed he was divorced from Alexandrina Oprtiescu at the time of his ceremonial marriage with Lydia Opritescu.

⁴ At times in the litigation, Mr. Opritescu asserted principles of equity to argue that the Court should grant dissolution rather than an annulment. Although divorce actions are, in fact, equitable in nature, the Court only has the jurisdiction conferred to it through statute. *See Saxon v. Riddell*, 16 Ariz.App. 325, 493 P.2d 127 (1972). Here, the Court finds that Mr. Opritescu, as a married man on April 16, 2002 lacked the capacity to marry Lydia Opritescu on that date. Thus, the Court cannot ignore the statutory parameters of marriage to enter a decree of dissolution.

ATTACHMENT F

**JUDICIAL PERFORMANCE REVIEW AND
COMMISSION VOTE REPORTS 2012 AND 2016**

Friday, June 24, 2016
JPR Vote Results

ARIZONA COMMISSION ON JUDICIAL PERFORMANCE REVIEW
 VOTE MEETING * JUNE 24, 2016

<u>MEETS</u> <u>STANDARDS</u>	<u>DOES</u> <u>NOT</u> <u>MEET</u>	<u>NOT</u> <u>VOTING</u>	<u>JUDGE</u>	<u>COURT</u>
32	0	0	Hon. Ann A. Scott Timmer	Supreme Court
32	0	0	Hon. Michael Brown	Court of Appeals-Division I
32	0	0	Hon. Kent Cattani	Court of Appeals-Division I
32	0	0	Hon. Kenton Jones	Court of Appeals-Division I
32	0	0	Hon. Jon Thompson	Court of Appeals-Division I
32	0	0	Hon. Lawrence Winthrop	Court of Appeals-Division I
32	0	0	Hon. Michael Miller	Court of Appeals-Division II
32	0	0	Hon. Susan Brnovich	Maricopa County Superior Court
32	0	0	Hon. David Gass	Maricopa County Superior Court
14	17	1	Hon. Jo Lynn Gentry	Maricopa County Superior Court
31	0	1	Hon. Douglas Gerlach	Maricopa County Superior Court
32	0	0	Hon. John Hannah	Maricopa County Superior Court
32	0	0	Hon. Lori Bustamante	Maricopa County Superior Court
32	0	0	Hon. Karen Mullins	Maricopa County Superior Court
32	0	0	Hon. Robert Oberbillig	Maricopa County Superior Court
32	0	0	Hon. Patricia Starr	Maricopa County Superior Court
32	0	0	Hon. David Udall	Maricopa County Superior Court
32	0	0	Hon. Andrew Klein	Maricopa County Superior Court
32	0	0	Hon. Christopher Whitten	Maricopa County Superior Court
32	0	0	Hon. Jay Adleman	Maricopa County Superior Court
32	0	0	Hon. Christopher Coury	Maricopa County Superior Court
32	0	0	Hon. Pamela Gates	Maricopa County Superior Court
32	0	0	Hon. Michael Gordon	Maricopa County Superior

32	0	0	Hon. Michael Kemp	Court Maricopa County Superior Court
32	0	0	Hon. Daniel Kiley	Maricopa County Superior Court
32	0	0	Hon. Margaret Mahoney	Maricopa County Superior Court
32	0	0	Hon. M. Scott McCoy	Maricopa County Superior Court
32	0	0	Hon. Jose Padilla	Maricopa County Superior Court
32	0	0	Hon. Teresa Sanders	Maricopa County Superior Court
32	0	0	Hon. Sherry Stephens	Maricopa County Superior Court
32	0	0	Hon. Suzanne Cohen	Maricopa County Superior Court
31	1	0	Hon. Jeanne Garcia	Maricopa County Superior Court
32	0	0	Hon. Paul McMurdie	Maricopa County Superior Court
32	0	0	Hon. Kathleen Mead	Maricopa County Superior Court
32	0	0	Hon. Joseph Mikitish	Maricopa County Superior Court
32	0	0	Hon. Timothy Thomason	Maricopa County Superior Court
32	0	0	Hon. Peter Thompson	Maricopa County Superior Court
32	0	0	Hon. James Beene	Maricopa County Superior Court
32	0	0	Hon. Rodrick Coffey	Maricopa County Superior Court
32	0	0	Hon. Bruce Cohen	Maricopa County Superior Court
32	0	0	Hon. Connie Contes	Maricopa County Superior Court
32	0	0	Hon. John Ditsworth	Maricopa County Superior Court
32	0	0	Hon. Lisa Flores	Maricopa County Superior Court
32	0	0	Hon. Cari Harrison	Maricopa County Superior Court
32	0	0	Hon. Kristin Hoffman	Maricopa County Superior Court
32	0	0	Hon. Colleen McNally	Maricopa County Superior Court
32	0	0	Hon. David Palmer	Maricopa County Superior

ARIZONA COMMISSION ON JUDICIAL PERFORMANCE REVIEW

Superior Court

Name of Judge: MCCRI-09 Hon. Pamela Gates	Total Surveys: 153						Assignment: Criminal					Cycle: Retention Election																
	ATTORNEY					83 Resp Mean	LIT/WIT/PRO PER					9 Resp Mean	JUROR					24 Resp Mean	STAFF					37 Resp Mean				
	UN	PO	SA	VG	SU		UN	PO	SA	VG	SU		UN	PO	SA	VG	SU		UN	PO	SA	VG	SU					
Section I: Legal Ability	0	2	9	15	47	72	3.5																					
Legal reasoning ability	0	2	9	16	46	73	3.5																					
Knowledge of substantive law	0	2	10	14	47	73	3.5																					
Knowledge of rules of evidence	0	2	8	15	45	70	3.5																					
Knowledge of rules of procedure	0	1	9	14	48	72	3.5																					
Section II: Integrity	0	1	5	16	46	68	3.6	0	0	0	0	6	6	3.9	0	0	0	2	19	21	3.9	0	0	0	5	22	27	3.8
Basic fairness and impartiality	0	3	8	19	51	81	3.5	0	0	1	2	5	8	3.5	0	0	0	3	21	24	3.9	0	0	0	5	23	28	3.8
Equal treatment regardless of race	0	1	6	18	47	72	3.5	0	0	0	0	6	6	4.0	0	0	0	2	19	21	3.9	0	0	0	5	22	27	3.8
Equal treatment regardless of gender	0	1	4	18	46	69	3.6	0	0	0	0	6	6	4.0	0	0	0	2	19	21	3.9	0	0	0	5	22	27	3.8
Equal treatment regardless of religion	0	0	4	14	42	60	3.6	0	0	0	0	6	6	4.0	0	0	0	2	19	21	3.9	0	0	0	5	22	27	3.8
Equal treatment regardless of national origin	0	1	4	15	44	64	3.6	0	0	0	0	6	6	4.0	0	0	0	2	19	21	3.9	0	0	0	5	22	27	3.8
Equal treatment regardless of disability	0	1	4	15	44	64	3.6	0	0	0	0	6	6	4.0	0	0	0	2	19	21	3.9	0	0	0	5	22	27	3.8
Equal treatment regardless of age	0	0	4	17	47	68	3.6	0	0	0	0	6	6	4.0	0	0	0	2	19	21	3.9	0	0	0	5	22	27	3.8
Equal treatment regardless of sexual orientation	0	0	4	14	43	61	3.6	0	0	0	0	6	6	4.0	0	0	0	2	18	20	3.9	0	0	0	5	22	27	3.8
Equal treatment regardless of economic status	0	1	4	17	47	69	3.6	0	0	0	0	6	6	4.0	0	0	0	2	19	21	3.9	0	0	0	5	22	27	3.8
Section III: Communication Skills	0	1	8	16	46	71	3.5	0	0	0	0	7	7	4.0	0	0	0	1	22	24	3.9	0	0	1	7	20	28	3.7
Clear and logical communications																						0	0	1	7	20	28	3.7
Clear and logical oral communications and directions	0	0	9	21	49	79	3.5																					
Clear and logical written decisions	0	0	7	11	38	56	3.6																					
Gave all parties an adequate opportunity to be heard	1	2	8	15	52	78	3.5																					
Explained proceedings (to the jury)								0	0	0	0	7	7	4.0	0	0	0	2	22	24	3.9							
Explained reason for delays								0	0	0	0	6	6	4.0	0	0	1	2	21	24	3.8							
Clearly explained the juror's responsibilities															0	0	0	0	24	24	4.0							
Section IV: Judicial temperament	1	1	8	18	53	81	3.5	0	0	0	1	7	8	3.8	0	0	0	2	21	24	3.9	0	0	2	4	23	29	3.7
Understanding and compassion	2	0	8	20	51	81	3.5	0	0	1	0	6	7	3.7	0	0	1	3	20	24	3.8	0	0	2	5	22	29	3.7
Dignified	1	1	6	18	56	82	3.5	0	0	0	2	7	9	3.8	0	0	0	2	22	24	3.9	0	0	1	4	24	29	3.8
Courteous	1	1	10	16	54	82	3.5	0	0	0	2	7	9	3.8	0	0	0	3	21	24	3.9	0	0	2	4	23	29	3.7
Conduct that promotes public confidence in the court	1	1	8	16	55	81	3.5	0	0	0	0	8	8	4.0	0	0	0	2	22	24	3.9	0	0	1	5	23	29	3.8
Patient	2	1	7	22	49	81	3.4	0	0	1	1	6	8	3.6	0	0	1	2	20	23	3.8	0	0	2	4	22	28	3.7
Section V: Administrative Performance	0	1	6	22	51	81	3.5	0	0	0	2	5	8	3.7	0	1	0	0	23	24	3.9	0	0	1	4	22	27	3.8
Punctual in conducting proceedings	0	2	6	26	49	83	3.5	0	0	0	2	5	7	3.7	0	2	0	0	22	24	3.8	0	0	1	3	22	26	3.8
Maintained proper control of courtroom	1	1	4	25	52	83	3.5	0	0	0	2	6	8	3.8	0	0	0	0	24	24	4.0	0	0	2	4	19	25	3.7
Prompt in making rulings and rendering decisions	0	1	6	20	48	75	3.5																					
Was prepared for the proceedings	0	1	7	22	52	82	3.5	0	0	0	3	5	8	3.6	0	0	0	0	24	24	4.0	0	0	1	3	22	26	3.8
Respectful treatment of staff																						0	0	2	4	23	29	3.7
Cooperation with peers																						0	0	1	4	24	29	3.8
Efficient management of calendar	1	1	7	19	52	80	3.5															0	0	1	3	21	25	3.8
Section VI: Settlement Activities	1	0	3	11	42	57	3.6																					
Appropriately promoted or conducted settlement	1	0	3	11	42	57	3.6																					

UN=Unacceptable, PO=Poor,
SA=Satisfactory, VG=Very Good,
SU=Superior

Category summaries are averages and may not add up due to rounding.

Surveys were distributed to court
users from 08/2015 - 01/2016

ARIZONA COMMISSION ON JUDICIAL PERFORMANCE REVIEW

Superior Court

Name of Judge:	Total Surveys: 153						Assignment: Criminal					Cycle: Retention Election												
MCCRI-09	ATTORNEY					83	LIT/WIT/PRO PER					9	JUROR					24	STAFF					37
Hon. Pamela Gates	UN	PO	SA	VG	SU	Mean	UN	PO	SA	VG	SU	Mean	UN	PO	SA	VG	SU	Mean	UN	PO	SA	VG	SU	Mean
Section I: Legal Ability	0%	2%	13%	20%	65%	3.5																		
Legal reasoning ability	0%	3%	12%	22%	63%	3.5																		
Knowledge of substantive law	0%	3%	14%	19%	64%	3.5																		
Knowledge of rules of evidence	0%	3%	11%	21%	64%	3.5																		
Knowledge of rules of procedure	0%	1%	13%	19%	67%	3.5																		
Section II: Integrity	0%	1%	7%	24%	68%	3.6	0%	0%	2%	4%	95%	3.9	0%	0%	0%	10%	90%	3.9	0%	0%	0%	18%	82%	3.8
Basic fairness and impartiality	0%	4%	10%	23%	63%	3.5	0%	0%	13%	25%	63%	3.5	0%	0%	0%	13%	88%	3.9	0%	0%	0%	18%	82%	3.8
Equal treatment regardless of race	0%	1%	8%	25%	65%	3.5	0%	0%	0%	0%	100%	4.0	0%	0%	0%	10%	90%	3.9	0%	0%	0%	19%	81%	3.8
Equal treatment regardless of gender	0%	1%	6%	26%	67%	3.6	0%	0%	0%	0%	100%	4.0	0%	0%	0%	10%	90%	3.9	0%	0%	0%	19%	81%	3.8
Equal treatment regardless of religion	0%	0%	7%	23%	70%	3.6	0%	0%	0%	0%	100%	4.0	0%	0%	0%	10%	90%	3.9	0%	0%	0%	19%	81%	3.8
Equal treatment regardless of national origin	0%	2%	6%	23%	69%	3.6	0%	0%	0%	0%	100%	4.0	0%	0%	0%	10%	90%	3.9	0%	0%	0%	19%	81%	3.8
Equal treatment regardless of disability	0%	2%	6%	23%	69%	3.6	0%	0%	0%	0%	100%	4.0	0%	0%	0%	10%	90%	3.9	0%	0%	0%	19%	81%	3.8
Equal treatment regardless of age	0%	0%	6%	25%	69%	3.6	0%	0%	0%	0%	100%	4.0	0%	0%	0%	10%	90%	3.9	0%	0%	0%	19%	81%	3.8
Equal treatment regardless of sexual orientation	0%	0%	7%	23%	70%	3.6	0%	0%	0%	0%	100%	4.0	0%	0%	0%	10%	90%	3.9	0%	0%	0%	19%	81%	3.8
Equal treatment regardless of economic status	0%	1%	6%	25%	68%	3.6	0%	0%	0%	0%	100%	4.0	0%	0%	0%	10%	90%	3.9	0%	0%	0%	19%	81%	3.8
Section III: Communication Skills	0%	1%	11%	22%	65%	3.5	0%	0%	0%	0%	100%	4.0	0%	0%	1%	6%	93%	3.9	0%	0%	4%	25%	71%	3.7
Clear and logical communications																			0%	0%	4%	25%	71%	3.7
Clear and logical oral communications and directions	0%	0%	11%	27%	62%	3.5																		
Clear and logical written decisions	0%	0%	13%	20%	68%	3.6																		
Gave all parties an adequate opportunity to be heard	1%	3%	10%	19%	67%	3.5																		
Explained proceedings (to the jury)							0%	0%	0%	0%	100%	4.0	0%	0%	0%	8%	92%	3.9						
Explained reason for delays							0%	0%	0%	0%	100%	4.0	0%	0%	4%	8%	88%	3.8						
Clearly explained the juror's responsibilities													0%	0%	0%	0%	100%	4.0						
Section IV: Judicial temperament	2%	1%	10%	23%	65%	3.5	0%	0%	5%	12%	83%	3.8	0%	0%	2%	10%	88%	3.9	0%	0%	6%	15%	79%	3.7
Understanding and compassion	2%	0%	10%	25%	63%	3.5	0%	0%	14%	0%	86%	3.7	0%	0%	4%	13%	83%	3.8	0%	0%	7%	17%	76%	3.7
Dignified	1%	1%	7%	22%	68%	3.5	0%	0%	0%	22%	78%	3.8	0%	0%	0%	8%	92%	3.9	0%	0%	3%	14%	83%	3.8
Courteous	1%	1%	12%	20%	66%	3.5	0%	0%	0%	22%	78%	3.8	0%	0%	0%	13%	88%	3.9	0%	0%	7%	14%	79%	3.7
Conduct that promotes public confidence in the court	1%	1%	10%	20%	68%	3.5	0%	0%	0%	0%	100%	4.0	0%	0%	0%	8%	92%	3.9	0%	0%	3%	17%	79%	3.8
Patient	2%	1%	9%	27%	60%	3.4	0%	0%	13%	13%	75%	3.6	0%	0%	4%	9%	87%	3.8	0%	0%	7%	14%	79%	3.7
Section V: Administrative Performance	0%	1%	7%	28%	63%	3.5	0%	0%	0%	30%	70%	3.7	0%	3%	0%	0%	97%	3.9	0%	0%	5%	13%	82%	3.8
Punctual in conducting proceedings	0%	2%	7%	31%	59%	3.5	0%	0%	0%	29%	71%	3.7	0%	8%	0%	0%	92%	3.8	0%	0%	4%	12%	85%	3.8
Maintained proper control of courtroom	1%	1%	5%	30%	63%	3.5	0%	0%	0%	25%	75%	3.8	0%	0%	0%	0%	100%	4.0	0%	0%	8%	16%	76%	3.7
Prompt in making rulings and rendering decisions	0%	1%	8%	27%	64%	3.5																		
Was prepared for the proceedings	0%	1%	9%	27%	63%	3.5	0%	0%	0%	38%	63%	3.6	0%	0%	0%	0%	100%	4.0	0%	0%	4%	12%	85%	3.8
Respectful treatment of staff																			0%	0%	7%	14%	79%	3.7
Cooperation with peers																			0%	0%	3%	14%	83%	3.8
Efficient management of calendar	1%	1%	9%	24%	65%	3.5													0%	0%	4%	12%	84%	3.8
Section VI: Settlement Activities	2%	0%	5%	19%	74%	3.6																		
Appropriately promoted or conducted settlement	2%	0%	5%	19%	74%	3.6																		

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Surveys were distributed to court users from 08/2015 - 01/2016

Maricopa County Voters Only
One Member Not Voting

Hon. Pamela Gates
Maricopa County Superior Court
Bench: Family
Appointed: 2009

**100% of the Commission Voted Judge Gates
MEETS Judicial Performance Standards**
29 Commissioners Voted 'Meets'
0 Commissioners Voted 'Does Not Meet'

2012	Attorney Surveys	Litigant Witness Surveys
	Distributed: 123 Returned: 44 <u>Detailed Report</u> Score (See Footnote)	Distributed: 215 Returned: 21 <u>Detailed Report</u> Score (See Footnote)
Legal Ability	98%	n/a
Integrity	96%	80%
Communication Skills	98%	88%
Temperament	97%	80%
Admin Performance	99%	87%
Settlement Activities	95%	n/a

FOOTNOTE: The score is the percentage of all evaluators who rated the judge "satisfactory", "very good", or "superior" in each of the Commission's evaluation categories. Depending on the assignment, a judge may not have responses in certain categories, indicated by N/A (for example, some judicial assignments do not require jury trials). The JPR Commission votes "Yes" or "No" on whether a judge "MEETS" Judicial Performance Standards, based on the statistical information, as well as any other information submitted by the public or the judge. Further information on the judges and justices can be found at each court's website.

ARIZONA COMMISSION ON JUDICIAL PERFORMANCE REVIEW

Superior Court

Name of Judge: MCFAM-07 Hon. Pamela Gates	Total Surveys: 81						Assignment: Family					Cycle: Retention Election																		
	ATTORNEY					44	LIT/WIT/PRO PER					21	JUROR					16												
	UN	PO	SA	VG	SU	Resp	Mean	UN	PO	SA	VG	SU	Resp	Mean	UN	PO	SA	VG	SU	Resp	Mean	UN	PO	SA	VG	SU	Resp	Mean		
Section I: Legal Ability	0	1	4	14	24	42	3.5																							
Legal reasoning ability	0	1	4	14	23	42	3.4																							
Knowledge of substantive law	0	1	3	15	23	42	3.4																							
Knowledge of rules of evidence	0	1	3	13	24	41	3.5																							
Knowledge of rules of procedure	0	0	4	12	26	42	3.5																							
Section II: Integrity	0	1	2	6	19	28	3.5	1	1	2	2	8	14	2.9						0	0	0	2	12	14	3.8				
Basic fairness and impartiality	0	1	3	12	26	42	3.5	4	2	1	4	8	19	2.5						0	0	0	1	14	15	3.9				
Equal treatment regardless of race	1	0	2	4	19	26	3.5	0	2	2	2	8	14	3.1						0	0	0	2	12	14	3.9				
Equal treatment regardless of gender	1	0	3	7	25	36	3.5	4	1	1	2	10	18	2.7						0	0	0	2	12	14	3.9				
Equal treatment regardless of religion	0	1	2	5	18	26	3.5	0	1	2	2	7	12	3.3						0	0	0	2	12	14	3.9				
Equal treatment regardless of national origin	1	0	2	5	16	24	3.5	0	1	2	2	7	12	3.3						0	0	0	2	12	14	3.9				
Equal treatment regardless of disability	0	1	2	4	16	23	3.5	1	0	1	2	5	9	3.1						0	0	0	2	12	14	3.9				
Equal treatment regardless of age	0	1	2	6	18	27	3.5	0	1	2	2	8	13	3.3						0	0	0	3	11	14	3.8				
Equal treatment regardless of sexual orientation	1	0	2	4	14	21	3.4	0	1	2	2	6	11	3.2						0	0	0	3	11	14	3.8				
Equal treatment regardless of economic status	0	1	3	6	21	31	3.5	3	4	1	2	10	20	2.6						0	0	0	3	11	14	3.8				
Section III: Communication Skills	0	1	2	13	27	43	3.5	1	2	5	3	8	17	2.9						0	0	0	2	13	15	3.9				
Clear and logical communications																														
Clear and logical oral communications and directions	1	0	1	16	26	44	3.5																							
Clear and logical written decisions	0	1	3	12	25	41	3.5																							
Gave all parties an adequate opportunity to be heard	0	1	3	10	29	43	3.6																							
Explained proceedings (to the jury)								0	2	5	2	11	20	3.1																
Explained reason for delays								1	1	4	3	5	14	2.7																
Clearly explained the juror's responsibilities																														
Section IV: Judicial temperament	0	1	2	13	26	42	3.5	1	3	3	3	10	21	2.9						0	0	0	3	12	15	3.8				
Understanding and compassion	1	0	4	14	23	42	3.4	2	5	2	2	9	20	2.6						0	0	0	2	13	15	3.9				
Dignified	0	0	2	14	27	43	3.6	1	1	4	4	10	20	3.1						0	0	1	2	13	16	3.8				
Courteous	0	1	1	14	27	43	3.6	1	2	4	3	11	21	3.0						0	0	1	3	12	16	3.7				
Conduct that promotes public confidence in the court	0	2	1	11	28	42	3.5	2	4	2	3	10	21	2.7						0	0	0	2	13	15	3.9				
Patient	0	2	3	12	25	42	3.4	1	2	4	4	10	21	3.0						0	0	0	4	11	15	3.7				
Section V: Administrative Performance	0	0	2	12	26	41	3.5	1	2	4	2	13	21	3.1						0	0	0	2	12	14	3.8				
Punctual in conducting proceedings	0	1	1	14	27	43	3.6	1	1	5	1	13	21	3.1						0	0	1	2	12	15	3.7				
Maintained proper control of courtroom	0	0	1	13	28	42	3.6	0	2	4	2	13	21	3.2						0	0	0	2	12	14	3.9				
Prompt in making rulings and rendering decisions	1	0	5	12	22	40	3.4																							
Was prepared for the proceedings	1	0	2	10	30	43	3.6	2	2	2	2	13	21	3.0						0	0	0	2	12	14	3.9				
Respectful treatment of staff																				0	1	1	2	11	15	3.5				
Cooperation with peers																				0	0	0	1	11	12	3.9				
Efficient management of calendar	0	0	2	11	25	38	3.6													0	0	0	3	11	14	3.8				
Section VI: Settlement Activities	0	1	0	7	11	19	3.5																							
Appropriately promoted or conducted settlement	0	1	0	7	11	19	3.5																							

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Surveys were distributed to court users from 08/2011 - 03/2012

ARIZONA COMMISSION ON JUDICIAL PERFORMANCE REVIEW

Superior Court

Name of Judge: MCFAM-07 Hon. Pamela Gates	Total Surveys: 81						Assignment: Family						Cycle: Retention Election												
	ATTORNEY					44	LIT/WIT/PRO PER					21	JUROR					16	STAFF					16	
	UN	PO	SA	VG	SU	Mean	UN	PO	SA	VG	SU	Mean	UN	PO	SA	VG	SU	Mean	UN	PO	SA	VG	SU	Mean	
Section I: Legal Ability	0%	2%	8%	32%	57%	3.5																			
Legal reasoning ability	0%	2%	10%	33%	55%	3.4																			
Knowledge of substantive law	0%	2%	7%	36%	55%	3.4																			
Knowledge of rules of evidence	0%	2%	7%	32%	59%	3.5																			
Knowledge of rules of procedure	0%	0%	10%	29%	62%	3.5																			
Section II: Integrity	2%	2%	8%	21%	68%	3.5	9%	10%	11%	16%	54%	2.9							0%	0%	0%	16%	84%	3.8	
Basic fairness and impartiality	0%	2%	7%	29%	62%	3.5	21%	11%	5%	21%	42%	2.5							0%	0%	0%	7%	93%	3.9	
Equal treatment regardless of race	4%	0%	8%	15%	73%	3.5	0%	14%	14%	14%	57%	3.1							0%	0%	0%	14%	86%	3.9	
Equal treatment regardless of gender	3%	0%	8%	19%	69%	3.5	22%	6%	6%	11%	56%	2.7							0%	0%	0%	14%	86%	3.9	
Equal treatment regardless of religion	0%	4%	8%	19%	69%	3.5	0%	8%	17%	17%	58%	3.3							0%	0%	0%	14%	86%	3.9	
Equal treatment regardless of national origin	4%	0%	8%	21%	67%	3.5	0%	8%	17%	17%	58%	3.3							0%	0%	0%	14%	86%	3.9	
Equal treatment regardless of disability	0%	4%	9%	17%	70%	3.5	11%	0%	11%	22%	56%	3.1							0%	0%	0%	14%	86%	3.9	
Equal treatment regardless of age	0%	4%	7%	22%	67%	3.5	0%	8%	15%	15%	62%	3.3							0%	0%	0%	21%	79%	3.8	
Equal treatment regardless of sexual orientation	5%	0%	10%	19%	67%	3.4	0%	9%	18%	18%	55%	3.2							0%	0%	0%	21%	79%	3.8	
Equal treatment regardless of economic status	0%	3%	10%	19%	68%	3.5	15%	20%	5%	10%	50%	2.6							0%	0%	0%	21%	79%	3.8	
Section III: Communication Skills	1%	2%	5%	30%	63%	3.5	3%	9%	26%	15%	47%	2.9							0%	0%	0%	13%	87%	3.9	
Clear and logical communications																			0%	0%	0%	13%	87%	3.9	
Clear and logical oral communications and directions	2%	0%	2%	36%	59%	3.5																			
Clear and logical written decisions	0%	2%	7%	29%	61%	3.5																			
Gave all parties an adequate opportunity to be heard	0%	2%	7%	23%	67%	3.6																			
Explained proceedings (to the jury)							0%	10%	25%	10%	55%	3.1													
Explained reason for delays							7%	7%	29%	21%	36%	2.7													
Clearly explained the juror's responsibilities																									
Section IV: Judicial temperament	0%	2%	5%	31%	61%	3.5	7%	14%	16%	16%	49%	2.9							0%	0%	3%	17%	81%	3.8	
Understanding and compassion	2%	0%	10%	33%	55%	3.4	10%	25%	10%	10%	45%	2.6							0%	0%	0%	13%	87%	3.9	
Dignified	0%	0%	5%	33%	63%	3.6	5%	5%	20%	20%	50%	3.1							0%	0%	6%	13%	81%	3.8	
Courteous	0%	2%	2%	33%	63%	3.6	5%	10%	19%	14%	52%	3.0							0%	0%	6%	19%	75%	3.7	
Conduct that promotes public confidence in the court	0%	5%	2%	26%	67%	3.5	10%	19%	10%	14%	48%	2.7							0%	0%	0%	13%	87%	3.9	
Patient	0%	5%	7%	29%	60%	3.4	5%	10%	19%	19%	48%	3.0							0%	0%	0%	27%	73%	3.7	
Section V: Administrative Performance	1%	0%	5%	29%	64%	3.5	5%	8%	17%	8%	62%	3.1							0%	1%	2%	14%	82%	3.8	
Punctual in conducting proceedings	0%	2%	2%	33%	63%	3.6	5%	5%	24%	5%	62%	3.1							0%	0%	7%	13%	80%	3.7	
Maintained proper control of courtroom	0%	0%	2%	31%	67%	3.6	0%	10%	19%	10%	62%	3.2							0%	0%	0%	14%	86%	3.9	
Prompt in making rulings and rendering decisions	3%	0%	13%	30%	55%	3.4																			
Was prepared for the proceedings	2%	0%	5%	23%	70%	3.6	10%	10%	10%	10%	62%	3.0							0%	0%	0%	14%	86%	3.9	
Respectful treatment of staff																			0%	7%	7%	13%	73%	3.5	
Cooperation with peers																			0%	0%	0%	8%	92%	3.9	
Efficient management of calendar	0%	0%	5%	29%	66%	3.6													0%	0%	0%	21%	79%	3.8	
Section VI: Settlement Activities	0%	5%	0%	37%	58%	3.5																			
Appropriately promoted or conducted settlement	0%	5%	0%	37%	58%	3.5																			

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