

APPLICATION FOR NOMINATION TO JUDICIAL OFFICE

This original application, 5 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 Wednesday, August 31, 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: **Frank James Conti Jr.**
2. Have you ever used or been known by any other legal name? **No.** If so, state name: **N/A.**
3. Office Address: **18380 N. 40th St., Ste O, Phoenix, AZ 85032**
4. When have you been a resident of Arizona? **Since 5/31/1990.**
5. What is your county of residence and how long have you resided there?

Maricopa County (26 years)

6. Age: **53**

(The Arizona Constitution, Article VI, §§ 22 and 37, requires 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 Party (1987 - present)

Democratic Party (1981 - 1987)

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

8. Gender: **Male**

Race/Ethnicity: 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.

Duquesne University 1981 - 1985 Bachelor of Arts

University of Pittsburgh 1985 - 1986 Master of Public and Internat'l Affairs

University of Denver 1987 - 1990 Juris Doctor

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

Duquesne University:

- Dual major in Political Science and History.
- Member, Alpha Phi Delta Fraternity.
- School champion and 1st Team All-School Goaltender, Intramural Street Hockey League, 1981 - 1985.
- Participant, Internship in Practical Politics Program, Penna. House of Representatives, Rep. Michael M. Dawida (D), (8/1984 – 12/1984).

University of Pittsburgh Graduate School of Public & International Affairs:

- Specialized certificate in international security studies.

University of Denver College of Law:

- Participant, Natural Resources Law Moot Court Competition.
- Campaign Intern, Schaefer to Congress, Rep. Dan Schaefer (R), U.S. House of Representatives (9/1988 – 11/1988), Englewood, CO.
- Participant, Corporate Legal Internship Program: US West Communications (1/1990 – 5/1990); U.S Securities & Exchange Commission, (9/1989 – 11/1989), Denver, CO.
- Member, Denver Journal of International Law & Policy (Fall 1988 – Winter 1989).

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

Duquesne University:

- Recipient, Wolves' Club of New Castle Scholarship, 1981.
- Recipient, Minnie Hyman Academic Scholarship Fund, 1981 - 1985.

- Earned Dean's List – Third Honors in three of eight semesters.
- Initiate, Phi Alpha Theta International Honor Society in History, 1984.
- GPA = 3.13 / (3.5 in History).

University of Pittsburgh Graduate School of Public & International Affairs:

- Specialized certificate in International Security Studies.
- GPA = 3.56

University of Denver College of Law:

- Finished 1st year ranked in top 10% of class. Graduated 63rd / 207 (top 30% of graduating class).
- Recipient, American Jurisprudence Award, Constitutional Law I & II.
- Member, Denver Journal of International Law & Policy (Fall 1988 – Winter 1989).

The necessity of maintaining employment during my college and law school years is, I believe, a relevant factor when considering my apparently unspectacular performance. This employment was required in light of the modesty of my parents' income and the cost of tuition at Duquesne University. Bartending and waiting tables in downtown Pittsburgh during the evening hours usually meant working until early morning, significantly restricting the amount of time available for study and sleep. In spite of this, I maintained a steady trend of gradual but consistent improvement in my GPA from semester to semester.

After graduating from Duquesne University in 1985 I enrolled in the University of Pittsburgh's Graduate School of Public and International Affairs. My original intention was to complete the dual degree program in conjunction with the University of Pittsburgh's School of Law. When I decided instead to attend law school in Denver, I focused my attention on completing my Master's degree as soon as possible. This made 1985 the only year in which I was not gainfully employed.

In March–August 1986 I had a work/study job as a special delivery

messenger for the U.S. Postal Service; I left that job in August 1986 to take a position as a litigation clerk with the firm of Kirkpatrick & Lockhart in downtown Pittsburgh. I remained at Kirkpatrick & Lockhart until moving to Denver for law school in May 1987.

My employment continued throughout law school. I worked as a summer law clerk with the firm of Long & Jaudon, P.C. from June-September 1988; and as a summer associate with the firm of Pendleton & Sabian, P.C. from June-September 1989. In addition to these jobs I was at all times consistently involved in a number of unpaid practical internships, both legal and political in nature. These internships have been listed elsewhere in this application. [See response to Question #10 above.]

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.

-State Bar of Arizona, admitted 10/27/1990.

-U.S. District Court, District of Arizona, admitted 6/16/2003.

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
Justice of the Peace Dreamy Draw Justice Court	1/1/2009 - present	Maricopa County, AZ
Justice of the Peace Pro Tempore	9/1999 - 12/2008	Maricopa County, AZ

Municipal Judge Pro Tempore	5/1997 - 12/2008	Glendale City Court Peoria Municipal Court Phoenix Municipal Court Tempe Municipal Court Mesa City Court
Executive Director Institute for Justice-Arizona Chapter	3/2003 - 7/2004	Phoenix, AZ
Private law practice	9/1994 - 5/1997	Maricopa County, AZ
Trial attorney Maricopa County Public Defender	10/1990 – 7/1994	Phoenix/Mesa, AZ

15. List your current law partners and associates, if any. You may attach a firm letterhead or other printed list. Applicants who are judges should attach a list of judges currently on the bench in the court in which they serve. **N/A.**

16. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice. **N/A.**

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

My legal practice from 1990-1997 involved mainly civil and criminal litigation. Except for a brief period of serving as a public interest lawyer from 2003-2004, I served exclusively as a municipal judge / justice of the peace pro tempore from 1997 until my first election to the office of Dreamy Draw Justice of the Peace in November 2008. Since that time my bar membership status has been properly maintained as “judicial.”

As a deputy public defender from 1990-1994 I appeared in Maricopa County Superior Court every day on a variety of felony criminal matters such as arraignments, pretrial conferences, evidentiary hearings, oral arguments, bench trials, jury trials, change of plea proceedings, sentencings, probation violation hearings, and preliminary hearings.

As a private practitioner from 1994-1997 I appeared in justice courts, municipal courts, and Maricopa County Superior Court at least once or twice a week on a variety of criminal and civil proceedings.

As a public interest lawyer with the Institute for Justice-Arizona Chapter I was responsible for researching, developing and arguing the legal theories involved in prosecuting a constitutional challenge to the Arizona Clean Elections public campaign financing system before the U.S. District Court of Arizona.

18. Identify all areas of specialization for which you have applied or been granted certification by the State Bar of Arizona. **N/A.**
19. Describe your typical clients. **N/A.**
20. Have you served regularly in a fiduciary capacity other than as a lawyer representing clients? If so, give details.

Other than being responsible for the administration of the Dreamy Draw Justice Court's budget and court staff, compliance with the Administrative Office of the Courts' Minimum Accounting Standards, and being the hiring and firing authority for the court, I have not otherwise served in a fiduciary capacity.

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

From November 2010 to November 2011, during the time of Judge John Ore's tenure as Presiding Justice of the Peace for Maricopa County, I was solely responsible for drafting, advancing, and ensuring passage of a major revision to the Bench Policy Directives for the Maricopa County Justice Courts.

My governance policy amendment created an initiative process that permitted judges who were not members of the Presider's hand-picked "Professional Standards and Policy Committee" an opportunity to submit bench policy proposals for consideration by a committee of the whole.

This amendment opened up the policymaking process to new ideas, promoting discussion and consideration of proposals that were approved by any justice of the peace, so long as at least five other justices signed on. This revision became known as the "Conti Amendment."

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. **N/A.**

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

Sole Counsel: **N/A.**

Chief Counsel: **N/A.**

Associate Counsel: **N/A.**

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: **2**

Chief Counsel: **0**

Associate Counsel: **2**

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.

The cases in which I negotiated a settlement of a criminal felony prosecution by way of plea bargain are so voluminous that I cannot accurately recall specific information re: dates, names of counsel, case substance or summaries. Nevertheless, I have press clippings which permit me to respond in the following limited way:

(1) **State v. Wickey** – In October 1991 I represented the defendant, a 17-year-old father who was charged as an adult for the offense of child abuse as a Class 2 felony. The offense required a mandatory prison term. My client, who had dropped out of high school in 10th grade, was arrested after shaking his 3-week-old son in an effort to quiet his crying.

On December 17, 1991 The Phoenix Gazette reported that the case had been filed before the Hon. Maurice Portley, and that Anne Williams was the deputy county attorney assigned to prosecute.

Ultimately I negotiated a plea agreement to attempted aggravated assault, which would have been a Class 4 felony and a probation-eligible offense.

- (2) **State v. Marks** –The circumstances of the case were unusual, prompting The Arizona Republic to report on the defendant's arrest on August 12, 1990—making it one of my first cases as a deputy public defender. My client, a sales manager at an auto sales and leasing business, had passed out at work.

Paramedics arrived at the scene and revived the defendant. Once revived, my client then struggled with one of the paramedics for control of a nearby gun, seized it and pointed it at him. The paramedics fled the scene, the police were called, and a tense four-hour negotiation ensued in an attempt to secure the defendant's surrender—the delay having been caused by the defendant having passed out again after agreeing to surrender.

My client was charged with aggravated assault, which was ultimately plea bargained down to a misdemeanor.

- (3) **Citizen 2000** – On August 2, 1996 The Arizona Republic / Phoenix Gazette reported that an agreement for a new lease had been struck between Central United Methodist Church and Citizen 2000, an inner-city charter school. I represented Citizen 2000 as sole counsel in association with attorney Gary Peter Klahr.

Citizen 2000 had been plagued with well-publicized accreditation and financial problems, as well as claimed improprieties regarding the use of state funds. The news stories caused the church to balk at signing a new lease with my client.

I managed to convince the church and its counsel to enter into what proved to be time-sensitive, delicate negotiations, and ultimately arranged an agreement on a new lease for the school that left my client quite pleased.

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: **1**
State Courts of Record: **800 - 1000**
Municipal/Justice Courts: **250**

The approximate percentage of those cases which have been:

Civil: **5**
Criminal: **95**

The approximate number of those cases in which you were:

Sole Counsel: **800 - 1000**
Chief Counsel: **1**
Associate Counsel: **50**

The approximate percentage of those cases in which:

You conducted extensive discovery¹: **5**
You wrote and filed a motion for summary judgment: **5**
You wrote and filed a motion to dismiss: **25**
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): **25**
You made a contested court appearance (other than as set forth in above response) **95**
You negotiated a settlement: **95**
The court rendered judgment after trial: **5**
A jury rendered verdict: **2**

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

Disposition occurred prior to any verdict: 95

The approximate number of cases you have taken to trial: Court 40

Note: If you approximate the number of cases taken to trial, explain why an exact count is not possible. Jury 5

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: 1

Criminal: 0

The approximate number of matters in which you appeared:

As counsel of record on the brief: AZ 1 U.S. 0

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

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.
N/A.

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.

(1) **State v. Hardwick, 1 CA-CR 94-0303, Maricopa County Superior Court, Hon. Maurice Portley presiding. Reversed, remanded. Reported at 183 Ariz. 649, 905 P.2d 1384 (Ct. App. 1995).**

As a deputy public defender I represented a client charged with 18 counts of child molestation and other dangerous crimes against children in the Spring of 1994. The trial was by jury before

the Hon. Maurice Portley, now recently retired from the Arizona Court of Appeals.

The victims were three sisters. The trial court directed verdict of acquittal on one count and the jury convicted defendant on 16 of the 17 remaining counts. Defendant was sentenced to 224 years of imprisonment.

During the trial the prosecutor, Anne Michael Williams of the Maricopa County Attorney's Office, had improperly cross-examined the defendant by use of an anonymously authored pamphlet. I objected on the grounds of hearsay and improper expert testimony. The trial court overruled.

On November 7, 1995 Division 1 of the Arizona Court of Appeals found the trial court's ruling on my objection to be clear and egregious error. Specifically, the appellate court found that I had properly stated the grounds for my objection to inadmissible evidence, thus preserving the issue for review.

The convictions were reversed and the case remanded for a new trial. The Court of Appeals also reversed the trial court's denial of another motion I had made for directed verdict on two of the 16 counts upon which the jury had returned a guilty verdict. Those additional counts were dismissed on double jeopardy grounds.

(2) **Robinson v. Wetton**, CV 95-07905, Maricopa County Superior Court, Hon. Mark F. Aceto presiding.

As a private practitioner in 1996 I represented a mother and daughter as sole counsel in a civil lawsuit as part of my brief, informal association with attorney Gary Peter Klahr. I was brought on to take over the case and defend a motion for summary judgment. After my research I found a basis for filing a cross-motion for summary judgment as to liability.

My client enrolled her 11-year-old daughter in Connacht Academy, a Christian charter school located on the premises of defendant 67th Avenue Baptist Church in Phoenix. The Church was represented by Brian Kaven and Theodore Julian Jr. The school was owned and operated by defendant Michael Wetton, who within the previous three months had been charged with felony child abuse for two separate incidents at the previous

school location, across the street from the defendant church.

Defendant Wetton had on these occasions administered corporal punishment by paddling children with their pants down, and had committed similar acts against my client's daughter at the new school location. Our negligence claim was based on the Church's breach of a duty to protect the plaintiff from Wetton's foreseeable criminal acts, because the Church failed to investigate Wetton's criminal history by performing a routine \$45 background check, which would have revealed pending criminal charges for child abuse arising from the precise same conduct.

The theory I advanced in this case was novel and ahead of its time, but completely supported by existing law. The trial court didn't see it that way, granting defendant Church's motion for summary judgment and denying our cross-motion. Much to my chagrin, my client did not wish to pursue an appeal.

(3) **City of Mesa v. Randall E. Bailey**, CV 2001-090422, Maricopa County Superior Court, Hon. Bethany G. Hicks presiding.

As a public interest lawyer with the Institute for Justice-Arizona Chapter, my first court appearance involved filing a motion for attorneys' fees and memorandum in support at the conclusion of this landmark case, in November 2003. The City was represented by Joseph Padilla of the Mesa City Attorney's Office; Mr. Bailey was also represented at one point by Dale S. Zeitlin of Phoenix.

Prior to my arrival with the Institute, plaintiff Mesa had filed a condemnation action against Bailey, where the trial court granted the city immediate possession. The Hon. Clint Bolick, now a Justice of the Arizona Supreme Court, had filed a special action before the Arizona Court of Appeals, which found that art. II, sec. 17 of the Arizona Constitution forbade plaintiff from condemning defendant's property.

The claim for attorneys' fees was pursuant to three separate bases: Ariz. R. Civ. P. 54(g); the equitable "private attorney general" doctrine; and A.R.S. 12-1129(B)(1), a new statute enacted during the pendency of the Bailey case mandating attorneys' fees in failed condemnation actions.

The motion for attorneys' fees was granted. The original claim of \$152,895.00 was reduced only slightly, to \$130,888.35.

- (4) **Association of American Physicians & Surgeons v. Brewer**, CV 04-0200-PHX-EHC, U.S. District Court, District of Arizona, Hon. Earl H. Carroll presiding. Reported at 363 F. Supp.2d 1197 (D. Ariz. 2005).

As a public interest lawyer with the Institute for Justice–Arizona Chapter I was primarily responsible for the research, development, pleading and argument of a legal challenge to the constitutionality of the Arizona Citizens Clean Elections public campaign financing system.

The complaint was filed on February 19, 2004 before the U.S. District Court of Arizona, the Hon. Earl H. Carroll presiding. The defendants were represented by Peter Silverman of the Arizona Attorney General's Office. My co-counsel was the Hon. Clint Bolick, now a Justice of the Arizona Supreme Court.

The essence of the claim for declaratory and injunctive relief was that the independent expenditure, matching funds and financial reporting requirements of the public campaign funding scheme violated the 1st and 14th Amendment rights of privately-funded candidates and groups wishing to support them.

While the case was dismissed in a ruling by Judge Carroll on March 10, 2005, these precise legal theories were ultimately vindicated by Justice Bolick before the U.S. Supreme Court in *Arizona Free Enterprise Club v. Bennett*, 131 S.Ct. 2806 (2011).

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.).

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Between 1994-1997 I completed 40 hours of mediation skills training through the justice courts' Maricopa County Dispute Resolution Alternatives Office, and served as a volunteer mediator in the justice courts on an ad hoc basis countywide.

With the exception of the period between 2003-2004 when I practiced as a public interest lawyer, at all times from 1997-2008 I served as a judge pro tempore for municipal courts and justice courts throughout Maricopa County.

My service as a judge pro tem began with the Glendale City Court in 1997. I was responsible for the adjudication of all case types heard in a municipal court, including weekend initial appearance proceedings held in conjunction with the Peoria Municipal Court. In fact, I served as a full-time pro tem judge for Glendale City Court so often that by 1999 mandatory deductions from my pay were made to fulfill the requirements of the Arizona State Retirement System.

In the period between 1997–2003 I also served as a judge pro tem for Phoenix Municipal Court, Tempe Municipal Court, and Mesa City Court, albeit in a much more sporadic, part-time capacity.

Beginning in 1999 I served as a judge pro tem for the Maricopa County Justice Courts on a consistent part-time basis until approximately 2005, when my service became so regular that I was again deemed a full-time county employee for ASRS purposes. In 2007 I served as acting justice of the peace pro tem for the Dreamy Draw Justice Court during the approximately year-long suspension of the Hon. Jacqueline McVay, my immediate predecessor in office. I was responsible for adjudicating all case types heard by a justice of the peace during this time.

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.

[See Exhibit A for minute entries for each case listed below, which I decided as Justice of the Peace for the Dreamy Draw Justice Court.]

(1) **Reiss v. Wells Fargo Bank**, CC2012-197432. Decided 4/30/2012. Plaintiff appeared pro per. Defendant represented by David N. Farren, Jaburg & Wilk, P.C., 3200 N. Central Ave., 20th Floor, Phoenix, AZ 85012, (602) 248.1000, dnf@jaburgwilk.com.

(2) **Bonaventure Mobile Home Park v. Armstrong**, CC2012-060146. Decided 9/5/2012. Plaintiff represented by Melissa A. Parham, Williams, Zinman & Parham, P.C., 7701 E. Indian School Rd., Ste. J, Scottsdale, AZ 85251, (480) 994.4732, clerkofcourt@wzplegal.com. Defendant represented by Blake D. Gunn, P.O. Box 22146, Mesa, AZ 85277, (480) 270.5073, Blake.Gunn@gunnbankruptcyfirm.com.

(3) **Bond v. Mosbarger**, CC 2012-110214. Decided 10/17/2012. Both parties appeared pro per.

(4) **Ellerman v. Nguyen**, CC2012-058733. Decided 4/11/2013. Both parties appeared pro per.

(5) **Lamm & Associates, PLLC v. Aldridge**, CC2012-244832. Decided 5/24/2013. Plaintiff represented by Jason D. Lamm, 6245 N. 24th Pkwy #208, Phoenix, AZ 85016, (602) 222.9237, jlamm@cyberlawaz.com. Defendant appeared pro per.

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

Throughout my twenty years of service as both a municipal judge pro tempore, justice of the peace pro tempore, and elected justice of the peace, I have always held firm to a philosophy of judicial restraint.

I believe that when a judge takes an oath to follow the constitution and laws, he or she cannot create new law from the bench in an effort to reach a desired result in a particular case. Sometimes the facts are heart-wrenching and the temptation is great to muddy what the law clearly mandates. It is at such moments that a judge must remain true to the oath of office. To do otherwise is to assume powers that do not properly come with a seat on the bench.

If I rewrite the law to suit my fancy in every case, I render the law meaningless and essentially make myself a legislator. If every judge acted in this way, the law would mean whatever a particular judge felt it should mean on any given day—rather than what our elected representatives intended it to mean. Such a whimsical judicial philosophy confounds the notion of equal justice for all.

When judges do not limit themselves to the written word, it creates uncertainty bordering on legal anarchy—because in that instance there is no reliable, consistent way for those who use our courts to measure the strength of their cases or predict outcomes. Fewer cases would reach settlement, clogging dockets that are already overcrowded.

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? **Yes.** If so, give details, including dates.

Shortly after the torrent of guilty verdicts came down in the *State v. Hardwick* case described in the response to Question #28 above, I chose to voluntarily resign from the Maricopa County Public Defender's Office in approximately the late Spring of 1994, as part of the countywide budgetary Reduction In Force program in effect at that time. My resignation was purely a matter of conscience, a decision that I could somewhat afford given that I was then unmarried with no children. Given my lower-middle class upbringing, however, I had assumed approximately \$120,000.00 in student loan debt in order to continue my higher education. My starting salary at the Public Defender was \$19,800.00/year.

The period between roughly 1995 – 1999 was, naturally, one of difficult financial struggle. During that time I worked as a coverage attorney for a variety of local counsel, including a brief, informal association with the late Gary Peter Klahr. I also worked as a bartender at the Ramada Inn in downtown Phoenix for a number of years, and the midtown Phoenix City Grille on 16th Street and Bethany Home Road as well. In fact, at one point in 1997 I was in the most unusual position of having worked as a lawyer, a judge pro tem and a bartender all at the same time. Thankfully, by 1999 I had established a reputation as a highly competent and reliable judge pro tempore, and was finally able to quit tending bar

During the period between 2004 – 2005 I supplemented my income as a judge pro tempore by working as an instructor at College America in Phoenix, teaching a variety of general education topics. I also worked as an adjunct professor of political science at Rio Salado College, teaching courses in American National Government and the U.S. Constitution.

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. **N/A.**

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? **N/A.** If not, give reasons. **N/A.**

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. **N/A.**
35. Have you paid all state, federal and local taxes when due? **Yes.** If not, explain. **N/A.**
36. Are there currently any judgments or tax liens outstanding against you? **No.** If so, explain. **N/A.**
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. **N/A.**
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) **CIV-00-02966-PHX-RJH.** The dire financial circumstances described in the response to Question # 32 lead to my inability to repay approximately \$120,000.00 in student loan debt that I had assumed in order to continue my education. This student loan debt comprised over 90% of my total liabilities at the time. Regrettably, I made the difficult decision to declare personal bankruptcy in March 2000. My student loans were not discharged, and I eventually repaid them.

(2) **Conti v. Bishop, CV 2002-012089 / Ariz. Sup. Ct. No. CV-02-0229-AP / EL (2002).** Petition challenge before the Maricopa County Superior Court, Hon. Mark W. Armstrong presiding. Filed in advance of the 2002 Republican primary election on numerous legal grounds, pursuant to A.R.S. 16-351 (A). The trial court ruled in favor of the defendant; affirmed on direct appeal to the Arizona Supreme Court on July 17, 2002, with subsequent memorandum decision issued Aug. 1, 2002.

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

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. **N/A.**
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. **N/A.**
- 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)? **No.** If so, identify the nature of the violation, the court, and the ultimate disposition. **N/A.**
42. If you performed military service, please indicate the date and type of discharge. If other than honorable discharge, explain. **N/A.**
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. **N/A.**
44. List and describe any litigation involving an allegation of fraud in which you were or are a defendant. **N/A.**
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. **N/A.**
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? **N/A.**

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. **N/A.**
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.) **N/A.**
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. **N/A.**
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. **N/A.**
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). **N/A.**
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. **N/A.**

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. **N/A.**
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. **[See response to Question #38 above.]**

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.

[Please see Exhibit B for a selection of these writings. I would humbly encourage the members of this Commission to review them, as I believe they provide important insights re: my judicial philosophy and decision-making process.]

-Frank J. Conti, *My Last Word: The case of the trailer-park doughnut-maker*, ARIZONA ATTORNEY, Nov. 2015.

-Frank J. Conti, *Judge: Some court cases boil down to rule of reason*, ARIZONA REPUBLIC, June 10, 2015.

-Frank J. Conti, *If a voice mail falls in the forest, does it make a sound?*, PARADISE VALLEY INDEPENDENT, June 4, 2015.

-Frank J. Conti, *Sometimes the simplest explanation is the best*, PARADISE VALLEY INDEPENDENT, April 30, 2015.

-Frank J. Conti, *Strange behavior often points to alcohol abuse*, SCOTTSDALE REPUBLIC (online), Mar. 19, 2013.

-Frank J. Conti, *Common sense trumped by law in judge's ruling*, PHOENIX REPUBLIC, May 2, 2012.

-Frank J. Conti, *Self-righteous acts lack righteous purity*, PHOENIX REPUBLIC, Mar. 2, 2012.

-Frank J. Conti, *Order of protection: Gut-wrenching task*, PHOENIX REPUBLIC, Feb. 10, 2012.

-Frank J. Conti, *Mom's poor manners cannot be defended*, PHOENIX REPUBLIC, Oct. 29, 2011.

-Frank J. Conti, *Making the call on a case of 21st birthday gone bad*, PHOENIX REPUBLIC, Apr. 27, 2011.

-Frank J. Conti, *Drivers must be made aware of texting's dangers*, PHOENIX REPUBLIC, Feb. 5, 2011.

-Frank J. Conti, *Jurors play a vital role in our justice system*, PHOENIX REPUBLIC, Nov. 27, 2010.

-Frank J. Conti, *Judge: Denial deep-rooted in some defendants*, PHOENIX REPUBLIC, Sept. 1, 2010.

-Frank J. Conti, *Tough times a chance to display moral values*, PHOENIX REPUBLIC, May 28, 2010.

-Frank J. Conti, *To resolve disputes, take a walk in other party's shoes*, PHOENIX REPUBLIC, Mar. 5, 2010.

-Frank J. Conti, *Judges cannot ignore law, give 'break' to less fortunate*, PHOENIX REPUBLIC, Dec. 9, 2009.

-Frank J. Conti, *JP candidates should have to prove they understand basic legal concepts*, PHOENIX REPUBLIC, Nov. 28, 2007.

-Frank J. Conti, *My Turn: Prop. 200 foes leave Latinos living in fear*, ARIZONA REPUBLIC, Nov. 16, 2004.

-Frank J. Conti, *Bolster Mexico's economy, not its dependence*, EAST VALLEY TRIBUNE, Mar. 23, 2005.

-Frank J. Conti, *Clean Elections law ruins any who don't use it*, TUCSON CITIZEN, Perspective, 5B, Mar. 17, 2004.

-Frank J. Conti, *Petty tyranny at root of eminent domain land grabbing*, EAST VALLEY TRIBUNE, June 23, 2003.

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

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.

As an adjunct professor of political science at Rio Salado College I taught several courses in American National Government and U.S. Constitutional Law.

As a justice of the peace I have taught COJET seminar courses to pro tem judges on topics such as criminal sentencing considerations and guidelines, issuing protective orders, and conducting protective order hearings under the Arizona Rules of Protective Order Procedure.

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

-Member, State Bar of Arizona, in good standing since Oct. 27, 1990.

-Member, Arizona Justice of the Peace Association.

-Member, Arizona Dispute Resolution Association (1995 - 1998).

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 have served on the Maricopa County Justice Courts' Pro Tem Committee for several years, and have been involved in the process of interviewing and selecting pro tem judges. I have been primarily responsible for the live, on-bench training and mentoring of newly elected judges and newly appointed pro tem judges for the justice courts. I very much enjoy the responsibility that comes with providing practical training and teaching moments for brand new judges.

In addition, I am currently serving as a member of the Arizona Supreme Court Administrative Office of the Courts' Conference Planning Committee for the 2016 Governor's Office of Highway Safety Conference, chaired by the Hon. Judge Frank Louis Dominguez.

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.

I have for several years been a member of the Maricopa County Justice Courts' Pro Tem Committee. During this time I have devoted a great deal of effort towards training lawyers so that they can capably serve as pro tem judges for the justice courts on a *pro bono* basis.

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

I have always been actively involved in my sons' extracurricular community activities by volunteering. For instance, I have for years acted as a volunteer lunch room / playground monitor at Madison Traditional Academy, where both my sons attended.

I was a volunteer assistant coach for all practices and games when my eldest son played Pop Warner football for the North Central Bruins. (Pop Warner Little Scholars, Inc. is the oldest and largest non-profit provider of youth football, cheerleading, and dance programs in the world.) I was one of the financial sponsors for the North Central Bruins. Likewise, I routinely volunteered to help our local scoutmasters for the years that my youngest son was active in the Boy Scouts of America.

I have also been involved in volunteer charitable activities to help those less fortunate, on an ad hoc basis and mostly through Catholic charities. I have made a point of teaching the importance of doing so to my teenage sons.

Additionally, I have instituted a Victim Impact Panel program at the Dreamy Draw Justice Court that requires attendance for those defendants convicted of DUI or other alcohol or drug-related offenses.

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

My first official act as the elected Justice of the Peace for the Dreamy Draw Justice Court was the institution of a Victim Impact Panel program sponsored by the local nonprofit Arizona Archangel Foundation. The North Central News, a monthly community newspaper, recognized this on the front page of its March 2009 edition. [See Exhibit C, *Court kicks off impact panel*, NORTH CENTRAL NEWS, March 2009.]

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

-Appointed Republican precinct committeeman, Pasadena Precinct (LD-18), 1998-2002.

-Republican primary election, Arizona State Representative (LD-18), Aug. 2000.

-Republican primary election, Central Phoenix Justice of the Peace, (won nomination), Aug. 2002. Subsequently defeated in the general election, Nov. 2002.

-Republican primary election, Dreamy Draw Justice of the Peace, Aug. 2008 (won nomination unopposed). Subsequently won the general election, Nov. 2008.

-Republican primary election, Dreamy Draw Justice of the Peace, Aug. 2012 (won nomination unopposed). Subsequently won the general election (unopposed) Nov. 2012.

-Republican primary election, Dreamy Draw Justice of the Peace, Aug. 2016 (won nomination unopposed). Officially unopposed in the general election, Nov. 2016.

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. **N/A.**

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

I enjoy swimming the 1500m breaststroke, walking, and yoga; creative writing; reading nonfiction, particularly American history; preparing and enjoying homemade Italian cuisine; beachcombing in southern California; singing and playing electric blues/rock guitar (sometimes in public); admiring/restoring American cars from the late 1960s and early 1970s; and occasionally taking my sons to see Arizona Coyotes hockey games.

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.

Three of my four grandparents came to America from Italy, sailing across the Atlantic to the greatest nation on earth in search of a better life. My parents grew up two blocks from each other in the same close-knit Italian neighborhood in New Castle, Pennsylvania, a small industrial town fifty miles north of Pittsburgh.

My father was a disabled Korean War veteran who worked as a real-estate specialist for the Pennsylvania Department of Transportation. He passed away in 1999. He had suffered five debilitating strokes in his lifetime—the first at age 42—but in spite of his poor health he never stopped trying to provide for his family.

My mother was a registered nurse and a nursing instructor, and is now retired. She remains a constant source of inspiration. How she raised me and my five siblings while caring for my father, working as a nurse, and later returning to school to obtain her certificate to teach nursing remains a miracle not easily explained.

When my mother's father arrived from Ellis Island he spoke no English. The train conductor had to place a sign around my grandfather's neck with the name of his destination so that he wouldn't miss his stop. He worked as a carpenter for the Baltimore & Ohio Railroad. My grandfather insisted that his six children speak only English in the home, because he believed that mastery of the language would ensure his family's success in the New World.

My grandfather was right. His four daughters all attended college, became excellent registered nurses, and even better mothers to their children. One of his two sons, my Uncle Frank, became a teacher, the head coach of the New Castle High School baseball and basketball teams, and later, the principal who signed my high school diploma. His other son, my Uncle Nick, entered the priesthood in the Roman Catholic Diocese of Pittsburgh, rose to the rank of Monsignor, and was ultimately appointed the Bishop of Harrisburg, Pennsylvania by His Holiness Pope John Paul II.

I earned a Bachelor of Arts in history and political science from Duquesne University in 1985, and was inducted into the Phi Alpha Theta International Honor Society in History. In 1986 I earned a Master of Public and International Affairs from the University of Pittsburgh, with a specialized certificate in International Security Studies.

In 1990 I earned a Juris Doctor from the University of Denver College of Law, receiving the American Jurisprudence Award in Constitutional Law. I have been a licensed Arizona attorney in good standing since 1990, and served as judge pro tempore for municipal and justice courts throughout Maricopa County from 1997-2008. Since January 1, 2009 I have been fortunate to serve as the elected Justice of the Peace for the Dreamy Draw Justice Court in Maricopa County.

As the Commission can plainly see from my frank responses to the questions above, I have faced my share of personal and professional challenges. Of course, as the late 19th century American writer-philosopher Elbert Hubbard once said, "The man who has no problems is out of the game." I recognize that no one is immune to difficulties. In that regard I am unremarkable.

But, through the ups and downs of my legal and judicial career I believe that I have consistently shown an extraordinary degree of perseverance, mental strength, and ultimate confidence in my ability to be a helpful force for good in this world. These are things that my parents and grandparents taught me that have thankfully stayed with me all this time. For that gift I am forever in their debt.

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

I have worked very hard throughout my now twenty-six-year legal and judicial career to develop a reputation for competence, diligence and integrity. I am most proud of these facts: (1) Since becoming a member of the State Bar of Arizona in 1990 I have never been subject to discipline for

professional misconduct as an attorney; and (2) Since first serving as a judge pro tempore in 1997 I have never been subject to discipline for an ethical violation by the Commission on Judicial Conduct.

As the members of this Commission are no doubt aware, judges who serve in limited jurisdiction courts—and especially justice courts—are necessarily subject to highly frequent, daily contact with self-represented litigants. Many of these people are angry, combative, or distraught. It's safe to say that few of them want to be there.

Adjudicating cases like evictions, civil and small claims lawsuits and protective order hearings are often tense, emotional, and hotly contested affairs. Performing this service well requires patience. Performing this service extremely well for twenty years—while maintaining impeccable judicial demeanor, and without being subject to discipline—requires an *extraordinary* amount of patience.

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. **N/A.**
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. **N/A.**
68. Attach a brief statement explaining why you are seeking this position.

At this point in my career I feel that I am uniquely well-qualified for the professional and intellectual challenge that an appointment to the Superior Court bench would provide.

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 Exhibit D attached.]

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 Exhibit E attached.]

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. **N/A.**

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

Exhibit

A

**IN THE DREAMY DRAW JUSTICE COURT
MARICOPA COUNTY, ARIZONA**

CC2012-197432

04/30/2012

HON. FRANK J. CONTI
JUSTICE OF THE PEACE

REISS

V.

WELLS FARGO BANK

MINUTE ENTRY

Plaintiff depositor sued Defendant bank, the complaint sounding in negligence and breach of fiduciary duty. At issue was whether the bank had the authority to withhold \$1,445.12 from the Plaintiff's account and remit it to the California Franchise Tax Board to satisfy a tax levy. Plaintiff sought that amount, plus reimbursement of a \$100 fee charged by the bank to process debiting the account.

The tax levy in question was issued by a department of the California state government on June 15, 2012. The bank notified Plaintiff four days later, and held the money for 11 days before remitting it to satisfy the tax levy.

The Plaintiff objected to the bank in writing, claiming that California had "no jurisdiction" over his money in Arizona. But, except for a blanket denial offered by Plaintiff during his closing argument, there was no evidence presented to indicate that he ever contested the validity of the tax levy itself, or raised any formal challenge, objection or appeal to the California Franchise Tax Board.

Plaintiff relies on A.R.S. 6-233, the Arizona adverse claims statute. This provision defines "adverse claimant" as "any person" asserting an adverse claim against a bank account. This court finds that a governmental taxing authority such as the IRS, the Arizona Department of Revenue, or, in this instance, the California Franchise Tax Board is not a person. Any other interpretation of the word "person" would prevent a governmental taxing authority, whether within or without the State of Arizona, from levying bank accounts to resolve unpaid tax debts without an order of a court in the United States.

Absent a special relationship, Defendant bank does not owe a fiduciary duty to its customers. McAlister v. Citibank, 171 Ariz. 207, 212, 829 P.2d 1253, 1258 (App. 1992). Pursuant to the Consumer Account Agreement between the parties, the relationship is termed as one between debtor and creditor, and the absence of a special or fiduciary relationship is expressly stated. [See Defendant's Ex. 6, p. 44]. So the Plaintiff's claim of negligent breach of fiduciary duty must fail.

Furthermore, under the heading "Legal Process," the parties' agreement clearly states that the bank "may accept and act on any legal process that it believes is valid." The agreement further defines legal process to include "a levy, garnishment or attachment, tax levy or withholding order." [See Defendant's Ex. 6, p. 18]. There was no evidence proffered at trial suggesting the invalidity of the Order to Withhold Personal Income Tax [Plaintiff's Ex. 2] issued to the Defendant by the California Franchise Tax Board.

IT IS ORDERED that, Plaintiff having failed to meet his burden of proof by a preponderance of the evidence, judgment will issue for Defendant. Defendant may submit a form of judgment and an affidavit for reasonable attorneys' fees and costs.



FRANK J. CONTI
Justice of the Peace
Dreamy Draw Justice Court



**IN THE DREAMY DRAW JUSTICE COURT
MARICOPA COUNTY, ARIZONA**

CC2012-060146

09/05/2012

HON. FRANK J. CONTI
JUSTICE OF THE PEACE

BONAVENTURE MOBILE HOME PARK

V.

TYLER KEITH ARMSTRONG

MINUTE ENTRY

Trial was heard by the court on August 28, 2012. Plaintiff trailer park brought suit against defendant for trespass, property damage, and/or negligent entrustment of his vehicle. The park manager testified that, beginning in May 2010, a series of ten incidents occurred whereby a newer model Ford Mustang was using the grassy area of the park to perform driving exhibitions which included "donut-making." The result was always the same: damage to the lawn and sprinkler heads.

The park purchased expensive camera equipment in an attempt to identify the offending driver. The fourth incident, in November 2010, happened in broad daylight on a rainy morning before noon. Several photos of a newer model Mustang were captured. The parties dispute whether the photos depict a green or a gray vehicle. The seventh incident, in September 2011, was late at night, and resulted in dark, grainy photographs which, while not entirely legible, seem to suggest that the license plate may have been that belonging to the defendant's car. The tenth and final incident, on a December night in 2011, finally gave Plaintiff a name and a face upon which to pin this hooliganism. For it was then that defendant's gray Mustang came to a smoky rest on the park's grassy area after smashing into a palm tree.

Defendant testified that he was intoxicated that evening and had asked his roommate to serve as designated driver. The defendant said he was in the back seat, stone drunk, with his girlfriend. The roommate was driving, and a mutual friend was in the passenger seat. The roommate and passenger appeared and corroborated the defendant's testimony. It was clear that these two young gentlemen were the individuals depicted in photographs taken by plaintiff's security cameras shortly after the accident.

The police were called, and a report was taken. According to the report, the defendant admitted to having a friend who once lived in the trailer park, and that "they had driven on the trailer park lawn 4 or 5 times in the last two years." [Plaintiff's Exhibit 7] Defendant testified that he told the police that it was the friend, now deceased, who was in the habit of driving on the lawn. He also testified that he was a

passenger for his friend's donut-making on two occasions, that it was always in his friend's vehicle, and that he never drove on the park's lawn himself. On cross examination the defendant said that he didn't believe the police officer was lying, but that her memory was faulty. Defense counsel correctly noted that the report was written a month after the incident. The court found the defendant's testimony credible.

The defendant's (now former) roommate took the stand and admitted to driving the defendant's car on the night of the accident. When the court inquired as to why he did it, he could say only that he "wanted to keep the party going." He admitted to having recently pleaded guilty to criminal damage as a result of the crash. There was no evidence that the roommate was intoxicated or otherwise incompetent to drive safely, or that the defendant knew or should have known that the roommate was incompetent. The roommate was not charged with DUI. He was, however, charged with criminal damage, pleaded guilty, and ordered to pay restitution.

The former roommate also testified that he didn't own a vehicle while he was living with the defendant, and that he often borrowed the defendant's Mustang. Most important, however, was the former roommate's admission that he had driven the defendant's Mustang on the trailer park lawn without his knowledge on at least two occasions. As he had never before wrapped it around a palm tree, there would have been no way for the defendant to know of his roommate's activities.

Ultimately what the plaintiff proved was that circumstantial evidence suggested that *the defendant's vehicle* may have been driven on the park lawn on two occasions. These are the incidents where a green or gray Mustang and a fuzzy license plate are depicted in photographs. However, there is no evidence that the defendant himself committed trespass by driving on the park lawn. Furthermore, the court would be engaging in rank speculation were it to find that defendant had either: (A) knowingly permitted an incompetent or intoxicated person to drive his car; or (B) intentionally permitted or encouraged another to commit trespass or criminal damage upon the plaintiff's property.

The burden of proof in tort cases is by a preponderance of the evidence. The standard Arizona jury instruction defining the preponderance of evidence reads, in relevant part:

To establish a fact by a preponderance of the evidence means *to prove that something is more likely true than not true*. In other words, a preponderance of the evidence in the case means such evidence when considered and compared with that opposed to it, has more convincing force, and produces in your minds a belief that what is sought to be proven is more likely true than not true. [Emphasis added.]

The totality of the evidence presented here creates a rather strong inference that the defendant's former roommate was in the habit of borrowing the defendant's car, and then using that car to habitually damage the plaintiff's lawn without the defendant's knowledge or consent. This is, in the court's view, more likely true than not true.

IT IS ORDERED granting judgment for the defendant.



FRANK J. CONTI
Justice of the Peace
Dreamy Draw Justice Court



**IN THE DREAMY DRAW JUSTICE COURT
MARICOPA COUNTY, ARIZONA**

CC2012-110214

10/17/2012

HON. FRANK J. CONTI
JUSTICE OF THE PEACE

BOND

V.

MOSBARGER

MINUTE ENTRY

This matter was heard by the court in a bench trial conducted on October 16, 2012. Plaintiff landlord filed suit for reimbursement of time and labor expenses connected with the lease agreement entered into with Defendant tenants. [See Plaintiff's complaint.] Plaintiff claimed \$2,469.95 in damages over and above the Defendant's deposit of \$1,295., which was never refunded by Plaintiff at the termination of the tenancy. Defendants countersued for return of the deposit pursuant to A.R.S. 33-1321.

The lion's share of Plaintiff's claimed damages (\$2,380.00) stemmed from his having been "impeded" from performing "emergency" and other work on the property due to the Defendants having been awarded an injunction against harassment against him. The Plaintiff also prayed for damages for time and travel expenses related to defending against the injunction. At trial the Plaintiff argued that these damages were in the nature of a claim for defamation, although no claim for defamation appears on the face of the complaint.

The court finds that these items dealing with the defense of the injunction against harassment are consequential to the lease agreement. Consequential damages are not compensable in contract actions. Furthermore, just as an attorney representing him or herself *pro se* cannot receive an award of attorney's fees, a *pro se* litigant cannot be compensated for time spent defending a civil action. Even if, assuming *arguendo*, that Plaintiff were represented by counsel in the injunction matter, the court which issued and heard the injunction (Phoenix City Court) would be the proper venue for seeking such an award. Based on the foregoing, the Plaintiff is not entitled to damages on the complaint.

The Defendant's counterclaim for failure to return the \$1,295 security deposit prayed for an award twice that amount under A.R.S. 33-1321(E). The operable clauses of the lease are paragraphs 135-143, dealing with maintenance responsibilities for the pool and yard areas. [See Plaintiff's Ex. A, Lease.]

The agreement between the parties was that the tenant would be responsible for “cleaning/routine maintenance” of the pool, and “maintenance” of the front, back and side yard areas. This court finds that cleaning and *routine* maintenance of the pool does not encompass the repair or replacement of pool equipment such as a leaky pool pump or replacement of Barracuda pool vacuum parts that may not be functioning properly. It should be noted that the “Swimming Pool Instructions” [Defendants’ Ex. A] provide a list of pool maintenance and upkeep duties that do not mention the replacement or repair of inoperable pool equipment.

Sometime on or after May 17, 2012, the Defendants made the Plaintiff aware of a problem with the pool equipment. E-mails were traded between the parties. Plaintiff insisted that the lease called for the Defendants to repair the equipment. The court finds that refusal to address the problem as unreasonable, and the Plaintiff’s interpretation of the lease incorrect. Simple prudence would have dictated that the landlord address any issues related to the operation of pool equipment, as that goes beyond mere “routine maintenance.”

The fact that an incident allegedly occurred on May 21 that led to the Defendants obtaining an injunction against harassment would not absolve the landlord from the responsibility to fix the equipment. There is a legal duty to mitigate damages that would prevent Plaintiff from allowing the pool to turn green due to failure to replace or repair equipment and then turn around and demand that Defendants pay for a much more expensive fix due to that failure. Based on the testimony and exhibits, the court finds by a preponderance of the evidence that Plaintiff properly deducted the following items from the deposit:

- \$112.50 tree trimming/debris removal
- \$102.19 garage door roller/lock repair
- \$44.73 missing bedroom door trim/shade
- \$22.54 toilet seat replaced
- \$6.25 A/C filter
-
- \$288.21

The remaining items on the “Lease End Move-Out Inspection/Fees and Costs” form [Defendants’ Ex. D.] were either pre-existing conditions of the leasehold or the Plaintiff did not meet the burden of proof with regard to either the need or actual cost of replacement. Given that the Defendants’ security deposit was \$1,295, subtracting \$288.21 leaves \$1,006.79 in unreturned monies due and owing Defendants. Pursuant to A.R.S. 33-1321(E), the law calls for an award twice that amount.

IT IS ORDERED issuing judgment in principal for Defendants on their counterclaim in an amount of \$2,013.58. Counsel for Defendants may present an affidavit for attorney fees and costs, and a form of judgment in conformity with the principal amount awarded herein.


FRANK J. CONTI
Justice of the Peace
Dreamy Draw Justice Court



**IN THE DREAMY DRAW JUSTICE COURT
MARICOPA COUNTY, ARIZONA**

CC2012-058733

04/11/2013

HON. FRANK J. CONTI
JUSTICE OF THE PEACE

ELLERMAN

V.

NGUYEN

MINUTE ENTRY

On April 9, 2013 the court heard the trial in this matter, and finds as follows:

On April 11, 2011 Plaintiff was sitting in his vehicle in the parking lot at the Safeway store on 7th Street and Glendale Avenue, within this court's jurisdiction. His vehicle was struck by another vehicle as it was backing out of a parking space. That vehicle sped away from the scene. The collision resulted in the Plaintiff having paid a \$1,000.00 deductible to his insurer, a fact which was not disputed.

Plaintiff testified that he paid particular note of the license plate number of the offending vehicle. He wrote down the plate number, along with a general description of the driver as "young girl, 30's, dark hair, light skin, medium size." [See Defendant's Ex. 1]. During cross-examination and questioning by the court, the Plaintiff testified that he wasn't sure of the vehicle's color, recalling that it was "dark" colored. He admitted that his primary focus was on making sure to correctly jot down the license plate number.

An accident report was created by the Phoenix Police Department. Defendant objected to the report's admission on hearsay grounds. The court sustained the objection. However, Plaintiff used the information in the report to identify the name and address of the registered owner of the vehicle. The owner was the named Defendant, Phi Nguyen. Plaintiff then drove to Defendant's address and took a photograph of a similar vehicle parked in front of Defendant's residence. [See Plaintiff's Ex. D].

Plaintiff admitted that the vehicle depicted in Exhibit D was not the vehicle that was involved in the collision. Defendant testified that the vehicle in the photo is owned by her daughter.

Plaintiff's Exhibit F is an estimate of damage to the Defendant's vehicle that was created by State Farm Insurance Company, Defendant's insurer. This estimate lists the date of loss as April 12, 2011, one

day after the collision in the Safeway parking lot. The estimate, created on April 26, 2011, two weeks after the incident, indicates that Defendant's vehicle bears the same license plate number as the number written down by Plaintiff immediately following the collision.

Most significant is the estimate's result of the inspection of Defendant's car. It identifies rear impact damage to Defendant's "goldish" 1998 Honda Accord, amounting to \$250 worth of necessary or suggested repairs.

While Arizona courts have not specifically declared that an owner of a vehicle is responsible for any and all damage caused by its operation, it is certainly implied. In *Baker v. Maseeh*, 20 Ariz. 201, 179 P. 53 (1919), our Supreme Court found that "proof of ownership is *prima facie* evidence that the driver of a vehicle causing damage by its negligent operation is the servant or agent of the owner and using the vehicle in the business of the owner." This creates a presumption of agency which must be rebutted by the defendant.

The Defendant denied having collided with Plaintiff's vehicle, and denied having been in the Safeway parking lot. She also denied having permitted another person to drive her car on the day of the collision.

However, the tort doctrine of *res ipsa loquitor* ("the thing speaks for itself") instructs the court here. In the court's view, Plaintiff proved by a preponderance of the evidence—through his testimony, the plate number of the offending vehicle, the Defendant's ownership of that vehicle, and the damage identified to the rear of Defendant's vehicle soon after the accident—that it was more likely than not the Defendant's vehicle that backed into his and caused damage.

Notwithstanding the Defendant's blanket denial, there is no reasonable conclusion to reach but that the mysterious driver of Defendant's car negligently caused damage to Plaintiff's car. There was no evidence presented by Defendant that rebuts the presumption that her car was being driven by someone with her express or implied permission.

IT IS ORDERED issuing judgment for the Plaintiff in the amount of \$1,000.00 plus costs.


FRANK J. CONTI
Justice of the Peace
Dreamy Draw Justice Court



**IN THE DREAMY DRAW JUSTICE COURT
MARICOPA COUNTY, ARIZONA**

CC2012-244832

5/24/2013

HON. FRANK J. CONTI
JUSTICE OF THE PEACE

LAMM & ASSOCIATES

V.

ALDRIDGE

MINUTE ENTRY

On May 22, 2013, in light of the considerable volume of pretrial motions filed in this matter, the court conducted an omnibus hearing at the time of trial and heard argument on a number of pretrial matters.

Plaintiff urged reconsideration of his motion to dismiss Defendants' counterclaim. It is clear from a review of paragraph 8 of Plaintiff's Exhibit 1 (the fee agreement between the parties) that Defendants agreed to final and binding arbitration through the State Bar of Arizona for any dispute relating to "legal services provided, fees or costs, or the attorney client relationship."

The essence of Defendants' counterclaim relates to what services Plaintiff provided and what Defendant was charged for those services. Defendants also claimed damages for having to pay \$2,500 for a polygraph examination after relieving Plaintiff of his duties and hiring substitute counsel. While Plaintiff admitted that this element of damages may be considered consequential to the agreement, the court finds that, if such a service were included in the agreed-upon fee, that it would be a matter relating to legal services provided, fees or costs, or the attorney client relationship. In any event, Defendants produced a letter from substitute counsel which seems to indicate that the \$2,500 payment made by Defendants was for a risk assessment, which included the cost of a polygraph test. The court deems the legal basis for recovery of this amount as consequential damages as somewhat dubious.

Given that Defendants expressly waived the right to file legal claims related to the reasonableness of legal fees and/or costs related to the representation, the Plaintiff's motion to dismiss Defendants' counterclaim is GRANTED.

Plaintiff also made a motion for summary judgment as to Defendants' liability for payment of legal fees. Again, the fee agreement instructed the court's decision. Paragraph 7 states that, in the event of client's termination of attorney's services, "client shall be liable to counsel for any work done prior to termination at a rate of \$350 per hour." [Emphasis added.] That paragraph further indicates that, "[i]n the event that client does not pay counsel any monies owed... client confesses judgment to those sums." [Emphasis added.] On that basis, Plaintiff's motion for summary judgment is GRANTED as to liability.

Defendants' renewed their position that Mrs. Carol Aldridge should be dismissed as a party defendant due to the existence of a prenuptial agreement. Mr. Aldridge was given great latitude to argue that several provisions of the prenuptial agreement absolved Mrs. Aldridge from liability for debts contracted during the marriage. The court finds that the prenuptial agreement does not expressly absolve Mrs. Aldridge from liability for such debts. Furthermore, Plaintiff produced Exhibit 3, a copy of a check from Mrs. Aldridge's bank account for the \$5,000 retainer for his legal services, which was signed by Mrs. Aldridge. In light of the foregoing, Defendants' motion to dismiss Mrs. Aldridge as a named defendant is DENIED.

In order to allow Defendants to exercise their contractual right to proceed to fee arbitration through the State Bar, *it is ordered placing this case on the inactive calendar for a period of 120 days.* The court therefore deems this matter as "not currently pending." Once the amount of the Defendants' debt is resolved by final and binding arbitration, Plaintiff may move to place this matter back on the active calendar and submit a form of judgment commensurate with the arbitrator's findings.

IT IS ORDERED granting jurisdiction over determining the amount of reasonable attorneys' fees to the State Bar of Arizona Fee Arbitration Committee, pursuant to Rule II (A)(5) of the State Bar's Rules of Arbitration of Fee Disputes.



FRANK J. CONTI
Justice of the Peace
Dreamy Draw Justice Court



Exhibit

B

Judges cannot ignore law, give 'break' to less fortunate

There are times when serving as a judge is an extraordinarily trying task. This is especially so in our current tough economic times, when many people in dire financial straits are involved in litigation.

MY TURN

Maricopa County's 25 justice

courts must handle tens of thousands of debt-collection and eviction cases a year, most resulting in displacement and/or bankruptcy for unfortunate families. Recently, a distraught woman appeared before me as a defendant in an eviction matter. Crying and nearly hysterical, she asked why the government is bailing out homeowners who can't pay their mortgage but does nothing for those who can't pay their rent. She implored me to take action to help her.

Unfortunately, the law does not permit a judge the luxury of weighing the misfortune of all those who cannot pay their rent and choosing who is worthy of "a break" and who isn't. No human



FRANK J. CONTI

being could accurately perform such a task. I had no authority to step into the landlord-tenant relationship and fashion a new bargain that the parties had not reached on their own accord. Nor could I grant her license to live on another's property without paying rent as required in the lease agreement.

All I could do was ensure that her legal rights were protected and refer her to a social-service relief agency to assist her in coping with the result.

Although it provided her little comfort, I explained the role of a judge in our legal system. A judge takes an oath to follow the constitution and laws and cannot create new law from the bench in an effort to reach a desired result in a particular case. Sometimes the facts are heart-wrenching and the temptation is great to muddy what the law clearly mandates. It is at such moments that a judge must remain true to the

“A judge takes an oath to follow the constitution and laws and cannot create new law from the bench in an effort to reach a desired result in a particular case.”

oath of office. To do otherwise is to assume powers that do not properly come with a seat on the bench.

For instance, when the law says that a judge “may” do something, it allows wide discretion. When it says that a judge “shall” do something, it leaves no discretion at all. And in Arizona the law does not recognize financial hardship as a defense to the non-payment of rent.

If I rewrite the law to suit my fancy in every case, I render the law meaningless and essentially make myself a legislator. If every judge acted in this way, the law would mean whatever a particular judge felt it should mean on any given day rather than what our

elected representatives intended it to mean. Such a whimsical judicial philosophy confounds the notion of equal justice for all.

When judges do not limit themselves to the written word, it creates uncertainty bordering on legal anarchy, as there would then be no reliable, consistent way for those who use our courts to measure the strength of their cases or predict outcomes. Fewer cases would reach settlement, clogging dockets that are already overcrowded. So the next time you are in court and see your local justice of the peace apologize, hesitate, sigh deeply or wince before rendering a decision, you can probably guess that the judge is humbly doing what the law requires rather than what the heart desires.

Frank J. Conti is the elected justice of the peace for the Dreamy Draw Justice Court, which serves northeast Phoenix and parts of Paradise Valley and Scottsdale. You can reach Judge Conti at www.contiforjustice.com.

MY TURN

JP candidates should have to prove they understand basic legal concepts

There is a mistaken belief that justices of the peace do nothing more than handle minor traffic tickets and perform wedding ceremonies. Of course, this is far from the truth.

There are 23 justices of the peace in Maricopa County who individually hear about 18,000 cases a year, all demanding knowledge of a wide variety of legal principles. JPs are limited-jurisdiction county judges who hear civil lawsuits in which the amount in controversy is \$10,000 or less; post-judgment proceedings like garnishments and writs of execution; criminal and criminal traffic misdemeanors, including complex DUI jury trials; civil traffic citations; highly contentious evictions and other landlord-tenant matters; hearings on injunctions against harassment and orders of protection; and the review of search and arrest warrants.

This is not a job for the faint of heart, the less than industrious, or the untrained. Unfortunately, the qualifications for becoming a JP are implied by a vague statute for county officers that mandates the person must be 18 years old, an Arizona resident, a registered

voter who lives within the justice precinct boundaries, and capable of reading and writing English. So the bar has not been set terribly high. If you can win an election, you can be a judge in Arizona - whether you graduated from high school or not.

In 2004, Arizona voters adopted a constitutional amendment that reversed a state Supreme Court order requiring that temporary JPs be attorneys. The people decided that it makes little sense for a temporary visiting judge to have higher qualifications than the elected judge he or she sits in for. In rural counties without many lawyers, this voter-approved change helps the effective administration of justice by retaining qualified temporary judges. But the Arizona Territory is now fully grown, and in large urban counties like Maricopa and Pima, where major universities are located and lawyers are plentiful, this logic breaks down.

JP candidates who are not educated in the law are thrown into deep legal waters after their election. Contracts, torts, civil and criminal procedure, criminal law, constitutional law, evidence, victims' rights, equity and

remedies, landlord-tenant law and DUI statutes are just some of the topics that a qualified justice of the peace should be familiar with. Training programs for new JPs are a necessary burden on taxpayers, who must foot the bill for teaching judges basic things that they should know before being fitted for robes.

There are (and have been) many excellent JPs who are neither lawyers nor law school graduates. But surely the same type of diligent, capable individuals who got themselves up to speed on the law after attaining the bench would do so before seeking judicial office in the first place.

Candidates for justice of the peace in large urban counties should be required to successfully pass an examination on rudimentary legal concepts directly related to the performance of the duties of the office - before their names are placed on the ballot.

Why not authorize the Arizona Supreme Court, which has constitutional authority over all courts in our state, to administer an examination to prospective JP candidates who are neither law school graduates nor at-

torneys licensed to practice in Arizona? An exception would also be made for JPs currently serving, due to their experience and regard for the previously expressed will of the voters.

A justice of the peace has the power to put you in jail for six months, impose fines and surcharges of nearly \$5,000, evict tenants from their dwellings, decide whether victims of domestic violence and their children should be protected from abusive offenders, and award six-figure civil judgments that affect your credit. Shouldn't we insist that this authority be given to people who have shown minimum competency in areas they deal with every day?

After all, lots of bad drivers on the road end up with simple traffic tickets in justice courts. But unlike the new JP with no legal knowledge deciding their fate, these drivers had to pass a test before earning an important privilege.

Frank J. Conti is a lawyer in Phoenix who has worked extensively in trial courts throughout Maricopa County as both a lawyer and a judge pro tempore.

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To resolve disputes, take a walk in other party's shoes

The most regrettable tragedies are often the self-inflicted kind. Plaintiff was a homeowners' association suing one of its members to collect a \$4,000 fine for building an unapproved structure. Mediation

MY TURN

was unsuccessful, and by the time we reached the status conference prior to trial both sides had amassed nearly \$60,000 in attorney's fees. I ordered a settlement conference in a last-ditch effort to resolve the matter before assembling a jury.

In settling disputes it's important to offer the parties a different perspective. Human nature dictates that when we're fighting about something and feel strongly that we're right we become entrenched in our position. The plaintiff believes that all would be well if the defendant hadn't done A, B and C. And the defendant believes likewise, if only the plaintiff hadn't done X, Y and Z.

As adults we must recognize that there are always two sides to every



FRANK J. CONTI

story. We must approach the dispute with humility, looking beyond the end of our nose and placing ourselves in the shoes of the other party. Only when we look at the situation from the other's point of view are we capable of seeing what we could have done to have avoided a costly lawsuit.

We discussed the strengths and weaknesses of each side's case. The facts screamed for settlement. The homeowner had shown a representative of the board a conceptual drawing of the structure, which the board member said didn't appear to be a problem. Two days later the board member reminded the owner she needed to have the architectural plans approved by the board.

Subsequently the homeowner submitted two sets of plans: one for a smaller structure and one for a larger structure. The board approved the

Only when we look at the situation from the other's point of view are we capable of seeing what we could have done to have avoided a costly lawsuit.

smaller one. The homeowner built the larger one.

The HOA could:

» Approve the structure with a penalty.

» Disapprove and have it torn down.

» Approve without penalty.

The board voted to approve the structure with a penalty, to which the homeowner consented at the meeting. She then decided not to pay the fine, and litigation ensued.

I reminded them that jury verdicts are an unpredictable form of legal gambling, and that settlement is always preferable because the parties retain control of the outcome. Then I placed

the court's massive file on the bench, which had grown a foot high with all the legal wrangling.

I warned them a train wreck was coming. A jury trial would mean more work for the lawyers, generating more legal fees that the losing party might be paying in the end. And the only thing worse than paying one lawyer is paying two.

I advised the defendant she could end up paying the \$4,000 fine plus the HOA's \$30,000 legal bill, forcing her to ponder the cost-effectiveness of paying her own lawyer \$30,000 to dispute a \$4,000 fine in the first place.

The parties settled later that morning.

Sometimes when we stop, look at our situation objectively, and listen to the other side, we realize it's better to be reasonable than right.

Frank J. Conti is the elected Justice of the Peace for the Dreamy Draw Justice Court, which serves northeast Phoenix and parts of Paradise Valley and Scottsdale.

PHOENIX REPUBLIC

Tough times a chance to display moral values

Maricopa County's 25 justices of the peace hear 180,000 civil lawsuits every year. Most cases involve claims for unpaid debts like auto and personal loans, credit-card accounts, homeowners association fees and fines, and rental payments.

MY TURN

Those who are dragged to the courthouse to face their money troubles react in either a positive or negative way. I've seen the whole spectrum.

Recently an elderly gentleman was sued for an unpaid credit-card balance. He had done everything to avoid a trial, filing numerous handwritten motions that presented one dubious legal theory after another. All of his motions were denied.

At the trial, the plaintiff's evidence showed that the defendant had failed to pay his monthly bills. The only issue was the name on the account, which was identical to the defendant's except for the addition of a single letter at the end of his first name.

The defendant testified under oath that he "thought" that "maybe" another relative was living in his home who had the same name, except for the mysterious added letter, and that this nebulous kin was "perhaps" using his credit card. He could offer no specifics about this person.

On cross examination he admitted the signatures on his driver's license and his legal motions were the same as the one on the credit application. He insisted nonetheless that a relative had used the card.

Dumbfounded, I awarded judgment for plaintiff without commenting on the defendant's testimony. Inwardly, however, I lamented the pitiful performance. After stepping off the bench, I sat in my chambers and thought about how a person could arrive at such a place in life.

In his classic book "Man's Search for Meaning," psychiatrist Viktor Frankl



FRANK J. CONTI

described his detainment at Auschwitz during World War II. Frank's thesis, fleshed out amid the horrors that surrounded him, was that our capacity to deal with suffering depends largely on our attitude toward it.

"The way in which a man accepts his fate and all the suffering it entails, the way in which he takes up his cross, gives him ample opportunity — even under the most difficult circumstances — to add a deeper meaning to his life. It may remain brave, dignified and unselfish. Or in the bitter fight for self-preservation, he may forget his human dignity and become no more than an animal. Here lies the chance for a man either to make use of or to forgo the opportunities of attaining the moral values that a difficult situation may afford him. And this decides whether he is worthy of his sufferings or not."

Persevering can be easier said than done. Enduring hard times can feel like a prison sentence. There is a sense of being trapped when the mathematical impossibility of meeting mounting debts with dwindling income sinks in. The temptation is great to allow our plight to consume us, and warp us into a creature that devolves into self-pity, dishonesty, criminality and even violence. We can choose either to bemoan the reality of our situation or to put our heads down, accept it and muddle through somehow.

Victory comes not through the expectation of a miraculous windfall, but in small, incremental improvements in our condition with patience, hard work and a conviction that we are better than our current state.

Frank J. Conti is the elected justice of the peace for the Dreamy Draw Justice Court, which serves northeast Phoenix and parts of Paradise Valley and Scottsdale.

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Judge: Denial deep-rooted in some defendants

Denial is defined as a defendant's opposition to charges against him and as a subconscious defense mechanism used to re-

MY TURN

duce anxiety by denying facts that are intolerable.

Many times in the criminal justice system, these definitions intersect.

While not everyone charged with a crime is guilty, most defendants end their case by pleading guilty. In justice courts, those who plead not guilty to misdemeanor offenses are entitled to a public trial.

The state must prove the defendant guilty beyond a reasonable doubt. The defendant needn't produce any evidence and can choose simply to argue reasonable doubt.

Hearing the defendant's concept of reasonable doubt is where things get interesting.

An elderly woman was charged with assault, a Class 3 misdemeanor,



FRANK J. CONTI

the least-serious type. A person is guilty of that charge if they touch another with the intent to injure, insult or provoke. At trial, the state produced a video of the defendant's spousal-main-

tenance hearing during her divorce from her ex-husband, the victim.

At the conclusion of that hearing, which resulted in the defendant's support being denied, her son approached the victim and began yelling at him. The video showed the victim calmly standing next to his lawyer until suddenly an arm rose from the left edge of the screen, striking him in the face. The victim turned and asked, "Did you see her hit me?"

The state called three witnesses: the victim, the victim's lawyer and the bailiff. All three testified they saw the defendant hit the victim in the jaw without provocation.

On cross-examination, defense counsel couldn't dilute their testimony. The defendant took the stand, admitted "frustration" but said she involuntarily jerked her arm up in self-defense because the victim "had a look in his eye" similar to one he had during an alleged incident of domestic violence years earlier.

As it seemed clear she had used the opening created by her son's aggression to advance unseen and take a measure of revenge, I found her guilty.

The prosecutor and victim gave no input as to punishment. Defense counsel spoke briefly and advised her client to stay silent. I sentenced the defendant to one year unsupervised probation (the maximum), domestic-violence counseling as required by law and a fine of \$500 (the maximum) to be paid if she failed to complete counseling.

I told her crimes committed in the courthouse are serious, but I imposed

no jail time due to her age and lack of criminal history and because immediately after the incident she spent 12 hours in the most inhospitable county jail in downtown Phoenix.

After going off the record, the defendant wanted to ask me a question. Her lawyer grimaced.

With a straight face, the elderly woman asked, "How could you find me guilty when you can't see me in the video?"

Unblinking, I replied, "Because three people testified under oath they saw you punch your ex-husband in the jaw, ma'am."

For some criminal defendants, denial is a chronic condition. Perhaps probation and counseling can provide the cure.

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Jurors play a vital role in our justice system



FRANK J. CONTI

This Thanksgiving weekend, let's take a moment to recognize the contribution we make to our democracy by performing jury duty. While it may seem strange to accept thanks for compulsory public service, we shouldn't overlook jurors' vital involvement in preserving our justice system. Legal rights are understood as personal. We don't think about them until we're involved in litigation or subpoenaed to appear in court as a witness. But when someone exercises their constitutional right to a trial by jury it triggers a corresponding obligation for the rest of us. We must step away from our daily lives to ensure that a jury of the defendant's peers is provided.

Recently I presided over a jury trial in a DUI case. The issues were technical, focused on the breathalyzer machine used by the Department of Public Safety, and the intricate law regard-



THE REPUBLIC

It is up to all of us to ensure that a jury of a defendant's peers is provided. Legal rights are understood as personal. We don't think about them until we're involved in litigation or subpoenaed to appear in court as a witness. But when someone exercises their constitutional right to a trial by jury it triggers a corresponding obligation for the rest of us. We must step away from our daily lives to ensure that a jury of the defendant's peers is provided.

Once the trial started the lawyers resumed their fierce battle over what evidence the jury should hear. Numerous objections were made, prompting a never-ending series of sidebars to dis-

alternate. Recently I presided over a jury trial in a DUI case. The issues were technical, focused on the breathalyzer machine used by the Department of Public Safety, and the intricate law regard-

MY TURN

cuss issues out of the panel's earshot.

As the trial lurched forward it became obvious that finishing in one day would be impossible. The state's first witness was the arresting DPS officer. The prosecutor was methodical in her questioning. The defense lawyer thoroughly cross-examined on every minute detail.

At day's end the state still hadn't started redirect examination. Somehow the jury had remained conscious.

At 5 p.m. I alerted the jury that I had good news and bad news. We were done for the day, but the seven-member panel would have to come back bright and early Monday morning.

When they returned from their weekend they were greeted with coffee, an assortment of doughnuts and muffins, and the morning paper. These insignificant creature comforts could scarcely compensate them for their time, the most precious commodity on Earth. But despite the bother all seven were cheerful, polite and eager to get

back on the case.

The law permits jurors to pose written questions to witnesses so long as they survive objection. Juror interest is directly related to the number of questions asked, and this jury asked plenty.

Monday brought the state's plodding redirect of the officer, one expert witness per side, and the defendant to the stand, with no reduction in testy objections and sidebars.

Finally at 2:30 p.m. the exhausted jurors were sent to deliberate. They labored for four hours, long after the building had closed for the night, and reached a verdict that both counsel found just. As did the judge.

So next time you get called for jury duty, take a moment to thank yourself for being a good citizen. Your friendly neighborhood justice of the peace will likely do the same.

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Drivers must be made aware of texting's dangers

Last year our Legislature debated a ban on texting while driving, making it a civil traffic offense punishable by a \$50 fine that would rise to \$200 if the driver were involved in an accident. The bill failed, but proponents vow to reintroduce it.



FRANK J. CONTI

Everyone agrees that pressing tiny buttons to form sentences on a screen the size of a cracker is not something we should be doing while operating a dangerous 2-ton machine in the company of others.

The debate centers on the notion of law itself. One side believes common sense cannot be legislated, and laws on reckless driving already forbid texting while driving. The other side contends a specific ban would save lives by putting drivers on notice that the prac-



THE REPUBLIC

Some say an Arizona law banning texting while driving won't accomplish much, but others argue it will raise awareness, which is sorely needed.

time must be stopped, and by punishing those who do it.

It's true that the law cannot solve every problem. Nor can it prevent crime as much as punish it after the fact. It's also true that we could kill plenty of trees filing our statute books with laws banning every conceivable failure of common sense. But common sense can and should be legislated in appropriate circumstances.

As a society we speak through our elected represen-

tatives or by ourselves through the initiative process, and declare how we regulate ourselves. We preserve these declarations in writing so that all will be put on notice of our expectations, and we elect or appoint judges to interpret their meaning and punish violations.

Those who favor a texting ban say it will save lives. In theory, this is indisputable. But law is merely symbolic without enforcement. Opponents point to the difficulty of

catching drivers who type behind the wheel. Phoenix has banned texting since 2007, with few citations written in that time. Officers have to determine whether the driver is typing or simply making a phone call, which would be lawful under the proposal.

These problems of proof are significant and hint that the ban might be a toothless "feel-good" law.

Under Arizona's current reckless-driving statute, typing behind the wheel is, by definition, driving "in reckless disregard for the safety of persons or property." Facing a maximum penalty of four months in jail and a \$750 fine under existing law would send a firmer message than a \$50 civil sanction.

But what about the need to raise public awareness? While awaiting resolution of this impasse we might require driver education on the dangers of texting while driving. There are excellent (albeit

MY TURN

(graphic) films available on the Internet designed to affect young drivers, one of which I have posted on my website (contiforjustice.com). We also can teach it in defensive-driving schools and create public-service announcements akin to those aired to prevent DUI offenses.

A generation ago American high schools showed gory accident footage to would-be teen drivers in an effort to "scare them straight." This is what I'd require violators of a texting ban to see if they were issued a citation in my jurisdiction. All drivers should witness the horrors that inattention can cause.

Frank J. Conti is the elected justice of the peace for the Dreamy Draw Justice Court, which serves northeast Phoenix and parts of Paradise Valley and Scottsdale. He can be reached at Frank@contiforjustice.com.

Making the call on a case of 21st birthday gone bad

A defendant was charged with endangerment, a Class 1 misdemeanor. On the date of the incident she was enjoying her 21st birthday in a manner consistent with how most who reach legal drinking age celebrate.

The victim was her boyfriend, a musician in a band. He was playing in a large festival across town. The defendant came along to help set up before the show, and she started consuming alcohol far earlier than might be considered prudent. She admitted being heavily intoxicated.

After midnight, concert over, the victim loaded the group's equipment into a trailer hitched to his truck. They soon began arguing about a text message the victim sent to a longtime ex-girlfriend. The victim testified that the defendant got into his truck without incident. The defendant said she went reluctantly. The victim testified that he and the de-



My Frank J. Conti

fendant had agreed she would spend the night at his parents' house.

On the drive she became increasingly agitated about the victim inviting his ex-girlfriend to the concert. The defendant insisted the victim take her home.

He told her it was late and too far out of the way and she could call someone to pick her up from his parents'. He wasn't willing to drop her off in the middle of nowhere in her condition.

As his truck approached an exit on Arizona 51, the defendant yanked the steering wheel sharply to the right. The victim lost control of his truck, which jackknifed, causing the trailer to overturn. Thousands of dollars' worth of mu-

sical equipment was destroyed. A DPS officer responded to the scene, and the defendant apologized and repeatedly admitted it was her fault.

Defense counsel's cross-examination of the victim angled for proof of self-defense. Numerous objections were made by the prosecutor, most of which were granted. It was disclosed the victim had a previous assault conviction not involving the defendant. But the officer's unchallenged testimony was that the defendant expressed no concern or fear of the victim and made no claim of having been kidnapped or kept against her will. The defendant's testimony was careful. She avoided blaming the victim but insisted repeatedly that she "didn't want to be" in his truck. She admitted under cross-examination that she entered his vehicle voluntarily despite being angry.

Fortunately, a judge can ask questions

of witnesses. There is no rule governing how this must be done, but it must be done fairly. Once both lawyers finished with the defendant, there remained an elephant in the room neither had noticed. "Did you have a cellphone on you?"

"Yes."

"Was it working?"

"Yes."

"Did you call 911 or anyone else while you were in the victim's truck?"

"No."

She was found guilty and sentenced to three years' probation, anger-management counseling, 30 hours of community service and an agreed-upon restitution.

Frank J. Conti is the elected justice of the peace for the Dreamy Draw Justice Court, which serves northeast Phoenix and parts of Paradise Valley and Scottsdale. He can be reached at frank@contiforjustice.com.

PHOENIX REPUBLIC

Mom's poor manners cannot be defended

The plaintiff was a dance instructor who requested protection in an injunction against the mother of a young girl enrolled at her studio.

The defendant in the harassment case asked for a hearing, at which both parties were present and represented by counsel.

The instructor and the mom traded e-mails about an upcoming program. The mother was concerned about how long the girls would be dancing at an outdoor Halloween festival. Every 20 minutes there would be a short dance number of three minutes or less.

By the third e-mail, the defendant threatened to pull her daughter from the program if she showed signs of heat exhaustion and opined that it was too much dancing. The instructor noted that no other parents had complained about 47 minutes of dancing over a five-hour show. The mom replied that parents knew the studio was losing students to a rival school.

By the last e-mail, the mom accused the instructor of exploiting children to feed her ego.

A meeting was set with the owner of the studio. Before that meeting, the defendant published a blog painting the instructor as a dictatorial "nightmare," again claiming a mass exodus of students. Although described as a private blog, a number of parents were privy to the contents, which may not have been accurate.

At the meeting with the owner, the mom was either asked to leave or left the studio voluntarily, but in any event her daughter could no longer attend. On her way out, she shared her ill opinion of the instructor with at least one parent in the parking lot.

The next day there was a carwash benefiting the dancers. Thirty minutes after it ended, the defendant and her family bumped into the plaintiff at the grocery store. The plaintiff left hurriedly.

The plaintiff said the defendant



My Turn

FRANK J. CONTI

drove past her house in a black SUV the following afternoon. The defendant and her husband testified they were attending their son's hockey game across town at the time, and they didn't own a

black SUV.

For an injunction against harassment to stand, the defendant must commit a series of acts directed at the plaintiff that would lead a reasonable person to be seriously annoyed, alarmed or harassed. Those acts must serve no legitimate purpose.

The defendant's e-mails were brusque and undiplomatic, but, while designed to create the fear of losing business, they carried the legitimate purpose of child safety. The blog, while overblown, wasn't directed at the plaintiff and didn't mention her by name. The chance meeting in the grocery store wasn't confrontational. The testimony on the drive-by was a draw.

As there was no proof of serious annoyance or a series of acts directed at the plaintiff, I dismissed the injunction.

The instructor was a sensitive young lady and didn't deserve such treatment. I took the defendant to task for being so abrasive in expressing her concerns and for needlessly demonizing the instructor. If she were a nicer person, she probably wouldn't have been served with a protective order and probably wouldn't have needed to hire a lawyer to defend her rudeness.

Frank J. Conti is the justice of the peace for the Dreamy Draw Justice Court, which serves the Northeast Valley. He can be reached at frank@contiforjustice.com.

PHOENIX REPUBLIC

Order of protection: Gut-wrenching task

Hearing requests for and issuing orders of protection and injunctions against harassment is one of the most gut-wrenching tasks for a justice of the peace.

Maricopa County's 25 Justice Courts issue over 7,000 protective orders every year, an average of more than 25 every day county-wide. Depending on the court's location, some issue far more than the average number of protective orders.

On one memorable Monday, 35 people appeared before me seeking the court's protection against harassment or domestic violence. Among them were three women who came forward sporting black eyes; two had both their eyes blackened by their spouses.

Sadly, one of these battered wives returned to the court a few days later, asking me to dismiss her order of protection. This is a dismaying and all-too-familiar pattern that repeats itself often, a product of what psychologists call co-dependency.

Her husband had gotten word to her through his mother that he wanted to come home, with the promise he would attend counseling. Since a protective order is a civil matter, the court cannot refuse a petitioner's request to dismiss. But I can certainly discuss the pros and cons of doing so.

I asked her what evidence she had of her husband's intent to attend counseling besides his promise. She said none. I asked whether it might be better to keep the order of protection in place until he could demonstrate proof that he had attended a few counseling sessions to show good faith.

She pondered the matter. Ultimately, she said her in-laws would be mad at her if she didn't dismiss the order. I placed her under oath and wrote, "No one forced or threatened me to dismiss this order of protection," on her mo-



My Turn

Frank Conti

tion form. I told her I would dismiss the order if she could sign the statement truthfully. She signed, and I dismissed as required by law.

The same day, I granted a single mother an injunction against

harassment on behalf of her 17-year-old son, protecting him against cavorting with a troubled 14-year old-girl.

Legal opinions differ on whether a parent can seek a protective order in such "Romeo and Juliet" situations, because the defendant's conduct is not directed at the parent. But I believe a reasonable parent would obviously be seriously annoyed and alarmed by the presence of bad influences on their minor children. Since aggrieved parents are legally responsible for their children until they reach 18, they have the right to protect them.

The mother sheepishly returned some weeks later, asking that I dismiss the injunction at her son's request. The son had been making life miserable for his mom, but she clearly didn't want it dismissed. I asked her when her son would turn 18, and she said six months. I thumbed through the criminal code until I found the definition for sexual conduct with a minor, a serious felony offense when the victim is under 15 years old.

Horrified, the mother found her courage and decided to make a stand. She withdrew her motion to dismiss.

Frank J. Conti is the elected justice of the peace for the Dreamy Draw Justice Court, which serves northeast Phoenix and Paradise Valley. Reach him at frank@contiforjustice.com.

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Self-righteous acts lack righteous purity

The defendant was a longtime tenant in a mobile-home park in north Phoenix being evicted for repeatedly violating park rules. The landlord alleged that



MY TURN
FRANK J. CONTI

the defendant had been keeping feral cats as pets and feeding them, much to the dismay of her neighbors. As evictions and foreclosures have increased dramatically during the recession, the number of people who abandon their feline friends has likewise skyrocketed. An estimated 350,000 feral cats now prowl Maricopa County, creating a multifaceted plague of fleas, disease, feces, noise, litters of unwanted kittens, the stench of urine and a rash of property damage in densely populated urban areas.

At trial the landlord produced a copy of the park rules, which clearly stated all pets were to be kept indoors or on a leash while outdoors. The rules forbid tenants from feeding stray cats. After a series of warning letters, the defendant was given a formal legal notice advising her that if she did not stop within 14 days, she could be evicted in a month.

The defendant persisted. Three weeks later the landlord gave her one last chance. A written agreement was reached whereby the defendant prom-

ised to feed the cats outside of the mobile-home park, and the landlord would continue trapping and relocating them. Finally, about 70 days after the notice, an exasperated neighbor took a series of time-stamped photographs. One depicted a feeding station of four large bowls filled with food and water lined up neatly on the defendant's



Despite repeated warnings, a defendant in a recent trial persisted in feeding stray cats. Her intent was good but she ignored others.' wishes CHARLIE LEIGHTHE REPUBLIC

driveway. Another showed an opening in the metal skirt beneath the defendant's trailer to provide shelter for the cats.

Four days later the landlord filed the eviction complaint. The defendant admitted she was feeding the cats on the property, but denied they were her pets. She testified

there was no safe place in the area to feed them. She presented photos taken after the case was filed that showed a repaired trailer skirt, the absence of food and water bowls, and the presence of a trap.

But the new skirt appeared makeshift and temporary. It seemed a bit too convenient that before the lawsuit there were bowls and no traps, but after the eviction there was a trap and no bowls.

In spite of the defendant's sincere profession of humanitarian motives, I granted judgment for the landlord. One of two things was true: either the cats were pets not kept indoors or on a leash, or they were strays being fed on the property. In either case, the defendant unapologetically flaunted rules she had agreed to abide during her tenancy.

Although she was a sympathetic figure, I scolded her for basking in the purity of her cause at the expense of her neighbors' wishes.

What's the difference between the righteous and the self-righteous? The righteous follow their conscience without regard for themselves. The self-righteous do so without regard for others.

Frank J. Conti is the elected justice of the peace for the Dreamy Prawn Justice Court, which serves northeast Phoenix and parts of Paradise Valley. Reach him at frank@contijustice.com.

PHOENIX REPUBLIC

Common sense trumped by law in judge's ruling

Much is made of reliance on "common sense" in justice court. But it's the law that must inform the judge's decision.

Plaintiff was a commercial tenant suing her ex-landlord for return of a \$5,000 security deposit. The landlord countersued for the cost of purchasing a new air-conditioning unit and for repairs to ready the space for a new tenant. At trial both sides were represented by counsel.

In landlord-tenant disputes, the lease forms the basis of the parties' relationship and presents the framework for a decision. The judge must refer to its contents and identify duties and responsibilities. If an issue isn't specifically addressed, the common law of contracts is used to divine their intent.

The building's air-conditioner, located on the roof, was old and required constant upkeep, for which the tenant was responsible. The tenant was also obligated to obtain a service contract for repairs and maintenance of the unit.

While she paid for repairs throughout her tenancy, she hadn't obtained such a contract. Just before the lease expired the air-conditioner stopped working, and the tenant produced an estimate from a service company indicating the unit had been vandalized.

The landlord paid \$5,000 for a new air-conditioner and another \$1,500 for removing interior walls, and kept the deposit to cover these expenses.

Who was responsible for paying these amounts?

The lease said the tenant was required to keep the air-conditioning system in good repair. She was also liable for paying the "actual cost" of any damage to the property caused by "breaking and entering," which included the roof. But the lease was silent on vandalism.

In contract law there are ancient Latin maxims that courts rely on to clarify situations like this. The *ejusdem generis* ("of the same kind")



My Turn

FRANK J. CONTI

rule of construction permits a judge to read into a contract items not specifically listed if they are similar in nature. Although vandalism wasn't mentioned in the agreement, it's a criminal act committed against property similar to trespassing or breaking and entering. Since the air-conditioner was on the roof, the tenant was deemed responsible for replacing it. But how much should she pay?

It came out on cross examination that the landlord made an insurance claim for vandalism, which their insurer paid minus a \$1,000 deductible. The landlord hadn't disclosed this information in pretrial discovery.

So under the lease the "actual cost" of replacing the air-conditioner wasn't the \$5,000 claimed by the landlord, but the deductible amount. So the same clause that worked against the tenant now turned in her favor.

The evidence also showed the tenant hadn't constructed any of the walls torn down by the landlord after she moved out. Normally in commercial leases new tenants are able to refashion the interior space to suit their needs, at their own expense. But if they make no improvements, tenants aren't responsible for the landlord's decision to gut the property's innards when they leave.

The plaintiff was awarded judgment for her deposit, minus the deductible and the minor cost of estimating the new air-conditioner, plus her attorney's fees.

Frank J. Conti is the elected justice of the peace for the Dreamy Draw Justice Court, which serves northeast Phoenix and parts of Paradise Valley. Reach him at frank@contiforjustice.com.

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Strange behavior often points to alcohol abuse

MY TURN

By FRANK CONTI

Every now and then a case so surreal will arise that not only defies logic and common sense, but demands that we suspend our disbelief. Many times alcohol abuse is at the bottom of all the weirdness.

A plaintiff and defendant were co-workers at a local eatery. An after-work party was held at the defendant's apartment complex, which was attended by the plaintiff and her friends. In both frosted mugs and the hot tub, the bubbles were flowing freely.

The plaintiff, an attractive young woman, got out of the hot tub and was mistaken for the defendant's girlfriend. The testimony was unclear, but apparently the plaintiff made an unflattering comment about either the defendant's girlfriend's posterior or her teeth. Either way, the defendant got wind of the derogatory remark. He promptly kicked the plaintiff and her friends out of his apartment, and they left without incident.

Once in her car the plaintiff began receiving a long series of angry phone calls and text messages from the defendant. "Sorry, it's out of my hands," wrote the inebriated young host. "Girlfriend (really mad). Called Hell's Angels. Five angry chicks on bikes headed your way."

This threat was amplified by a text reading only "Hope you know what you're in for, (expletive)." Copies of the plaintiff's cellphone records were produced by her lawyer to show that these words, and numerous other calls and texts, had been received from the defendant's number.

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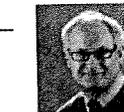
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Not content to leave well enough alone, the defendant then called and asked the horrified plaintiff "what the value of her life was," and wondered aloud whether she realized that he could "kill her in a second." The plaintiff then called 911, and officers responded to the defendant's home, where he was questioned and arrested for threatening and intimidating. The young lady came into court the next morning and obtained an injunction against harassment and had the defendant served.

The defendant requested a hearing on the injunction because it prohibited him from going to work with the plaintiff. He cited his need for gainful employment as reason to dismiss or modify the protective order. He further explained that he was highly intoxicated and didn't remember calling or texting the plaintiff, at least not as many times as her records proved. He speculated that perhaps someone else at the party had gotten hold of his cellphone.

The defendant, without prompting, admitted that he had recently been charged with DUI and was seeking counseling at the suggestion of his lawyer. The plaintiff's counsel forced him to admit on cross-examination that he had not yet done so. The defendant also had to confess that he told the police "he was so angry at the plaintiff he wanted to explode."

Faced with the task of weighing the repulsive nature of defendant's past conduct with his dazzling promises of future behavior, simple, old-fashioned prudence demanded that the injunction against harassment remain in effect without modification. He'd have to find another place to work.

Frank J. Conti is the elected justice of the peace for the Dreamy Draw Justice Court, which serves northeast Phoenix and Paradise Valley. Conti can be reached at frank@contiforjustice.com.

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Welcome to "My Last Word," a place for members' own musings.

The case of the trailer-park doughnut-maker

Plaintiff trailer park brought suit against defendant for trespass, property damage, and negligent entrustment of his vehicle.

There were a series of 10 mysterious incidents where a newer-model Ford Mustang was using the grassy area of the park to perform driving exhibitions that included "doughnut-making." The result was always the same: damage to the lawn and sprinkler heads.

Rather than simply erect a fence around the lawn after the first three exhibitions, the park instead chose to purchase expensive video-surveillance equipment in an attempt to identify the offending driver. The fourth incident happened in broad daylight on a rainy morning. Several photos of a newer-model Mustang were captured. The parties disputed whether the photos depict a green or a gray vehicle. The seventh incident was late at night and resulted in dark, grainy photographs that hinted the license plate may have been the defendant's.

The tenth and final incident brought an end to this hooliganism. For it was on that fateful night that defendant's gray Ford Mustang came to a smoky rest on the park's lawn after smashing into a palm tree.

Defendant was intoxicated that evening and asked his roommate to serve as designated driver. The defendant was laid out in the back seat, stone drunk, with his girlfriend. The roommate was driving, and a mutual friend was in the passenger seat. The roommate and passenger corroborated the defendant's testimony. These two young gentlemen appeared in photographs taken by plaintiff's security cameras shortly after the accident.

The police were called and a report taken. The defendant admitted to having a friend who once lived in the trailer park, and that "they had driven on the lawn 4 or 5 times in the last two years." At trial the defendant clarified this, testifying that he told police that he was a passenger for his friend's doughnut-making on two occasions. Both times the defendant's friend had used his own vehicle. The defendant never drove on the lawn himself.

The defendant's (now former) roommate took the stand and admitted to driving the Mustang on

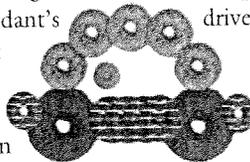
the night of the accident. He had recently pleaded guilty to criminal damage as a result of the crash. There was no evidence that the roommate was intoxicated or otherwise unable to drive safely, or that the defendant knew or should have known that the roommate was incompetent. Nor was the roommate charged with DUI. He was, however, charged with criminal damage, pled guilty, and ordered to pay restitution.

The former roommate also testified that he didn't own a vehicle and often borrowed the defendant's Mustang. He admitted to driving it on the trailer park lawn without defendant's knowledge or consent on at least two prior occasions. As he had never before wrapped it around a palm tree, there was no way for the defendant to know of his activities.

Ultimately what the plaintiff proved was that *the defendant's vehicle* may have twice been driven on the park lawn. These were the incidents where images of a green or gray Mustang and a fuzzy license plate were photographed. But there was no evidence that the defendant drove on the park lawn himself, knowingly permitted an incompetent or intoxicated person to drive his car, or intentionally permitted or encouraged his former roommate to commit trespass or criminal damage.

Judgment for the defendant. **BY**

On that fateful night, defendant's gray Ford Mustang came to a smoky rest on the park's lawn after smashing into a palm tree.



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Home Opinions JP: Sometimes the simplest explanation is the best

JP: Sometimes the simplest explanation is the best

Apr 30th, 2015 · by Frank J. Conti · 0 Comments

Many times a justice of the peace is called upon to decide whether a tenant has committed a material and irreparable breach of their lease agreement. Usually this occurs when the tenant, another occupant, or a guest commits a criminal offense on the leased property. Unlike a criminal prosecution, which requires proof of guilt beyond a reasonable doubt, the burden of proof in eviction actions is by a mere preponderance of the evidence. If the tenant is found to have committed a material and irreparable breach, the penalty is immediate termination of the lease.



An eviction may result as early as 12 to 24 hours after judgment is entered. So for the tenant, the landlord, and the other residents of the community, the stakes are high.

The defendant was a middle-aged woman whose teenage son was accused of stealing their next-door neighbor's safe. The landlord testified that the son was on felony probation for possession of illegal drugs for sale.

About a month prior to the alleged theft the son had driven his mother's car through the apartment complex wall, causing significant damage. His mother claimed a mechanical problem led to the accident. A handful of other unfortunate incidents involving the wayward teen were described, and his mom explained away each event.

Other neighbors had complained to the landlord about missing property, but the identity of the culprit remained a mystery.

The landlord produced a police report, without objection by the defendant, which laid out the pertinent facts. The neighbor came home to find her safe missing. It contained a few items of jewelry and \$400 in cash, which sadly amounted to her life savings. A witness said he saw the son entering the apartment earlier that day.

The neighbor went over to inquire about her missing property, finding only the mother at home. They walked into the mother's apartment and eventually found the empty safe in her son's bedroom.

The mother was emotional and insisted that her son was blameless. Perhaps, she testified, a shadowy, vengeful "friend" she had turned in to the police six months earlier had set her son up by planting the safe in his bedroom. On cross examination she could provide little in the way of details, including the friend's last name.

In his closing remarks the landlord's counsel made a most unusual argument. After reciting the litany of circumstantial evidence against the defendant he made reference to a scientific principle known as Ockham's Razor, named for a 14th Century English logician and Franciscan friar named William of Ockham.

In essence, Ockham's Razor suggests that one start with known, simpler theories to explain certain phenomena before moving to more unknown explanations.

There was, in the final analysis, a single striking fact that tipped the scales in favor of the landlord. The neighbor had told the police that the mother did indeed retrieve the empty safe from her son's bedroom and return it to her. But not before wiping it down thoroughly with a towel.

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Home Opinions If a voice mail falls in the forest, does it make a sound?

If a voice mail falls in the forest, does it make a sound?

Jun 4th, 2015 · by Frank J. Conti · 0 Comments

The defendant was charged with three counts of interfering with a judicial proceeding. He allegedly violated a protective order three times.

An order of protection had been issued by the superior court in favor of defendant's wife. It forbade the defendant from contacting her in any way but electronically. Any such communication was only to be regarding their children.



Frank J. Conti is the elected justice of the peace for the Dreamy Draw Justice Court, which serves northeast Phoenix and Paradise Valley.

As the expiration of the order drew near, the defendant called his wife three times and left a voice message each time. None of these messages dealt with the children; in fact, the defendant's calls were basically a lobbying effort to convince his wife not to renew the order. The tone of the messages was not entirely pleasant.

At trial his wife testified that three messages were left on two separate days, about a week prior to the order's expiration. Her cell phone had stopped working around that time, and it took two weeks for her provider to send her a new one.

Two police detectives testified that they retrieved the messages, noted the dates and times, and recorded them for posterity. The voice mails were played in the courtroom for the record.

The defendant's lawyer argued several points. He quizzed the detectives about the reliability of the electronic date-stamping of phone messages. He cross-examined them sharply about whether it was a new phone the victim had received, or whether it was her old phone that had been repaired and sent back to her.

He grilled them about their identification of the voice on the messages, despite the fact that the victim was present and could easily do so herself—and despite the message content making it painfully obvious that it was her estranged husband doing the talking.

But the main defense offered was that no violations of the order of protection had occurred because the voice mails were not received by the victim until after the expiration of the order.

Reference was repeatedly made to the age-old riddle of whether a tree falling in the forest makes a sound if no one is there to hear it.

In his summation, defense counsel proffered the notion that if, for example, the victim had lost her cell phone in the ocean, no criminal charges would ever have been brought against his client. The deputy county attorney reminded her counterpart that one can easily retrieve their voice mails without having actual physical custody of their cell phone.

In pronouncing the defendant guilty of all three counts of violating the order of protection, the court made reference to an analogy of its own. What if the order had prohibited the defendant from writing the victim, and, the day after the order expired, she had gone to her mailbox and found three letters from the defendant, all postmarked three days earlier?

Would that not be considered prohibited contact while the order was in effect?

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Judge: Some court cases boil down to rule of reason

Frank Conti | Special to the Republic 11:08 a.m. MST, June 10, 2015



(Photo: Dreamy Draw Justice Court)

Many times in litigation the parties are faced with the classic choice between a bird in the hand and two in the bush. A recent case demonstrates this problem nicely.

Plaintiff sued defendant for \$9,999.99, a penny less than the statutory limit for civil actions in justice court.

The parties were driving on a city street when a third vehicle made an ill-advised u-turn, cutting off the defendant and causing her to swerve and strike the plaintiff's car, causing minor damage. The defendant was able to take down the license-plate number of the offending car as it sped away.

A police officer arrived and issued the defendant a citation for failure to control the speed of a vehicle to avoid a collision, despite both parties agreeing that the third car caused the accident.

Although a license-plate search was successful, the officer couldn't issue a citation without identifying the driver. Both parties testified the officer told the defendant that it would've been better if she had let the third car hit her. The wisdom of that advice will be examined momentarily.

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Before trial, a mediation hearing was conducted to attempt settlement. The plaintiff submitted a claim to the defendant's insurance company for the repair of his 1994 Geo Metro, which was valued at \$800. The insurer offered \$1,500. But the plaintiff refused, citing the fact that he had spent more than \$2,500 in the past year on various other repairs completed before the accident.

At trial the plaintiff, to his credit, admitted that he had seen the third vehicle's bad u-turn, and further admitted that he didn't think the defendant was at fault. He leaned heavily on the officer's opinion that the defendant shouldn't have tried to avoid hitting the other car. He also clung to his notion that every dime he ever spent fixing his 17-year-old car should be included in assessing its value.

In auto-accident cases, the fact that a party was issued a traffic citation is not necessarily fatal to their cause if a civil lawsuit is filed. The officer arrived well after the event, and pieced together what happened based on what he saw and what people told him. A simple weighing of the fault of the two drivers remaining at the scene resulted in the defendant getting a ticket.

State law requires all drivers to use reasonable care for the protection of others, which includes an obligation to avoid colliding with other vehicles. The defendant wasn't legally or morally obligated to let the third car hit her in order to avoid hitting the plaintiff's car.

When a split second is all one has to react, neither law nor common sense requires such robotic calculations. A reasonable person in the defendant's position would try to avoid a car swerving into her lane. Also, the plaintiff admitted that he saw what was happening around him, but gave no hint as to what he did to avoid the collision.

The plaintiff's failure to prove the defendant's negligence resulted in judgment for the defendant.

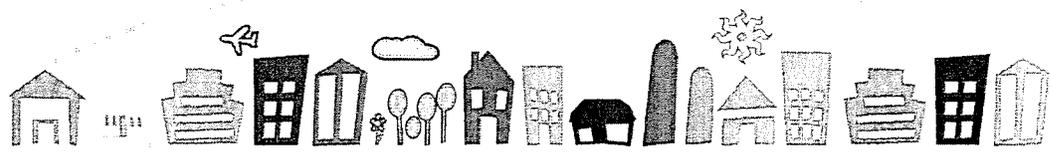
Frank Conti is the elected justice of the peace for the Dreamy Draw Justice Court, which serves northeast Phoenix and parts of Paradise Valley. Reach him at frank@contiforjustice.com (<mailto:frank@contiforjustice.com>).

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Exhibit

C



north central news

the voice of the north central phoenix community volume 11, issue 3 march 2009

Court kicks off impact panel

A DUI conviction is normally associated with a series of painful losses. For the first-time offender the law requires a loss of time (court appearances); a loss of money (\$1,690 in fines, surcharges and fees, plus higher insurance rates); a loss of freedom (minimum 10 days in jail and a license suspension); and a loss of dignity (mandatory counseling and installation of an ignition interlock device).

What the law does not require is for the DUI convict to be reminded of the losses that drunken driving imposes on society. In order to drive home the consequences that bad decisions by some create for others, the Dreamy Draw Justice Court has begun hosting a Victim Impact Panel on the first Friday evening of every month.

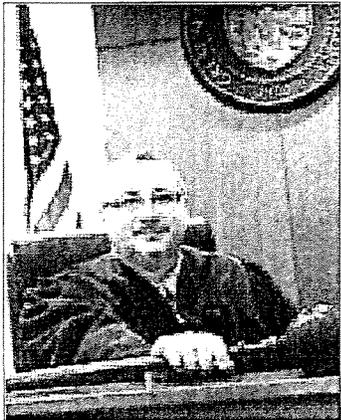
"The VIP is an emotional and moral education program conducted by the Arizona Archangel Foundation, a local nonprofit organization dedicated to a simple mission: forcing drunk drivers to examine the scars that their irresponsibility leaves behind," explained Judge Frank J. Conti, Dreamy Draw Justice of the Peace.

The Dreamy Draw Justice Court serves North Central and Northeast Phoenix as well as parts of Paradise Valley and Scottsdale.

A typical impact panel will last for two hours, and will feature one or more speakers who tell how their lives were changed forever by impaired driving. People like Heather Hurst, whose brother, Gary, was killed by a drunk driver in Missouri in 1985. Or Aaron Fraser, a passenger in an alcohol-related accident who has been paralyzed and wheelchair-bound since 1985.

please see IMPACT on page 4

COMMUNITY



Judge Frank J. Conti, the new Dreamy Draw Justice of the Peace, has adopted a policy where those convicted of DUI must listen to the stories of people victimized by drunk drivers (submitted photo).

will be required to attend a Victim Impact Panel in addition to the mandatory conditions of their sentence.

"Not because the law requires it, although perhaps it should," he pointed out. "I believe there is a chance that seeing the damage up close will prevent further losses. And along with this chance to make a difference comes the hope for a more enlightened citizenry."

Editor's note: Questions, comments or suggestions should be sent to Judge Conti at frankjconti@hotmail.com.

IMPACT continued from page 1

"Heather and Aaron are real-life heroes; not just because they have endured a cruel twist of fate, but because they wake up every morning, take the lemons that fate handed them, and make lemonade for the rest of us," Judge Conti said.

"There is a big difference between reading about the suffering of others and seeing it with our own eyes. The VIP program awakens our conscience and reminds us of our duty toward our fellow man more directly than any other method—by forcing us to come face to face with real pain and heartache endured by real people."

As the newly elected Justice of the Peace, Conti instituted a new policy in the Dreamy Draw Justice Court whereby anyone convicted of DUI, alcohol-related reckless driving, or underage possession or consumption of alcohol

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Exhibit

D

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10
11
12 **IN THE UNITED STATES DISTRICT COURT**
13 **DISTRICT OF ARIZONA**
14

15 ASSOCIATION OF AMERICAN
16 PHYSICIANS AND SURGEONS, a
17 nonprofit corporation; MATT SALMON, a
18 citizen of the State of Arizona; DEAN
19 MARTIN, a citizen of the State of Arizona;
20 and LORI DANIELS, a citizen of the State of
21 Arizona,

22 Plaintiffs,

23 V.

24 JAN BREWER, in her official capacity as
25 Secretary of State of the State of Arizona;
26 DAVID PETERSEN, in his official capacity
27 as Treasurer of the State of Arizona; TERRY
28 GODDARD, in his official capacity as
Attorney General of the State of Arizona; and
LESLIE "GENE" LEMON, DAVID G.
McKAY, KATHLEEN S. DETRICK,
ERMILA JOLLEY, and MARCIA
BUSCHING, in their official capacity as
members of the ARIZONA CITIZENS
CLEAN ELECTIONS COMMISSION,

Defendants.

No. CV 04-0200-PHX-EHC

**PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION
AND MEMORANDUM IN
SUPPORT**

(Oral argument requested)

1 Pursuant to Fed. R. Civ. P. 65(a), Plaintiffs request that this Court issue a
2 preliminary injunction enjoining Defendants and their agents, employees, attorneys, and
3 all others in active concert or participation with them, from directly or indirectly
4 enforcing A.R.S. §§ 16-941(B)(1) and (2), § 16-941(C), § 16-952(A), (B) and (C), and §
5 16-958 of the Arizona Citizens Clean Elections Act, and any administrative rules
6 promulgated in furtherance thereof, pending this Court's final determination of the
7 constitutionality of those statutes. The basis for this motion is supported below in
8 Plaintiffs' attached Memorandum.
9

11 MEMORANDUM IN SUPPORT

12 Statement of Facts

13
14 This motion for preliminary injunction comes in a civil rights action seeking a
15 declaratory judgment to vindicate the First Amendment rights to freedom of political
16 speech and association. There are two classes of Plaintiffs facing imminent and
17 irreparable injury to these rights: Matt Salmon, Dean Martin, and Lori Daniels,
18 individuals who desire to run a traditional, privately supported campaign for political
19 office without being punished for choosing not to participate in the government funding
20 system created by the Arizona Citizens Clean Elections Act, A.R.S. § 16-940 *et. seq.*
21 ("the Act"); and the Association of American Physicians and Surgeons ("the
22 Association"), which desires to make independent expenditures on behalf of such
23 traditional candidates without fear of having its speech chilled or nullified by the State.
24
25

26
27 The Act was narrowly approved by Arizona electors in the November 3, 1998
28 general election, creating a system of government campaign financing for statewide and

1 legislative elected offices within Arizona, and the Citizens Clean Elections Commission
2 (“the Commission”), a bureau of unelected officials granted broad enforcement and
3 regulatory powers extending not only to candidates who accept government funding, but
4 even to candidates who refuse taxpayer money. Government-funded (“participating”)
5 candidates must obtain a set number of \$5 contributions from constituents in order to
6 qualify for funding. Once qualified, they must follow strict contribution and spending
7 limits and reporting requirements, and must participate in debates. Payments to
8 participating candidates are capped at three times the predetermined spending limit for
9 the office sought.¹ Privately supported (“nonparticipating”) candidates choose to fund
10 their campaigns with private donations and receive no taxpayer money. They must
11 nonetheless adhere to specified contribution limits and even more extensive reporting
12 requirements, for the sole purpose of triggering equalization payments (“matching
13 funds”) to participating candidates based on the nonparticipating candidates’
14 contributions, expenditures, and certain independent expenditures that benefit the
15 nonparticipating candidate. [See EX. A, STATUTES; EX. B, BENEFITS & PUNISHMENTS.]

20 Introduction

21 In deciding this motion for preliminary injunction, the Court is presented with a
22 straightforward issue:
23

24 **The Supreme Court has found that involuntary limits on campaign**
25 **expenditures—and attempts to equalize the relative financial**
26 **resources of candidates—violate the First Amendment. The Arizona**

27 ¹ For example, in 2002 participating gubernatorial candidates had a spending limit of \$409,000 in the primary and
28 \$615,000 in the general election; legislative candidates had a choice of receiving either \$10,790 or \$16,180 in the
primary, then receiving the other of those two amounts in the general election.

1 **A. Plaintiffs face imminent, irreparable injury to fundamental rights, and have**
2 **a strong likelihood of success on the merits.**

3 **(1) *Plaintiffs face imminent, irreparable injury to fundamental rights.***

4 The Supreme Court has held that the “loss of First Amendment freedoms, for
5 even minimal periods of time, unquestionably constitutes irreparable injury.”⁶ The Act
6 now subjects nonparticipating candidates like Plaintiffs Salmon, Martin, and Daniels to
7 imminent injury, through a series of punitive measures that coerce participation in the
8 public funding scheme by providing overwhelming benefits to participants. [SEE EX. E,
9 DECS. OF NONPARTICIPATING CANDIDATE PLAINTIFFS.] The Act also subjects Plaintiff
10 Association to imminent injury, because the Clean Elections system chills the protected
11 political speech of independent expenders who want to speak out on behalf of
12 nonparticipating candidates, by paying dollar-for-dollar matching funds to participating
13 candidates whenever such independent expenders speak out on behalf of a
14 nonparticipating candidate with a participating opponent. [SEE EX. C, DEC. OF SCHLAFELY.]

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18 **(2) *The likelihood of success on the merits is high.***

19 **(a) *The Act violates nonparticipating candidates’ First Amendment rights by coercing***
20 ***participation and equalizing candidate funding.***

21 In the landmark case of *Buckley v. Valeo*, the Supreme Court declared candidate
22 and independent expenditure limits unconstitutional, explaining that such limitation
23 “necessarily reduces the quantity of expression by restricting the number of issues
24 discussed, the depth of their exploration, and the size of the audience reached.”⁷ *Buckley*
25

26
27 ⁶ *Elrod v. Burns*, 427 U.S. 347, 373 (1976); see also *Sammaranto v. First Judicial District Court*, 303 F.3d 959,
28 973 (9th Cir. 2002).

⁷ 424 U.S. 1, 19 (1976).

1 found that expenditures are protected speech, and constitute expression “at the core of
2 our electoral process and of the First Amendment freedoms.”⁸ “Discussion of public
3 issues and debate on the qualifications of candidates are integral to the operation of the
4 system of government established by our Constitution. The First Amendment *affords*
5 *the broadest protection to such political expression.*”⁹ The Court also found that the
6 “interest in equalizing the relative financial resources of candidates...is clearly not
7 sufficient to justify...infringement of fundamental First Amendment rights.”¹⁰

10 The government cannot limit campaign expenditures, either directly, by express
11 limits, or indirectly, by coercing participation in public campaign financing. The First,
12 Sixth, and Eighth Circuits have all upheld the principle that state public financing
13 systems chill speech where they go beyond promoting participation in taxpayer funding,
14 and actually begin *punishing nonparticipation*. In *Buckley*'s wake, certain tests have
15 been formulated to determine whether a public financing system is coercive. In *Vote*
16 *Choice, Inc. v. DiStefano*, the First Circuit struck down Rhode Island's compelled
17 disclosure provision that applied to PACs, but ratified giving free cable TV time to
18 participating candidates.¹¹ *Vote Choice* found that Rhode Island could provide
19 candidates with a choice among different packages and had a valid interest in having
20 candidates accept public financing, announcing the following test:

24
25 ⁸ 424 U.S. at 39, quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968).

26 ⁹ 424 U.S. at 14 (emphasis added).

27 ¹⁰ *Buckley*, 424 U.S. at 54. The Court's recent decision in *McConnell v. FEC*, 124 S.Ct. 619, 655 (2003) upholds
the continuing vitality of *Buckley*'s strict scrutiny of expenditure limitations. (“In *Buckley* and subsequent cases,
we have subjected restrictions on campaign expenditures to closer scrutiny than limits on campaign contributions.”)

28 ¹¹ This benefit was deemed constitutional and not coercive because privately financed candidates were not
prevented from petitioning for equal time under 47 U.S.C. § 315. *Vote Choice*, 4 F.3d 26, 45-50 (1st Cir. 1993).
Also, unlike Arizona, Rhode Island required nothing from the nonparticipating candidate.

1 A permissible choice of campaign finance packages of benefits occurs
2 where there is *no credible evidence of a penalizing purpose*, the choice
3 between the packages is real, *uncoerced*, and available to all, *the status*
4 *quo option, standing alone, raises no red flags*, and the challenged
5 disparity is narrowly tailored and logically related, in scope, size, and kind,
6 to compelling governmental interests.¹²

7 In *Gable v. Patton*, the Sixth Circuit struck down part of a Kentucky law that
8 forbade a candidate from spending his own money 28 days before an election. *Gable*
9 found that “although a statutorily created benefit [to a participating candidate] does not
10 per se result in an unconstitutional burden [to nonparticipating candidate], such benefits
11 could conceivably ‘snowball’ into a ‘coercive’ measure upon a nonparticipating
12 candidate.”¹³ *Gable* traces this analysis directly to *Buckley*:

13 The doctrine that benefits provided to participating candidates can become
14 unconstitutionally coercive, if they are overwhelming enough, follows
15 logically from the holding in *Buckley* that involuntary limits on a
16 candidate’s campaign expenditures are unconstitutional. *See Buckley, 424*
17 *U.S. at 58*. This holding would be rendered meaningless if the government
18 could effectively force a candidate into accepting expenditure limits by
19 providing overwhelming benefits to participating candidates.¹⁴

20 This notion of *voluntariness* is particularly poignant in Arizona, where competent
21 political consultants would never advise their clients to run a private campaign under the
22 Clean Elections system as currently constituted. [See EX. D, DECS. OF POLITICAL
23 CONSULTANTS.] The Commission’s website trumpets the recent success of participating
24 candidates; in 2002, government-funded politicians nearly ran the table, winning seven
25 of nine statewide races. The real story isn’t how many participating candidates won, but

26 ¹² 4 F.3d at 40 (emphasis added).

27 ¹³ 142 F.3d 940, 948 (6th Cir. 1998), citing *Vote Choice*, 4 F.3d 26, 38 (1st Cir. 1993), and *Rosenstiel v. Rodriguez*,
101 F.3d 1544, 1550 (8th Cir. 1996) (“There is a point at which [public financing] incentives stray beyond the pale,
28 creating disparities so profound that they become impermissibly coercive.”)

¹⁴ *Id.*

1 how many *ran*. Of the nine races, only three of 18 major-party candidates opted for a
2 private campaign—a clear sign that the system is coercive rather than voluntary.¹⁵

3
4 (i) *The statutory scheme.*

5 The **independent expenditure matching provision** of § 16-952(C) punishes
6 nonparticipating candidates by providing their participating opponents with money that
7 they *can* control, based on independent expenditures that nonparticipating candidates
8 *cannot* control. Since the system does not count those matching funds against the
9 maximum amount of public money that participating candidates can receive, it's like
10 free money that falls out of the sky and into the participating candidate's lap. Consider
11 this classic example from the 2002 gubernatorial campaign: First, the Democratic Party
12 spent about \$1million for TV ads attacking Plaintiff Salmon that was not counted against
13 public monies to be received by Janet Napolitano, one of Salmon's two participating
14 opponents. But when the Republican Party countered with its own independent
15 expenditure of about \$330,000—not coordinated, approved, or solicited by Salmon—the
16 State wrote checks for that amount to both Napolitano and Independent Dick Mahoney.

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20 [SEE EX. E-1, DEC. OF SALMON.]

21 The **contribution and expenditure matching provisions** of §§ 16-952(A) and
22 (B) are also guilty of coercion and equalization. A.R.S. § 16-952(A) pays equalization
23 matching funds to participating candidates based on expenditures made by their
24 nonparticipating opponents in primary elections, and is designed both to equalize
25
26

27 ¹⁵ They were Corporation Commissioner Mike Gleason, Superintendent of Public Instruction Tom Horne, and
28 Plaintiff Salmon. Using personal funds, Horne was able to drastically outspend his two participating opponents in
the Republican primary.

1 candidate funding and discourage private spending. A.R.S. § 16-952(B) pays matching
2 funds to participating candidates based on gross (not net) contributions received by
3 nonparticipating candidates in general elections. These sections penalized Plaintiff
4 Salmon in Arizona's 2002 primary and general election [SEE EX. E-1, DEC. OF SALMON, ¶ 8-
5 11.] and threaten future nonparticipating candidates like Plaintiffs Martin and Daniels.
6 [SEE EX. E-2 AND E-3, DECS. OF MARTIN AND DANIELS.] Consider how the system punished
7 Plaintiff Salmon by paying his participating opponents the gross amount of contributions
8 he received after the primary. President Bush came to Arizona and raised about
9 \$750,000 for Salmon; Salmon paid \$250,000 to put on the event, leaving a net gain of
10 \$500,000. But Napolitano and Mahoney each received \$750,000 from the State—the
11 amount of Salmon's gross receipts—resulting in \$1.5 million in taxpayer subsidies being
12 generated by \$500,000 in net contributions, and a net loss of \$1 million for Plaintiff
13 Salmon. [SEE EX. D-3, DEC. OF BOWEN, ¶ 25; EX. E-1, DEC. OF SALMON, ¶ 8-11.] *Only in*
14 *Arizona could a fundraising visit from the President of the United States amount to a \$1*
15 *million deficit for the intended beneficiary. Only the foolish, the hopelessly principled,*
16 *and the fabulously wealthy will run private in the future. While designed to equalize*
17 *candidate funding, this provision guarantees that participating candidates receive more*
18 *money than their nonparticipating opponent, so long as the nonparticipant cannot spend*
19 *more than three times the participant's predetermined spending limit.*

20 Perhaps the most punitive of all are the **reporting requirement provisions** of §§
21 16-941(B)(2), 16-941(C), and 16-958, and Commission rules promulgated to implement
22 and enforce these statutes. [SEE EX. E-2, DEC. OF MARTIN.] In the current election year,
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1 nonparticipating candidates must spend a lot of time and resources preparing a series of
2 special “trigger” reports beginning January 1, 2004—with 37 reports required between
3 July 1 and Election Day, November 2, 2004. [SEE EX. F, REPORTING TIMELINES; EX. G,
4 TRIGGER REPORTS.] These reports serve the sole purpose of facilitating the State’s
5 payment of additional taxpayer monies to their participating opponents, and do nothing
6 to combat corruption or the appearance of corruption. By comparison, participants are
7 required to submit only three special reports in addition to the six reports that all
8 candidates must file. This disparity raises the question: *Which candidate is the one*
9 *participating in the system?* The one that must file 37 reports in the last 88 business
10 days of the campaign, or the one that must file only three? The Commission proclaims
11 that this reporting regime is designed to “level the playing field” by equalizing candidate
12 funding. [SEE EX. H, 2001 COMM’N REPORT.]

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16 In *Shrink Missouri Government PAC v. Maupin*, the Eighth Circuit found daily
17 reporting requirements on nonparticipating candidates unconstitutionally punitive. The
18 offending Missouri law penalized candidates who did not abide “voluntary” spending
19 limits, by: (1) forbidding them to seek donations from important sources of private
20 funding that they would otherwise be free to seek; and (2) requiring daily disclosure
21 reports once the spending limits were exceeded.¹⁶ Similarly, Arizona’s punitive daily
22 reporting scheme grabs nonparticipating candidates by the collar and throws them
23 headlong into a regulatory meat grinder—forcing them to publicly disclose valuable
24 strategic information regarding donations and expenditures early and more than 12 times
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28 ¹⁶ *Shrink Missouri Government PAC v. Maupin*, 71 F.3d 1422, 1425 (8th Cir. 1995).

1 as often as participating candidates. Participants are given a major information-
2 gathering edge, and a front-row seat to their opponents' campaign strategy.

3
4 This punitive daily reporting is intensified by the Commission's aggressive and
5 highly publicized harassment of nonparticipating candidates for alleged reporting
6 infractions *during the election cycle*. The Commission enjoys sweeping powers that
7 have resulted in rabid enforcement of these burdensome reporting requirements. The
8 public announcement of alleged reporting improprieties—even if ultimately
9 unsubstantiated—have had a negative impact on the perception of nonparticipants, as
10 occurred with Plaintiff Salmon and others. [SEE EX. D-3, DEC. OF BOWEN; EX. I, 2002 MEDIA
11 CLIPS.] Because the filing requirements for nonparticipants are much more onerous, the
12 Commission's boundless power (and willingness to use it) creates a predatory climate
13 and a strong disincentive to private campaigns. The system goes far beyond "leveling
14 the playing field," by leveling certain players on that field for the benefit of others—
15 adding an Orwellian twist to Arizona elections that mocks the notion of a free society.

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19 The **reduced maximum contribution limit provision** of § 16-941(B)(1) coerces
20 candidates to accept public financing by reducing the maximum individual contribution
21 that can be accepted by a nonparticipating candidate by 20 percent. It does not promote
22 the acceptance of public funding, and has no effect on participating candidates. Rather,
23 it simply diminishes the pool of available private contributions. Since the contribution
24 limit applies only to races involving participating candidates and not all races for elected
25 office, it cannot be aimed at preventing corruption. The Commission itself declares that
26 this provision is designed to "level the playing field." [SEE EX. H, 2001 COMM'N REPORT.]
27
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1 Either individually or cumulatively, the aforementioned provisions all have the
2 effect of coercing participation and mandating the equalization of the relative financial
3 resources of candidates. Contrary to *Vote Choice*, *Gable*, and *Shrink Missouri*, the Act
4 wears its penalizing purpose on its sleeve. The contribution, expenditure, and
5 independent expenditure matching provisions of § 16-952 are entitled “Equal funding of
6 candidates,” plainly evincing an improper design that runs afoul of *Buckley*. Although
7 *Vote Choice* demands that running private should raise “no red flags,” the Act marks
8 Arizona candidates who exercise that option with a bull’s-eye—and targets them for
9 extinction. In stark contrast to the Arizona scheme, the federal public campaign
10 financing system requires nothing of nonparticipants. Matching funds (the first \$250 of
11 every donation) are paid to participants depending on their own fundraising efforts,
12 provided they abide by a spending cap. President Bush and both Democratic
13 frontrunners Kerry and Dean have all voluntarily opted out of federal funding. All we
14 ask is that Plaintiffs Salmon, Martin, and Daniels be permitted to do the same in
15 Arizona. This Court must find the Clean Elections system coercive and involuntary for
16 one simple reason: *there is no escape for nonparticipants*.

21 (b) *The Act chills the Association’s right to speak out on behalf of nonparticipating*
22 *candidates, or in opposition to participating candidates.*

23 A.R.S. § 16-952(C) imposes involuntary limits on independent expenditures
24 made in political campaigns—placing a chilling effect on the exercise of the right of an
25 individual or group to make such expenditures. [SEE EX. C, DEC. OF SCHLAFLY; EX. E-1,
26 DEC. OF SALMON, ¶ 10.] A.R.S. § 16-952(C) provides a direct dollar-for-dollar public
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1 subsidy to participating candidates whenever an independent expenditure is made that
2 either opposes a participating candidate, or favors a nonparticipating candidate with a
3 participating opponent. The Eighth Circuit relied on *Buckley's* broad protection of
4 expenditures in *Day v. Holahan*, where a similar (and less burdensome) provision of
5 Minnesota's public financing system was declared unconstitutional. *Day* found that the
6 mere enactment of the independent expenditure matching provision prevented many if
7 not most potential independent expenditures from ever being made, and summarized its
8 chilling effect on those wanting to speak out against participating candidates:
9

11 The knowledge that a candidate who one does not want to be elected will
12 have her spending limits increased and will receive a public subsidy equal
13 to half the amount of the independent expenditure, as a direct result of that
14 independent expenditure, chills the free exercise of that protected speech.
15 This "self-censorship" that has occurred even before the state implements
16 the statute's mandates is no less a burden on speech that is susceptible to
17 constitutional challenge than is direct government censorship.¹⁷

18 *Day* is perfectly analogous to this case. Unlike the unconstitutional Minnesota
19 financing scheme, Arizona's law does not subtract the amount of independent
20 expenditures *favoring* participating candidates from the total public disbursement they
21 can receive. Also, Arizona provides a dollar-for-dollar match, while Minnesota gave
22 participating candidates only *half* the amount of an opposing independent expenditure.
23 So Clean Elections is more noxious to free speech than the offending Minnesota system.

24 Since A.R.S. § 16-952(C) infringes the fundamental right of free political speech,
25 this Court must determine whether it is content-neutral or content-based and apply the
26

27
28 ¹⁷ *Day v. Holahan*, 34 F.3d 1356, 1360 (8th Cir. 1994), citing *City of Lakewood v. Plain Dealer Publishing Co.*,
486 U.S. 750, 757-58 (1988).

1 appropriate level of scrutiny. In considering the chilling effect of statutes, it is helpful
2 to recall the Supreme Court's statement in *Turner Broadcasting Systems v. FCC*:

3
4 Government action that stifles speech on account of its message, or that
5 requires the utterance of a particular message favored by the Government,
6 contravenes this essential right. Laws of this sort pose the inherent risk that
7 the Government seeks not to advance a legitimate regulatory goal, but to
8 suppress unpopular ideas or information or manipulate the public debate
9 through coercion rather than persuasion. *These restrictions "raise the*
10 *specter that the Government may effectively drive certain ideas or*
11 *viewpoints from the marketplace."*¹⁸

12 Under *Turner Broadcasting*, the question is whether the law "by [its] terms
13 distinguishes favored speech from disfavored speech on the basis of the ideas or views
14 expressed."¹⁹ Content-based regulations must be presumed invalid under the First
15 Amendment given *Buckley's* command that the state may not "restrict the speech of
16 some elements of our society in order to enhance the relative voice of others."²⁰ This
17 Court must "apply the most exacting scrutiny to regulations that suppress, disadvantage,
18 or impose differential burdens upon speech because of its content."²¹ The State must
19 show that the Act is narrowly drawn to serve a compelling interest.²²

20 A.R.S. § 16-952 is entitled "Equal funding of candidates," declaring on its face
21 the State's improper interest in "leveling the playing field." But the Supreme Court has
22 repeatedly said "preventing corruption or the appearance of corruption are *the only*
23 *legitimate and compelling government interests thus far identified for restricting*
24

25 ¹⁸ *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) (emphasis added); quoting *Simon & Schuster,*
26 *Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

27 ¹⁹ 512 U.S. at 643, citing *Burson v. Freeman*, 504 U.S. 191, 197 (1992) ("Whether individuals may exercise their
28 free-speech rights near polling places depends entirely on whether their speech is related to a political campaign.")

²⁰ *Buckley*, 424 U.S. at 48-9.

²¹ *Turner Broadcasting*, 512 U.S. at 642.

²² *Boos v. Barry*, 485 U.S. 312, 321 (1988).

1 campaign finances.”²³ The Court has also found that “political ‘free trade’ does not
2 necessarily require that all who participate in the political marketplace do so with
3 exactly equal resources,”²⁴ and that “[r]elative availability of funds is after all a rough
4 barometer of public support.”²⁵ The State’s interest in equalization cannot justify
5 violation of fundamental First Amendment freedoms:
6

7 *[T]he concept that government may restrict the speech of some elements of*
8 *our society in order to enhance the relative voice of others is wholly*
9 *foreign to the First Amendment, which was designed “to secure ‘the widest*
10 *possible dissemination of information from diverse and antagonistic*
11 *sources,’” and “to assure unfettered interchange of ideas for the bringing*
12 *about of political and social changes desired by the people.”*²⁶

13 A.R.S. § 16-952(C) is not content-neutral, because it treats political speech
14 differently depending on who it favors. A group that favors a participating candidate
15 can speak as it wishes without fear of governmental interference. But a group that
16 opposes a participating candidate or favors a nonparticipating one has much to fear,
17 because the State will drown out their voice with matching funds—and hand *whatever*
18 *amount they spend* over to the candidate they don’t want to see elected.

19 Although the State will rely on *Daggett v. Commission on Governmental Ethics*
20 *and Election Practices* as contrary to *Day*, that reliance is misplaced. *Daggett* deals with
21 the chilling effect of independent expenditure matching in only the most cursory fashion;
22

23 ²³ *FEC v. Nat’l Conservative PAC*, 470 U.S. 480, 496-7; citing *Buckley* and *Citizens Against Rent Control v. Berkley*, 454 U.S. 290 (1981) (emphasis added). In fact, the interest in fighting corruption has been used to justify contribution restrictions, not candidate spending limits, which require strict scrutiny. See *McConnell v. FEC*, 124 S.Ct. 619, 656, n.40 (“Since our decision in *Buckley*, we have consistently applied less rigorous scrutiny to contribution restrictions aimed at the prevention of corruption and the appearance of corruption.”)

24 ²⁴ *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 257-8 (1986); citing *FEC v. Nat’l Conservative PAC*, 470 U.S. 480 (1985) (invalidating limits on independent spending by political committees); *Buckley*, 424 U.S. at 39-51 (striking down expenditure limits in 1971 Campaign Act.)

25 ²⁵ 479 U.S. at 258.

26 ²⁶ *Buckley*, 424 U.S. at 48-9. (citations omitted) (emphasis added).

1 makes no attempt to determine whether the law is content-based; refuses to find even an
2 “indirect” burdens on speech, frustrating *Buckley*’s “broadest protection” guarantee;
3 identifies no compelling state interest that would pass strict scrutiny; and involves an
4 untested Maine system that, unlike Arizona, subtracted the amount of independent
5 expenditures received by participating candidates from the total public subsidy they
6 could receive.²⁷ Moreover, *Daggett* omits a key phrase from *Buckley* that completely
7 contradicts the Supreme Court’s essential holding.²⁸
8
9

10 Plaintiff Association faces imminent injury to its First Amendment rights to free
11 political speech and free association, because the system will nullify the speech of any
12 independent expender who disfavors a participating candidate. The knowledge that
13 making such an independent expenditure will result in the State paying dollar-for-dollar
14 matching funds (with no effect on the participating candidate’s spending limit) creates a
15 chilling effect on the Association’s free exercise of protected speech, and imposes a
16 climate of self-censorship that is inimical to our American heritage of fairness and
17 decency. [SEE EX. C, DEC. OF SCHLAFLY.] This encroaches upon the ability of “like-
18 minded persons to pool their resources in furtherance of common political goals,” which
19 violates the Association’s protected associational freedoms as well.²⁹
20
21
22

23 **B. This preliminary injunction advances a compelling public interest.**

24 In *Sammaranto v. First Judicial District Court*, the Ninth Circuit found that
25

26 ²⁷ 205 F.3d 445, 464 (1st Cir. 2000).

27 ²⁸ (“[T]he concept that government may restrict the speech of some elements of our society in order to enhance
the relative voice of others is wholly foreign to the First Amendment...” was omitted by *Daggett* at 464.) *Buckley*,
424 U.S. at 48-9. This bit of jurisprudential legerdemain contorts the meaning of *Buckley* beyond recognition.

28 ²⁹ *Day*, 43 F.3d at 1360, n.3, quoting *Buckley*, 424 U.S. at 22.

1 “[c]ourts considering requests for preliminary injunctions have consistently recognized
2 the significant public interest in upholding First Amendment freedoms.”³⁰ Since no
3 speech in America is more highly treasured than free political speech, the need to
4 prevent further loss of Plaintiffs’ fundamental freedoms trumps the State’s interest in
5 socializing elections in Arizona.
6

7 **C. No security bond should be required.**

8
9 Although Fed. R. Civ. P. 65(c) requires that an applicant for a preliminary
10 injunction give security, this Court has discretion to waive this requirement under the
11 Ninth Circuit’s holding in *Barahona-Gomez v. Reno*.³¹ In the unlikely event that the
12 State is ultimately found to have been wrongfully enjoined here, any cost would be
13 minimal or nonexistent. In fact, once the State is removed from the business of
14 micromanaging statewide and legislative elections—and prevented from rushing to the
15 ATM (Arizona Taxpayer Money) to provide matching funds that improperly equalize
16 candidate funding—it will enjoy a dramatic increase in revenues. Moreover, Plaintiffs
17 are of little means and are represented by a nonprofit, public-interest legal foundation.
18 For these reasons, the preliminary injunction should be granted without security.
19
20

21 **Conclusion**

22
23 The Arizona Citizens Clean Elections Act makes individuals and groups think
24 twice before speaking up in political campaigns, and makes candidates an offer they
25 can’t refuse: *take taxpayer money, or take your lumps*. The Supreme Court has
26

27
28 ³⁰ *Sammaranto*, 303 F.3d at 974.

³¹ 167 F.3d 1228, 1237 (9th Cir. 1999).

1 consistently maintained the following principles first set forth in *Buckley*: that
2 involuntary limits on campaign expenditures and attempts to equalize the relative
3 financial resources of candidates are unconstitutional infringements of free political
4 speech; and that “preventing corruption or the appearance of corruption are *the only*
5 *legitimate and compelling government interests* thus far identified for restricting
6 campaign finances.”³² The Act’s reporting requirement, matching fund, and
7 contribution limit provisions penalize nonparticipating candidates for raising and
8 spending private money in Arizona political campaigns, and provide overwhelming
9 benefits to their participating, government-funded opponents. The fatal flaw of Clean
10 Elections is that *there is no escape for nonparticipants*.

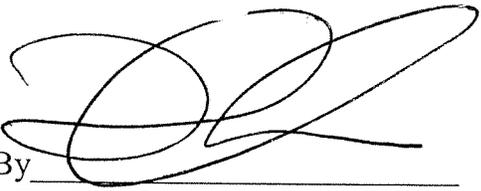
11 For the reasons stated, Plaintiffs ask this Court to grant this motion for
12 preliminary injunction, and enjoin Defendants from enforcing or extending the operation
13 of the aforementioned provisions of the Arizona Citizens Clean Elections Act to
14 nonparticipating candidates who do not wish to participate in the public campaign
15 financing system; and to further enjoin Defendants from extending the operation of the
16 Act to individuals or groups that wish to speak out on behalf of such nonparticipants.

17
18
19
20
21 **RESPECTFULLY SUBMITTED** this 19th day of February, 2004.

22
23 **INSTITUTE FOR JUSTICE**
24 **ARIZONA CHAPTER**
25 Clint Bolick
26 Frank J. Conti Jr.
27 Timothy D. Keller
28 *Attorneys for Plaintiffs*

³² *FEC v. Nat'l Conservative PAC*, 470 U.S. 480, 496-7; citing *Buckley* and *Citizens Against Rent Control v. Berkley*, 454 U.S. 290 (1981) (emphasis added).

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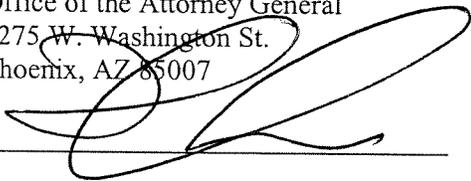

By _____
Frank J. Conti Jr.

ORIGINAL was filed this 19th
day of February, 2004 with:

Clerk of the Court
UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA
401 W. Washington St.
Phoenix, AZ 85003

COPY of the foregoing hand delivered
this 19th day of February, 2004 to:

Terry Goddard
Peter Silverman
ATTORNEY GENERAL, STATE OF ARIZONA
Office of the Attorney General
1275 W. Washington St.
Phoenix, AZ 85007



1 **INSTITUTE FOR JUSTICE**
2 **ARIZONA CHAPTER**

3 Clint Bolick (021684)
4 Frank J. Conti Jr. (013188)
5 Timothy D. Keller (019844)
6 111 W. Monroe St., # 1107
7 Phoenix, AZ 85003
8 Telephone: (602) 324-5440

9 Attorneys for Defendants

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

12 CITY OF MESA, a municipal
13 corporation,

14 Plaintiff,

15 v.

16 RANDALL E. BAILEY and MELISSA
17 M. BAILEY, husband and wife, DALE
18 I. BAILEY and JANET L. BAILEY,
19 husband and wife; COUNTY OF
20 MARICOPA, as to any unpaid real
property taxes, et al.,

21 Defendants.

No. CV2001-090422

**MOTION FOR ATTORNEYS’
FEES AND MEMORANDUM IN
SUPPORT**

(Hon. Bethany G. Hicks)

22
23
24 Defendants Randall E. Bailey, Melissa M. Bailey, Dale I. Bailey, and Janet
25 L. Bailey (hereinafter “the Baileys” or “Defendants”), by and through their
26 undersigned counsel, move this Court for reasonable attorneys’ fees in the amount
27
28

1 of \$152,895.00. This motion is made pursuant to Ariz. R. Civ. P. 54(g), the
2 equitable private attorney general doctrine, and A.R.S. § 12-1129(B)(1), and is
3 supported by the following Memorandum of Points and Authorities, Affidavits,
4 and Exhibits attached hereto and incorporated herein by this reference.
5
6

7 8 Memorandum of Points and Authorities

9
10 Defendants are entitled to an award of attorneys' fees for the *pro bono* legal
11 work performed by the public-interest lawyers at the Institute for Justice Arizona
12 Chapter under any one of three theories: one required by procedural rule (Ariz. R.
13 Civ. P. 54(g)); one discretionary by equitable doctrine (the "private attorney
14 general doctrine"); and one required by statute (A.R.S. § 12-1129(B)(1)).
15
16

17 18 Argument

19 **I. Defendant Baileys made a claim for attorneys' fees in their pleadings and** 20 **are entitled to such an award under Ariz. R. Civ. P. 54(g).**

21
22 Plaintiff City of Mesa instituted a condemnation proceeding against the
23 Defendant Baileys, who then asked for reasonable attorneys' fees as specific relief
24 in their answer to Plaintiff's complaint. [See Ex. A]. The trial court granted the
25 City immediate possession, but at special action the Court of Appeals
26 subsequently found that art. II, § 17 of the Arizona Constitution forbade Plaintiffs
27
28

1 from condemning Defendants' property. [See Ex. B]. Thus, having made a claim
2 for fees in their answer, the Baileys are in compliance with Rule 54(g).

3
4 Notwithstanding other equitable and statutory bases for a fee award, such an
5 award is appropriate in this case.

6
7
8 **II. Under the equitable "private attorney general" doctrine, attorneys' fees**
9 **are properly awarded for all *pro bono* legal work performed during the**
10 **trial and special action proceedings.**

11 **A. *Pro bono* attorneys are entitled to fee awards.**

12
13 In *Arnold v. Arizona Department of Health Services*¹ the Arizona Supreme
14 Court determined that attorneys' fees are appropriately awarded to *pro bono*
15 counsel. The *Arnold* Court stated the matter succinctly:

16
17
18 Attorneys' fees should not be limited by the fact that the plaintiffs are
19 indigent and that their attorneys accepted the case on a *pro bono*
20 basis. It would be a paradox to hold that litigants who are able to pay
21 will have their attorneys' fees reimbursed while attorneys who
22 represent litigants unable to pay will be forced to remain unpaid.²

23
24 *Arnold* was the first decision to apply the "private attorney general"
25 doctrine in Arizona, an equitable rule which permits courts in their discretion to
26 award attorneys' fees to a party who has vindicated a right that:

27 ¹ 160 Ariz. 593, 775 P.2d 521 (1989).

- (1) benefits a large number of people;
- (2) requires private enforcement; and
- (3) is of societal importance.³

In *Arizona Center for Law in the Public Interest v. Hassell*,⁴ this doctrine was expanded, imposing the cost of vindicating public rights on private as well as public litigants on the losing side of an argument. In fact, the *Hassell* Court found it “hypertechnical and unjust” to preclude victorious public-interest lawyers from recovering attorneys’ fees earned against intervening defendants—even where the complaint was not amended to expressly include the intervenors within the demand for judgment and fees.⁵ *Hassell* is instructive here, because it granted the appellants an award for fees under the private attorney general doctrine *without reaching* their alternative request under A.R.S. § 12-2030 for having brought a mandamus action against the state.⁶

The *pro bono* legal work performed for the Baileys by the public-interest lawyers at the Institute for Justice Arizona Chapter falls within the private attorney general doctrine. First, the ruling by the Court of Appeals above benefits

² *Id.* at 608, 775 P.2d at 536.

³ *Id.* at 609, 775 P.2d at 537.

⁴ 172 Ariz. 356, 837 P.2d 158 (Ct. App. 1991).

⁵ *Id.* at 371-72, 837 P.2d at 173-74.

⁶ *Id.* at 371, 837 P.2d at 173.

1 a large number of people—specifically, all Arizona private property owners who
2 are subject to the indignity of having their land taken by their local government
3 and handed over to other private parties. Second, given that the government is the
4 sole possessor of the power of eminent domain, the City of Mesa is certainly in no
5 position to challenge instances of misuse. The chore of enforcing constitutional
6 rights and limits on government power is left solely to private citizens like the
7 Baileys. Third, the preservation of private property rights is a matter of grave
8 societal importance. During this litigation our Legislature has enacted a series of
9 new measures aimed at curbing abuses of the government’s taking power,
10 including a provision mandating attorneys’ fee awards against state or local
11 entities that institute failed condemnation actions. Within a month of the Court of
12 Appeals’ decision in this case, the City of Tempe abandoned its effort to take the
13 home that Kenneth and Mary Ann Pillow have lived in for past 45 years.⁷
14 Because the constitutional rights and legal principles defended successfully in this
15 matter fit comfortably within the confines of the private attorney general doctrine,
16 the Baileys should be awarded reasonable attorneys’ fees incurred at every stage
17 of the proceedings.
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27 ⁷ Alia Beard Rau, *Tempe couple stave off bulldozers*, Arizona Republic, Oct. 31, 2003; Kirsten
28 Searer, *Tempe backs off home seizure*, East Valley Tribune, Oct. 31, 2003.

1 **B. *Pro bono* fee awards are calculated using the lodestar method.**

2
3
4 The proper method of calculating attorneys' fee awards for *pro bono*
5 counsel is the "lodestar" method. The "lodestar" is the product of the hours
6 expended times a reasonable hourly rate of compensation.⁸ This method is
7 generally used where fees are not actually paid on an hourly basis and where the
8 prevailing party does not have an agreement with counsel setting the attorney's
9 billing rate for the representation.⁹ In *Kadish v. Arizona State Land Department*,
10 the Court of Appeals decided that the private attorney general doctrine imposes no
11 express limitation on the hourly reimbursement rate to be applied in making an
12 award.¹⁰ Under *Kadish*, the prevailing market rate is the proper amount to be used
13 as the reasonable hourly rate of compensation for the lodestar calculation where
14 the prevailing party has been represented by nonprofit counsel.¹¹
15
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23 ⁸ *State v. Tocco*, 173 Ariz. 587, 845 P.2d 513 (Ct. App. 1992); *London v. Green Acres Trust*,
24 159 Ariz. 136, 765 P.2d 538 (Ct. App. 1988); *Schweiger v. China Doll Restaurant, Inc.*, 138
Ariz. 183, 186 n.5, 673 P.2d 927, 930 n.5 (Ct. App. 1983).

25 ⁹ *Id.*

26 ¹⁰ 177 Ariz. 322, 332, 868 P.2d 335, 345 (Ct. App. 1993).

27 ¹¹ *Id.*, citing *Arnold*, 160 Ariz. at 608, 775 P.2d at 536.
28

1 **III. Under A.R.S. § 12-1129(B)(1), attorneys’ fee awards are mandatory**
2 **against the Plaintiff for bringing a failed condemnation action.**

3
4 Under A.R.S. § 12-1129(B)(1), enacted during the litigation of this matter, a
5 court “*shall award*” the owner of private property subject to condemnation “*an*
6 *amount that will reimburse the owner* for... reasonable costs, disbursements and
7 expenses, including reasonable *attorney*, appraisal and engineering *fees, actually*
8 *incurred because of the condemnation proceeding* if ... [t]he final judgment is that
9 the plaintiff cannot acquire the real property by condemnation.”¹² Since the City
10 of Mesa failed in its bid to condemn the Baileys’ property, Arizona law requires
11 that the Baileys be awarded their reasonable attorneys’ fees incurred throughout
12 these proceedings.
13

14
15
16 The Baileys’ legal fees were generated by *pro bono* public-interest lawyers.
17 Any argument that their statutory fee claim is somehow lacking—either because
18 (1) they are not technically to be “reimbursed,” or (2) the fees were not “actually
19 incurred”—must necessarily fail. This is so for three reasons. First, the Arizona
20 Supreme Court specifically found in *Arnold* that *pro bono* lawyers are entitled to
21 attorneys’ fee awards, even though they agree not to charge a fee.¹³ Second, in
22 *Hassell* the Court of Appeals relied on the equitable private attorney general
23
24
25

26 ¹² A.R.S. § 12-1129(B)(1) (emphasis added).

27 ¹³ See n. 2 *supra*.
28

1 doctrine as the sole basis for awarding *pro bono* attorneys' fees—without regard
2 for the appellant's statutory fee claim.¹⁴ Third, the Court of Appeals ruled in
3
4 *Kadish* that statutory fee provisions do not preempt application of the private
5 attorney general doctrine as a basis for an award of fees against the state.¹⁵
6
7

8 Conclusion

9
10
11 Based on the foregoing, the Baileys respectfully request an award for
12 reasonable attorneys' fees in the amount of \$152,895.00, as reflected in their
13 attached Affidavits and Exhibits, using the lodestar method of calculation set forth
14 in *Kadish*.
15

16 **RESPECTFULLY SUBMITTED** this ____ day of November, 2003.

17
18 INSTITUTE FOR JUSTICE
19 ARIZONA CHAPTER

20 By _____
21 Clint Bolick
22 Frank J. Conti Jr.
23 Timothy D. Keller
24 111 West Monroe St., Suite 1107
25 Phoenix, Arizona 85003
26 Attorneys for Defendants Baileys

27 ¹⁴ See n. 6 *supra*.

28 ¹⁵ *Kadish*, 177 Ariz. at 328, 868 P.2d at 341.

1 ORIGINAL of the foregoing filed
2 this _____ day of November, 2003 with:

3 Clerk of the Superior Court
4 Maricopa County
5 Southeast Regional Facility
6 222 E. Javelina Dr.
7 Mesa, AZ 85210-6201

8 COPY of the foregoing hand-delivered
9 this _____ day of November, 2003:

10 The Honorable Bethany G. Hicks
11 Maricopa County Superior Court
12 Southeast Regional Facility, 2G
13 222 E. Javelina Dr.
14 Mesa, AZ 85210-6201

15 Joseph Padilla
16 Deputy City Attorney
17 MESA CITY ATTORNEY'S OFFICE
18 P.O. Box 1466
19 Mesa, AZ 85211
20 Attorney for Plaintiff

21 Mark Holmgren
22 John Paulsen
23 Deputy County Attorneys
24 222 North Central Ave., # 1100
25 Phoenix, AZ 85004
26 Attorneys for Defendant Maricopa County
27 (mailed)

28 By _____

1 Gary Peter Klahr, P.C.
Frank J. Conti, Jr. #013188
2 917 West McDowell Road
Phoenix, Arizona 85007
3 (602) 254-5166 / (602) 650-1118
Fax: (602) 254-2008

JUDGE MARK F. ACETO
APR 12 1996

4 Attorney for Plaintiffs

5 IN THE SUPERIOR COURT, STATE OF ARIZONA

6 IN AND FOR THE COUNTY OF MARICOPA

7 [REDACTED] ROBINSON, individually, and as
natural guardian and next friend of [REDACTED]
8 [REDACTED] a minor,

CV 95-07905

9 Plaintiffs,

PLAINTIFF'S RESPONSE TO
DEFENDANT CHURCH'S MOTION
FOR SUMMARY JUDGMENT AND
CROSS-MOTION FOR SUMMARY
JUDGMENT AS TO LIABILITY
AGAINST DEFENDANT CHURCH

10 vs.

11 MICHAEL WETTON and BERNADETTE
WETTON, *et al.*,

(Assigned to the Honorable Mark F. Aceto)

12 Defendants.

(Oral Argument Requested)

13 Plaintiff, by and through undersigned counsel, hereby responds to Defendant Church's
14 Motion for Summary Judgment, and moves this Court for summary judgment as to liability
15 against Defendant Church because there is no genuine issue as to any material fact and only one
16 inference can be drawn therefrom. Plaintiff has attached a Memorandum of Points and
17 Authorities, a Statement of Facts, and Affidavits and Exhibits attached thereto incorporated
18 herein by this reference.

19 DATED this 12th day of April, 1996.

20 GARY PETER KLAHR, P.C.

21 

22 Frank J. Conti, Jr.
23 Attorney for Plaintiffs
24

1 would have revealed his pending prosecution for that crime (DR#40947219, Child Abuse, dated
2 August 25, 1994) and investigation for a subsequent offense at the same location.
3 (DR#41324118, Child Abuse, dated October 31, 1994). These police reports existed at the time
4 Defendant Church agreed to permit Defendant Wetton to use its property for the operation of his
5 Academy, and were readily available and easily attainable had they taken the reasonable step of
6 conducting a routine criminal background check. [See Affidavit of Ken Liddell, Exhibits 1 and 2]

7 **Proposition I: This Court Can And Should Rule As A Matter Of Law That Defendant**
8 **Church Had A Duty To Protect The Public Against Defendant Wetton's Foreseeable**
9 **Criminal Act.**

10 The court decides whether a duty exists. Markowitz v. Arizona Parks Board, 146 Ariz.
11 352, 356, 706 P.2d 364, 368 (1985). The court must determine whether an obligation is
12 recognized by the law requiring the defendant to conform to a particular standard of conduct
13 toward the plaintiff. This includes the question of whether the injury to the particular plaintiff was
14 foreseeable. If it is foreseeable and the duty is found by the trial court to exist, the court may or
15 may not refer the foreseeability question to the jury by instruction on the issue of negligence. This
16 issue is presented to the jury where there is a debatable question whether the injury to plaintiff
17 was within the foreseeable scope of the risk, or whether defendant was required to recognize the
18 risk or take precautions against it. Chavez v. Tolleson Elementary School District, 122 Ariz.
19 472, 595 P.2d 1017 (App. 1979).

20 According to both the case law and public policy of Arizona, the injury to plaintiff [REDACTED]
21 [REDACTED] was foreseeable and is not a question which this Court could conceivably consider
22 "debatable." Plaintiff has attached the Affidavit of private investigator Ken Liddell which proves
23 that it was reasonably foreseeable that Defendant Wetton — a man with a past history of physical
24 abuse of a sexually deviant nature against children — would commit similar acts if provided with
a school facility, a paddle, and children. Such conduct and the resulting injury therefrom form a

1 continuous and foreseeable stream of events that Defendant Church could and should have
2 prevented by merely investigating Defendant Wetton's background before allowing him to operate
3 a private Christian school on its property. Had the Church taken the simple precaution of taking
4 down Mr. Wetton's basic information in the form of an application, or even asking to see his
5 driver's license, it could have discovered that he was investigated for committing at least two
6 separate acts of child abuse at the church next door only three months earlier, and was in the
7 process of being prosecuted for at least one of them. [See Affidavit of Ken Liddell, Exhibits 1
8 and 2]

9 Arizona courts now recognize the imposition of a duty to protect the public against the
10 foreseeable criminal acts of others. In Petolicchio v. Santa Cruz County Fair Association, 177
11 Ariz. 256, 866 P.2d 1342 (1994), the Supreme Court of Arizona ruled that the defendant had a
12 duty to guard stored alcohol from those who would foreseeably endanger the public by its use,
13 and that the theft of such alcohol was foreseeable and hence not a superseding cause. Petolicchio
14 involved a suit by the parents of a minor passenger killed in an alcohol-related automobile
15 accident against the County Fair Association and its liquor inventory and security manager. The
16 security manager's son used his mother's keys to steal the Association's liquor, which lead to the
17 alcohol-related death of plaintiff.

18 In analyzing the foreseeability issue, the court in Petolicchio met squarely the question of
19 the imposition of a duty of reasonable care to protect the public against another's foreseeable
20 criminal acts. Citing Carillo v. El Mirage Roadhouse, Inc., 164 Ariz. 364, 793 P.2d 121 (App.
21 1990), the court concluded that the continuing devastation from drunk driving required an
22 examination of the changing attitudes and needs of society. The court expressed the elasticity and
23 evolutionary nature of the duty concept, stating that "[t]he frequency of accidents involving drunk
24 drivers and the attendant carnage to an unsuspecting public compel us to continually scrutinize the

1 scope of the common law in this area." Id. at 367.

2 The court went on to outline similar situations in which a duty of reasonable care is
3 imposed to protect the public against another's foreseeable criminal acts. For instance, courts
4 now routinely hold a landlord liable for damages arising from the property's inadequate security
5 or lighting which contributes to harming a tenant or third person due to an intervening criminal
6 act. (See, e.g. Frances T. v. Village Green Owners Ass'n, 42 Cal. 3rd 490, 723 P.2d 573 (1986)).

7 Furnishing firearms is another area in which courts frequently impose a duty of care. Even though
8 a third person's criminal or intentional act directly caused the injury, if a person or business
9 negligently provided or allowed access to a gun there could still be liability to the injured party.

10 In Crown v. Raymond, 159 Ariz. 87, 91, 764 P.2d 1146, 1150 (App. 1988), the court overruled
11 summary judgment for defendant gunstore owner, finding that the existence of an Arizona statute
12 prohibiting the sale of firearms to minors without parental consent was a legislative declaration of
13 the foreseeability of possible injury to minor plaintiff, who had committed suicide.

14 The present case is perfectly analogous to the "public duty" line of cases cited by the court
15 in Petolicchio. The sexual exploitation and physical abuse of children is a rampant social disease
16 that has now been ushered to the forefront of our social consciousness. Given the onerous
17 mandatory prison sentences that our legislature has imposed for sexual misconduct involving
18 children, it is clear that the public policy of Arizona recognizes the gravity and pervasiveness of
19 the problem. The ever-increasing awareness of the involvement of religious institutions and
20 clergymen in the physical, emotional and sexual abuse of children has particularly horrified the
21 public; especially in situations like this one, where a trusting and vulnerable plaintiff enters a house
22 of worship and finds a wolf hiding in The Shepherd's clothing. The only responsible social policy
23 is to impose a duty of reasonable care on Defendant Church to properly investigate the
24 background of a prospective school headmaster — especially where corporal punishment is the

1 central theme of his pedagogical philosophy. Certainly, if Defendant Church were an employment
2 agency for nannies it would have a duty to investigate prospective employees for past deviant
3 conduct. No self-respecting, reasonable nanny agency or day-care center would allow anyone to
4 deal directly with children unless and until they were satisfied that the individual was safe for
5 children. Likewise, a Church which decides to try its hand at the business of allowing a school to
6 operate on its property must, at the very least, be found to have assumed a duty to investigate the
7 prospective headmaster. A man who holds himself out as a discipliner of children, and who forces
8 them to disrobe before meting out corporal punishment, should certainly be screened for past
9 criminal behavior or sexual misconduct before being permitted around children with a paddle.

10 Duty is not sacrosanct in itself, but is only an expression of the sum total of those
11 considerations of policy which lead the law to say that the particular plaintiff is entitled to
12 protection. — Prosser, Law of Torts, 3d.Ed. at 332-333 (1964). "Those considerations of policy"
13 which have been articulated by the courts and commentators were set forth by the Arizona Court
14 of Appeals in Cooke v. Berlin, 153 Ariz. 220, 735 P2d 830 (App. 1987) as follows:

- 15 (1) The foreseeability of harm to the plaintiff flowing from the defendant's act,
- 16 (2) The degree of certainty that the plaintiff suffered injury,
- 17 (3) The "closeness" of the connection between the defendant's conduct and the injury
18 suffered,
- 19 (4) The moral blame attached to the defendant's conduct,
- 20 (5) **The policy of preventing future harm,**
- 21 (6) The burden on the defendant and to the community of imposing a duty of exercise
22 due care, and
- 23 (7) The availability, cost and prevalence of insurance to cover the risk.

24 (Emphasis added). Id. At 225, quoting Tarasoff v. Regents of University of California, 17 Cal.3d

1 425, 131 Cal.Rptr. 14, 551 P.2d 334 (1976). These policy considerations, taken as a whole,
2 overwhelmingly militate in favor of imposing a duty on the Defendant Church in this case. In
3 addition, the fact that the victim here is a child should weigh heavily in this Court's mind. The
4 characteristics of children are proper matters for consideration in determining what is ordinary
5 care with respect to them; and a person may have a duty, with respect to persons of tender years,
6 to take precautions that would not be necessary for adults. Shannon v. Butler Homes, Inc., 102
7 Ariz. 312, 428 P.2d 990 (1967).

8 **Proposition I(A): A Special Possessor Of Land — Licensee Relationship Existed Between**
9 **Defendant Church And Defendant Wetton/Connacht Academy**

10 In addition to this "public duty" theory of liability, Defendant Church can be found to have
11 a duty under a "Restatement theory" arising from its relationship to both the Plaintiff and
12 Defendant Wetton. As Plaintiff put forth in her original response, a "special relationship" existed
13 between Defendant Church and Defendant Wetton which clearly was more than a mere landlord-
14 tenant nexus. Defendant Church granted Wetton a license to use the Church's educational
15 facilities in return for the payment of all utilities on the premises. In addition, the Church also
16 required regular meetings with Wetton to discuss the Academy's curriculum and/or religious
17 perspective, reviewed and approved the Academy's student handbook, and oversaw fundraising
18 activities and special holiday programs at the school. [See Plaintiffs' Response to Defendant's first
19 Motion for Summary Judgment, Exhibit E, "Elder's Report to Congregation"] Thus, the
20 Defendant Church reserved the authority to exercise control and oversight powers over the day to
21 day operation of certain functions of the Defendant Wetton/Academy, as the Academy was not
22 free to operate its school without Church input.

23 Counsel for Defendant Church remain desperate to categorize its relationship with the
24 Connacht Academy as landlord-tenant in order to cower behind the ancient general rule of

Exhibit

E

**IN THE DREAMY DRAW JUSTICE COURT
MARICOPA COUNTY, ARIZONA**

TR2015-131865

07/12/2016

HON. FRANK J. CONTI
JUSTICE OF THE PEACE

STATE OF ARIZONA

LAUREN MARSHALL

V.

BRIANNA P. NIKKEL

ROLAND L. RIOS

MINUTE ENTRY

Defendant is accused of committing the offense of aggressive driving, a Class 1 misdemeanor. The case is set for a jury trial in approximately one month. The State filed a motion asking the court to preclude the Defendant's expert witness from testifying pursuant to *Daubert v. Merrell Dow*, 509 U.S. 579 (1993) and requesting a *Daubert* hearing. Defendant, through counsel, responded to the motion, and the State replied.

In Arizona, a party seeking to admit expert testimony "must prove, by a preponderance of the evidence, that the testimony is both relevant and reliable." *State ex rel. Montgomery v. Miller*, 234 Ariz. 289, 298, 321 P.3d 454, 463 (App. 2014). Ariz. R. Evid. 702, which governs testimony by expert witnesses, states as follows:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

Rule 702 was amended effective January 1, 2012 to adopt the language of Rule 702, Fed. R. Evid., and to reflect the principles set forth in *Daubert*. See *State v. Salazar-Mercado*, 232 Ariz. 256, para. 5, 304 P.3d 543, 546 (App. 2013). Amended Ariz. R. Evid. 702 is construed in accordance with its federal counterpart. *Ariz. State Hospital/Ariz. Cmty. Protection & Treatment Ctr. v. Klein*, 231 Ariz. 467, para. 26, 296 P.3d 1003, 1009 (App. 2013); see also Ariz. R. Evid. Prefatory Cmt. to 2012 Amendments ("Where the language of an Arizona rule parallels that of a federal rule, federal court decisions interpreting the federal rule are persuasive but not binding . . .").

Daubert saw the U.S. Supreme Court tackle the question of the admissibility of scientific expert testimony, suggesting a series of non-exclusive factors to assist the court in gate-keeping the introduction of such evidence. These factors to consider include empirical testing, peer review, error rate, the existence of standards and controls, and the degree to which the theory and technique is generally accepted by a relevant scientific community. *Ariz. State Hospital/Ariz. Cmty. Protection & Treatment Ctr. v. Klein*, 231 Ariz 467, para. 27, 296 P.3d 1003, 1009 (App. 2013); see also *Daubert* 509 U.S. at 593-94.

On appeal, an "abuse of discretion" standard is used when assessing the trial court's *Daubert* analysis. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997); *Pipher v. Loo*, 221 Ariz. 399, para. 6, 212 P.3d 91, 93 (App. 2009). The *Daubert* test applies to all expert testimony, not just novel scientific evidence. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

The State seeks to preclude the defendant's expert witness from testifying on the subject of possible inaccuracies involved when a police officer determines the speed of a moving vehicle by employing the pace method. The parties agree that Ms. Justice Bruursema, the defendant's proposed expert, is the holder of a PhD in physics from Johns Hopkins University. Her research included the movement of stars and the emission of light from gas.

Dr. Bruursema has never testified as an expert before, and has never personally researched the reliability of pacing a vehicle. In a pretrial interview, Dr. Bruursema indicated that she used basic physics equations of motion to derive an equation to solve for speed and error rates. From these calculations, Dr. Bruursema concluded that general errors would be expected to be 5-10 MPH for a pacing scenario.

In Arizona, even an erroneous application of scientific principles may not always clearly render expert evidence unreliable. Not all errors in the application of reliable principles or methods will warrant exclusion. Rule 702 contemplates that expert testimony can be "shaky" yet admissible. Ariz. R. Evid. 702 cmt. (2012). "The overall purpose of Rule 702 . . . is simply to ensure that a fact-finder is presented with reliable and relevant evidence, not flawless evidence." *State v. Bernstein*, 234 Ariz. 89, 317 P.3d 630 (App. 2014), citing *State v. Langill*, 945 A.2d 1, 10 (N.H. 2008). Rule 702(d) "must be interpreted and applied with some flexibility to encompass the multitude of scenarios that may be presented and to maintain the division in function between the fact-finder and gatekeeper." *Id.*

In close cases, the trial court should allow the jury to exercise its fact-finding function, for it is the jury's exclusive province to assess the weight and credibility of evidence. *State v. Clemons*, 110 Ariz. 555, 556 – 57, 521 P.2d 987, 988 – 89 (1974). “[A]s long as an expert’s scientific testimony rests upon good grounds, . . . it should be tested by the adversary process—competing expert testimony and active cross-examination—rather than excluded from jurors’ scrutiny for fear that they will not grasp its complexities or satisfactorily weigh its inadequacies.” *State v. Bernstein*, 234 Ariz. 89, para. 18, 317 P.3d 630 (App. 2014); see also *Langill*, 945 A.2d at 11 (quoting *United States v. Vargas*, 471 F.3d 255, 265 (1st Cir. 2006)).

Mankind’s unquenchable thirst for the development of means and methods for observing, studying, and calculating the movement of heavenly bodies and other objects has proceeded since time immemorial. This court finds that the same or similar physical scientific principles that govern calculation of the speed of objects in space can be related to the calculation of the speed of vehicles on our highways.

In fact, this court can take judicial notice of the existence and widespread publication of reliable, relevant and readily available mathematical formulae for scientific use in precisely this situation. (See David Brown, “*How Was Your Speed Measured?*” <http://www.nolo.com/legal-encyclopedia/free-books/beat-ticket-book/chapter-6-2.html>.) In other words, defendant’s proffered expert in astrophysics is certainly qualified to use her knowledge to give relevant opinion testimony concerning potential inaccuracies that may have resulted from the officer’s use of the pace method to determine the approximate speed of the defendant’s vehicle.

Additionally, it has been decided that a trial court has great discretion whether to set a pretrial hearing to evaluate proposed expert testimony. *Sandretto v. Payson Healthcare Management, Inc.*, 234 Ariz. 351, 357 para. 17 (App. 2014), citing *Ariz. State Hosp.*, 231 Ariz. 467, para. 31, 296 P.3d at 1010.

This court finds that the defendant’s proposed expert witness Dr. Bruursema meets the qualifications for admissible expert testimony pursuant to Ariz. R. Evid. 702 (a)-(d). This court further finds that, pursuant to *Daubert*, the physics theories and techniques employed by Dr. Bruursema are generally accepted by a relevant scientific community. This factor alone outweighs all others, and militates strongly towards a finding of admissibility.

IT IS ORDERED that the State’s motion to preclude defendant’s expert witness and request for *Daubert* hearing is DENIED.



FRANK J. CONTI
Justice of the Peace
Dreamy Draw Justice Court





IN THE GLENDALE CITY COURT
MARICOPA COUNTY, ARIZONA

5711 W. Glendale Avenue, Glendale, Arizona 85301
(623) 930-2400

RECEIVED
JENNIFER VALDEZ
CODED 23 PM 1:43

HON. FRANK J. CONTI
JUDGE PRO TEMPORE

K. Williams

December 29, 2000

Clerk

Nº TR 20000-019270

STATE OF ARIZONA

Glendale City Prosecutor
by:

v.

Neal W. Bassett
Attorney at Law
P.O. Box 33370
Phoenix, Arizona 85067

JENNIFER VALDEZ

Carla J. Bastien
Attorney for State
5705 West Glendale Avenue
Glendale, Arizona 85301

The Court having considered all motions and responses filed by the parties, IT IS ORDERED AS FOLLOWS:

Defendant Jennifer Valdez is accused of committing three civil traffic violations on October 14, 2000 in Glendale, Arizona which arise out of a two-car accident allegedly caused by her violation of A.R.S. section 28-772. Defendant, in her recitation of facts contained in all motions filed with this Court, indicates that the driver of the other car was seriously injured and the passenger, his wife, was killed.

Defendant has requested various forms of relief, which the Court will address individually below.

I. DEFENDANT'S MOTION TO DISMISS COUNT A

Defendant requests that the charge of 28-772, failure to yield turning left at an intersection, be dismissed on the grounds that it is a lesser included offense to either 28-672.A [accident resulting in serious injury] or 28-672.C [accident resulting in death]. The State has stipulated to the dismissal of Count A as a lesser included offense. Nevertheless, Defendant's Motion to Dismiss Count A is **DENIED**.

Although this is a civil traffic matter, both parties rely on an analysis of criminal case law concerning lesser included offenses. However, even in a criminal context there are such things as "predicate offenses." For example, the offense of first-degree (felony) murder is committed by a defendant who kills another while in the act of committing robbery. Robbery is not a lesser included offense to felony murder, but rather a separate offense and a necessary element of the crime.



IN THE GLENDALE CITY COURT
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The plain meaning of both 28-672.A and 28-672.C clearly envision the necessity of finding a defendant responsible for any one of three predicate moving violations: running a red light [28-645A(3)(a)], running a stop sign [28-855B], or failure to yield turning left [28-772]. There can be no violation of 672.A or 672.C without an initial finding that a defendant is responsible under one of these three sections. Section 672A reads in pertinent part:

“A person is responsible for a civil traffic violation if the person *violates any one of the following and the violation* results in an accident....” [Emphasis added].

Therefore it seems clear that the Legislature intended for there to be an initial determination of whether a defendant committed any one of three predicate moving violations *before* proceeding to the question of whether said *violation* resulted in an accident. This Court finds as a matter of law that determining whether the defendant is responsible for a predicate moving violation must necessarily precede a finding of responsible under either 28-672.A or 672.C. There is no other way for the State to notify a defendant of the basis for a charge under 672 *without* charging her with one of the three predicate moving violations.

II. DEFENDANT’S DEMAND FOR JURY TRIAL

Defendant’s demand for jury trial pursuant to ARS 22-320 is **DENIED**, as that statute deals specifically with criminal proceedings in justice and police courts. As discussed in Part IV of this Opinion, this Court finds as a matter of law that this is not a criminal matter.

III. DEFENDANT’S MOTION TO DISMISS COUNT B

Defendant moves this Court to dismiss Count B, an allegation under 28-672.A that she committed a moving violation that caused an accident resulting in serious physical injury to another person. The crux of Defendant’s argument is that 28-672 prevents the State from charging her with additional counts simply because there was more than one occupant in the other car involved in the accident.¹

The central question is whether the Legislature intended for 28-672 to permit *civil traffic* defendants to be charged for each *person* injured or killed, or for each *violation* which causes an accident resulting in serious injury or death. **This Court holds as a matter of law that a defendant in a civil traffic action under 28-672 cannot be charged with causing both a serious injury accident under subsection A**

¹ Defendant’s citation of State v. Tinajero, 188 Ariz. 350, 935 P.2d 928 (Div. 1, 1997) is not persuasive, as that case dealt with a criminal statute intended to punish individuals for leaving the scene of an accident. The focus of 28-672 is on violations, not accidents. The plain meaning of the text renders the number of cars involved irrelevant, because a one car accident or a ten car accident is still an accident for 672 purposes.



IN THE GLENDALE CITY COURT
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and a fatal accident under subsection C for the same moving violation.

Section 28-672 is a bifurcated statute, in that only one half or the other was intended to be alleged at any one time. Subsections A and B deal with serious injury accidents, while C and D cover fatal accidents. Both halves are nearly identical, except for the greater fine and suspension period provided for accidents causing death. Much can be learned from Subsection E, which states as follows:

...

“If a person’s driving privilege is *suspended pursuant to any other statute* because of an incident involving a violation of subsection A or C of this section, the suspension period prescribed in subsection B or D of this section shall run concurrently with the other suspension period.”

...

Subsection E therefore encompasses the possibility of a defendant’s license being *suspended pursuant to any other statute* because of an incident involving a violation of subsection A or C. This event could only occur “pursuant to any other statute” if, for example, the defendant were found responsible for 28-772 and 28-672.C, MVD added the required points, and those points resulted in a suspension.

It is interesting that a judge *may* suspend the defendant’s license for a violation of 672, but that suspension must be *concurrent* to any other suspension arising out of the same incident. This statute precludes a result where the Defendant is found responsible under both subsections A and C and then sentenced to consecutive license suspensions. In the absence of any express or implied legislative desire for consecutive punishment, there seems little benefit to the State in charging a defendant under both subsections A and C.

If the Legislature intended for each half of the law to operate at the same time it might have drafted subsection E to read “suspended *pursuant to this or any other statute*” or “pursuant to *any statute*” rather than “pursuant to any *other statute*.” Or it might have said “subsection A *and/or* C” and “subsection B *and/or* D” instead of listing them only in the alternative. But the Legislature chose neither option.

The penalty provisions in subsections B and D allow for the exercise of judicial discretion in determining the fine amount, whether the defendant’s license should be suspended, or whether community service should be performed. Significantly, the only *mandatory* penalties are the defendant’s successful completion of traffic survival school and the sentencing court’s reporting the judgment to MVD. A statute which is unambiguous should be interpreted to mean what it plainly states, unless an absurdity results. *Sunstate Equip. Corp. v. Industrial Comm’n*, 135 Ariz. 477, 662 P.2d 152 (Ct. App. 1983). It is highly doubtful that the Legislature intended for a defendant under 28-672 to complete traffic school *twice* for the same moving violation.

In order for a violation of 28-672 to be proven there must be 1.) a moving *violation* of a specific type; 2.) an *accident*; and 3.) a result of *serious injury or death*. In this case there is an allegation of *one* moving violation [28-772] and *one* accident, which resulted in a serious injury and a fatality. The State must choose



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which of those results it will allege.

IV. DEFENDANT’S MOTION TO DISMISS COUNTS B AND C

Defendant’s Motion to Dismiss Counts B and C is **DENIED**. The Legislature created 28-672 as a penalty enhancement for certain moving violations which are most likely to cause accidents resulting in death or serious physical injury. The drafters were careful to punish defendants for each *violation* rather than for each *victim*, presumably to avoid the necessary involvement of criminal Constitutional rights for defendants and victims alike.²

Shifting the primary focus of 28-672 from Defendant’s simple negligence to the consequences of that negligence takes a civil traffic law where no civil traffic law has gone before. Such a victim-centric interpretation would blur the line between civil and criminal punishment, raising the very substantial Constitutional concerns which Defendant identifies.

This Court finds no clear proof that the statutory scheme of 28-672 is so punitive as to negate its designation as civil [See *Martin v. Reinstein*, 195 Ariz. 293, 987 P.2d 779 (App. 1999)], particularly in light of this Court’s ruling in Part III above which forbids the State from citing a defendant under 28-672 for each person injured or killed.

IT IS SO ORDERED.

² If the State wished to pursue Defendant for each *person* injured or killed it could charge her with negligent homicide [13-1102, a class 4 felony] if her conduct was criminally negligent. Or it might charge her with assault [13-1203.A.1, a class 2 misdemeanor] if her conduct was deemed reckless.