ARIZONA CASES DIGEST

160 Arizona Cases Digest **November 4, 2025**

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Publication of Opinions.
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IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

SANTA CRUZ COUNTY, a public body; and Alma Schultz, in her official capacity as Santa Cruz County Elections Director,
Plaintiffs/Appellants/Cross-Appellees,
v.
AUDIT USA, a 501(C)(3) Organization; and John R. Brakey, a natural person, in his official capacity as Director and Co-Founder of Audit USA,
***Defendants/Appellees/Cross-Appellants*.**

No. 2 CA-CV 2024-0328
Filed October 20, 2025

Appeal from the Superior Court in Pima County
No. C20223426
The Honorable Casey F. McGinley, Judge
AFFIRMED

COUNSEL
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By William J. Risner
Counsel for Defendants/Appellees/Cross-Appellants

OPINION
Judge Eckerstrom authored the opinion of the Court, in which Presiding Judge Brearcliffe and Chief Judge Staring concurred.

This opinion is subject to revision before publication in the Pacific Reporter.

ECKERSTROM, Judge:
¶1 Santa Cruz County and Alma Schultz (collectively "the County") appeal from the superior court's judgment denying their motion for reconsideration of the court's grant of the motion to dismiss filed by AUDIT USA and John R. Brakey (collectively "AUDIT USA"). AUDIT USA cross-appeals, contending the superior court erred in only awarding limited attorney fees. For the following reasons, we affirm.

Factual and Procedural Background

¶2 "On appeal from a motion to dismiss, this court 'assume[s] the truth of [all] well-pled factual allegations'" in the complaint "'and indulge[s] all reasonable inferences therefrom.'" *Swift Transp. Co. of Ariz. v. Ariz. Dep't of Revenue*, 249 Ariz. 382, ¶ 3 (App. 2020) (alterations in *Swift*) (quoting *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, ¶ 7 (2008)). Further, we view those factual allegations in the light most favorable to the non-moving party, *Mirchandani v. BMO Harris Bank*, 235 Ariz. 68, ¶ 2 (App. 2014), here the County.

¶3 In 2022, AUDIT USA submitted a public records request for "ballots Images, the Cast Vote Record and the Cast Vote Record Database," as well as three official reports from the August 2022 primary election in Santa Cruz County. A Cast Vote Record ("CVR") "is an electronic record of a voter's selections" from ballot images processed by an election management system that aggregates and tabulates votes.[1]

¶4 The County replied that the CVR, CVR database, and official reports would be transmitted to AUDIT USA. However, the County denied AUDIT USA's request for ballot images on the ground that "they are confidential by law and therefore, not subject to disclosure under the public records law, A.R.S. § 39-121 et seq." Shortly thereafter, the County provided two of the requested official reports. It was unable to provide the third, as that report did not exist and could not be produced. As to the remaining requested records, the County identified them as protected from disclosure under A.R.S. § 16-625. AUDIT USA did not formally challenge that conclusion with any court filing.

¶5 Nonetheless, the County filed a declaratory judgment action pursuant to A.R.S. § 12-1831 asking the superior court to clarify the proper course of action as to the release of CVRs. AUDIT USA filed a motion to dismiss the County's action, contending the issue was not justiciable. The court granted that motion. The County moved for reconsideration[2] and supplemented that motion when AUDIT USA submitted a new request for the disputed CVRs. The court denied the motion and reaffirmed its decision granting AUDIT USA's dismissal.

¶6 In early 2023, the County appealed that denial to this court. A panel of this court vacated the dismissal and remanded the case to the superior court to consider whether AUDIT USA's renewed request for disclosure "was material to the issue of the existence of an actual controversy." On remand, the superior court considered the renewed request for CVRs, requested briefing on the issue, and ultimately ruled that there was still no justiciable issue. It entered final judgment in September 2024, including awarding AUDIT USA partial attorney fees and costs. This appeal followed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

Discussion

I. Justiciability

¶7 The County claims the superior court erred when it concluded on remand that the County's action seeking declaratory judgment raises no justiciable issue. An action seeking declaratory relief must raise one or more "specific adverse claims, based upon present rather than future or speculative facts, which are ripe for judicial

determination." *Manning v. Reilly*, 2 Ariz. App. 310, 314 (1965).

¶8 A justiciable adverse claim exists if there is an assertion of both a right in which the plaintiff has a "definite interest" and a denial of that right by the opposing party. *Ponderosa Fire Dist. v. Coconino County*, 235 Ariz. 597, ¶ 16 (App. 2014). For this reason, no justiciable controversy exists when the defendant has not actually denied the plaintiff's asserted interest, *Land Department v. O'Toole*, 154 Ariz. 43, 47 (App. 1987), or when the defendant lacks the power to deny it, *Yes on 200 v. Napolitano*, 215 Ariz. 458, ¶ 29 (App. 2007).

¶9 For a controversy to be ripe, it must presently exist. The ripeness doctrine prevents courts from rendering premature judgments or opinions on situations that may never occur. *Winkle v. City of Tucson*, 190 Ariz. 413, 415 (1997); *see also Thomas v. Anchorage Equal Rts. Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (role of courts is not to "issue advisory opinions nor to declare rights in hypothetical cases, but to adjudicate live cases or controversies"). Our statute authorizing declaratory judgment actions, A.R.S. § 12-1832, also requires a presently existing controversy, rather than a mere potential one. *Town of Wickenberg v. State*, 115 Ariz. 465, 468 (App. 1977) (plaintiff's rights "must be presently affected" for controversy to be justiciable under terms of § 12-1832).

¶10 On the record before us, the County's claim is neither sufficiently adverse nor ripe. In essence, the County maintains that its denial of a request for public records creates an actionable controversy against the requesting party. It implicitly contends that an "adverse claim" exists even when, as here, the requesting party is not pursuing any legal remedy as a result of that denial. But our jurisprudence instructs that no adverse claim exists when the defendant lacks the power to deny the plaintiff's asserted interest in the action. *Yes on 200*, 215 Ariz. 458, ¶ 29. And, under our state's public records regime, AUDIT USA lacks any power to require the County to disclose the requested records unless it first files a special action pursuant to A.R.S. § 39-121.02. AUDIT USA has filed no such action.

¶11 Nor has AUDIT USA otherwise denied the County's asserted interest in making determinations about which public records must be disclosed and which must be withheld under prevailing law. As the County emphasizes, AUDIT USA renewed its request for the CVRs after the initial dismissal of the County's declaratory judgment action. But that request was neither a lawsuit nor did it expressly threaten one. Because AUDIT USA took no action that denied the County's authority to reject its requests for the CVRs, and because AUDIT USA lacked any power to counter that authority without first filing a special action, the County's declaratory judgment action states no "adverse claim" against AUDIT USA. *Yes on 200*, 215 Ariz. 458, ¶ 29.

¶12 Even if the County could establish the components of an adverse claim against AUDIT USA, that claim would still not be justiciable because it would not be ripe. In explaining its rationale for filing this action, the County maintains that it faces a "recurring dilemma": that it either produce the CVRs and risk violating § 16-625, or "deny the records . . . potentially running afoul of the Arizona Public Records Law." But that reasoning overlooks the actual posture of this case. The County faces no risk of any sanction under § 16-625 because it has denied the request for the CVRs. Nor would the County face any risk of an adverse adjudication under the public records law unless AUDIT USA challenges the denial of its request in court. *See* § 39-121.02. In the absence of such a challenge, the County's declaratory judgment action asks the court to render "a premature judgment or opinion on a situation that may never occur." *Winkle*, 190 Ariz. at 415. Thus, the County asserts only the existence of a potential controversy with AUDIT USA, rather than a presently existing one, and ultimately seeks an advisory opinion from the courts.[3]

¶13 Lastly, the County observes that Arizona courts have previously reached the merits of actions initiated by public bodies to clarify their duties under Arizona's public records law. *See Scottsdale Unified Sch. Dist. No. 48 v. KPNX Broad. Co.*, 191 Ariz. 297, ¶¶ 5-8 (1998); *Ariz. Bd. of Regents v. Phx. Newspapers, Inc.*, 167 Ariz. 254, 255-59 (1991). But in neither of those cases did our supreme court address the justiciability of the underlying action before it. Nor do those cases reflect that the defendants, both news organizations, ever challenged the lawsuits on that basis. Therefore, those cases shed little light on the question before us.[4] Because the County's complaint neither states an actual controversy nor a ripe one, we conclude the superior court did not err in determining that the County's declaratory action is non-justiciable.

II. Attorney Fees

¶14 The superior court awarded AUDIT USA approximately $20,000 in attorney fees and costs. This amount reflects a portion of the fees AUDIT USA had requested under A.R.S. § 12-348. On cross-appeal, AUDIT USA contends the court abused its discretion by denying additional fees under A.R.S. §§ 12-349(A) and 12-350.[5] Specifically, AUDIT USA asserts that the County's claims lacked substantial justification.

¶15 Section 12-349(A)(1) provides that a court may award attorney fees as a sanction if it finds that a claim was brought "without substantial justification," meaning that the claim was both groundless and not made in good faith. *See* § 12-349(F). As our supreme court explained in *Arizona Republican Party v. Richer*, "a claim is 'not made in good faith' if (1) it is groundless and (2) the party or attorney knows or should know that it is groundless,

or is indifferent to its groundlessness, but pursues it anyway." 257 Ariz. 237, ¶ 38 (2024).

¶16 Under this framework, the superior court did not abuse its discretion in denying AUDIT USA's request for additional attorney fees. While the County's claim was ultimately unsuccessful, the record does not support a finding that it was brought "without substantial justification" as defined by § 12-349(F). That standard requires more than a failed legal position; it demands a showing that the claim was both groundless and not made in good faith, such that the claiming party knew or should have known the claim lacked merit. *See Richer*, 257 Ariz. 237, ¶ 38.

¶17 Here, the issue raised by the County was not novel in Arizona. Although the County permitted the disclosure of CVRs following the 2020 election, legal uncertainty surrounding the release of such records persisted. The County's concerns were justified, particularly in light of subsequent litigation in other counties. *See AUDIT-USA v. Maricopa County*, 254 Ariz. 536, ¶ 7 (App. 2023) (determining CVRs properly withheld due to statutory restrictions). Thus, although the County's filing was procedurally defective, the concerns underlying it were supported by a plausible reading of applicable statutes and a genuine effort to clarify legal obligations in the face of conflicting statutes. The superior court was in the best position to evaluate whether the County's conduct in filing a non-justiciable action crossed the line from mistaken to sanctionable. The court concluded that it did not. We find no reason to disturb that determination.

¶18 Moreover, our prior decision in this case, in which we granted a remand on the question of justiciability, supports the superior court's conclusion that the County's belief that it had brought a justiciable claim, while ultimately mistaken, was not frivolous. Accordingly, given the two-prong test under § 12-349, the court reasonably determined that the County's claim, while legally flawed, was not groundless and was not pursued in bad faith or with conscious disregard for its merits. Because this determination rests on a discretionary assessment of the facts and circumstances, and because the court is afforded broad discretion in making such determinations, we affirm the denial of additional attorney fees.

¶19 AUDIT USA requests its attorney fees and costs on appeal pursuant to § 39-121.02(B). Because AUDIT USA is the "substantially prevailing party" in a dispute arising from a public records request, we exercise our discretion to grant those fees and costs. *Id.*

Disposition

¶20 For the foregoing reasons, we affirm the judgment of the superior court.

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1 John Wack et al., Nat'l Inst. of Studs. & Tech., Dep't of Com., NIST Special Publication 1500-103, Cast Vote Records Common Data Format Specification, at iii (2020), https://doi.org/10.6028/NIST.NP.1500-103.

2 Later, to preserve the appeal deadline, the County successfully filed an expedited motion to convert the motion for reconsideration into a motion for a new trial under Rule 59(a), Ariz. R. Civ. P.

3 To the extent the County seeks official advice as to the lawfulness of its decision to deny the request for disclosure of the CVRs, it may request an advisory opinion from the Attorney General. *See* A.R.S. § 41-193(A)(7) (requiring Attorney General to "render a written opinion on any question of law" when requested by "any public officer of this state or a county attorney").

4 A public body's preemptive lawsuit—triggered by nothing more than a person or group seeking public records—also arguably runs afoul of Arizona's public records laws. Under that scheme, a requesting party is authorized to seek relief by special action if the public body denies a request for records. *See* § 39-121.02(A). As AUDIT USA observes, the scheme contains no parallel provision authorizing the public body to challenge the lawfulness of a request. We acknowledge that granting public bodies such authority would burden a requestor's statutory right to seek public records with the risk of defending a lawsuit. Such a burden could frustrate the purpose for which our public records laws were enacted: to promote transparency in government by "allow[ing] the public access to official records and other government information so that the public may monitor the performance of government officials and their employees." *Phx. Newspapers, Inc. v. Keegan*, 301 Ariz. 344, ¶ 33 (App. 2001) (quoting 1991 Op. Ariz. Att'y Gen. I91-004, at 6). But we also acknowledge that the County, by filing a declaratory judgment action, would avoid improperly denying a public records request—an action that would arguably promote transparency in government. Because we have affirmed the dismissal of the declaratory judgment before us on other grounds, and because the superior court did not address the question, we do not resolve whether the terms of our public records laws implicitly preclude public bodies from initiating such actions.

5 AUDIT USA also argues that the superior court abused its discretion in denying its request for additional attorney fees under A.R.S. § 12-349(B) because the court did not hold a "culprit hearing" to allocate fees between party and counsel. A *sanctioned* party may request a culprit hearing to determine who is at fault for the sanction. *See Marquez v. Ortega*, 231 Ariz. 437, ¶ 26 (App. 2013). However, a prerequisite for a culprit hearing is that there must first be a sanctioned party. Here, because there was no sanctioned party, there was no basis for a culprit hearing, and thus the court did not abuse its discretion in denying AUDIT USA's request.

Cite as
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IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE of Arizona,
Appellee,
v.
Devon Loujoseph ALSTON,
Appellant.

No. 1 CA-CR 23-0511
FILED 10-20-2025

Appeal from the Superior Court in Maricopa County
No. CR2021-110684-001
The Honorable David J. Palmer, Judge
AFFIRMED

COUNSEL

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Bain & Lauritano, PLC, Glendale
By Amy E. Bain, *Counsel for Appellant*

OPINION

Presiding Judge Michael J. Brown delivered the opinion of the Court, in which Judge Daniel J. Kiley and Judge D. Steven Williams joined.

This opinion is subject to revision before publication in the Pacific Reporter.

BROWN, Judge:

¶1 Devon Alston appeals his convictions and sentences for first-degree murder and drive-by shooting. He argues the trial court improperly admitted several out-of-court statements from witnesses and wrongly considered aggravating factors the State had not proven at sentencing. Because Alston has not shown reversible error, we affirm.

BACKGROUND

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all reasonable inferences against Alston. State v. Fierro, 254 Ariz. 35, 38, ¶ 2 (2022). Late one evening in March 2021, a venue located in a strip mall hosted a party. The venue hired security guards, including Warren and Hunter, to ensure no weapons or alcohol were brought into the party and to prevent people from loitering outside.[1] As the evening progressed, Warren overheard Alston—who appeared to be wearing a pink beanie—say that he had a "banger," meaning a firearm. Warren relayed that statement to the other security guards, including Hunter. Both Warren and Hunter watched Alston as he walked around the parking lot and talked with others.

¶3 As the party was winding down and people began to leave, Alston and several others ran to a red sedan in a parking lot near the venue. Alston got into the driver's seat, drove the car out of the parking lot, and then continued down the street with the driver's side of the car facing the venue. Several shots were fired from the car toward the venue. Both Warren and Hunter noted the driver's side window was down, and they each saw muzzle flashes from a firearm coming from that window. One of the bullets struck a partygoer, who died at the scene from the gunshot.

¶4 Law enforcement interviewed the security guards, as well as Samuel (the event organizer), who explained the "pink beanie" was actually a pink ski mask that had been rolled up and resembled a beanie. Officers found 9-millimeter and .40 caliber bullet casings on the street in front of the venue. After speaking to a member of the victim's family the next morning, police suspected that Alston may have been involved in the shooting. Officers located Alston in an apartment complex and followed him. They noticed he was wearing a black hooded sweatshirt and carrying a black backpack when he got into a red car and drove away, eventually stopping in a neighborhood and entering a house. After receiving permission from the renter of the house to search for Alston, the officers found him there; he was wearing a maroon sweatshirt and did not have a backpack.

¶5 Police searched the house, finding a black sweatshirt as well as a backpack resembling what Alston had been carrying earlier. Inside the backpack was a .40 caliber handgun and a 9-millimeter rifle. Officers also found a smaller fanny pack containing both .40 caliber and 9-millimeter ammunition. Subsequent testing determined that the bullet casings recovered at the scene had been fired from the firearms found in the backpack. Officers also searched Alston's apartment, where they found a pink ski mask on top of a refrigerator. During a photo lineup, security guards Hunter and Warren identified Alston as the person in the driver's seat of the car from which the gunshots were fired.

¶6 A grand jury indicted Alston for first-degree murder, drive-by shooting, and misconduct involving weapons. The court severed trial of the misconduct count. After a seven-day trial on the remaining counts, at which the security guards and Samuel testified, a jury convicted Alston as charged. During the aggravation phase, the State alleged the offenses were (1) dangerous; (2) involved the use of a deadly weapon; and (3) caused physical, emotional, or financial harm to the victims or their families. The jury found the State proved the first two factors as to both convictions. The jury further found the State did not prove emotional or financial harm to the victim's family as to Alston's murder conviction and could not reach a unanimous decision for the same aggravator as to the drive-by shooting conviction.[2]

¶7 At sentencing, the trial court acknowledged the two aggravating factors found by the jury and that Alston had a prior conviction for facilitation to commit aggravated robbery, a class six non-dangerous felony. Despite the jury's determination that the State did not prove the victim's family suffered emotional harm, the court relied on that factor at sentencing. The court then sentenced Alston to natural life in prison for the murder conviction, and a slightly aggravated term of 12 years' imprisonment for the drive-by shooting conviction. Alston timely appealed. We have jurisdiction under A.R.S. §§ 13-4031, -4033.

DISCUSSION

A. Prior Consistent Statements

¶8 Alston argues the trial court erred by admitting several hearsay statements and audio recordings as prior consistent statements under Arizona Rule of Evidence ("Rule") 801(d)(1)(B). Though we review evidentiary rulings for an abuse of discretion, *State v. Fish*, 222 Ariz. 109, 114, ¶ 8 (App. 2009), we review the interpretation of rules de novo, *State v. Winegardner*, 243 Ariz. 482, 484, ¶ 5 (2018).

1. Hunter's Statements

¶9 Alston first challenges the admission of statements Hunter made to a police officer shortly after the shooting. At trial, an officer who responded to the crime scene testified about an interview he conducted with Hunter, and specifically, whether Hunter had indicated "that he paid closer attention" to Alston because "he had made some mention of having a gun." The court allowed the officer to answer questions about the interview over Alston's hearsay objection after the State asserted that it was admissible as a prior consistent statement under Rule 801(d)(1)(B) because Hunter's credibility had been attacked on cross-examination.

¶10 Generally, an out-of-court statement offered for the truth of the matter asserted is hearsay and not admissible as evidence. Ariz. R. Evid. 801(c), 802. But a declarant's prior statements that are consistent with that declarant's testimony are not hearsay if the declarant testifies at trial, is subject to cross-examination about the statements, and as pertinent here, the statements are offered either (1) "to rebut an express or implied charge that the declarant recently fabricated" the testimony, or (2) "to rehabilitate the declarant's credibility as a witness when attacked on another ground." Ariz. R. Evid. 801(d)(1)(B)(i),(ii). Amended in 2015, the current rule is intended "to extend substantive effect to consistent statements that rebut other attacks on a witness—such as the charges of inconsistency or faulty memory." *See* Ariz. R. Evid. 801 cmt. 2015 Amendment to Rule 801(d)(1)(B). The text of Rule 801(d)(1)(B) mirrors the text of the analogous federal rule of evidence. *See* Fed. R. Evid. 801(d)(1)(B).

¶11 Alston argues he never expressly or impliedly accused Hunter or any other witness of fabricating their testimony, making Rule 801(d)(1)(B)(i) inapplicable. He also contends that Rule 801(d)(1)(B)(ii) does not protect the statements because his trial strategy focused on misidentification rather than witness credibility.

¶12 Contrary to Alston's position, nothing in Rule 801(d)(1)(B)(ii) limits or qualifies the use of prior consistent statements based on how a party attacks witness credibility, or how important attacking that witness's credibility is to the party's case. *See Winegardner*, 243 Ariz. at 484, ¶ 5 ("[I]f a rule's language is subject to only one reasonable meaning, we apply that meaning."). Instead, subpart (ii) explicitly allows the use of a prior consistent statement to rehabilitate the declarant's credibility as a witness if it has been attacked on "another ground," meaning a different ground than fabrication of testimony. Ariz. R. Evid. 801(d)(1)(B)(ii). Thus, under this rule, once a party attacks a witness's credibility, that witness's prior consistent statements offered to rehabilitate their testimony become substantively admissible.

¶13 Arizona courts have not addressed the issue of the scope or significance of a credibility attack required to trigger the rule's protection for such statements, but federal courts have held that even brief attacks on credibility may allow the admission of prior consistent statements. *See United States v. Flores*, 945 F.3d 687, 705 (2d Cir. 2019) (noting that prior consistent statements were admissible under the Federal Rule of Evidence 801(d)(1)(B)(ii) even though the defendant's challenges to the witness-declarant's memory during opening statements were "brief" and "not their main challenges"); *see also United States v. Cox*, 871 F.3d 479, 487 (6th Cir. 2017) (finding admission of prior consistent statements proper when defendant attacked witness's memory); *see also Winegardner*, 243 Ariz. at 485, ¶ 8 ("Although the federal courts' interpretation of the Federal Rules of Evidence does not control our interpretation of our own evidentiary rules, federal precedent is particularly persuasive given that we have expressly sought to conform our rules to the federal rules.").

¶14 Alston impeached Hunter with prior statements Hunter made to officers about the number of people in the parking lot outside the party, as well as Hunter having seen other partygoers wearing pink beanies. Although the questioning was brief, it was nonetheless an attack on Hunter's credibility. Even if Alston did not focus on Hunter's credibility at trial, the trial court could have reasonably determined that Alston had attacked Hunter's credibility, and Hunter's prior statements to the officer were admissible to rebut that attack. *See United States v. Purcell*, 967 F.3d 159, 196 (2d Cir. 2020) (noting that Federal Rule of Evidence 801(d)(1)(B)(ii) was amended in 2014 to allow substantive admission of prior consistent statements to "explain what otherwise appears to be an inconsistency in the witness's testimony or to

rebut a charge of faulty memory" (internal quotations and citations omitted)). Alston has not shown the court abused its discretion by admitting Hunter's prior consistent statements.

2. Warren's Statements

¶15 The State also introduced statements at trial Warren made to police. The State asked to play for the jury a portion of a recorded interview of Warren under Rule 801(d)(1)(B), which the court allowed without objection by Alston. In the clip, Warren explained that (1) the person he identified as the shooter was wearing a pink beanie, dark jeans, and a colorful shirt; (2) he heard the person talk about having a weapon; and (3) a group, including the person, ran south from the event toward a red sedan. Because Alston did not object to the introduction of these statements or the recording, we review for fundamental error only. *State v. Escalante*, 245 Ariz. 135, 140, ¶ 12 (2018).

¶16 Under that standard of review, Alston must show that admission of the statements was error, that the error was fundamental, and the error caused him prejudice. *Id.* An error is fundamental when it either (1) goes to the foundation of his case, (2) deprives him of a right essential to his defense, or (3) is so egregious that he could not have received a fair trial. *Id.* at 142, ¶ 21. If the error is fundamental under the first two prongs Alston must demonstrate prejudice, but not under the third. *Id.*

¶17 Whether Alston sufficiently attacked Warren's credibility to render his prior consistent statements admissible as non-hearsay under Rule 801(d)(1)(B)(ii) is unclear. Regardless, Alston has not carried his burden to demonstrate prejudice, which required him to show that if the State had not introduced the prior consistent statements, "a reasonable jury could have reached a different verdict." *Id.* at 144, ¶ 29 (citation modified). This "could have" standard is not easily met and is an objective inquiry that cannot rely on imaginative guesswork. *Id.* at ¶ 31.

¶18 Alston argues he does not have to show prejudice because admitting the challenged statements was "so egregious that [he] could not possibly have received a fair trial," obviating any need to show prejudice. *Escalante*, 245 Ariz. at 141, ¶ 20. According to Alston, the hearsay statements constituted a "parade of corroborating witnesses," which created the egregious error. But Alston fails to recognize that fundamental error under this prong is a very demanding standard, *State v. Romero*, 258 Ariz. 237, 255, ¶ 65 (App. 2024), and the error in question must "so profoundly distort the trial that injustice is obvious without the need to further consider prejudice," *Escalante*, 245 Ariz. at 141, ¶ 20. Even assuming Alston is correct that some of these statements should not have been admitted at trial, much of their content was established through testimony of the same declarant, or the testimony of other witnesses. *Infra* ¶ 19. The claimed errors are not "so egregious" that Alston "could not possibly have received a fair trial." *Escalante*, 245 Ariz. at 141, ¶ 20.

¶19 Moreover, the information conveyed through the recorded interview and the officer's testimony largely reflects the same information Warren provided on direct examination. Warren testified that the night of the shooting, he recalled seeing an individual in dark clothing wearing a pink beanie, who had mentioned having a "banger" (meaning a firearm). Warren also noted this person's race, height, and build. He also saw this individual leave the event with a group of people who then got into a red sedan. Hunter likewise testified to many of the same facts reflected in the recording. Warren's prior consistent statements offered evidence the jury would have heard from other witnesses or his own properly admitted testimony presented at trial. *See State v. Wood*, 180 Ariz. 53, 65 (1994) (finding that impermissible hearsay evidence did not prejudice the defendant because "other witnesses presented direct testimony on the same issue"). Nothing in this record convinces us that a reasonable jury could have reached a different conclusion had Warren's prior statements been precluded, and thus Alston has not shown prejudice. *Cf. State v. McGann*, 132 Ariz. 296, 299 (1982) (noting that admission of unobjected to hearsay testimony warrants reversal when it is "the sole proof of an essential element of the state's case").

3. Samuel's Statements

¶20 Alston also argues the trial court abused its discretion by allowing the State (1) to question the same officer who had interviewed Hunter about statements Samuel made to law enforcement after the shooting, and (2) to further play a recorded portion of the interview. In the recorded interview, Samuel described seeing the shooter wearing a pink beanie and running towards a car. Samuel also said he saw this same individual driving by the party, with his window rolled down, and the individual was "shooting in the air." The officer testified that Samuel indicated he saw the shooter wearing a pink beanie and dark clothing, and that this individual ran to a vehicle. Alston objected to playing the recorded interview for the jury and thus we review its admission for harmless error. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 18 (2005). An error is harmless if the State demonstrates "beyond a reasonable doubt that the error did not contribute to or affect the verdict or sentence." *Id.*

¶21 Given that the record does not reveal any attack on Samuel's credibility as a witness such that his statements would be admissible under Rule 801(d)(1)(B), admission of these statements was error. However, Samuel's prior statements to the officer, as evidenced both in the recording and through the officer's testimony, reflected the same facts established through Samuel's own testimony and the testimony of the security guards. Evidence that "supports a fact otherwise established by existing evidence" is cumulative, *State v. Copeland*,

253 Ariz. 104, 116, ¶ 27 (App. 2022) (citations omitted), and the erroneous admission of cumulative evidence is harmless, *State v. Williams*, 133 Ariz. 220, 226 (1982). *See State v. Hoskins*, 199 Ariz. 127, 144, ¶ 66 (2000) (finding error was harmless because "all aspects of [the witness's] prior statements were included in [his] own testimony" and the witness was subject to cross-examination).

¶22 Citing *State v. Martin*, 135 Ariz. 552 (1983), Alston contends that concluding the hearsay statements did not affect the verdict is impossible. But the circumstances in *Martin* are materially different from the present case. *Martin* involved a defendant accused of child molestation, where the State introduced several witnesses with whom the victim had discussed her allegations. *Id.* at 553. Those witnesses testified about what the victim had told them. Our supreme court analyzed the statements under Rule 801(d)(1)(B)(i) and held admission of these statements was erroneous because the superior court "made no determination as to when the motive to fabricate began." *Id.* at 555. The court further concluded it could not say this "parade of corroborating witnesses" did not influence the jury's verdict beyond a reasonable doubt. *Id.*

¶23 Samuel's testimony at trial and the content of his prior statements reflect facts that both Warren and Hunter largely established in their properly admitted testimony. Alston's case does not present a situation where a "parade of corroborating witnesses" bolstered the credibility of the State's key witness, *see Martin*, 135 Ariz. at 555, given that Samuel was one of several witnesses attesting to essentially the same set of facts. And though admission of corroborating hearsay statements may be prejudicial when credibility is "'the central issue' because of scant physical evidence or a dearth of corroborating eyewitnesses," *Copeland*, 253 Ariz. at 116, ¶ 29, Alston has plainly asserted in his appellate briefing that his trial strategy did not turn on witness credibility. The State has met its burden of showing that admitting Samuel's prior consistent statements was harmless. *See State v. McVay*, 127 Ariz. 450, 453 (1980) (using prior consistent statements to bolster a witness's credibility may be prejudicial when that witness's testimony is the only evidence for elements of an offense, or when the credibility of that witness may be "the factor which removed a reasonable doubt in the minds of the jurors").

B. Aggravating Factors at Sentencing

¶24 Alston argues the trial court improperly considered several aggravating factors at sentencing. Because Alston did not object at sentencing, we review for fundamental, prejudicial error. *Escalante*, 245 Ariz. at 140, ¶ 12. To justify re-sentencing, Alston must demonstrate that absent the error the court could have reasonably imposed a lighter sentence. *State v. Trujillo*, 227 Ariz. 314, 318, ¶ 16 (App. 2011).

¶25 At sentencing, the court considered four aggravating factors: the dangerousness of the offense, the use of a deadly weapon, Alston's prior felony conviction, and the emotional harm to the victim, or the victim's family. The State concedes the court should not have considered the first two factors. The "dangerousness" of the offense is not an aggravating factor a court could properly use to impose an aggravated sentence under A.R.S. § 13-701(D). The use of a deadly weapon was an essential element of the drive-by shooting offense, and by extension felony murder, which meant it could not serve to aggravate the sentence for the convictions. *See* A.R.S. § 13-701(D)(2). But Alston does not contest he had a prior conviction, nor does he assert the court erred in considering the conviction. *See* A.R.S. § 13-701(D)(11). Thus, only the emotional harm factor is at issue here. Alston argues the court's reliance on that factor was improper because the jury found the State did not prove it as to his murder conviction and could not reach a verdict on that factor for his drive-by shooting conviction. We analyze the court's consideration of the emotional harm factor as it pertains to each of Alston's convictions.

1. First-Degree Murder Sentence

¶26 When a defendant is convicted of first-degree murder based on felony murder, *see* A.R.S. § 13-1105(A)(2), and the State has not noticed an intent to seek the death penalty, "the court shall determine whether to impose a sentence of life or natural life," A.R.S. § 13-752(A). "A defendant who is sentenced to natural life is not eligible for commutation, parole, work furlough, work release or release from confinement on any basis," whereas a defendant sentenced to life "shall not be released on any basis" until that defendant serves a set term, the length of which turns on the age of the victim. A.R.S. § 13-751(A)(2).

¶27 Section 13-752(Q) sets forth the applicable factors for determining whether to impose life or natural life. The statute says the trial court "[s]hall consider the aggravating and mitigating circumstances listed in section 13-701 and *any* statement made by a victim" and "[m]ay consider *any* evidence introduced before sentencing or at any other sentencing proceeding." *Id.* (emphasis added). Nothing in the statute suggests the court or a jury must find an aggravating factor to sentence a defendant to natural life, as opposed to a life sentence; nor does the Constitution require such a finding. *See State v. Fell*, 210 Ariz. 554, 560, ¶ 19 (2005) (concluding that "the Sixth Amendment does not require that a jury find an aggravating circumstance before a natural life sentence can be imposed").

¶28 Alston has not shown the court erred by considering the emotional harm to the victim's family in determining the appropriate sentence for his murder conviction, regardless of the jury's verdict during the aggravation phase of trial. At the

sentencing hearing, several of the victim's family members spoke and discussed the effect the murder had on their lives. Additionally, the presentence report included numerous letters from the victim's family and friends describing how the loss of the victim affected them. At the least, the court had discretion under A.R.S. § 13-751(Q)(2) to consider evidence of emotional harm to the victim's family, notwithstanding the jury's aggravation verdict, in determining what sentence was appropriate for the murder conviction.

2. Drive-by Shooting Conviction

¶29 We next address whether the trial court erred by considering emotional harm to the victim as it relates to Alston's conviction for drive-by shooting. Alston was convicted of violating A.R.S. § 13-1209, which makes "intentionally discharging a weapon from a motor vehicle at a person . . . or an occupied structure" a class two felony. A.R.S. § 13-1209(A), (D). Because Alston committed a dangerous offense, he was subject to sentencing under A.R.S. § 13-704. Section 13-704(A) establishes the applicable sentencing range for a class two dangerous felony offense: the minimum sentence is 7 years, the presumptive is 10.5 years, and the maximum is 21 years. To aggravate a sentence beyond the presumptive term, the court needed to rely on at least one aggravating factor found by the trier of fact. A.R.S. §§ 13-701(C), (D), -704(H). Aggravating factors must be found beyond a reasonable doubt by the trier of fact, except for the prior felony conviction factor under A.R.S. § 13-701(D)(11), which may be found by the court. A.R.S. § 13-701(C).

¶30 Once an appropriate aggravating factor has been found beyond a reasonable doubt, the trial court may then "find and consider additional factors relevant to the imposition of a sentence up to the maximum." *State v. Martinez*, 210 Ariz. 578, 585, ¶ 26 (2005). In determining what sentence to impose within a permissible sentencing range, the court may find any additional aggravating factors relevant to the court's exercise of such discretion by a preponderance of the evidence. *Id.*

¶31 The trial court imposed a 12-year sentence for the drive-by shooting conviction. Because this exceeds the 10.5-year presumptive sentence, there needed to be at least one aggravating factor under A.R.S. § 13-701. The court found, and Alston does not contest, that he had a prior felony conviction within the past 10 years under A.R.S. § 13-701(D)(11). So regardless of the emotional harm factor, the court was authorized to impose an aggravated sentence for Alston's conviction for drive-by shooting up to the maximum term based on his prior conviction; any additional factors the court relied upon were merely relevant to the court's exercise of discretion as to what specific sentence it would impose. *See State v. Price*, 217 Ariz. 182, 185, ¶ 15 (2007) (explaining that if a prior conviction is found by the court or the jury, "the Sixth Amendment permits the sentencing judge to find and consider additional factors relevant to the imposition of a sentence up to the maximum prescribed in that statute"); *see also* A.R.S. § 13-701(G) (requiring a sentencing court to "consider the evidence and opinions presented by the victim or the victim's immediate family at any aggravation or mitigation proceeding or in the presentence report").

¶32 Under these circumstances, the court did not err by considering the emotional harm factor in sentencing Alston to an aggravated term of imprisonment. As noted, the jury could not reach a unanimous decision on this factor during the aggravation phase at trial. However, as the court instructed, the jury had to determine whether the State proved emotional harm to the victim *beyond a reasonable doubt*. At sentencing, the trial court found that Alston had a prior conviction under A.R.S. § 13-701(D)(11), and thus proof of the emotional harm factor was no longer governed by the same standard. Instead, the burden of proof required at sentencing was preponderance of the evidence. *Martinez*, 210 Ariz. at 585, ¶ 26. Because the jury evaluated the emotional harm factor for a different purpose and under a higher burden of proof than the court when it considered the same factor at sentencing, the court did not err in relying on that factor at sentencing.

¶33 Even assuming the court should not have considered the emotional harm to the victim or victim's family, Alston has not shown that any error was fundamental to his sentence for either conviction. It is true that an illegal sentence constitutes fundamental error. *See State v. Pesqueria*, 235 Ariz. 470, 478, ¶ 29 (App. 2014). But Alston's sentences are not illegal. Because the prior conviction served as a legally proper aggravating factor to support an aggravated sentence for drive-by shooting, and because the court did not need any such factor to sentence Alston to natural life for his murder conviction, Alston's sentences were within the court's discretion to impose. *See State v. Munninger*, 213 Ariz. 393, 397, ¶ 12 (App. 2006) (concluding that the erroneous consideration of an aggravating factor was not fundamental error in part because the defendant did not receive an illegal sentence and the sentences were within the statutory range prescribed for the offense).

¶34 Nor are we persuaded by Alston's reliance on *Trujillo*, 227 Ariz. at 314, ¶ 15, in asserting that consideration of an "improper factor" warrants resentencing in this case. In *Trujillo*, the trial court specifically relied on the defendant's lack of remorse during sentencing in imposing an aggravated sentence. *Id.* at 316, ¶ 6. This court held that such consideration improperly infringed on the defendant's Fifth Amendment right against self-incrimination. *Id.* at 318, ¶ 15. Alston has not identified how consideration of the emotional harm to the victim or victim's family, or the other factors the State concedes as error (the dangerousness of the

offense and the use of a deadly weapon), similarly deprived him of any constitutional protection. He has therefore failed to meet his burden of demonstrating that any sentencing error was fundamental.

CONCLUSION

¶35 We affirm Alston's convictions and sentences.

1 We use pseudonyms to protect the identities of the victims, including the security guards and event organizer.

2 As stated in A.R.S. § 13-701(D)(9), this factor applies when "[t]he victim . . . suffered physical, emotional or financial harm." For the drive-by shooting conviction, because the State's argument during the aggravation phase relied only on the emotional harm Alston's conduct had on Hunter, we reference only that type of harm in our analysis.

Cite as
160 Arizona Cases Digest 12

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

Margarita HENKE, ET AL.,
Plaintiffs/Appellants,
v.
HOSPITAL Development of West Phoenix, Inc., ET AL.,
Defendants/Appellees.

No. CV-24-0259-PR
Filed October 22, 2025

Appeal from the Superior Court in Maricopa County
The Honorable Joan M. Sinclair, Judge
No. CV2019-001950
REVERSED AND REMANDED

Memorandum Decision of the Court of Appeals,
Division One
No. 1 CA-CV 23-0661
Filed October 8, 2024
VACATED

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JUSTICE KING authored the Opinion of the Court, in which CHIEF JUSTICE TIMMER, VICE CHIEF JUSTICE LOPEZ, and JUSTICES BOLICK, BEENE, MONTGOMERY, and CRUZ joined.

This opinion is subject to revision before publication in the Pacific Reporter.

JUSTICE KING, Opinion of the Court:

¶1 Under A.R.S. § 12-563(2), a plaintiff in a medical malpractice action must prove that "the failure of a health care provider to follow the accepted standard of care . . . was a proximate cause

of the injury." This is a prima facie element of a medical malpractice claim.

¶2 A separate statute, A.R.S. § 12-572, provides that health professionals and hospitals providing treatment in emergency departments are not liable for damages "[u]nless the elements of proof contained in § 12-563 are established by clear and convincing evidence." This clear and convincing standard of proof is higher than the preponderance of the evidence standard that applies in other medical malpractice actions.

¶3 We now consider whether a medical malpractice claim based on treatment in an emergency department fails as a matter of law *solely* because the plaintiff's expert testifies the alleged negligence "likely" caused the injury, instead of testifying to the clear and convincing evidence standard on causation ("highly probable" or "reasonably certain").

¶4 The clear and convincing evidence requirement in § 12-572 is the standard of proof for claims based on treatment in an emergency department. It is not a prima facie element of a medical malpractice claim. Where, as here, the plaintiff's expert testifies that the alleged negligence "likely" caused the injury, the plaintiff has established the requisite causal connection between the alleged negligence and the injury under § 12-563(2), such that a jury would not be left to infer or speculate about the element of causation. Accordingly, the plaintiff's claim does not fail as a matter of law solely because of this expert testimony. Instead, the expert testimony and any other relevant, admissible evidence on causation must be considered in determining whether the plaintiff has established causation by clear and convincing evidence.

BACKGROUND

¶5 On March 4, 2017, Greg Henke visited an urgent care facility, where he was seen by a medical doctor.[1] Henke presented with a fever, headache, chills, and malaise, which began two weeks earlier. After examining Henke, the urgent care doctor became concerned that Henke may have bacterial endocarditis, which is a bacterial infection of the heart's inner lining that can be fatal without treatment. Henke had an aortic valve replacement in 2011, leaving him at risk for infection.

¶6 The urgent care doctor referred Henke that same day to the emergency department at Abrazo West Campus, where his aortic valve replacement procedure had been performed. The urgent care doctor recorded in his notes that (1) the plan of care was for Henke to go to the emergency department "to be evaluated for possible endocarditis," (2) the urgent care doctor called and spoke to a nurse named Amber at Abrazo West Campus's emergency department, and (3) he notified her that Henke was going to that emergency department and reviewed Henke's care with her. The urgent care doctor also testified in his deposition that he wrote a note for Henke to give to the emergency department upon his arrival there.

¶7 Henke left urgent care and immediately went to Abrazo West Campus's emergency department, where Dr. Morium Chowdhury examined him. According to deposition testimony of Henke's wife and brother-in-law who were at the emergency department, (1) Henke told Dr. Chowdhury that he previously had an aortic valve replacement surgery at Abrazo West Campus hospital and he was a heart patient, (2) Henke gave the urgent care doctor's note to Dr. Chowdhury and asked her about "what the urgent care doctor suspected," and (3) Dr. Chowdhury read the note, said "I don't think it's this" (or "I doubt it's this"), and then set the note down.

¶8 According to Abrazo West Campus's medical records, Henke complained of "body ache, fever, chills and weakness. Symptoms started 2 weeks ago while at his private residence." Also, Henke was "diagnosed last week" with influenza and "[g]iven Tamniflu [sic] with no imprivement [sic]." At the Abrazo West Campus emergency department, Henke received a computed tomography (CT) scan of his abdomen and pelvis without contrast, a chest x-ray, and hematology tests. According to the complaint, Henke did not receive proper testing to rule out bacterial endocarditis, such as an echocardiogram. Dr. Chowdhury diagnosed Henke with a "[v]iral syndrome" and discharged him with instructions to follow up with his primary care provider within one to two days.

¶9 On March 7, Henke had an appointment with his primary care provider, who evaluated Henke for an acute febrile illness, noted his history of having an aortic valve replacement procedure, and documented that a specialist should be contacted to "have infective endocarditis ruled out ASAP."

¶10 On March 9, Henke passed away. An autopsy revealed the cause of death was "[c]omplications of sepsis due to acute bacterial endocarditis."

¶11 Henke's wife, Margarita Henke ("Plaintiff"), filed this wrongful death lawsuit on behalf of herself and Henke's daughters and parents. Plaintiff named as defendants Dr. Chowdhury and Hospital Development of West Phoenix, Inc., doing business as Abrazo West Campus (collectively "Defendants").[2] Plaintiff claims Defendants' medical negligence, including the absence of a timely diagnosis and treatment, caused Henke's death.

¶12 In discovery, Plaintiff disclosed the following two expert witnesses on causation: (1) Dr. Patrick Joseph, M.D., a board certified specialist in infectious disease, and (2) Dr. Alexander Marmureanu, M.D., who is board certified in thoracic surgery and general surgery. In their signed declarations, Dr. Joseph and Dr. Marmureanu both stated, "No written discovery has yet been received, and no depositions have yet been taken. As a result, these are my preliminary opinions" that may be supplemented if necessary.

¶13 Dr. Joseph's declaration stated in relevant part:

> It is also my opinion that the failure of the

> emergency medicine physician at Abrazo West campus on March 4, 2017, to evaluate Mr. Henke for endocarditis, as requested by [the urgent care doctor] when he spoke to Nurse Amber at Abrazo, *was a cause of, or contributed to, Mr. Henke's death, in that it likely deprived him of a chance of survival* . . . . I am unable to quantify the decreased chance of survival due to the lack of specialty consultation, and medical or surgical intervention.

(Emphasis added.)

¶14 Dr. Marmureanu's declaration stated in relevant part:

> It is my opinion that, if Mr. Henke would have been admitted to the hospital on March 4, 2017, (as he should have been) he would have undergone immediate medical treatment for his sepsis associated with endocarditis, and *more likely than not, he would have survived*. During the hospital work up, a surgical consult should have been requested, and next an echocardiogram should have been done. A treatment plan would have been then formulated based on the ECHO findings. If the echocardiogram would have shown any abnormal surgical pathology, surgery would have been performed, and *more likely than not, he would have survived*.

(Emphasis added.)

¶15 In a disclosure statement, Dr. Chowdhury disclosed an expert witness, Dr. Brian Blackburn, M.D., who is board certified in internal medicine and infectious diseases. This disclosure stated in relevant part:

> Dr. Blackburn is aware that Arizona law requires Plaintiff to prove her case by clear and convincing evidence, and he will clarify that the *chance* of survival on March 4, 2017 does not justify a conclusion that survival was highly likely or highly probable at that point in time.

¶16 Defendants moved for summary judgment, requesting judgment in their favor because Plaintiff's expert declarations failed to establish causation by clear and convincing evidence, as § 12-572 requires. Defendants based their motion exclusively on the contents of Plaintiff's expert declarations. Defendants emphasized that Plaintiff's experts did not testify that the "alleged failure to timely diagnose endocarditis as of March 4, 2017, caused Mr. Henke's death *to a high degree of medical probability*."

¶17 The trial court granted summary judgment in favor of Defendants. The court explained that "[w]here causation is not readily apparent, as in this case, 'expert causation testimony is necessary,'" quoting from *Sampson v. Surgery Center of Peoria, LLC*, 251 Ariz. 308, 312 ¶ 19 (2021). According to the court, Plaintiff's expert opinions were "insufficient to meet the high standard of clear and convincing evidence required by A.R.S. § 12-572" because neither "stated that Dr. Chowdhury's action or inaction caused the death of Mr. Henke to a high degree of medical probability." Thus, "as a matter of law, the Plaintiff would not be able to prove her case."

¶18 Plaintiff moved for reconsideration and attached a supplemental declaration of Dr. Marmureanu, which stated:

> At the time of my preliminary declaration dated September 2019, I was only asked to opine on Mr. Henke's workup and management during his ER visit on March 4, 2017.
>
> It was my opinion that more likely than not, if Mr. Henke had a proper endocarditis workup, followed by hospital admission for medical/surgical treatment, he would not have died. I would like to reemphasize that even though no specific treatment for endocarditis was provided on March 4, 5, 6, 7 and 8, 2017, Mr. Henke remained stable, until just before his death.
>
> In my opinion, it is highly probable that if on March 4, 2017 during his ER visit, Mr. Henke had undergone the standard endocarditis work-up, associated with IV antibiotic administration, followed by hospital admission for medical/surgical management, he would have survived this episode of endocarditis. I have not been deposed.

The court denied Plaintiff's motion for reconsideration.

¶19 The court of appeals affirmed the grant of summary judgment in favor of Defendants. *See Henke v. Hospital Dev. of W. Phoenix*, No. 1 CA-CV 23-0661, 2024 WL 4441666, at *3 ¶ 20 (Ariz. App. Oct. 8, 2024) (mem. decision). The court noted that "neither expert offered an opinion to a reasonable degree of medical certainty or probability that Dr. Chowdhury's actions caused Mr. Henke's death." *Id.* Plaintiff's causation experts "needed to opine to a high degree of medical probability that the alleged standard of care violations proximately caused the death," and their failure to do so would leave the jury to speculate on causation, which is prohibited by *Sampson*. *Id.* at *4 ¶ 24. The court concluded that Plaintiff's "disclosed expert opinions were insufficient to meet the clear and convincing evidence standard required under A.R.S. § 12-572, and thus summary judgment was appropriate." *Id.* at *4 ¶ 25.

¶20 The court also affirmed the denial of Plaintiff's motion for reconsideration, noting that "[m]otions for reconsideration are not to be used to make new arguments or to present new evidence." *Id.* at *5 ¶ 30.

¶21 We granted review to determine whether a medical malpractice claim against an emergency medicine health professional and hospital fails as a

matter of law where a plaintiff's causation expert testifies the alleged negligence "likely" caused the injury, an issue of statewide importance that is likely to recur.[3] We have jurisdiction under article 6, section 5(3) of the Arizona Constitution.

DISCUSSION

¶22 "[W]e review a grant of summary judgment de novo, viewing the evidence in the light most favorable to the party against whom summary judgment was entered." *Dabush v. Seacret Direct LLC*, 250 Ariz. 264, 267 ¶ 10 (2021). We review de novo the interpretation of statutory provisions. *See Rasor v. Northwest Hospital, LLC*, 243 Ariz. 160, 163 ¶ 11 (2017).

A. Applicable Standards Of Proof In Medical Malpractice Actions

¶23 "In medical malpractice actions, as in all negligence actions, the plaintiff must prove the existence of a duty, a breach of that duty, causation, and damages." *Seisinger v. Siebel*, 220 Ariz. 85, 94 ¶ 32 (2009). The Arizona Legislature codified some of these elements in § 12-563:

> Both of the following shall be necessary elements of proof that injury resulted from the failure of a health care provider to follow the accepted standard of care:
>
> 1. The health care provider failed to exercise that degree of care, skill and learning expected of a reasonable, prudent health care provider in the profession or class to which he belongs within the state acting in the same or similar circumstances.
>
> 2. Such failure was a proximate cause of the injury.

¶24 At issue here is the element of causation, which requires a plaintiff to show "a natural and continuous sequence of events stemming from the defendant's act or omission, unbroken by any efficient intervening cause, that produces an injury, in whole or in part, and without which the injury would not have occurred." *Sampson*, 251 Ariz. at 311 ¶ 15 (quoting *Barrett v. Harris*, 207 Ariz. 374, 378 ¶ 11 (App. 2004)).

¶25 "A plaintiff must generally prove the elements of his medical malpractice claim by a preponderance of the evidence." *Stafford v. Burns*, 241 Ariz. 474, 477 ¶ 9 (App. 2017); *see also Aileen H. Char Life Int. v. Maricopa Cnty.*, 208 Ariz. 286, 291 ¶ 11 (2004) (stating "the usual rule [is] that a plaintiff must establish each element of a civil action by a preponderance of the evidence"). "The preponderance of the evidence standard requires that the fact-finder determine whether a fact sought to be proved is more probable than not." *Kent K. v. Bobby M.*, 210 Ariz. 279, 284 ¶ 25 (2005). Consequently, a plaintiff in a medical malpractice action must generally prove that the failure to follow the accepted standard of care more probably than not caused the injury.

¶26 In 2009, however, the Legislature adopted § 12-572, which heightened the standard of proof to clear and convincing evidence for medical malpractice claims against health professionals or hospitals based on treatment in emergency departments. *See, e.g.*, *Seisinger*, 220 Ariz. at 93 ¶ 30 ("[T]he legislature is empowered to set burdens of proof as a matter of substantive law . . . ." (quoting *Valerie M. v. Ariz. Dep't of Econ. Sec.*, 219 Ariz. 331, 336 ¶ 21 (2009))). Section 12-572(A) addresses claims against health professionals:

> Unless the elements of proof contained in § 12-563 are established by clear and convincing evidence, a health professional . . . who provides or who is consulted to provide services to a patient of a licensed hospital in compliance with the emergency medical treatment and labor act [42 U.S.C. § 1395dd] is not liable for any civil or other damages as a result of any act or omission.

And § 12-572(B) addresses claims against hospitals:

> Unless the elements of proof contained in § 12-563 are established by clear and convincing evidence regarding the acts or omissions of a licensed hospital or its agents and employees in cases that are covered by [§ 12-572(A)], the hospital is not liable for any civil or other damages as a result of any act or omission.

¶27 "Clear and convincing evidence . . . reflects a heightened standard of proof that indicates that 'the thing to be proved is highly probable or reasonably certain.' This standard places a heavier burden upon one party to prove its case to a reasonable certainty." *Kent K.*, 210 Ariz. at 284–85 ¶ 25 (quoting Black's Law Dictionary 577 (7th ed. 1999)); *see also Thompson v. Better-Bilt Aluminum Products Co.*, 171 Ariz. 550, 557 (1992) ("Clear and convincing evidence means that which may persuade that the truth of the contention is highly probable." (citation modified)); *State v. Renforth*, 155 Ariz. 385, 388 (App. 1987) ("[A] party who has the burden of proof by clear and convincing evidence must persuade the jury that his or her claim is highly probable. This standard is more exacting than the standard of preponderance of the evidence . . . .").

B. Interpretation Of § 12-563 And § 12-572

¶28 Defendants argue that Plaintiff's claim fails as a matter of law because Dr. Joseph and Dr. Marmureanu did not testify to a high degree of medical probability that Henke would have survived if Defendants had met the standard of care, citing § 12-563 and § 12-572. We begin by interpreting the text of § 12-563 and § 12-572.

¶29 Section 12-563 explicitly sets forth "necessary elements of proof" for a medical malpractice claim. Section 12-563(2) specifies that one element of the claim is causation—that the failure to follow the accepted standard of care "was a proximate cause of the injury."

¶30 In § 12-572, the Legislature required the "clear and convincing evidence" standard of proof for malpractice claims based on treatment in

emergency departments. Notably, § 12-572 does not provide that clear and convincing evidence is itself an element of the claim. Instead, § 12-572 requires that "the elements of proof contained in § 12-563 [must be] established by clear and convincing evidence" before liability is imposed. Thus, § 12-572 identifies the standard of proof, which is the factfinder's degree of confidence in the evidence presented in support of the claim. *See Beck v. Neville*, 256 Ariz. 415, 422 ¶ 23 (2024) ("The function of a standard of proof . . . is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" (quoting *Addington v. Texas*, 441 U.S. 418, 423 (1979))); *Renforth*, 155 Ariz. at 386 ("[A]ll the factfinder can acquire is a belief of what *probably* happened. The intensity of this belief—the degree to which a factfinder is convinced that a given act actually occurred—can, of course, vary." (quoting *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring))).

¶31 Thus, § 12-563 codifies some prima facie elements of a medical malpractice claim. And § 12-572 serves a different purpose, by setting forth the standard of proof required to convince a factfinder of those elements when the claim is based on treatment in an emergency department. The higher standard of proof in § 12-572 raises the requisite degree of the factfinder's confidence in the evidence, but it does not change the elements of the claim in § 12-563.

¶32 This distinction between the elements of a claim and the standard of proof is consistent with Arizona case law. Indeed, we recently recognized this distinction in *Beck*. 256 Ariz. at 419–24 ¶¶ 11–27. There, after determining that Arizona recognizes a certain common law claim, we addressed the "elements" of such claim and then separately addressed the "standard of proof" for such claim, noting that "[n]o Arizona court . . . has set forth the quantum of proof required to establish all the elements." *Id.* at 422 ¶ 22.

¶33 The Revised Arizona Jury Instructions ("RAJIs") also illustrate the distinction between the elements of a medical malpractice claim and the standard of proof. The RAJIs have causation instructions for ordinary medical negligence and for negligence from treatment in an emergency department, which are the same in relevant part. *See* Rev. Ariz. Jury Instr. (Civ.) Medical Negligence 1 (7th ed. 2025); RAJI Medical Negligence 2. Separately, the RAJIs have specific instructions for the standards of proof. *See* RAJI Medical Negligence 2 ("[Plaintiff] must prove by clear and convincing evidence that [defendant] was negligent and [defendant]'s medical negligence was a cause of injury to [plaintiff]."); RAJI Standard 3 (Burden of Proof, Clear and Convincing); RAJI Standard 2 (Burden of Proof, More Probably True).

¶34 Defendants seek to conflate two distinct legal concepts: the prima facie elements of a claim and the standard of proof. The elements of a medical malpractice claim require the plaintiff to produce evidence that establishes the existence of a duty, a breach of that duty, causation, and damages. *See Seisinger*, 220 Ariz. at 94 ¶ 32; § 12-563. The standard of proof is the degree of confidence the factfinder has in that evidence. *See Beck*, 256 Ariz. at 422 ¶ 23; *Renforth*, 155 Ariz. at 386–88; § 12-572. Notably, § 12-563's elements of proof remain the same regardless of whether the standard of proof is preponderance of the evidence or clear and convincing evidence. *See Seisinger*, 220 Ariz. at 94 ¶ 32; §§ 12-563, -572. Thus, the higher standard of proof in § 12-572 for treatment in emergency departments requires the factfinder to reach a greater degree of confidence in the evidence, but it does not modify the elements of the claim in § 12-563.

¶35 We have one additional observation about § 12-572. As noted, Defendants rely exclusively on Plaintiff's expert declarations in arguing that causation has not been established by the clear and convincing evidence standard in § 12-572. But § 12-572 does not reference expert testimony, much less state that the clear and convincing evidence standard is exclusively met through expert testimony. Section 12-572 is silent on what type of evidence a plaintiff must present to satisfy the clear and convincing evidence standard. Thus, the Legislature did not mandate *how* § 12-572's clear and convincing evidence standard is met.

C. Arizona Case Law Regarding Medical Expert Testimony On Causation

¶36 Defendants cite *Seisinger* and *Sampson* in support of their position that judgment in their favor is warranted because Plaintiff's expert testimony fails to establish causation by clear and convincing evidence. We now address each case in turn.

¶37 In *Seisinger*, this Court considered the constitutionality of A.R.S. § 12-2604(A) (Supp. 2008), which requires that a person be licensed as a health professional and meet other criteria to give expert testimony on the appropriate standard of practice or care in a medical malpractice action. 220 Ariz. at 87–88 ¶¶ 1–5. As this Court has the authority under article 6, section 5(5) of the Arizona Constitution to promulgate procedural rules, *Seisinger* considered whether the Legislature's enactment of § 12-2604(A) infringed on this Court's constitutional authority. *Id.* at 87 ¶ 1, 88 ¶ 7, 96 ¶¶ 42, 44.

¶38 In evaluating the separation of powers issue, *Seisinger* noted that "Arizona courts have long held that the standard of care normally must be established by expert medical testimony," and this Court's decisions "teach that a plaintiff cannot satisfy the burden of proving a required element of [medical malpractice] in the absence of a very specific kind of evidence. To establish the requisite

standard of care, Arizona cases do not accept just any kind of expert witness, but rather demand a physician." *Id.* at 94 ¶ 33, 95 ¶ 37. As *Seisinger* explained, "the requirement of expert testimony in a medical malpractice action is a substantive component of the common law governing this tort action," and thus "§ 12-2604(A) is properly viewed as a modification of that substantive common law, not merely as a change in procedure." *Id.* at 95 ¶ 38, 96 ¶ 41. Accordingly, *Seisinger* held that § 12-2604(A) is substantive in nature and does not violate the separation of powers doctrine. *Id.* at 96 ¶ 42.

¶39 *Sampson* involved the death of a child after he returned home from a scheduled tonsillectomy and adenoidectomy. 251 Ariz. at 310 ¶¶ 3–5. The child's mother filed a medical malpractice claim, alleging the defendants kept her son in the post-operative anesthesia care unit for an insufficient length of time (61 minutes) before discharge. *Id.* at 310 ¶¶ 3–7. This Court observed that "[a]s medicine in general and, more specifically, advanced medical techniques involve extensive professional training, in most instances the applicable standard of care, and the probable consequences of failing to meet that standard, are beyond ordinary lay knowledge." *Id.* at 311 ¶ 16. Therefore, to "establish the requisite causal connection, the plaintiff's expert is generally required to testify as to *probable* causes of the plaintiff's injury." *Id.* (quoting *Benkendorf v. Advanced Cardiac Specialists Chartered*, 228 Ariz. 528, 530 ¶ 8 (App. 2012)). "[E]xpert causation testimony is necessary unless causation is 'readily apparent to the jury on the facts.'" *Id.* at 312 ¶ 19 (quoting *Rasor*, 243 Ariz. at 166 ¶ 32); *see also id.* at 311 ¶ 13 (citing *Seisinger*, 220 Ariz. at 94 ¶ 33, for the proposition that absent expert testimony, plaintiff could not meet the burden of production "except when it was a matter of common knowledge . . . that the injury would not ordinarily have occurred if due care had been exercised" (citation modified)).

¶40 The "expert testimony establishing causation was essential" in *Sampson*, as "[d]isagreement existed even over the cause of [the child's] death." *Id.* at 312 ¶ 21. This Court stated that such causation must be shown to be probable—not merely possible. *Id.* at 313 ¶ 23. But the plaintiff's expert in *Sampson* "did not opine that insufficient observation was the probable proximate cause of [the child's] death. Rather, he opined that greater observation 'could have' allowed [defendant's] personnel to resuscitate [him]." *Id.* at 312 ¶ 17. The expert's "failure to connect the dots between the premature discharge and [the child's] death would leave the jury to infer that Surgery Center's failure to observe was the proximate cause," which was insufficient as a matter of law to prove causation. *Id.* at 313 ¶ 23.

¶41 *Sampson* was very clear about its holding: "We hold today that a jury in a medical malpractice case may not be left to 'infer' causation without the guidance of expert testimony where the cause of death is disputed and not obvious to an ordinary person." *Id.* at 309 ¶ 1. *Sampson*, therefore, establishes the standard for satisfying the element of proximate causation in § 12-563(2), so that a jury is not left to infer causation in medical malpractice cases.

¶42 Although *Seisinger* and *Sampson* address expert testimony in the context of medical malpractice actions, neither case addresses § 12-572's clear and convincing evidence standard or what evidence a plaintiff may use to establish causation by clear and convincing evidence under § 12-572. Is a plaintiff limited exclusively to medical expert testimony when seeking to prove causation by clear and convincing evidence? Or may a plaintiff use medical expert testimony *and* other evidence? *Seisinger* and *Sampson* do not answer these questions.

D. Consideration Of Expert Testimony And Other Evidence On Causation

¶43 In this case, Plaintiff did not merely offer expert testimony that Defendants' alleged negligent conduct "could have," "may have," or "possibly" caused Henke's death. *See Sampson*, 251 Ariz. at 313 ¶ 23. Instead, Plaintiff offered expert testimony that Defendants' alleged conduct "more likely than not" caused Henke's death. This testimony "connect[ed] the dots" between the alleged negligence and Henke's death, such that a jury is not left to infer or speculate about causation. *Id.* Indeed, as acknowledged by counsel for Dr. Chowdhury at oral argument, if this was not an emergency medicine case, Plaintiff's expert testimony would be sufficient to establish causation by a preponderance of the evidence. Thus, Plaintiff has sufficiently established at the summary judgment stage that the alleged failure to follow the accepted standard of care "was a proximate cause of the injury." § 12-563(2).

¶44 We are now left to determine whether only medical expert testimony may move the needle on causation from a preponderance of the evidence to clear and convincing evidence. Defendants have not identified any Arizona case holding that expert testimony is the exclusive evidence that may be considered in determining whether causation has been established by clear and convincing evidence. Indeed, as Dr. Chowdhury acknowledges, "no Arizona case specifically has held that an expert must testify to a high degree of medical probability to establish proximate causation under A.R.S. § 12-572."

¶45 Whether causation is "probable" or "highly probable" is determined from the totality of relevant, admissible evidence in the record. *See Saide v. Stanton*, 135 Ariz. 76, 78 (1983) ("The use or refusal of an expert to use a 'magic word' or phrase such as 'probability' is not determinative. The trier of fact is allowed to determine probability or lack thereof if the evidence, taken as a whole, is sufficient to warrant such a conclusion."). The factfinder in a medical malpractice action must be

able to consider expert testimony and other relevant, admissible evidence in determining whether a plaintiff has proven causation by clear and convincing evidence. *See Jamas v. Krpan*, 116 Ariz. 216, 217 (App. 1977) (explaining that although a jury may need expert testimony to determine whether a physician deviated from the accepted standard of care, "it does not necessarily follow that the jury, having been informed of community standards, is incompetent to judge the nature or gravity of the deviation; i.e., whether it was simple negligence or reckless disregard of the safety of the patient").

¶46 Indeed, the factfinder may be persuaded that other evidence in the record shifts causation from a preponderance of the evidence to clear and convincing. Take the following example: A patient passes away in the emergency room under the care of Dr. Smith. In a highly emotional state, Dr. Smith texts her sister, "I'm sorry, I'm really upset and not in the right state of mind to make it to our dinner tonight. A patient just died. I'm kicking myself because if I had acted with more urgency to schedule immediate surgery, he would still be alive today." Under Defendants' theory, the medical malpractice claim would fail as a matter of law solely because the expert declaration failed to articulate that causation was "highly probable" or "reasonably certain," in spite of Dr. Smith's relevant statement against interest on the issue of causation.

¶47 There are also other factors that a factfinder may consider relevant to whether causation has been established by a preponderance of the evidence or clear and convincing evidence, including the medical expert's credibility, demeanor, experience, and reasoning behind the testimony. Thus, § 12-572 requires that the element of causation in § 12-563(2) be established by clear and convincing evidence after the consideration of expert testimony and any other relevant, admissible evidence on causation.

¶48 As to the case before us, Plaintiff presented evidence indicating that the urgent care doctor discerned a particular condition and directed Henke to the emergency department with a note about what he suspected and a phone call to the emergency department to discuss Henke's care. The emergency department doubted, and ultimately rejected, the urgent care doctor's suspicions. Shortly thereafter, Henke's primary care provider evaluated him and expressed concern about the same condition the urgent care doctor had suspected. Two days later, Henke died of that same condition. This additional evidence must be considered, along with expert testimony and any other relevant, admissible evidence, in determining whether Plaintiff has proven causation by clear and convincing evidence.

¶49 We express no view as to whether Plaintiff will ultimately prove causation by clear and convincing evidence. We simply note that, in some cases, a jury is fully capable of considering the natural, unbroken sequence of events, along with expert testimony and any other relevant, admissible evidence, to determine whether causation has been proven by the applicable standard of proof. *See Sampson*, 251 Ariz. at 313 ¶ 22 (discussing the requirement for plaintiff to "establish that the failure to observe [the child] for a longer period caused his death by starting a natural and continuous sequence of events, unbroken by any intervening causes").

E. Motions For Summary Judgment And The Function Of The Jury

¶50 We now address Plaintiff's contention that "whether the weight of evidence on any issue is 'clear and convincing' is exclusively a function of the fact-finding jury, not the judge."

¶51 In *Orme School v. Reeves*, this Court held that a motion for summary judgment "should be granted if the facts produced in support of the claim or defense have so little probative value, *given the quantum of evidence required*, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." 166 Ariz. 301, 309 (1990) (emphasis added). The "quantum of evidence" that may be considered includes the clear and convincing evidence standard. *Id.* at 307–08 (noting "it is difficult for a court to determine whether a specific quantum of evidence is 'clear and convincing' without evaluating and weighing that evidence, at least to some minimal extent"); *see also Thompson*, 171 Ariz. at 557–58 (holding a summary judgment motion "must be denied if a reasonable jury could find the requisite evil mind by clear and convincing evidence" and "the motion should be granted if no reasonable jury could find the requisite evil mind by clear and convincing evidence").

¶52 Thus, we disagree with Plaintiff that the clear and convincing evidence standard has absolutely no role in the trial court's consideration of a summary judgment motion. There may be instances where a court properly grants summary judgment based on the evidence and applicable standard of proof. *See Orme School*, 166 Ariz. at 309 ("[A]ffidavits that contain inadmissible evidence, that are internally inconsistent, that tend to contradict the affiant's sworn testimony at deposition, and similar items of evidence may provide a 'scintilla' or create the 'slightest doubt' and still be insufficient to withstand a motion for summary judgment."). To be clear, however, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of the judge." *Id.* (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986)); *see also Thompson*, 171 Ariz. at 558 ("Because in granting or denying such a motion [for summary judgment] the judge is not a fact finder, the evidence and all reasonable inferences that may be drawn from the evidence should be construed in a light most favorable to the non-moving party.").

¶53 Our decision today does not preclude Defendants from moving for summary judgment on

remand after further discovery. If that occurs, however, the trial court must not rely solely on expert testimony on causation in considering the summary judgment motion. Instead, the court must consider whether causation is readily apparent based on the evidence; if it is not, the court must consider expert testimony and any other relevant, admissible evidence on the issue of causation. *See* Ariz. R. Civ. P. 56.

F. The Policy Reasons Behind § 12-572

¶54 As a final matter, Defendants and amici have urged us to decide this case in a manner consistent with the policy reasons underlying the Legislature's enactment of § 12-572. We note that § 12-572 lacks a declaration of "public policy," as the Legislature has provided in other contexts. *See, e.g.*, A.R.S. § 46-401 (declaring "the public policy of this state" as it relates to child support and public assistance programs); A.R.S. § 45-801.01 (declaring "[t]he public policy of this state and the general purposes of this chapter" with respect to water supplies). The text of § 12-572 is the only pronouncement to which the Legislature agreed, and our holding today is consistent with the plain meaning of § 12-572. *See, e.g., S. Ariz. Home Builders Ass'n v. Town of Marana*, 254 Ariz. 281, 286 ¶ 31 (2023) (noting that we determine the meaning of a statute "according to the plain meaning of the words in their broader statutory context, unless the legislature directs us to do otherwise").

CONCLUSION

¶55 We reverse the trial court's judgment in favor of Defendants, and remand to the trial court for further proceedings consistent with this Opinion. We also vacate the court of appeals' memorandum decision.

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1 Because we are reviewing a decision granting summary judgment in favor of the defendants, we describe the facts in the light most favorable to the plaintiff, the non-moving party. *See Gipson v. Kasey*, 214 Ariz. 141, 142 ¶ 2 (2007).

2 Although Plaintiff named other defendants in the lawsuit, the issues upon which we granted review do not pertain to those other defendants.

3 We also granted review on a second issue—whether the trial court erred in denying Plaintiff's motion for reconsideration. Because of our conclusion on the first issue, this second issue is now moot and we will not consider it.

Cite as
160 Arizona Cases Digest 19

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

The STATE of Arizona,
Respondent,
v.
Marcos Isaac DANNER,
***Petitioner*.**

No. 2 CA-CR 2025-0126-PR
Filed October 22, 2025

Petition for Review from the Superior Court in
Pima County
No. CR20234992001
The Honorable Kathleen A. Quigley, Judge
REVIEW GRANTED; RELIEF GRANTED

COUNSEL

Laura Conover, Pima County Attorney
By J. William Brammer Jr. and James W. Rappaport, Tucson, *Counsel for Respondent*
Megan Page, Pima County Public Defender
By Ian M. McCloskey, Assistant Public Defender, Tucson, *Counsel for Petitioner*

OPINION

Judge Eckerstrom authored the opinion of the Court, in which Chief Judge Staring and Vice Chief Eppich concurred.

This opinion is subject to revision before publication in the Pacific Reporter.

ECKERSTROM, Judge:

¶1 Marcos Danner seeks review of the trial court's order summarily dismissing his petition for post-conviction relief filed pursuant to Rule 33, Ariz. R. Crim. P. We grant review, and, because the court erred in rejecting Danner's claim under Rule 33.1(h), we grant relief.

¶2 In March 2024, Danner pled guilty to solicitation to possess a deadly weapon by a prohibited possessor based on his possession of a firearm in November 2023. The trial court suspended the imposition of sentence and placed Danner on a three-year term of probation.

¶3 Danner sought post-conviction relief, arguing his conviction violates the Second Amendment to the United States Constitution because "there is no historical tradition of disarming similarly situated non-violent offenders," citing New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022). He later filed an amended petition adding a claim under Rule 33.1(h) that he was not, in fact, a prohibited possessor on the date of the offense because his

right to possess a firearm had been automatically restored under A.R.S. § 13-907(A) based on amendments to that statute effective in September 2022. He explained that he had been convicted in 2020 of solicitation to commit organized retail theft—a nondangerous and nonserious offense, *see* A.R.S. §§ 13-706, 13-704—and that he thus met the criteria for automatic reinstatement under the current version of § 13-907(A). In response, the state acknowledged that Danner's probation term in the retail theft case had ended in 2021 but argued that the automatic restoration provisions of § 13-907(A) did not apply because his probation had ended before the statute was amended and the statute was not expressly retroactive.

¶4 The trial court summarily dismissed Danner's petition. It concluded he had waived his constitutional challenge by pleading guilty and that the amendment to § 13-907(A) was not retroactive. As to the latter, the court reasoned that the amendment to § 13-907(A) was substantive—as opposed to procedural, which may be applied retroactively—because it would require "a reversal of convictions for prohibited possessors in qualifying cases." The court also denied Danner's motion for rehearing. This petition for review followed.

¶5 On review, Danner reurges his claims. Because we agree that his right to possess a firearm was automatically restored when the amendments to § 13-907 took effect, he is entitled to relief under Rule 33.1(h), and we need not reach his constitutional arguments.

¶6 At the time Danner completed his probation in 2021, § 13-907(A) provided that, "[o]n final discharge, any person who has not previously been convicted of a felony offense shall automatically be restored any civil rights that were lost or suspended as a result of the conviction if the person pays any victim restitution imposed." 2022 Ariz. Sess. Laws, ch. 199, § 2. Subsection (C) excluded the right to possess a firearm from the automatic restoration of rights, providing a defendant could instead apply for restoration pursuant to A.R.S. § 13-910.

¶7 As amended, § 13-907(A) provides that the automatic restoration of rights is triggered "[o]n completion of probation . . . or absolute discharge from imprisonment." And the statute now allows for the automatic restoration of the right to possess a firearm unless the underlying offense was dangerous or serious. § 13-907(C). The question before us, then, is whether that amendment applies to an individual—like Danner—who completed probation before the amended statute's effective date in September 2022 but would unquestionably qualify for the automatic restoration of the right to possess a firearm if he had completed it later.[1]

¶8 We review issues of statutory construction de novo. *In re Chalmers*, ___ Ariz. ___, ¶ 12, 571 P.3d 885, 888 (2025). "Statutory interpretation requires us to determine the meaning of the words the legislature chose to use. We do so neither narrowly nor liberally, but rather according to the plain meaning of the words in their broader statutory context, unless the legislature directs us to do otherwise." *Id.* (quoting *S. Ariz. Home Builders Ass'n v. Town of Marana*, 254 Ariz. 281, ¶ 31 (2023)).

¶9 Danner argues that he need not demonstrate that the amended statute operates retroactively because the revisions to § 13-907(A) changed his status—from a prohibited possessor to a person with restored Second Amendment rights—prospectively from 2022 onward. The state, conversely, asserts that because Danner's constitutional rights were automatically restored—save his right to possess a firearm—when his probation terminated in 2021, the 2022 amendments to § 13-907(A) do not apply to him unless we conclude the statute operates retroactively.

¶10 "A statute applies retroactively when it 'attaches new legal consequences' to events completed before the effective date of the statute." *Zuther v. State*, 199 Ariz. 104, ¶ 15 (2000) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269-70 & 270 (1994)). But "[a] statute is not necessarily retroactive because it 'relate[s] to antecedent facts.'" *Id.* ¶ 17 (first alteration added, second alteration in *Zuther*) (quoting *Tower Plaza Invs. Ltd. v. DeWitt*, 109 Ariz. 248, 250 (1973)). A substantive statute may not be applied retroactively absent an express directive by the legislature. *Krol v. Indus. Comm'n of Ariz.*, 259 Ariz. 261, ¶ 25 (2025); A.R.S. § 1-244. But a procedural statute has no such restriction if it "does not affect an earlier established substantive right." *In re Shane B.*, 198 Ariz. 85, ¶ 8 (2000) (quoting *Bouldin v. Turek*, 125 Ariz. 77, 78 (1979)); *see also Krol*, 259 Ariz. 261, ¶ 31.

¶11 Much of Danner's argument centers on this court's decision in *State v. Nixon*, 242 Ariz. 242 (App. 2017). There, the defendant asserted that his right to possess a firearm was not automatically suspended under A.R.S. § 13-904(A)(5) because that provision was added in 1994, several years after his 1987 conviction. *Nixon*, 242 Ariz. 242, ¶ 1. The statute provides that "[a] conviction for a felony suspends" certain "civil rights of the person sentenced." § 13-904(A). The 1994 amendment added to the list of suspended rights "[t]he right to possess a . . . firearm." 1994 Ariz. Sess. Laws, ch. 200, § 5.

¶12 Nixon argued that applying § 13-904(A)(5) to him was an improper retroactive application of the law. *Nixon*, 242 Ariz. 242, ¶ 1. We determined, however, that it was not necessary for the statute to be retroactive to suspend Nixon's right to possess a firearm. *Id.* ¶¶ 1, 8. His conviction was not the trigger for the suspension of his gun rights but instead merely an antecedent fact, and the statute did "not change the consequences of Nixon's past acts." *Id.* ¶ 7. Instead, "[t]he only effect that the statute had on Nixon was to change his status as a

felon to a prohibited possessor from 1994 onward." *Id.* ¶ 8. Thus, we concluded, the statute "prospectively applies to convicted felons who had yet to have their civil rights restored when it became effective, regardless whether the conviction occurred before or after its effective date." *Id.*

¶13 Danner interprets *Nixon* to mean that "statutes related to the loss of rights and restoration of rights upon conviction" apply prospectively "at the moment the statute becomes effective," regardless of when the conviction occurred. We agree that much of Nixon's reasoning applies here. Section 13-907(A) refers to a specific event—the completion of probation or absolute discharge from imprisonment—to trigger the automatic restoration of rights. But, under *Nixon*, that does not necessarily mean the statute is improperly retroactive if that event has already occurred. As noted above, § 13-904(A) also refers to a specific triggering event—the conviction for a felony. Nonetheless, the addition of subsection (A)(5) suspending the right to possess a firearm did not alter the legal consequences of that previous event.

¶14 The state correctly observes, however, that Danner's rights had already been restored at the time the statutory amendments took effect, unlike Nixon's. It focuses on the statement in *Nixon* that the modified statute applies only to "convicted felons who had yet to have their civil rights restored." *Id.* According to the state, then, the key event is not the effective date of the statute but the restoration of rights. But the state's argument overlooks the difference between § 13-904(A) and § 13-907(A). The former suspends rights, and the latter explains how they are restored. It is one thing to conclude the legislature may restore additional rights to a felon whose rights have already been partially restored. It is another to conclude the legislature may again suspend the rights of a felon whose rights have been restored.

¶15 Additionally, the state's interpretation could lead to arbitrary results, as the following hypothetical illustrates. Two defendants convicted of identical crimes are subsequently placed on identical probation terms, which would begin before the effective date of the revisions to § 13-907(A) and end afterwards. The first defendant, however, is terminated from probation early under Rule 27.4, Ariz. R. Crim. P. The other is not. According to the state, only the second defendant would automatically regain the right to possess a firearm. We cannot agree Arizona law compels this outcome.

¶16 Even were we to read the amendment to § 13-907(A) as creating new legal consequences, that is, the restoration of Danner's right to possess a firearm, based on events completed before the amendment— his completion of probation, *see Zuther*, 199 Ariz. 104, ¶ 15, we would nonetheless conclude Danner is entitled to relief. As noted above, the presumption against retroactivity applies only to statutes affecting vested substantive rights. "Substantive law creates, defines and regulates rights." *Krol*, 259 Ariz. 261, ¶ 32 (quoting *Aranda v. Indus. Comm'n*, 198 Ariz. 467, ¶ 12 (2000)). "Conversely, a procedural law 'prescribes the method of enforcing such rights or obtaining redress.'" *Id.* (quoting *Hall v. A.N.R. Freight Sys., Inc.*, 149 Ariz. 130, 138 (1986)). In other words, a "procedural law relates to the manner and means by which a right to recover is enforced or provides no more than the method by which to proceed." *Aranda*, 198 Ariz. 467, ¶ 12. In the criminal context, a law is substantive if it defines a crime or the parameters of punishment. *Carson v. Gentry*, ___ Ariz. ___, ¶ 78, 574 P.3d 205, 221 (2025).

¶17 Section 13-907(A) neither creates nor defines the right to possess firearms. Nor does it regulate that right—§ 13-904(A)(5) mandates the suspension of the right to possess firearms. Section 13-907, in contrast, provides the procedure for restoring those rights. Under subsection (A), the rights are restored automatically to qualified defendants, and the statute refers defendants who do not meet its requirements to appropriate additional procedures. *See* § 13-907(B), (D). Moreover, the suspension of the right to possess a firearm is not punishment. *See State v. Olvera*, 191 Ariz. 75, 77 (App. 1997). It instead reflects a legislative determination of "unfitness to engage in the future activity of possession of a firearm." *Id.* Thus, because § 13-907(A) does not create, define, or regulate rights nor punish defendants, it is procedural, and there is no barrier to applying its amendment retroactively to those who completed their probation before the amendment's effective date.

¶18 Danner's right to possess a firearm was restored automatically on the effective date of the amendments to § 13-907(A), September 24, 2022. Thus, he was not prohibited from possessing a firearm on the date of his arrest in November 2023. He is entitled to relief under Rule 33.1(h).

¶19 We grant review and relief. We direct the trial court to enter an order vacating Danner's conviction for solicitation to commit prohibited possession and the resulting disposition.

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1 It is undisputed that Danner was a prohibited possessor before the statute was amended and would not have been permitted to possess a firearm before the statute's effective date. A defendant is held to the law in effect at the time the crime was committed. *See State v. Hamilton*, 177 Ariz. 403, 406 (App. 1993) ("In the context of criminal law, an offender must be punished under the law in force when the offense was committed and is not exempted from punishment by a subsequent amendment to the applicable statutory provision.").

Cite as
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IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

MARKETECH International Corporation USA, Inc.,
Petitioner,
v.
PROCESS SERVICE Specialists, L.L.C.,
Respondent.

No. 1 CA-SA 25-0039
FILED 10-23-2025

Appeal from the Superior Court in Maricopa County
No. CV2024-018710
The Honorable Erik Thorson, Judge
VACATED AND REMANDED

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OPINION

Presiding Judge Brian Y. Furuya delivered the opinion of the Court, in which Chief Judge Randall M. Howe joined. Judge Angela K. Paton dissented.

This opinion is subject to revision before publication in the Pacific Reporter.

FURUYA, Judge:

¶1 Petitioner Marketech International Corporation USA, Inc. ("Marketech") seeks special action review of the superior court's order compelling arbitration and denying its motion for reconsideration.

¶2 This case calls upon us to decide whether the court may compel arbitration by enforcing an arbitration clause contained within an illegal construction contract that, barring applicability of any exceptions, may be void because of a party's violation of A.R.S. Section 32-1151. As further explained below, contracts that are illegal and void because of such violations cannot be used to compel an unwilling party to arbitrate the issues of that illegality. Instead, the court must resolve any issues regarding illegality in the first instance and may compel arbitration of further issues only upon a determination that the arbitration clause is not void. Because the court improperly delegated the preliminary determination as to illegality and voidness over Marketech's objection to the arbitration, we accept special action jurisdiction, vacate the court's order, and remand for an evidentiary hearing to resolve those issues in the first instance.

FACTS AND PROCEDURAL HISTORY

¶3 On July 28, 2022, Marketech entered into a Master Services Agreement("the Agreement") with Process Service Specialists, L.L.C. ("PSS") in connection with the construction of a manufacturing facility. At the time the parties executed the Agreement, PSS was not licensed as a contractor in Arizona. Nevertheless, PSS submitted a $28 million proposal to Marketech on August 4, 2022. Four days later, PSS obtained its contractor's license on August 8, 2022, and on September 15, 2022, the parties executed their first purchase order.

¶4 A dispute arose between the parties concerning the performance of the construction work. After mediation failed, PSS filed a demand with the American Arbitration Association pursuant to the terms of the Agreement, asserting claims exceeding $50 million. Marketech filed a complaint in the superior court and moved to stay the arbitration, arguing arbitration could not be compelled under the Agreement because PSS lacked legal capacity to contract under Arizona's licensing statutes at the time of formation. Marketech's argument was directed at both the Agreement as a whole and also specifically to the arbitration clause contained within it. PSS then moved to stay litigation and compel arbitration. After briefing, the court granted PSS's motion, reasoning (1)"the arbitrator must decide the contract's validity in the first instance," (2) Marketech failed to specifically challenge the delegation clause, and (3)Arizona's licensing statutes do not bar PSS from initiating arbitration.

¶5 Marketech filed this special action challenging that ruling. While it does not dispute that the Federal Arbitration Act ("FAA") would apply if the Agreement were validly formed, it argues that PSS's lack of a contractor's license at the time the Agreement was signed rendered it void at inception.

DISCUSSION

I. We Accept Special Action Jurisdiction.

¶6 The Rules of Procedure for Special Actions guide us in accepting or declining special action jurisdiction and "should [be] use[d] and construe[d] . . . in a just manner that avoids unnecessary delay and expense." Ariz. R.P. Spec. Act. 1(c). Special action jurisdiction "is'highly discretionary[.]'" *Yauck v. W. Town Bank & Tr.*, ___ Ariz.___, ___ ¶ 12, 568 P.3d 386, 390 (App. 2025) (citing *Prosise v.*

Kottke, 249 Ariz. 75, 77 ¶ 10 (App. 2020)); *see also* Ariz. R.P. Spec. Act. 12(a) ("Whether to accept jurisdiction of an appellate special action is within the court's discretion . . . . In accepting or declining jurisdiction, the court is determining whether remedy by appeal is equally plain, speedy, and adequate."). In the exercise of that discretion, we are directed to consider, among other factors, whether the petition for special action asks us to resolve questions"the resolution of which will materially advance the efficient management of the case, other than issues presented by ordinary dispositive motion practice[.]" Ariz. R.P. Spec. Act. 12(b)(7); *see also State Comp. Fund v. Superior Court*, 190 Ariz. 371, 374 (App.1997) ("Special action jurisdiction is appropriate because . . .resolution of the issues will avoid undue expense and delay for both the litigants and others.").

¶7 Although A.R.S. Section 12-2101.01(A)(1) allows appeals from orders denying arbitration, it does not mention orders granting arbitration—which our supreme court has interpreted as an intent to minimize interlocutory review. *See S. Cal. Edison Co. v. Peabody W. Coal Co.*, 194 Ariz. 47, 52–53 ¶¶ 16–17 (1999). Thus, under normal circumstances, an order compelling arbitration is not immediately appealable. But though such orders may be reviewed on appeal after a final judgment confirms an award following full arbitration, *see Roeder v. Huish*, 105 Ariz. 508, 510 (1970), nevertheless, the "general rule [prohibiting appeals from orders compelling arbitration] provides little comfort in those cases in which there are complex issues and in which a bona fide dispute exists over arbitrability. In those instances, justice might be better served by pre-arbitration resolution of arbitrability." *Peabody*, 194 Ariz. at 53 ¶ 18.

¶8 This special action presents one such instance because it concerns whether a party can be compelled to expend very substantial time and resources arbitrating a dispute when the order to arbitrate is predicated on a potentially illegal and void contract. Specifically, the parties here agreed unequivocally at oral argument that PSS was unlicensed when the Agreement was signed and that the Agreement concerns provision of construction services. The question presented in the petition, therefore, raises only the narrow legal issue regarding whether PSS's lack of licensure under A.R.S. Sections 32-1151 and -1153 rendered the arbitration clause illegal and void. *See State v. Bergin*, 256 Ariz. 516, 521 ¶ 10 (App.2023) ("[Petition] raises a purely legal issue, making it particularly appropriate for special-action review.").

¶9 PSS argues against accepting jurisdiction, observing that an arbitrator would be capable of deciding the issue of whether the Agreement is illegal. That may be so, but capacity and ability of the arbitrator are not the issue. Resolving this issue early via special action will materially advance the efficient management of the case. *See* Ariz. R.P. Spec. Act. 12(b)(7). Accepting jurisdiction now will resolve who must decide the threshold question of whether arbitration can be compelled at all in the face of a likely illegal and void contract, before a costly, duplicative, and unnecessary proceeding must be litigated to conclusion.

¶10 Citing the general principle established in *Roeder* and *Peabody* that orders compelling arbitration are reviewable after the superior court affirms the award, the dissent questions how this case is different from other cases where orders compelling arbitration did not merit special action review. But neither *Roeder* nor *Peabody* involved a court compelling arbitration using an illegal or void contract as the foundation for its order. In our view, justice is better served by requiring the court to resolve disputes as to the illegality and voidness of an arbitration contract before compelling arbitration under that contract. *Peabody*, 194 Ariz. at 53 ¶ 18.

¶11 For these reasons, we exercise our discretion and accept special action jurisdiction.

II. Where a Party Disputes the Existence of an Agreement to Arbitrate, the Court, Not the Arbitrator, Must Decide Whether that Agreement Exists.

¶12 We review the superior court's decision to compel arbitration de novo. *Gray v. GC Servs., LP*, 256 Ariz. 480, 484 ¶ 9 (App. 2023); *see RLI Ins. Co. v. Nat'l Constr. & Dev., Inc.*, 258 Ariz. 504, 507 ¶¶ 3–4 (App. 2024).

¶13 The FAA provides that a written arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract[.]" 9 U.S.C. § 2. The inquiry under Section 2—whether a valid arbitration agreement was formed—is governed by state contract law. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Further, 9 U.S.C. Section 4 provides that where "the making of the arbitration agreement . . . [is] in issue," the court must proceed summarily to decide that question before ordering arbitration. *See id.* at 944; *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 69 (2019) ("[B]efore referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists.").

¶14 Arizona follows this same rule. "On motion of a person alleging that an arbitration proceeding has been initiated or threatened but that there is no agreement to arbitrate, *the court shall* proceed summarily to decide the issue." A.R.S. § 12-3007(B) (emphasis added); *see also*, *Gray*, 256 Ariz. at 484 ¶ 9 ("When addressing whether the parties agreed to arbitrate a certain matter, courts generally apply state-law principles governing contract formation."); *Escareno v. Kindred Nursing Ctrs. W., L.L.C.*, 239Ariz. 126, 129 ¶ 7 (App. 2016) ("The fundamental prerequisite to arbitration is the existence of an actual agreement or contract to arbitrate."); *Brake Masters Sys., Inc. v. Gabbay*, 206 Ariz. 360, 364¶ 12 (App. 2003) (noting courts

should not presume arbitrability without "clear and unmistakable" evidence).

¶15 Here, the parties concede that an arbitration proceeding had been initiated, and Marketech's complaint to halt that arbitration alleged that PSS's lack of capacity to contract rendered the arbitration provision void at inception. Accordingly, the superior court was obligated to resolve the threshold issue of formation. A.R.S. § 12-3007(B). It failed to do so and instead delegated that duty to the arbitrator. This was error.

¶16 PSS and the superior court rely on *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), and *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010), to argue that challenges to contract validity must go to the arbitrator. But both cases are inapposite because neither concerned illegal or void contracts. In *Buckeye*, the parties did not dispute the existence of a contract; the issue was whether the formed contract was enforceable. 546 U.S. at 444 n.1. In *Rent-A-Center*, the Court likewise noted that neither party challenged the existence of the arbitration clause itself. 561 U.S. at 70 n.2. By contrast, Marketech's challenge is one of formation, not enforceability—it alleges that no valid contract to arbitrate was ever formed because PSS's lack of a contractor's license rendered the Agreement and its arbitration clause illegal and void. Thus, we hold that this threshold issue must first be resolved by the court before Marketech can be compelled to arbitrate. *See First Options*, 514 U.S. at 944; *Henry Schein*, 586 U.S. at 69; A.R.S. § 12-3007(B).

III. The Agreement is Illegal Under Arizona Law, But the Superior Court Must Determine if the Agreement is Void.

¶17 Arizona law provides that:

> It is unlawful for any person, firm, partnership, corporation, association or other organization . . . to engage in the business of, submit a bid or respond to a request for qualification or a request for proposals for construction services as, act or offer to act in the capacity of or purport to have the capacity of a contractor without having a contractor's license in good standing in the name of the person, firm, partnership, corporation, association or other organization as provided in [Chapter 10 of Title 32, Arizona Revised Statutes].

A.R.S. § 32-1151. Notably, this prohibition applies not only to unlicensed contractors who perform construction work, but also to those who negotiate for, offer, or agree to provide construction services, or even merely represent that they are authorized to do so. *Id.*; *see also* A.R.S. § 32-1101(6). When a contract is deemed illegal under this statute, it is generally void. *See WB, The Bldg. Co., LLC v. El Destino, LP*, 227 Ariz. 302, 308 ¶ 15 (App. 2011); *Hunt v. Douglas Lumber Co.*, 41 Ariz. 276, 287–88 (1933) (recognizing that predecessor statute to A.R.S. § 32-1151 rendered contracts entered by unlicensed contractors void ab initio because the statute made such contracts illegal); *Northen v. Elledge*, 72 Ariz. 166, 171–73 (1951) (same); *Miller v. Superior Court*, 8 Ariz. App. 420, 423 (1968) (same); *Pace v. Hanson*, 6 Ariz. App. 88 (1967) (same); *see also Yank v. Juhrend*, 151 Ariz. 587, 590 (App. 1986) (noting that generally, unless legislative intent specifies otherwise, contracts made in contravention of a statute are illegal and void). Further, an arbitration clause embedded in that void contract—and upon which it is dependent for context—would be likewise void. *See Austin v. Austin*, 237 Ariz. 201, 206 ¶ 12 (App. 2015); A.R.S. § 12-3006(A) (an arbitration clause is not valid where grounds exist for revoking the contract as a whole).

¶18 In this case, it is undisputed that PSS was unlicensed when it negotiated for and signed the Agreement on July 28, 2022, and its eventual licensure does not cure that initial defect. PSS counters that the Agreement did not become operative until the first purchase order was executed in September 2022—after it had acquired its contractor's license. In other words, PSS argues that formation did not occur until after it was licensed. We disagree. It does not matter that the Agreement did not contain finalized pricing or scope of work, or that construction had not yet begun. Arizona law applies the stringent licensing requirement even at the proposal and negotiation stage. A.R.S. § 32–1151; *El Destino*, 227Ariz. at 308 ¶ 15. Because PSS admits, at the very least, it negotiated to provide construction services while unlicensed, the statutory bar was triggered even before execution, and thus, the Agreement is illegal and may be void. If void, the Agreement and its arbitration clause are a nullity and confer no authority upon the court to compel an unwilling Marketech to arbitration. *See Escareno*, 239 Ariz. at 129 ¶ 7.

¶19 There are two circumstances that may prevent an arbitration contract rendered illegal by operation of A.R.S. Section 32-1151 from being defeated for voidness: (1) complete renegotiation of the contract after licensure; or (2) substantial compliance with the licensing requirements. We address each in turn.

¶20 First, a complete renegotiation and agreement to a new contract after licensure would render the void contract moot. This is because such renegotiation and agreement after licensure would result in a new contract that is not subject to the fatal defects for violation of A.R.S. Section 32-1151, which in turn provides a valid basis for enforcing an arbitration clause contained in the new contract. On the other hand, a mere subsequent transaction that is dependent upon prior void agreements cannot retroactively validate the void contract. *See Columbus Life Ins. Co. v. Wilmington Tr., N.A.*, 255Ariz. 382, 384 ¶ 8 (2023) ("A void contract is one which never had any legal existence or effect, and it cannot in any manner have life

breathed into it."). At oral argument it was discussed that subsequent purchase and change orders could potentially have intended a complete renegotiation of the parties' agreement, thereby establishing a legal construction contract entered after PSS's licensure. But such is not conclusive from the record before us, so this becomes a question of fact for the superior court to decide on remand.

¶21 Second, Arizona recognizes a narrow, equitable exception for contractors who substantially comply with licensing requirements, *see Crowe v. Hickman's Egg Ranch, Inc.*, 202 Ariz. 113, 115 ¶ 8(App. 2002), potentially making a contract merely voidable, rather than void. *Smith v. Pinnamaneni*, 227 Ariz. 170, 173–74 ¶ 9 (App.2011). Substantially complying with licensing requirements allows an unlicensed contractor to bring a suit under A.R.S. Section 32-1153, which otherwise prohibits unlicensed contractors from seeking compensation for work performed. *Aesthetic Prop. Maint. Inc. v. Capitol Indem. Corp.*, 183 Ariz. 74, 78 (1995). Because such compliance allows an unlicensed contractor to sue under an otherwise void contract, substantial compliance with licensing requirements makes the contract voidable instead of void. By parity of reasoning, voidable contracts are subject to defenses regarding enforceability rather than formation, and therefore, may properly be referred to an arbitrator for resolution. *See e.g.*, *Buckeye Check Cashing, Inc.*, 546 U.S. at 444. But the record is also not clear on this issue, so whether PSS could meet this standard is a factual determination the superior court must resolve before arbitration can be compelled.

¶22 Because the court cannot use a void arbitration agreement to force Marketech to arbitrate, and because the two exceptions discussed above raise factual issues as to the legal existence of the Agreement, the court, not an arbitrator, must resolve these issues before compelling arbitration. Therefore, we vacate the superior court's order compelling Marketech to arbitrate formation issues. We remand to the court to determine whether: (1) the parties completely renegotiated and agreed to a new contract with a valid arbitration agreement, compliant with A.R.S. Section 32-1151; or (2) the Agreement is merely voidable because of substantial compliance. Only if the court finds that one or both of these circumstances pertain may it then enter an order compelling Marketech to arbitration.

IV. PSS's Remaining Arguments Fail.

¶23 To the extent PSS contends that the arbitration clause survives unless specifically challenged, that principle applies only when contract enforceability is at issue—not formation. *See Rent-A-Center*, 561 U.S. at 71–72. We recently reaffirmed this distinction in *Duncan v. Pub. Storage, Inc.*, No. 1 CA-CV 24-0598, 2025 WL1304599, at *2 ¶ 9 (Ariz. App. May 6, 2025) (mem. decision), where we held that enforceability challenges must specifically target the arbitration clause. But where the issue is formation, that requirement does not apply. By its own terms, the FAA finds application only when a valid agreement to arbitrate exists. *See* 9 U.S.C. § 2; *see also* A.R.S. §§ 12-1501 (same), -3003(A)(3) (specifying application when there is "an agreement to arbitrate whenever made"). Where there is no valid agreement to arbitrate, such as when an arbitration agreement is illegal and void ab initio, arbitration—including of issues regarding arbitrability—cannot be compelled.

¶24 Further, PSS argues that even if the Agreement as a whole is void because of its lack of a contractor's license, the arbitration clause itself still survives and compels arbitration because it is separable. *See Rent-A-Center*, 561 U.S. at 70 ("[A] party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate."); *see also Hamblen v. Hatch*, 242 Ariz. 483, 487 ¶¶15–16 (2017) (recognizing Arizona's adoption of the separability doctrine). PSS contends that, generally, agreements to arbitrate do not require a contractor's license to be valid. Thus, because the Agreement's arbitration clause must be regarded as a separate contract from the Agreement itself, *see Rent-A-Center*, 561 U.S. at 70, that clause survives Marketech's challenge grounded in PSS's lack of a contractor's license. PSS's argument goes too far.

¶25 True, arbitration clauses must be treated as separable. *Hamblen*, 242 Ariz. at 487 ¶¶ 15–16. And an agreement to arbitrate in a general transaction does not require a contractor's license to be valid. *See generally* A.R.S. §§ 12-1501, -3003. But the arbitration agreement at issue in this case is clearly not for a general transaction. Rather, it is unquestionably an agreement to arbitrate disputes involving a construction contract. The terms of the Agreement—and the inclusion and language of the arbitration clause contained within it—establish that the clause was part of the negotiations for construction services. That context is sufficient to bring the separate arbitration contract within the ambit of A.R.S. Section 32-1151. And as provided in A.R.S. Section 32-1153, no contractor shall:

> commence or maintain any action in any court of the state for collection of compensation for the performance of any act for which a license is required . . . without alleging and proving that the [contractor] was a duly licensed contractor when the contract sued upon was entered into and when the alleged cause of action arose.

¶26 Enforcing any award under the arbitration agreement at issue would require PSS to do so in court and would necessarily depend upon the context and purpose for which the clause was entered, i.e., for construction services. But it is not disputed that PSS lacked a valid contractor's license

when the Agreement containing the instant arbitration clause was signed. Nor is it reasonably disputable that the instant arbitration clause is for the arbitration of disputes surrounding the provision of construction services under the Agreement. Thus, A.R.S. Sections 32-1151 and -1153 apply to the arbitration clause, even when treated as a separate contract. Unless PSS establishes at least one of the exceptions to the requirements of those statutes as discussed above, the statutes will prevent PSS from enforcing the arbitration clause, though it be separable. Therefore, the separability of the arbitration clause does not alter the result here.

CONCLUSION

¶27 We accept special action jurisdiction. On this record, we hold that the superior court may not compel arbitration of the issues of legality and voidness of the Agreement and its embedded arbitration clause. Instead, because formation is at issue, the court must itself resolve the legality and voidness of the Agreement and the arbitration clause before compelling arbitration of any further issues or disputes as described above. *See supra* ¶ 22. Therefore, we vacate the court's order and remand for the superior court to conduct such proceedings as may be necessary to resolve these issues.

¶28 PSS requests attorneys' fees pursuant to A.R.S. Section 12-341.01, but because no decision on the merits has been reached, the request is premature and denied. *Austin*, 237 Ariz. at 210–11 ¶ 34. But this denial is without prejudice to seek fees incurred during this special action at conclusion of the action on its merits. As the prevailing party on appeal, we award Marketech its costs upon its compliance with Rule 21 of the Arizona Rules of Civil Appellate Procedure.

PATON, Judge, dissenting:

¶29 I dissent because I would have declined to exercise special action jurisdiction.

¶30 The legislature has identified six instances in which an arbitration order, judgment, or decree can be appealed. A.R.S. § 12-2101.01. These include an order denying an application to compel arbitration, orders denying confirmation of an award, modifying or correcting an award, and the final award. *See id.* Although Section 12-2101.01 expressly permits appeals from orders denying to compel arbitration, it is silent as to orders compelling arbitration, the type of order at issue here. *Id.*

¶31 In *Roeder v. Huish*, our supreme court held that an order compelling arbitration was not appealable prior to the arbitration proceedings, but such an order could be properly reviewed after the arbitration award was confirmed. 105 Ariz. 508, 510 (1970). The court reaffirmed this principle in *Southern California Edison Company v. Peabody*, when it held that a superior court order compelling arbitration is not appealable until a final order is entered after arbitration proceedings have concluded. 194 Ariz. 47, 54, ¶ 23 (1999). As our supreme court reasoned in *Peabody*, by making orders compelling arbitration non-appealable, the legislature disfavors interlocutory review of orders compelling arbitration. *Id.* at ¶¶ 16–17 ("[A] multitude of appeals from orders compelling arbitration would use judicial and litigant resources when arbitration might determine all issues to the parties' satisfaction.").

¶32 It thus follows that Marketech's action here is "equally appropriate to address by appeal" after the arbitration process takes place, *i.e.*, the award is confirmed in a final judgment—which is one of our considerations in determining whether to exercise special action jurisdiction. Ariz. R. P. Spec. Act. 12(c)(4). In citing *Peabody*, the majority justifies its exercise of special action jurisdiction here after noting that "[the] general rule [prohibiting appeals from orders compelling arbitration] provides little comfort in those cases in which there are complex issues and in which a bona fide dispute exists over arbitrability." Decision *supra* ¶ 7. And "[i]n those instances, justice might be better served by pre-arbitration resolution of arbitrability." Decision *supra* ¶ 7.

¶33 Marketech and the majority contend that we should accept jurisdiction because the arbitration agreement is illegal and it "should not be forced to arbitrate with PSS over the next year incurring significant attorneys', arbitration, and expert fees and costs, which will only result in a decision that PSS can never enforce in court." But I am not persuaded that avoiding the expense of arbitration is a compelling reason to consider the issue now, when it is "equally appropriate to address by appeal." Ariz. R. P. Spec. Act. 12(c)(4). Particularly where, as here, Marketech could have sought special action review of the superior court's denial of its motion to certify its order under Rule 54(b)—the procedure *Peabody* laid out for challenging an order compelling arbitration via special action review. *Peabody*, 105 Ariz. at 53, ¶ 18. If we were to decline, it is also possible that the arbitrator may agree with Marketech's position on the arbitrability issue in that proceeding and, even if it did not, Marketech could still prevail in the arbitration on the underlying merits. But the bottom line is, if Marketech loses in the arbitration, the arbitrability issue it raises via special action here is "equally appropriate to address by appeal." Ariz. R. P. Spec. Act. 12(c)(4).

¶34 For these reasons, I would have declined to exercise special action jurisdiction here. I therefore respectfully dissent.

Cite as
160 Arizona Cases Digest 27

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

CLUB WEST Conservancy,
Petitioner,
v.
SHEA HOMES Limited Partnership; SHEA HOMES, Inc.; THE EDGE at Club West LLC,
***Respondents*.**

No. 1 CA-SA 25-0117
FILED 10-27-2025

Petition for Special Action from the Superior Court in Maricopa County
No. CV2021-018435
The Honorable Susanna C. Pineda, Judge
JURISDICTION ACCEPTED;
RELIEF GRANTED

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OPINION
Presiding Judge Michael S. Catlett delivered the opinion of the Court, in which Chief Judge Randall M. Howe and Judge D. Steven Williams joined.

This opinion is subject to revision before publication in the Pacific Reporter.

CATLETT, Judge:
¶1 Arizona Rule of Civil Procedure 54(b) allows courts in a civil action to enter judgment as to fewer than all claims or parties. When a court does so, Rule 54(g)(3)—which describes how and when a party should request attorney fees—usually applies. Rule 54(h) then requires the final judgment to reflect a fee award.
¶2 Under Rules 54(b), (g), and (h), entering a civil judgment usually plays out as follows. The court issues a decision resolving all claims against a party, while other claims against other parties remain. The successful party does not want to wait for those claims against other parties to conclude before obtaining judgment. So the successful party asks the court to enter judgment under Rule 54(b) and files a proposed form of judgment with a blank space for the court to enter a fee award. That party also moves for attorney fees. After full briefing, the court resolves the fee request. If the circumstances are right, the court then enters a *judgment* with Rule 54(b) language and reflecting fees awarded.
¶3 But courts sometimes enter judgment under Rule 54(b) when no party requests it. And they sometimes do so without awarding attorney fees to the successful party. That happened here. So this special action requires us to decide how and when a successful party must request attorney fees if the court unilaterally enters a Rule 54(b) judgment on all claims asserted against the successful party when claims against other parties remain.
¶4 We conclude Rule 54(g)(3) does not govern here—Rule 54(h)(2)(C) does. When the court unilaterally enters judgment without awarding fees, "a prevailing party seeking costs and/or fees must file a motion to alter or amend the judgment within the time required by Rule 59(d)." Ariz. R. Civ. P. 54(h)(2)(C). Under Rule 59(d), that must usually occur within "15 days after the entry of judgment." Because no such motion was timely filed here, we accept special action jurisdiction and grant relief.

FACTS AND PROCEDURAL HISTORY

¶5 Club West Conservancy ("Club West") sued Shea Homes Limited Partnership, Shea Homes, Inc. (collectively, "Shea Homes"), and the Edge at Club West LLC. As against Shea Homes, Club West sought a declaration that the Foothills Club West Golf Course must remain a golf course or an open space. Shea Homes moved for summary judgment.
¶6 On February 14, 2025, the superior court entered a signed minute entry granting Shea Homes' motion, dismissing it from the action, and entering judgment under Rule 54(b). The judgment said nothing about attorney fees.
¶7 One month later, on March 14, Shea Homes filed a "Notice of Lodging Proposed Form of Final Judgment Pursuant to Ariz. R. Civ. P. 54(b)." It agreed the court "fully resolved all claims against [it]," but its proposed form of judgment included space for a fee award, which Shea Homes said it would seek "within the time allotted under Rule 54(f) and (g)."
¶8 Club West objected. It argued that, because the court entered judgment without a proposed form of judgment, Rule 54(h)(2)(C) governed. Club West contended that Shea Homes had to move to alter or amend the judgment within 15 days after its entry. Club West argued the only way Shea Homes could extend that deadline was to show under Rule 6(b)(2) that it was not notified of the judgment within 21 days. And Club West maintained Shea Homes could not make that showing, so its fee request came too late. Shea Homes responded that its fee request was timely under Rule 54(g), Rule 54(h) does not apply, and the court could allow more time to move to alter or amend the judgment.

¶9 The superior court concluded that, under Rule 54(h)(2)(C), Shea Homes had to move to alter or amend the judgment. But the court concluded it could, under Rule 6(b)(2), extend the deadline for Shea Homes to do so. Because Shea Homes showed excusable neglect, the court extended the time for amending the judgment and treated Shea Homes' proposed form of judgment and attorney fee application as a motion to alter or amend the judgment. Club West petitioned for special action relief.

JURISDICTION

¶10 Arizona Rule of Procedure for Special Actions 2(c) outlines the relief available in a special action. To obtain special action review, a petition must seek relief formerly obtained through the writs of certiorari, mandamus, or prohibition. Ariz. R.P. Spec. Act. 2(c). But even when a special action petition seeks such relief, jurisdiction "may be accepted only if the remedy by appeal is not equally plain, speedy, and adequate." Ariz. R.P. Spec. Act. 2(b)(2); *see also* Ariz. R.P. Spec. Act. 12(a) ("In accepting or declining jurisdiction, the court is determining whether remedy by appeal is equally plain, speedy, and adequate."). And even then, whether we accept special action jurisdiction is discretionary. *Id.*

¶11 Club West argues the court's Rule 54(b) judgment is now final. If Club West is correct, then the superior court lacks jurisdiction to alter it under Rule 59(d). *See Preston v. Denkins*, 94 Ariz. 214, 219 (1963) (a superior court lacks jurisdiction to rule on an untimely post-judgment motion); *Egan-Ryan Mech. Co. v. Cardon Meadows Dev. Corp.*, 169 Ariz. 161, 166 (App. 1990) (if a Rule 59 motion is not timely, the court lacks jurisdiction to address it). Special action jurisdiction is appropriate when a party claims the court lacks jurisdiction. *United States v. Super. Ct.*, 144 Ariz. 265, 269 (1985) ("[P]etitioners claim that the respondent trial judge is proceeding with the action in excess of or without jurisdiction, so that special action relief is appropriate."). If Club West is correct that the court is acting without jurisdiction, Club West's only remedy to immediately stop it from doing so is a special action. *See Glenn H. v. Hoskins*, 244 Ariz. 404, 407 ¶ 7 (App. 2018) ("Special action jurisdiction is . . . appropriate to prevent the superior court from acting without jurisdiction."); *see also Westerlund v. Croaff*, 68 Ariz. 36, 41 (1948) ("[A] writ of prohibition lies to prevent an inferior tribunal from acting without or in excess of its jurisdiction.").

¶12 The parties also ask us to interpret procedural rules using undisputed facts—a pure legal question. *See Sw. Gas Corp. v. Irwin*, 229 Ariz. 198, 201 ¶ 7 (App. 2012) ("[W]hen . . . the special action presents a pure question of law, it is particularly appropriate for us to accept jurisdiction," because "the interpretation and application of a procedural rule like Rule 54(b)" is "solely a question of law"). In recent years, we have often accepted jurisdiction to interpret legal rules. *See, e.g.*, *Yauck v. W. Town Bank & Tr.*, ___ Ariz. ___, ___ 568 P.3d 386, 391 ¶ 16 (App. 2025) (interpreting Civil Rules 64 and 69); *White v. State*, ___ Ariz. ___, ___ 565 P.3d 1062, 1064 ¶¶ 7-8 (App. 2025) (interpreting Criminal Rules 1.5(c) and 26.9); *Kelly v. Blanchard*, 255 Ariz. 197, 200 ¶ 10 (App. 2023) (interpreting Civil Rule 35).

¶13 Lastly, the issues here are of first impression, likely to recur, and of statewide importance. *See* Ariz. R.P. Spec. Act. 12(b)(3)–(4); *Stubblefield v. Trombino*, 197 Ariz. 382, 383 ¶ 2 (App. 2000) (special action jurisdiction is appropriate when an issue will recur). We accept jurisdiction.

DISCUSSION

¶14 We consider the interplay between three civil rules: Rules 54, 59, and 6. We interpret court rules de novo. *Kelly*, 255 Ariz. at 200 ¶ 11. Like with statutes, interpreting a rule begins with its text. *Id.* "If the text of the rule, when read in context, is unambiguous, our interpretative task ends, and we apply the text as written without resorting to other methods of interpretation." *Id.* But if not, we may use the rule's subject matter and history, its effects and consequences, and its purpose. *Id.*

I.

¶15 The superior court entered judgment for Shea Homes under Rule 54(b) without receiving a motion to do so or a proposed form of judgment. Club West contends that, by doing so, the court resolved all claims by or against Club West. The judgment, therefore, triggered Rule 54(h)(2)(C) and, to request fees, Shea Homes had to move to amend the judgment within the time limit in Rule 59(d). Club West argues Shea Homes missed that deadline, so the judgment is final.

¶16 Shea Homes responds that its attorney fees request was a separate claim against Club West, and by not resolving that claim, the judgment did not resolve all claims by Club West. Because the judgment did not do so, Shea Homes argues it did not need to move to amend the judgment and the court could extend the deadline to request fees.

¶17 We agree with Club West that the court's Rule 54(b) judgment resolved all claims by or against Club West. So Shea Homes had to move to amend the judgment under Rule 59(d) within 15 days. The court could extend that deadline under Rule 6(b)(2), but only if Shea Homes received delayed notice of the judgment. Shea Homes does not allege delayed notice, and it does not dispute it missed the 15-day deadline. When that deadline passed, the judgment became final, so the court now lacks jurisdiction to consider Shea Homes' proposed form of judgment and its fee request. We now explain these conclusions.

A.

¶18 Shea Homes needed to move to alter or amend the judgment.

1.

¶19 We begin with Rule 54's text. At its outset, Rule 54 differentiates between a judgment and a decision. *See* Ariz. R. Civ. P. 54(a). "[A] 'decision' is a written order, ruling, or minute entry" adjudicating "at least one claim or defense." *Id.* But a "judgment" "includes a decree and any order from which an appeal lies." *Id.*

¶20 When a civil action involves a single plaintiff bringing a single claim against a single defendant, entering judgment is straightforward. But when a civil action involves multiple claims or multiple parties to a side (e.g., one plaintiff and two defendants), entering judgment gets more complicated. In multi-claim or multi-party litigation, the superior court can enter judgment in two scenarios. The first: when the court "adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties" and thinks it should enter judgment before resolving remaining claims. Ariz. R. Civ. P. 54(b). The second: when the court resolves all claims against all parties. Ariz. R. Civ. P. 54(c).

¶21 In neither situation is a decision automatically a judgment. For a decision resolving all claims against all parties to be a judgment, the court must sign it, recite that "no further matters remain pending," and say it "is entered under Rule 54(c)." Ariz. R. Civ. P. 54(c), 58(b)(1). For a decision resolving one or more but fewer than all claims against all parties to be a judgment, the court must sign it, "expressly determine[] there is no just reason for delay," and recite that it "is entered under Rule 54(b)." Ariz. R. Civ. P. 54(b), 58(b)(1). This distinction between a decision and a judgment is important to the timing of fee requests.

2.

¶22 Rule 54—in subsections (g) and (h)—discusses five scenarios in which trial courts adjudicate claims, and it describes the method and timing for requesting fees in each.

¶23 The first scenario: the court files a decision resolving all claims against all parties and "judgment is to be entered under Rule 54(c)." Ariz. R. Civ. P. 54(g)(2). There, "any motion for attorney's fees must be filed within 20 days after the decision is filed" or by a later date the court sets. *Id.*

¶24 The second: the court files a decision resolving all claims and liabilities of a party, but other claims remain against other parties. *See* Ariz. R. Civ. P. 54(g)(3)(A). If a party then seeks judgment under Rule 54(b), "a motion for fees must be filed within 20 days after service of the" request seeking a Rule 54(b) judgment or by a later date the court sets. Ariz. R. Civ. P. 54(g)(3)(A)(i).

¶25 The third: like the second, the court files a decision resolving all claims and liabilities of a party, but other claims remain against other parties. Unlike the second scenario, no party seeks a Rule 54(b) judgment or the court declines to enter one. *See* Ariz. R. Civ. P. 54(g)(3)(A)(ii). Here, a party seeking fees must do so "no later than 20 days after any decision" adjudicating "all remaining claims" in the case, or "20 days after the action's dismissal, whichever occurs first." *Id.*

¶26 The fourth: the court files "a decision or judgment adjudicat[ing] fewer than all claims and liabilities of a party[.]" Ariz. R. Civ. P. 54(g)(3)(B). The deadline here is the same as in the third scenario— 20 days after a "decision" resolving all remaining claims or the action's dismissal, whichever comes first. *Id.*

¶27 In each of these four scenarios, Rules 54(g)(2) and (3) peg the deadline to request fees to a *decision* date, not a *judgment* date. So, in most circumstances, Rule 54 contemplates a bifurcated process—decision first, judgment second. To ensure that occurs, Rule 54 requires that "claims for attorney's fees and costs must be resolved before any judgment may be entered under Rule 54(b) or (c)." Ariz. R. Civ. P. 54(h)(1)(A).

¶28 We urge courts to use that bifurcated process—the court here did not. Rule 58 allows parties to submit and respond to proposed forms of judgment, *see* Ariz. R. Civ. P. 58(a), and that process is important. It helps ensure all necessary items make it into the judgment. *See* Ariz. R. Civ. P. 54(h)(1)(B). It allows the court to consider the parties' views about whether to enter an interlocutory judgment. And it provides greater clarity about later deadlines, including when to seek attorney fees and to appeal.

¶29 The fifth scenario—that in Rule 54(h)—differs from the first four. Here, "the court enters a judgment under Rule 54(b) or (c) without first receiving a motion for judgment or a proposed form of judgment[.]" Ariz. R. Civ. P. 54(h)(2)(C). Without a bifurcated process, the parties will not have applied for fees and the court will not have awarded them. So, despite Rule 54 urging otherwise, the judgment will not reflect a fee award. *See* Ariz. R. Civ. P. 54(h)(1)(B). The comments to Rule 54 state that instances when a court "enters a judgment that should include fees or costs without first receiving a motion for judgment or a proposed form of judgment" are "rare." Ariz. R. Civ. P. 54 cmt. (2017). But when those rare instances occur, Rule 54 instructs that "a prevailing party seeking costs and/or fees must file a motion to alter or amend the judgment within the time required by Rule 59(d)." Ariz. R. Civ. P. 54(h)(2)(C).

3.

¶30 Which scenario occurred here? Shea Homes answers the fourth (and, at times, the second); Club West answers the fifth. Club West is correct.

a.

¶31 Everyone agrees the court entered judgment for Shea Homes under Rule 54(b) without a motion for judgment or a proposed form of judgment. Rule 54(h)(2)(C) applies when "the court enters a judgment under Rule 54(b) or (c) without first receiving a motion for judgment or a proposed form

of judgment[.]" Ariz. R. Civ. P. 54(h)(2)(C). Rule 54's comment reiterates that subsection applies when "a court enters a judgment that should include fees or costs without first receiving a motion for judgment or a proposed form of judgment." Ariz. R. Civ. P. 54 cmt. (2017). There is no ambiguity here—Rule 54(h)(2)(C) applies. *See Kelly*, 255 Ariz. at 200 ¶ 11 (when a rule's text is clear, we apply it); *In re Washburn*, 2022 WL 839792 *3 ¶ 18 (Ariz. App. Mar. 22, 2022) (mem. decision) (applying Rule 54(h)(2)(C) when "the probate court entered final judgment without having considered attorney fees").

b.

¶32 But Shea Homes argues its fee request is a stand-alone claim, so the court's judgment did not resolve all its claims against Club West and Rule 54(g)(3)(B) applies. Recall that Rule 54(g)(3)(B) applies when a decision or judgment resolves fewer than all claims and liabilities of a party, and it says a fee request must be made no later than 20 days after a decision adjudicating all remaining claims. Ariz. R. Civ. P. 54(g)(3)(B). Shea Homes claims its fee request remained after the court's judgment because its fee request was a separate claim.

¶33 We do not see it that way. Shea Homes' interpretation would make Rule 54(g)(3)(B) nonsensical. Take this case. Under Shea Homes' view, the court's judgment left a separate claim for attorney fees unresolved. Because it did so, the court had to issue a second decision resolving that claim before the 20-day deadline to file a fee request would trigger. *See* Ariz. R. Civ. P. 54(g)(3)(B). But Rule 54(g)(3)(B) gives no deadline to resolve remaining claims, so Shea Homes would have had no deadline to seek fees. Only after Shea Homes sought fees and the court resolved that request would the 20-day deadline to seek fees start running. But by then, Shea Homes would have already sought fees. We do not believe, properly interpreted, Rule 54(g)(3)(B) requires the court to resolve a fee request to trigger the deadline to file a fee request. *See France v. Indus. Comm'n*, 250 Ariz. 487, 490 ¶ 13 (2021) ("[We] avoid construing a statute in a manner that leads to an absurd result.").

¶34 The rest of Rule 54 also cuts against Shea Homes' interpretation. *See Stambaugh v. Killian*, 242 Ariz. 508, 509 ¶ 7 (2017) ("In construing a specific provision, we look to the statute as a whole[.]"). Again, Rule 54(g) contemplates a bifurcated process where fees are resolved after decisions but before judgment. Rule 54(g)(3)(A) applies when a court issues a decision resolving all claims by or against a party. If a fee request is a separate claim, no single decision could resolve all claims against a single party (the fee claim would always remain), and the 20-day deadline in Rule 54(g)(3)(A) to request fees would not trigger until the court awards fees. Again, the court would need to resolve the fee request to trigger the deadline for a fee request—a strange result.

¶35 On the other hand, Club West's interpretation gives coherent meaning to Rule 54(g) and the role it plays in maintaining order when entering final judgment. Rule 54(g), by its nature, treats a request for fees differently than other claims because that Rule gives the framework for granting fee awards and incorporating them into judgments. Put differently, when determining whether a decision or judgment adjudicates some or all claims in an action, and thus which part of Rule 54(g)'s framework applies, a request for fees is not a separate claim. If a decision resolves *all claims* by or against *all parties*, other than fees, then Rule 54(g)(2) applies. If a decision resolves *all claims* by or against *a party*, other than fees, then Rule 54(g)(3)(A) applies. And if a decision or judgment resolves one or more, but *less than all*, claims against *a party* (other than attorney fees), then Rule 54(g)(3)(B) applies.

¶36 In fact, Rule 54(g)(2) exempts attorney fees requests when determining whether a decision resolves all claims and liabilities. That subsection triggers when "a decision adjudicates all claims and liabilities of all of the parties, *except a claim for attorney's fees*, and judgment is to be entered under Rule 54(c)." Ariz. R. Civ. P. 54(g)(2) (emphasis added). The same consideration applies when a court determines whether its decision resolves all, or fewer than all, claims under Rule 54(g)(3). We do not think "all claims and liabilities" has one meaning in Rule 54(g)(2) and a different meaning in Rule 54(g)(3). *See In re Drummond*, 257 Ariz. 15, 18 ¶ 5 (2024) (we look at the whole text when construing a specific provision). Instead, excluding an attorney fee request when determining whether a decision resolves all claims and liabilities remains constant throughout Rule 54(g).

¶37 At times, Shea Homes argues Rule 54(g)(3)(A)(i) governs. That subsection applies when "a *decision* adjudicates all claims and liabilities of any party[.]" Ariz. R. Civ. P. 54(g)(3)(A) (emphasis added). Had the superior court filed only a decision in its favor, then Shea Homes would be correct. But the court went further, adding its signature and Rule 54(b) language to its minute entry. By doing so, the court entered a judgment, not a decision, *see* Ariz. R. Civ. P. 54(a) (distinguishing between a "judgment" and a "decision"), and thus Rule 54(g)(3)(A)(i) no longer applied.

¶38 But Shea Homes is correct in this sense: the better practice is to follow the process in Rule 54(g)(3)(A)(i). Rather than entering judgment, the court should have issued a decision. It then should have waited for a party to move for judgment and for Shea Homes to request fees. Once Shea Homes did so, the court could have resolved the fee request and included any award in its final judgment. *See* Ariz. R. Civ. P. 54(g)(3)(A)(i). That would have been the optimal way to proceed because Rule 54(h)(1)(A) requires the court to resolve a fee

request before entering judgment under Rule 54(b). And Rule 54(h)(1)(B) requires judgments to include "any award of attorney's fees or costs" "[e]xcept as otherwise allowed by this rule." That exception applies when Rule 54 "expressly allows a motion for fees or request for costs to be deferred." Ariz. R. Civ. P. 54 cmt. (2017). The *only time* Rule 54 does so is in subsection (g)(3)(B), when the court resolves fewer than all claims or liabilities of a party (not including attorney fees). But that did not occur here.

c.

¶39 Shea Homes also relies on precedent treating attorney fee requests as separate claims. In *Britt v. Steffen*, decided in 2008, we concluded that "Rule 54(b) now treats a claim for attorneys' fees as a separate claim from the decision on the merits of the cause[.]" 220 Ariz. 265, 270 ¶ 22 (App. 2008). We said, "now treats" because, before rules amendments in 1996 and 1999, both our supreme court and this court treated a judgment's silence on a fee request as implicitly denying that request, thus requiring a motion to alter or amend the judgment to request fees. *See Mark Lighting Fixture Co. v. Gen. Elec. Supply Co.*, 155 Ariz. 27, 31-32 (1987) ("*Mark Lighting II*"); *Monti v. Monti*, 186 Ariz. 432, 436 (App. 1996) (treating a judgment's silence on a fee request as implicitly denying it).

¶40 When we decided *Britt* in 2008, Rule 54(g) provided this about the timing for fee requests:

> (2) *Time of Determination*. When attorneys' fees are claimed, the determination as to the claimed attorneys' fees shall be made after a decision on the merits of the cause. The motion for attorneys' fees shall be filed within 20 days from the clerk's mailing of a decision on the merits of the cause, unless extended by the trial court.

Britt, 220 Ariz. at 269 ¶ 17. And, in 1999, our supreme court added this last sentence to Rule 54(b): "For purposes of this subsection, a claim for attorneys' fees may be considered a separate claim from the related judgment regarding the merits of a cause." *Id.* at 269 ¶ 18.

¶41 In *Britt*, we concluded that new last sentence and other rule changes superseded *Mark Lighting II*, which treated a judgment's silence on a fee request as implicitly denying it (those rule changes also necessarily undercut *Monti* and other opinions relying on *Mark Lighting II*). *Id.* at 270 ¶ 22. Because attorney fees could be treated as a separate claim, we said the defendants in *Britt* timely moved for fees on the twentieth day after the court filed a signed order—a final judgment—dismissing the case for lack of prosecution. *Id.*

¶42 We should also mention *Trebilcox v. Brown & Bain, P.A.*, 133 Ariz. 588 (1982). In that case, "the trial court entered summary judgment in favor of Brown & Bain dismissing the Trebilcox counterclaim with prejudice." *Trebilcox*, 133 Ariz. at 589. Trebilcox filed a notice of appeal. *Id.* Brown & Bain moved for attorney fees, but the trial court deferred that request until after trial on the remaining claims. *Id.* Following trial, the court entered a second judgment in Brown & Bain's favor for attorney fees. *Id.* Trebilcox filed a second notice of appeal. *Id.* He then argued in this court that the trial court lacked jurisdiction to award attorney fees. *Id.*

¶43 We agreed: "Brown & Bain's request for attorney's fees was not a separate claim nor" could that "request be fairly characterized as an action in furtherance of the appeal." *Id.* at 590. We concluded "that the trial court may not make an award granting attorney's fees pursuant to A.R.S. § 12–341.01 where a notice of appeal has been filed from the underlying contract claim upon which the award is based." *Id.* at 591.

¶44 Like *Mark Lighting II*, *Trebilcox* became obsolete in 1999, when our supreme court added the "separate claim" sentence to Rule 54(b). In fact, the comments to the 1999 revision make this clear: "This amendment changes the result in *Trebilcox* . . . which interpreted the prior version of Rule 54(b)." Ariz. R. Civ. P. 54 cmt. (1999).

¶45 Just as the 1996 and 1999 amendments undercut *Mark Lighting II*, *Monti*, and *Trebilcox*, the 2017 amendments undercut *Britt*. In 2014, our supreme court formed a task force to restyle the civil rules. *See* Ariz. Supr. Ct. Admin. Ord. 2014-116. The task force proposed deleting the last sentence in Rule 54(b) treating attorney fees as separate claims. *See* Ariz. R. Pet. No. R-16-0010, Task Force Pet. App'x C at 39. In proposing that deletion, the task force explained that "[t]his sentence was added to the rule in 1999 to allow a trial court to certify a final judgment under Rule 54(b) without first determining fees, changing the result in *Trebilcox*[.]" *Id.* The task force proposed deleting the last sentence because its revisions "limit[] the circumstances in which a final judgment may be entered without first determining fees," so "this issue should arise less frequently." *Id.* Instead, "[s]ubdivision (i)(2) would be added to incorporate the substance of the last sentence of current Rule 54(b)," so a court could award fees only when a Rule 54(b) judgment "adjudicates fewer than all the claims or liabilities of a party[.]" *Id.* at 42.

¶46 The task force also proposed amending Rule 54(h)(3) to provide that, if the court enters final judgment without awarding fees, the successful party must move "to alter or amend the judgment within the time required by Rule 59(d)." *See* Ariz. R. Pet. No. R-16-0010, Task Force Amend. Pet. App'x A at 205. The task force explained that amendment would clarify that "a judgment omitting . . . costs or fees will be final for purposes for appeal, unless a timely motion to alter or amend the judgment is filed." *See* Ariz. R. Pet. No. R-16-0010, Task Force Amend. Pet. at 10.

¶47 Our supreme court adopted the task force's proposals. It deleted the last sentence in Rule 54(b)

and amended Rule 54(h) to require a motion to alter or amend if the trial court enters a judgment without resolving attorney fees. Ariz. R. Pet. No. R-16-0010, Order 09/02/2016, at Att. A at 155, 158.

¶48 With those changes, Rule 54 no longer treats attorney fee requests as separate claims. Instead, the trial court retains jurisdiction to award fees only when its decision or judgment resolves fewer than all claims and liabilities (other than attorney fees) against a party. *See* Ariz. R. Civ. P. 54(g)(3)(B), 54(i)(2). That exception is where our supreme court parked the substance of the now-deleted "separate claim" sentence. *See supra* ¶¶ 45, 47. In all other circumstances, the trial court must resolve fee requests before entering judgment under Rule 54(b) or (c) and include a fee award in the judgment. *See* Ariz. R. Civ. P. 54(h)(1). If the court does not, a party seeking fees must move to alter or amend the judgment; otherwise, the judgment is final. *See* Ariz. R. 54(h)(2)(C); Ariz. R. Civ. P. 54 cmt. (2017) ("Absent a timely motion under Rule 59(d), a judgment omitting fees or costs will be final for purposes of appeal.").

¶49 *Britt* followed a different path. The trial court in *Britt* omitted a fee award in a final judgment resolving all claims (other than attorney fees). Under the current regime, that final judgment would need to include a fee award. *See* Ariz. R. Civ. P. 54(c), (h)(1)(B). And after omitting such an award, the *Britt* defendants would now need to move to alter or amend the judgment. *See* Ariz. R. Civ. P. 54(h)(2)(C). But, in *Britt*, we concluded the court retained jurisdiction to award fees. *See* 220 Ariz. at 270 ¶ 22. We relied mainly on the last sentence in the prior version of Rule 54(b) treating a fee request as a separate claim. *See id.* Although *Britt*'s analysis was correct when decided, the last sentence in Rule 54(b) no longer exists and the fee issue would now come out differently. So *Britt* does not help Shea Homes.

¶50 Shea Homes also relies on *A Miner Contracting Inc. v. Safeco Ins. Co. of America*. *See* 2021 WL 4477441 (Ariz. App. Sept. 30, 2021) (mem. decision). There, we concluded the trial court did not err by entering two judgments because a claim for fees may be considered a separate claim. *Id.* at *9 ¶¶ 45-46. As an unpublished decision, *A Miner Contracting* is not binding—it applies only if it persuades. *See* Ariz. R. Sup. Ct. 111(c)(1)(C). On the fees issue, it does not. In allowing the trial court to treat attorney fees as a separate claim, we quoted an opinion relying on the then-deleted, separate-claim language in Rule 54(b). *A Miner Contracting Inc.*, 2021 WL 4477441 at *9 ¶ 46 (quoting *Fields v. Oates*, 230 Ariz. 411, 414 ¶ 10 (App. 2012)). So *A Miner Contracting* is unpersuasive.

¶51 To sum up, after the court entered judgment like it did, neither Rule 54(g)(3)(A)(i) nor Rule 54(g)(3)(B) applied. Instead, Rule 54(h)(2)(C) required Shea Homes to "file a motion to alter or amend the judgment within the time required by Rule 59(d)." And, absent Shea Homes timely moving to amend it, the judgment became final and the court lost jurisdiction. *See* Ariz. R. Civ. P. 54 cmt. (2017) ("Absent a timely motion under Rule 59(d), a judgment omitting fees or costs will be final for purposes of appeal."); Ariz. R. Civ. P. 54(i)(2)(B) (the court retains jurisdiction to award fees only "[i]f a judgment certified under Rule 54(b) adjudicates fewer than all of the claims and liabilities of any party").

B.

¶52 Shea Homes did not timely move to alter or amend the judgment.

1.

¶53 When (as here) Rule 54(h)(2)(C) applies, a party seeking fees after judgment must move to alter or amend the judgment "within the time required by Rule 59(d)." Ariz. R. Civ. P. 54(h)(2)(C). So we now turn to Rule 59(d). That subsection says, "A motion to alter or amend a judgment must be filed no later than 15 days after the entry of judgment." Ariz. R. Civ. P. 59(d).

¶54 The court entered Rule 54(b) judgment on February 14, 2025. Shea Homes did not move to alter or amend the judgment. But the court treated Shea Homes' proposed form of judgment as a motion to alter or amend. Even assuming that treatment was correct, Shea Homes did not file its proposed form of judgment until March 14, 2025, which was 28 days after the court's judgment—outside the 15-day period in Rule 59(d).

2.

¶55 There is one exception to Rule 59(d)'s 15-day deadline. The court may extend the deadline "as allowed by Rule 6(b)(2)." Ariz. R. Civ. P. 59(d).

¶56 Under Rule 6(b)(2), the court may extend the time to move to alter or amend the judgment "for 10 days after the entry of the order extending the time" when three requirements are met. As applied to a motion to alter or amend a judgment under Rule 59(d), those three requirements are as follows. First, the court must find that neither the clerk nor any party notified the moving party within 21 days that the court entered judgment. Ariz. R. Civ. P. 6(b)(2)(B). Second, the moving party must ask for an extension within 45 days after judgment or 7 days after receiving notice of the judgment, whichever is earlier. *See* Ariz. R. Civ. P. 6(b)(2)(A). And third, the court must find that an extension will cause no prejudice to any party. Ariz. R. Civ. P. 6(b)(2)(C).

¶57 The superior court read Rule 6(b)(2) as applying only when the court already gave more time to move to alter or amend the judgment and the moving party seeks a second extension. That misreads the Rule. Instead, Rule 6(b)(2) unambiguously applies any time the court "extend[s] the time to act under" Rule 59(d), requires that all three conditions in the Rule exist, and caps any extension at "10 days after the entry of the order extending the time[.]" Ariz. R. Civ. P. 6(b)(2).

¶58 Shea Homes concedes that if Rule 6(b)(2) applies, it cannot satisfy its conditions. That concession is correct. The clerk notified Shea Homes about the judgment when the court entered it. Without Rule 6(b)(2), Shea Homes had to ask the court to amend the judgment within 15 days. It did not do so. The judgment is now final and the court can no longer amend it. *See* Ariz. R. Civ. P. 54 cmt. (2017) ("Absent a timely motion under Rule 59(d), a judgment omitting fees or costs will be final for purposes of appeal.").

II.

¶59 Shea Homes seeks attorney fees and costs under A.R.S. §§ 12-341 and 12-341.01, and Club West seeks attorney fees under § 12-341.01. We deny Shea Homes' request because it is not a successful party. In our discretion, we also deny Club West's request. *See Hart v. Seven Resorts Inc.*, 190 Ariz. 272, 284 (App. 1997).

CONCLUSION

¶60 We accept jurisdiction and grant relief. Shea Homes did not timely move to alter or amend the judgment. The judgment is final, and the superior court lacks jurisdiction. We vacate the court's order treating Shea Homes' form of judgment as a motion to alter or amend the judgment. We deny as moot Club West's request for oral argument.

Cite as
160 Arizona Cases Digest 33

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Matter of: Angel Josefina LARREA,
Petitioner/Appellee,
v.
Ravi CHAND,
Respondent/Appellant.

No. 1 CA-CV 25-0005 FC
FILED 10-29-2025

Appeal from the Superior Court in Maricopa County
No. FN2022-002036
The Honorable Amy Michelle Kalman, Judge
APPEAL DISMISSED IN PART;
AFFIRMED IN PART;
REVERSED AND REMANDED IN PART

COUNSEL

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Counsel for Respondent/Appellant

OPINION

Presiding Judge Paul J. McMurdie delivered the Court's opinion, in which Judge Samuel A. Thumma and Judge Kent E. Cattani joined.

This opinion is subject to revision before publication in the Pacific Reporter.

McMURDIE, Judge:

¶1 Ravi Chand ("Husband") appeals from the decree dissolving his marriage to Angel Josefina Larrea ("Wife").

¶2 We affirm the superior court's rulings that Husband failed to prove a right to an offset or reimbursement for separate-property contributions he made to the community during and after the marriage. We also affirm the court's decision to treat a future tax benefit as community property in its equalization analysis and its preclusion of Husband's appraiser's opinion. We reverse the court's valuation of a community vehicle and its use of a rejected home-valuation boost to calculate Wife's equalization award, and we remand so that the court may adjust the award accordingly.

¶3 We dismiss the appeal as much as it challenges the award of attorney's fees and costs against Husband because the court did not resolve the award in the decree, and Husband did not file a notice of appeal after the court entered the separate judgment awarding fees and costs.

FACTS AND PROCEDURAL BACKGROUND

¶4 Husband and Wife married in 2018. Wife served a dissolution petition in mid-2022.

¶5 The matter proceeded to a trial in March 2024. But the court continued the trial to a second day in August because of late disclosures from both parties. Finding Husband more at fault for the disclosure issues, the court sanctioned him by awarding Wife interim attorney's fees, to be credited against any future fee award.

¶6 At the trial, Husband argued that he had a right to recoup around $79,000 of separate funds he had deposited during the marriage into a community bank account used for community expenses ("Wells Fargo x3581"). He also argued that he should recoup post-service contributions of separate funds to the community account used to pay a tax liability and recurring community debts, including the monthly car loan payments on the parties' Tesla.

¶7 Wife's financial expert testified on the first trial day and updated his opinions both on the second trial day and in connection with Wife's written closing argument. The expert testified that the transaction history for Wells Fargo x3581 rendered Husband's separate property deposits untraceable. He explained that, "after [many, possibly] thousands of transactions," there was "no way to differentiate one dollar from another," analogizing the situation to both "a scrambled egg that I cannot unscramble" and a can of white paint that, when mixed in with black paint, made the color "completely grey."

¶8 Wife's expert also calculated the values of the parties' two community vehicles: the Tesla and an unencumbered Infiniti. In determining the Tesla's equity value, the expert accounted for the loan payments due by the first trial day. Although the expert testified that he understood more loan payments were due before the second trial day, he did not update his valuation to reflect those payments.

¶9 Wife's expert also opined on the future tax benefit arising from the community's investment in a cryptocurrency firm that went bankrupt. He testified that the tax benefit for the loss was a real asset that only Husband could realize given the investment's structure. He assigned it a value based on the applicable tax rates. On the second trial day, the expert added that he believed Husband had begun to realize the tax benefits.

¶10 Along with the financial expert, Wife offered the testimony and report of an appraiser who valued the community home. In response, Husband sought to introduce a competing appraiser's report or recite the appraiser's opinion during his testimony. But the court precluded the report and prevented Husband from testifying to anything except that he had obtained an appraisal. The court reasoned that although neither party had invoked application of the Arizona Rules of Evidence ("Evidence Rules") via Arizona Rule of Family Law Procedure ("Family Rule") 2, the Evidence Rules governing expert and lay opinions still applied, and Husband was not qualified to offer an opinion under those rules.

¶11 After considering the evidence and the parties' written closing arguments, the court entered the dissolution decree in November 2024. The court determined that the community property should be divided equally. The court adopted nearly all of Wife's expert's positions, finding that he "was credible and presented an appropriate and logically consistent methodology for calculating community property as well as the competing and offsetting equalization payments due to each spouse." The court agreed with the expert that Husband's separate-property deposits into Wells Fargo x3581 were untraceable and found that Husband provided no clear, convincing, or credible tracing analysis. The court also found that Husband failed to adequately or clearly show payment from his separate funds for recurring community expenses post-service, and it gave him no credit for paying the alleged community tax debt.

¶12 The court divided all community bank accounts (including Wells Fargo x3581) equally, credited Wife for Husband's receipt of the tax benefit for the community's cryptocurrency-investment loss, credited Wife for Husband's receipt of the community home, and awarded the Infiniti to Wife and the Tesla to Husband. The court used Wife's appraiser's opinion to value the home and her financial expert's opinion to value the Tesla, without regard to the loan payments due by the second trial day. The court ordered Husband to pay Wife a substantial equalization.

¶13 The court found in the decree that Wife had a right to recover attorney's fees, expert's fees, and costs under Arizona Revised Statutes ("A.R.S.") § 25-324 because Husband had far more financial resources and he acted more unreasonably in the litigation. The court certified the decree as an appealable judgment under Family Rule 78(b) without deciding the amount of fees and costs to be awarded. Some months later, the court awarded Wife specific legal and expert fees and costs in an appealable judgment under Family Rule 78(c).

¶14 Husband timely filed a notice of appeal from the Family Rule 78(b) decree, but he did not file a notice of appeal from the Family Rule 78(c) judgment calculating the fees and costs. He challenges both the decree and the fee judgment in his appellate briefs.

JURISDICTION

¶15 Our jurisdiction is limited to that specifically provided by statute, Brionna J. v. Dep't of Child Safety, 247 Ariz. 346, 349, ¶ 7 (App. 2019), and "[w]e have an independent duty to determine whether we have jurisdiction over an appeal," *Desert Palm Surgical Grp., P.L.C. v. Petta*, 236 Ariz. 568, 576, ¶ 15 (App. 2015); *Walker v. Walker*, 256 Ariz. 295, 298, ¶ 10 (App. 2023) (A judgment

must comply with the applicable procedural rules.). We must dismiss an appeal when we lack jurisdiction. *Davis v. Cessna Aircraft Corp.*, 168 Ariz. 301, 304 (App. 1991).

¶16 A dissolution decree is generally appealable under A.R.S. § 12-2101(A)(1). *See Walker*, 256 Ariz. at 298, ¶ 11. A family-court litigant may appeal when fewer than all claims are resolved in a decree, so long as "the court expressly determines there is no just reason for delay and recites that the judgment is entered under [Family] Rule 78(b)." Ariz. R. Fam. L.P. 78(b). A claim for attorney's fees can be separate from the decree under Family Rule 78(b). *See Bollermann v. Nowlis*, 234 Ariz. 340, 342, ¶ 8 (2014). But for a fee judgment to be appealable, the court must first determine its amount. *Hernandez v. Athey*, 256 Ariz. 530, 532-33, ¶¶ 5-9 (App. 2023). "Until the court makes the entitlement decision and awards an amount, the court cannot certify any portion of the attorney-fees claim" as appealable. *Id.* at 533, ¶ 8.

¶17 Here, the court in the dissolution decree resolved the disputed claims and found that Wife was entitled to legal and expert fees and costs, but did not determine the specific amounts. Thus, the court's Family Rule 78(b) certification made only the decree's terms appealable. The fee and cost awards did not become appealable until the court issued the Family Rule 78(c) judgment, which settled the amounts. Because Husband appealed only from the decree, we lack jurisdiction to consider his challenges to the fees and costs awards and therefore dismiss that part of the appeal. We address the balance of the appeal below.

STANDARD OF REVIEW

¶18 We review the court's property characterization as separate or community *de novo*. *Bell-Kilbourn v. Bell-Kilbourn*, 216 Ariz. 521, 523, ¶ 4 (App. 2007). We review the court's allocation of community property for an abuse of discretion, upholding the ruling if the evidence reasonably supports it. *Boncoskey v. Boncoskey*, 216 Ariz. 448, 451, ¶ 13 (App. 2007). We view the evidence in the light most favorable to affirming the judgment, *id.*, and we defer to the superior court's determinations on witness credibility, *Gutierrez v. Gutierrez*, 193 Ariz. 343, 347-48, ¶ 13 (App. 1998). We review the court's evidentiary rulings for abuse of discretion and resulting prejudice, *Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 506 (1996), but we review the court's interpretation of procedural rules *de novo*, *Gutierrez v. Fox*, 242 Ariz. 259, 266, ¶ 28 (App. 2017).

DISCUSSION

A. The Superior Court Correctly Characterized Wells Fargo x3581 as Community Property Without Regard to Separate-Property Contributions During the Marriage.

¶19 Husband challenges the superior court's characterization of Wells Fargo x3581 as community property, asking to recoup separate funds he deposited into the account during the marriage. We detect no error in the court's characterization of the account as community property without accounting for the separate-property contributions made during the marriage.

¶20 Separate funds do not become community property simply because they are commingled with community funds during the marriage. *In re Marriage of Cupp*, 152 Ariz. 161, 164 (App. 1986) ("[T]ransmutation of separate property to community property [through commingling] occurs only when the identity of the property as separate or community is lost."); *see also O'Hair v. O'Hair*, 109 Ariz. 236, 239 (1973) (When a spouse deposits separate funds into a joint bank account, the marital relationship alone does not presume a gift of those funds to the community.). So long as the separate funds remain identifiable in some manner, they retain their character. *Cupp*, 152 Ariz. at 164.

¶21 But when the transactions (deposits and expenditures) are so mixed that a court cannot tell how much money is separate and how much is community, "a transmutation of separate money into community money occurs." *Potthoff v. Potthoff*, 128 Ariz. 557, 562 (App. 1981). That is, the commingled funds become community property unless the separate property is "explicitly traced" by its proponent. *Kim v. Pak*, 258 Ariz. 594, 597, ¶ 9 (App. 2024) (quotation omitted). The separate-property proponent must meet the burden to identify and trace the separate funds "with clear and satisfactory evidence." *Whitt v. Meza*, 257 Ariz. 176, 181, ¶ 15 (App. 2024). Tracing with sufficient evidence may take various forms. The court may consider circumstantial evidence, so dollar-for-dollar documentation of every transaction is not required. *Kim*, 258 Ariz. at 598, ¶ 17. For example, the separate-property proponent may use percentages to isolate and account for the separate property. *See id.* at 597-99, ¶¶ 8, 15-19. Or he or she may rely on account statements to show that separate contributions could not have been used on community expenses because the balance never fell below the separate amounts and there were no separate expenditures. *Whitt*, 257 Ariz. at 181-82, ¶ 16. But the proponent may not simply rest on the fact that he or she made separate-property deposits into a community account without accounting for separate expenditures. And that is what Husband did here.

¶22 Husband testified that he deposited around $79,000 of his separate funds into the community account during the four-year marriage. But Husband provided no reliable, systematic analysis tracking the disposition of the separate funds he deposited, including funds from his separate investment account and his separate real estate investments. He failed to trace his separate funds by any method explicitly. The court reasonably found Husband's testimony neither credible nor clear.

¶23 Husband urges that the court should have applied a presumption that the separate funds in a commingled account are used for separate expenses. *See Walker*, 256 Ariz. at 302, ¶ 33 (citing *Blaine v. Blaine*, 63 Ariz. 100, 113 (1945)). But he did not track his separate expenses from the account, and he acknowledged that funds from the account were also used for community expenses. When a spouse contributes separate property to pay community expenses during the marriage, the contribution is treated as a gift to the community unless there is a reimbursement agreement. *See Baum v. Baum*, 120 Ariz. 140, 146 (App. 1978). Husband failed to show how much of the account was used for separate or community expenses.

¶24 The court reasonably adopted Wife's financial expert's opinion that tracing the separate deposits was impossible on the evidence presented. Husband's contention that Wife's expert performed the tracing is untrue. Although the expert acknowledged commingling in the account and at first acknowledged that certain rental deposits could be traced, upon receiving more information, he unequivocally concluded that tracing the separate funds was impossible. And even assuming the expert was incorrect about the tracing being impossible, performing the tracing was Husband's—not Wife's—burden, to a standard of clear and satisfactory evidence. *See Whitt*, 257 Ariz. at 181, ¶ 15. Husband failed to satisfy that burden. He did not prove how any of the separate funds he moved to (or through) the account during the marriage remained separate.

¶25 The court did not err by finding Wells Fargo x3581 to be community property, despite the separate-property deposits made during the marriage.

B. The Superior Court Correctly Declined to Order Reimbursement for Separate-Property Contributions After Service of the Dissolution Petition.

¶26 Husband challenges the superior court's failure to order reimbursement for his payment of community liabilities with separate funds after he was served with the dissolution petition, including a tax debt and the recurring payments for the Tesla and other obligations. The court found: "Husband has not adequately or clearly made a claim for payment of recurring expenses after date of service. There are also significant and legitimate concerns with the adequacy and timeliness of his disclosures on the subject, but even without that issue, the Court is not convinced." We affirm the court's ruling.

¶27 First, the court did not abuse its discretion by declining to reimburse Husband for the community tax debt because he failed to prove its existence. Second, we agree that Husband was not entitled to reimbursement for his post-service separate-property contributions to Wells Fargo x3581, from which community debts (such as the Tesla debt) continued to be paid.

¶28 Separate funds used to pay community obligations during the marriage are presumed to be gifts to the community. *See Baum*, 120 Ariz. at 146. But because the community ends upon service of a petition that results in a dissolution decree, A.R.S. § 25-213(B), separate funds used to pay a community expense post-service are not presumed to be a gift to the community, *Bobrow v. Bobrow*, 241 Ariz. 592, 596, ¶ 15 (App. 2017). Thus, Husband was entitled to reimbursement for the separate funds he contributed to the community account post-service, which the parties used to pay community debts (or that remained unspent), absent clear and convincing evidence that he intended to make a gift to the community. *Id.* at 596-97, ¶¶ 15, 19-20. To prove his claim, Husband had the burden to prove his right to reimbursement—i.e., he had to show that his post-service separate contributions financed community obligations. *See Robertson v. Petz*, ___ Ariz. ___, ___, ¶¶ 25-27, 574 P.3d 232, 240-41 (App. 2025).

¶29 The record shows that Husband and Wife contributed separate funds to the account post-service. But Husband failed to meet his burden of proving a specific amount to which he had a right to be reimbursed for his separate contributions made after service. Husband argues that his post-service separate deposits must have been used to pay community debts because, in mid-June 2022, the month after service, Wells Fargo x3581's balance dropped to around $300. He ignores, however, that his separate deposits were not the only potential source of community post-service debt payments after the balance dropped to $300. Soon after the drop, Wells Fargo x3581 received significant infusions of community funds from a community investment account—$20,000 in June 2022 (which Husband briefly transferred to a different account that the court later found transmuted to community property) and $31,000 in August 2022. Furthermore, Wells Fargo x3581 was not later used solely for community expenses—it was also used to pay the separate debts of both parties. Although Husband provided a spreadsheet at trial listing expenditures and deposits, he did not show, by any measure of evidence, when or how his separate funds were used above the community deposits.

¶30 We detect no error in the superior court's determination that Husband was not entitled to reimbursement because he failed to prove that he spent his separate property on behalf of the community post-service.

C. The Court Correctly Characterized the Future Tax Carry-Forward Credit as Community Property.

¶31 Husband challenges the court's award of an equalization amount to Wife based on his receipt of a tax benefit arising from the community's failed investment in the bankrupt cryptocurrency firm. We affirm the court's ruling.

¶32 Wife's financial expert testified that the community's lost capital investment based on the company's bankruptcy created a tax benefit that, even when unrealized, was a "real," "tangible," "[c]alculatable," and "verifiable" asset. He valued it in his report based on its carry-forward benefit to Husband on future tax returns. The expert's characterization and calculation of the tax benefit was not error.

¶33 Individuals may claim capital loss from one year as a deduction from later-realized capital gains. *See* Brett R. Turner, *Income Tax Carry-Forwards*, 22 No. 11 Equitable Distribution J. 122 (2005). Other jurisdictions have recognized that such a "carry-forward" credit caused by lost community capital is community property subject to distribution at dissolution, valued in terms of the tax savings it is likely to generate. *Id.* (collecting cases); Brett R. Turner, 1 *Equitable Distribution of Property* § 5:9, n.19 (4th ed. 2024) (collecting cases). We agree. Even if the deduction is not immediately possible, it "offer[s] a reliable guarantee of future tax savings to the taxpayer who is able to claim [it]." Turner, *Income Tax Carry-Forwards*, *supra*. It is not, as Husband contends, a speculative or hypothetical benefit.

¶34 Thus, the court correctly characterized the carry-forward credit as community property and correctly considered its value to Husband when calculating Wife's equalization payment.

D. The Superior Court Correctly Precluded Husband's Appraiser's Opinion.

¶35 Husband challenges the court's ruling precluding him from admitting evidence of his appraiser's opinion about the community home's value. We affirm the court's ruling.

¶36 Because neither party chose to require compliance with the Evidence Rules under Family Rule 2, certain Evidence Rules did not apply, including those that limit the use of hearsay and require witnesses to have personal knowledge. *See* Ariz. R. Fam. L.P. 2(b)(1) (specifying that Evidence Rules 602 and 801-807 are among those that do not apply). But the Evidence Rules governing the admissibility of opinion testimony—Evidence Rules 701-706—still applied. *See* Ariz. R. Fam. L.P. 2(b)(2).

¶37 Husband argued that he could offer his appraiser's opinion because the hearsay and personal-knowledge requirements did not constrain him. The court reasoned, however, that the Evidence Rules on opinion testimony still barred its admission. Husband now argues that he could offer the evidence because a property owner is always entitled to opine about the property's value.

¶38 The principle that a property owner is competent to opine on his or her property's value is well-established, with our caselaw recognizing it in condemnation cases predating the adoption of the federal evidence rules (which our rules track as relevant here). *See, e.g.*, *Bd. of Regents of the Univ. & State Colls. of Ariz. v. Cannon*, 86 Ariz. 176, 177 (1959) (describing principle); *United States v. Martinez*, 536 F.2d 1107, 1108 (5th Cir. 1976) (describing the 1975 promulgation of federal evidence rules); *compare* Ariz. R. Evid. 701-02 *with* Fed. R. Evid. 701-02. And the evidence rules accommodate the principle that an owner may testify about his or her property's value. *See* Fed. R. Evid. 702 advisory committee notes to the proposed 1972 rule (The rule governing the admission of expert opinions includes "the large group sometimes called 'skilled' witnesses, such as bankers or landowners testifying to land values."); Fed. R. Evid. 701 advisory committee notes to the 2000 amendment (The rule governing the admission of lay opinions, which added a provision that such opinions cannot be based on "scientific, technical, or other specialized knowledge within the scope of Rule 702," was "not intended to affect the 'prototypical example[s] of the type of evidence contemplated by the adoption of Rule 701,'" such as a business owner's opinion on the business's value arising not from "experience, training or specialized knowledge within the realm of an expert, but . . . [from] the particularized knowledge that the witness has by virtue of his or her position in the business."). The rationale for allowing owner opinions is that an owner "has, by definition, knowledge of the components of value that are useful in ascertaining value." *United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 304 (App. 1983). In other words, the owner has knowledge "rooted in [his or] her experience as a landowner" about "what makes [the property] valuable." *City of Tucson v. Tanno*, 245 Ariz. 488, 493, ¶¶ 18, 20 (App. 2018).

¶39 The problem here is that Husband did not seek to offer his opinion, but that of his appraiser. To be sure, an owner may rely on collateral information to form his or her opinion. *See, e.g.*, *Town of Paradise Valley v. Laughlin*, 174 Ariz. 484, 486 (App. 1992) (A landowner who purchased property on the advice of others, with no personal investigation, should have been allowed to testify as to his opinion of the property's value.); *United Cal. Bank*, 140 Ariz. at 304 (An owner who calculated value using the Consumer Price Index was offering his own opinion.). Such reliance typically goes only to the evidence's weight, not its admissibility. *See Hartford Accident & Indem. Co. v. Dikomey Mfg. Jewelers, Inc.*, 409 A.2d 1076, 1079-81 (D.C. 1979) (The court correctly admitted an owner's opinion of her jewelry's value that was based on appraisals because she stated that "her own opinion as to value formulated by synthesizing information received from knowledgeable sources," and the opposing party could cross-examine her about the basis for her opinion and could cross-examine one of the appraisers as well.). But the owner must be offering his or her opinion—not merely introducing an absent expert's opinion wholesale. *See id.* at 1080 &

n.6 (An owner's flat recitation of an absent expert's opinion was inadmissible.) (citing *Yonan Rug Servs., Inc. v. U.S. Auto. Ass'n*, 69 A.2d 62 (D.C. 1949)); *United States v. 68.94 Acres of Land*, 918 F.2d 389, 398 (3d Cir. 1990) ("The rationale which justifies landowners' opinion testimony—i.e., their special knowledge of the property—does not extend to the mere repetition of another's assessment of the property's value.").

¶40 Here, Husband argued that he wanted to "testify to the existence of the appraisal and the amount that it appraised for." He elaborated that he was "not offering expert testimony, [but] . . . factual information that he requested an appraisal, and this was the amount," and was "just saying this is the appraisal I had done, and this is the resulting amount." But he also stated that he wanted the court to "consider the number." Husband's request was not a request to offer his opinion of the property's value as informed by the appraisal—it was a request to have the expert's opinion admitted and considered without complying with Evidence Rule 702. The court correctly precluded the evidence.[1]

E, The Superior Court Erred in Valuing the Tesla.

¶41 Husband challenges the superior court's failure to account for all payments on the Tesla in calculating its value. We agree with Husband that the court erred by calculating the Tesla's value based only on select payments, which impacted the court's equalization analysis.

¶42 Payments that reduced the Tesla's debt affected the community's equity value in it. Wife's financial expert recognized this when he accounted for the payments in calculating the vehicle's equity value as of the first trial day. He then conceded that additional payments came due before the second trial day. But neither the expert nor the court considered those added payments when assigning the Tesla's equity value. That was error. The Tesla was a community asset, so its equity value when awarded to Husband was relevant to the court's determination of an overall equitable division of the community property. *See* A.R.S. § 25-318(A).

¶43 On appeal, Wife argues that the court's decision not to consider the payments after the first trial day was intended to compensate her for Husband's role in creating the need for the second trial day. We reject Wife's argument for two reasons. First, Wife's theory is speculative as the court never stated it. Second, although the court has broad discretion to determine valuation dates to achieve equity, *e.g.*, *Sample v. Sample*, 152 Ariz. 239, 242-43 (App. 1986), its equitable determinations about property division must be made without regard to fault, *see* A.R.S. § 25-318(A), (C) (Absent waste, the court must divide community property "equitably, though not necessarily in kind, without regard to marital misconduct."). In short, although a party's litigation conduct may be relevant to sanctions, *see* Ariz. R. Fam. L.P. 26, or attorney's fees, *see* A.R.S. § 25-324, it does not affect an equitable property division.

¶44 The record reflects no justification for the court's disregard of the effect of the added loan payments on the Tesla's value. We remand so the court may revise the Tesla valuation to account for those payments and make any necessary adjustments to Wife's equalization award. We also reverse and remand for the court's use of Wife's boosted home valuation in calculating the equalization—an act that the parties agree was error, given the court's previous rejection of the boost.

CONCLUSION

¶45 We dismiss the part of the appeal that challenges the fee and cost awards. We reverse the dissolution decree's valuation of the Tesla and its use of the boosted home valuation to calculate the equalization payment, and remand so that the court may adjust the equalization in view of all relevant Tesla payments and without regard to the home valuation boost. We otherwise affirm the decree.

¶46 Both parties request attorney's fees and costs on appeal under A.R.S. § 25-324. Per our discretion, we deny both parties' requests.

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1 Because we affirm the court's determination on the merits, we need not explain why we reject Wife's argument that Husband waived his objection to the preclusion of the appraiser's opinion.

Cite as
160 Arizona Cases Digest 39

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE of Arizona,
Appellee,
v.
Francisco Santiago TAPIA-MUNOZ,
Appellant.

No. 1 CA-CR 24-0260
FILED 10-29-2025

Appeal from the Superior Court in Yuma County
No. S1400CR202201349
The Honorable David M. Haws, Judge
AFFIRMED

COUNSEL
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By Gracynthia Claw, *Counsel for Appellee*

OPINION
Judge Michael J. Brown delivered the opinion of the Court, in which Presiding Judge Anni Hill Foster and Judge Paul J. McMurdie joined.

This opinion is subject to revision before publication in the Pacific Reporter.

BROWN, Judge:
¶1 Francisco Tapia-Munoz appeals from his convictions and sentences for two counts of first-degree murder, and one count each of attempted murder, aggravated assault, and unlawful flight. Among the issues raised on appeal, he argues the trial court erred in overruling his hearsay objection to the contents of a cell phone extraction report. Because the report was generated automatically and its contents could not be influenced or altered by any human, we conclude the statements were not hearsay. We therefore affirm.

BACKGROUND

¶2 We view the evidence in the light most favorable to sustaining the jury's verdicts, resolving all reasonable inferences against Tapia-Munoz. See State v. Fierro, 254 Ariz. 35, 38, ¶ 2 (2022). In the early morning hours of November 12, 2022, Somerton police responded to a call about a man being shot multiple times. The victim, John, was lying on the sidewalk by a clinic, with blood coming from the back of his head.[1] Police found two bullet casings near John's body, as well as evidence at other locations nearby, including an intersection with casings and an alleyway with several other items.

¶3 Surveillance video footage showed a Buick sedan approach the area, with the driver shooting John at the intersection where the bullet casings were located. John then ran towards the alleyway to evade his assailant. The attacker pursued and ran over John with the Buick as he entered the alley. John was still able to stand up and flee to the clinic, where police ultimately found him, but he later died from his gunshot wounds. An automatic license plate reader took a photo of the Buick as it drove away from the clinic, with the license plate visible.

¶4 Another incident occurred at a nearby casino shortly after the shooting. The victim (Robert) and his fiancée were leaving the casino when they stopped before crossing a street to go toward the parking lot. A car with a license plate matching a portion of the Buick's license plate stopped and allowed them to cross, after which the couple proceeded to Robert's vehicle. The same car that had allowed them to cross drove back around and pulled up next to the couple. The driver exited the car, shot and killed Robert, and drove away. Later that day, Robert's fiancée identified the assailant as Tapia-Munoz in a photographic lineup. Police also found a bullet casing and an unfired bullet in the casino parking lot.

¶5 Officers located the Buick later the same morning and set a perimeter around the neighborhood where the car was parked. Around noon, Tapia-Munoz got in the Buick and tried to leave the area. Despite law enforcement efforts to stop him, Tapia-Munoz sped out of the neighborhood past the police, and a chase ensued. Tapia-Munoz eventually drove into another neighborhood, abandoned his vehicle, and fled on foot. After several minutes of searching, officers located and arrested Tapia-Munoz. Officers later searched the Buick and found a handgun with ammunition consistent with the casings found at both crime scenes. Subsequent testing confirmed the casings had markings consistent with having been fired from Tapia-Munoz's gun. Police also found several cellphones in the Buick. Cell phone location data placed Tapia-Munoz in the vicinity of both crime scenes when the murders occurred.

¶6 The State charged Tapia-Munoz with two counts of first-degree murder, one count of attempted murder for the initial shooting of John, one count of aggravated assault for running over John with the car, one count of unlawful flight, and one count of misconduct involving weapons. Before trial, Tapia-Munoz moved to sever the murder charge involving Robert from the offenses involving John under Arizona Rule of Criminal Procedure ("Rule") 13.4, asserting the two murders were "significantly different," and joinder would risk evidence of one murder becoming propensity evidence in the other. Tapia-Munoz also moved to sever the misconduct involving weapons charge from the other offenses. The court granted his motion on the misconduct charge but denied it on

the murder charge involving Robert, finding the offenses were "of the same or similar character" and were "connected in time, location and by overlapping evidence."

¶7 The jury convicted Tapia-Munoz as charged. During the aggravation phase, the jury found he committed each offense (except unlawful flight) with the use of a deadly weapon or dangerous instrument, and the offenses were committed while he was lying in wait for the victim.

¶8 At sentencing, the court found Tapia-Munoz had prior felony convictions sufficient in number and quality to make him a category three repetitive offender, *see* A.R.S. § 13-703(C), and he committed the crimes while on release in a separate felony case, *see* A.R.S. § 13-708(D). The court sentenced Tapia-Munoz to consecutive terms of natural life in prison for each murder conviction. For attempted murder, the court imposed a 28-year sentence, noting the factors the jury found, the prior convictions, and the lack of any mitigating factors justified the sentence. For aggravated assault, the court again noted the jury's aggravating factors, along with the lack of any mitigation, and imposed a 20-year sentence. As to unlawful flight, even though the jury found no aggravating factors, the court found an "aggravated" six-year sentence was appropriate based on "the aggravating circumstances . . . found by the jury" along with lack of mitigation. Tapia-Munoz appealed, and we have jurisdiction under A.R.S. §§ 13-4031, -4033.

DISCUSSION

¶9 Tapia-Munoz argues the trial court erred by (1) denying his motion to sever, (2) admitting the cell phone extraction report over his hearsay objection, and (3) committing sentencing errors.

A. Motion to Sever

¶10 According to Tapia-Munoz, the trial court abused its discretion in denying his motion to sever the first-degree murder count as to Robert from the remaining counts related to John's death. But given that Tapia-Munoz failed to renew his motion at the close of evidence, we review the court's denial only for fundamental error. *See State v. Allen*, 253 Ariz. 306, 332, ¶ 50 (2022); *State v. Laird*, 186 Ariz. 203, 206 (1996); *see also* Ariz. R. Crim. P. 13.4(c) (requiring defendant to renew a motion to sever during trial before or at the close of evidence, and that the right to severance under the rule is waived if the defendant "fails to timely . . . renew a proper motion").

¶11 To establish fundamental error, Tapia-Munoz must show trial error occurred, the error was fundamental, and the error caused him prejudice. *State v. Escalante*, 245 Ariz. 135, 142, ¶ 21 (2018). To establish prejudice, Tapia-Munoz must show that without the error, a reasonable jury could have reached a different verdict. *Id.* at 144, ¶ 29. This standard is not easily satisfied; it is an objective inquiry that "necessarily excludes imaginative guesswork." *Id.* at ¶ 31.

¶12 Arizona Rule of Criminal Procedure 13.3(a) allows "[t]wo or more offenses [to] be joined in an indictment, information, or complaint if they are each stated in a separate count" and the offenses: "(1) are of the same or similar character; (2) are based on the same conduct or otherwise connected together in their commission; or (3) are alleged to have been a part of a common scheme or plan." If the offenses are joined only because they are of the same or similar character, *see* Ariz. R. Crim. P. 13.3(a)(1), the defendant is entitled to severance as a matter of right unless "evidence of the other offense [] would be admissible if the offenses were tried separately." Ariz. R. Crim. P. 13.4(b).

¶13 Tapia-Munoz contends the court erred because much of the evidence related to each murder would not have been admissible had the offenses been tried separately. He points to the surveillance footage capturing John's murder, ballistic evidence recovered from that murder, and eyewitness testimony from Robert's fiancée that would not have been cross-admissible. According to Tapia-Munoz, this constituted improper propensity evidence of other bad acts.

¶14 We need not determine whether the court erred in denying the motion to sever because Tapia-Munoz has not presented any argument in his briefing regarding fundamental error or prejudice. Nor has he pointed to anything in the record showing the failure to sever the charges caused the jury to improperly consider evidence of Robert's murder as support for the other offenses. He offers only speculation that the jury improperly considered evidence from the different murders in finding him guilty, which is insufficient to establish prejudice. *See Escalante*, 245 Ariz. at 144, ¶ 31.

¶15 Moreover, the court instructed the jury that "[e]ach count charges a separate and distinct offense" and that they "must decide each count separately on the evidence with the law applicable to it, uninfluenced by [their] decision on any other count." The court further instructed the jury it could "find that the State has proved beyond a reasonable doubt all, some, or none of the charged offenses." Tapia-Munoz has not identified anything in this record showing the court's denial of his motion to sever caused the jury to render any of its verdicts on an improper basis. *See Allen*, 253 Ariz. at 334, ¶ 62 (citation omitted); *see also State v. Hausner*, 230 Ariz. 60, 75, ¶ 48 (2012) (concluding a defendant could not show prejudice when "the trial court instructed the jurors to consider each charged offense separately and advised them that the State had to prove each beyond a reasonable doubt."). Tapia-Munoz has failed to show the court committed fundamental, prejudicial error in denying his motion to sever.

B. Hearsay

¶16 During trial the State introduced exhibits 541 and 542 to confirm a "Cellebrite" extraction police had performed on one of the cell phones found in

the Buick. As explained by one of the State's witnesses, a criminal intelligence analyst, Cellebrite is a "tool that is used to extract information from devices such as cell phones, SD cards, [and] SIM cards." Cellebrite consists of a hardware component used to extract data from a phone along with software that processes the information and converts it to a viewable report. The analyst noted that Cellebrite generates the report of the extracted data, and that he has no way of manipulating the information in the report. The only information listed in the one-page Cellebrite reports is the cell phone number connected to the SIM for each of the two phones. These were the same phone numbers used to collect the cell phone location data linking Tapia-Munoz to the crime scenes. The trial court admitted the exhibits over Tapia-Munoz's objection under the business record exception to the hearsay rule.

¶17 Tapia-Munoz challenges the admission of the Cellebrite reports. He argues the reports do not satisfy the business record hearsay exception found in Arizona Rule of Evidence ("Evidence Rule") 803(b)(6). We review a court's ruling on hearsay for an abuse of discretion. *State v. Franklin*, 232 Ariz. 556, 559, ¶ 10 (App. 2013).

¶18 Before deciding whether the exhibits meet the requirements of a hearsay exception, we first consider whether the reports constitute hearsay. Hearsay is "a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted." Ariz. R. Evid. 801(c). A "statement" is "a *person's* oral assertion, written assertion, or nonverbal conduct," and a "declarant" is "the *person* who made the statement." Ariz. R. Evid. 801(a)–(b) (emphasis added). Hearsay statements are generally inadmissible. *See* Ariz. R. Evid. 802.

¶19 The State argues the Cellebrite reports are not hearsay because there is no "declarant" who could have provided a "statement" under this rule. Federal courts have addressed similar questions, and because the Federal Rules of Evidence and the Arizona Rules of Evidence are identical on this topic, *compare* Ariz. R. Evid. 801(a)–(c), 802, *with* Fed. R. Evid. 801(a)–(c), 802, such authority is persuasive, *see State v. Delgado*, 232 Ariz. 182, 186, ¶ 11 (recognizing that when the Arizona Rules of Evidence mirror the Federal Rules of Evidence, federal court decisions are persuasive authority in analyzing Arizona's rules).

¶20 In *United States v. Lizarraga-Tirado*, 789 F.3d 1107, 1109–10 (9th Cir. 2015), the Ninth Circuit determined that a "tack" placed on a map by Google Earth was not hearsay because it was not a "statement." The court explained that Google Earth users could type in GPS coordinates, and that the program would automatically produce a digital "tack" on a map corresponding with those coordinates. *Id.* at 1108. Though a person enters the coordinates, that person "has no role in figuring out where the tack will be placed" and Google Earth places the tack after analyzing the coordinates "without any human intervention." *Id.* at 1110. The Ninth Circuit concluded that because the program makes the relevant assertion that its tack aligns with the coordinates provided, there is no "statement" for hearsay purposes. *Id.* Several other circuit courts have reached similar conclusions. *See, e.g.*, *United States v. Waguespack*, 935 F.3d 322, 334 (5th Cir. 2019) (rejecting appellant's argument that the trial court erred by admitting machine-generated materials); *United States v. Channon*, 881 F.3d 806, 811 (10th Cir. 2018) (explaining that records "produced by machines" fell "outside the purview of Rule 801, as the declarant is not a person"); *United States v. Lamons*, 532 F.3d 1251, 1262–64 (11th Cir. 2008) (noting the court had "no difficulty" concluding that billing records from a telephone provider fell outside the definition of hearsay because producing those records was "fully automated" and "no human intervened at the time the raw billing data was 'stated' by the machine"); *United States v. Washington*, 498 F.3d 225, 229–31 (4th Cir. 2007) (finding that machine-generated raw data about a blood sample was not hearsay because "[o]nly a *person* may be a declarant and make a statement," meaning nothing produced by a machine constitutes hearsay).

¶21 The criminal intelligence analyst testified that Cellebrite automatically organizes the information it extracts. Aside from physically plugging the phone and SIM card into the hardware, there is no human input into the program's functioning or the report it produces. Importantly, the analyst explained that he cannot manipulate the information that Cellebrite generates in its report. *See People v. Hamilton*, 452 P.3d 184, 193, ¶ 26 (Colo. App. 2019) ("A computer-generated record constitutes hearsay, however, when its creation involves human input or interpretation."). Much like the program described in *Lizarraga-Tirado*, Cellebrite performs the "real work" of extracting data from the phone and does so "without any human intervention" after the phone is plugged into the system. *Lizarraga-Tirado*, 789 F.3d at 1110.

¶22 This is not to say that information or communications generated by computers or machines are automatically beyond the purview of hearsay. Machine-generated materials and reports may implicate hearsay concerns when the underlying contents rely on some kind of human input to create those materials. *See United States v. Juhic*, 954 F.3d 1084, 1089 (8th Cir. 2020) (noting that an automated log of child sexual abuse material was hearsay because the process for compiling those materials required humans to tag those images); *see also Black v. State*, 358 S.W.3d 823, 832 (Tex. Crim. App. 2012) (finding that text messages stored on a cellphone were not computer-generated data exempt from hearsay because "the contents of the

messages were produced by human thought and action"); *Baker v. State*, 117 A.3d 676, 683 (Md. Ct. Spec. App. 2015) (declining to find cellphone call records fell outside the definition of hearsay because the record showed the relevant data was "entered by a person"). Aside from hearsay, such materials may involve authentication issues. *See* Ariz. R. Evid. 901(a); *Lizarraga-Tirado*, 789 F.3d at 1110 ("A proponent must show that a machine is reliable and correctly calibrated, and that the data put into the machine is accurate."); *see also* Kenneth S. Broun et. al., 2 *McCormick on Evidence* § 294 (Robert P. Mosteller ed., 9th ed. 2025) ("Because such records are not the counterpart of a statement by a human declarant, which should ideally be tested by cross-examination of that declarant, they should not be treated as hearsay, but rather their admissibility should be determined on the basis of the reliability and accuracy of the process involved."). Those concerns are not presented here.

¶23 Because Cellebrite is not a "person," and nothing in this record suggests the results of the Cellebrite report were in any way the product of human thought or action, they are not "statements" made by a "declarant," and thus are not hearsay under Evidence Rule 801. This conclusion aligns with decisions from other states addressing similar issues. *See e.g.*, *Bryan v. State*, 903 S.E.2d 160, 167–68 (Ga. App. 2024) (finding that Cellebrite extraction report was not a statement made by a declarant and therefore not hearsay); *Commonwealth v. Udeba*, 170 N.E.3d 709, 717 (Mass. App. Ct. 2021) (explaining that "the human input required to create the extraction reports essentially amounted to plugging each cell phone into the Cellebrite device" and that the extraction reports were "not statements for purposes of the hearsay rule"); *People v. Abad*, 490 P.3d 1094, 1105, ¶¶ 54–55 (Colo. App. 2021) (noting that cell phone extraction reports did "not require any human input short of plugging the phone into a machine" and because the reports were "automatically generated" they were not "statements" made by a "declarant"); *cf. Commonwealth v. Grubbs*, 330 A.3d 444, 451 (Pa. Super. Ct. 2025) (finding that GPS data collected from cell phone records did not qualify as hearsay).

¶24 Accordingly, we need not determine whether the exhibits met the requirements of a hearsay exception. The trial court did not abuse its discretion by overruling Tapia-Munoz's objection.

C. Sentencing and Aggravating Factors

¶25 Tapia-Munoz's final argument concerns his sentences for aggravated assault and unlawful flight. Because he failed to object at sentencing, we review for fundamental error only, which requires him to show his sentences were erroneous, the errors were fundamental, and the errors prejudiced him. *Escalante*, 245 Ariz. at 142, ¶ 21.

¶26 The trial court found that Tapia-Munoz is a category three repetitive offender, a finding he did not challenge at sentencing or in his appellate briefing. Thus, A.R.S. § 13-703(J) provides the relevant sentencing ranges for the offenses at issue. To impose a maximum sentence, the court must have found at least one statutory aggravating factor under A.R.S. § 13-701(D). *See* A.R.S. § 13-703(C).

1. Aggravated Assault

¶27 Tapia-Munoz argues the trial court erred in sentencing him as to his aggravated assault conviction. For all convictions except unlawful flight, the jury found two aggravating factors: Tapia-Munoz committed the offenses (1) with a deadly weapon or dangerous instrument; and (2) while he was lying in wait for the victim. As to aggravated assault, Tapia-Munoz argues the first factor should not have been considered because the use of a deadly weapon or dangerous instrument was an essential element of the underlying aggravated assault conviction.

¶28 The State charged Tapia-Munoz with aggravated assault under A.R.S. § 13-1204(A)(2), which provides that a defendant commits aggravated assault by committing simple assault, *see* A.R.S. § 13-1203, and does so using "a deadly weapon or dangerous instrument," A.R.S. § 13-1204(A)(2). Aggravated assault under this subsection is a class three felony. A.R.S. § 13-1204(F). Under A.R.S. § 13-703(J), the presumptive sentence term for a class three felony is 11.25 years and the maximum is 20 years. Tapia-Munoz received a 20-year sentence for aggravated assault.

¶29 As provided in A.R.S. § 13-701(D)(2), the court may consider the use of a deadly weapon or dangerous instrument as an aggravating factor unless "this circumstance is an essential element of the offense of conviction." Because the use of a deadly weapon or dangerous instrument is an essential element of § 13-1204(A)(2), the court erred in considering this factor when imposing an aggravated sentence as to this conviction.

¶30 But Tapia-Munoz must also demonstrate fundamental error resulting in prejudice. *See Escalante*, 245 Ariz. at 142, ¶ 21. Although the imposition of an illegal sentence is fundamental error, *see State v. Munninger*, 213 Ariz. 393, 397, ¶ 11 (App. 2006), Tapia-Munoz did not receive an illegal sentence. The court needed only one proper aggravating factor to impose a sentence above the presumptive. *See* A.R.S. § 13-703(D); *State v. Martinez*, 210 Ariz. 578, 585, ¶ 26 (2005) ("[T]he existence of a single aggravating factor exposes a defendant to an aggravated sentence"). And the jury found such a factor by determining that Tapia-Munoz was lying in wait for the victim when he committed the offense. *See* A.R.S. § 13-701(D)(17). Moreover, the court found that Tapia-Munoz had prior convictions, which could also function as an aggravating factor. *See* A.R.S. § 13-701(D)(11). Because the court had sufficient aggravating factors to impose an aggravated sentence, Tapia-Munoz has not shown that resentencing is necessary.

2. Unlawful Flight

¶31 Tapia-Munoz likewise argues the court erred by imposing an aggravated sentence on his conviction for unlawful flight. Unlike Tapia-Munoz's other convictions, the jury found no aggravating factors applicable to this offense. Thus, he contends the court "improperly considered aggravating factors not found by the jury when it imposed an aggravated sentence." *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.").

¶32 Unlawful flight is a class five felony. A.R.S. § 28-622.01. Because the court found that Tapia-Munoz was a category three repetitive offender, his sentence for this offense is governed by A.R.S. § 13-703(J). Under A.R.S. § 13-703(J), the presumptive sentence for a class five felony is five years and the maximum, requiring at least one proper aggravating circumstance, is six years. *Id.*; A.R.S. § 13-701(C). The minimum sentence is four years. A.R.S. § 13-703(J). The court imposed a six-year sentence based on the aggravating factors the jury found, but as the State acknowledges, the jury found no aggravating factors for this offense.

¶33 The State argues nonetheless that Tapia-Munoz's sentence was appropriate because Tapia-Munoz committed the crime while on pretrial release. Under A.R.S. § 13-708(D), "[a] person who is convicted of committing any felony offense that is committed while the person is released on bond or on the person's own recognizance on a separate felony offense . . . shall be sentenced to a term of imprisonment two years longer than would otherwise be imposed for the felony offense." At sentencing, the court found that Tapia-Munoz committed unlawful flight while on pretrial release for a separate felony offense.[2] In light of § 13-708(D), had the court imposed the presumptive term for this offense, for which no aggravating factor is required, Tapia-Munoz would have received a seven-year sentence. But the six-year sentence the court imposed meant that Tapia-Munoz actually received the *minimum* sentence (four years) for unlawful flight. With the two-year enhancement required under § 13-708(D), the court did not err because no aggravating factors were needed to support a six-year sentence for unlawful flight.

CONCLUSION

¶34 We affirm Tapia-Munoz's convictions and sentences.

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1 We use pseudonyms to protect the victims' identities.

2 The State notes in its answering brief the trial court found Tapia-Munoz committed the crime while on pretrial release. Because that finding increased his sentence through § 13-708(D), such a finding should have been made by a jury. *See State v. Gross*, 201 Ariz. 41, 45, ¶ 19 (App. 2001) (concluding that a defendant's release status, for sentencing purposes, must be determined by a jury); *State v. Benenati*, 203 Ariz. 235, 241–42, ¶ 22 (App. 2002) (vacating two-year sentencing enhancement because consideration of defendant's release status was not decided by the jury). But Tapia-Munoz did not object to the court's finding, nor has he challenged it on appeal. Thus, we consider the implication of § 13-708(D) for his sentence but note that in normal circumstances such a finding is appropriately left to the jury rather than the court.

Cite as
160 Arizona Cases Digest 44

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

IN RE The MARRIAGE OF
Marc Aaron WICHANSKY,
Petitioner/Appellant/Cross-Appellee,
and
Alexis Haley WICHANSKY,
Respondent/Appellee/Cross-Appellant.

No. 2 CA-CV 2024-0192-FC
Filed October 29, 2025

Appeal from the Superior Court in Maricopa County
No. FC2015009035
The Honorable Kevin Wein, Judge
The Honorable James Drake, Judge
AFFIRMED

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OPINION
Vice Chief Judge Eppich authored the opinion of the Court, in which Judge Sklar and Judge O'Neil concurred.

This opinion is subject to revision before publication in the Pacific Reporter.

EPPICH, Vice Chief Judge:
¶1 Marc Wichansky appeals from the trial court's order granting his former wife Alexis Wichansky's motion to divide undivided assets, as well as its denial of his motion to compel attorney communications and several post-judgment motions. Alexis cross-appeals from the court's order denying her motion to amend. Marc argues the court erroneously concluded he had not disclosed his interest in a business, Team Select, to Alexis, failed to enforce the Property Settlement Agreement (PSA) as written, and wrongly awarded over $3.68 million in attorney fees. On cross-appeal, Alexis asserts the court erred by not awarding her a higher amount of attorney fees. For the following reasons, we affirm.

Factual and Procedural Background
¶2 Marc and Alexis married in 2002. Marc petitioned for dissolution of marriage in November 2015. During dissolution proceedings, Marc and Alexis came to a settlement and filed a PSA with the trial court in September 2017. The language of the PSA, in relevant part, is as follows:

> **2. Disposition of Property**. . . . This agreement intends and does eliminate any and all claims made by wife to husband's business(s) interest, whether past, present or future.
>
> . . . .
>
> **9. Release of Claims.** Subject to the provisions of this Agreement and the custody agreement each Party hereto:
>
> (a) Releases the other Party from all further claims, rights, liabilities or obligations, arising out of or associated with their marriage, the Dissolution Action, or the division of their property or obligations. Specifically, wife waives any claims to any interest husband may have or has in any business, except as outlined below regarding the judgment for the MGA funds. Husband waives any claims for monies given to wife since the filing and reimbursement of any fees paid to wife's counsel or charged to any community credit card now known to husband and paid by husband currently.
>
> For Wife's waiver of these claims, wife shall receive a portion of the net funds collected due to husband's judgment for his separate business interest known as the MGA judgment which business was sold during the marriage of the parties. . . .
>
> (b) Both parties further release any and all rights, interests, or claims that he or she may now or hereafter have in any earnings or property . . . now owned or hereafter acquired by or on behalf of the other Party.
>
> . . . .
>
> **15. Full Disclosure.** The parties hereby warrant and represent to one another that each has made a full, fair, and complete disclosure of all assets and liabilities known to them. This agreement divides all community, common or joint property or property to which either party claims an interest, either directly or indirectly.
>
> Each party does hereby intend that this Agreement shall be and is a full and complete resolution of all issues between the parties. Each party hereby waives the right to any further disclosure and acknowledges that the right to seek further disclosure or discovery of any assets and/or liabilities is forever waived by this provision. Each party has made an undisputed decision to resolve all issues

relating to their marriage, based upon the disclosure made available to each party and the other parties warranting of good faith and fair dealing in the disclosure of all property and debts.

¶3 The trial court entered the consent decree of dissolution that same month, incorporating the PSA by reference. In October 2018, Alexis filed a motion to set aside the initial decree of dissolution and then amended her motion to divide undivided assets. Afterward, the court permitted the issue to go forward and allowed Alexis to conduct discovery. Marc moved to vacate this order for lack of subject-matter jurisdiction and also filed a motion to set aside the consent decree. The court denied both motions. After continued litigation, the court granted Alexis's motion to divide undivided assets in August 2021. Marc filed a motion for reconsideration, which the court denied. The court then ordered Marc to pay Alexis a judgment of $23,199,378.59 as well as $3,684,510.81 in attorney fees. Both parties filed motions to amend, which the court denied. Marc appealed, and Alexis cross-appealed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Discussion

I. Team Select Disclosure

¶4 On appeal, Marc argues the trial court erroneously concluded he had not disclosed his interest in Team Select to Alexis. "We review a trial court's findings of fact for abuse of discretion and reverse only when clearly erroneous." *In re Marriage of Gibbs*, 227 Ariz. 403, ¶ 6 (App. 2011). "Factual findings are not clearly erroneous if substantial evidence supports them." *In re $26,980 U.S. Currency*, 199 Ariz. 291, ¶ 9 (App. 2000). Evidence is substantial if it permits a reasonable person to reach the court's result. *Id.*

¶5 Marc sent Alexis an email in September 2015, two months before filing his petition for dissolution. In this email, he acknowledged that Team Select was valuable and that they may need to hire a valuation expert in preparation for separating their community property. However, despite Alexis's continued questions throughout the dissolution proceedings as to his interest in Team Select, Marc and his attorneys expressly and repeatedly denied that he held any interest in it.[1] Alexis signed the PSA, which did not specifically mention Team Select, and the PSA was incorporated into the decree of dissolution on September 15, 2017. Marc received $10 million from the sale of Team Select a little over two weeks later, with future payments to follow. Still, Marc continued to assert he did not have any interest in Team Select.

¶6 Alexis filed a motion to divide undivided assets, and at trial she testified that Marc had not informed her of his ownership interest in Team Select. She presented numerous statements from Marc and his attorneys to support her testimony.

¶7 On appeal, Marc claims that his interest in Team Select was only an "ambiguous handshake agreement, and a hope," of which Alexis was aware. He also argues the 2015 email sufficiently disclosed his interest in Team Select, despite his numerous subsequent denials to her and to the trial court of any interest in the asset.

¶8 Marc's arguments on appeal lack merit. The trial court did not abuse its discretion by finding the 2015 email was insufficient disclosure because Marc repeatedly denied any ownership in Team Select instead of providing Alexis with information that would assist her in evaluating his interest in the company. See Ariz. R. Fam. Law P. 49(g)(6). His next assertion, that Alexis was informed of his "handshake agreement, and a hope," is contradicted by the record. We do not reweigh the credibility of witnesses on appeal, *see In re Ghostley*, 248 Ariz. 112, ¶ 21 (App. 2020), and the court found credible Alexis's testimony, supported by ample evidence, that Marc had denied having any interest in Team Select. A reasonable person could thus conclude Marc did not disclose his interest in Team Select. *See $26,980 U.S. Currency*, 199 Ariz. 291, ¶ 9. Therefore, the court's finding was not clearly erroneous. *See Marriage of Gibbs*, 227 Ariz. 403, ¶ 6.

II. Motion to Compel

¶9 Marc next contends the trial court erroneously denied his motion to compel discovery because Alexis impliedly waived her attorney-client privilege by stating that her understanding of what was included in the PSA was based on communications with her attorney. We review whether a party has impliedly waived the attorney-client privilege de novo, as this poses a mixed question of law and fact. *Empire W. Title Agency, L.L.C. v. Talamante*, 234 Ariz. 497, ¶ 8 (2014).

¶10 Before trial, Marc deposed Alexis and she testified that she understood any asset not included in the PSA to be an "omitted asset" under A.R.S. § 25-318(D). When asked where her understanding of § 25-318(D) came from, she replied, "My lawyer at the time." Marc moved to compel discovery of these communications between Alexis and her attorney, arguing that Alexis had "made this case about *her understanding and intent* regarding the PSA." The trial court denied his request, concluding Alexis's motion to divide undivided assets did not depend on the substance of the privileged communications.

¶11 In order for there to be an implied waiver of attorney-client privilege, there must be an assertion of the privilege; the asserting party must put the protected information at issue; and application of the privilege must deny the opposing party access to information vital to his or her defense. *State Farm Mut. Auto. Ins. Co. v. Lee*, 199 Ariz. 52, ¶ 10 (2000) (quoting *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D. Wash. 1975)). When a party uses the privilege as both a "sword and a shield," the privilege has been waived. *Id.* ¶ 18. However, "neither the 'relevance nor pragmatic importance alone [of the information

sought] will support a finding that the attorney-client privilege has been waived.'" *Empire W. Title Agency*, 234 Ariz. 497, ¶ 10 (alteration in *Empire W. Title Agency*) (quoting *Twin City Fire Ins. Co. v. Burke*, 204 Ariz. 251, ¶ 22 (2003)). The party asserting the privilege must have affirmatively put his or her mental state or subjective knowledge at issue. *Id.* ¶ 14.

¶12 An important preliminary question is to determine Alexis's position in asserting her case. In her motion to divide undivided assets, Alexis asked the trial court to grant relief on the ground that Team Select was an omitted asset that Marc had failed to disclose during dissolution proceedings. In concluding that "the parties did not intend for the PSA to apply to [Marc]'s ownership interest in Team Select," the court found that he had repeatedly failed to disclose that asset in violation of the PSA's good-faith disclosure requirement. Based on that finding, the court determined that Marc could not benefit from the release provision contained in section fifteen of the PSA, and thus Team Select was an omitted asset under that contract. None of this reasoning suggests that Alexis's subjective interpretation of the contract was at issue. Instead, Marc's failure to disclose his interest in Team Select caused the court to find it to be an omitted asset that he and Alexis equally owned as tenants in common under § 25-318(D).

¶13 The lone case Marc cites to support his position, *State Farm Mutual Automobile Insurance Co. v. Lee*, is distinguishable. In that case, the party claiming attorney-client privilege was defending against a bad-faith claim and asserted that its communications with its attorneys was proof of its subjective good faith. *Lee*, 199 Ariz. 52, ¶ 15. Here, Alexis's claim did not rely on her subjective interpretation of the contract or her reliance on her attorney's advice when signing the PSA. Instead, her claim relied on Marc's repeated misrepresentations to her that he did not have any ownership interest in Team Select. Therefore, because Alexis did not put the privileged information at issue, she did not waive her attorney-client privilege. *See Empire W. Title Agency*, 234 Ariz. 497, ¶¶ 8, 14.

¶14 Even if we were to conclude Alexis had put her subjective interpretation of the contract at issue, Marc fails to show how application of the privilege denied him access to information vital to his defense. *See Lee*, 199 Ariz. 52, ¶¶ 10, 23. Marc questioned Alexis concerning her understanding of the PSA at her deposition and at trial. Alexis's discussions with her attorneys about her understanding of the PSA is not vital to his claim that he had disclosed his interest in the asset. *See Twin City Fire Ins. Co.*, 204 Ariz. 251, ¶ 22.

III. Extrinsic Evidence

¶15 Marc next asserts that because the PSA was unambiguous, the trial court erred by allowing extrinsic evidence at trial to help interpret it. We review de novo whether contract language is ambiguous so that extrinsic evidence is permitted. *See In re Estate of Lamparella*, 210 Ariz. 246, ¶ 21 (App. 2005). But we review the court's evidentiary rulings for an abuse of discretion. *See Larsen v. Decker*, 196 Ariz. 239, ¶ 6 (App. 2000); *see also Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 155 (1993) (trial court has discretion to decide when to admit extrinsic evidence because it is "in the best position to decide how to proceed").

¶16 Before trial, Marc filed a motion to set aside the consent decree. He argued that the PSA was "clear and unambiguous" as to Alexis's waiver of her interest in Team Select. The trial court denied the motion and found the language of the release to be ambiguous. Marc later filed a motion for summary judgment, where he again claimed the PSA was unambiguous. The court denied this motion, and "continue[d] to find the PSA ambiguous." At trial, the court considered extrinsic evidence in the form of Alexis's testimony that she did not believe Team Select was covered by the PSA because Marc had denied owning it.

¶17 Arizona law adopts a permissive approach to the parol evidence rule. *Long v. City of Glendale*, 208 Ariz. 319, ¶ 27 (App. 2004). Before the trial court can admit extrinsic evidence when interpreting a contract, it must first consider the offered evidence, and if the contract is "reasonably susceptible" to the proponent's interpretation, the evidence is admissible. *Lamparella*, 210 Ariz. 246, ¶ 22 (quoting *Taylor*, 175 Ariz. at 154). If the asserted interpretation is unreasonable, or the offered evidence is not persuasive, the court need not admit the extrinsic evidence. *Taylor*, 175 Ariz. at 155.

¶18 Here, the trial court correctly concluded Alexis's interpretation of the PSA was reasonable. While section two of the PSA broadly waives "any and all" of Alexis's claims to Marc's business interests, and section nine contains a similar release provision, these waivers are not unqualified. The entire agreement is subject to section fifteen's full-disclosure requirement, with which the court concluded Marc did not comply. As explained above, we defer to the trial court's finding of fact if it is not clearly erroneous. *Marriage of Gibbs*, 227 Ariz. 403, ¶ 6. As such, Alexis's interpretation of the PSA was reasonable, and the court did not err by considering extrinsic evidence in its interpretation of the contract. *See Taylor*, 175 Ariz. at 155.

IV. Team Select Waiver

¶19 Marc next argues Alexis waived any interest she may have had in Team Select by signing the PSA, and because the PSA provided for Team Select, the trial court erred by granting her motion to divide an undivided interest under § 25-318(D). We review the trial court's interpretation of contracts such as the PSA de novo. *See Rinegar v. Rinegar*, 231 Ariz. 85, ¶ 14 (App. 2012); *In re Marriage of McCulloch & Parker*, 257 Ariz. 195, ¶ 34 (App. 2024).

¶20 Before trial, Marc filed a motion to set aside the consent decree, claiming, as he does on appeal, that Alexis waived any interest she may have had in Team Select by signing the PSA. The trial court denied this motion, finding Team Select was not identified in the PSA, and therefore it was not clear if Alexis had waived her interest in that particular asset. Marc later filed a motion for summary judgment, in which he again claimed the PSA included a waiver of her interest in Team Select. The court, following its prior reasoning, denied this motion, finding neither the PSA, divorce decree, nor settlement negotiations made any mention of Team Select and therefore the PSA did not clearly contain a release of interest in Team Select.

¶21 Marc asserts sections two and nine of the PSA include catch-all provisions where Alexis waived her interest in any business he may have had an interest in at the time of signing, including Team Select. Therefore, Marc contends, Team Select was provided for by the PSA and cannot be an omitted asset divisible by § 25-318(D). Alexis argues Team Select is not included in the catch-all provision because Marc did not comply with the full-disclosure provision of the agreement in section fifteen, and thus is not provided for by the PSA.

¶22 A PSA incorporated into the decree of dissolution is an independent contract and is governed by the principles of contract law. *MacMillan v. Schwartz*, 226 Ariz. 584, ¶ 15 (App. 2011). "[A] court will attempt to enforce a contract according to the parties' intent." *Taylor*, 175 Ariz. at 152. Under § 25-318(D), any community property that is not provided for in the decree is held by the parties as tenants in common. This statute does not apply when all of the parties' assets are explicitly disposed. *Lamparella*, 210 Ariz. 246, ¶ 2. Additionally, § 25-318(F) requires the decree to specifically describe any property affected.

¶23 Here, Alexis's contention that Team Select was not included in the PSA, despite the catch-all waiver provision, was correct considering Marc's repeated claims he had no interest in the asset. The PSA includes a provision requiring full disclosure of all assets by both parties. Alexis's testimonial extrinsic evidence demonstrated that Marc did not comply with this provision. The trial court found her testimony that the PSA was not intended to cover Team Select to be "credible and supported by the evidence." We defer to the court's findings of credibility, *Ghostley*, 248 Ariz. 112, ¶ 21, and similarly conclude the PSA did not provide for Team Select, *cf. Lamparella*, 210 Ariz. 246, ¶¶ 25-26 (an unqualified catch-all provision applies to any and all property not otherwise identified in the agreement and the property is not divisible under § 25-318(D)).

V. Attorney Fees

¶24 Marc argues that the trial court erred in its award of attorney fees. We will not disturb a court's award of attorney fees absent an abuse of discretion. *Lehn v. Al-Thanayyan*, 246 Ariz. 277, ¶ 29 (App. 2019).

¶25 Alexis hired her current attorneys in April 2019 and July 2021. She entered into a contingency fee agreement to pay them collectively 33.3 percent of all gross amounts recovered. Her attorneys completed approximately four thousand hours of work spanning over five years during the course of litigation. The trial court awarded her fees for the litigation related to two separate assets, MGA Employee Services, Inc. ("MGA"), and Team Select.

¶26 The PSA included a provision concerning litigation Marc was involved in with his former company, MGA. Under the PSA, if Marc received a judgment net payment of $8 million or more, Alexis would receive $2.5 million. Marc admitted to receiving a disbursement above the agreed-upon $8 million, but failed to provide Alexis with any accounting of the proceeds or to pay her any amount. Alexis's attorneys petitioned the trial court to enforce the decree. Later, Alexis filed a motion for summary judgment on her petition to enforce the decree. The court granted Alexis's petition and awarded her attorney fees.

¶27 During the Team Select litigation, the trial court held two trials. In the first, the court considered whether to grant Alexis's motion to divide Team Select as an undivided asset. Her motion was granted, and as the prevailing party, the court awarded her attorney fees "associated with the MGA litigation only." It determined Marc had significantly greater financial resources than Alexis, he had acted unreasonably during proceedings, and the continency fee agreement was appropriate.

¶28 Alexis filed an application and affidavit in support of the award of attorney fees for the MGA litigation, requesting the contingency fee amount owed, $832,500, although her attorneys calculated the actual fees incurred to only be around $35,000. Marc filed a response, contending the amount requested was unreasonable. Ultimately, the trial court deferred ruling until the Team Select litigation was complete. In its August 2021 ruling, the court conducted an eight-factor *Fallers*[2] test to evaluate the reasonableness of the contingency fee for the MGA litigation and determined that "while a contingency fee arrangement is appropriate here, a full 1/3 fee is not called for." Instead, it awarded $500,000 for fees in association with the MGA litigation.

¶29 In regard to the Team Select litigation, the trial court found the amount of attorney fees could not be calculated until Team Select's value was determined. After trial, the court valued Alexis's share in Team Select to be worth approximately $23.2 million, including pre-judgment interest. The court also found the lodestar calculation to be "fair and equitable" and applied a lodestar multiplier of 1.5 to the ultimate fee calculation, resulting in a fee award of approximately $3.68 million. It awarded

fees for both awards under A.R.S. §§ 25-324 and 12-341.01.

¶30 On appeal, Marc argues the trial court erred by only considering the contingency agreement and not the lodestar calculation for the MGA litigation, the Team Select fee award was unreasonably high, the contingent-fee rationale does not apply where there is a fee-shifting statute, and the court committed mathematical errors in its fee awards. Alexis contends the court correctly awarded $500,000 for the MGA litigation, the Team Select fee award was reasonable, the court can award contingency fees even if there is a fee-shifting statute, and the court "appropriately considered the full amount of attorney's fees and costs" and "did not create an error." She further argues the court erred by not awarding her more in attorney fees.

A. MGA & Team Select Litigation Fee Award

¶31 In deciding whether to award fees under A.R.S. § 25-324(A), the trial court must consider the financial resources of both parties and the reasonableness of each party's positions during litigation. The fee award may cover "the costs and expenses of maintaining or defending any proceeding. . . ." *Id.* Costs and expenses "may include attorney fees, deposition costs and other reasonable expenses as the court finds necessary." § 25-324(C). Under § 25-324, a court is permitted to award fees based on differences in financial resources alone. *See Goodell v. Goodell*, 257 Ariz. 563, ¶ 41 (App. 2024).

¶32 It is undisputed that Marc has greater financial resources than Alexis. In its award of attorney fees for the MGA litigation, the trial court awarded Alexis her attorney fees based on this disparity. The court did not abuse its discretion in so doing. *See id.*

¶33 As for the Team Select litigation, the trial court again noted Marc's greater financial resources and further found that Marc took "unreasonable positions" that "caused extensive delays and protracted litigation." The ultimate attorney fees awarded for both the MGA litigation and the Team Select litigation did not exceed the costs Alexis incurred by hiring counsel and agreeing to a one-third contingency fee. The language of § 25-324 does not expressly prohibit a contingency fee from being considered as part of the cost of litigation. Therefore, the court did not abuse its discretion by awarding attorney fees. See Lehn, 246 Ariz. 277, ¶ 29.

¶34 Moreover, the trial court also relied on A.R.S. § 12-341.01 in its attorney fees award. To the extent this case could be construed as a contract action, we cannot say the court abused its discretion in awarding fees under § 12-341.01. *See Lehn*, 246 Ariz. 277, ¶ 29.

¶35 We have previously concluded that a separate agreement incorporated into a dissolution decree maintains its status as an enforceable contract. *See Chopin v. Chopin*, 224 Ariz. 425, ¶ 6 (App. 2010). If there is a causal link between a party's claim and an underlying contract, it is appropriate for the trial court to award fees under § 12-341.01(A). *Marcus v. Fox*, 150 Ariz. 333, 335-36 (1986). Under § 12-341.01(A), the court may award reasonable attorney fees to the successful party. The award does not need to equal, but cannot be more than, the "amount paid or agreed to be paid." § 12-341.01(B). The court has broad discretion to determine what fees are reasonable. *Flood Control Dist. of Maricopa Cnty. v. Paloma Inv. Ltd. P'ship*, 230 Ariz. 29, ¶ 85 (App. 2012). A court begins its determination by reviewing "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Bogard v. Cannon & Wendt Elec. Co.*, 221 Ariz. 325, ¶ 42 (App. 2009) (quoting *Timmons v. City of Tucson*, 171 Ariz. 350, 357 (App. 1991)). This figure is known as the "lodestar," and it is presumptively reasonable. *See id.* We have affirmed an attorney fees award in excess of the lodestar. *Lindsey v. Univ. of Ariz.*, 157 Ariz. 48, 54-55 (App. 1987).

¶36 While Marc is correct that the trial court is not required to award fees based on what is in the contingency agreement, *see Sunland Dairy LLC v. Milky Way Dairy LLC*, 251 Ariz. 64, ¶ 30 (App. 2021), under § 12-341.01(B) the court is permitted to award up to the amount contracted, *see Cont'l Townhouses E. Unit One Ass'n v. Brockbank*, 152 Ariz. 537, 545-46 (App. 1986). Here, the multiplier used by the court resulted in an attorney fees award that was less than the amount agreed to under the contingency agreement. Therefore, the court's award of attorney fees to Alexis was reasonable. *See Flood Control Dist.*, 230 Ariz. 29, ¶ 85.

B. Mathematical Errors

¶37 Marc also contends the trial court committed two mathematical errors in its attorney fees calculation. We review the court's award of attorney fees for an abuse of discretion. *Bogard*, 221 Ariz. 325, ¶ 39. If the court's reasoning is "untenable, legally incorrect, or amount[s] to a denial of justice," the court has abused its discretion. *Id.* (quoting *Charles I. Friedman, P.C. v. Microsoft Corp.*, 213 Ariz. 344, ¶ 17 (App. 2006)).

¶38 On page eight of the judgment awarding Alexis her Team Select attorney fees, the trial court calculated her costs to be $125,371.84 and her fees to be $1,298,283.75; totaling $1,423,655.59. However, on page eleven of the judgment, the court listed Alexis's fees as $1,423,655.59 and again added $125,371.84—double counting her costs. The court also determined a lodestar multiplier of 1.5 was appropriate, but instead of multiplying the correct lodestar of $1,298,283.75, it used the incorrect amount of $1,423,655.59. Marc filed a motion to amend the judgment, arguing these calculation errors should be corrected. However, the court declined to recalculate its award. Marc makes the same argument on appeal.

¶39 Although we would otherwise be inclined to remand for the trial court to address this argument in the first instance, the court has already done so when it rejected Marc's motion to amend the judgment. We need not remand only for the court to repeat the same exercise of discretion. Although the court did not explain why it decided against changing the award in light of the prior calculation errors, implicit in the court's denial is the conclusion that the total amount awarded was appropriate even after those errors had been brought to the court's attention. Because the amount was reasonable and within the trial court's discretion, we affirm. See Bogard, 221 Ariz. 325, ¶ 39.

C. Cross-Appeal

¶40 On cross-appeal, Alexis argues the trial court should have awarded her more in attorney fees. Our standard of review remains one of an abuse of discretion. *See Lehn*, 246 Ariz. 277, ¶ 29; *Flood Control Dist.*, 230 Ariz. 29, ¶ 84. For the same reason Alexis prevails above, she does not prevail here.

¶41 As we discuss above, the trial court has broad discretion to determine what fees are reasonable under both § 25-324, *see Armer v. Armer*, 105 Ariz. 284, 289 (1970), and § 12-341.01, *see Flood Control Dist.*, 230 Ariz. 29, ¶ 85. Alexis fails to demonstrate how the court abused that discretion in its fee award. Although the court is permitted to award attorney fees up to the contingency agreement, so long as they are reasonable, it is not required to do so. *See Sunland Dairy LLC*, 251 Ariz. 64, ¶¶ 30-32. Therefore, we cannot say the court abused its discretion by not awarding Alexis a higher amount of attorney fees. *See Lehn*, 246 Ariz. 277, ¶ 29; *Flood Control Dist.*, 230 Ariz. 29, ¶ 84.

D. Attorney Fees on Appeal

¶42 Both parties request an award of attorney fees on appeal under §§ 12-341.01 and 25-324. We conclude Marc has taken an unreasonable position by maintaining his claim on appeal that the PSA precluded Alexis's claim of a share in the interests in Team Select, despite the trial court's credibility finding—to which we defer—as to his repeated denials of any interest despite the PSA's clear disclosure obligation. *See Ghostley*, 248 Ariz. 112, ¶ 21. We therefore award Alexis her appellate attorney fees pursuant to § 25-324. As Alexis has substantially prevailed on appeal, she may recover her appellate costs upon compliance with Rule 21, Ariz. R. Civ. App. P. *See* A.R.S. § 12-341.

Disposition

¶43 For the foregoing reasons, we affirm.

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1 Some examples include, "At no time has [Marc] ever had an interest in the company," "Marc does not own [Team Select] now or ever," "As far as [T]eam [S]elect, [Marc] has never owned, nor does he now, have any ownership interest in the business . . . He is not an owner, he has no stock . . . He has nothing," "He received no interest in the business," "[H]e doesn't have ownership in it," and, "He does not own anything."

2 *In re Conservatorship of Fallers*, 181 Ariz. 227, 229-30 & n.2 (App. 1994) (citing *In re Swartz*, 141 Ariz. 266, 271 (1984) and Ariz. R. Sup. Ct. 42, ER 1.5(a)).

Cite as
160 Arizona Cases Digest 50

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

Jamie CLEM,
Plaintiff/Appellant/Cross-Appellee,
v.
PINAL COUNTY; PINAL COUNTY Sheriff Mark Lamb,
Defendants/Appellees/Cross-Appellants.

No. 2 CA-CV 2024-0305
Filed October 30, 2025

Appeal from the Superior Court in Pinal County
No. S1100CV201600707
The Honorable Joseph R. Georgini, Judge
AFFIRMED

COUNSEL

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OPINION

Judge Sklar authored the opinion of the Court, in which Vice Chief Judge Eppich and Judge Vásquez concurred.

This opinion is subject to revision before publication in the Pacific Reporter.

SKLAR, Judge:

¶1 In this wrongful-death case, the trial court excused a potentially biased juror during trial. This case requires us to address whether it also should have declared a mistrial. The issue arises from Jamie Clem's unsuccessful action against the Pinal County Sheriff, who she alleged was responsible for her son's death at the Pinal County Adult Detention Facility. The excused juror was a political supporter of the sheriff. He was also friends with the sheriff's in-court representative.

¶2 We conclude that a mistrial was not required. The juror's potential bias supplied the trial court with ample reason to excuse him. For a mistrial, though, our law requires prejudice. Clem has demonstrated none. We also reject Clem's argument that the court was required to preclude expert testimony for an asserted disclosure violation. And we reject the defendants' argument on cross-appeal concerning a sanction under Rule 68(g) of the Arizona Rules of Civil Procedure. We therefore affirm the judgment.

BACKGROUND

¶3 In April 2015, Skyler Clem died of a drug overdose. He had been in custody at the Pinal County Adult Detention Facility when he was found nonresponsive in a holding cell. His mother and statutory beneficiary, Jamie Clem, filed this wrongful-death lawsuit in April 2016. The initial defendants were the county and its sheriff.

¶4 Years of litigation followed, including a prior appeal. The case proceeded to a ten-day jury trial in January 2024. On the first day, the parties stipulated to the county's dismissal, leaving the sheriff as the sole defendant. The jury returned a verdict in the sheriff's favor.

¶5 The trial court entered judgment in favor of the county and sheriff. Under Rule 68(g), the court awarded the defendants double their taxable costs as well as $30,000 for what it deemed their reasonable expert-witness fees. Clem appealed. The defendants cross-appealed because the award of expert fees was less than half of their request.

JUROR DISQUALIFICATION AND MISTRIAL

¶6 Clem makes two arguments concerning the juror who had supported the sheriff and was friends with his in-court representative. She first argues that the trial court erred by empaneling the juror. Second, she argues that, although that juror was excused after additional information came to light, the court erred by denying her request for a mistrial. We review both issues for an abuse of discretion. State v. Johnson, 247 Ariz. 166, ¶ 106 (2019) ("We review the trial court's denial of a motion to strike a juror for an abuse of discretion."); *Porterie v. Peters*, 111 Ariz. 452, 458 (1975) ("We cannot say from the record that the action taken by the trial court in failing to grant a mistrial was an abuse of discretion.").

I. The trial court empanels juror six over a for-cause challenge

¶7 At issue is juror six, a retired corrections officer. During voir dire, juror six described his relationship with then-Sheriff Mark Lamb's in-court representative, Lt. Ross Teeple. At the time, Lamb was campaigning for the United States Senate, and Teeple was campaigning to replace Lamb as sheriff.

¶8 Juror six explained, "I've worked with Ross Teeple at the prison, the state prison, and I've been retired almost ten years now. Just friends." He explained that he had seen Teeple "here and there" during Teeple's campaign for sheriff. However, he agreed that the friendship would not "persuade [him] in any way to favor one side over the other."

¶9 Juror six did not respond when jurors were asked if any of them had "been in pictures" endorsing Lamb or Teeple. But later in the day, Clem's counsel found a "public Facebook post that

juror number six had appeared with and spoken at events with Sheriff Lamb." The photo involved a "reposting from Teeple for the People, which is Lieutenant Teeple's election campaign."

¶10 That prompted follow-up questions from the trial court and counsel. Juror six explained that he and Teeple were "close friends" who saw each other "[m]aybe every two months or something." He also stated that he had contributed to Teeple's campaign. He said that during the earlier questioning, he had forgotten the photo in which he appeared with Teeple. He explained, "I had a hat on that said 'Teeple for the People' for his campaign." He also said that, when Lamb had been campaigning for sheriff in 2020, he had supported Lamb at two events. However, he clarified that he was not involved in Lamb's senate campaign.

¶11 Clem challenged juror six for cause. The trial court denied the challenge. It explained in part, "I don't find the nature of the relationships . . . to be of any real significance to disqualify him given what I've been told by both sets of attorneys regarding the involvement of Teeple and Lamb" in the case. The court concluded, "At this point it appears based on his body language, the record, his statements on the record to the court, to the attorneys that he can be fair and impartial."

II. The trial court denies Clem's motion for mistrial after Clem discovers additional information about the juror's associations with Teeple and Lamb

¶12 Further developments arose on the fifth trial day. A paralegal for Clem's counsel had seen that on juror six's Facebook page "he had posted a[n] endorsement of Mark Lamb and Ross Teeple during this trial." Clem sought a mistrial, arguing, "[T]his post during trial is signaling to Ross Teeple and Mark Lamb, 'I'm still your guy.'"

¶13 Juror six acknowledged reposting a video from the "Teeple for the People" website. He also acknowledged that "it could" look unfair that he had posted support for Teeple and Lamb during trial. But he reiterated that he had no allegiance to Teeple and Lamb "pertaining to this trial." He said, "When I did that, I wasn't even thinking about this case."

¶14 On questioning from the trial court, juror six said he did not recall speaking with the other jurors "about anything involving this case or politics." But, as illustrated by the following colloquy with the court, he had discussed his opinions about Teeple and Lamb with other jurors: Q. Okay. So but have you—have you voiced any of your opinions involving any of the people, including Lieutenant Teeple or Sheriff Lamb, to any of your colleagues, your fellow jurors?

> A. Yes, we have discussions.
>
> Q. Okay. Have you—have you told them that you're friends with Sheriff Lamb and/or Lieutenant Teeple?
>
> A. Yes, they know.
>
> Q. You used the term "friend" versus "supporter," right? Is that—you consider yourself friends? A. Yes, with Lieutenant Teeple.

The juror further explained on questioning from defense counsel that he had seen Teeple within about a month at campaign events, but "[m]onths, maybe a year" excluding campaign events. And he reaffirmed that he believed he could be "fair and impartial to both sides in the case."

¶15 The trial court concluded, "We have an appearance of impropriety at this point." It explained that although juror six had assuaged any concerns that arose during voir dire on the first day, the court had become "more concerned—significantly more concerned" and would therefore remove the juror.

¶16 However, the trial court denied Clem's motion for mistrial without explanation. After the jury rendered its verdict, Clem renewed the motion, which the court again denied. At no point after the verdict did Clem seek to renew the motion or supplement the record with affidavits from other jurors about their discussions with juror six. Nor does the record contain evidence about the content of those discussions, except as described above.

III. The empanelment of juror six was not reversible error in the absence of prejudice

¶17 Clem first argues that the trial court abused its discretion and committed "reversible error" by empaneling juror six. At oral argument, she characterized juror six's empanelment as having resulted in an "appearance of impropriety" and a "tainted" trial requiring reversal even in the absence of prejudice.

¶18 Under A.R.S. § 21-211(4), a person who is "biased or prejudiced in favor of or against either of the parties" is disqualified from jury service. Juror six's lengthy friendship and public political support for Teeple—the sheriff's in-court representative at trial—strongly suggests a bias, especially given his public support for Lamb as well. This is true despite the juror's repeated assurances that he could put his friendship aside. *See State v. Hill*, 174 Ariz. 313, 319 (1993) ("[T]he impartiality of a potential juror who is personally acquainted with individuals involved in the prosecution is necessarily suspect, and the trial judge must take care to be certain that the juror can and will be fair and impartial."). Thus, Clem makes a strong argument that juror six should not have been empaneled and that his empanelment created an appearance of impropriety.

¶19 It does not follow, however, that any error in empaneling juror six was reversible in the absence of prejudice. In civil cases, a prejudice requirement derives from our constitution, case law, and procedural rules. Ariz. Const. art. VI, § 27 ("No cause shall be reversed for technical error in pleadings or proceedings when upon the whole case it shall appear that substantial justice has been done."); *Creach v. Angulo*, 189 Ariz. 212, 214-15 (1997); *see also* Ariz. R. Civ. P. 61 ("At every stage

of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.").

¶20 Verdicts may typically be reversed without prejudice only in the narrow context of structural error. *See State v. Ring*, 204 Ariz. 534, ¶¶ 45-46 (2003) (listing types of structural error). We have found no case law, though, extending structural error beyond the criminal context. *See id.* ¶ 46. And even if structural error applies in this civil case, our case law suggests that it would not include the empanelment of a biased juror who was later excused, before deliberations began. *Cf. State v. Eddington*, 226 Ariz. 72, ¶¶ 12, 15, 18 (App. 2010) (concluding that error in declining to strike juror who was "interested" in the case under Section 21-211 was subject to harmless-error review (quoting § 21-211(2))), *aff'd*, 228 Ariz. 361 (2011). We decline to reach such a conclusion in the first instance, especially because, as we discuss below, any impropriety in empaneling juror six was remedied by his excusal.

¶21 Absent structural error, Clem does not identify any remedy for the empanelment of juror six that the trial court failed to provide. The only other plausible remedy is a mistrial. *Cf. State v. Cruz*, 218 Ariz. 149, ¶¶ 69-82, 86 (2008) (finding no abuse of discretion in denial of mistrial where jurors had been excused after misapprehending admonition and making incorrect statements of law to other jurors). And Clem is already challenging the court's denial of a mistrial based on the totality of juror six's statements, not just those he made before being empaneled. Thus, we need not further address juror six's empanelment.

IV. The trial court did not abuse its discretion in denying Clem's motion for mistrial

¶22 A mistrial is an "extreme remedy." *State v. Rios*, 258 Ariz. 175, ¶ 13 (App. 2024) (quoting *State v. Kleinman*, 250 Ariz. 362, ¶ 12 (App. 2020)). It is appropriate only where some occurrence has made it "apparent to the court" that "one of the parties cannot have a fair trial, or where further proceedings would be productive of great hardship or manifest injustice." *Id.* (quoting *Kleinman*, 250 Ariz. 362, ¶ 12). Before declaring a mistrial, the trial court must attempt to determine whether feasible alternatives exist. *State v. Woods*, 237 Ariz. 214, ¶ 15 (App. 2015).

A. Standard for mistrial based on improper juror communications

¶23 Neither the parties' briefing nor our research has yielded any cases in which a party sought a mistrial under circumstances similar to those here. Our case law recognizes that, as a general matter, a mistrial can be appropriate where jurors engage in improper communications. *See, e.g.*, *State v. Miller*, 178 Ariz. 555, 557, 560 (1994) (holding evidentiary hearing or mistrial necessary after alternate juror left note on juror's car reading "He's guilty" or "My vote is guilty"). But such an outcome is proper only where the offending communications result in prejudice. *State v. Vasquez*, 130 Ariz. 103, 105 (1981); *cf. Perez ex rel. Perez v. Cmty. Hosp. of Chandler, Inc.*, 187 Ariz. 355, 358 (1997) (requiring prejudice for improper communication to be basis for new trial).

¶24 As our supreme court recognized in *American Power Products, Inc. v. CSK Auto, Inc.*, the prejudice inquiry typically requires courts to "determine whether the communication would likely prejudice a hypothetical average juror." 239 Ariz. 151, ¶ 17 (2016). This objective standard requires the court to consider "whether the communication related to the evidence presented, the applicable law, or the ultimate issue in the case, or whether it clearly interfered with the jury's decision-making process." *Id.* ¶ 18.

¶25 But in *American Power Products*, the court also recognized that some errors make a prejudice determination difficult. *Id.* ¶ 16. In part, this is because Rule 606(b)(1) of the Arizona Rules of Evidence limits the scope of inquiries into a verdict's validity by prohibiting jurors from testifying about their deliberations. That rule reads:

> During an inquiry into the validity of a verdict in a civil case, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment.

The rule contains two relevant exceptions. First, jurors may testify about whether "extraneous prejudicial information was improperly brought to the jury's attention." Ariz. R. Evid. 606(b)(2)(A). Second, they may testify about whether "an outside influence was improperly brought to bear on any juror." Ariz. R. Evid. 606(b)(2)(B). Taken together, the rule and its exceptions permit jurors to be questioned about outside information they received, but not about its effect on the deliberations.

¶26 Given Rule 606(b), the court concluded in *American Power Products* that prejudice must be presumed in certain cases. 239 Ariz. 151, ¶ 17. Specifically, where an improper juror communication "creates a structural defect in the trial that deprives a litigant of an essential right, the trial judge must conclusively presume prejudice." *Id.*; *see also State v. Vasquez*, 130 Ariz. at 105 (requiring mistrial where "such a state of facts is shown that it may fairly be presumed . . . that the defendant's rights were prejudiced" (quoting *State v. Adams*, 27 Ariz. App. 389, 392 (1976))).

B. Clem has not demonstrated prejudice under either applicable standard

¶27 In arguing that a mistrial was required, Clem asserts that juror six "objectively appeared biased and prejudiced in favor of Defendant Sheriff and his official, in-court, designated representative." As we have explained, whether a juror is "biased or prejudiced" is undoubtedly relevant to that juror's

qualifications to serve. § 21-211(4). But Clem has pointed to no case suggesting that a mistrial is necessary simply because a biased juror was empaneled and remained on the jury for some portion of the trial, even where the empanelment raised an appearance of impropriety. Nor have we found any such case, let alone one that required a mistrial where that juror was excused before deliberations began.

¶28 We are unpersuaded that we should impose such a standard here. Instead, we conclude that the relevant inquiries are whether any improper communications occurred, and if so, whether they satisfied the prejudice standard articulated in *American Power Products*. Absent prejudice from one of juror six's communications, a mistrial was not necessary.

¶29 Clem does not frame her argument with these inquiries. But she nevertheless asserts that she was prejudiced by juror six's discussions with other jurors about his opinions of Teeple and Lamb, as well as the jury's awareness of his friendship with Teeple. The prejudice was heightened, in her view, by Arizona Rule of Civil Procedure 40(h)(1)(B), which allows civil jurors to discuss the evidence even before deliberations begin, under certain conditions.

¶30 Clem acknowledges, however, that the record contains "only scraps and hints about what Juror No. 6 told the other jurors." Indeed, the record is devoid of any reference to the content of assertedly improper communications. To excuse this lack of evidence, she relies on Arizona Rule of Evidence 606(b). But Rule 606(b) was not applicable when juror six was questioned and excused on the fifth trial day. That rule concerns the permissible scope of inquiries into the validity of a verdict. Likewise, Rule 606(b)'s prohibition on juror testimony concerns their deliberations, votes, and mental processes. Here, no deliberations or votes had occurred on the fifth day, and the trial court was not inquiring into the validity of a verdict. Its inquiry was more akin to an investigation into juror misconduct, where courts generally have broad discretion. *See State v. Cota*, 229 Ariz. 136, ¶ 74 (2012) ("When a trial court becomes aware of possible juror misconduct, it should 'conduct whatever investigation it deems warranted.'" (quoting *State v. Cook*, 170 Ariz. 40, 55 (1991))).

¶31 Moreover, even after the trial concluded, Rule 606 did not prevent Clem or the trial court from obtaining at least some information regarding juror six's communications. At a minimum, they could have asked what "extraneous prejudicial information" or "outside influence" had been shared. *See* Ariz. R. Evid. 606(b)(2)(A)–(B); *Brooks v. Zahn*, 170 Ariz. 545, 553 (App. 1991) (describing scope of permissible inquiry in determining whether jury considered extraneous information).

¶32 Nevertheless, Clem did not obtain affidavits or other information from jurors about this information. *See, e.g., Dunn v. Maras*, 182 Ariz. 412, 419-20 (App. 1995) (discussing affidavits from jurors about extraneous, prejudicial information provided by juror regarding settlement involving separate defendant in medical-malpractice case). Nor did any other jurors comment during trial about juror six's communications with them. We therefore have very limited information about the nature of those communications. To the extent we know about them, they largely concerned information that was already shared during voir dire—juror six had supported Lamb and Teeple, and he was friends with Teeple. Nothing about this information was prejudicial, especially once juror six was excused.

¶33 Thus, despite having available mechanisms for obtaining them, Clem has not presented any facts that could allow us to conclude that a hypothetical, reasonable juror would have been prejudiced by any improper communications from juror six. Nothing suggests that any such communications concerned the evidence, applicable law, or ultimate issues, or that they interfered with the jury's decision-making. *Am. Power Prods.*, 239 Ariz. 151, ¶ 18.

¶34 We are similarly unpersuaded that we must presume the existence of prejudice, which would require a "structural defect" in the trial. *Id.* ¶ 17. Clem has largely not addressed this issue. At best, she points to the possibility that juror six's friendship with Teeple and support for Lamb influenced the jury's discussions about the evidence before the juror was excused.

¶35 But Clem has not explained how these facts could have deprived her of an essential right. Although the jury could discuss the evidence, it was instructed not to "form final opinions about any fact or about the outcome of the case" until hearing all evidence, argument, and instructions. *See* Ariz. R. Civ. P. 40(h)(1)(B) (requiring court to instruct jurors to "reserve judgment about the action's outcome until deliberations begin"). That did not occur until after juror six was excused. We presume the jury followed the trial court's instructions. *Ahmad v. State*, 245 Ariz. 573, ¶ 10 (App. 2018). As a result, we see no basis for presuming that any improper communications from juror six resulted in a structural defect. It follows that the court did not abuse its discretion in denying Clem's motion for mistrial. Excusing juror six was a sufficient remedy for any impropriety or error in his empanelment.

STANDARD-OF-CARE EXPERT

¶36 Clem also argues that the trial court improperly allowed a defense expert to testify about jail standards of care even though his report did not use the term "standard of care." In Clem's view, this amounts to a disclosure violation under Rule 37(c)(1) of the Arizona Rules of Civil Procedure. We review for an abuse of discretion whether a trial court properly admitted expert testimony. *Escamilla v. Cuello*, 230 Ariz. 202, ¶ 20 (2012). We apply the same standard to a court's decision to allow

untimely disclosed evidence. *Estate of Brady v. Tempe Life Care Village, Inc.*, 254 Ariz. 122, ¶ 16 (App. 2022).

¶37 At issue is the testimony of Gary DeLand. Clem objected to DeLand's testimony on the ground of a lack of disclosure, but the trial court overruled the objection. DeLand's report is not in our record. But DeLand acknowledged at trial that the report did not use the term "standard of care." It did contain details about standards for intake, supervision, surveillance, security checks, headcounts, and "meal pass-outs." DeLand testified extensively about these issues. And in doing so, he was asked numerous questions, both on direct and cross-examination, about the standard of care. His opinion had also been described in at least one pretrial document as containing standard-of-care opinions.

¶38 Rule 26.1(d) provides detailed requirements for expert reports. Among these is a "complete statement of all opinions the expert will express and the basis and reasons for them." Ariz. R. Civ. P. 26.1(d)(4)(B). If a party fails to timely disclose required material, the trial court must preclude the party from using the information at trial. Ariz. R. Civ. P. 37(c)(1). However, this is not required if the "court specifically finds that such failure caused no prejudice or orders otherwise for good cause." *Id.*

¶39 Here, while the term "standard of care" is legally significant, we are unpersuaded that its omission from the report constitutes a failure to disclose under Rule 26.1. This is especially true given our inability to compare DeLand's report to his testimony. From the record, it appears that his testimony and report covered the same subject matter. Therefore, Clem could not have reasonably been surprised by his testimony, especially given the pretrial document describing him as a standard-of-care expert. *See Reyes v. Town of Gilbert*, 247 Ariz. 151, ¶ 24 (App. 2019) (explaining purpose of disclosure rules is to allow parties to reasonably prepare for trial, and "courts must use a common-sense approach in applying the rules"). Nor has Clem adequately described how the omission prejudiced her. We therefore conclude that the trial court did not abuse its discretion in declining to preclude DeLand's testimony.

RULE 68 SANCTION

¶40 On cross-appeal, the defendants argue that the trial court improperly reduced a mandatory sanction under Rule 68. The sanction was ordered because the defendants obtained a more favorable verdict at trial than an offer of judgment they had conveyed in June 2016. We review the court's award of expert fees under Rule 68 for an abuse of discretion. *Flood Control Dist. v. Paloma Inv. Ltd. P'ship*, 230 Ariz. 29, ¶ 57 (App. 2012).

¶41 Rule 68 concerns offers of judgment. At issue here is subsection (g), which imposes consequences on a party that rejected an offer and failed to obtain a more favorable judgment. The trial court relied on the 2016 version of Rule 68(g), which was in effect when the offer was made. Under that version, the party that rejected the offer was required to "pay, as a sanction, reasonable expert witness fees and double the taxable costs, as defined in A.R.S. § 12-332, incurred by the offeror after making the offer." The court calculated the sanction at $15,931.67 for taxable costs and $30,000 for reasonable expert fees. The defendants, however, had sought $16,283.72 in taxable costs and $61,827.71 in expert fees.

¶42 The defendants challenge the reduction. They appear to focus primarily on the reduction in expert fees, because they conceded in the trial court that the cost reduction was appropriate. In their view, because Rule 68 made an award mandatory, the court was required to explain its reduction. But Rule 68 does not expressly require the court to do so, and the defendants have identified no other authority that does.

¶43 More generally, trial courts have broad discretion in assessing the reasonableness of expert fees. *Lohmeier v. Hammer*, 214 Ariz. 57, ¶ 18 (App. 2006). And the defendants have cited no authority requiring courts to explain reductions based on unreasonableness. We do not generally require such explanations in determinations of a reasonable attorney fee. *See, e.g., Fulton Homes Corp. v. BBP Concrete*, 214 Ariz. 566, ¶ 9 (App. 2007) (providing that attorney-fee award under A.R.S. § 12-341.01 can be affirmed "with a reasonable basis even if the trial court gives no reasons for its decision regarding whether to award fees").

¶44 We see no reason to depart from that practice here. This is especially true because Clem presented significant argument in the trial court that the defendants' experts had kept insufficient time records. We therefore conclude that the court did not abuse its discretion in reducing the expert-witness-fee award.

DISPOSITION

¶45 We affirm the judgment of the trial court.

SUPREME COURT OF ARIZONA

In the Matter of	)	Arizona Supreme Court
	)	No. R-17-0034
RULE 37, RULES	)	
OF PROCEDURE	)	
FOR CIVIL TRAFFIC	)	
AND CIVIL BOATING	)	
VIOLATIONS	)	
	)	
	)	**FILED 10/21/2025**

ORDER AMENDING 8/31/2017 ORDER

The Court recently discovered an error in Rule 37, Form 11 of the Rules of Court Procedure for Civil Traffic, Boating, Marijuana, and Parking and Standing Violations ("Civil Traffic Rules"). Form 11 is entitled the "Arizona Traffic Ticket and Complaint" and is the form law enforcement personnel use in issuing citations for violations governed by the Civil Traffic Rules.

In March 2017, a petition was filed to make several amendments to Form 11 on an emergency basis. On April 27, 2017, the Court entered an order granting that relief. On May 3, 2017, the Court entered another order adopting on an emergency basis a "technical" amendment to the front page of each copy of the ticket appearing in the form. The amendment replaced the form's entry for appearance date and time from "At the date and time indicated" to "At or before the date and time indicated."

On August 31, 2017, the Court entered an order adopting on a permanent basis the amendments to Form 11 the Court adopted on an emergency basis in its April 27 order, effective immediately but with a delayed implementation date of January 1, 2018. The order also "abrogate[d]" the "technical amendment" the Court adopted in its May 3 order "as shown in the attachment hereto." The attached form, however, merely shows the form's entry for appearance date and time as it appeared before the amendment (i.e., "At the date and time indicated") rather than inserting an interlineated version deleting the words added by the amendment (i.e., "At or before the date and time indicated").

Perhaps because of the ambiguity in the order, Form 11 as it appears in the Rules of Court still shows the form's entry for appearance date and time as "At or before the date and time indicated." The Court understands that the inclusion of the words "or before" has created confusion and adversely affects the daily operations of limited jurisdiction courts. Among other things, defendants who appear before the stated appearance date and time are generally being told to return later because the courts cannot resolve the case before the stated date and time due to logistical issues and the need to comply with victim notification requirements.

Accordingly, to address the apparent error in Form 11 and the ambiguity in the Court's implementing order,

IT IS ORDERED amending Rule 37, Form 11, of the Civil Traffic Rules to delete the words "or before" from the form's entry for appearance date and time appearing on the front page of each copy of the form (on pages 1, 3, 5, and 7 of Form 11) in accordance with the form inAttachment 1 to this order. The deletion is shown by interlineation and highlighting.

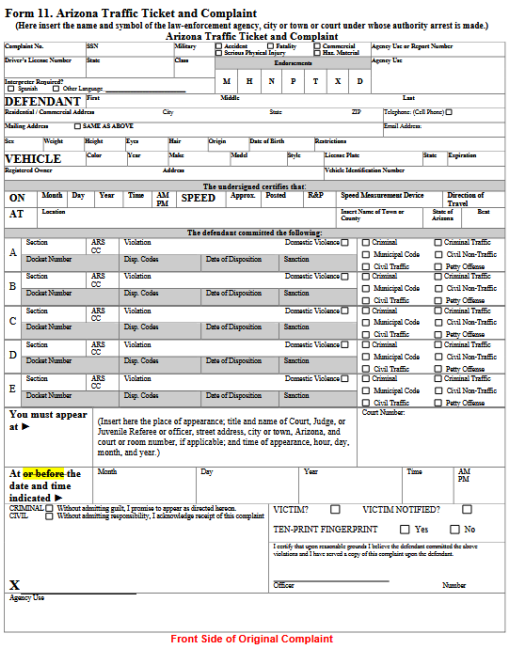
IT IS FURTHER ORDERED that this amendment is effective immediately upon the filing of this order.

IT IS FURTHER ORDERED that this order does not amend, abrogate, or otherwise alter the amendments to Form 11 this Court adopted in its orders in R-21-0005 (filed August 25, 2021) and R-21-0033 (filed December 8, 2021).

DATED this 21st day of October, 2025.

/s/
ANN A. SCOTT TIMMER
Chief Justice

Attachment #1



Form 11. Arizona Traffic Ticket and Complaint
(Here insert the name and symbol of the law-enforcement agency, city or town or court under whose authority arrest is made.)
Arizona Traffic Ticket and Complaint

Complaint No. | HIN | Military | Accident | Fatality | Commercial | Serious Physical Injury | Haz. Material | Agency Use or Report Number
Driver's License Number | State | Class | Endorsements: M H N P T X D | Agency Use
Interpreter Required? Spanish | Other Language
DEFENDANT First | Middle | Last
Residential / Commercial Address | City | State | ZIP | Telephone: (Cell Phone)
Mailing Address | SAME AS ABOVE | Email Address
Sex | Weight | Height | Eyes | Hair | Origin | Date of Birth | Restrictions
VEHICLE Color | Year | Make | Model | Style | License Plate | State | Expiration
Registered Owner | Address | Vehicle Identification Number
The undersigned certifies that:
ON Month | Day | Year | Time | AM PM | SPEED | Approx. | Posted | R&P | Speed Measurement Device | Direction of Travel
AT Location | Insert Name of Town or County | State of Arizona | Beat
The defendant committed the following:
A–E: Section | ARS CC | Violation | Domestic Violence | Criminal | Criminal Traffic | Municipal Code | Civil Non-Traffic | Civil Traffic | Petty Offense; Docket Number | Disp. Codes | Date of Disposition | Sanction
You must appear at ▶ (Insert here the place of appearance; title and name of Court, Judge, or Juvenile Referee or officer, street address, city or town, Arizona, and court or room number, if applicable; and time of appearance, hour, day, month, and year.) | Court Number:
At ~~or before~~ the date and time indicated ▶ Month | Day | Year | Time | AM PM
CRIMINAL ☐ Without admitting guilt, I promise to appear as directed hereon.
CIVIL ☐ Without admitting responsibility, I acknowledge receipt of this complaint
VICTIM? ☐ VICTIM NOTIFIED? ☐
TEN-PRINT FINGERPRINT ☐ Yes ☐ No
I certify that upon reasonable grounds I believe the defendant committed the above violations and I have served a copy of this complaint upon the defendant.
X _____ Officer | Number
Agency Use

Front Side of Original Complaint

Continued on Next Page . . .

ARRAIGNMENT — Charges A–E: Not Guilty / Not Responsible / No Contest / Guilty / Responsible / Defendant Signature*

SPECIAL NOTES: ☐ Possible Criminal Rule 11 ☐ State Seeks Jail ☐ Interpreter Required ☐ Spanish ☐ Other ☐ Attorney Notice of Appearance

CONDITIONS OF RELEASE: ☐ Own Recognizance ☐ Plus Special Conditions, See Release Order ☐ Bond / Deposit Amount ☐ Set Review Hearing ☐ Appoint Attorney

*By my signature, I hereby waive my right to trial, enter a plea of guilty or responsible for the violation and consent to judgment imposing the prescribed fine or civil sanction.

SETTINGS: ☐ Pretrial Set for ☐ Trial Set for ☐ Jury ☐ Bench ☐ Civil Hearing Set for

Date / Judge's Initials

JUDGMENTS AND ORDERS OF THE COURT (A, B, C, D, E)

☐ CDP ☐ No Contest ☐ Guilty ☐ Responsible ☐ Civil Hearing ☐ Not Resp ☐ Responsible; TRIAL ☐ Jury ☐ Bench ☐ Not Guilty ☐ Guilty ☐ Grant Rule 20; ☐ See Minute Entry for Sentence Details; ☐ Probation ___ Months; ☐ Defendant Ordered Not to Return to: ☐ Incident Location ☐ Restitution; ☐ Fine / Sanction; ☐ Suspend ☐ Only if requirements are met; ☐ Pay ___ ☐ By ___; At Rate Of; Beginning; ☐ Or Proof of; ☐ Community Service; Total Hours ___ By ___; ☐ Insurance By; ☐ Registration By; ☐ With Proof, Reduce Amount to be paid to:; Date of Disposition; Disposition Code; Fine; Jail

Date / Judge's Initials

AMENDMENT / DISMISSAL (A, B, C, D, E): On Motion of: ☐ State ☐ Defendant ☐ Court; ☐ Amend; ☐ Dismiss ☐ With Prejudice ☐ Without Prejudice

Date / Judge's Initials

Reverse Side Complaint Copy

(Here insert the name and symbol of the law-enforcement agency, city or town or court under whose authority arrest is made.)

Arizona Traffic Ticket and Complaint

Complaint No. [redacted] Military ☐ Accident ☐ Fatality ☐ Serious Physical Injury ☐ Commercial ☐ Haz. Material — Agency Use or Report Number

Driver's License Number — State — Class — Endorsements: M H N P T X D — Agency Use

Interpreter Required? ☐ Spanish ☐ Other Language

DEFENDANT First — Middle — Last

Residential / Commercial Address — City — State — ZIP — Telephone: (Cell Phone)

Mailing Address ☐ SAME AS ABOVE — Email Address:

Sex — Weight — Height — Eyes — Hair — Origin — Date of Birth — Restrictions

VEHICLE Color — Year — Make — Model — Style — License Plate — State — Expiration

Registered Owner — Address — Vehicle Identification Number

The undersigned certifies that:

ON Month — Day — Year — Time — AM PM — SPEED — Approx. — Posted — R&P — Speed Measurement Device — Direction of Travel

AT Location — County — State of Arizona — Beat

The defendant committed the following:

A	Section — ARS CC — Violation — Domestic Violence ☐	**VIOLATION 1**	☐ Criminal ☐ Municipal Code ☐ Civil Traffic	☐ Criminal Traffic ☐ Civil Non-Traffic ☐ Petty Offense
B	Section — ARS CC — Violation — Domestic Violence ☐	**VIOLATION 2**	☐ Criminal ☐ Municipal Code ☐ Civil Traffic	☐ Criminal Traffic ☐ Civil Non-Traffic ☐ Petty Offense
C	Section — ARS CC — Violation — Domestic Violence ☐	**VIOLATION 3**	☐ Criminal ☐ Municipal Code ☐ Civil Traffic	☐ Criminal Traffic ☐ Civil Non-Traffic ☐ Petty Offense
D	Section — ARS CC — Violation — Domestic Violence ☐	**VIOLATION 4**	☐ Criminal ☐ Municipal Code ☐ Civil Traffic	☐ Criminal Traffic ☐ Civil Non-Traffic ☐ Petty Offense
E	Section — ARS CC — Violation — Domestic Violence ☐	**VIOLATION 5**	☐ Criminal ☐ Municipal Code ☐ Civil Traffic	☐ Criminal Traffic ☐ Civil Non-Traffic ☐ Petty Offense

You must appear at ▶ (Insert here the place of appearance; title and name of Court, Judge, or Juvenile Referee or officer, street address, city or town, Arizona, and court or room number, if applicable; and time of appearance, hour, day, month, and year.) — Court Number:

At or before the date and time indicated ▶ Month — Day — Year — Time — AM PM

CRIMINAL ☐ Without admitting guilt, I promise to appear as directed hereon.
CIVIL ☐ Without admitting responsibility, I acknowledge receipt of this complaint

VICTIM? ☐ VICTIM NOTIFIED? ☐

TEN-PRINT FINGERPRINT ☐ Yes ☐ No

I certify that upon reasonable grounds I believe the defendant committed the above violations and I have served a copy of this complaint upon the defendant.

X ____________ Officer — Number

Agency Use

NOTICE TO DEFENDANT:
THIS IS A TRUE COPY OF THE COMPLAINT WHICH WILL BE FILED IN COURT.
YOU ARE ADVISED TO READ THE INSTRUCTIONS ON THE REVERSE.
IF YOU APPEAR IN COURT, PLEASE BRING THIS COPY WITH YOU.

Front Side of Violator/Defendant Copy

IMPORTANT NOTICE TO DEFENDANT

The other side of this page is a true copy of the offense described in the complaint that will be filed in the designated court or hearing office.

The offense for which you have been cited is an Administrative Violation, a Civil Traffic Violation, a Civil Non-Traffic Violation, a Criminal Offense, a Criminal Traffic Offense, or a Petty Offense. To determine which notice(s) applies to you, look at the box(es) checked under "the defendant committed the following" on the reverse side of this notice.

If you are required to pay fines, penalties, fees or other financial obligations as a result of this citation and **you are unable to pay**, bring this to the attention of court staff or the judge as payment over time or other alternatives may be available. Do not ignore the citation and the responsibility to pay as this may result in additional penalties and costs to you. For more information contact the court or an attorney, or visit the following website: [insert the appropriate website].

By providing your cell phone number you are granting permission to receive texts and other communication regarding court dates, pending payments and other relevant information about your case. Normal text and SMS rates may apply. Please contact the court in which your case is filed should you desire to opt out of this service.

CIVIL TRAFFIC

If the Civil Traffic box is checked, notice is hereby given that if you fail to appear as directed in this complaint, a default judgment will be entered against you, a civil sanction will be imposed, the Department of Transportation may refuse to renew the registration of a vehicle of which you are the registered owner, and your case may be sent to collections.

CIVIL NON-TRAFFIC

If the Civil Non-Traffic box is checked, notice is hereby given that if you fail to appear as directed in this complaint, a default judgment will be entered against you, and a civil penalty will be imposed.

CIVIL MARIJUANA VIOLATION IMMIGRATION ADVISEMENT

Marijuana remains a controlled substance that is illegal to possess under federal law. As a result, a finding of responsibility for this infraction may impact your immigration status. For further information and advice you should consult an attorney.

CRIMINAL OR PETTY OFFENSE

If the Criminal or Petty Offense box is checked, notice is hereby given that if you fail to appear in court as directed in this complaint, a warrant will be issued for your arrest (A.R.S. 13-3903(F)).

CRIMINAL TRAFFIC

If the Criminal Traffic box is checked, notice is hereby given that if you fail to appear as directed in this complaint on a criminal charge, a warrant could be issued for your arrest and your license will be suspended (A.R.S. 28-1557(B)(1)).

(The court, law enforcement agency or public body responsible for issuing the Arizona Traffic Ticket and Complaint may include any additional information considered necessary to the defendant regarding appearances, pleas, and payment of fines or civil sanctions.)

Reverse Side Violator/Defendant Copy

(Here insert the name and symbol of the law-enforcement agency, city or town or court under whose authority arrest is made.)

Arizona Traffic Ticket and Complaint

Complaint No. — SSN — Military ☐ Accident ☐ Fatality ☐ Serious Physical Injury ☐ Commercial ☐ Haz. Material — Agency Use or Report Number

Driver's License Number — State — Class — Endorsements: M H N P T X D — Agency Use

Interpreter Required? ☐ Spanish ☐ Other Language

DEFENDANT First — Middle — Last

Residential / Commercial Address — City — State — ZIP — Telephone: (Cell Phone) ☐

Mailing Address ☐ SAME AS ABOVE — Email Address:

Sex — Weight — Height — Eyes — Hair — Origin — Date of Birth — Restrictions

VEHICLE Color — Year — Make — Model — Style — License Plate — State — Expiration

Registered Owner — Address — Vehicle Identification Number

The undersigned certifies that:

ON Month — Day — Year — Time — AM PM — SPEED — Approx. — Posted — R&P — Speed Measurement Device — Direction of Travel

AT Location — County — State of Arizona — Beat

The defendant committed the following:

A	Section — ARS CC — Violation — Domestic Violence ☐; Docket Number — Disp. Codes — Date of Disposition — Sanction	☐ Criminal ☐ Municipal Code ☐ Civil Traffic	☐ Criminal Traffic ☐ Civil Non-Traffic ☐ Petty Offense
B	Section — ARS CC — Violation — Domestic Violence ☐; Docket Number — Disp. Codes — Date of Disposition — Sanction	☐ Criminal ☐ Municipal Code ☐ Civil Traffic	☐ Criminal Traffic ☐ Civil Non-Traffic ☐ Petty Offense
C	Section — ARS CC — Violation — Domestic Violence ☐; Docket Number — Disp. Codes — Date of Disposition — Sanction	☐ Criminal ☐ Municipal Code ☐ Civil Traffic	☐ Criminal Traffic ☐ Civil Non-Traffic ☐ Petty Offense
D	Section — ARS CC — Violation — Domestic Violence ☐; Docket Number — Disp. Codes — Date of Disposition — Sanction	☐ Criminal ☐ Municipal Code ☐ Civil Traffic	☐ Criminal Traffic ☐ Civil Non-Traffic ☐ Petty Offense
E	Section — ARS CC — Violation — Domestic Violence ☐; Docket Number — Disp. Codes — Date of Disposition — Sanction	☐ Criminal ☐ Municipal Code ☐ Civil Traffic	☐ Criminal Traffic ☐ Civil Non-Traffic ☐ Petty Offense

You must appear at ▶ (Insert here the place of appearance; title and name of Court, Judge, or Juvenile Referee or officer, street address, city or town, Arizona, and court or room number, if applicable; and time of appearance, hour, day, month, and year.) — Court Number:

At or before the date and time indicated ▶ Month — Day — Year — Time — AM PM

CRIMINAL ☐ Without admitting guilt, I promise to appear as directed hereon.
CIVIL ☐ Without admitting responsibility, I acknowledge receipt of this complaint

VICTIM? ☐ VICTIM NOTIFIED? ☐

TEN-PRINT FINGERPRINT ☐ Yes ☐ No

I certify that upon reasonable grounds I believe the defendant committed the above violations and I have served a copy of this complaint upon the defendant.

X ____________ Officer — Number

Agency Use

Front Side of Law Enforcement Copy

The reverse side of the Enforcement Copy may contain such information considered necessary by the court, law-enforcement agency, or public body responsible for issuing the Arizona Traffic Ticket and Complaint.

Reverse Side of Law Enforcement Copy

(Here insert the name and symbol of the law-enforcement agency, city or town or court under whose authority arrest is made.)

Arizona Traffic Ticket and Complaint

Complaint No.	SSN	Military	☐ Accident ☐ Serious Physical Injury	☐ Fatality	☐ Commercial ☐ Haz. Material	Agency Use or Report Number							
Driver's License Number	State	Class	Endorsements			Agency Use							
Interpreter Required? ☐ Spanish ☐ Other Language: _____			M	H	N	P	T	X	D				
DEFENDANT First			Middle							Last			
Residential / Commercial Address			City			State			ZIP	Telephone: (Cell Phone) ☐			
Mailing Address ☐ SAME AS ABOVE										Email Address			
Sex	Weight	Height	Eyes	Hair	Origin	Date of Birth		Restrictions					
VEHICLE	Color	Year	Make		Model	Style		License Plate		State	Expiration		
Registered Owner			Address					Vehicle Identification Number					

The undersigned certifies that:

ON	Month	Day	Year	Time	AM PM	**SPEED**	Approx.	Posted	R&P	Speed Measurement Device	Direction of Travel	
AT	Location									County	State of Arizona	Beat

The defendant committed the following:

A	Section	ARS CC	Violation		Domestic Violence ☐	☐ Criminal ☐ Municipal Code ☐ Civil Traffic	☐ Criminal Traffic ☐ Civil Non-Traffic ☐ Petty Offense
	Docket Number		Disp. Codes	Date of Disposition	Sanction		
B	Section	ARS CC	Violation		Domestic Violence ☐	☐ Criminal ☐ Municipal Code ☐ Civil Traffic	☐ Criminal Traffic ☐ Civil Non-Traffic ☐ Petty Offense
	Docket Number		Disp. Codes	Date of Disposition	Sanction		
C	Section	ARS CC	Violation		Domestic Violence ☐	☐ Criminal ☐ Municipal Code ☐ Civil Traffic	☐ Criminal Traffic ☐ Civil Non-Traffic ☐ Petty Offense
	Docket Number		Disp. Codes	Date of Disposition	Sanction		
D	Section	ARS CC	Violation		Domestic Violence ☐	☐ Criminal ☐ Municipal Code ☐ Civil Traffic	☐ Criminal Traffic ☐ Civil Non-Traffic ☐ Petty Offense
	Docket Number		Disp. Codes	Date of Disposition	Sanction		
E	Section	ARS CC	Violation		Domestic Violence ☐	☐ Criminal ☐ Municipal Code ☐ Civil Traffic	☐ Criminal Traffic ☐ Civil Non-Traffic ☐ Petty Offense
	Docket Number		Disp. Codes	Date of Disposition	Sanction		

You must appear at ▶ (Insert here the place of appearance, title and name of Court, Judge, or Juvenile Referee or officer, street address, city or town, Arizona, and court or room number, if applicable, and time of appearance, hour, day, month, and year.) Court Number:

At or before the date and time indicated ▶ Month | Day | Year | Time | AM PM

CRIMINAL ☐ Without admitting guilt, I promise to appear as directed hereon.
CIVIL ☐ Without admitting responsibility, I acknowledge receipt of this complaint

X _____

VICTIM? ☐ VICTIM NOTIFIED? ☐

TEN-PRINT FINGERPRINT ☐ Yes ☐ No

I hereby certify that the information contained herein is a true and correct abstract of the record in this case.

_____
Judge / Clerk

_____
Date

Agency Use

Front Side of Court Report Copy

The reverse side of the Court Report may contain the Disposition Code instructions for completing and forwarding the Court Report and such other information considered necessary by the court, law-enforcement agency, or public body responsible for issuing the Arizona Traffic Ticket and Complaint.

Reverse Side of Court Report Copy