# IN THE SUPREME COURT OF THE UNITED STATES

## Motion To Direct The Clerk Of The Court To File Petition for Certiorari and related documents "Out Of Time"

Lawrence Seidman

Petitioner

Frank Weiler et al. Re/Max Excalibur: Micheal & Maracruz Martinez; Realty/Realty One Group: Anita Burg, James Sexton

Defendants

**RE: AZSC No. CV-19-0167**

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**RE: AZSC No. CV-19-0167**

Petitioner Seidman, having been notified that his Petition for Certiorari was filed after a *"Statute of Limitations"* for submission had run, motions the Court to: **1)** Review the precedent case rulings in this motion and correct the Courts error in time limitation calculation. **2)** Having noted the basis for error correction, direct the Clerk Of The Court to file Petitioners Petition For Certiorari", and related documents *"out of time"*.

NOTE: I have no education in law, and from State court experiences believe sometimes you must say the same things repeatedly, over and over. Forgive any overly repetitious statements of previously stated issues and facts.

The Precedent/Events/Case Law/Rules of Civil Procedure supporting this motion address areas for Confirmation/consideration begin:

**TIME LIMITS FOR ACQUISITION OF JUSTICE AND ENFORCEMENT OF CONSTITUTIONAL PROTECTIONS**

The following address:

1 ) Arizona ( hereafter AZ) Courts refused decision/judgement on MOTION FOR REHEARING ( 1/13/2020), Hence, still pending, no final... **2)** AZ courts case still in play. **3)** Rule 60. Judgement in AZ courts based on Fraud, hence NO FINAL JUDGEMENT. **4)** AZ courts forfeited jurisdiction. **5)** Fraud Upon The Court( FUTC) renders any decision/Judgement VOID. **6)** Petitioner has one year from date of AZ Supreme Court refusal to review to submit Petition. **7)** Petitioner has 36 months post judgement to submit petition **8)** Petitioner has ten years post judgement to submit petition. **9)** Petitioner has 30 years to submit Petition. **10)** Rule 30 allows extended time to file Petition. **11)** 28 USC 455, Jurisdiction forfeit. **12)** Treason against the Constitution, judgement VOID. **13)** Latches. **13)** ADA warrants Rule 30 "*extension of time*"

In addressing above, certain issues appear multiply redundant, which fit under multiple sections of Rule 60, attached exhibit A.

E.G.: " a void judgment can never acquire validity through laches. See Crosby v. Bradstreet Co., 312 F.2d 483 (2nd Cir.) cert.denied, 373 U.S. 911 ,83 S.Ct. 1300, 10 L.Ed.2d 412 (1963) where the court vacated a Judgment as void 30 years after entry". 30 years !

"a decision produced by fraud upon the court is not in essence a decision at all, and never becomes final." 7th Circuit Court

The multiplicity of arguments/cases above support and confirm Petitioners' submission of Petition for Certiorari and any accompanying documents ARE TIMELY.

AZ Supreme Court refused to review the case on 11/19/19 , (Appendix, hereafter "App" A-C in the Petition), attached exhibit **B** herein. This would allow, under Rule

60 (c)(1), to actually state, under conditions of Rule 60 (b)(3)(4)(6) FUTC, Void Judgement, Forfeiture of Jurisdiction. As Petitioner had, at minimum, one year to submit a Petition. Thus, using the 11/19/**19** date of AZ supreme court denial, until 11/19/20**20**. In fact, the Petition was submitted on **09/01/2020**, received 9/9/2020. Attached exhibit **C.**

Therefore, Petitioners' Petition appears timely. HOWEVER, any delays, between AZ courts refusal to review, and date initiating Petitioners' 9/1/2020 submission can be attributed to AZ courts Shenanigans*1. Indeed, I was given what used to be called, "*The Run-A-Round*". A more detailed step-by-step process of "*the run-a-round*"-procedures-rules, and resultant from following the guidance of the AZ Supreme Court Clerk, are attached herein as Exhibit **K**, and contain the 2 content pages of Petition Apps A-D and A-E. (Petition pages 102--104) who directed me to apply first for a re-hearing with the AZ Court of Appeals, which was submitted on 1/13/2020. I hand carried the Motion to the main court buildings in Phoenix where the AZ Court of Appeals and Supreme Court are headquartered. Delivery confirmed by stamp court-stamp on 1/13/2020. ( in Petition App A-D) NOTE DATE STAMP BY APPEALS COURT. The motion started title as: *"MOTION FOR RE-HEARING IN ENGLISH LANGUAGE....."* Attached Exhibit **E** .

In motion for a "re-hearing", Petitioner invoking AZ RULE 26, ( attached Exhibit **D** ), Simply summarized, Rule 26 suspends all other rules, "*in the service of due process and justice*", including any time-frame-limitations of AZ courts

*1 1: a devious trick used especially for an underhand purpose
2a: tricky or questionable practices or conduct —usually used in plural

procedures. I was told, by the AZ Court Clerk, I would receive immediate response.

Having received no *"immediate"* response, I again travelled to AZ Courts headquarters building, appeals court, to find out "*what's up?*", whose clerk then told that I must, instead, submit a motion to a "*special court*", with a "*special Judge*" to whom such a motion must be directed, and to include *"special"* forms. Instead of the main central Phoenix courthouse, where the AZ Supreme Court and Court of Appeals are headquartered, and where any actions occur, I was directed to a small courthouse location in the city of Surprise, some 30 miles NW of the courthouse. I was directed to seek out a Superior Court ( ?) judge Timothy Thomason, in that location, and present documents to him. All three pro-se motions for re-hearing/Stay/remand and such were at the time I was informed of the award to defendants due, and so, I created a 1/15/2020 motion for SPECIAL AND IMMEDIATE ATTENTION asking for both a *"stay"* on the payment of the award, by FUTC, and for "*re-hearing*" by an *"Honest Court"*.. This was hand carried on 1/15/2020 and court stamped same date. Attached Exhibit **F** .

One must of course ask, IF this *"special judge"* at a *"special court"* was actually part of the procedure, why I wasn't instructed/informed/told of such, back when I first contacted the courts end of 2019, prior to the1/13/2020 submission ?

Again, receiving no response on the motion for re-hearing of 1/13/2020, or the amended motion for "SPECIAL IMMEDIATE ATTENTION" of 1/15/2020, by either the AZ Superior Court acting for the AZ Appeals Court, acting for the AZ Supreme Court, (The Run-A-Round) I then submitted an amended motion dated

1/17/2020....for both a *"stay and immediate attention"*, again, through the "special judge/special court hand delivered on 1/17/2020. ( Petition App A-E ) Attached exhibit **G**. The motion for *"stay and immediate attention"* dated 1/15/2020, was denied on 1/17/2020, but not filed until 1/22/2020, and ....though I submitted *"pro se"*, it was sent to the law firm no longer representing me, (ATTACHED H.), empirical evidence that no judge ever read any of the motions or they would have known where to send the denial.. The denial referenced only the 1/15/2020 motion. . The motion submitted on 1/17/2020, was an amended version of the 1/15/2020 motion and was never addressed, accepted, granted, or denied, ever, as was the original 1/13/2020 motion for "re-hearing" by the AZ Court of Appeals . ( Attached exhibit **E** ).

One might ask, is the reasons no denial, nor grant of motions submitted on 1/13/2020 and 1/17/2020, is that they motioned for a re-hearing, while the 1/15/2020 motion was for a *"stay"* and an "*honest court*" .....

While one might tend to ignore such, thinking that:

> *" Oh, poor judges ! so much repetitive reading about the judges FUTC, her announcement in court, that she, a judge, lies in her business transactions in breach of the obligations of contract, and the movants obnoxiously repetitive pleading to get an honest English speaking judge on the case"* .....

.....caused a *"lapse"* in obligated court procedures of responding to ALL motions. Please, read the Petition, which lays out ongoing repetitive FUTC by the judge and defendants as a basis for judgement.

Based upon the documentary evidence, one must conclude, that the motions for a re-hearing & Amended Immediate Attention (1/13/2020/ 1/17/2020) have never been

ruled on, and are still pending .....ERGO, no final decision was ever made. Nor were any basis for denial stated by any AZ judge as being *"out of time"* in Arizona ( AZ) by virtue of Arizona Court procedures.

ERGO: NO FINAL RULING AT THE TIME I SUBMITTED PETITION.

FURTHERMORE, As I cited in my Petition, Vazquez V Dreyfus an Arizona case, civil # 2693, filed 7/16/1928, there is no time limitation/statute of limitation on issues of fraud in AZ. Certainly Fraud Upon The Court, by the Court, and officers of the court or fraud by defendants. The problem is , all AZ courts are.....complicit.....in protecting one of the 6 largest election campaign contributors.....judges here are elected.....ERGO, my motion/petition/whatever-it's-called for a re-hearing ( App A-E/A-D in Petition) with the Arizona Courts was timely, and more than viable. Citing Vazquez:

> ". JUDGMENT — JUDGMENT PROCURED BY FRAUD MAY BE VACATED ANY TIME ON PROPER SHOWING BY INJURED PARTY. — Fraud vitiates everything which it touches, and when fraud has been committed by party in whose favor a judgment was rendered, it may be vacated at any time upon proper showing made by injured party."

I.E., at the time of my petition submission to you, the Az case was therefore active, and/or "*still in play*". NO final judgement.( App O. In Petition, pages 209-212) Attached herein exhibit **J** , #2, PP 2, #3, PP 1,2,3) Hence, my submission was, according to AZ court ruling in AZ, timely.

According to your Court, by reason of FUTC, "*no final judgement*". Hence not out of time, or, Judgement by FUTC VOID, Hence, not out of time. 28 USC 455,

Judge had no jurisdiction, ( In Petition, App C,D, O #4,PP1,2,6,7,8,9,10,13,) hence, no final judgement (Attached J #4 PP 1,2,4,6,7,8,9,10,13) Again, no jurisdiction, no final judgement, FUTC, by the Court and other ( Defendants) renders any judgement VOID. Officers of the Court, no jurisdiction. No time limit on filing Petition for Certiorari.

The reason for denial of a "re-hearing" or "review", by AZ courts is spelled out in my Petition to you under preface document, "Brief Statement of The Case" before the PAGE 1 of petition, and in appendix T the Petition.

MORE LAW AND CITATIONS: FEDERAL

Supreme Court RULE 60 (b) (3) & (4) ( attached exhibit A ) confirms not less than one year from the date of any judgement/denial/whatever, and, since as the 11/16/2019...( Attached B ) denial gives the false impression of finality....because my Petition for a Writ of Certiorari, is to gain not just relief, but a pronouncement of VOID upon the AZ court rulings, and under the numerous cases cited in my Petition, a judgement for all damages/wounds/whatever-they're-called( 28 US 1983). Against the State of Az/Defendants.....Thus, I should have had at a very minimum, until 11/16/2020. Petition was submitted in latest form ( so far) on 09/01/2020.( Attached C ) Timely. Bear in mind Hazel-Atlas Glass Co. v Hartford-Empire Co., 322 U.S. 238 (1944) submitted petition 10 years post judgement, and was granted the desired ruling. My Petition was submitted within one year designated under Rule 60.....HOWEVER, per Hazel Atlas Glass, and for the same reasons.....Petitioner has...9 years to go !

When the AZ Court *"filed"* denial of 1/15/2020 motion, on 1/22/2020 ..and with the Rule 13 allowance of 90 days, certainly took me to March, when Rule 13 Covid-rules allowed for 150 days, post ruling....so, .the case was still "live", per AZ Rule 26 (attached herein D), Vazques V Drefus,/ and the USA per Hazel Atlas/etc., and under Rule 60 referenced above,(attached herein within A) stating FUTC=NO FINAL JUDGEMENT= NO TIME LIMIT... OR,...Rule 60 (b) (3) & (c) (1) would then apply to the date denial of the motion on 1/15/2020 submission was filed,( attached exhibit i.e., 1/22/2020, H) which should allow me, at minimum, until 01/ 22/2021. Hence, I should be: *"good to go"* !

**AGAIN, MOST IMPORTANT**, as with the Vazquez case, US Supreme Court cases Elliot V Piersol, 1 pet 328,340,26 US 328 (**1828**)/ KENNER V CIR 387 F.689 (1068) MOORES FEDERAL PRACTICE 2d ed.( many precedent cite's in Petition) **With FUTC, *"THERE IS NO FINAL DECISION",*** hence, no time limit for Petition-submission time hasn't run, or even started. ( Petition App O, attached herein Exhibit **J**).And remember, motion for re-hearing of 1/13/2020 was never denied....still pending....ergo: No final Judgement !

"**Fraud upon the court**" has been defined by the 7th Circuit Court of Appeals to "embrace that species of fraud which does, or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." Kenner v. C.I.R. , 387 F.3d 689 (1968); 7 Moore's Federal Practice, 2d ed., p. 512, ¶ 60.23. The 7th Circuit further stated "a **decision produced by fraud upon the court** is **not in essence** a decision at all, **and never becomes final.**"

Hence, any ruling by any Az court is NOT FINAL, VOID, and as such, has no time limit depriving Petitioner of any future action even begun to run.,

> ".If any room has been left for a relaxation of the statutory finality in order to permit tax court to consider whether its decision is the product of a fraud upon it, that is all that has been left. Even that possibility seems to have been rejected by the eighth circuit in deciding that the tax court does not have equitable jurisdiction to set aside a decision, once it has become final, even, apparently, where fraud has been demonstrated.[7] We think, however, that it can be reasoned that a decision produced by fraud on the court is not in essence a decision at all, and never becomes final. It is most difficult to assume that Congress intended that a decision procured by fraud on the tax court could not be reached by any procedure in any tribunal, once the possibilities of direct review were exhausted. If a convincing case of palpable fraud on the court were presented, it is hard to justify a holding that it could not be considered. We conclude that the tax court has power to inquire into the integrity of its own decision even when such decision has become final and immutable in all other respects as a result of exhaustion of direct review or expiration of the time allowed for seeking review." Kenner v CIR 387 F.2d 689 (7th Cir. 1968)

ERGO:

> "No time limit applies to a motion under the Rule 60(b)(4) because a void judgment can never acquire validity through laches. See Crosby v. Bradstreet Co., 312 F.2d 483 (2nd Cir.) cert.denied, 373 U.S. 911 ,83 S.Ct. 1300, 10 L.Ed.2d 412 (1963) where the court vacated a Judgment as void 30 years after entry. See also Marquette Corp. v. Priester, 234 .Supp.799 MOTION TO VACATE VOID JUDGMENTS (E.D.S.C.1964) where the court expressly held that clause Rule 60(b)(4) carries no real time limit "

ERGO:, US Rules of the Supreme Court allow for submission of a writ or petition/motion BEFORE or AFTER any final judgement/rulings/whatever by a State Court. And I have up to 30 years (Crosby v. Bradstreet Co.), to submit Petition.

30 years !!!!. or.....no time limit at all for VOID judgement.....I am..... *"on time".*

*AGAIN:* , **as NO judgement/ruling reached or based on FRAUD UPON THE COURT, is final, no time limitation statutes have even begun to "run".**

**AND/ OR:**

**CONCEPT OF LATCHES TO STATUTE OF LIMITATIONS**: (attached **L)** *P* Petrella v. Metro-Goldwyn-Mayer, Inc., *No. 12-1315, (U.S. May 19, 2014).* Judge Ginsburg summarized in 3 sentences. To wit:

> " Courts are not at liberty to jettison Congress' judgment on the timeliness of suit. Laches, we hold, cannot be invoked to preclude adjudication of a claim for damages brought within the three-year window. As to equitable relief, in extraordinary circumstances, laches may bar at the very threshold the particular relief requested by the plaintiff.

This action in your Court, could be considered a part of the suit...BEFORE any legitimate court ruling in AZ could ever, was ever, will ever, be forthcoming .....

It would appear as though, per this case ruling, I have...had and have, at a minimum...36 months....from date of last denial of *"stay" & "rehearing",* received 1/23/2020 .....and including the AZ Supreme Court refusal to review dated 11/19/19 would give me, per the judge Ginsburg ruling, at a minimum, until 11/19/**2022** ., IE. , Two years from now, or actual, from "Special and Immediate Attention" for "stay" and "review" denial, until 1/23/2023....although, as cited above, with a judgement via FUTC, I'd have until, at minimum, per Hazel Atlas, till 2029 **, or,** per Crosby v. Bradstreet till 1/23/2049

I assume that the Judge Ginsburg ruling of 36 months, is applicable in all courts, as I am still experiencing ever increasing financial loss, and the referenced case applies to legal and equitable remedies. Although, Applying the precedents cited in

Exhibit **J** however, resulting in No jurisdiction, and/or NO final judgement, I have until.....well, again, 30 years at a minimum. Maximum ? perhaps approaching forever. Sadly, my age and physical condition does not allow for any length of time. So, between the above precedent cases, it appears I have at a **minimum** 36 months, or 29 years, or longer. ERGO: I am still within any time limitation, NO time limitation for action has been exceeded. According to the rulings of US Supreme Court, again, it appears, 14th amendment, 5th amendment and all....I have a time limit between 3 years to 30 (Crosby v. Bradstreet ) years. Please forgive me, I know, I'm obnoxiously repetitive on key issues.

ADDITIONALLY, AZ Courts REFUSED to rule on Petitioners 1/13/2020 Motion For Re-hearing. No ruling ever ! No final judgement!...Ergo: Case *still "open"*.!

BECAUSE the rulings of the AZ courts are based on the willful and suborned acts of fraud by both defendants and the judges, decriminalizing of Felony Fraud to serve a "protected" industry, rewarding breach-of-contract, it would appear from case cite's reporting FRAUD UPON THE COURT ( Please review cite's in Petition and App O in petition, Attached herein in **J** ) that the/all rulings/judgements are NOT FINAL THEREFORE, because of FUTC, , and, as Judge refused recusal for bias ( Petition App C, D &O ) The AZ courts forfeited Jurisdiction (28 USC 455), and ARE VOID. ADDITIONALLY.....

RULE 30 ( attached M ) makes clear that That the Clerk of the Court may grant any extension of time for a variety of reasons applicable to this case.

I would think, hope, that the seriousness of the issues in this case.....Judges making up their own language, and upper courts just "*rubber-stamping*" same to "*make no waves*" "*just following orders*" mentality in AZ, would be of great importance, especially considering the machinations the courts went through to alter and re-define language to de-criminalize felony fraud, (Petition App A, A-B, A-Bb, A-Bc ) and, to do ( the behaviors necessary to perpetrate FUTC ) such, the AZ judges knowingly violated the AZ constitution ( App P in Petition), the US Constitution, and, their "*Oath of Office*" which obligates defense of, and upholding of, the AZ and US constitutions, all of which would be, if not allowed challenge in your Court, a clear "*Miscarriage Of Justice*" .( Rule 30, # 4 (1) & (2) )

One (1) Superior court judge, three (3) Appeals court judges...made up their own language-meaning-of-words on which to base a case ruling, and seven (7) AZ Supremes blessed the fraud !....**It is an act, and a declaration, of Anarchy**. It is a statement that the rule of law is determined by individual judges for their individual intents. Remember Brandeis:

> "Our **government** is the potent, the omnipresent teacher.
> IF the **government** becomes a **law**-breaker, it breeds contempt for **law**;
> **it invites** every man to become a **law** unto himself; it **invites anarchy**"

Lastly, American with Disabilities Act in application, because I am limited-constrained-handicapped (I hate that term) –impeded-disabled....by my ever deteriorating physical condition, I motion the Court, to grant me any "extra" 60-90, even 120 days grace, on any necessary "turn-around-repeat submissions to the Court. Reasons below.

My ability to use hands, fingers, legs, feet, and recently confirmed spinal deterioration's, confound my ability to write, type, staple, carry, walk, sit, stand, etc....

Although just recently, AZ has given up its top scoring tie for covid case record with Texas, with my immune-system condition, it isn't safe for me to travel to post office and interact with people, to mail in documents. I have had to sit in parking lot, on days I am able to walk and drive comfortably, waiting for times when there is no line at the post office, so I can send things to you guys with appropriate receipt-signature-cards and such with diminished risk. Yes, compromised immune system, so, I'm high risk for covid.

Then, of course, the general walking, and fine motor coordination....to type, create or edit documents.....as fingers do not work well, or that often, and when working, do not work for long..... I do have opiate pain medication to ease.....discomforts of joint and movement pains, but I really kinda *"lose the thread"* on any project or document when I take them.....so, takes me.....way too much time to compose a document, what with re-reads and tweaks/edits, added cites and such..... and I can only type/sit in one position/etc. for maybe 1-2 hours, + or –, at any one time, and it varies on any day.....it's unpredictable.

Travel to a Xeroxing shop to make copies.....be like finding the Lost Ark.....a very rare event, an adventure....considering all the actions that have to occur in a single event/day. Boxing documents for travel. Ability to walk to and from car, carry boxes. Ability to drive. Ability to get into copy shop. ...I need it to be kinda

empty.....Ability to separate and explain how documents must be copied, and in what order....we're talking over 240 pages of assorted sections of petition. Waiting...walking about in the copy shop until documents are copied. Carrying larger heavier box of documents back to car. Removing box from car and carrying into house. Then, separating and ordering all section of petitions into the multiple copies necessary to serve everyone involved, and of course to send to you. Boxing/packaging each set, and then, off to post office when I can.

MOST IMPORTANT: .....as with any correspondence/returns/whatever, arrives to me without any form of signature card necessitating postal carrier to notify me of its existence,..... I have had no reason to believe any additional issues would be illuminated, After my September submission, and so, with no warning to be on the lookout for a receipt of documents, had no reason to check, as the neighborhood mailboxes are maybe 250-300 yards distant, bottom of the hill, and my limited physical abilities kind of keep me at home. If I can't walk, especially .... uphill in our (in September was still 110 degree + or -) weather....or unsafe to drive, but it's a day to day thing with no predictability.

If there are future submission exchanges, I could receive an email or phone message....both is best....'cause uh Murphy's law, so I can arrange pick-up...an assist for a *"timely"* response. In the "back and forth" between myself and the Court, I have received benefit of directs, answers, monitoring. I Thank you greatly!, but if I don't know it's coming...it could sit in mailbox for weeks.

So, to provide Petitioner with opportunity equal to benefit of a fully physically functioning person, be best if dates of *"start"* on any correspondence requiring a return/response/re-submission were dated from when I received anything, rather than when it was packaged. And Thank You for considering such.

If required, I can furnish disability report documents by my assorted physicians, confirming my deteriorating condition. Which is another issue of concern....I am old and deteriorating rapidly. I need action on the Petition ASAP, *"Action this day !"....* because I'm not sure I will be around much longer.....and I must provide for my daughter and her newborn....I must recoup the loss I have experienced at the hands of bent judges and lying defendants who support the judges. And, Defendants lied repeatedly in declarations to court, when comparing to their confessions in deposition ( App K in Petition), hence, perjury (18 USC 1621 &1623). Judges knew, they had "de-novo-ed" all court submissions on which to base judgements.

In Court rule 30, which indicates you could grant me such a "Grace".....considering all the issues of "Accommodation" spelled out in the Americans With Disabilities Act.( ADA)... grant me additional time on issues to submit documents *Rule 30. Computation and Extension of Time* ( Attached M) and highlighted ), plus all the ADA accommodations.

The Petition...or just the very brief statement-of-the-case in the preface section, even the questions to the Court, it will make clear the Rule 30 *"miscarriage of justice"* that I am trying to correct, it is serious, truly an issue of national

importance, i.e., it will effect every state court in the country. Hence, Rule 11 imperative, even if the courts of origin do not meet Rule 11 compliance.....

The content-merits of the Petition topic/issue/violations, supersede any and all rules of format and time.....

AZ judges by their behavior, can rightfully be called, not a judge, but a warlord, a dictator, a criminal. The behavior spits on the Constitution. Fraud Upon The Court, {also called "Treason Against The Constitution" , also called "war on the Constitution" }, bias, (28 USC 455) by a judge, forfeits any jurisdiction. Corrupt behavior, is not an accident...11 judges supporting such, is a Cabal, not a court-of-law system..... Behavior is the final arbiter of intent.....one only has to identify the beneficiary. Actually it's the axiom of caught fish outcomes X time. Duh !

Hence, my 2nd motion. To speed things up a bit.

Support the Constitution, slap the AZ courts, bent judges, crook defendants, and grant this Motion To Direct The Clerk of The Court To File Petition for Certiorari, and related documents....."Out Of Time",.....because , if I am understanding the case cite's referenced, they are not.

I thank you for your courtesy and indulgence

Lawrence Seidman
(480) 443-0598
e-mail: elltees@cox.net

## ATTACHED EXHIBIT TABLE OF CONTENTS

A

## Rule 60. Relief from a Judgment or Order

(a) CORRECTIONS BASED ON CLERICAL MISTAKES; OVERSIGHTS AND OMISSIONS. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) GROUNDS FOR RELIEF FROM A FINAL JUDGMENT, ORDER, OR PROCEEDING. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) TIMING AND EFFECT OF THE MOTION.

(1) *Timing.* A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) *Effect on Finality.* The motion does not affect the judgment's finality or suspend its operation.

(d) OTHER POWERS TO GRANT RELIEF. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. §1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) BILLS AND WRITS ABOLISHED. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita .

B

# Supreme Court

STATE OF ARIZONA

ROBERT BRUTINEL
Chief Justice

ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET, SUITE 402
PHOENIX, ARIZONA 85007
TELEPHONE: (602) 452-3396

JANET JOHNSON
Clerk of the Court

November 19, 2019

**RE: LAWRENCE SEIDMAN et al v FRANK WEILER et al**
Arizona Supreme Court No. CV-19-0167-PR
Court of Appeals, Division One No. 1 CA-CV 18-0261
Maricopa County Superior Court No. CV2015-003144

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on November 19, 2019, in regard to the above-referenced cause:

**ORDERED: Petition for Review = DENIED.**

**FURTHER ORDERED: Request for Attorneys' Fees (Appellants Seidman) = DENIED.**

**FURTHER ORDERED: Request for Attorneys' Fees (Appellees Weiler) = GRANTED.**

**Justice Beene did not participate in this matter.**

Janet Johnson, Clerk

C

**SENDER: COMPLETE THIS SECTION**

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

US SUPREME COURT
MR. DUGGAN
ONE FIRST STREET NE
WASHINGTON DC
20543

9590 9402 6052 0125 2752 56

7020 0090 0000 9594 0331

**COMPLETE THIS SECTION ON DELIVERY**

A. Signature

X ☐ Agent ☐ Addressee

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If YES, enter delivery address below: ☐ No

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SUPREME COURT, U.S.

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D



**Rule 26. Suspension of Rules**
Arizona Revised Statutes Annotated
Rules of the Supreme Court of Arizona

Arizona Revised Statutes Annotated
Rules of the Supreme Court of Arizona (Refs & Annos)
IV. General Provisions

A.R.S. Sup.Ct.Rules, Rule 26

# Rule 26. Suspension of Rules

Currentness

The court may, for good cause shown and in furtherance of justice, suspend the operation of any of these Rules in particular cases. These Rules shall be liberally construed in the furtherance of justice.

## Credits

Amended, effective Jan. 1, 1965.

17A Pt. 2 A. R. S. Sup. Ct. Rules, Rule 26, AZ ST S CT Rule 26
Current with amendments received through 08/15/2020.

**END OF DOCUMENT**

[redacted] E

T.O.

**TO THE COURT OF APPEALS IN THE STATE OF ARIZONA**

LAWRENCE SEIDMAN, an individual; and LAWRENCE T. SEIDMAN, AS TRUSTEE OF THE LAWRENCE T. SEIDMAN LIVING TRUST, dated 8/11/1998,

Plaintiffs-Appellants,

vs.

FRANK D. WEILER and ANA J. WEILER, husband and wife; et. al.,

FRANK D. WEILER and ANA J. WEILER, Husband and Wife; RE/MAX EXCALIBUR, An Arizona Real Estate Brokerage; DOE BROKER, Designated Real Estate Broker thereof; MICHAEL MARTINEZ and MARICRUZ MARTINEZ, Husband and Wife, Sales Agents; REALTY ONE GROUP, An Arizona Real Estate Brokerage; JAMES SEXTON, Designated Real Estate Broker; ANITA BURG and JOHN DOE BURG, Husband and Wife, Sales Agents; JOHN DOES 1-10; JANE DOES 11-12; ABC PARTNERSHIPS 13-15; XYZ CORPORATIONS 16-20, BLACK TRUSTS or OTHER PURPORTED ENTITIES, 21-30,

Appellees.

Defendants-Appellees.

Court of Appeals, Division One
Case No. 1 CA-CV 18-0261

Maricopa County Superior Court
Case No. CV2015-003144

**MOTION FOR RE-HEARING-REVIEW, IN ENGLISH LANGUAGE, 2NDARY TO A CORRUPTED-ERROR LADEN APPLICATION OF THE ENGLISH LANGUAGE BY JUDGES AS TO NATURE AND MEANING OF ACTUAL WORDS ON WHICH TO BASE JUDGEMENT. AND NEED FOR REVIEW BY NEW HONEST JUDGES, "STAY" ON FEES TO APPELLEES-DEFENDANTS, AND REQUEST FOR ATTORNEYS' FEES TO APPELLANTS-PLAINTIFFS**



22 [redacted]

[redacted]

COPY

JAN 15 2020

CLERK OF THE SUPERIOR COURT
L. OVERTON
DEPUTY CLERK


**Person Filing:** Lawrence Seidman
**Address (if not protected):** 11378 N. 129th Way
**City, State, Zip Code:** Scottsdale, Arizona, 85259
**Telephone:** 480-443-0598
**Email Address:** elltees@cox.net
**Lawyer's Bar Number:**


**Representing** ☒ **Self, without a Lawyer or** ☐ **Attorney for** ☒ **Petitioner OR** ☐ **Respondent**

# SUPERIOR COURT OF ARIZONA
# IN MARICOPA COUNTY

Lawrence Seidman
Name of Plaintiff or Petitioner

Case Number: CV2015-003144/ 1 CA-CV 18-0261

Title: MOTION TO STAY ON ALL AWARDS & Judgements

Weiler, et.al.
Name of Defendant or Respondent

Explain what you want the Court to order. The Judge may grant, deny, or change your request (or "motion"). A ruling will be issued by "minute entry."

Requesting a "stay" on the payment off all judgements and awards until this case is ruled on by the United States Supreme Court.

REASON: , IS THE PRIOR COURTS "ERROR" IN LANGUAGE USAGE, in order to make A judgement "PUFFERY", to dismiss any charge of FRAUD, by CALLING A VERB, WHICH IS A PART OF SPEECH WHICH CAN GARNER CONSENUS AS A FACT, OR NOT A FACT, BY A JURY. ( E.G, THE Plane "crashed", or, the Plane did NOT "crash"....Jane was "raped", or Jane was NOT "raped". CRASH, CRASHED, RAPED, are all VERBS)....the Courts, for only 1 of 3 possible reasons, declared the partof speech to be an "ad-verb", which we all know, from 6th grade English, is most oft an adjective, with an LY added to the end. The AZ COURT OF APPEALS made the ENGLISH LANGUAGE THEIR FULCRUM FOR JUDGEMENT RATIONALE.... and then stuck a crutch under 1/2 the balance bar BY ALTERING THE DEFINITION OF WORDS. 14TH AMENDMENT ISSUE HENCE, THIS CASE IS SUBMITTED TO THE US SUPREME COURT, WHERE THE JUDGES ARE MORE FAMILIAR, FLUENT IN, AND OPERATE WITHIN, THE ACTUAL MEANINGS OF THE PARTS OF SPEECH OF THE ENGLISH LANGUAGE, WHERE THE CASE WILL BE DECIDED IN, AND UPON, OUR NATIONS OFFICIAL LANGUAGE, AND NOT SOME MADE-UP ALTERATION OF LANGUAGE TO FIT A "SPECIAL" AGENDA.

SEE NEXT PAGE





[redacted] 23

GN10f-040517

IN THE STATE OF ARIZONA COURT OF APPEALS

| | |
|---|---|
| LAWRENCE SEIDMAN, an individual; and LAWRENCE T. SEIDMAN, AS TRUSTEE OF THE LAWRENCE T. SEIDMAN LIVING TRUST, dated 8/11/1998,<br><br>Plaintiffs-Appellants,<br><br>vs.<br><br>FRANK D. WEILER and ANA J. WEILER, husband and wife; et. al.,<br>FRANK D. WEILER and ANA J. WEILER, Husband and Wife; RE/MAX EXCALIBUR, An Arizona Real Estate Brokerage; DOE BROKER, Designated Real Estate Broker thereof; MICHAEL MARTINEZ and MARICRUZ MARTINEZ, Husband and Wife, Sales Agents; REALTY ONE GROUP, An Arizona Real Estate Brokerage; JAMES SEXTON, Designated Real Estate Broker; ANITA BURG and JOHN DOE BURG, Husband and Wife, Sales Agents; JOHN DOES 1-10; JANE DOES 11-12; ABC PARTNERSHIPS 13-15; XYZ CORPORATIONS 16-20, BLACK TRUSTS or OTHER PURPORTED ENTITIES, 21-30,<br><br>Appellees.<br><br>Defendants-Appellees. | Court of Appeals, Division One<br>Case No. 1 CA-CV 18-0261<br><br>Maricopa County Superior Court<br>Case No. CV2015-003144<br><br>**PETITION FOR SPECIAL ACTION**<br>**&**<br>**IMMEDIATE ATTENTION**<br><br>**MOTION TO STAY ANY ORDER-MANDATE TO PAY APPELLEES-DEFENDANTS ATTORNEY FEES UNTIL CASE IS RULED ACCURATELY BY THE U.S. SUPREME COURT, OR , UNDERGO A THOROUGH AND HONEST REVIEW AND JUDGEMENT BY THE ARIZONA COURT OF APPEALS-ARIZONA SUPREME COURT.** |

NOW, IN *PRO SE/PER,FORMA PAUPERIS*, Appellants, invoking RULE 26 and its stated purpose, ( see complete Appendices-Motion-exhibits)

[redacted]

G

**Person Filing:** LAWRENCE SEIDMAN
**Address (if not protected):** 11378 N. 129TH WAY
**City, State, Zip Code:** SCOTTSDALE, AZ 85259
**Telephone:** 480-443-0598
**Email Address:** elltees@cox.net
**Lawyer's Bar Number:**

COPY

JAN 17 2020

CLERK OF THE SUPERIOR COURT
R. MERINO
DEPUTY CLERK

**Representing** ☒ **Self, without a Lawyer or** ☐ **Attorney for** ☒ **Petitioner OR** ☐ **Respondent**

# SUPERIOR COURT OF ARIZONA
# IN MARICOPA COUNTY

LAWRENCE SEIDMAN
Name of Plaintiff or Petitioner

WEILER ET.AL.
Name of Defendant or Respondent

Case Number: CV2015-003144

Title: AMMENDED 01/15/20 MOTION TO STAY ANY AWARD/JUDGEMENT, AND REMAND TO UNBIASED COURT FOR JURY TRIAL

Explain what you want the Court to order. The Judge may grant, deny, or change your request (or "motion"). A ruling will be issued by "minute entry."

I AM REQUESTING, 2NDARY TO APPLICABLE RULE 26:"SUSPENSION OF COURT RULES IN FURTHURANCE OF JUSTICE & RULE 60-a,b,b-1,b-3,b-6, THAT:ANY & ALL AWARDS , JUDGEMENTS, DECISIONS, BE "STAYED" UNTIL SUCH TIME AS:

1) AN UNBIASZED AZ COURT OF APPEALS REVIEW-RE-HEAR THE CASE BASED ON "ERROR", I.E., THE USE OF A "MADE-UP" LANGUAGE APPLICATION ON WHICH TO BASE JUDGEMENT, AND REFUSAL TO DO SUCH,

2) REMAND TO A DIFFERENT, UNBIASED COURT THAT WILL CORRECTLY USE AND APPLIES THE ENGLISH LANGUAGE LINGUISTIC-LEXICOLOGY TO CORRECTLY NAME AND IDENTIFY FACTS FOR TRIAL BY JURY

3) THAT THE ATTACHED MOTION AND EXHIBITS BE SCRUTINIZED FOR PROOF PRIOR COURTS a-1)"ERROR" IN APPLIED LANGUAGE,a-2 MERITORIOUS DEFENSE OR ASSERTION BY PLAINTIFF , b-3) INTRINSIC FRAUD-MISREPRESENTATION -MISCONDUCT, including TAMPERING WITH EVIDENCE, b-6) ANY OTHER REASON-NUMEROUS 14TH AMENDMENT VIOLATIONS.

NOTE: PROOFS OF ALL 3 STATEMENT, AND SUB-STATEMENTS FROM RULE 60 ARE SPELLED OUT, IDENTIFIED, ILLUMINATED.....IRREFUTEABLY, IN THE ATTACHED MOTION AND EXHIBITS

THIS IS AN AMMENDED MOTION TO THE ORIGINAL FILED 01/15/20

RECEIVED
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SUPERIOR COURT
COURT ADMINISTRATOR

IN THE STATE OF ARIZONA COURT OF APPEALS

G

LAWRENCE SEIDMAN, an individual; and LAWRENCE T. SEIDMAN, AS TRUSTEE OF THE LAWRENCE T. SEIDMAN LIVING TRUST, dated 8/11/1998,

Plaintiffs-Appellants,

vs.

FRANK D. WEILER and ANA J. WEILER, husband and wife; et. al.,
FRANK D. WEILER and ANA J. WEILER, Husband and Wife; RE/MAX EXCALIBUR, An Arizona Real Estate Brokerage; DOE BROKER, Designated Real Estate Broker thereof; MICHAEL MARTINEZ and MARICRUZ MARTINEZ, Husband and Wife, Sales Agents; REALTY ONE GROUP, An Arizona Real Estate Brokerage; JAMES SEXTON, Designated Real Estate Broker; ANITA BURG and JOHN DOE BURG, Husband and Wife, Sales Agents; JOHN DOES 1-10; JANE DOES 11-12; ABC PARTNERSHIPS 13-15; XYZ CORPORATIONS 16-20, BLACK TRUSTS or OTHER PURPORTED ENTITIES, 21-30,

Appellees.

Defendants-Appellees.

Court of Appeals, Division One
Case No. 1 CA-CV 18-0261

Maricopa County Superior Court
Case No. CV2015-003144

**PETITION FOR SPECIAL ACTION**
**&**
**IMMEDIATE ATTENTION**

**MOTION TO STAY ANY ORDER-MANDATE TO PAY APPELLEES-DEFENDANTS ATTORNEY FEES UNTIL CASE IS RULED ACCURATELY BY THE U.S. SUPREME COURT, OR , UNDERGO A THOROUGH AND HONEST REVIEW AND JUDGEMENT BY THE ARIZONA COURT OF APPEALS-ARIZONA SUPREME COURT.**

NOW, IN *PRO SE/PER,FORMA PAUPERIS*, Appellants, invoking RULE 26 and its stated purpose, ( see complete Appendices-Motion-exhibits)

26

H

Clerk of the Superior Court
*** Electronically Filed ***
01/22/2020 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2015-003144

01/17/2020

HONORABLE TIMOTHY J. THOMASON

CLERK OF THE COURT
N. Johnson
Deputy

LAWRENCE SEIDMAN

JOHN DUKE HARRIS

v.

FRANK D WEILER, et al.

C ADAM BUCK

FATIMA NMN BADREDDINE
JOHN FYKE
MICHAEL H ORCUTT
ROBERT B ZELMS
JUDGE THOMASON

**RULING**

The Court having received and considered plaintiff Lawrence Seidman's Motion to Stay any Award or Judgment, filed January 15, 2020,

**IT IS ORDERED** denying plaintiff Lawrence Seidman's Motion to Stay any Award or Judgment.

53



# 27

H

**Lawrence**

**From:** Tori Dunphy <tori.dunphy@eckleylaw.com>
**Sent:** Wednesday, January 22, 2020 11:12 AM
**To:** Lawrence [redacted]
**Cc:** John Harris
**Subject:** Ruling
**Attachments:** Ruling.pdf

Greetings Larry,

Please find attached to this e-mail a Ruling that came in on your case.

Sincerely,

*Eckley & Associates*
*An Interstate Law Firm*

PHOENIX - TUCSON - PORTLAND - SEDONA

By: Tori Dunphy
Paralegal and Business Manager
For the Firm

**CENTRAL OFFICE:**

**THE ECKLEY BUILDING:**

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TODAY'S OFFICE FOR CORRESPONDANCE: (602) 952-1177
CENTRAL TELEFAX: (602) 952-2600
E-MAIL: tori.dunphy@eckleylaw.com
WEBSITE: http://www.eckleylaw.com

J

# "Fraud On The Court By An Officer Of The Court" And "Disqualification Of Judges, State and Federal"

http://www.ballew.com/bob/htm/fotc.htm



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1. Who is an "officer of the court"?

A judge is an officer of the court, as well as are all attorneys. A state judge is a state judicial officer, paid by the State to act impartially and lawfully. A federal judge is a federal judicial officer, paid by the federal government to act impartially and lawfully. State and federal attorneys fall into the same general category and must meet the same requirements. *A judge is not the court.* People v. Zajic, 88 Ill.App.3d 477, 410 N.E.2d 626 (1980).

2. What is "fraud on the court"?

Whenever any officer of the court commits fraud during a proceeding in the court, he/she is engaged in "fraud upon the court". In Bulloch v. United States, 763 F.2d 1115, 1121 (10th Cir. 1985), the court stated "Fraud upon the court is fraud which is directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statements or perjury. ... It is where the court or a member is corrupted or influenced or influence is attempted or where the judge has not performed his judicial function -- thus where the impartial functions of the court have been directly corrupted."

"Fraud upon the court" has been defined by the 7th Circuit Court of Appeals to "embrace that species of fraud which does, or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." Kenner v. C.I.R., 387 F.3d 689 (1968); 7 Moore's Federal Practice, 2d ed., p. 512, ¶ 60.23. The 7th Circuit further stated "a decision produced by fraud upon the court is not in essence a decision at all, and never becomes final."

3. What effect does an act of "fraud upon the court" have upon the court proceeding?

"Fraud upon the court" makes void the orders and judgments of that court!

It is also clear and well-settled Illinois law that any attempt to commit "fraud upon the court" vitiates the entire proceeding. The People of the State of Illinois v. Fred E. Sterling, 357 Ill. 354; 192 N.E. 229 (1934) ("The maxim that fraud vitiates every transaction into which it enters applies to judgments as well as to contracts and other transactions."); Allen F. Moore v. Stanley F. Sievers, 336 Ill. 316; 168 N.E. 259 (1929) ("The maxim that fraud vitiates every transaction into which it enters ..."); In re Village of Willowbrook, 37 Ill.App.2d 393 (1962) ("It is axiomatic that fraud vitiates everything."); Dunham v. Dunham, 57 Ill.App. 475 (1894), affirmed 162 Ill. 589 (1896); Skelly Oil Co. v. Universal

Oil Products Co., 338 Ill.App. 79, 86 N.E.2d 875, 883-4 (1949); Thomas Stasel v. The American Home Security Corporation, 362 Ill. 350; 199 N.E. 798 (1935).

Under Illinois and Federal law, when any officer of the court has committed "fraud upon the court", the orders and judgment of that court are void, of no legal force or effect.

4. What causes the "Disqualification of Judges?"

Federal law requires the automatic disqualification of a Federal judge under certain circumstances.

In 1994, the U.S. Supreme Court held that "Disqualification is required if an objective observer would entertain reasonable questions about the judge's impartiality. If a judge's attitude or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely, the judge must be disqualified." [Emphasis added]. Liteky v. U.S., 114 S.Ct. 1147, 1162 (1994).

Courts have repeatedly held that positive proof of the partiality of a judge is not a requirement, only the appearance of partiality. Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 108 S.Ct. 2194 (1988) (what matters is not the reality of bias or prejudice but its appearance); United States v. Balistrieri, 779 F.2d 1191 (7th Cir. 1985) (Section 455(a) "is directed against the appearance of partiality, whether or not the judge is actually biased.") ("Section 455(a) of the Judicial Code, 28 U.S.C. §455(a), is not intended to protect litigants from actual bias in their judge but rather to promote public confidence in the impartiality of the judicial process.").

That Court also stated that Section 455(a) "requires a judge to recuse himself in any proceeding in which her impartiality might reasonably be questioned." Taylor v. O'Grady, 888 F.2d 1189 (7th Cir. 1989). In Pfizer Inc. v. Lord, 456 F.2d 532 (8th Cir. 1972), the Court stated that "It is important that the litigant not only actually receive justice, but that he believes that he has received justice."

The Supreme Court has ruled and has reaffirmed the principle that "justice must satisfy the appearance of justice", Levine v. United States, 362 U.S. 610, 80 S.Ct. 1038 (1960), citing Offutt v. United States, 348 U.S. 11, 14, 75 S.Ct. 11, 13 (1954). A judge receiving a bribe from an interested party over which he is presiding, does not give the appearance of justice.

"Recusal under Section 455 is self-executing; a party need not file affidavits in support of recusal and the judge is obligated to recuse herself sua sponte under the stated circumstances." Taylor v. O'Grady, 888 F.2d 1189 (7th Cir. 1989).

Further, the judge has a legal duty to disqualify himself even if there is no motion asking for his disqualification. The Seventh Circuit Court of Appeals further stated that "We think that this language [455(a)] imposes a duty on the judge to act sua sponte, even if no motion or affidavit is filed." Balistrieri, at 1202.

Judges do not have discretion not to disqualify themselves. By law, they are bound to follow the law. Should a judge not disqualify himself as required by law, then the judge has given another example of his "appearance of partiality" which, possibly, further disqualifies the judge. Should another judge not accept the disqualification of the judge, then the second judge has evidenced an "appearance of partiality" and has possibly disqualified himself/herself. None of the orders issued by any judge who has been disqualified by law would appear to be valid. It would appear that they are void as a

matter of law, and are of no legal force or effect.

Should a judge not disqualify himself, then the judge is violation of the Due Process Clause of the U.S. Constitution. United States v. Sciuto, 521 F.2d 842, 845 (7th Cir. 1996) ("The right to a tribunal free from bias or prejudice is based, not on section 144, but on the Due Process Clause.").

Should a judge issue any order after he has been disqualified by law, and if the party has been denied of any of his / her property, then the judge may have been engaged in the Federal Crime of "interference with interstate commerce". The judge has acted in the judge's personal capacity and not in the judge's judicial capacity. It has been said that this judge, acting in this manner, has no more lawful authority than someone's next-door neighbor (provided that he is not a judge). However some judges may not follow the law.

If you were a non-represented litigant, and should the court not follow the law as to non-represented litigants, then the judge has expressed an "appearance of partiality", and, under the law, it would seem that he/she has disqualified him/herself.

However, since not all judges keep up to date in the law, and since not all judges follow the law, it is possible that a judge may not know the ruling of the U.S. Supreme Court and the other courts on this subject. Notice that it states "disqualification is required" and that a judge "must be disqualified", under certain circumstances.

The Supreme Court has also held that if a judge wars against the Constitution, or if he acts without jurisdiction, he has engaged in treason to the Constitution. If a judge acts after he has been automatically disqualified by law, then he is acting without jurisdiction, and that suggest that he is then engaging in criminal acts of treason, and may be engaged in extortion and the interference with interstate commerce.

Courts have repeatedly ruled that judges have no immunity for their criminal acts. Since both treason and the interference with interstate commerce are criminal acts, no judge has immunity to engage in such acts.

Fraud Upon The Court

K

# APPENDIX A-D

## CONTENT

Petition for Re-hearing/Revue by Arizona Supreme Court.

After phoning and speaking to clerk of AZ Suprm Crt , and looking up procedures on internet, I spent a number of days drafting a MOTION FOR RE-HEARING/REVIEW of the Suprm Crt denial of motion for review, dated 11/19/2019.(App A-C)

On 01/13/2020 I traveled to the Az Supreme Court clerk office, in downtown Phoenix Courts building, with the Motion. The clerk refused to take my Motion, and instead, informed me I must first submit for a re-hearing with the Court of Appeals. I went home, re-drafted the face sheet on my motion, traveled back to Apcrt that day, handed to the clerk at the Apcrt, who stamped my copy, confirming receipt on 1/13/2020. I was told that I would hear back "*immediately -in a few days*".

I never did "*hear back*".

I have still had no response to my motion for re-hearing, hence, NO FINAL JUDGEMENT on my motion/RE-hearing.....still pending....

ATTEACHED: face sheet with date stamp.

# APPENDIX A- E

Having received nothing from court on 1/13/2020 motion for re-hearing, I travelled back to the Phoenix AZ central courthouse on 1/15/2020 to Apcrt clerk to learn "what's goin' on? " with the 1/13/2020 motion. I was then informed that:

There is a specific judge Timothy Thomason in the Superior Court, in a superior court building 25 miles N.W. of Phoenix Apcrt office, to whom I should submit any motion for review-re-hearing-etc.. The question is: Why didn't they notify me of this "special Judge" when I contacted clerk before 1/13/2020 ?

To submit to him, a motion, I would have to fill out and attach a form GN 10f-040517, ( attached 4 pages) which shall proceed the motion. Superior Court judge Thomason would review, confirming all claims, facts, review all documents, and "special" judge would decide whether or not to send to Court of Appeals, or deny. I filled out forms, and amended my 1/13/2020 motion, to be a motion for "stay" and "re-hearing", and filed on 01/15/2020. Again, hearing no rapid response, I again filed a motion for "Special Action" 1/17/2020. Same day, my 1/15/ motion was denied, however, it was not filed until January 22nd, and again, even though I motioned Pro-Se, it was sent to the law firm which no longer represented me. Clearly Arizona judges didn't even bother to read the motion, just denied *"out of hand"*. I never had a response of any kind, to my MOTION FOR REHEARING, filed 1/13/2020, and ruling on such, is STILL PENDING. Hence, time limitation to submit petition for Certiorari has NOT expired. .ATTACHED: Date stamped forms and face sheet of Motion,

L

# U.S. Supreme Court Clarifies Defense of Laches

Posted On June 11, 2014

Earlier this year, the U. S. Supreme Court came out with an interesting opinion clarifying the defense of laches. While this case was decided in the context of copyright law, the ruling likely affects all areas of federal law. The entire holding is summarized by Justice Ginsberg in three sentences:

"courts are not at liberty to jettison Congress' judgment on the timeliness of suit. Laches, we hold, cannot be invoked to preclude adjudication of a claim for damages brought within the three-year window. As to equitable relief, in extraordinary circumstances, laches may bar at the very threshold the particular relief requested by the plaintiff."

Thus, where Congress has established a statute of limitations, no delay—however unreasonable—will prevent a suit from going forward so long as some damage has accrued within the time prescribed by the statute. A defense of laches for an unreasonable delay will only affect the remedy sought by the plaintiff. And since latches is an equitable defense, logically it would only apply to the equitable remedies as opposed to the legal remedies.

For anyone interested in copyright law, this opinion is a great introduction to some of the inherent peculiarities caused by the long copyright terms and the various revisions to the copyright code.

To summarize the particular facts of this case, MGM was sued in 2009 by the copyright owner of the screenplay behind the 1980 movie "Raging Bull." MGM argued the defense of laches "must be available to prevent a copyright owner from sitting still, doing nothing, waiting to see what the outcome of an alleged infringer's investment will be." The Supreme Court not only rejected this traditional view of laches but expounded on why this was exactly what the copyright owner should do: "there is nothing untoward about waiting to see whether an infringer's exploitation undercuts the value of the copyrighted work . . . It allows a copyright owner to defer suit until she can estimate whether litigation is worth the candle."

Also notable is the unusual split of the conventional blocks within the Court: Justice Ginsburg delivered the opinion and was joined by Justices Scalia, Thomas, Alito, Sotomayor, and Kagan. A dissenting opinion was filed by Justice Breyer in which Justices Roberts and Kennedy joined.

M

- *1. In the computation of any period of time prescribed or allowed by these Rules, by order of the Court, or by an applicable statute, the day of the act, event, or default from which the designated period begins to run is not included. The last day of the period shall be included, unless it is a Saturday, Sunday, federal legal holiday listed in 5 U. S. C. §6103, or day on which the Court building is closed by order of the Court or the Chief Justice, in which event the period shall extend until the end of the next day that is not a Saturday, Sunday, federal legal holiday, or day on which the Court building is closed.*

*2. Whenever a Justice or the Clerk* ***is empowered by law or these Rules to extend the time to file any document, an application or motion seeking an extension*** *shall be filed within the period sought to be extended. An application to extend the time to file a petition for a writ of certiorari or to file a jurisdictional statement must be filed at least 10 days before the specified final filing date as computed under these Rules; if filed less than 10 days before the final filing date, such application will not be granted except in the most extraordinary circumstances.* THIS might be considered an extraordinary circumstance..i.e., this case. I just found this rule 30 thing this week.

- ***4. A motion to extend the time to file any document or paper other than those specified in paragraph 3 of this Rule may be presented in the form of a letter to the Clerk setting out specific reasons why an extension of time is justified.*** *The letter shall be served on all other parties as required by Rule 29. The motion may be acted on by the Clerk in the first instance, and any party aggrieved by the Clerk's action may request that the motion be submitted to a Justice or to the Court. The Clerk will report action under this paragraph to the Court as instructed.*

2 *[7] 18 U.S.C. § 3161(h)(7)(A). The court must consider a list of non-exhaustive factors, including* ***whether the failure to grant a continuance would result in a "miscarriage of justice,"*** *and whether a delay in filing an indictment was caused because an arrest occurred when it would have been "unreasonable to expect" the return and filing of the indictment within the original 30-day period. 18 U.S.C. § 3161(h)(7)(B).*

35 [redacted]

# APPENDIX A-B

RULING 03/09/2018

Granting RE/MAX and REALTY ONE and WEILER motions to deny petitioner leave to supplement, denying plaintiff motion for reconsideration.

NOTE: I have made commentary, part of my argument, by "capping" in red type. Although it changes the number of pages of the Ruling, none of the wording of the ruling has been altered.

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
03/13/2018 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2015-003144 03/09/2018

HONORABLE DAWN M. BERGIN

CLERK OF THE COURT
S. Ortega
Deputy

LAWRENCE SEIDMAN

JOHN DUKE HARRIS

v.

FRANK D WEILER, et al.

C ADAM BUCK

FATIMA NMN BADREDDINE
JOHN FYKE
MICHAEL H ORCUTT
ROBERT B ZELMS

**RULING**

At oral argument on December 5, 2017, the Court granted the Realty One Defendants' and the ReMax Defendants' Motions for Summary Judgment and denied Plaintiffs' request for supplemental briefing. On December 7, 2017, Plaintiffs filed a "Motion for Reconsideration of Ruling Denying Request to Supplement Summary Judgment Pleadings and Plaintiffs' Positions with Previously Disclosed Licensees (sic) Expert Opinions for Standard of Care Issue." On December 14, 2017, the Court issued a minute entry ordering Defendants to file responses to the Motion for Reconsideration addressing two issues: (1) whether it would be an abuse of discretion for the Court to deny Plaintiff's request to supplement; and (2) whether allowing the Plaintiff to supplement with the expert report would change the outcome of the Court's rulings on Defendants' Motions for Summary Judgment and if not, why not.
Only defendants could comment. Like asking fox to guard hen house

The Court has considered the following in making its ruling:

- Plaintiffs' Motion for Reconsideration of Ruling Denying Request to Supplement Summary Judgment Pleadings and Plaintiffs' Positions with Previously Disclosed Licensees Expert Opinions for Standard of Care Issue;
- The Realty One Defendants' Response;



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- The ReMax Defendants' Response;
- The Weiler Defendants' Response; and
- The ReMax Defendants' Joinder in the Weilers' Response

Plaintiffs Lawrence Seidman and his Trust (collectively "Plaintiff") purchased a house that turned out to have a leaky roof and other alleged defects. Defendant James Sexton served as the selling broker and Defendant Anita Burg as the selling sales agent. Both worked for Defendant Realty One Group (collectively the "Realty One Defendants"). Defendant Kathy Laswick served as the listing broker and Defendants Michael Martinez and Maricruz Martinez as the listing agents. Laswick and the Martinezes worked for Defendant VDH Investments Corporation d/b/a RE/MAX Excalibur (collectively the "ReMax Defendants").[1]

Plaintiff alleged negligence, negligent misrepresentation and consumer fraud[2] IT WAS SEVERAL TYPES OF FRAUD against the ReMax Defendants, and breach of fiduciary duty, negligent misrepresentation, constructive fraud and common law fraud/misrepresentation against the Realty One Defendants.

The Court granted the ReMax Defendants' and the Realty One Defendants' Motions for Summary Judgment on the negligence-based claims and breach of fiduciary duty claim at oral argument on December 5, 2017 based on lack of causation and failure to provide expert testimony on standard of care and breach.[3] It denied Plaintiff's oral request to supplement his briefing with the expert declaration that had been disclosed to Defendants more than a year before.

Plaintiff then filed the pending Motion for Reconsideration. Plaintiff included an expert declaration and substantive argument regarding the declaration with the Motion. Thus, the Motion was both a request to reconsider the ruling denying supplemental briefing *and* a request to reconsider the merits of the summary judgment ruling in Defendants' favor.

**Motion for Reconsideration of Denial of Request for Supplemental Briefing**

Plaintiff failed to provide any expert testimony or opinions with his Response to Defendants' Motions for Summary Judgment to establish the standard of care for Defendants and

[1] A detailed account of the factual background is set forth in the Court's August 11, 2017 minute entry in which it granted summary judgment in favor of sellers, Defendants Ana and Frank Weiler.

[2] Plaintiff conceded at oral argument that his consumer fraud claim against the ReMax Defendants was barred by the statute of limitations, and that the ReMax Defendants were therefore entitled to summary judgment on that claim.

[3] The Court granted summary judgment on the fraud claims based on lack of causation and its previous ruling that

1) Plaintiff failed to allege sufficient facts to create a genuine issue of material fact as to his claims for fraud and negligent misrepresentation against the sellers, and failed to present any additional facts that

would create a genuine issue of material fact regarding the commission of fraud by these Defendants.

The court , refused to consider any documentary, photographic, videographic evidence enabling them to ignore multiple facts /science/defendant behaviors to come to this conclusion.

1 ) Multiple "patches" on atop the other, in the same location, is proof that defendant seller had knowledge of the same problem over time. Simply: You don't patch a tire that isn't flat. You don't abandon a ship that isn't sinking, you don't add water to a tank already full, and you do not repeatedly "patch" a damage in a roof/wall/whatever, that isn't defective.

2 )Defendant sellers et. al., with full knowledge( they are licensed realtors with 20 years experience) of the applicable laws ( App G ) created a knowingly fraudulent property description (scienter). In deposition, confessed to doing so ( App E) and excused it as a "*Grammatical error*".The court clearly accepted without an iota reality-thought, OR, she would have concluded: The chance of the description being a "grammatical error" , in a grammar-appropriate a 99 word, 532 letter property description ( words X 26 letter choices for every letter-position comprising a word, X the number of English words available/existing ( 218,632 ) X the number of words in the property description are not less than 1 in 21,644,568 of the description being in error.

Look up a Supreme Court decision of 100 words. If the description flows with a fluency of English, there is no "grammatical error". Hence, fraud-scienter.

their breach of that standard, despite having filed a Declaration pursuant to A.R.S. §12-2602 at the outset of the case stating that the claims in the Complaint *did* require supporting expert opinions and testimony. When the Court questioned Plaintiff's counsel about his reasons for not including expert testimony, he said that he did not think it was necessary because the issue was simple. But he then stated that he "certainly wouldn't present this at trial to a jury without an expert."

It was this judge who made the ruling on breach of contract in Neilson V. Star, another real estate case, HOWEVER, it involved owner dispute and involved NO realty industry actors.

Expert testimony is required to establish the standard of care and breach of the standard by a licensed professional unless "the negligence is so grossly apparent that a lay person would have no difficulty recognizing it." *Asphalt Eng'rs v. Galusha*, 160 Ariz. 134, 135-36 (App. 1989). At the oral argument, Plaintiff's counsel simply suggested to the Court what the Defendants *could have done* that allegedly would have resulted in the discovery of defects, which in turn, allegedly would have averted any damage to Plaintiff.

As the Court explained on the record at the hearing, a lay juror would not have sufficient knowledge of the duties of each of the licensed professionals to determine what they shouldhave done under the specific factual circumstances of this case. For example, Plaintiff's counsel suggested that they should have hired a roofing expert. But, without an expert explaining under what circumstances a real estate broker or listing agent should take the affirmative step of hiring a roofing expert, the jury would just be speculating.[4]

Arizona law makes clear ( App G) that if a realtor creates a property description, for the purpose of home sales, he must verify and confirm the accuracy of every statement in the description. The realtor does not need to do the confirmations-tests himself, he can engage whatever specialist is necessary to confirm. In this case, 1 issue is roofing, and the law does not state the realtor must examine the roofing, it says he must confirm as fact, and description of the roofing. The court has interpreted the laws as meaning the realtor must do it himself, or, something in the law for realtors, excludes realtors, from complying with the law. Duh ! NONE of defendants/judges basis for judgement are appropriate, because the issue if the language. Fraud is by language. See United States v Bernard Madoff.

Plaintiff now seeks leave to supplement his summary judgment briefing with a declaration from a real estate expert, which was disclosed to Defendants more than one year ago.

Although not cited by Plaintiff in his Motion for Reconsideration, the Court addresses Rule 56(f)(2), Ariz. R. Civ. P., which provides as follows:

> After notice and a reasonable time to respond, the court may: . . grant summary judgment on grounds not raised by a party.

While Defendants argued lack of causation in their briefing, they did not argue that summary judgment was warranted based on lack of expert testimony. The Court, however, finds that Plaintiff had sufficient opportunity to address the Court's finding because: (1) the Court discussed the issue at length at oral argument, and Plaintiff's counsel *conceded* that he could not

[4] The allegation that Defendants should have hired a roofing expert also highlights the causation issue. For example, Plaintiff provided no opinion from a roofing expert that they would have discovered the roofing problems or what the recommendation or cost of repair would have been. Similarly, Plaintiff argued that the agents and brokers should have demanded invoices or other documentation. He provided no evidence, however, of what information would have resulted from such a demand or that it would have changed the outcome.

present the case to a jury without expert testimony; and (2) Plaintiff did not argue in his Motion for Reconsideration that expert testimony was *not* necessary.

Plaintiff states, without citing any authority, that it would be an abuse of discretion for the Court to deny the request to supplement. The Court disagrees. In *Phil W. Morris Co. v. Schwartz*, 138 Ariz. 90, 94 (App. 1983), the Court held that a trial court has discretion to reject affidavits submitted after a ruling on summary judgment when the party submitting the affidavit did not show that it "contained newly discovered material or that they could not with reasonable diligence have been discovered and produced at the time of the hearing." As noted, the expert declaration had been prepared and disclosed more than a year before the briefing.

In addition, in *Bohmfalk v. Cochise Co.*, 2016 WL 3434717 (App. 2016), the court found that the trial court did not abuse its discretion when it struck plaintiffs' supplemental statement of facts presented at oral argument, which included a letter disclosed "years earlier." The trial court based its ruling Rule 7.1's limitation on motion practice to a motion accompanied by a memorandum, an answering memorandum, and reply memorandum. *Id.* at ¶31. Further, the trial court was affirmed even though plaintiffs argued that the letter was "inadvertently omitted" from their statement of facts, because plaintiffs provided no good cause for the late filing or any legal authority supporting an abuse of discretion. *Id. See also Boland v. Discount Tire Co., Inc.*, 2017 WL 6521289 ¶ 17 (App. 2017).

The case for denial of supplemental briefing is even more compelling here because there was no mistake or inadvertent omission. Rather, Plaintiff's counsel made a knowing decision not to include an expert declaration because he determined that the issue was "simple," although he then admitted that he knew he would need a real estate expert to present the case to the jury.

**Futility of Granting Leave to Supplement**

Finally, as the Realty One Defendants point out, allowing supplemental briefing would be futile because the Declaration of Plaintiff's expert, Curtis Hall, would be inadmissible under Rule 80(c)(3). The first paragraph of Hall's declaration states "I, the undersigned, Curtis Hall, pursuant to ARCP 43(b) and ARCP 80(i) [renumbered as 80(c)], et. seq. hereby make this my Declaration and solemn affirmation and so solemnly affirm and declare as follows, certify, verify, and state that the following is true and correct." However, Rule 80(c)(3) requires that the declarant certify *under penalty of perjury* that the declaration is true and correct. Without this language, the declaration is unsworn hearsay and inadmissible. *See State ex rel. Corbin v. Sabel*, 138 Ariz. 253, 256 (App. 1983); *Meserole v. M/V Fina Belgique*, 736 F.2d 147, 149 (5th Cir. 1984) (rejecting as inadmissible an expert's unsworn letter) (cited with approval in *Harvest Credit Management VII, LLC v. Adams*, 2009 WL 1395427 ¶14 (App. 2009)).

What is interesting to me, is that it was the judge who informed defendants that they should object to the experts report, and then told them how to word their objection so she could sustain, this was after defendants had the experts report for over a year. I did not know that judges can "run" the case of specific litigants. 14th or 5th amendments, equal protections/treatment, seems the judge should have informed Plaintiff one year earlier. Can't provide a "grace" for one litigant and not the other.

**IT IS THEREFORE ORDERED** denying Plaintiff's Motion for Reconsideration of Ruling Denying Request to Supplement Summary Judgment Pleadings and Plaintiffs' Positions with Previously Disclosed Licensees (sic) Expert Opinions for Standard of Care Issue.

However, all judgements/rulings/whatever vitiated when court make up its own EGLLL and lied about it to justify ruling to benefit a "protected" industry.

Again. All the issues of who knew what when, would-uh, could-uh, should-uh, experts, lay opinion, is moot, and just a diversion. THE issue id fraud via language. The meaning of words. What words represent, and how wording in advertising, property condition representation, whatever, is dependent on, and based on VERBS. If a verb is in the same sentence as an adjective or an adverb, the adverb and adjective can be called "opinion", or "puffery", but the VERB CAN NOT. You cannot make a crime disappear by calling the words used to commit the crime, or describing the crime, something else.

# APPENDIX A-Bb

MINUTE ENTRY 12/5/2017

Summary Judgement in favor of :

RE/MAX. Michael and Maricruz Martinex, agents
Kathy Laswick, broker

REALTY ONE. James Sexton, broker
Anita Burg, agent

NOTE: I have made commentary, part of my argument, by "capping" in red type. Although it changes the number of pages of the Ruling, none of the wording of the ruling has been altered.

A-Bc

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
12/08/2017 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2015-003144

12/05/2017

HONORABLE DAWN M. BERGIN

CLERK OF THE COURT
C. Ramirez/T. Cooley
Deputy

LAWRENCE SEIDMAN

JOHN DUKE HARRIS

v.

FRANK D WEILER, et al.

C ADAM BUCK

FATIMA NMN BADREDDINE
JOHN FYKE
MICHAEL H ORCUTT
ROBERT B ZELMS

MINUTE ENTRY

Courtroom 713 - ECB

8:38 a.m. This is the time set for Oral Argument re: Motions for Summary Judgment. Plaintiff, Lawrence Seidman who is present, is represented by counsel, John Duke Harris. Defendants, Re/max Excalibur, Michael Martinez, Maricruz Martinez, and Kathleen Laswick, are represented by counsel, Michael H. Orcutt. Defendants, Realty One Group, James Sexton, and Anita Burg, are represented by counsel, Fatima M. Badreddine.

A record of the proceedings is made digitally in lieu of a court reporter.

The Court has reviewed the following Motions:

- Realty One Defendants' Motion for Summary Judgment filed on September 22, 2017; and



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- Defendants Re/Max Excalibur, Kathy Laswick, Michael Martinez, and Maricruz Martinez's Motion for Summary Judgment filed on September 22, 2017.

The Court outlines the issues to be addressed by counsel.

Argument is presented.

For the reasons set forth on the record,

**IT IS ORDERED** granting both of the Motions for Summary Judgment.

**IT IS FURTHER ORDERED** that the Defendants will have twenty (20) days from today to file any Motions for Attorney's Fees, Requests for Costs, and a proposed form of judgment.

**IT IS FURTHER ORDERED** that the Court will enter a single Rule 54(c) judgment after ruling on all motions for attorneys' fees and requests for costs filed by Defendants.

11:21 a.m. Hearing concludes.

# APPENDIX A-Bc

UNDER ADVISEMENT RULING 08/11/2017

Granting WEILER motion for summary judgement

NOTE: I have made commentary, part of my argument, by "capping" in red type. Although it changes the number of pages of the Ruling, none of the wording of the ruling has been altered.

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
08/15/2017 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2015-003144 08/11/2017

HONORABLE DAWN M. BERGIN

CLERK OF THE COURT
S. Ortega
Deputy

LAWRENCE SEIDMAN JOHN DUKE HARRIS

v.

FRANK D WEILER, et al. C ADAM BUCK

FATIMA NMN BADREDDINE
JOHN FYKE
MICHAEL H ORCUTT

**UNDER ADVISEMENT RULING**

The Court has considered the following:

- Defendants Weiler's Motion for Summary Judgment filed on February 6, 2017
  - Realty One Group, James Sexton and Anita Burg's Joinder in the Motion
  - ReMax Excalibur, Kathy Laswick, Michael Martinez and Maricruz Martinez' Joinder in the Motion
  - Plaintiffs' Response to the Weilers' Motion for Summary Judgment
  - Plaintiffs' Response to the Re/Max Defendants' Joinder
  - Plaintiffs' Response to Realty One Defendants' Joinder
  - Defendants Weiler's Reply in Support of their Motion for Summary Judgment

- The arguments of counsel presented at the April 21, 2017 hearing.

- Plaintiffs' Motion to Supplement Plaintiffs' Response Facts and Legal Arguments to Defendants Weiler's Motion for Summary Judgment with Weiler's Deposition Testimony filed on May 25, 2017

- Defendants Weiler's Response to the Motion to Supplement filed on June 12, 2017

The Court now makes the following findings and orders.

**Factual Background**

This case involves a dispute over alleged misrepresentations, concealment and/or non-disclosure of property defects by the sellers of a residence. Plaintiff Roger Seidman and his Trust (collectively "Plaintiff") has sued the sellers and brokers and agents involved in the transaction, alleging multiple tort claims against each. He has also alleged contract claims against the Weilers. The primary defects Plaintiff complains about are leakage from the roof and poor drainage leading to cracks in the foundation.

On March 16, 2013, the Weilers entered into a Purchase Agreement with Plaintiff for the sale of their house (the "Property"). The purchase price was $432,000. Defendant James Sexton served as the selling broker and Defendant Anita Burg as the selling sales agent. Both worked for Defendant Realty One Group (collectively the "Realty One Defendants"). Defendant Kathy Laswick served as the listing broker and Defendants Michael and Maricruz Martinez as the listing agents. Laswick and the Martinezes worked for Defendant VDH Investments Corporation dba RE/MAX Excalibur (collectively the "Remax Defendants").

Plaintiff signed the Residential Seller's Property Disclosure Statement (the "SPDS") on March 18, 2013. As set forth in more detail below, the Weilers disclosed prior roof leaks in the SPDS. In March 2013, Plaintiff hired Delaney & Barenz, LLC, dba WIN Home Inspection Fountain Hills ("WIN") to conduct an inspection of the Property. WIN issued its report on March 19, 2013. The report contains the following statement regarding the roof:

> I noted signs of a possible roof leak in the garage ceiling. I was unable to confirm if these at [sic] from a past leak of and active leak. I recommend asking the current owner about any past leaks and roof repairs.

Judge leaving out sellers answer, that they were from a leak 1-2 years ago, which the seller had repaired, and then coated the roof with a sealing agent. This was a lie. Never Repair, seller just rolled on some reflective latex paint so roof would appear "new". Confirmed as lie In weiler deposition..

On March 21, 2013, Plaintiff signed the Buyer's Inspection Notice and Seller's Response (the "BINSR"). He listed numerous items that he wanted repaired. Two of those items are potentially relevant to this case: item (c) contained a request for a "credit or Professional Roofer

to repair gap above the flat roof flashing in a number of areas;" and item (f) requested a "credit or determine source of moisture damage to base of master bathroom cabinets near shower and repair." The Weilers responded on March 22, 2013: "In lieu of all repairs, Seller provides $1,000 credit/concession toward Buyer's closing costs and/or prepaids at close of escrow." Plaintiff accepted that offer the following day.
Judge is making up stuff./quotes defendants. Not all repairs. It was credit for 7 items identified by the home inspectors. In ADR ( App H) seller weiler claims the $ 1,000 credit was to cover any and all repairs ever needed. Confirmed as lie in Apert mandate page 48, PP 16 line 3. ONLY seven items listed on BINSR.

On April 19, 2013, Plaintiff signed a "Buyer Pre-Closing Walk-Through," affirming that:

> The Buyer(s) find the property to be as represented at the time the purchase contract was accepted by the parties, and any subsequent repairs that were agreed to by the Seller(s) and Buyer(s) have been completed to the satisfaction of the Buyer(s).
>
> Escrow closed the same day.

Plaintiff alleges that he set aside $20,000 for cosmetic repairs to the home. He began discovering some of the issues raised in this lawsuit in March 2014. THIS IS A LIE OF DEFENDANTS AND COURT ( App H) THE ACTUAL DATE OF INITIAL DISCOVERING END OF APRIL 2013, AND IN JULY 28 2013, SEASONAL RAINS, WATER POURED THROUGH KITCHEN CEILINGS AND FLOODED SUNKEN LIVINGROOM, KITCHEN AND SUCH. It was not until December 2014 that he first discovered problems with the roof. Seidman Decl. at ¶19. He ultimately spent approximately $137,000 on the home. The parties dispute, however, whether the expenditures were for repairs or remodeling. IT WAS 12/2014 THAT DISCOVERED THE ENTIRETY OF THE ROOF WAS ORIGINAL, BUBBLING TAR FROM WATER SATURATION AND THAT THE ENTIRETY OF THE ROOF WOULD NEED TO BE REPLACED INCLUDING MULTIPLE ROOF JOISTS. : IF THE DESCRIPTION OF THE PROPERTY HAD BEEN REAL (App K), than not more than 20K would have been spent, for interior paint, make an office in 4th bedroom, change some baseboard, add bookcases.

Plaintiff identifies the following statements by the Weilers to support his misrepresentation and fraud claims:[1]

1. <u>From the SPDS</u>

   57-59 Are you aware of any past or present roof leaks? Explain.
   Response: Leaks were identified and corrected ( lied)

   60-61 Are you aware of any other past or present roof problems?

Response: No
seller confessed in depo to having to replace 800 sq ft prior to sale, as part of a damage camouflage program to hide all damage he knew existed BEFORE LISTING FOR SALE, or, why did he replace the 800 sq ft of wall and ceilings.?

62-63 Are you aware of any roof repairs? Explain.
Response: Sun side re-cover older tile approx 12 yrs.
NO,..IN DEPO, STATED IT WAS REALLY 18 YEARS OLD, NOT 12, HOWEVER, ALSO A LIE. THE ROOF HAD MULTIPLE "PATCHES" IN THE SAME AREA, ONE OVER THE OTHER. THERE NEVER WAS AN ACTUAL REPAIR MADE TO ANY PART OF THE PROPERTY. EVER. YES, HAVE LOTS EVIDENCE COURT IGNORED, ESPECIALLY WHEN DEFENDANTS CONFESSED TO FELONY FRAUD.

67-68 Are you aware of any interior wall/ceiling/door/window/floor problems?
Response: No REPLACED 800 SQ FT WALLBOARD ON CEILINGS AND WALLS, AND ENTIRE WALL FRAMING-STUDS AS TOO ROTTED AND MOLDY FOR NEW WALLBOARD....BUT KEPT THE ORIGINAL ROTTED BOTTOM PLATE.

69-70 Are you aware of any cracks or settling involving foundation, exterior walls or slab?
Response: No
AGAIN, LOTTA PHOTO EVIDENCE.....CRACKED WALLS FOUNDATION WERE PUTTIED IN AND PAINTED OVER. DID A GOOD JOB, NOT NOTICEABLE....UNTILL THE PAINT WASHED OFF 90 DAYS POST PURCHASE ...YES, LOTTA EVIDENCE

73-75 Are you aware of any damage to any structure on the Property by any of the following? Flood, fire, wind, expansive soils, water, hail or other?

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[1] *See* PSSOF ¶¶ 6, 9, 10, 15.
YES, MORE LIE.....STEM WALLS "POWDERING" AND CAMO'D OVER, CRACKED FOUNDATION CAMO'D, BRICK WALLS OF HOME ALL CARCKED OUT CEMENT JOINTS, FILLED WITH PUTTY, PAINTED OVER

Response: No

135-37 Are you aware of any work on the property such as building, plumbing, electrical or other improvements?
Response: No
MAJOR LIE, LOTTA EVIDENC...COURT SAW ALL PHOTO-VIDEO-GRAPHIC EVIDENCE.....PLUMBING UNDER WET BAR CORRODED AWAY, AND

SPRAYED OVER, FANS 4, HUNG FROM CEILING WITH NO JUNCTION BOXES...JUST SCREWED INTO CEILING, MAY SWITCHES-SOCLKETS MOVED AND GROUND WIRE LEFT OFF. WALLWAY SCONCES WIRED IN WITH SPLICES JUST TAPE WRAPPED....NO CAPPING PER CODE. CRACKED SHOWER PAN CAMO'D OVER.

209-10 Are you aware of any water damage or water leaks of any kind on the Property? Explain.
Response: Yes. Some roof leaks
IN DEPOSITION, SELLER REPORTED NO ACTIVE LEAKS....LIED...IN SPDS..FOLOWING QUESTIONS JUDGE OMITTED, SAID ANY ROOF LEAKS "CORRECTED" OR "REPAIRED"

211-12 Are you aware of any past or present mold growth on the Property?
Response: No
LIE. IN DEPOSITION, WEILER STATED HAD TO CHANGE 800 SQ FT WALLBOARD CEILING AND WALLS, HAD TO REMOVE AN ENTIRE WALL....STUDS ALL ROTTED AND MOLDY....LOTTA MOLD IN CEILING AS WELL. LOTTA PHOT-VIDEO EVIDENCE, COURT HAD ALL. 800 SQ FT. THE AVERAGE SMALL GUEST BEDROOM IN AN AVERAGE TRACT HOUSE HERE IS 100-120 SQ FT/

2. March 22, 2013 Email

On March 21, 2013, Burg sent an email to the Martinezes about a possible roof leak in the garage. The Martinezes forwarded the question to the Weilers, who responded on March 22, 2013 (the "March 22 Email"). Below is the full email exchange:

There are signs of a possible roof leak in the garage ceiling. Can you confirm with the owner if this is from a past leak or active leak? And if past leak has been fixed?

Response: The roof leak seen in the garage is from a previous leak situation from years ago that was corrected, and a recent re-seal of that portion of the flat roof was completed in December last year.
LIE, NO RE-SEAL...THEY JUST ROLLED A REFLECTIVE PAIND TO MAKE IT APPEAR NEW-ISH, AND AGAIN...MULTIPLE PATCHES IN SAME LOCATION ONE OVER THE OTHER, BUT NEVER ANY ACTUAL REPAIRS

3. The Listing

Plaintiffs also complain about the statement in the listing brochure that the home had "newer A/C units and a roof, which should provide for low maintenance in years to come."[2]

**Legal Analysis**

[2] Plaintiff also complains about the representation in the listing brochure that the home was "lovingly maintained." The idea that a statement like this could be actionable is completely meritless. Such statements constitute "puffery" and cannot form the basis of a fraud claim. *See Law v. Sidney,* 47 Ariz. 1, 4, 53 P.2d 64, 66 (1936) (stating that fraud "cannot be predicated upon the mere expression of an opinion or upon representations in regard to matters of estimate or judgment"); *Construction Dev. Svcs. Inc. v. Wells Fargo Bank, N.A.,* 2016 WL 3619028, *5 (D. Ariz. 2016).

MORE IN CAHOOTS JUDGE LIES....."LOVINGLY" IS AN ADVERB...SO, OPINION, HENCE "PUFFERY". MAINTAINED IS A VERB, A WORD OF FACT, NOT PUFFERY.VERBS CAN GARNER CONSENSUS...THE PLANE "CRASHED", OR IT DID NOT "CRASH". NO OPINION, DID OR DID NOT. FACT

Plaintiff has brought claims against: (1) Frank and Ana Weiler for breach of contract;

DOCUMENTARY PROOF OF "CAHOOTS" BETWEEN COURT, AND DEFENDANTS IN App M SAME JUDGE RULED....DIFFERENT REAL ESTATE CASE...BUT JUST REGULAR PEOPLE, NO CLIENTEL INDUSTRY MEMBERS.....PARAPHRASING. IT TERMS ARE SPELLED OUT, THEY ARE CONTRACT OBLIGATION ( App N ). NOT KEEPING OBLIGATION IS BREACH. SALES CONTRACT ON THIS CASE OBLIGATED SIGNATORIES TO ALTERNATE-DISPUTE-RESOLUTION. SELLER BROUGHT TO PETITIONER ATTENTION, PETITIONER INITIATED , DEFENDANT SELLER REFUSED TO PARTICIPATE. ERGO, BREACHED CONTRACT CLAUSE. JUDGE REFUSED TO APPLY HER OWN RULING FROM ANOTHER CASE.....SO REALTY INDUSTRY PROTECTED....ALL IN App M

negligent misrepresentation; mutual mistake; consumer fraud; common law fraud/ misrepresentation; (2) the Remax Defendants for negligence; negligent misrepresentation; and consumer fraud; (3) the Realty One Defendants for breach of fiduciary duty; negligent misrepresentation; constructive fraud; and common law fraud/misrepresentation.

NOT IN HILL V JONES, BECAUSE THE PROPERTY DESCRIPTION DID NOT STATE "NO TERMITES", AND, THE ISSUES WERE NOT CLOSE....HILL V JONES, THEY LIED IN ANSWER TO A QUESTION, DID NOT INITIATE A CAMPAIGN OF COSMETIC CAMOUFLAGE TO COVER UP, AND, NOTHING IN THE PROPERTY DISCLOSURE UTILIZED VERBS IN THE SAME MANNER AS THIS CASE, NOR DID THE COURT MAKE UP THEIR OWN LANGUAGE AS A BASIS FOR JUDGEMENT.

AGAIN, SEE App G FOR SPECIFICS OF FELONY FRAUD.

The standard for disclosure in the sale of real property was established in *Hill v. Jones,* 151 Ariz. 81, 85, 725 P.2d 1115, 1119 (App. 1986). In that case, plaintiff buyers entered into a purchase agreement with sellers after visiting the home several times. Sellers were required to pay for and place in escrow a termite inspection report certifying that no evidence of termite infestation existed. Prior to the report being issued, buyers made another visit to the home. They noticed a ripple in the wood floor and asked sellers if it could be evidence of termites. Sellers responded that the ripple was the result of prior water damage. Buyer husband was a maintenance supervisor and was still concerned that the ripple was evidence of termites, but he decided to wait for the termite inspection report. The final report indicated that there was no visible evidence of termite infestation, physical damage or past treatment.

After moving in, buyers noticed that the steps leading to the living room were crumbling. They called an exterminator who confirmed the existence of termite damage. The buyers later learned that the sellers had received two termite guarantees from an exterminating company when they purchased the home; that they paid the annual fee for the protections provided by the guarantee; that they had the extermination company treat two active infestations during the time they owned the home;[3] and that they had seen termites on the back fence and had treated and replaced parts of the fence. Sellers did not disclose any of this information to the buyers, the realtor or the termite inspector.

The trial court granted summary judgment in favor of the sellers, finding that they had no affirmative duty to disclose the past termite problems. The Court of Appeals reversed, holding that "where the seller of a home knows of facts materially affecting the value of the property which are not readily observable and are not known to the buyer, the seller is under a duty to disclose them to the buyer."[4] *Id.* (quoting *Johnson v. Davis,* 480 So.2d 625, 629 (Fla. 1985)). The court remanded the case, finding that fact issues existed regarding the materiality of the omission and buyers' alleged knowledge of the infestation.
IN PETITIONERS CASE, ALL DAMAGE KNOWN TO SELLER WHO REFUSED TO DISCLOSE. PROOFS THEY KNEW: WOULD YOU PATCH A TIRE THAT WAS NOT FLAT? WOULD YOU ABANDON A SHIP THAT WAS NOT SINKING?, WOULD YOU APPLY MULTIPLE PATCHES TO A ROOF THAT DID NOT LEAK? WOULD YOU REPLACE A WALL AND REPLACE 800 SQ FT OF CEILING AND WALL COVERING JUST BEFORE PUTTING UP FOR SALE, ON A HOUSE THAT HAD NO PRE-EXISTING AND ONGOING DAMAGE?

**A. Fraud/Negligent Misrepresentation/Breach of Contract**

[3] The termite inspector admitted missing the evidence of past treatment and damages, claiming that boxes blocked his view.

[4] Plaintiff also complains that the Weilers failed to provide any supporting documentation about the condition of the home or repairs made. However, he fails to cite any authority imposing such a duty on the Weilers, nor does he indicate that he requested such documentation.

FOOTNOTE #4: THINK THIS THROUGH....IF SELLER CLAIMED THERE WERE NO DAMAGE...TO THE EXTENT THAT THERE ACTUALLY WAS....THEY WOULD NOT "HAVE" ANY DOCUMENTATION CONFIRMING REPAIRS TO A HOUSE THAT NEEDED NO REPAIRS....SO WHAT SUPPRTING DOCUMENTATION THAT NO WORK WAS EVER DONE TO THE HOUSE, COULD POSSIBLY EXIST ? I.E.,

, SHE JUST CITED A CASE ABOVE,WHERE APCRT RULED, DUTY TO DISCLOSE. IN DEPOSITION, CONFESSED THAT THERE WAS A LOT OF DAMAGE HE COVERED UP, AND REFUSED TO DISCLOSE.

Here, Plaintiff relies on the following as proof of the Weilers' "knowledge and concealment of their own property's roof problems, water damages and other defects:"[5] (1) the alleged misrepresentations in the SPDS as outlined above; (2) the March 22 Email; (3) a February 11, 2014 letter from Allstate Insurance denying Plaintiff's insurance claim for water damage (the "Allstate Letter"); and (4) the declaration/report from their construction defect expert George Frank (the "Frank Report").

The Court first notes that the representations in the SPDS and March 22 Email do not by themselves constitute misrepresentations or concealment. They are simply representations. Thus, the only evidence Plaintiff proffers to show that the representations were false are the Allstate Letter and the Frank Report....AND THE DEPOSITION CONFESSIONS ! JUDGE STILL LYING. MUCH PHOTO AND VIDEO GRAPHIC EVIDENCE, AS WELL AS CONSTRUCTION MATERIALS EVIDENCE. THE COMMENT ON "REPRESENTATIONS"...ARE YOU LAUGHING.

Plaintiff cites the Allstate Letter as evidence that the Weilers' roof was not "newer," as stated in the listing brochure. PSSOF ¶15. However, the Letter does not support this proposition. The Letter simply states that Allstate's denial of coverage applied only "to the soffit portion of your roof where the damage was caused by repeated leakage or seapage [sic] from your roof, which occurred over a period of weeks, months or years." "Weeks" would be newer, "months" would be newer, and "years" could be newer. Thus, there is no statement Plaintiff can rely on in that letter as evidence that the roof was not "newer." Furthermore, it is not even clear where the information about the roof came from—that is, whether Allstate did an inspection or relied on information from someone else. In short, it has no probative value.

JUDGE REFUSED TO CONSIDER HOME WARRANTY REPORT....FROM 8/2013, AND THE PHOTO EVIDENCE OF ALL THE ROTTEED ROOF JOISTS, AND THE "PATCHING" DONE BY WEILER....HAD TO REPORTS THAT ROOF WAS ORIGINAL

The Frank Report is of limited value because it is laden with statements that constitute improper expert opinion testimony. Below is just a sampling of such statements:

- "The inspector's findings of areas that needed some roof mastic should have led to further investigation by Defendants . . ." Frank Report at 12, ¶3. Who should have done what investigation is not something an expert is permitted to opine on. In fact, arguably, the findings should have led Plaintiff to conduct more investigation.

- "The return air system had been compromised by the previous owner and was not disclosed prior to the sale of the home." *Id.* at 3, ¶(F)(14). Frank cannot know that the Weilers "compromised" the air system or intended to do so if it was in fact "compromised." Noting that it was not disclosed is also improper opinion testimony since Frank was not involved in the sale and has no personal knowledge of what was or was not disclosed. Further, he is not permitted to opine on whether something should have been disclosed.

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[5] The Court declines to consider unidentified "other defects."

IGNORING EVIDENCE. WEILER PUNCHED HOLES IN AIR SYSTEM TO RUN PHONE AND INTERNET CABLE IN ORDER TO GET IT TO A GUEST BEDROOM OFFICE.HE COULDN'T GET THE CABLING AROUND THE DUCTING, SO HE PUNCHED THROUGH IT. YES, LOT OF PHOTOGRAPHIC EVIDENCE.

- "This condition has resulted in long cracks in the exterior cement block walls, many of which have been caulked and painted *to hide the damage.*" *Id.* at 4-5, ¶(G)(1) (emphasis added). Experts do not get to speculate about a party's intentions or motives.
REALLY? EMPIRICAL EVIDENCE GALORE.....WHO....CALKS AND PAINTS OVER THE CRACKS IN EXTERIOR WALLS, CHANGES THE 800 SQ FT WALL AND CEILING BOARD, RIPS DOWN AND REPLACES AN ENTIRE INTERIOR WALL JUST BEFORE THEY LIST THE PROPERTY.....I/M NOT MENTIONING PAINT BECAUSE ANYONE MIGHT WANT TO PAINT TO SPRUCE UP HOUSE, BUT, ON TOP OF ALL THE OTHER ACTIONS, IT WAS A CAMPAIGH OF CAMOUGLAGE TO HIDE ONGOING DAMAGE REFUSED DISCLOSUR. THE JUDGE WOULD HAVE US BELIEVE THE ONLY EXPLANATIONS IS SPACE ALIENS DID ALL THE COSMETIC CAMOUFLAGING OF THE MATERIAL DEFECTS.
- "This discovery [of the painting of the roof with latex painting] leads to the question: was the application of a poor quality latex paint installed to hide the fact that the existing roof was, in fact, a major problem and the paint was applied to hide the issue in order to sell the home?" *Id.* at 5, ¶I.

Frank's concluding opinion is found in the third-to-last paragraph on page 7:

Based on the numerous defects found throughout this home, reviewing the multitude of photos taken over the past few years of the numerous defects and problems discovered, and the Defendants [sic] Disclosure Statement together with that of the Realtor, the previous owner and the Sellers Realtor had to be aware of many of these defects present in the home before the sale to Mr. Seidman.

Nowhere does Frank specify exactly which of the "many" alleged defects Defendants "had to be aware of." The Frank Report is also particularly confusing because it addresses each

item identified in the WIN inspection report, regardless of whether it has anything to do with Plaintiff's claims. And, Plaintiff's briefing is not helpful in identifying the specific items for which he is seeking recovery and which alleged misrepresentations are associated with the item.

THE FACT THAT THERE WERE "MANY" MATERIAL DEFECTS, AND MANY OF THOSE WITH LAYER UPON LAYER OF REPETITIVE PATCHING, IS LIKE SCREAMING THROUGH A MEGAPHONE...

ONE HAS TO WONDER WHY THE JUDGE KEEPS SLANTING CONCLUSIONS IN ONLY ONE DIRECTION....SELLER FRAUD JOINDERS REALTY FRAUD

As an example, the Frank Report notes that the inspector found that the vegetation and trees should be trimmed, and that Plaintiff "removed one tree and some vegetation but has been advised that much more effort is needed . . ." *Id.* at 2, ¶(F)(1). Presumably, Plaintiff saw what the vegetation looked like before he bought the house. The Court is perplexed as to why Frank is opining on how much additional work might be required to remove the vegetation when Plaintiff is not seeking recovery for removal of the vegetation.....BECAUSE, THE INSPECTION REPORT, CITED IN ORALS AND MANDATE, TALKS ABOUT POSSIBLE LOT GRADING FLAWS WAS COVEREDE UP BY VEGITATION.

Similarly, the inspector noted under the heading "Roof- - Flashing/Caulking" that there was "a gap above the flat roof flashing in a number of areas. I recommend caulking these gaps with a good quality roof mastic." Frank opines that these findings "should have led to further investigation by Defendants . . .," but then states that the caulking itself is not an open issue. *Id.* at 3, ¶(F)(12). Moreover, this particular roof problem was one of the repairs listed by Plaintiff in the BINSR, for which Plaintiff received the $1,000 credit.[6]

[6] In his briefing, Plaintiff contends that his claims do not encompass the items on the BINSR.

There are also inconsistencies between the briefing and the Frank Report. For example, on page 10 of the Response, Plaintiff complains that Mr. Weiler lied when he told Plaintiff that the water stains on the baseboard of the master bathroom cabinet were from a previously leaking sink when they were actually from a damaged shower pan. As noted above, in the BINSR, Plaintiff asked for a "credit or determine source of moisture damage to base of master bathroom cabinets near shower and repair." While Plaintiff claims he is not suing for any items on the BINSR because he received a $1,000 credit for them, he contends that he is entitled to sue the Weilers for this alleged misrepresentation and damage because the BINSR item was just related to anything damaged by the generic moisture in the master bathroom. Not only is this a dubious proposition, but on page 4 of the Frank Report, Fra
remediated" and "not an open issue." THE SHOWER PAN WAS CRACKED. WEILER KNEW THIS BECAUSE IF ONE SHOWERED IN IT THE WATER WOULD BE ALL OVER THE FLOOR. WEILER REFUSED TO

DISCLOSE..IT WOULD MEAN THE WEILERS HAD TO SHOWER IN THE GUEST BATH.

1. The Roof

The Court is therefore left to attempt to cull from the Frank Report any opinions that are based on observations and inspections in his area of expertise rather than on speculation about the Weilers' motives and state of mind, and to tie them to particular alleged misrepresentations. As to the roof, the specific representations made by the Weilers were that: (1) there were prior roof leaks that had been identified and corrected; (2) the roof was "newer;" (3) they had resealed the garage portion of the flat roof in December 2012; and (4) they had re-covered the older tile on the sun-side.

With respect to these specific issues, Frank states:

> Based on our on-site inspection of the roof it was quite obvious that the roof had been painted with what looked to be latex paint. Based on the condition found on the roof by Kings Roofing, it became quite evident that the roof had not been recently or appropriately repaired as claimed by the home owner and realtors.

These observations/findings are very general, however. It is unclear which part of the roof Frank is commenting on. For example, he simply states that "the roof" was not recently or appropriately repaired. The Weilers gave specific information only as to the leak in the garage ceiling. However, Frank does not say that that portion of the roof had not been recently resealed as asserted by the Weilers. And, while the repair made by the Weilers may not have been to Plaintiff's satisfaction, he presents no evidence that the Weilers made a knowingly inadequate repair. Further, while Frank speculates that the Weilers applied the latex paint "to hide the fact that the existing roof was, in fact, a major problem . . .," he never identifies what the paint was hiding—stains, holes?

IN FACT, KINGS ROOFING HAD TO STRIP THE FLAT ROOF SECTION DOWN TO JOISTS, WHICH THEY EXPOSED IT WAS AN ORIGINAL ROOF.....ORIGINAL....ROTTED THROUGH, AND COATED WITH LAYER UPON LAYER OF ROOF MASTIC, ABOVE ROTTED THROUGH AREAS, SPLIT AREAS, MISSING AREAS JUST COVERED WITH A TROWELED ON CALKING....LOTTA PHOTO AND VIDEO EVIDENCE OF THE ENTIRETY OF THAT ROOF RE-BUILD. QUESTION IS, WHO KEPT SLATHERING ON CAULKING, ONE LAYER OVER AN OTHER, PUTIN ?..IF THE WORK WAS DONE, THE WEILERS WOULD HAVE TO KNOWN IT. LAYER AFTER LAYER IN THE SAME LOCATIONS...

Plaintiff also accuses the Weilers of lying when they identified the roof repair of "sun side re-cover older tile approx. yrs.,'but fails to explain how this representation was false. In addition, Plaintiff disingenuously argues that the Weilers failed to disclose the roof leaks when they stated that they were not aware of "any other past or present roof problems." Plaintiff reads "other" out of the question as if the Weilers had not already identified the leaks and repairs they were aware of. [7]

DEPOSITION, WEILER WAS HANDED AN ARIAL VIEW OF THE HOUSE, AND ASKED TO TAKE A PENCIL, AND POINT-MARK, WHICH IS THE "SUN-SIDE" ROOF. WEILER ADAMANTLY REPEATEDLY REFUSED TO DO SUCH....FURTHUR, THERE NEVER WAS A REAL "RE-COVER"....THERE WERE MULTIPLE PATCHES ONE ON TOP THE OTHER, ALL OVER THE ROOF. LOTTA PHOTO EVIDENCE...COURT DIDN'T CARE. PHOTOS TAKEN WHEN "HOUSE FLIPPER" REMOVED THE ROOF FOR A REBUILD, AND LET ME PHOTOGRAPH. COURT HD THE EVIDENCE.

Frank does state that "based on our findings and supported by the physical evidence, the entire roof has been an ongoing problem for 10-15 years," *id.* at 6, ¶(I)(1), which tends to undermine Defendants' representation in the listing brochure that the roof was "newer." However, the term "newer" is vague and Plaintiff never asked what date the roof was replaced. In any event, the focus of Plaintiff's complaints about the roof is not the age, but the leaks that caused the water damage. In other words, a roof could start leaking after 8 years depending on the quality of the materials and the workmanship. Or, a roof that is 20 years old could still be watertight. Further, Plaintiff's inspector did not express any concerns about the roof's age. Thus, the representation that the roof was "newer" was not material to the transaction.

n NOPE !, PER "ENGLISH 101" IN PETITION, THE DESCRIPTION, TO A READER OF ENGLISH, REPRESENTED THE ROOF TO BE THE SAME AGE AS THE AIR CONDITIONERS...5 YEARS OLD.

2. Poor Drainage and "Ponding" .

As to the poor drainage, Plaintiff alleges that the first few times it rained, there was significant "ponding" of water against the house that also caused water damage and cracks in the foundation or slab. Again, the only purported evidence that Plaintiff has presented to show that the Weilers were aware of cracks involving the foundation, exterior walls or slab is his and Frank's opinion that they "had to" know about it. Presumably, Plaintiff considers this damage to be from a "flood" since he alleges that the Weilers lied when they responded that they were not aware of any damage to any structure on the Property by "flood, fire, wind, expansive soils, water, hail or other." That water "ponds" against an owner's house after a heavy rain in Arizona is hardly sufficient to give rise to a reasonable inference that the house was damaged by a "flood" or that the homeowner was aware that the water had caused damage to the foundation. Furthermore, the home inspector wrote in his report that there was "marginal to poor drainage away from the structure." Plaintiff did nothing to follow up on this issue. LIE, THE INSPECTOR REPORT SAID A LOT MORE ABOUT THE GRADING, THAT IT WAS NOT IMPORTANT ENOUGH TO DEAL WITH, UNTIL IT HAD BEEN MONITORED THROUGH RAIN EVENTS....ALSO, DURING REGULAR SEASONAL RAINS....THE WATER IN THE BACK YARD CAME UP TO THE BACK DOOR LOWER JAM....PATIO UNDER 3", WATER ALL OVER, WATER "PONDING" IN THE SUNKEN LIVING ROOM. PHOTO AND VIDEO EVIDENCE GALORE. COURT DIDN'T CARE, BUT, THEY DID NOT WANT THIS CASE

GOING TO A JURY....HURT THE REALTY GUYS. PETITIONER HAD TO DIG TRANCHES 1.5 – 2 FEET DEEP, 2 FEET WIDE ALL AROUND THE HOUSE....FILLED WITH RIVER ROCK...TO DRAIN WATER OUT OF BACK AND FRONT YARD TO THE STREET. LOTTA FLOODING ....NOT PONDING...FLOODING OF THE PROPERTY. LOT OF VIDEO EVIDENCE, PATIO UNDER 3" WATER....IN NORMAL SEASONAL RAINS. THAT MEANS THAT IT WAS THE SAME ALL 23 YEARS WEILER OWNED THE PROPERY. REFUSED TO DISCLOSE FLOODING.

Plaintiff has also presented no evidence (other than Frank's speculation) that the Weilers lied when they represented that they were not aware of any interior wall, ceiling, door, window, or floor problems. Finally, Plaintiff accuses Defendants of lying when they stated they were unaware of "any work on the property such as building, plumbing, electrical or other

[7] Frank states in his report that the sellers said that "there was a leak in the past which has been repaired and there were no signs of any leaking as they had just recently had the roof redone." Frank Report at 3, ¶14. However, there is no evidence that the sellers said they had the roof "redone." Rather, they said that "a rece nt r-seal of that portion of the flat roof was completed in December last year." March 22 Email.

improvements." Having reviewed the briefing and the Frank Report multiple times, the Court has still been unable to identify any undisclosed work that was material to the transaction. WEILER CONFESSED IN DEPOSITION App E

Plaintiff also ignores that whether his work on the home is labeled "repairs" or "remodeling," he did not begin to notice any defects until March 2014, one year after moving in; and he did not notice any problems with the roof until December 2014, a year and nine months after moving in. And, he did not discover the water damage until he began to dismantle walls, cabinets or other items. Thus, the damage was *hidden*...AGAIN WITH THE LYING....STARTED DISCOVERING END OF APRIL 2013, WATER POURED THROUGH CEILINGS AND PROPERTY FLOODING IN JULY 2013...KNOELEDGE THE ENTIRETY OF ROOF ROTTED THROUGH IN 12/2014.(App H )

Clearly, this case is nothing like *Hill*. Here, Plaintiff has produced no evidence of a particular misrepresentation by Defendants. In short, Plaintiff attempts to create a genuine issue of material fact through non-specific opinions by Frank, which boil down to: "the Weilers must have been lying because the water damage was so extensive." In other words, he works backwards—because there was damage, the Weilers must have known about it. This is not the law in Arizona, and the Court finds that this speculative inference is insufficient to create a genuine issue of material fact as to Plaintiff's claims for fraud, negligent misrepresentation[8] or breach of contract.[9]

NOT AT ALL. IT WAS THE MULTIPLE PATCHING ON WALLS AND CEILING/ROOF, ONE PATCH OVER THE OTHER THAT WAS THE CLUE...AGAIN, IF NOTHING WRONG, AND WEILER DIDN'T KNOW, WHO DID, OR ORDERED PATCHES , AND THE COSMETIC CAMOUFLAGING

**B. Mutual Mistake**

Plaintiff alleges in Count 3 of the First Amended Complaint that rescission should be granted based on a mutual mistake regarding the adverse conditions of the home. A party seeking to rescind a contract on the basis of mutual mistake must show by clear and convincing evidence that the agreement should be set aside. *Nelson v. Rice*, 198 Ariz. 563, 12 P.3d 238 (App. 2000). Further, under §154(b) of the Restatement (Second) of Contracts, which has been adopted in Arizona, the doctrine of mutual mistake is not available if the party seeking relief bore the risk of the mistake. *Id.* Comment (a) to Section 154(b) states that a party bears the risk of mistake when "he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient."

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[8] While the elements of negligent misrepresentation differ from those of fraud, Plaintiff still must prove that a Defendant either provided Plaintiff or others with false or incorrect information, or omitted or failed to disclose material information. *Van Buren v. Pima Community College District Bd.*, 113 Ariz. 85, 546 P.2d 821 (1976). As set forth above, Plaintiff cannot satisfy this element of the tort. Further, the specific duty with respect to disclosure in sales of residences was established by *Hall,* and Plaintiff cannot meet the burden set forth in that case.

[9] Defendants also argued that summary judgment should be granted because Plaintiff was on notice of the alleged defects as a result of the SPDS and the inspection report. However, they fail to cite any authority to support this argument, other than cases reciting the elements of claims for misrepresentation.

Here, Plaintiff knew that he had limited knowledge about the roof leaks and the drainage on the property. And, while he hired a general inspector to inspect the home, he did not hire a roofer to take a closer look even after the inspector noted the stains on the garage ceiling. He also failed to follow up on the inspector's notation regarding poor drainage. Under these circumstances, the Court finds that no reasonable juror could find by clear and convincing evidence that Plaintiff is entitled to rescission based on mutual mistake.
THE LAW( App G) GUARANTEED THE VERACITY OF THE PROPERTY DESCRIPTION. ALSO, DEFENDANT BURG, IN DEPOSITION, STATED THAT PETITIONER HAD DONE MORE THAN NECESSARY TO CHECK OUT PROPERTY. REMEMBER, IN A HOME INSPECTION, THE INSPECTOR CANNOT GO ABOUT PUNCHING HOLES IN WALLS AND CEILING/ROOF LOOKING FOR HIDDEN DAMAGE....

**Motion to Supplement**

In Plaintiffs' Motion to Supplement their Response and Facts to the Weilers' Motion for Summary Judgment, Plaintiff seeks leave to supplement his briefing with testimony from Mr.

Weiler's deposition taken after the oral argument. The substance of the testimony is that the roof leak that the Weilers disclosed caused discoloration of portions of the interior walls. They therefore had their former son-in-law, a licensed contractor, replace a small section of the discolored wall board and paint the rooms prior to putting the house on the market. Plaintiff alleges that the failure of Defendants to disclose this information at the time of the sale goes directly to their claims. The Court disagrees. As reflected above, the Weilers disclosed roof leaks that were identified and corrected. Replacing part of an interior wall damaged by the leak and repainting the rooms constitute part of the repair process and not evidence of a misrepresentation .IT WAS 800 SQ FT THAT WEILER "COULD REMEMBER"....PLUS ALL THE STUDS-WALL IN BEDROOM THAT HAD ROTTED THROUGH TO THE OTHER ROOM. JUDGE MAKES A CONCLUSION, A SPECULATION AS FACT. REPAIR HAS A SPECIFIC MEANING. IT'S A VERB. THE SAME THING ON WHICH SHE SPECULATES COULD ALSO BE CALLED A PATCH, AND A "COVER UP" OF ALL THE UNDERLYING DAMAGE. SO, JUDGE THINKING IS HYPOCRITICAL. ALL ABUSE OF POWER, KEEP THE CASE AND ALL EVIDENCE FROM A JURY.

**IT IS THEREFORE ORDERED** denying Plaintiff's Motion to Supplement their Response and Facts to the Weilers' Motion for Summary Judgment.

For the reasons set forth above,

**IT IS FURTHER ORDERED** granting Defendants Weiler's Motion for Summary Judgment.

The other Defendants joined in the Weilers' Motion for Summary Judgment based on notice to Plaintiff that there were roof leaks. Because the Court has ruled in favor of the Weilers based on the lack of a material issue of fact regarding any misrepresentation by the Weilers,

**IT IS FURTHER ORDERED** denying the Realty One and Remax Defendants' Joinders in the Weilers' Motion for Summary Judgment.

# APPENDIX A-C

## CONTENTS

# Supreme Court

STATE OF ARIZONA

ROBERT BRUTINEL
Chief Justice

ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET, SUITE 402
PHOENIX, ARIZONA 85007
TELEPHONE: (602) 452-3396

JANET JOHNSON
Clerk of the Court

November 19, 2019

**RE: LAWRENCE SEIDMAN et al v FRANK WEILER et al**
Arizona Supreme Court No. CV-19-0167-PR
Court of Appeals, Division One No. 1 CA-CV 18-0261
Maricopa County Superior Court No. CV2015-003144

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on November 19, 2019, in regard to the above-referenced cause:

**ORDERED: Petition for Review = DENIED.**

**FURTHER ORDERED: Request for Attorneys' Fees (Appellants Seidman) = DENIED.**

**FURTHER ORDERED: Request for Attorneys' Fees (Appellees Weiler) = GRANTED.**

**Justice Beene did not participate in this matter.**

Janet Johnson, Clerk

IN THE

# ARIZONA COURT OF APPEALS

## DIVISION ONE

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LAWRENCE T. SEIDMAN, et al., *Plaintiffs/Appellants,*

v.

FRANK D. WEILER, et al., *Defendants/Appellees.*

No. 1 CA-CV 18-0261
FILED 5-16-2019

Appeal from the Superior Court in Maricopa County
No. CV2015-003144
The Honorable Dawn M. Bergin, Judge

**AFFIRMED**

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COUNSEL

Eckley & Associates, PC, Phoenix
By J. Robert Eckley, John Duke Harris
*Counsel for Plaintiffs/Appellants Seidman*

Radix Law, PLC, Scottsdale
By C. Adam Buck, Stephanie A. Webb
*Counsel for Defendants/Appellees Weiler*

Manning & Kass Ellrod Ramirez Trester, LLP, Phoenix
By Anthony S. Vitagliano, Robert B. Zelms, Fatima M. Badreddine
*Counsel for Defendants/Appellees Realty One, James Sexton, Anita Burg*

Lipson Neilson, PC, Phoenix
By Daxton R. Watson, Michael H. Orcutt
*Counsel for Defendants/Appellees RE/MAX, VDH Investments, Kathy Laswick, Michael Martinez, Maricruz Martinez*

## MEMORANDUM DECISION

Presiding Judge David D. Weinzweig delivered the decision of the Court, in which Judge Kent E. Cattani and Judge James P. Beene joined.

**W E I N Z W E I G**, Judge:

¶1 Plaintiffs Lawrence Seidman and the Lawrence T. Seidman Revocable Trust ("Buyer") appeal the superior court's entry of summary judgment in favor of Frank and Ana Weiler ("Sellers"); Realty One Group, James Sexton, Anita Burg (collectively, "Realty One Defendants"); and ReMax Excalibur, Kathy Laswick, Michael Martinez and Maricruz Martinez (collectively, "ReMax Defendants"). We affirm.

## FACTS AND PROCEDURAL BACKGROUND

¶2 This lawsuit concerns the sale of a house. Buyer purchased a house in Scottsdale from Sellers in April 2013. Sellers were represented by the ReMax Defendants. Buyer was represented by the Realty One Defendants. Buyer later claimed to have discovered latent defects with the house in March and December 2014, and then sued all the parties associated with the transaction in February 2015, including the Sellers, the ReMax Defendants and Realty One Defendants, but not the home inspector.

¶3 Sellers purchased the house in 1987, two years after it was built, and owned it for 26 years. They hired the ReMax Defendants to sell the house in November 2012. The ReMax Defendants toured the property and asked the Sellers to complete a blank Seller's Property Disclosure ("SPDS"), which was later uploaded into the Multiple Listing Service ("MLS") database. Sellers signed the SPDS on November 18, 2012, and certified the information was "true and complete to the best of [their] knowledge."

¶4 The house was listed for sale in December 2012. The "Public Remarks" section of the MLS listing stated: "Second owners of this home, this abode has been lovingly maintained" and "[t]his home has newer A/C units and a roof, which should provide for low maintenance in years to come." The original listed price was $485,000. Based on feedback, the price was reduced to $439,000 on March 14, 2013.

¶5 Two days later, Buyer extended a counteroffer and negotiated a lower purchase price of $432,000. Buyer and Sellers entered a written

purchase contract on March 16, 2013. Buyer initialed a "BUYER ACKNOWLEDGEMENT" in the contract, written in bold and all capital letters, where he "recognize[d], acknowledge[d], and agree[d]" that the ReMax and Realty One Defendants "are not qualified, nor licensed, to conduct due diligence with respect to the premises or the surrounding area." The provision further "instructed" Buyer to conduct due diligence, which "is beyond the scope of the Broker's expertise and licensing," and Buyer agreed to "expressly release[] and hold[] harmless" the ReMax and Realty One Defendants "from liability for any defects or conditions that could have been discovered by inspection or investigation."

¶6 The Realty One Defendants separately furnished a 10-page Buyer Advisory to Buyer, created by the Arizona Department of Real Estate. Buyer "acknowledge[d] receipt" of the Advisory on March 16, 2013, with an electronic signature of his initials on each page (11 times in all) and his full electronic signature on the final page. The Advisory explained that real estate agents are "generally not qualified to discover defects or evaluate the physical condition" of the house; emphasized the limited duties of Realty One Defendants to Buyer, which do not include "verifying the accuracy of" the SPDS or MLS listing; warned that Buyer "is responsible for" conducting due diligence prior to purchase; and cautioned that MLS listings are "similar to an advertisement" and Buyer "should verify any important information contained in the MLS."

¶7 Buyer received the SPDS from Sellers on March 18, "acknowledg[ing] receipt" with his electronic initials on each page and an electronic signature at the end. Ms. Burg of Realty One Group avowed that she read and reviewed the SPDS with Buyer "line by line." In response to questions about roof issues, the Sellers disclosed their "aware[ness] of" past roof leaks, water damage and roof repairs. They said the leaks "were identified and corrected" and described the repairs as "[s]un side re-cover older tile approx 12 yrs." But otherwise, the couple was not aware of "any interior wall/ceiling/door/window/floor problems," "any cracks or settling involving foundation, exterior walls or slabs," or "any past or present mold growth."

¶8 Once again, the SPDS advised Buyer to verify the disclosures with a professional and specifically directed him to "CONTACT A PROFESSIONAL TO VERIFY THE CONDITION OF THE ROOF." It also included an acknowledgement from Buyer "that the information contained herein is based only on the Seller's actual knowledge and is not a warranty of any kind. Buyer acknowledges Buyer's obligation to investigate any material (important) facts in regard to the Property. Buyer is encouraged

to obtain Property inspections by professional independent third parties and to consider obtaining a home warranty protection plan."

¶9 The due diligence period then ensued. The contract afforded Buyer 10 days to perform all desired inspections of the property. Buyer asked Burg to recommend a home inspector and received a list of licensed home inspectors with good reputations. Burg told Buyer he was free to choose any home inspector and did not have to choose from the list. Buyer quickly picked and retained the second inspector on the list, Don Barenz of WIN Home Inspection. The Realty One Defendants received no referral fee.

¶10 The home inspection occurred on March 19. Buyer and Burg attended. Sellers also attended, which facilitated a convenient back-and-forth dialogue in which Buyer asked "questions about things" he had noticed during the inspection, including "the condition of the roof" and "concern[s] about the moisture" in the home, pointing to "a piece of baseboard molding in the master bath that had water discoloration." Buyer inquired about a potential leak in the garage roof, which Frank Weiler said "was taken care of."

¶11 Buyer accompanied the home inspector during the inspection. He even climbed on the roof with the inspector to discuss roof issues. Buyer "jumped up and down on the roof," remarked that it "seem[ed] flexy," and asked the inspector whether this reflected "water damage or rot." The inspector responded it was "standard" and "of no concern" because the builders "used a particular dimension of underlay drywall [or] plywood." Buyer also asked about the gaps and caulking recommendation of the inspector because "if it needed caulking, maybe there's water that came in and that's why the roof was flexing because it was rotted or weak, but he said no."

¶12 The home inspector provided his "Extended Home Inspection Report," which highlighted various roof-related issues and "recommend[ed] asking the current owner about any past leaks and roof repairs." The inspector found gaps in the flashing, moisture-trapping debris, and evidence of past or present leaking:

> **Roof - Debris on Roof:** Maintenance. There is debris on the flat roof. The debris will trap moisture as well as clog scupper system. All debris should be removed.
>
> **Roof - Flashing/Caulking:** Maintenance. There is a gap above the flat roof flashing in a number of areas. I

> recommend caulking these gaps with a good quality roof mastic.
>
> **Roof - Indications of Leaking:** Yes. I noted sign[s] of possible roof leak in the garage ceiling. I was unable to confirm if these a[re] from a past leak o[r] an[] active leak. I recommend asking the current owner about any past leaks and roof repairs.

**¶13** The report further noted defects to the exterior structure, including "an open penetration on the east side of the home that is prone to moisture and pest intrusion [and] should be sealed," and "marginal to poor drainage away from structure" on the east side. The inspector "recommend[ed] monitoring these areas during and after periods of heavy rainfall," and "grading and making any other needed repairs to ensure all water drains away from the structure," if necessary.

**¶14** Buyer had a few more questions after the home inspection on March 21, including about roof leaks. Burg emailed Buyer's questions to the ReMax Defendants who, in turn, forward them to Sellers. Burg inquired: "There are signs of a possible roof leak in the garage ceiling. Can you confirm with the owner if this is from a past leak or active leak? And if [from a] past leak has [it] been fixed?" Sellers responded: "The roof leak seen in the garage is from a previous leak situation from years ago that was corrected, and a recent re-seal of that portion of the flat roof was completed in December last year."

**¶15** That same day, Buyer formally responded to the SPDS with his Buyer's Inspection Notice and Seller's Response ("BINSR"). Buyer sought a credit or repair for roofing and other issues, including a "[c]redit or Professional Roofer to repair gap above the flat roof flashing in number of areas," and "[c]redit or [d]etermine source of moisture damage to base of master bathroom cabinets near shower and repair." Buyer electronically signed the BINSR, indicating he had "completed all desired [i]nspection[s]" and "verified all information deemed important [from the] MLS or listing information," and "acknowledg[ing]" the ReMax and Realty One Defendants "assume no responsibility for any deficiencies or errors made" by the inspector and "neither the Seller nor Broker(s) are experts at detecting or repairing physical defects in the Premises."

**¶16** Sellers tendered a counteroffer on March 22 to "provide Buyer [a] $1,000 credit toward [his] closing costs, escrow costs and/or lender fees,

in lieu of all repairs on BINSR." Buyer accepted the counteroffer later that day and the parties signed an addendum to the purchase contract.

¶17 Buyer completed a final walk-through inspection on April 19 and acknowledged with his signature that "the property [is] as represented at the time the purchase contract was accepted by the parties, and any subsequent repairs that were agreed to . . . have been completed to the satisfaction of [Buyer]."

¶18 Buyer began renovating the house within "a few days to a week" after escrow closed on April 18. He budgeted around $20,000 for extensive repairs and remodeling, including painting, replacing baseboards, fixing fireplace and tile cracks, refinishing doors, and building various items. Buyer alleges he discovered "more and more things . . . that needed fixes" as he made renovations.

¶19 Buyer claims he discovered roof problems almost a year later, after "heavy rainfall during the late summer to fall 2014" caused "paint and caulking . . . to peel and crack." Buyer said he found water leaks and mold in the walls and water pooling in front of the home. Buyer, however, alleges he only learned the roof was not "newer" on December 11, 2014, when he and his attorney climbed onto the roof and discovered "bubbles."

¶20 Buyer filed this lawsuit on February 26, 2015. He sued Sellers for negligent misrepresentation, consumer fraud, common law fraud, mutual mistake and breach of contract for failure to disclose latent defects; sued the ReMax Defendants for negligence, negligent misrepresentation, consumer fraud and common law fraud; and sued the Realty One Defendants for breach of fiduciary duty, negligent misrepresentation, constructive fraud and common law fraud.[1]

¶21 The same day, Buyer filed a formal certificate under A.R.S. § 12-2602, where his counsel avowed "[t]hat claims currently contained in the Plaintiff's Complaint allege matters which do require expert opinions and testimony in support thereof." Buyer disclosed five expert witnesses during discovery, including a construction defect expert named George Frank and a real estate professional expert named Curtis Hall. In September 2016, Buyer disclosed Hall as an expert "to render opinions

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[1] Buyer did not sue the home inspector, despite complaining about his work. Buyer blames the ReMax Defendants for letting him sign a home inspector's service agreement that released the home inspector from "liability for incompetence."

about the professional standards of care for all such real estate licensees and to apply same to the issues in this case and to state, by expert opinion, whether the licensee's conduct in question has fallen below the applicable standard of care." Meanwhile, he disclosed Frank as an expert who "would discuss and evaluate construction problems" with the home and calculate the cost of repair.

¶22 On February 6, 2017, Sellers moved for summary judgment on all claims asserted against them, and the ReMax and Realty One Defendants joined. Before having to respond, Buyer asked for more time to conduct discovery (seven depositions) under Arizona Rule of Civil Procedure ("Rule") 56(d), and to extend the discovery deadline (set to expire on February 10). Buyer pointed to an impending mediation in support. The court denied Buyer's request for Rule 56(d) relief and ordered him to respond by March 17. The court did, however, extend the discovery deadline on March 21 under a stipulated order.

¶23 Buyer responded on March 17, arguing that genuine issues of material fact precluded summary judgment on his fraud and misrepresentation claims. He asserted "[t]here is significant proof" that Sellers knew about and concealed the "roof[ing] problems, water damages and other defects." He then pointed to several items for "[s]uch proof," including the SPDS, an email exchange between agents, an Allstate Insurance letter and Frank's expert report.

¶24 The court held oral argument on April 21 and took the matter under advisement. In the interim, Buyer deposed Frank and Ana Weiler and moved to supplement the "facts and legal arguments" in his opposition to summary judgment on May 25. But Buyer included no additional legal arguments and only pointed to deposition testimony that Sellers had hired a licensed contractor "to perform construction work" on the property "in the form of removal and replacement of wall board (*i.e.*, sheet rock) in the residence and then repainted same" without disclosure to Buyer. Buyer contended this "newly discovered" evidence supported his concealment theory. Sellers opposed the motion, arguing the testimony was irrelevant given the express SPDS disclosures.

¶25 On August 11, the superior court granted summary judgment in favor of Sellers and denied Buyer's motion to supplement. The court found Buyer had not provided any competent, admissible evidence to create a genuine issue of material fact that Sellers knew about the alleged defects at sale and misrepresented or concealed them from Buyer. The court likewise dismissed Buyer's mutual mistake claim because he

understood he had imperfect information. The court denied Buyer's motion to supplement, however, because the proffered "new" evidence did not create a fact issue.

¶26 The court denied the joinder motions of the ReMax and Realty One Defendants, emphasizing its summary judgment ruling related only to Sellers' alleged conduct. Those defendants thus moved for summary judgment in September 2017, which Buyer opposed. After oral argument on December 5, the court granted both summary judgment motions from the bench based on, among other things, the absence of expert testimony to establish a professional duty and breach of that duty. Buyer verbally asked for permission to supplement his briefing to include expert testimony he had disclosed but not included or argued, which the court denied.

¶27 Before a minute entry issued, Buyer filed a "Motion for Reconsideration of Ruling Denying Request to Supplement Summary Judgment Pleadings and Plaintiffs' Positions with Previously Disclosed Licensees (sic) Expert Opinions for Standard of Care Issue." The court requested and considered briefing on "(1) whether it would be an abuse of discretion for the Court to deny Plaintiff's request to supplement; and (2) whether allowing Plaintiff to supplement with the expert report would change the outcome of the Court's rulings on Defendants' Motions for Summary judgment and if not, why not." The court subsequently denied the motion for reconsideration and issued its written decision granting summary judgment to the remaining defendants. The superior court entered final judgment in favor of all defendants, and Buyer timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

## DISCUSSION

¶28 We review the grant of summary judgment *de novo*, viewing the evidence in the light most favorable to the non-moving party. *Williamson v. PVOrbit, Inc.*, 228 Ariz. 69, 72, ¶ 11 (App. 2011). Summary judgment is proper when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(a). We will affirm the disposition if it is correct for any reason. *Logerquist v. Danforth*, 188 Ariz. 16, 18 (App. 1996).

### A. Sellers' Motion for Summary Judgment

#### 1. Misrepresentation, Fraud and Breach of Contract

¶29 Buyer's tort and breach of contract claims against Sellers hinge on his allegations that they misrepresented and concealed material

information about roof leaks and repairs. The superior court examined these claims under *Hill v. Jones*, 151 Ariz. 81 (App. 1986), which concerns the issue of disclosure in real estate transactions and creates a duty of disclosure for home sellers who "know[] of facts materially affecting the value of the property which are not readily observable and are not known to the buyer." 151 Ariz. at 85 (quotation omitted). The court granted summary judgment to Sellers because Buyer provided insufficient evidence to create a genuine issue of material fact that Sellers (1) misstated or concealed alleged defects, or (2) knew about the defects they allegedly misstated or concealed from Buyer. We agree.

¶30 Buyer asserts Sellers "did not completely or truthfully represent the actual condition of the property being sold." He points to three affirmative statements from the MLS listing and sales brochure: "lovingly maintained," "beautifully remodeled," and "newer A/C units and a roof." Buyer also cites statements in the SPDS and an email exchange to demonstrate Sellers "did not accurately disclose their property's roof condition, roof repairs and leaks."

¶31 The court held the "beautifully remodeled" and "lovingly maintained" statements represented mere sales puffery, which is not actionable as fraud or misrepresentation. We agree. A fraud claim cannot be premised on mere opinion. *Page Inv. Co. v. Staley*, 105 Ariz. 562, 564-65 (1970). The same is true for negligent misrepresentation. *See McAlister v. Citibank*, 171 Ariz. 207, 215 (App. 1992) ("Negligent misrepresentation requires a misrepresentation or omission of a *fact*."). The character of the statements as puffery or a representation of fact is a legal question. *Cheatham v. ADT Corp.*, 161 F. Supp. 3d 815, 827 (D. Ariz. 2016). These are not concrete representations of fact; they are inexact opinions of an adverb-laden sales pitch.

¶32 Buyer also points to the MLS description of a "newer" roof. At oral argument, Buyer's counsel argued the "reasonable definition" of "newer" in the real estate context means the roof was less than "five, six [or] seven years old." The superior court, however, found that "newer" is a relative adjective that derives its meaning from comparing two or more items; the term has no concrete meaning standing alone. We agree. As presented, "newer" has no concrete meaning—it might indicate the roof was installed in 1990 or just last month; or it might be an opinion of someone who thinks a 20-year-old roof is still "newer" or "newish." The

statement is not one of material fact unless tethered to another roof; for instance, the roof might be "newer" than the original roof.[2]

¶33 What is more, Buyer's assumed definition of "newer" as less than "five, six [or] seven years old" conflicts with Sellers' express disclosure in the SPDS that roof repairs had been conducted around 12 years earlier on the "sun side" portion of the roof. At a minimum then, Buyer knew the "sun side" portion of the roof did not comport with his subjective definition of "newer."

¶34 And last, Buyer claims Sellers misrepresented the history and condition of the roof in their SPDS and an email from their real estate agent on March 22, 2013. Buyer points to several misstatements or omissions, including: (1) Sellers were "aware of" past roof leaks and they "were identified and corrected," (2) Sellers had "re-cover[ed]" the "older tile" on the sun-side of the roof in 2000, (3) Sellers had resealed the garage portion of the flat roof in December 2012; and (4) Sellers were "not aware" of "any interior wall/ceiling/door/window/floor problems," "any cracks or settling involving foundation, exterior walls or slabs," or "any past or present mold growth."

¶35 The superior court granted summary judgment on these claims because Buyer offered no evidence to establish a genuine fact issue to demonstrate causation or prove Sellers knowingly misstated or withheld the alleged material facts from Buyer. We agree Buyer did not establish a genuine issue of material fact on the element of knowledge—that is, he offered insufficient evidence to show Sellers knew of the material facts they are accused of misrepresenting or concealing.

¶36 Buyer relied on two pieces of evidence to demonstrate Sellers' knowledge: a denial of coverage letter from Allstate Insurance and the George Frank expert report. We examine each in turn. The Allstate letter, dated February 11, 2014, is addressed to Buyer and responds to his request for coverage of "soffit damage due to rot from repeated leakage." Allstate denied coverage based on various exclusions in Buyer's insurance policy.

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[2] Buyer makes this point with the evidence he proffers to demonstrate the roof was not "newer," which is a denial of coverage letter from Allstate to Buyer in February 2014 noting the roof had been damaged by leaks "over a period of weeks, months or years." As the superior court recognized, this evidence does not demonstrate falsity because the roof might still be "newer" even assuming historical leaks from the previous week or the prior year.

Buyer emphasizes the second to last paragraph, which states "[t]his letter only applies to the soffit portion of your roof where the damage was caused by repeated leakage or seapage [sic] from your roof which occurred over a period of weeks, months, or years." This letter does not create a genuine issue of material fact as to Sellers' knowledge. It never even mentions Sellers, much less indicates what they knew and when they knew it. Nor is knowledge proven by an unattributed and indeterminate finding of historical roof leaks. Indeed, Sellers disclosed the existence of past roof leaks in the SPDS and negotiated a credit for Buyer "to repair gap above the flat roof flashing in number of areas." The court correctly concluded the Allstate Letter "has no probative value."

¶37 Buyer fares no better with the expert report of George Frank, whom Buyer disclosed as an expert to "discuss and evaluate construction problems" with the home and calculate the cost of repair, if any. The court observed that Frank's report offers unhelpful, general opinions and "is laden with statements that constitute improper expert opinion testimony." Most significant, however, the report provides no evidence or testimony to establish that Sellers *knew* about and misstated or concealed the alleged extent of roof and house problems, and Frank instead resorts to mere speculation: "[T]he previous owner and the [ReMax Defendants] *had to* be aware of many of these defects present in the home before the sale to [Buyer]." His speculation is not enough to survive summary judgment.[3]

¶38 Buyer claims that summary judgment was inappropriate under *Hill v. Jones*, where this court held that house sellers have a duty to disclose termite damage "known to the seller, but not to the buyer, which materially affects the value of the property." 151 Ariz. at 83-84. But *Hill* is more harmful to Buyer's case than helpful because it amplifies the evidentiary shortcoming in this record that necessitated summary judgment. Unlike here, the record in *Hill* was teeming with evidence showing those sellers *knew* about the material defects misrepresented to or concealed from the buyers—for instance, those sellers had two visits from an exterminator to treat the house for termites, had a termite guarantee and regular termite inspections, had seen termite damage on the back fence, and a neighbor had shown the sellers "the area where the [termite] damage and treatment had occurred." *Id.* at 82-83. Buyer offered no such evidence here, instead arguing the Sellers simply must have known about the water damage because they had lived in the house for so long. But mere

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3 We also note the inconsistency between Frank's speculation and the allegations that Buyer himself only learned about the hidden defects after living in the house for a year and tearing down the walls.

speculation is unlike the hard evidence that created a factual question in *Hill*.

¶39 Buyer also argues the superior court refused to consider two documents in its summary judgment analysis, but the argument misconstrues the court's decision. Buyer points to a paragraph from the decision where the court "notes that the representations in the SPDS and March 22 Email do not by themselves constitute misrepresentations or concealment. They are simply representations." The court did not ignore these documents, but instead recognized their limited evidentiary value—that is, the documents contain representations that might form the basis of a misrepresentation claim, but Buyer must still prove the representations are false. Nor do the documents represent proof that Sellers knew about the alleged defects they purportedly misrepresented or concealed. We affirm the grant of summary judgment in Sellers' favor.

**2. Mutual Mistake**

¶40 The superior court concluded no reasonable jury could find by clear and convincing evidence that mutual mistake justifies rescission of the purchase contract. We agree.

¶41 To rescind the contract based on mutual mistake, Buyer "must show by clear and convincing evidence that the agreement should be set aside," which requires that the mutual mistake cover "a basic assumption on which both parties made the contract," and "have had such a material effect on the agreed exchange of performances as to upset the very bases of the contract." *Nelson v. Rice*, 198 Ariz. 563, 566, ¶ 7 (App. 2000) (quotation omitted). Buyer has no claim for mutual mistake if he was "aware, at the time the contract [was] made, that he ha[d] only limited knowledge with respect to the facts to which the mistake relate[d] but treat[ed] his limited knowledge as sufficient." *Id.* at 566, ¶¶ 7-8 (quotation omitted).

¶42 The court found that Buyer "knew that he had limited knowledge about the roof leaks and the drainage on the property," but "did not hire a roofer to take a closer look even after the inspector noted the stains on the garage ceiling." We agree. The undisputed facts indicate that Buyer had notice of roof-related issues from the Sellers and his home inspector, and he was repeatedly advised that he was responsible for conducting due diligence and warned to verify material information (in his counteroffer, the Buyer Advisory, the SPDS and BINSR). He was instructed to hire a professional roofer, to verify the roof's condition and to further

explore roof-related issues. He acknowledged the warnings and verified that he completed all desired inspections. Yet Buyer did not hire a roofer to take a closer look and instead opted to complete the transaction with limited knowledge. We find no error in dismissing Buyer's mutual mistake theory on this record.

### B. Motion to Supplement Summary Judgment Response

**¶43** Buyer next asserts the superior court abused its discretion in denying his motion to supplement his response to Sellers' motion for summary judgment with deposition testimony elicited *after* the motion was fully briefed and argued, but still under advisement.

**¶44** Buyer filed his summary judgment response on March 17 and participated in oral argument on April 21. Two months after his response and one month after oral argument, Buyer deposed Frank and Ana Weiler. A week after the depositions, Buyer moved for permission to supplement his response based on new evidence. The claimed new evidence was deposition testimony from Sellers that they hired "a licensed contractor, who was a prior son-in-law, to perform construction work on the [house] in the form of removal and replacement of wall board (*i.e.*, sheet rock) in the residence and then repainted the same," and never told Buyer about the hire. Buyer argued the testimony had "a direct impact on this litigation," presumably as evidence of a cover-up. The court disagreed that the testimony went "directly to [Buyer's] claims" and denied the motion because "[Sellers] disclosed roof leaks that were identified and corrected," and the new evidence was simply "part of the repair process and not evidence of a misrepresentation."

**¶45** We review the court's ruling for a clear abuse of discretion. *Schwab v. Ames Constr.*, 207 Ariz. 56, 60, ¶ 17 (App. 2004); Ariz. R. Civ. P. 7.1(a)(3)-(4) (responsive memoranda "must" be filed within 10 days after service of the motion, and "[a]ffidavits and other evidence submitted in support of any . . . memorandum *must* be filed with the . . . memorandum, unless the court orders otherwise") (emphasis added). Buyer articulated no good cause for waiting to depose the Sellers in his lawsuit until two months *after* filing his opposition to Sellers' motion for summary judgment. *Cf. Zimmerman v. Shakman*, 204 Ariz. 231, 236, ¶ 16 (App. 2003) (court may bar the use of supplemental disclosure if dispositive motion is pending but it also may allow late disclosure if good cause is shown). With minimal diligence, Buyer could have conducted the depositions before summary judgment had been briefed and argued, but he did not. On this record, the

court's decision was not "manifestly unreasonable." *Tilley v. Delci*, 220 Ariz. 233, 238, ¶ 16 (App. 2009).

¶46 Moreover, the "newly discovered" evidence was consistent with the record and would not have rescued Buyer's claims from summary judgment. Even if the deposition testimony had been considered, the record contained insufficient evidence to show that Sellers had knowledge of roof-related defects which they had not tried to identify and correct, but instead had concealed from Buyer. *See Hill*, 151 Ariz. at 85. The testimony echoed the record and SPDS disclosures—confirming that roof leaks existed, and that Sellers had hired someone to identify and repair the damage. Sellers disclosed historical roof leaks and repairs and noted the leaks "were identified and corrected." We cannot conclude the court abused its discretion by denying Buyer's motion to supplement.

### C. Motions for Summary Judgment of ReMax and Realty One Defendants

¶47 After hearing oral argument, the superior court granted summary judgment against Buyer on his professional negligence and breach of fiduciary duty claims because, among other things, Buyer provided no expert testimony to establish the professional standard of care and breach.[4] The court recognized that expert testimony was indispensable for Buyer to withstand summary judgment on his claims for professional negligence and breach of fiduciary duty—both to *establish* the professional standard of care for licensed real estate agents and agencies, and to demonstrate that defendants *breached* the standard. *Powder Horn Nursery, Inc. v. Soil & Plant Lab., Inc.*, 119 Ariz. 78, 80, 83 (App. 1978) (affirming summary judgment in defendant's favor because plaintiff provided no expert testimony that established the requisite standard of care owed by a professional plant laboratory to its customers and departure therefrom).

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[4] The court also granted summary judgment on the fraud claims "based on lack of causation and its previous ruling that [Buyer] failed to allege sufficient facts to create a genuine issue of material fact as to his claims for fraud and negligent misrepresentation against [Sellers], and failed to present any additional facts that would create a genuine issue of material fact regarding the commission of fraud by [the ReMax and Realty One Defendants]."

¶48 Expert testimony was imperative because jurors are not equipped to designate a definitive standard of care for licensed real estate professionals and agencies, determine whether the standard has been satisfied or breached, and then apportion fault between and among several different professionals.[5] *Kreisman v. Thomas*, 12 Ariz. App. 215, 221 (1970) ("In the absence of evidence establishing the requisite standard of care and that defendant's conduct failed to meet that standard, there was no basis upon which the jury could have found defendant liable to the plaintiff, and therefore the trial court did not commit error in refusing to submit the matter to the jury."). Without expert testimony, the professional standard was indistinct and uncertain, leaving no genuine issue of material fact as to the elements of duty and breach. *Id.* ("Where, as here, the duty which the law recognizes arises because the defendant has held himself out to be trained in a particular trade or profession, the standard required for the protection of customers against unreasonable risks must be established by specific evidence. It cannot be left to conjecture nor be established by argument of counsel.").

¶49 Buyer argues the superior court should not have granted summary judgment for three reasons. First, he claims that no expert testimony was required because the standard of care was obvious and the alleged misconduct was grossly apparent. *Riedisser v. Nelson*, 111 Ariz. 542, 544 (1975) (expert testimony is required in professional negligence cases "unless the negligence is so grossly apparent that a layman would have no difficulty in recognizing it"). We disagree. An expert opinion was especially critical here, where Buyer sued seven different real estate professionals and agencies representing different parties with different interests and different relationships; Buyer has contracts with some and no contracts with others; and he signed various documents, guides and disclosures during the transaction which implicate and address the duties and responsibilities of distinct parties.

¶50 Nor did Buyer point to grossly apparent misconduct that all laypersons could identify. Buyer alleges the real estate professionals breached assorted duties and standards—ranging *from* alleged duties to detect all material defects a "professional person" could discover *to* purported duties to confirm that all transmitted information is accurate. These claims are novel and tenuous, not obvious and grossly apparent. The defendants held themselves out as having particular skills and training, and

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[5] Liability among shared tortfeasors is several only, not joint, except in limited circumstances that do not apply here. *See* A.R.S. § 12-2506.

expert testimony was needed to establish the standard of care by which to measure their actions.

**¶51** Buyer himself debunked this argument at the outset of this lawsuit when his counsel certified that he needed expert testimony to succeed on his claims under A.R.S. § 12-2602, and again when he conceded at oral argument on summary judgment that he would need to elicit expert testimony at trial. His initial, reflexive concession only amplifies the gaping evidentiary chasm.

**¶52** Second, Buyer argues at minimum the superior court erred in denying his motion to supplement or reconsider and we should therefore reverse the summary judgment order.[6] After the superior court announced its summary judgment decision in open court, Buyer orally sought permission to supplement his opposition with an expert declaration he had previously disclosed but never used to oppose summary judgment. The court denied his motion, and he filed a written motion to reconsider. The court invited and considered briefing on the issue, then denied the motion. We review the denial for an abuse of discretion. *Tilley*, 220 Ariz. at 238, ¶ 16.

**¶53** The court did not abuse its discretion. Buyer again insists he should have received a do-over. He emphasizes he disclosed an expert witness and declaration regarding standard of care issues in discovery and insists the court should have reconsidered its summary judgment decision as if he had presented the expert declaration in opposition to summary judgment. But he didn't. Buyer had a reasonable opportunity to prepare and present his case and craft the summary judgment opposition of his choice, yet he made no mention of expert testimony to establish the standard of care in this professional negligence action. *Cf. Hunter Contracting Co. v. Superior Court*, 190 Ariz. 318, 322 (App. 1997) ("[T]he major objective of Rule 56(f) is to insure [sic] that a diligent party is given a reasonable opportunity to prepare his case.") (quotation omitted); *Jones v. MEA, Inc.*, 160 So. 3d 241, 248 (Miss. App. 2015) ("While they cited multiple civil-procedure rules in their post-judgment motion, we have no rule that

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[6] We generally do not consider evidence and argument first presented in a motion for reconsideration. *Evans Withycombe, Inc. v. W. Innovations, Inc.*, 215 Ariz. 237, 240, ¶ 15 (App. 2006). One reason for this rule is that "when a new argument is raised for the first time in a motion for reconsideration, the prevailing party below is routinely deprived of the opportunity to fairly respond." *Id.* We nevertheless exercise our discretion and address Buyer's arguments here.

allows for what the Joneses are asking—to make a second, better attempt at trying a claim *after* that claim has been properly dismissed on summary judgment.").

¶54 Buyer might have decided to omit Hall's expert affidavit from his summary judgment opposition for assorted tactical reasons; he might have deemed it unpersuasive or believed it compromised his other arguments. What matters, however, is that Buyer concluded it was unnecessary to include or even reference Hall's affidavit in opposing the summary judgment motion or controverting the statements of fact.

¶55 As before, Buyer waited until after the parties exhaustively briefed and argued summary judgment and after the court orally granted the motion before requesting a do-over. He does not claim the evidence represents new facts or circumstances that came to light after summary judgment was decided. *Cf. Union Rock & Materials Corp. v. Scottsdale Conference Ctr.*, 139 Ariz. 268, 273 (App. 1983) (new matters in motion for reconsideration may be considered by another trial court when new facts or circumstances come to light between the granting of the motion for summary judgment and the motion for reconsideration). He provided no good reason for omitting the expert affidavit and neglecting the first element of his professional negligence claims. His counsel instead claims the issue was not raised or contested at summary judgment, which is false. Buyer had nearly three years to formulate his summary judgment defense and arguments. The court was not "manifestly unreasonable" in refusing Buyer's request to resurrect his professional negligence claims and reconsider the question of summary judgment based on backfilled evidence and argument. *Tilley*, 220 Ariz. at 238, ¶ 16.[7]

¶56 Buyer's third argument misconstrues the superior court's decision. He claims the court improperly dismissed his lawsuit because he never filed his real estate expert's declaration under A.R.S. § 12-2602, without ever "set[ting] a date and terms for compliance" under § 12-2602(E). *Warner v. Sw. Desert Images, LLC*, 218 Ariz. 121, 129, ¶ 19 (App. 2008) (court abused its discretion when it did not comply with § 12-2602(E) before dismissing claim under § 12-2602(F)). But his claim was not dismissed for failure to comply with A.R.S. § 12-2602. Buyer lost because he provided no evidence to prove an indispensable element of his claim (duty and breach), and a reasonable jury, therefore, could not find in his favor based on the record. He presented no expert testimony to establish

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[7] Because we affirm on this basis, we need not consider the alternative grounds for denying leave to allow supplemental briefing, *e.g.*, futility.

the ReMax and Realty One Defendants owed a duty and breached that duty—indispensable elements of his claims. *See Baird v. Pace*, 156 Ariz. 418, 420 (App. 1987) (expert testimony generally needed to establish duty and breach in professional cases).

¶57 In sum, we affirm summary judgment in favor of the ReMax and Realty One Defendants because Buyer did not establish a genuine issue of material fact on the professional standard of care or whether the defendants breached the undefined standard.

### D. Attorney's Fees and Costs

¶58 Sellers and the ReMax Defendants request their attorney's fees and costs pursuant to A.R.S. § 12-341.01(A). Because Sellers and the ReMax Defendants are prevailing parties, and the claims against them arose out of contract, we grant their request for attorney's fees on appeal under A.R.S. § 12-341.01(A), and their costs, subject to compliance with ARCAP 21.

## CONCLUSION

¶59 We affirm the superior court's orders granting summary judgment to all defendants.


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

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