IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

SEDONA-OAK CREEK AIRPORT AUTHORITY INC.,
Plaintiff/Appellee,

v.

DAKOTA TERRITORY TOURS ACC,
Defendant/Appellant.

No. 1 CA-CV 20-0158
FILED 1-12-2021

Appeal from the Superior Court in Yavapai County
No. V1300CV201980119
The Honorable Krista M. Carman, Judge

AFFIRMED

COUNSEL

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By Kiersten A. Murphy
Co-Counsel for Plaintiff/Appellee

Law Office of Tony S. Cullum PC, Flagstaff
By Tony S. Cullum
Co-Counsel for Plaintiff/Appellee

Ahwatukee Legal Office PC, Phoenix
By David L. Abney
Counsel for Defendant/Appellant

MEMORANDUM DECISION

Presiding Judge James B. Morse Jr. delivered the decision of the Court, in which Judge Maria Elena Cruz and Judge Paul J. McMurdie joined.

MORSE, Judge:

¶1 Dakota Territory Tours AAC ("Dakota") appeals from an order granting summary judgment and finding it guilty of forcible detainer. For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND[1]

¶2 Dakota conducts a helicopter and fixed-wing air tour business out of the Sedona Airport under a lease agreement with Sedona-Oak Creek Airport Authority Inc. ("SOCAA"), which manages the airport's operations. In 2012, Dakota entered into a 24-month commercial activity lease with SOCAA for property on the Sedona Airport ("the Property"). The parties later extended the lease to expire in April 2017.

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[1] Dakota filed a "Motion to Reschedule Oral Argument" on November 9, 2020, then filed a "Withdrawal of the Motion to Reschedule Oral Argument." It is ordered accepting Dakota's withdrawal and denying the motion as moot.

¶3 In 2014, Dakota initiated a civil lawsuit against SOCAA over a lease dispute. The parties reached a settlement agreement ("Settlement Agreement") in April 2017, before the lease expired. In pertinent part, the Settlement Agreement provided the following:

> [SOCAA] has agreed, and hereby confirms that it has agreed to continue leasing the existing property pursuant to the existing lease on a month-to-month basis until an RFP issues. In the event Dakota is the successful bidder, then a new lease will issue to Dakota and its use of the premises will not be interrupted. In the event Dakota is not the successful bidder, Dakota must vacate the premises no later than thirty (30) days after receipt of the (30) day notice . . . which [SOCAA] may provide at any time on or after the date of the award . . . advising of the date of the award and that Dakota must vacate the premises within thirty (30) days. No other notice of termination shall be required from [SOCAA].

¶4 SOCAA issued a request for proposals ("RFP") in May 2017. The RFP provided that "[t]he 'best responsible proponent' shall be that proponent which [SOCAA] and Yavapai County may determine," and "[t]he Yavapai County Board of Supervisors will consider the proposals on or before June, 2017," and that "any proposal will be subject to Federal Aviation Administration review and approval prior to commencement of any lease/agreement." SOCAA received proposals from both Dakota and Guidance Air Service ("Guidance"). On June 26, 2017, SOCAA notified

Guidance it had been selected. SOCAA did not consult either the Yavapai County Board of Supervisors ("Board") or the Federal Aviation Administration ("FAA") before deciding the best proponent. SOCAA notified Dakota that its proposal was not chosen and it had thirty days to vacate the Property.

¶5 Instead of vacating the premises, Dakota initiated another civil lawsuit ("the 2017 lawsuit") in Yavapai County Superior Court seeking a temporary restraining order precluding SOCAA from evicting Dakota, arguing that SOCAA breached the RFP because the Board and FAA had not participated in selecting the Guidance proposal. The superior court initially granted a temporary restraining order and held a three-day evidentiary hearing on Dakota's claims. At the end of the hearing, the court invited SOCCA "to file a motion with the Court to lift the injunction."

¶6 SOCAA then filed a motion to dissolve the injunction. The court held argument, found that SOCAA established that the Board was given the requisite opportunity to participate and the FAA was not required to approve, and dissolved the injunction in November 2017.

¶7 SOCAA immediately sent Dakota a new termination notice demanding Dakota vacate the Property. But Dakota appealed, and the matter stayed until this court affirmed the dissolution of the preliminary injunction in April 2019. *See Dakota v. Sedona-Oak Creek Airport Auth. Inc.*, 1 CA-CV 17-0767, 2019 WL 1499853 (Ariz. App. Apr. 4, 2019) (mem. decision).

¶8 After this court issued its decision, SOCAA notified Dakota it would bring a forcible entry and detainer ("FED") action if Dakota did not vacate the Property. Dakota failed to vacate the Property, and SOCAA filed a FED complaint. The superior court stayed the FED action until this court issued a mandate for the 2017 lawsuit. We issued an amended mandate in October 2019.

¶9 Dakota requested a jury trial in the FED action. The superior court initially granted Dakota's request for a jury trial in a preliminary ruling before the oral argument. SOCAA then moved for summary judgment, which Dakota opposed. The court granted summary judgment in favor of SOCAA and found Dakota guilty of forcible detainer under A.R.S. §§ 12-1171(3) and -1173(1). The court denied Dakota's request for a jury trial, noting that after considering the motions and oral arguments, it determined there was "no material question of fact related to the right to possession":

> Dakota's right to remain on the property extinguished when SOCAA completed the RFP process by presenting the proposals to the County Board of Supervisors. Importantly, Judge Napper lifted the injunction in the civil cases finding that SOCAA had complied with the RFP. The tenancy clearly terminated after SOCAA issued the RFP and selected Guidance as the winner of the RFP. Following the appeal and issuance of the mandate, written notice to vacate was sent to Dakota and Dakota failed to vacate the premises. The

> Settlement Agreement provided for 30 days' notice to vacate the property following the issuance of the RFP if the winner was not Dakota. SOCAA has provided notice in excess of that time. Dakota stated at oral argument that it did not dispute notice. The court **finds** based on the facts that Dakota has retained possession after its tenancy has terminated and after it received written demand of possession by SOCAA.

¶10 A signed judgment was filed on March 6, 2020. The judgment found Dakota guilty of forcible detainer of the Property and awarded SOCAA attorney fees and costs. Dakota timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

DISCUSSION

¶11 Dakota claims the superior court erred by failing to grant its request for a jury trial, overlooking genuine issues of material fact, and finding that SOCAA has the right of actual possession of the Property.

I. Denial of Jury Trial.

¶12 Dakota claims the superior court violated its statutory and constitutional right to a jury trial when it entered summary judgment. "Interpreting rules, statutes, and constitutional provisions raises questions of law, which we review de novo." *State v. Hansen*, 215 Ariz. 287, 289, ¶ 6 (2007).

A. Right to Jury Trial Under A.R.S. § 12-1176.

¶13 Dakota argues that A.R.S. § 12-1176 grants parties to FED actions "a substantive, absolute right to a jury trial" that, if timely exercised, no trial court can deny.

¶14 A.R.S. § 12-1176 provides:

> (A) If a jury trial is requested by the plaintiff, the court shall grant the request. If the proceeding is in the superior court, the jury shall consist of eight persons, and if the proceeding is in the justice court, the jury shall consist of six persons. The trial date shall be no more than five judicial days after the aggrieved party files the complaint.
>
> (B) If the plaintiff does not request a jury, the defendant may do so on appearing and the request shall be granted.
>
> (C) The action shall be docketed and tried as other civil actions.

¶15 Dakota argues that the repeated use of "shall" in A.R.S. § 12-1176(B) highlights the substantive nature of the right to a jury trial in FED actions. However, the language in A.R.S. § 12-1176(B) that a request for a jury trial "shall be granted" is not dispositive. *See Orme Sch. v. Reeves*, 166 Ariz. 301, 308-09 (1990) (finding that when there are no material issues of fact, summary judgment does not offend the Arizona Constitution's guarantee that "the right to jury trial 'shall

remain inviolate'") (quoting Ariz. Const. art. 2, § 23); *Goldman v. Kautz*, 111 Ariz. 431, 432 (1975) (interpreting statutory language that "[a] trial by jury shall be had if demanded" as being procedural, rather than substantive).[2]

¶16 Rule 11(d) of the Arizona Rules of Procedure for Eviction Actions ("Eviction Rules") provides that "[i]f no factual issues exist for the jury to determine, the matter shall proceed to a trial by the judge alone regarding any legal issues or may [be] disposed of by motion or in accordance with these rules, as appropriate." Dakota argues this rule conflicts with the right to a jury trial provided in A.R.S. § 12-1176 and, therefore, the rule must fail. We disagree. If the statute provides a procedural, as opposed to a substantive, right to a jury trial, then the rule prevails. *See Duff v. Lee*, ___ Ariz. ___, 476 P.3d 315, 318, ¶ 12 (2020) (stating that if there is a conflict "between a procedural statute and a rule, the rule prevails") (quoting *Seisinger v. Siebel*, 220 Ariz. 85, 88-89, ¶ 8 (2009)); *see also* Ariz. Const. Art. 6, § 5(5) (conferring power on the supreme court

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[2] Dakota's reliance on cases recognizing a right to a jury trial in criminal cases is misplaced. *See Highway Prods. Co. v. Occupational Safety & Health Review Bd.*, 133 Ariz. 54, 57-58 (App. 1982) ("[T]he constitutional rights of a criminal defendant have nothing to do with proceedings . . . which may result in the imposition of civil penalties."); *cf. also Hoyle v. Superior Court*, 161 Ariz. 224, 226-27 (App. 1989) (noting historical distinction between civil and criminal actions in determining whether there is a right to a jury trial in paternity actions); *State ex rel. Wanberg v. Smith*, 211 Ariz. 101, 104, ¶ 10 (App. 2005) (emphasizing the need "to distinguish between the two settings in which the language pertaining to jury trials is placed").

"to make rules relative to all procedural matters in any court"). Thus, we "first must determine whether an irreconcilable conflict exists between the statute and rule," and only "then determine whether the statute is procedural or substantive." *Duff*, ___ Ariz. ___, 476 P.3d at 318, ¶ 12.

¶17 There is no irreconcilable conflict between A.R.S. § 12-1176 and Eviction Rule 11(d). *See id.* at ¶ 14 ("[W]e avoid interpretations that unnecessarily implicate constitutional concerns." (internal quotation marks and citation omitted)); *Marianne N. v. Dep't of Child Safety*, 243 Ariz. 53, 57, ¶ 18 (2017) (deciding whether a statute is substantive or procedural is not necessary where they can be harmonized); *Hansen*, 215 Ariz. at 289, ¶ 7 ("Rules and statutes should be harmonized wherever possible and read in conjunction with each other." (internal quotation marks and citation omitted)). Read together, A.R.S. § 12-1176 and Eviction Rule 11(d) provide that a court "shall grant the request" for a jury trial if "factual issues exist for the jury to determine." *See also Brewster-Greene v. Robinson*, 34 Ariz. 547, 552 (1929) ("But in this [forcible detainer action] . . . there was nothing for a jury to pass upon. The salient or controlling facts appear from the pleadings, the lease, and the subsequent compromise agreement. The question to be decided was one of law and for the court."). Because the use of "shall" does not confer a right to a jury trial under any circumstance, but rather a right to a jury trial if there are contested issues of fact, there is no conflict. *See Montano v. Luff*, ___ Ariz. ___, 2020 WL 7488071, *4, ¶¶ 15-16 (App. Dec. 21,

2020) (finding no irreconcilable conflict between the mandatory language of A.R.S. § 12-1176(B) and Eviction Rule 11(d)).

B. Constitutional Right to a Jury Trial.

¶18 Dakota also argues the superior court deprived it of its constitutional right to a jury trial when it entered summary judgment. *See* Ariz. Const. art. 6, § 17 ("The right of jury trial as provided by this constitution shall remain inviolate. . . ."). However, the Arizona Supreme Court has long held that disposition on summary judgment "does no violence to our guarantee of trial by jury" under the Arizona Constitution. *Orme Sch.*, 166 Ariz. at 309.

¶19 If summary judgment was proper, the superior court did not deprive Dakota of its statutory or constitutional rights by denying it a jury trial. *Id*. We, therefore, turn to an analysis of whether the superior court erred in granting summary judgment.

II. Summary Judgment.

¶20 Dakota argues the superior court was precluded from entering summary judgment. First, Dakota argues the Eviction Rules categorically preclude courts from entering summary judgment in FED actions. Second, Dakota claims the superior court overlooked a host of genuine issues of material fact that made summary judgment improper.

A. Summary Judgment in FED Actions.

¶21 Dakota claims the superior court was not entitled to issue summary judgment, arguing the Eviction Rules do not incorporate Arizona Rule of Civil Procedure 56.

¶22 Dakota correctly notes the Eviction Rules replace the Arizona Rules of Civil Procedure ("Civil Rules") in eviction actions. *Bank of New York Mellon v. Dodev*, 246 Ariz. 1, 8, ¶ 22 (App. 2018). The Civil Rules apply in eviction actions "only when incorporated by reference" in the Eviction Rules. Eviction Rule 1. But even if the superior court erred in citing Civil Rule 56, Dakota's argument fails because Eviction Rules 9(h) and 11(d) expressly contemplate the summary judgment procedure employed in this case. Eviction Rule 11(d) provides "[i]f no factual issues exist for the jury to determine, the matter shall proceed to a trial by the judge alone regarding any legal issues or may [be] disposed of by motion or in accordance with these rules, as appropriate."[3] Further, Eviction Rule 9 permits either party to make "appropriate motions" and provides the court power to "dispose of the motion summarily." We need not consider whether Civil Rule 56 is incorporated because Eviction Rule 11(d) expressly authorizes

[3] Under the facts of this case, we discern no meaningful difference between the procedures contemplated by Civil Rule 56 ("The court shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law."), and those contemplated by Eviction Rule 11(d) ("If no factual issues exist for the jury to determine, the matter . . . may [be] disposed of by motion or in accordance with these rules, as appropriate.").

judges to dispose of the matter by motion if no factual issues exist. Accordingly, the superior court did not err in employing a summary judgment procedure in this case.

B. Genuine Issues of Material Fact.

¶23 Dakota argues that a host of contested, genuine, and material facts precluded summary judgment under Eviction Rule 11(d). The superior court entered summary judgment, finding that Dakota's tenancy clearly terminated after SOCAA selected Guidance as the winner of the RFP and Dakota received written demand of possession by SOCAA.

¶24 "We review *de novo* whether summary judgment is warranted, including whether genuine issues of material fact exist and whether the superior court correctly applied the law." *Specialty Cos. Grp. LLC v. Meritage Homes of Ariz. Inc.*, 248 Ariz. 434, 438, ¶ 7 (App. 2020). We consider the evidence and all reasonable inferences in the light most favorable to Dakota, the nonmoving party. *Id.*

¶25 "On the trial of an action of forcible entry or forcible detainer, the only issue shall be the right of actual possession and the merits of title shall not be inquired into." A.R.S. § 12-1177(A). The purpose of FED actions is to afford "a summary, speedy, and adequate remedy for obtaining possession of premises withheld by tenants. . . ." *Old Bros. Lumber Co. v. Rushing*, 64 Ariz. 199, 204-05 (1946). This purpose "would be entirely frustrated if the defendant were permitted to deny his

landlord's title, or to interpose customary and usual defenses permissible in the ordinary action at law." *Id.* at 205.

¶26 A person is guilty of forcible detainer if he:

> Wilfully and without force holds over any lands, tenements or other real property after termination of the time for which such lands, tenements or other real property were let to him or to the person under whom he claims, after demand made in writing for the possession thereof by the person entitled to such possession.

A.R.S. § 12-1171(3). Forcible detainer is also established when "[a] tenant at will or by sufferance or a tenant from month to month or a lesser period whose tenancy has been terminated retains possession after his tenancy has been terminated or after he receives written demand of possession by the landlord." A.R.S. § 12-1173(1).

¶27 Dakota's brief lists fifteen issues it claims are genuine issues of material fact, but Dakota does not provide citation, argument, or authority to explain why these factual issues should have precluded summary judgment. Thus, Dakota has waived these claims. *See* ARCAP 13(a)(7) ("An 'argument' . . . must contain . . . contentions concerning each issue presented for review, with supporting reasons for each contention, and with citations of legal authorities and appropriate references to the portions of the record on which the [party] relies."); *see also Stafford v. Burns*, 241 Ariz.

474, 483, ¶ 34 (App. 2017) (finding appellant's failure to develop an argument in a meaningful way constituted waiver).

¶28 Moreover, we find these fifteen factual issues to be primarily subsumed within or duplicative of an additional six issues raised by Dakota related to the validity and enforceability of the RFP. In summary, Dakota asserts the following six issues were contested, genuine, and material issues of fact that the superior court overlooked: (i) the Board and FAA did not review and approve the RFP;[4] (ii) the RFP featured an illegal provision; (iii) the RFP was for a different building and site than the Property; (iv) Dakota's business would have been interrupted had it been awarded the RFP; (v) Guidance's bid did not comply with the RFP's stated requirements; and (vi) the RFP was a "sham" and just a pretext to eject Dakota from the Property.

¶29 We agree with the superior court that Dakota's asserted issues are impermissible counterclaims related to the Settlement Agreement and "are already subject of an existing case between the parties. . . ." Such "counterclaims, offsets and cross complaints are not available either as a defense or for affirmative relief" in this FED action. *See Old Bros. Lumber Co.*, 64 Ariz. at 204-05. Because the claimed factual disputes

[4] SOCAA asserts that this issue has already been resolved in its favor in prior proceedings. *See Dakota*, 2019 WL 1499853, at *3, ¶ 19. Because we conclude these issues are not pertinent to the FED action, we do not address SOCAA's argument.

are not pertinent to the FED proceedings, they are not material issues of fact precluding summary judgment.

C. Right of Actual Possession.

¶30 The parties agree that the Settlement Agreement determined the right of actual possession. Because the Settlement Agreement allowed Dakota "to continue leasing the existing property . . . until an RFP issues[,]" Dakota argues the RFP for a different facility was not valid and it retains a right of possession under the Settlement Agreement until SOCAA issues a valid RFP.

¶31 We disagree. "[T]he right to actual possession is the only issue to be determined in [an FED] action." *Old Bros. Lumber Co.*, 64 Ariz. at 204. The Settlement Agreement provided Dakota with a right of possession only until the RFP was issued, a winner selected, and notice provided. The Settlement Agreement does not define or set forth requirements for the RFP. Thus, the only factual issues relevant to the FED action are whether SOCAA issued an RFP, selected Guidance as the winner, and provided Dakota notice to vacate. Although Dakota contests the terms of the RFP, it admits one was issued, SOCAA notified Guidance that its proposal had been selected, SOAA notified Dakota that its proposal had not been selected, and SOCAA provided Dakota notice that its lease had been terminated.[5] Thus, under the Settlement Agreement, Dakota's right

[5] Although Dakota acknowledges that SOCAA sent notices, it does not concede that "the notice was accurate or effective."

to possession of the Property ended. Dakota's claims that the RFP was flawed may give rise to damages claims for breach of contract or the covenant of good faith and fair dealing, and are currently being litigated in a separate civil action. *See Curtis v. Morris*, 184 Ariz. 393, 398 (App. 1995) ("Because an FED action does not bar subsequent proceedings between the parties to determine issues other than the immediate right to possession, those issues are better resolved in proceedings designed to allow full exploration of the issues involved."). But those claims do not provide a right to continued possession of the Property after the RFP was awarded and provide no defense to forcible detainer under A.R.S. §§ 12-1171(3) and -1173(1). The superior court did not err in finding Dakota had no right to continued possession of the Property. *See Taylor v. Stanford*, 100 Ariz. 346, 349 (1966) (disapproving of litigants who "seek to convert unlawful detainer into a suit for specific performance"). Thus, we affirm the court's judgment in its entirety.

III. Attorney Fees and Costs on Appeal.

¶32 SOCAA requests an award of attorney fees and costs incurred on appeal pursuant to ARCAP 21, ARCAP 25, and A.R.S. § 12-349(A)(3). Aside from the unsupported statements that Dakota's appeal "was solely for the purpose of delay" and "unreasonably expanded and delayed this FED proceeding," SOCAA does not develop an argument for an award of attorney fees. Thus, we exercise our discretion and decline to award attorney fees to either party. *See* ARCAP 13(a)(7);

Bank of New York Mellon, 246 Ariz. at 12, ¶¶ 39-41 (declining to impose sanctions under ARCAP 25 where the requesting party had failed to offer argument justifying sanctions).

¶33 As the prevailing party, SOCAA is entitled to costs upon compliance with ARCAP 21.

CONCLUSION

¶34 We affirm the judgment of the superior court.

[SEAL]

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

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IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

SEDONA-OAK CREEK AIRPORT AUTHORITY, INC., an Arizona nonprofit corporation, Plaintiff, vs. DAKOTA TERRITORY TOURS, ACC, RED LIMITED LIABILITY COMPANIES I-X, BLACK CORPORATIONS I-X, and WHITE PARTNERSHIPS I-X, Defendants.	Case No. V1300-CV2019-80119 **JUDGMENT** (Hon. Krista Carman)

The Court, having reviewed Plaintiff Sedona-Oak Creek Airport Authority, Inc.'s ("SOCAA") Motion for Summary Judgment, Defendant Dakota Territory Tours, ACC's ("Dakota") Response, SOCAA's Reply, and the exhibits thereto, and having considered the parties' presentations at oral argument, for the reasons set forth in the Court's January 31, 2020 Under Advisement Ruling, and other good cause appearing, it is hereby **ORDERED, ADJUDGED, AND DECREED** as follows:

1. SOCAA's Motion for Summary Judgment is granted in full.

2. Pursuant to A.R.S. §§ 12-1171(3) and 12-1173(1), Dakota is guilty of forcible detainer of the real property in Yavapai County, Arizona, located at 1225 Airport Road, Sedona, Arizona 86336.

3. SOCAA is entitled to possession of said property as a matter of law.

4. SOCAA is entitled to its taxable costs in the amount of **$796.29**.

5. SOCAA is entitled to its attorneys' fees in the amount of **$41,286.00**.

No matters remain pending and this judgment is entered pursuant to Ariz. R. Civ. P. 54(c).

/s/ eSigned by CARMAN, KRISTA M 03/06/2020 14:53:24 mWP8fWJN

Hon. Krista M. Carman, Division 4

cc: Kiersten A. Murphy-Henze Cook Murphy, PLLC (e)
Tony C. Cullum-Law Office of Tony S. Cullum, PLLC (e)
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**SUPERIOR COURT, STATE OF ARIZONA,
IN AND FOR THE COUNTY OF YAVAPAI**

SEDONA-OAK CREEK AIRPORT AUTHORITY, INC., an Arizona non-profit corporation, Plaintiff, -vs- DAKOTA TERRITORY TOURS, ACC, RED LIMITED LIABILITY COMPANIES I-X, BLACK CORPORATIONS I-X, and WHITE PARTNERSHIPS I-X, Defendants.	**Case No.** V1300CV201980119 **UNDER ADVISEMENT RULING**
HONORABLE KRISTA M. CARMAN **DIVISION 4**	**BY:** Jennifer Kuns, Judicial Assistant **DATE:** January 31, 2020

Before the Court is Sedona-Oak Creek Airport Authority's Motion for Summary Judgment. The Court has read the Motion, Response and Reply. The Court has heard oral argument on January 30, 2020.

Relevant Facts

There are material undisputed facts that the Court has considered in reaching this decision.

Dakota's lease with SOCAA was set to expire on April 30, 2017 but pursuant to a settlement agreement between the parties, the lease continued on a month to month basis. As a result of a 2014 lawsuit, the parties entered into a settlement agreement. Part of the settlement agreement required SOCAA to issue an RFP in which Dakota could participate. An RFP was issued, Dakota did participate and the RFP was awarded to Guidance Aviation and not Dakota. SOCAA sent Dakota a 30 day notice to vacate on June 26, 2017. On July 21, 2017, Dakota filed the Complaint herein as well as an Application for Preliminary Injunction. Judge Napper granted the Preliminary Injunction. Specifically, Judge Napper stated that SOCAA was required to submit the RFP to the County for its consideration. Subsequently, Judge Napper lifted the injunction. The transcript indicates that in lifting the injunction, Judge Napper found that SOCAA had completed the RFP process as it submitted the RFP to the County for participation and the County declined to participate. Following the lifting of the injunction, SOCAA sent a second notice to vacate by the end of the year to Dakota on November 29, 2017. Dakota timely appealed the lifting of the injunction. The Court of Appeals affirmed the lifting of the injunction. On April 12, 2019, SOCAA sent Dakota a third notice to vacate. Dakota filed a Petition for Review with the Arizona Supreme Court which was denied. The Court of Appeals issued its mandate returning jurisdiction to this Court on October 18, 2019. Dakota has been on the airport more than 30 months after it first received notice to vacate. This forcible entry and detainer action was

filed by SOCAA on April 23, 2019 following the Court of Appeals memorandum decision.

Legal Analysis

Summary judgment is appropriate where, "the moving party shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a).

This is a forcible detainer action. The "only issue to be determined is the right of actual possession." *Casa Grande Tr. Co. v. Superior Court In & For Pinal Cty.*, 8 Ariz. App. 163, 165, 444 P.2d 521, 523 (1968). Arizona law is clear:

"[T]he object of a forcible entry and detainer action to afford a summary, speedy, and adequate remedy for obtaining possession of premises withheld by tenants, and for this reason this objective would be entirely frustrated if the defendant were permitted to deny his landlord's title, or to interpose customary and usual defenses permission in this ordinary action at law . . . And for the same reason, the merits of the title may not be inquired into in such an action, for if the merits of the title and the other defenses above enumerated were permitted and the court heard testimony concerning them, then other and secondary issues would be presented to the court and the action would not afford a summary, speedy and adequate remedy for obtaining possession of the premises." *Olds Bros. Lumber Co. v. Rushing*, 64 Ariz. 199, 204-05 (1946).

Dakota asserts many issues relating to the RFP in its response. However, those issues are not proper defenses to a forcible entry and detainer action. Although they are plead as defenses, in reality they should be plead as counterclaims related to the contract. Those claims are already the subject of an existing case between the parties (*Dakota Territory Tours AAC v. Sedona-Oak Creek Airport Authority*, V1300CV201780201). The issues briefed by Dakota are best resolved in the existing civil action (CV2017801201) for damages. The response herein encompasses breach of contract, illegality of contract, and breach of the covenant of good faith and fair dealing. These claims are not proper defenses in a forcible entry and detainer action where the sole issue is right to possession.

Finally, Dakota asserts that this Court has already found there are issues of fact in granting the request for a jury trial and therefore, summary judgment must be denied. The Court did grant a jury trial on the basis that there appeared to be a factual dispute as to the right to possession. However, that was a preliminary ruling prior to the motion for summary judgment and oral argument. Having read the motion, response, reply and heard oral argument, the Court now has determined there is no material question of fact related to the right to possession.

A.R.S. §12-1173 provides that "[a] person is guilty of forcible entry and detainer, or of forcible detainer . . . if he (3) willfully and without force holds over any lands, tenements or other real property after

termination of the time for which such lands, tenements or other real property were let to him or to the person under whom he claims, after demand made in writing for the possession thereof by the person entitled to such possession." A.R.S. § 12-1171(3). Additionally, "[t]here is a forcible detainer if: [a] tenant at will or by sufferance or a tenant from month to month or a lesser period whose tenancy has been terminated retains possession after his tenancy has been terminated or after he receives written demand of possession by the landlord." A.R.S. § 12-1173(1).

THE COURT FINDS that Dakota is guilty of forcible detainer pursuant to A.R.S. § 12-1171(3) and 12-1173(1). Dakota's right to remain on the property extinguished when SOCAA completed the RFP process by presenting the proposals to the County Board of Supervisors. Importantly, Judge Napper lifted the injunction in the civil case finding that SOCAA had complied with the RFP. The tenancy clearly terminated after SOCAA issued the RFP and selected Guidance as the winner of the RFP. Following the appeal and issuance of the mandate, written notice to vacate was sent to Dakota and Dakota failed to vacate the premises. The Settlement Agreement provided for 30 days' notice to vacate the property following the issuance of the RFP if the winner was not Dakota. SOCAA has provided notice in excess of that time. Dakota stated at oral argument that it did not dispute notice. The Court **finds** based on the facts that Dakota has retained possession after its tenancy has terminated and after it received written demand of possession by SOCAA.

Additionally, Dakota asserted at oral argument and in its pleadings that this Court was under an obligation to stay this case while its appeal is pending with the Court of Appeals. This Court received notice January 30, 2020 that the appeal, 1 CA-CV 20-0006, was dismissed. Any argument or discussion about staying this matter pending the appeal is moot.

IT IS ORDERED granting summary judgment in favor of Sedona-Oak Creek Airport Authority.

IT IS FURTHER ORDERED the Motion for Exclusion of Evidence is moot given the ruling on the Motion for Summary Judgment.

IT IS FURTHER ORDERED Plaintiff shall submit a form of order within ten days.

/s/ Krista Carman
eSigned by CARMAN,
KRISTA M 01/31/2020
14:02:51 o1hLI6g9

Honorable
Krista M. Carman

cc: Kiersten A. Murphy-Henze Cook Murphy, PLLC (e)
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[SEAL]

Supreme Court
STATE OF ARIZONA

ROBERT BRUTINEL
Chief Justice

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TRACIE K. LINDEMAN
Clerk of the Court

July 30, 2021

RE: SEDONA-OAK CREEK AIRPORT v DAKOTA TERRITORY TOURS
Arizona Supreme Court No. CV-21-0037-PR
Court of Appeals, Division One No. 1 CA-CV 20-0158
Yavapai County Superior Court No. V1300CV201980119

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on July 30, 2021, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

FURTHER ORDERED: Request for Attorneys' Fees (Appellant Dakota Territory Tours ACC) = DENIED.

FURTHER ORDERED: Request for Attorneys' Fees (Appellee Sedona-Oak Creek Airport Authority Inc) = DENIED.

Tracie K. Lindeman, Clerk

TO:
Kiersten A Murphy
Tony S Cullum
David L Abney
Amy M Wood
pm

SUPREME COURT OF ARIZONA

SEDONA-OAK CREEK AIRPORT AUTHORITY INC., Plaintiff/Appellee, v. DAKOTA TERRITORY TOURS ACC, Defendant/Appellant.	Arizona Supreme Court No. CV-21-0037-PR Court of Appeals Division One No. 1 CA-CV 20-0158 Yavapai County Superior Court No. V1300CV201980119 **FILED 12/08/2021**

ORDER REISSUING PREVIOUS ORDER DENYING PETITION FOR REVIEW

On July 30, 2021, this Court entered the following order in the above-referenced cause:

ORDERED: Petition for Review = DENIED.

FURTHER ORDERED: Request for Attorneys' Fees (Appellant Dakota Territory Tours ACC) = DENIED.

FURTHER ORDERED: Request for Attorneys' Fees (Appellee Sedona-Oak Creek Airport Authority Inc) = DENIED.

On August 4, 2021, Appellant filed a Notice of Bankruptcy and of Automatic Stay advising the Court that, on July 26, 2021, Appellant had filed a voluntary petition for relief under Title 11 of the United States Code in the United States Bankruptcy Court for the District of Arizona in Case No. 3:21-bk-05729-EPB. Appellant contended that:

> Technically, therefore, the Minute Letter that the Arizona Supreme Court filed on July 30, 2021, which denied Debtor Dakota's petition for review, is invalid because it was entered in violation of the automatic stay that 11 U.S.C. § 362(a) imposed by operation of federal law.

Appellant contended that the above-referenced cause had been stayed by operation of the automatic stay imposed by 11 U.S.C. § 362(a).

On August 5, 2021, this Court ordered that its July 30, 2021 Minute Letter decision would be vacated and "this proceeding will be stayed" unless, before August 27, 2021, Appellee filed a "persuasive objection to this proposed course."

On August 27, 2021, Appellee filed a Response to Appellant's Notice of Bankruptcy and Automatic Stay, stating that:

> [R]ather than litigating that issue before this Court, and in an abundance of caution, [Appellee] intends promptly to move the bankruptcy court for an order either: (a) confirming that the automatic stay is inapplicable to these proceedings; or (b) for relief from the automatic stay so that [Appellee] can bring this long-pending forcible detainer action to its proper conclusion. [Appellee] will notify this Court of the bankruptcy court's order either confirming that the automatic stay is inapplicable or granting [Appellee's] motion for stay relief, and will respectfully seek the Court's immediate re-issuance of a Minute Entry Letter denying [Appellant's] petition for review.

On August 31, 2021, this Court entered an Order Vacating Minute Letter and Staying Case "until further order from this Court." The Court further ordered

> that the parties shall notify the Court of the final disposition of the bankruptcy case in United States Bankruptcy Court for the District of Arizona, case no. 3:21-bk-05729-EPB or the entry of an order that vacates the automatic stay or abandons this proceeding from the bankruptcy.

On November 16, 2021, Appellee filed a Notice of Bankruptcy Court's Order Confirming the Absence of Stay With Respect to Certain pre-Petition Eviction Litigation, stating:

> In its Order entered November 16, 2021, and effective immediately upon entry, id. at p.3 ¶ 5, the Bankruptcy Court determined that the automatic stay of Bankruptcy Code § 362 does not apply to this forcible entry and detainer action. See Exhibit A, at p.2 ¶ C. The Bankruptcy Court further authorized [Appellee] to: "among other things (i) pursue the issuance of another Minute Entry letter denying review from the Arizona Supreme Court; (ii) oppose any attempt by the Debtor to obtain a stay of the Arizona Court of Appeal's mandate during pursuit of any appeal of the FED Order to the U.S. Supreme Court, including without limitation, filing a writ of certiorari with the U.S. Supreme Court; (iii) seek from the Arizona Court of Appeals a mandate and remand to the trial court with respect to the FED Order; and (iv) pursue a

> writ of eviction from the trial court, including among other relief, directing the Yavapai County Sheriff to remove the Debtor from the Airport premises (or otherwise ensuring the Debtor's voluntary exit). Id. ¶ 3.

Appellee requested that the Court reissue its Minute Entry Letter denying review of the above-referenced cause

> so that [Appellee] can proceed to realize its right to a "summary, speedy and adequate statutory remedy for obtaining possession of premises by one entitled to actual possession." *Casa Grande Tr. Co. v. Superior Court In & For Pinal Cty.*, 8 Ariz. App. 163, 165, 444 P.2d 521, 523 (1968) (citations omitted) (emphasis added). *See also Olds Bros. Lumber Co. v. Rushing*, 64 Ariz. 199, 204-05, 167 P.2d 394, 397 (1946) (emphasis added) ("As we have said, the object of a forcible entry and detainer action is to afford a summary, speedy and adequate remedy for obtaining possession of premises withheld by tenants.").

The Court having considered all of the foregoing filings and the action of the Bankruptcy Court, now therefore,

IT IS ORDERED vacating the stay that was issued by this Court on August 31, 2021.

IT IS FURTHER ORDERED granting Appellee's request, reissuing the Minute Entry of July 30, 2021, and ordering as follows:

Petition for Review = DENIED.

Request for Attorneys' Fees (Appellant Dakota Territory Tours ACC) = DENIED.

Request for Attorneys' Fees (Appellee Sedona-Oak Creek Airport Authority Inc) = DENIED.

DATED this 8th day of December, 2021.

/s/
ROBERT BRUTINEL
Chief Justice

TO:
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SUPREME COURT
STATE OF ARIZONA

SEDONA-OAK CREEK AIRPORT AUTHORITY, INC.,	**Case No. CV-21-0037-PR**
Plaintiff/Appellee/ Respondent,	**Arizona Court of Appeals Case No. 1 CA-CV 20-0158**
v.	
DAKOTA TERRITORY TOURS, ACC,	Yavapai County Superior Court Case No. V1300CV201980119 Hon. Krista Carmen
Defendant/Appellant/ Petitioner.	

PETITION FOR REVIEW

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Other Materials

[6] **Why This Court Should Grant Review**

1. In an FED action, an unconsented-to summary judgment cannot defeat a tenant's right to a rapid jury trial.

Forcible-entry-and-detainer ("FED") cases are fast. They are also controlled by statute for all procedures. *AU Enterprises, Inc. v. Edwards*, 249 Ariz. 109, 110 ¶ 5 (App. 2020). By statute, a landlord filing an FED complaint can request a jury trial, and the "court shall grant" the request. A.R.S. § 12-1176(A). If the landlord does not request a jury trial, the tenant can

request one—"and the request shall be granted." A.R.S. § 12-1176(B).

Here, a tenant ("Dakota") timely requested a jury trial. But the trial court granted no jury trial and, instead, many months later, granted a summary-judgment motion for the landlord ("Airport Authority").

This Court should grant review because, whether the FED statutes and procedural rules permit unilateral summary-judgment motions when the tenant has asked for a jury trial, is an issue of great interest, recurring statewide importance, and first impression. An FED case is incompatible with unilateral summary-judgment motions, since an FED action is a rapid process where the only triable issue is "the right of actual possession." A.R.S. § 12-1177(A).

When a tenant demands a jury trial in an FED action, the jury's task is to "return a verdict of guilty or not guilty of the charge as stated in the complaint." A.R.S. § 12-1177(B). Only if there is no demand for a jury can the trial court try [7] the action. *Id*. The goal is speed of decision. Indeed, it is only for "good cause shown, supported by an affidavit," that the jury trial can be postponed, and then, at the superior-court level, for a mere ten calendar days. A.R.S. § 12-1177(B). Indeed, "the accelerated nature of FED actions does not include disclosure or discovery available in general civil litigation." *Iverson v. Nava*, 248 Ariz. 443, 448 ¶ 11 (App. 2020).

2. FED actions allow some unconsented-to motions—but not summary-judgment motions.

Despite the absence of discovery and disclosure, the Arizona Rules of Procedure for Eviction Actions allow some dispositive motions—but *only* rapid law-based motions, and only as long as the "filing of [the] motions, responses and replies shall not delay the times set by statute for proceeding with an eviction action, except for continuances granted for good cause shown or by stipulation of the parties." Ariz. R. Proc. Evic. Act. 9(b).

Indeed, time is so critical in FED actions that, although written responses and replies are allowed, responses and replies "to any motion may be made orally in open court." Ariz. R. Proc. Evic. Act. 9(b).

The procedural rules do not allow for unilateral summary judgment motions. In contrast, the procedural rules allow for a few short motions, as long as they do not delay the action. Thus, a party can file a motion to amend a pleading (only for good cause shown), a motion for judgment on the pleadings (if the trial court does [8] not consider any matters outside the pleadings), a motion to dismiss, or a motion for reconsideration (with no oral argument and no right to file a response or reply). Ariz. R. Proc. Evic. Act. 9(d), (e), (f) & (g).

"Other appropriate motions may be made by either party." Ariz. R. Proc. Evic. Act. 9(h). But there is no mention of summary judgment in *any* eviction rule. That is because if it is not agreed to, it cannot be an

"appropriate" motion. Indeed, the only time the word "summary" appears in any eviction rule is in Ariz. R. Proc. Evic. Act. 2, which states: "All eviction actions are statutory summary proceedings and the statutes establishing them govern their scope and procedure." The word "summary" in that rule is describing a crisp and swift process.

Summary-judgment proceedings are neither crisp nor swift. They are, in fact, greatly slower than the rapid trials mandated in FED actions. In a summary-judgment proceeding, 30 days are set aside for a response and 15 days for a reply. Then there is setting and conducting a hearing. And there is always the right to a Rule 56(d) motion asking for even more time to find facts presently unavailable to the opposing party.

In addition to time delays, the Arizona Rules of Procedure for Eviction Actions do not specifically incorporate Rule 56, surely a deliberate choice, since Rule 56 motions are a mainstay of civil-procedure practice in non-FED actions. Indeed, the "Arizona Rules of Civil Procedure apply" to eviction actions "only [9] when incorporated by reference." Ariz. R. Proc. Evic. Act. 1. If this Court had wanted to complicate and slow FED actions by allowing unilateral summary-judgment motions, it would have incorporated Rule 56.

But what if there are no facts to try? This Court provided for that in the eviction rules, when this Court specified that:

> At the initial appearance, if a jury trial has been demanded, the court shall inquire and determine the factual issues to be determined by the jury. If no factual issues exist for the jury to determine, the matter shall proceed to a trial by the judge alone regarding any legal issues or may disposed of by motion or in accordance with these rules, as appropriate.

Ariz. R. Proc. Evic. Act. 11(d).

The process is simple. If the trial court decides there are no factual issues to try, the trial court alone tries the case on any legal issues or may dispose of the matter by motion. *Id*. A summary-judgment motion with opposing statements of fact is unnecessary, and *inappropriate* under Ariz. R. Proc. Evic. Act. 11(d), when the trial court has already determined there are no genuine issues of material fact. The "appropriate" motion would be a motion solely dealing with legal issues, such as a motion for judgment on the pleadings or a motion to dismiss. But in no event would the proper motion be a summary-judgment motion.

Moreover, a unilateral summary-judgment motion denies a tenant's right to a jury trial in an FED action if, as here, the landlord does not request a jury. If that happens, the tenant may request a jury trial "on appearing," as Dakota did. And [10] once requested, "the request shall be granted." A.R.S. § 12-1176(B).

3. A tenant's right to a jury trial in an FED action has strong roots in Arizona jurisprudence and history—and in the Arizona Constitution.

Dakota was exercising a historic Arizona right dating back to the first Arizona legislative code. *See* John S. Goff, *William T. Howell and the Howell Code of Arizona*, 11(3) Am. J. Leg. Hist. 221 (1967). Since the Howell Code of 1864, defendants in Arizona FED cases have had the right to a jury trial. *See* Howell Code ch. 43, § 8 (1864); Comp. Laws Ariz. Terr. ch. 43, § 8 (1871); Comp. Laws Ariz. Terr. ch. 43, § 2296 (1877); Rev. Stat. Ariz. ch. 29, § 2013 (1887); Rev. Stat. Ariz. Terr. ch. 29, § 2676 (1901). A.R.S. § 12-1176(B) guarantees that 157-year-old right. Indeed, the right to a jury trial in FED cases has centuries older common-law roots. *See*, *e.g.*, *Lord Proprietary v. Brown*, 1 H. & McH. 428, 429 (Prov. Ct., Proprietary Province of Md. 1772); Statute of 8 Henry VI, ch. 9 (1429).

Dakota is also entitled to a jury trial in this civil matter under Ariz. Const. art. 2, § 23, which provides that the "right of trial by jury shall remain inviolate." It is true that the constitutional right to a "trial by jury may be waived by the parties in any civil cause." Ariz. Const. art. 6, § 17.

But Dakota has <u>never</u> waived its right to a jury trial. Instead, it timely requested one. (IR-011). The trial court's refusal to grant the requested jury trial reduced the FED action to a slow-moving shambles and

violated Dakota's historical, procedural, constitutional, *and* statutory right to a jury trial.

[11] **4. The procedural right to a jury trial is substantive. Both Divisions of the Court of Appeals have, however, recently improperly created a unilateral right to file summary-judgment motions in FED cases.**

Although this Court has exclusive power over procedural matters in Arizona courts, it cannot enlarge or diminish substantive rights a statute has created. *Marianne N. v. Department of Child Safety*, 243 Ariz. 53, 56 ¶ 14 (2017). A.R.S. § 12-1176(B) creates a substantive, strong right to a jury trial that Ariz. R. Proc. Evic. Act. 11(d) cannot weaken. That is consistent with this Court's reasoning that the FED statute's "procedural" provisions are not just "procedural" and are not superseded by the civil-procedure rules. *Hinton v. Hotchkiss*, 65 Ariz. 110, 114-16 (1946).

Unless the parties and the trial court mutually agree, there is no right to file a unilateral summary judgment motion in an FED action. Despite that, Divisions One and Two have both recently indicated there *is* a right to file a unilateral summary judgment motion in an FED action. Division One did it on January 12, 2021 in this case. *Mem. Dec*. at *7-8 ¶ 22. And Division Two did it on December 21, 2020, in *Montano v. Luff*, ___ Ariz. ___, No. 2 CA-CV 2020-0025, 2020 WL 7488071 at *4 ¶¶ 15-16 (App. Dec. 21, 2020).

Both Divisions are wrong. Unless the trial court and the parties agree on a case-by-case basis, in an FED action there is no right to a file a summary judgment motion. The FED statutes do not allow it. The procedural eviction rules do not [12] allow it. And the statutory, procedural, historical, constitutional, common-law, and traditional right to a jury trial does not allow it.

Dakota was deprived of its right to a swift and decisive jury trial. Instead, in an FED action where Dakota timely filed its request for a jury trial on April 20, 2019 (Doc. 011), the trial court did not file its "Under Advisement Ruling" granting the Airport Authority's summary judgment motion until January 31, 2020 (Doc. 089). And here we are a year later on appeal, with months to go before the appellate process ends. FED actions are supposed to afford a "speedy" remedy "for obtaining possession of the premises," *Olds Brothers Lumber Co. v. Rushing*, 64 Ariz. 199, 204 (1946), and "proceed according to strict, short procedural timelines, which are an integral part of the right itself." *Curtis v. Morris*, 184 Ariz. 393, 398 (App. 1995).

Summary judgment motions afford no speedy remedy and violate the short timelines the Arizona Legislature imposed in FED actions to benefit both landlords and tenants. The new rule that Divisions One and Two have adopted—allowing for unilateral summary judgment motions in FED actions—will deny the right to speedy jury trials in FED actions across Arizona.

This is a recurring issue of great interest and statewide importance. Neither the Arizona Legislature nor the eviction rules this Court adopted allow unilateral summary judgment motions in FED actions when a tenant has demanded a jury [13] trial. The requested jury trial must swiftly occur and takes precedence. It cannot be derailed by summary-judgment proceedings. Dakota therefore urges the Court to grant the petition.

5. A tenant's due-process right to a jury trial in FED cases implicates the Seventh Amendment to the U.S. Constitution.

Indeed, more broadly, denial of the well-established right to a jury trial in FED cases implicates the Seventh Amendment to the U.S. Constitution, which preserves the historical and common-law right to trial by jury in civil matters.

In *Pernell v. Southall Realty*, 416 U.S. 363 (1974), the U.S. Supreme Court held that, because the right to recover possession of real property was a right that the common law had long identified and protected, a party involved in a lawsuit under local statutes establishing a summary procedure for possession of real property was entitled to demand a trial by jury under the Seventh Amendment.

From the territorial period forward, Arizona courts have recognized that the Seventh Amendment guarantees the right to a jury trial in civil lawsuits. *See*, *e.g.*, *Valler v. Lee*, 190 Ariz. 391, 393 n. 3 (App. 1997); *Yetman v. English*, 168 Ariz. 71, 78-80 (1991)

(This Court notes the "seventh amendment guarantee of trial by jury in all common law cases" in ruling that the case fell under "the protections of the seventh amendment" and that the "seventh amendment therefore requires that the issue of interpretation [in that case] be left to the jury."); *Carroll v. Byers*, 4 Ariz. 158, 162 (Terr. 1894).

[14] Notably, in *Pernell*, the U.S. Supreme Court specifically identified Arizona as a state providing "for trial by jury in summary eviction proceedings," and cited to A.R.S. § 12-1176. *Id*. at 385 n. 34. If Arizona has not formally brought the Seventh Amendment into its jurisprudence, it has recognized that it is a source for the right to a jury trial in Arizona state-court civil cases. The right to a jury trial in an Arizona superior court also has Seventh Amendment constitutional significance because a "landlord-tenant dispute, like any other lawsuit, cannot be resolved with due process of law unless both parties have had a fair opportunity to present their cases." *Id*. at 385.

Finally, as a matter of first impression that was not waived at the trial court or at the Court of Appeals, since only this Court can decide it, if *Yetman* did not incorporate the Seventh Amendment into Arizona law, this Court should consider whether it should formally recognize the incorporation of the Seventh Amendment as an additional protection of the rights of Arizona's tenants and landlords.

Under its plain terms, there is no reason why the Seventh Amendment should not apply in all civil cases

where there was a recognized right to a jury trial when Arizona became a state. Recent scholarship has concluded that under the "Supreme Court's doctrine of incorporation and legal history," the "right to trial by jury in civil cases is implicit in the concept of due process, and therefore the Seventh Amendment must apply to state governments." James L. "Larry" Wright [15] and M. Matthew Williams, *Remember the Alamo: The Seventh Amendment of the United States Constitution, the Doctrine of Incorporation, and State Caps on Jury Awards*, 45 S. Tex. L. Rev. 449, 450 (2004).

We submit that the U.S. Supreme Court's 2010 selective incorporation of the Second Amendment has opened the door to selective incorporation of the Seventh Amendment. *McDonald v. City of Chicago, Illinois*, 561 U.S. 742 (2010).

It makes no sense for the Seventh Amendment to be a constitutional orphan when federal constitutional rights with far less clarity, historicity, and force have been held to apply to the States. This federal issue may, of course, be a matter for the U.S. Supreme Court to resolve on a petition for writ of certiorari, if this Court does not resolve it or if it denies the petition for review.

Issue Presented for Review

Right to jury trial. In an FED action, can the trial court deny a tenant's right to receive a prompt jury trial?

Other Issues to Consider if Review Is Granted

The RFP. Was the purported request for proposals ("RFP") in this matter a void, irrelevant, and illegal sham that was not the legitimate RFP that the Settlement Agreement required before there could be any FED action?

Actual possession. Did the Airport Authority have a right of actual possession of the leased premises under A.R.S. § 12-1177(A) sufficient to support [16] a judgment in its favor in this FED action?

Standard of Review

This Court reviews issues of law arising from a contract, as well as the grant of a motion for summary judgment, de novo. *JTF Aviation Holdings Inc. v. CliftonLarsonAllison LLP*, 249 Ariz. 510, 513 ¶ 14 (2020). This Court also reviews interpretation of a statute de novo. *Glazer v. State*, 237 Ariz. 160, 163 ¶ 12 (2015).

Summary judgment is only appropriate if the movant shows there is no genuine issue of material fact and it is entitled to judgment as a matter of law. *Normandin v. Encanto Adventures, LLC*, 246 Ariz. 458, 460 ¶ 9 (2019). On appeal from grant of summary judgment, this Court views the evidence and all reasonable inferences from it in the light most favorable to the nonmovant. *Quiroz v. ALCOA Inc.*, 243 Ariz. 560, 563 ¶ 2 n. 1 (2018).

This appeal involves interpreting the statutes for FED actions and the Arizona Rules of Procedure for

Eviction Actions. Because interpreting court rules and statutes raises questions of law, this Court reviews them de novo. *Duff v. Lee*, 250 Ariz. 135, 138 ¶ 11 (2020).

The Material Facts

The Airport Authority leased premises at the Sedona-Oak Creek Airport to Dakota, which ran helicopter and airplanes tours from them. *OB* at 15-16. They litigated disputes about lease provisions, but eventually reached a Settlement [17] Agreement ending their initial litigation. *OB* at 16. Under the Settlement Agreement, Dakota could keep leasing the premises until the Airport Authority issued a specific Request for Proposals that would be open to all potential lessees, including Dakota, for the premises Dakota had been leasing for its business for years. *OB* at 17-18.

The Airport Authority eventually issued a request for proposals that, among other defects, violated the federal Anti-Head Tax Act, 49 U.S.C. § 40116, and was not for the premises Dakota had been leasing. *OB* at 18-22. The request for proposals was thus an illegal nullity. The Airport Authority's failure to comply in good-faith with the Settlement Agreement's terms led to an FED action against Dakota. *OB* at 22-24.

Procedural Background

On April 23, 2019, the Airport Authority filed an FED action against Dakota. (IR-002). On April 30,

2019, Dakota filed its request for a jury trial (IR-011) and *then* filed its Answer (IR-014). The trial court did not provide the requested jury trial.

So what was supposed to be a just and rapid FED jury trial descended into a confusing free-for-all of time-consuming motions to dismiss, motions for summary judgment, and truncated appeals. *OB* at 10-15. Finally, in an "Under Advisement Ruling" filed January 31, 2020, the trial court granted a sweeping summary [18] judgment in favor of the Airport Authority. (IR-089).

On March 6, 2020, the trial court filed a signed Rule 54(c) Judgment. (IR-104). Dakota filed a timely notice of appeal on March 9, 2020. (IR-106).

On January 12, 2021, the Court of Appeals filed its Memorandum Decision. On January 15, 2021, Dakota filed a motion for publication and reconsideration. In an Order filed January 26, 2021, the Court of Appeals filed an Order denying those motions. This timely petition followed.

Request for Attorney's Fees and Costs

Dakota asks the Court to award to it the reasonable attorney's fees and costs it has incurred in pursuing this petition because this case arises from contract, A.R.S. § 12-341.01, and because attorney's fees and costs are awardable under the terms of A.R.S. § 12-1178(B), which provides, in relevant part, that if a defendant in an FED case "is found not guilty of forcible

entry and detainer or forcible detainer, judgment shall be given for the defendant against the plaintiff for damages, attorney fees and court and other costs." If Dakota prevails on this petition, it also requests an award of costs under A.R.S. §§ 12-331 and 12-341.

Conclusion

There is only one way a summary judgment motion can be proper in an FED case, and that is if the parties and trial court agree to allow it.

But when a tenant timely demands a jury trial in an FED action, the trial [19] court must rapidly set and conduct the jury trial. The trial court cannot accept any unilateral summary-judgment motions. After all, once the tenant has requested a jury trial, an unconsented-to summary-judgment motion violates the FED statutes, violates the Arizona Rules of Procedure for Eviction Actions, and violates the historical, traditional, common-law, and constitutional right to a jury trial in FED actions. It would be a jury-trial-nullification trifecta.

And yet, Divisions One and Two have just approved unilateral summary-judgment motions in FED actions. There is no such right. Certainly, the parties and the trial court could stipulate to summary-judgment proceedings. But once a tenant demands a jury trial, the trial court *must* grant that jury trial at once and conduct it rapidly. That would leave no time for summary-judgment proceedings. The trial court has a statutory, procedural, and constitutional duty to protect

the tenant's right to an immediate FED-action jury trial.

FED actions as supposed to go fast. What both Divisions have done defeats that goal and will impede and clog FED actions across Arizona. Sloth will replace speed. And tenants will lose their statutory, procedural, historical, common-law, and constitutional right to a rapid jury trial in FED actions—a right guaranteed to Arizona tenants since 1864, when Abraham Lincoln was President and hammering the golden spike at Promontory Summit near Odgen, Utah, marking completion of the first transcontinental railroad, was still in the future, on May 10, 1869.

[20] Dakota asks the Court to grant review of this petition.

DATED this 10th day of February, 2021.

AHWATUKEE LEGAL OFFICE, P.C.
/s/ David L. Abney, Esq.
David L. Abney
Appellate Counsel for
Defendant/Appellant/Petitioner

[Certificate Of Compliance Omitted]

[Certificate Of Service Omitted]

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SUPREME COURT

STATE OF ARIZONA

SEDONA-OAK CREEK AIRPORT AUTHORITY, INC., Plaintiff/Appellee/ Respondent, v. DAKOTA TERRITORY TOURS, ACC, Defendant/Appellant/ Petitioner.	**Case No. CV-20-0037-PR** **Arizona Court of Appeals Case No. 1 CA-CV 20-0158** Yavapai County Superior Court Case No. V1300CV201980119 Hon. Krista Carmen

RESPONSE TO PETITION FOR REVIEW

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Cases

Statutes

[4] **I. INTRODUCTION**

Dakota Territory Tours, LLC's ("Dakota") Petition could not be *less* worthy of this Court's discretionary review. Not only does the Petition fail to articulate a meaningful justification for review under ARCAP 23(d)(3), but the primary focus of Dakota's argument – opposing summary disposition because forcible entry and detainer ("FED") proceedings are supposed to be "fast" – is the definition of audacity and hypocrisy, given Dakota's conduct below.

Namely, Dakota spends the vast majority of its Petition complaining that Dakota (a tenant who remains in possession *to this day*) was denied a "swift and crisp process" by the trial court's grant of summary judgment, when it is Dakota that has waged a *nearly four year* campaign to remain unlawfully in possession of

Sedona-Oak Creek Airport Authority, Inc.'s ("SOCCA") property. Dakota has wrongfully occupied SOCAA's property since 2017, during the pendency of its several requests to stay this very case and its multiple appeals, all in derogation of SOCAA's private property rights.

Dakota cannot fairly be heard to complain about delay. Dakota has employed every possible procedural device to delay this action and thwarted resolution of SOCAA's FED complaint for almost four years, for the sole purpose of stalling its inevitable eviction so that it could continue profiting handsomely. This Petition (and Dakota's suggestion that it intends to use this action as a vehicle for filing a writ of [5] certiorari with the Supreme Court of the United States) is illustrative of Dakota's exhaustive effort to remain on property to which it has no legal right. Dakota has had more than its share of legal process. It is SOCAA that is the aggrieved party.

II. ARGUMENT

The Petition fails to identify any reason this Court should exercise its discretion to accept review; nor could it. The Court of Appeals correctly affirmed the trial court's order granting summary judgment for SOCAA in this FED action and this Court should deny the Petition.

A. The Court Should Deny Review.

Rule 23(d)(3) imposes the burden on Dakota to demonstrate why its Petition should be granted, including that: (1) "no Arizona decision controls the point of law in question"; (2) "a decision of the Supreme Court should be overruled or qualified"; (3) "there are conflicting decisions by the Court of Appeals;" or (4) "important issues of law have been incorrectly decided." The Petition fails on all fronts.[1]

First, both this Court and the Court of Appeals have decided the issue raised here. Summary judgment is appropriate in an FED proceeding. *See e.g.*, *Brewster-Greene v. Robinson*, 34 Ariz. 547, 552, 273 P. 538 (1929) (finding summary [6] disposition in an FED action appropriate because "there was nothing for a jury to pass upon. The salient or controlling facts appear from the pleadings, the lease, and the subsequent compromise agreement. The question to be decided was one of law and for the court."); *Montano v. Luff*, —– Ariz. ——, ——, 2020 WL 7488071, *4, ¶¶ 15-16 (App. Dec. 21, 2020) (finding the mandatory language of A.R.S. § 12-1176(B) and Rule 11(d) were "readily harmonized"); *Wells Fargo Bank, Nat'l Ass'n as Tr. for Structured Asset Mortg. Investments II Inc. v. Park*, 2019 WL 5701758, *2 (Ariz. Ct. App. Mem. Dec. Nov. 5,

[1] Dakota argues that the trial court's denial of a jury trial in the FED action implicates its rights under the Seventh Amendment of the United States Constitution. Petition at 13-15. But Dakota waived that argument by failing to raise it in its Opening Brief before the Court of Appeals. *Webster v. Culbertson*, 158 Ariz. 159, 163, 761 P.2d 1063, 1067 (1988)

2019) (affirming summary judgment in an FED proceeding over defendant's objection that "summary judgment should have been impossible" because defendant "demanded a 'trial by jury' from the beginning," because the trial court correctly determined that defendant failed to "identify any relevant factual issues—those within the statutory scope of an FED action—that would preclude the court from entering judgment on the pleadings"); *Lovett v. Singh*, 2019 WL 5152313 (Ariz. Ct. App. Mem. Dec. Oct. 15, 2019), review denied March 31, 2020 (finding in an FED action that a party "was only entitled to a jury trial if any of his alleged defenses had a legal basis for contesting the FED complaint").

Second, Dakota does not argue that any Supreme Court decision should be overturned. It instead ignores well-reasoned and controlling authority. Brewster-Greene v. Robinson, a 1929 Arizona Supreme Court case, affirmed summary [7] disposition when there was no factual issue for a "jury to pass on" and the question "was one of law to be decided for the court." *Id.* at 552, 273 P. at 539.

Third, there is unanimity and no dispute among the lower courts, as Dakota admits. Both Divisions of the Court of Appeals have upheld summary judgment in FED actions. *See* Petition, at 11; *see*, *e.g.*, *Montano v. Luff*, 2020 WL 7488071, *4, ¶¶ 15-16; *Wells Fargo*, 2019 WL 5701758, *2.

Fourth, as further discussed below, Dakota does not meaningfully argue that any issue of law has been

incorrectly decided, particularly in light of nearly 100 years of precedent supporting the propriety of summary dispositions as a matter of law in FED proceedings.

B. The Court of Appeals Correctly Affirmed the Trial Court's Order Granting Summary Judgment.

In suggesting that this Court should accept review, Dakota gets it wrong on every score. Specifically, Dakota: (1) has the policy underlying FED proceedings exactly backwards and ignores or misstates pertinent portions of the factual and procedural record; and (2) errs in its interpretation of Arizona law.

1. *FED Actions Provide a Summary, Speedy Remedy for Obtaining Possession of Premises*.

Dakota contends that, in an FED action, a "tenant" has the right to a "rapid jury trial." An FED action, Dakota argues, is meant to be a "rapid process" where the "goal is speed of decision," "[t]ime is critical," and results are meant to be "crisp and swift." *Id.* at 7. What Dakota omits, of course, is the public policy underlying *why* FED actions are meant to be "crisp [8] and swift." Namely, FED actions are intentionally expedited so that the party entitled to possession, not the holdover tenant, can *regain possession* quickly and summarily: "a forcible detainer action is a summary, speedy and adequate statutory remedy for obtaining possession of

premises *by one entitled to actual possession*." *Casa Grande Tr. Co. v. Superior Court In & For Pinal Cty.*, 8 Ariz. App. 163, 165, 444 P.2d 521, 523 (1968) (citations omitted) (emphasis added). *See also Olds Bros. Lumber Co. v. Rushing*, 64 Ariz. 199, 204–05, 167 P.2d 394, 397 (1946) (emphasis added) ("As we have said, the object of a forcible entry and detainer action is to afford a summary, speedy and adequate remedy *for obtaining possession of premises withheld by tenants*.")

Dakota has no need for speed (which explains its behavior below and the reason for filing this Petition) because its lease expired in April 2017, and it has remained in possession of SOCAA's property for nearly four years beyond any conceivable time it had a claim of right to the property. Far from working toward a speedy resolution of whether SOCAA has a right to possession, Dakota employed every device at its disposal to delay resolution of SOCAA's FED complaint.

Dakota, not SOCAA, is responsible for lack of a speedy resolution in this case. First, Dakota *twice* moved to stay the FED trial. Dakota's first motion for stay, granted over SOCAA's objection, was in effect for six months pending the Court of [9] Appeals' mandate in a separate contract dispute between the same parties. [*See* IR[2]-13, 38, 44]. Dakota's second motion for stay, which the trial court denied [*See* IR-44], argued that the FED action should be stayed pending the nine-day jury trial scheduled in that separate contract

[2] "IR" refers to the Clerk of Court's Index of Record on Appeal.

dispute. Dakota again attempted to stay the FED action through an interlocutory appeal from the trial court's order denying its second stay request [*See* IR-66], but the Court of Appeals dismissed the appeal for lack of jurisdiction. *See* Order Dismissing Appeal, *Sedona-Oak Creek Airport Authority v. Dakota Territory Tours*, ACC, No. CA-CV 20-0006 (Jan. 30, 2020).

In addition, Dakota *twice* unsuccessfully moved to dismiss the FED action (after having filed its Answer). [*See* IR-28, IR-45]. And Dakota used its dispositive motions to argue in favor of a stay: "It's already been stayed twice. . . . And for all the reasons in our motion to stay that's pending, it can be stayed and should be stayed. Particularly if it's going to be dismissed on our motion to dismiss or our revised motion to dismiss." [*See* Nov. 25, 2019 Trans. at 13:10-22].

Even Dakota's demand for a jury trial was not designed to expeditiously resolve the issue of possession. Dakota demanded a nine-day jury trial with thirty-seven (37) witnesses, and at least 136 exhibits, spanning thousands of pages [*See* IR-57] to try the same "core issues and the same witnesses" as the parties' separately litigated breach of contract and damages dispute. In other words, Dakota sought to [10] try counterclaims that were already at issue in a separate civil lawsuit, and that had nothing to do with the issue of possession. (The trial court granted SOCAA's motion for summary judgment on the issue of specific performance in that lawsuit which prevents Dakota from arguing that it has any other or further right to possession based on those claims.) When SOCAA

demanded that the FED trial must occur within ten days as required under Arizona law [*Id.* at 13:2-5], Dakota objected that there was no way Dakota could prepare for trial in that timeframe. [*Id.* at 16:12-17].

Of course, SOCAA objected and rightly argued: (1) that a nine day jury trial was unnecessary because the only issue before the court in an FED action was the right to possession; and (2) that Dakota's extraneous issues were impermissible counterclaims. [*See* Nov. 25, 2019 Trans. at 17:17-22]. The Court of Appeals agreed. *See Sedona-Oak Creek Airport Authority, Inc. v. Dakota Territory Tours, ACC*, 2021 WL 97217, *6 ¶ 29 (Jan. 12. 2021) ("We agree with the superior court that Dakota's asserted issues are impermissible counterclaims related to the Settlement Agreement and "are already subject of an existing case between the parties. . . ." Such "counterclaims, offsets and cross complaints are not available either as a defense or for affirmative relief" in this FED action."). This is a fatal flaw in Dakota's Petition. Dakota is complaining about the loss of a jury trial it will never be entitled to under any circumstance. Its impermissible counterclaims are beyond the jurisdiction of a trial court in a forcible detainer proceeding.

[11] At every turn, SOCAA vigorously pursued a summary, speedy remedy to regain possession of its property. At every turn, Dakota objected, stalled, and sought delay. What Dakota now claims was "a confusing free-for-all of time consuming motions to dismiss, motions for summary judgment, and truncated appeals," Petition at 17, was wholly a result of Dakota's

own conduct (with the exception of SOCAA's summary judgment motion, which fully, finally, and expeditiously resolved this action as a matter of law). Dakota cannot fairly claim prejudice because SOCAA's summary judgment motion meant the FED action was not "crisp or swift," particularly where SOCAA's dispositive motion was briefed, argued, and decided on an expedited basis. [*See* IR-69].

2. *Summary Disposition is Appropriate in FED Cases.*

The trial court's order granting SOCAA's motion for summary judgment was procedurally proper, and the Court of Appeals properly determined that "the superior court did not deprive Dakota of its statutory or constitutional rights by denying it a jury trial." *Sedona-Oak Creek Airport Authority v. Dakota Territory Tours, ACC*, 2021 WL 97217, *4 ¶ 19.

The Arizona Supreme Court has long held that, notwithstanding the Arizona Constitution's clear mandate that the "right of trial by jury shall remain inviolate," a trial court's summary disposition on undisputed material facts is wholly consistent with that right. *Orme School v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1009 [12] (1990). Indeed, Arizona courts have been clear that disposition on summary judgment does "no violence to our guarantee of trial by jury" under the Arizona Constitution. *Id.*

There is no authority, constitutional or otherwise, that FED proceedings must be treated differently than

other civil disputes for purposes of summary disposition, or that an FED statute's language could ever supersede the Arizona Supreme Court's interpretation of the Arizona Constitution, permitting summary judgment as consistent with the "inviolate" right to a jury trial. And, in fact, longstanding Arizona law supports summary disposition in FED actions. *See*, *e.g.*, *Brewster-Greene v. Robinson*, 34 Ariz. 547, 552, 273 P. 538 (1929). Further, the Court has explicitly determined that summary disposition does "no violence to our guarantee of trial by jury under article 2, § 23 of the Arizona Constitution." *Orme School*, 166 Ariz. at 309, 802 P.2d at 1009. Even the constitutional right to a jury trial only attaches if the case presents a genuine, material factual questions. *Id.* As such, summary judgment operates "as an efficient instrumentality to expedite the business of the court by permitting the summary adjudication of meritless claims without the necessity of trial." Id. at 305, 802 P.2d 1005.

Rule 1 of the Rules of Procedure for Eviction Actions incorporates the Arizona Rules of Civil Procedure, if incorporated by reference. Rule 9(h) of the Eviction Rules is that reference. It permits either party to make "appropriate [13] motions" and gives the court power to "dispose of the motion summarily." And, Rule 11(d) provides that, "[i]f no factual issues exist for the jury to determine, the matter shall proceed to a trial by the judge alone regarding any legal issues *or* may disposed of by motion *or* in accordance with these rules, as appropriate." That is, if no factual issues exist:

(1) trial can be to the court; or (2) disposed of by motion; or (3) in accordance with the eviction rules.

Arizona courts routinely grant judgment in FED proceedings and this Court has affirmed those decisions. *Brewster-Greene v. Robinson*, 34 Ariz. 547, 552, 273 P. 538 (1929); *Montano v. Luff*, —— Ariz. ——, ——, 2020 WL 7488071, *4, ¶¶ 15-16 (App. Dec. 21, 2020); *Wells Fargo Bank, Nat'l Ass'n as Tr. for Structured Asset Mortg. Investments II Inc. v. Park*, 2019 WL 5701758, *2 (Ariz. Ct. App. Mem. Dec. Nov. 5, 2019); *Lovett v. Singh*, 2019 WL 5152313 (Ariz. Ct. App. Mem. Dec. Oct. 15, 2019). Section 12-1176's jury trial language, which Dakota insists is mandatory, must be read consistently with the Arizona Supreme Court's determination that the "inviolate" right to a jury trial exists only when genuine factual questions remain for a jury to decide. Rule 11(d) of the eviction rules is likewise consistent with the Arizona Constitution, applicable case law, and § 12-1176. *See* Ariz. R. P. Evict. Act. 11(d). *Montano*, 2020 WL 7488071, *4, ¶¶ 15-16 (finding the mandatory language of A.R.S. § 12-1176(B) and Rule 11(d) were "readily harmonized").

[14] Eviction Rule 11(d) reflects the ruling in *Orme* – it provides that the trial court must first determine if there are relevant factual disputed issues for the jury to decide. *Id.* If there are no material facts in dispute, there are no facts for a jury (as fact finder) to decide, and the trial court can resolve the matter via a bench trial or by motion as a matter of law. *Id.* The role of a jury is to find facts, and if an FED defendant can articulate no material factual issues, there simply are

no facts for the jury to find, and a jury trial – just for the sake of having a jury trial – would be directly contrary to summary judgment's function as an "efficient instrumentality to expedite the business of the court." 166 Ariz. at 305, 802 P.2d at 1005.

Moreover, there is no injustice to remedy here. Although Dakota purported to list a host of "disputed" facts, the Court of Appeals correctly determined that none of those "facts" is material to the only relevant issue in this action – Dakota's entitlement to possession of SOCAA's property. *Sedona-Oak Creek Airport Authority v. Dakota Territory Tours, ACC* 2021 WL 97217, *6 ¶ 19. As to the relevant and material facts, Dakota either conceded to and/or admitted each fact. There was nothing relevant to the FED action remaining for a jury to decide.

The trial court's determination that Dakota was guilty of forcible detainer as a matter of law is consistent with the Arizona Constitution, the Arizona cases interpreting the constitution, A.R.S. § 12-1176, and Ariz. R. P. Evic. Act. 11(d).

[15] **III. <u>ATTORNEYS' FEES</u>**

SOCAA requests its attorneys' fees and costs pursuant to: A.R.S. § 12-341.01, as this action arises out of contract; § 12-1178(A), because Dakota was found guilty of forcible detainer and SOCAA is entitled to "attorney fees, court and other costs;" C and §§ 12-331 and 12-341.

IV. CONCLUSION

The Court of Appeals thoughtfully and properly affirmed the trial court's order granting SOCAA's motion for summary judgment. Dakota failed to articulate any error in the court's decision or any other basis justifying this Court's exercise of its discretionary review. SOCAA respectfully requests that this Court deny the Petition and allow SOCAA to regain possession of its property at long last.

RESPECTFULLY SUBMITTED this 26th day of February, 2021.

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