IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

BOBBY WILSON,
Plaintiff/Appellant,

v.

PHOENIX NEWSPAPERS, INC.; GANNETT CO., INC.;
HUGO PUBLISHING CO., INC.; DUSTIN GARDINER;
ALISON STEINBACH; STAN STAMPER; AND GREG BURTON,
Defendants/Appellees.

No. 2 CA-CV 2020-0047
Filed February 10, 2021

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED
BY APPLICABLE RULES. NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1);
Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. C20192032
The Honorable Brenden J. Griffin, Judge

AFFIRMED

COUNSEL

Bobby Wilson, Green Valley
In Propria Persona

Ballard Spahr LLP, Phoenix
By David J. Bodney and Daniel A. Arellano
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Presiding Judge Eppich authored the decision of the Court, in which Chief Judge Vasquez and Judge Brearcliffe concurred.

EPPICH, Presiding Judge:

¶1 Bobby Wilson, a former candidate for Arizona State Senate, appeals from the trial court's grant of summary judgment in favor of Phoenix Newspapers, Inc. (PM), the publisher of *The Arizona Republic* and its corresponding website azcentral.com; its parent company, Gannett Co., Inc.; Hugo Publishing Co., Inc., the publisher of *The Hugo News* and former publisher of the *Choctaw County Weekly*; and select journalists, as well as an owner and an editor ("Defendants").[1] Wilson argues the trial court erred in denying his motion to strike Defendants' exhibits and granting summary judgment in favor of Defendants on his claims of defamation, false light invasion of privacy, and intentional infliction of emotional distress. For the following reasons, we affirm.

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[1] Although not all individual defendants were involved in every allegation, we refer to "Defendants" collectively.

Factual and Procedural Background

¶2 The following facts are undisputed. In 2018, Bobby Wilson was campaigning for a seat in the Arizona State Senate. In July, at a candidate's forum on gun-control legislation, he revealed he once shot and killed someone in self-defense. A reporter employed by PNI, Alison Steinbach, contacted Wilson and interviewed him to follow up on the statements he had made at the debate. This action was brought after *The Arizona Republic* published three articles after Steinbach's interview.

Article One: References to 1963 Murder Confession

¶3 On July 17, 2018, *The Arizona Republic* published an article written by Steinbach titled, "Senate hopeful shot mom in 1963."[2] The article reported that Wilson had admitted shooting someone in self-defense at a candidate's forum to illustrate that having "a good guy there with a gun" was more effective than gun-control legislation.

¶4 The article noted that court records and contemporaneous newspaper articles "suggest[ed] there may be more to the story than Wilson's account." It mentioned that" [t]hose records show he was charged with

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[2] A similar article was posted at azcentral.com – the online version of *The Arizona Republic* – the day before. The online version was titled "Arizona Senate candidate who killed his mother supports 'good guys' with guns." The only material difference between the two versions was that the online article included images that the print edition did not.

the murder of his mother and sister, and soon after his arrest he confessed to those charges," and "later recanted his confession and claimed he had amnesia about the events of the night in question."

¶5 The article then described Wilson's version of the events as described by him in the interview with Steinbach and mentioned that he wrote a memoir in 2010 that "[told] his version of the story." It reported Wilson had claimed that his mother had repeatedly shot at him, that his mother hit his sister in the head with a rifle butt, that bullets from his mother's shooting ricocheted off containers of gasoline in his room, that he shot his mother in self-defense, and that the house exploded when he turned a light switch on. He further claimed that all charges against him had been dismissed after he faced two "inconclusive" trials and that the prosecutor "announced that the state never had a solid case against him and was wrong all along."

¶6 The article then reported that contemporaneous court records and a local newspaper "differ[ed] significantly" from Wilson's version of events. It referenced 1963 articles in the *Choctaw County Weekly* – an Oklahoma publication that had compiled articles from multiple area newspapers – and revealed that one of those articles "reported that Wilson had confessed [to] murdering his mother and sister."[3] The article reported the

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[3] The online version of the article published by *The Arizona Republic* had included an image of a 1963 *Choctaw County Weekly* article with the headline "Bobby Wilson Confesses He Murdered His Mother and Sister Last Thursday." The body of the article is not clearly legible in the version reported online.

1963 article said that Wilson had led officers to where he buried the rifle and that after "prompting by his [former] boss," he had confessed to shooting his mother, crushing his sister's skull with his rifle butt, placing the bodies on the bed, pouring gas around the house, and lighting a match.

¶7 The article stated that court records showed Wilson filed a motion arguing he did not have the "mental [ ]capacity to make a rational defense" and the court had "suspended" Wilson's trial after a jury found he suffered from amnesia. It reported that the murder charges were dismissed after Wilson moved to dismiss the charges on speedy trial grounds.

Article Two: Threatening to Kill HOA President

¶8 On August 15, 2018, *The Arizona Republic* published another article about Wilson, written by reporter Dustin Gardiner, and titled, "HOA leader: Candidate said he'd kill me."[4] This article referenced Steinbach's July 2018 article and recounted the 1963 newspaper article that had indicated Wilson confessed to killing his mother and sister. It then reported that Wilson's neighbors at a gated beach community in Mexico said he had broken down a door and threatened to harm Dan Dimovski, the president of the homeowner's association (HOA). The article indicated that

[4] Two days earlier, a similar version of this article was published online at azcentral.com. The online version was titled "Neighbors: Arizona Senate candidate who killed his mother threatened HOA president in 2016."

Wilson had acknowledged damaging a door but denied threatening anyone that day.

¶9 The article reported that Dimovski had contacted *The Arizona Republic* after reading its previous article describing Wilson's gun comments and the death of his mother. It reported that Dimovski had said that "Wilson [had] threatened to kill him," two years prior, at a HOA meeting where Wilson's wife was in attendance. According to the article, Dimovski said "he [could not] recount Wilson's exact words, given the incident came as a complete shock." But, Dimovski indicated that Wilson made statements similar to "I know who you are," "You know what I could do to you?" and "I'll take care of you." Dimovski also said, "Knowing what I know now, I think it was a threat to kill me, especially the fact that he has exposed his position on what he thinks of weapons. . . ." The article also reported that the vice president of the HOA, Bruce Turner, was there and had confirmed Wilson "made threatening statements about harming Dimovski." It reported that Dimovski and Turner had called the Mexican police after seeing that a HOA office door had been kicked in but that the HOA later agreed to not press charges after Wilson and his wife paid to fix the door.

¶10 The article noted Wilson had acknowledged being upset and confronting Dimovski over an "illegal meeting" but he had claimed "that he never made any physical threats" and only acted in that manner because he was concerned for his wife's well-being. The article reported that Wilson and his wife had claimed that Dimovski was lying and that there was conflict

between the HOA board and some of its residents regarding the HOA's alleged mismanagement of the property.

Wilson's Retraction Demand

¶11 After both articles were published, Wilson sent a retraction demand to the editor of *The Arizona Republic*, claiming that the two articles falsely reported that Wilson had confessed to murdering his mother and sister "by re-publishing old articles" that were "untrue and libelous." In the demand, Wilson claimed he had given a reporter a copy of his book which "was the only true account of what caused the deaths of [his] mother and sister." Wilson stated that the 1963 newspaper editor who had published accounts of Wilson's confession and the local sheriff had "admitted under oath at trial that there had never been any written or oral confession of any murders or arson by [him]." *The Arizona Republic* responded to Wilson and informed him that it would not retract the articles, in part, because he had not provided any evidence to support his assertion that these two witnesses had admitted under oath that Wilson had never confessed. It encouraged him to provide any evidence to support his position. Wilson did not respond or provide further evidence.

Article Three: References to Material in First Two Articles

¶12 On February 15, 2019, *The Arizona Republic* published a third article about Wilson written by

Dustin Gardiner. This article was posted on azcentral.com and, among other things, recalled and discussed the contents of the two previous articles.

Wilson's Lawsuit

¶13 In April 2019, Wilson filed this lawsuit alleging defamation, intentional infliction of emotional distress, and false light invasion of privacy against seven defendants: PNI, which distributes *The Arizona Republic* and operates azcentral.com; Gannett Co., Inc., the parent company of PM; Alison Steinbach and Dustin Gardiner, reporters employed by PNI; Greg Burton, executive editor of *The Arizona Republic;* Hugo Publishing Co., Inc., which publishes *The Hugo News* (formerly *The Hugo Daily News)* and formerly published the *Choctaw County Weekly;* and Stan Stamper, the president of Hugo Publishing Co., Inc.

¶14 Wilson alleged that the articles published by *The Arizona Republic* falsely reported that he had confessed to murdering his mother and sister and that he had threatened to kill Dimovski. Defendants moved for summary judgment, arguing that Wilson could not prove actual malice by clear and convincing evidence nor falsity. Wilson cross-moved for partial summary judgment. In that same filing, he also moved to strike some of Defendants' exhibits. The trial court denied Wilson's motions and granted summary judgment in favor of Defendants because Wilson had not produced sufficient evidence for a jury to find by clear and convincing evidence that Defendants acted with actual

malice nor was there sufficient evidence of outrageous conduct to warrant an intentional infliction of emotional distress claim.[5] After the court denied Wilson's motion for a new trial, Wilson timely filed this appeal. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(5)(a).

Motion to Strike Exhibits

¶15 Wilson argues the trial court committed reversible error by refusing to strike some of Defendants exhibits offered in support of their motion for summary judgment. Specifically, he argues that Gardiner's declarations should have been excluded because they "were not signed and dated by the supposed witness."[6] He also argues that Stan Stamper's declaration should have been stricken because Stamper falsely stated that exhibits one through six came from his archives, when he was not actually the source of the items and had no original copy in his possession before this

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[5] The trial court observed that it did not "think [Wilson] responded to the defendant's statement of facts properly." Defendants contend that in doing so, the court "ruled that Wilson's failure to comply with Rule 56 was an independent basis on which to grant relief" in their favor. However, the court indicated it "went beyond that" and decided the issues on their merits.

[6] On appeal, Wilson also argues that Gardiner's supplemental declaration should have been stricken because it was unsworn and that Stamper's declaration should have been stricken due to a lack of competency and personal knowledge. Because Wilson did not adequately raise these issues below, he has waived them on appeal. *Sobol v. Marsh*, 212 Ariz. 301, ¶ 7 (App. 2006) ("[A] party cannot argue on appeal legal issues and arguments that have not been specifically presented to the trial court.").

lawsuit was filed. Wilson further argued that Stamper's declaration should have been stricken because it referenced several exhibits that were hearsay and "did not come within any recognized exception to the Arizona hearsay evidence rules."[7]

¶16 We review a trial court's ruling on evidentiary matters for a "clear abuse of discretion" and "will not reverse unless unfair prejudice resulted or the court incorrectly applied the law." *Larsen v. Decker*, 196 Ariz. 239, ¶ 6 (App. 2000) (citation omitted). "We will affirm the trial court's decision if it is correct for any reason, even if that reason was not *considered* by the trial court." *Glaze v. Marcus*, 151 Ariz. 538, 540 (App. 1986).

Gardiner's Declarations

¶17 Defendants submitted Dustin Gardiner's declaration in support of their motion for summary judgment. Wilson filed a motion alleging, among other things, that Gardiner's declaration should be stricken because the signature and date "were produced by artificial means," thereby not complying with Rule 80(c),

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[7] Wilson argues the trial court erred in refusing to issue sanctions as a result of the allegedly invalid affidavits under Rule 56(h), Ariz. R. Civ. P. However, that rule only indicates that a court *may* impose sanctions on a party if an "affidavit is submitted in bad faith or solely for delay." *Id.* Because Wilson does not explain why the affidavits fell under these categories or meaningfully develop his argument on appeal, we find that issue waived. *Polanco v. Indus. Comm'n*, 214 Ariz. 489, n.2 (App. 2007) (insufficient argument waives review of claim).

Ariz. R. Civ. P. Defendants countered that the declaration was electronically dated and signed by Gardiner and complied with Rule 80(c) because the rule does not prohibit electronic signatures.

¶18 Defendants also submitted Gardiner's supplemental declaration, in support of their motion for summary judgment. In response, Wilson argued that this supplemental declaration was inadmissible for the same reason as Gardiner's first declaration. The trial court denied his motion to strike Gardiner's declarations without explanation.

¶19 Unsworn declarations and affidavits have "the same force and effect" as sworn declarations and affidavits if they are "(1) signed by the person as true under penalty of perjury; (2) dated; and (3) in substantially the [correct] form." Ariz. R. Civ. P. 80(c). Nothing in Rule 80 requires handwritten signatures or prohibits electronic signatures. Therefore, Wilson has not established that the trial court clearly abused its discretion by refusing to strike Gardiner's declarations on these grounds.

Stamper's Declaration

¶20 Defendants also submitted Stan Stamper's declaration in support of their motion for summary judgment. In the declaration, Stamper stated that "as president and publisher of *The Hugo News,*" formerly known as The *Hugo Daily News*, he had access to the company's publishing archives and he attached exhibits one through six – copies of six articles that

appeared in *The Hugo Daily News* reporting on Wilson's murder case. Stamper also stated he had researched other archival materials discussing Wilson's case after learning of the lawsuit. These materials were attached as exhibits seven through eleven and included: two articles from national magazines, an article from another newspaper, a purported copy of Wilson's transcribed confession to the Oklahoma State Bureau of Investigation (OSBI) where Wilson said, "I don't know [who shot my mother]. I was the only one in the house alive so I guess it must have been me since I was the only one in the house alive," and an email from OSBI demonstrating how Stamper had obtained a copy of the confession.

¶21 Stamper indicated he had "forwarded archival materials from Hugo publications to [*The Arizona Republic*], but [he] did not alter or add to the original publications." He indicated he did not have "knowledge that anything in the aforementioned archival materials was false, nor did [he] ever entertain serious doubts about their truth." He also indicated that to his knowledge, Wilson "has never served a retraction demand on Hugo over any statement that appeared in any of the articles it published concerning [Wilson's] role in the . . . murders of his mother and sister in 1963, nor had Wilson ever previously sued Hugo regarding anything that ever appeared in one of its publications concerning his role in those 1963 murders."

¶22 Wilson argued that the eleven exhibits attached to Stamper's declaration were inadmissible hearsay. He also argued that Stamper was dishonest because he

falsely claimed he obtained exhibits one through six from his own archives, when they actually came from the Oklahoma Historical Society, as evidenced by the imprint at the top of the exhibits. Defendants argued exhibits one through nine were all newspaper and magazine articles and were self-authenticating under Rule 902(6), Ariz. R. Evid., and fell under the Rule 803(16), Ariz. R. Evid., hearsay exception. Defendants also argued that exhibits ten and eleven were admissible. They argued that exhibit ten was not hearsay under Rule 801(c)(2), Ariz. R. Evid., because it was not being introduced "to prove the truth of the matter asserted in the statement." They further argued both exhibits were sufficiently authenticated under Rule 901(b)(7)(B), Ariz. R. Evid., and if they were hearsay, they fell under the Rule 803(16) and Rule 803(8), Ariz. R. Evid., hearsay exceptions. The trial court denied Wilson's motion to strike these exhibits without explanation.

¶23 An affidavit may be used to support a motion for summary judgment if it, among other things, "set[s] out facts that would be admissible in evidence." Ariz. R. Civ. P. 56(c)(5). Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Ariz. R. Evid. 801(c). Hearsay is inadmissible unless an exception applies. Ariz. R. Evid. 802, 803, 804. The ancient document hearsay exception provides, "[a] statement in a document that was prepared before January 1, 1998, and whose authenticity is established" is not excludable on hearsay grounds "regardless of whether the declarant is available as a witness."

Ariz. R. Evid. 803(16). Rule 902(6) provides that "[p]rinted material purporting to be a newspaper or periodical" is self-authenticating evidence which "require[s] no extrinsic evidence of authenticity in order to be admitted."

¶24 There is also a hearsay exception for public records. Ariz. R. Evid. 803(8). A statement of a public office qualifies for this exception if it sets out, "in a civil case . . . factual findings from a legally authorized investigation" and "the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness." Ariz. R. Evid. 803(8)(A)(iii), (B). Evidence that "a purported public record or statement is from the office where items of this kind are kept" satisfies the authentication requirement. Ariz. R. Evid. 901(b)(7)(B).

¶25 Here, the parties agree that exhibits one through nine are hearsay. But as Defendants point out, these exhibits are all magazine periodicals or newspaper articles published in the 1960s so they are self-authenticating under Rule 902(6) and admissible under the Rule 803(16) exception to the prohibition on hearsay. Therefore, the trial court did not abuse its discretion in considering these exhibits for summary judgment purposes.

¶26 Wilson asserts that exhibits ten and eleven are hearsay because they involve statements offered to prove the truth of the matter asserted. However, even assuming that these exhibits are hearsay and that they were improperly considered by the court, reversal

on these grounds is unwarranted because it was harmless error. *See Creach v. Angulo*, 189 Ariz. 212, 214-15 (1997) ("To justify the reversal of a case, there must not only be error, but the error must have been prejudicial to the substantial rights of the party."); *see also* Ariz. Const. art. VI, § 27 ("No cause shall be reversed for technical error in pleadings or proceedings when upon the whole case it shall appear that substantial justice has been done.").

¶**27** These two exhibits were obtained by Defendants *after* the lawsuit began and were seemingly offered to prove a confession occurred. However, the court granted Defendants' motion for summary judgment based on Wilson's failure to produce sufficient evidence of actual malice – a standard that is only concerned with a "defendant's state of mind at the time of publication." *Kahl v. Bureau of Nat'l Affs., Inc.*, 856 F.3d 106, 118 (D.C. Cir. 2017).[8] Because these two exhibits were obtained after the purported defamatory material was published, they have no bearing on "[Dlefendants' state of mind at the time of publication." *Id.* Therefore, there is no reasonable probability that the outcome of the case might have been different if these exhibits were not considered because these items were irrelevant to the actual malice standard. *See United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 295 (App. 1983) (harmless error if no reasonable

[8] Although the trial court appeared to believe, at the time of its ruling, that the actual malice standard did not apply to intentional infliction of emotional distress claims, as discussed below, this standard applies equally to all of the claims in this case.

probability result might have been different if error did not occur).

¶28 Lastly, Wilson argues the Stamper declaration should have been stricken because Stamper falsely stated exhibits one through six came from his archives when that was actually not the source of the items. Even if this were true, Wilson fails to demonstrate how this goes to admissibility of the evidence rather than its weight. As Wilson acknowledges, in a motion for summary judgment the trial court may not weigh the evidence because the court's function is "merely to determine whether there is evidence that could reasonably be believed in determining whether" a genuine dispute of material fact exists for trial. *Orme Sch. v. Reeves*, 166 Ariz. 301, 307 (1990); *see also* Ariz. R. Civ. P. 56(a). In sum, the trial court did not abuse its discretion in denying Wilson's motion to strike Defendants exhibits.

Summary Judgment

¶29 Wilson argues the trial court erred in granting Defendants' motion for summary judgment because he created a genuine dispute that Defendants acted with actual malice when they republished and referenced the confession to murder from the 1963 article on three separate occasions. He also contends he created a genuine dispute that Defendants acted with actual malice when they published " 'threat to kill' language" because there is no proof he ever said those words to Dimovski.

¶30 "We review de novo a trial court's grant of summary judgment and view the evidence in the light most favorable to the party against whom summary judgment was entered." *Simon v. Safeway, Inc.*, 217 Ariz. 330, ¶ 13 (App. 2007). Summary judgment is properly granted "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." Ariz. R. Civ. P. 56(a). Therefore, a summary judgment motion "should be granted if the facts produced in support of the claim . . . have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim." *Noriega v. Town of Miami*, 243 Ariz. 320, ¶ 12 (App. 2017) (quoting *Reeves*, 166 Ariz. at 309).

¶31 The First Amendment "extend[s] journalists a wider margin of error in reporting about public figures than in reporting about private figures." *Scottsdale Publ'g, Inc. v. Superior Court (Romano)*, 159 Ariz. 72, 75 (App. 1988). A public figure "seeking damages from media defendants for publications of defamatory material on matters of public concern [can] only recover on clear and convincing evidence of 'actual malice." *Dombey v. Phx. Newspapers, Inc.,* 150 Ariz. 476,480 (1986) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964)).[9] "The question whether the evidence in the

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[9] The actual malice standard is a constitutional rule that also applies to false light invasion of privacy and intentional infliction of emotional distress. *See Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (intentional infliction of emotional distress);

record . . . is sufficient to support a finding of actual malice is a question of law." *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 685 (1989). "[T]he appropriate summary judgment question [is] whether the evidence in the record could support a reasonable jury finding . . . that the plaintiff has shown actual malice by clear and convincing evidence." *Dombey*, 150 Ariz. at 486 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-56 (1986)).

¶32 A plaintiff demonstrates actual malice by producing "evidence that defendant[s] published either knowing that the article was false and defamatory or that it published with 'reckless disregard of whether it was false or not.'" *Id.* at 487 (quoting *Sullivan*, 376 U.S. at 280).[10] To show reckless disregard, a plaintiff must "present 'significant probative evidence' which would support a finding that defendant published even though it entertained a subjective doubt of truth." *Id.* at 488 (quoting *Anderson*, 477 U.S. at 256); *see also St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) ("There must be sufficient evidence to permit the

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Godbehere v. Phx. Newspapers, Inc., 162 Ariz. 335, 342-43 (1989) (invasion of privacy). Arizona courts are required to follow it because this rule is based on the Supreme Court's interpretation of the First Amendment. *See McLaughlin v. Jones*, 243 Ariz. 29, ¶ 25 (2017) ("The United States Supreme Court's interpretation of the Constitution is binding on state court judges, just as on other state officers.").

[10] "To be defamatory, a publication must be false and must bring the defamed person into disrepute, contempt, or ridicule, or must impeach plaintiff's honesty, integrity, virtue, or reputation." *Godbehere*, 162 Ariz. at 341.

conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."). When the defendants deny knowing their material was false or that they doubted its truth, "a public figure must rely on circumstantial evidence to prove his case." *Dombey*, 150 Ariz. at 487 (quoting *Hunt v. Liberty Lobby*, 720 F.2d 631, 643 (11th Cir. 1983)).

¶33 Here, it is undisputed that Wilson was a public figure when the articles at issue were published.[11] Although Wilson agrees that the actual malice standard is binding precedent on this court, he nevertheless urges us to adopt a new standard We decline to do so. *See id.* at 481; *State v. Smyers*, 207 Ariz. 314, n.4 (2004) ("The courts of this state are bound by the decisions of [its supreme court] and do not have the authority to modify or disregard [that] court's rulings.").

¶34 Wilson has not presented any evidence that Defendants admitted publishing the articles knowing they contained false and defamatory material. Therefore, we need only determine whether Wilson produced significant probative evidence that Defendants entertained a subjective doubt of truth of the articles at the time of publishing, thereby proving Defendants published with reckless disregard for the truth. *See*

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[11] Wilson argues for the first time on appeal, that he was no longer a public figure when the third article was published, presumably because he was no longer running for Arizona state senate at that time. However, Wilson has waived this argument on appeal by failing to raise it below. *Sobol*, 212 Ariz. 301, ¶ 7.

Dombey, 150 Ariz. at 487. For the reasons that follow, we conclude that he did not.[12]

References to 1963 Murder Confession

¶35 Wilson argues he "clearly produced proof of Defendants' commission of constitutional malice." Wilson's evidence of actual malice at summary judgment included (1) his assertion that he gave Steinbach a copy of his memoir which he contends proves the confession to murder referenced in the 1963 article never occurred because the publisher of the article – Jack Stamper – and a local sheriff admitted at trial that Wilson did not confess to them, (2) the lack of a conviction, (3) his former supervisor – RD. Payne – claimed that Wilson never confessed to him, (4) Defendants' violation of "the model code of journalism conduct" and failure to adequately investigate, and (5) Defendants' refusal to retract the articles. But, even taken together, these claims do not provide significant probative evidence for a jury to conclude by clear and convincing evidence that Defendants entertained a subjective doubt of truth.

¶36 Wilson argues Defendants should have had serious doubts that the 1963 article – reporting he had confessed to murder – was true because during his interview with *The Arizona Republic*, he told Steinbach

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[12] Wilson's failure to provide sufficient evidence of actual malice defeats all of his claims and we therefore do not address the parties' arguments pertaining to whether Wilson produced sufficient evidence of the other elements of his claims.

that the 1963 article was false, that the publisher made it up, that no confession ever occurred, and he warned her that if *The Arizona Republic* republished the article he would sue. Wilson claims he gave a copy of his memoir to Steinbach to prove this.[13] In opposition to Defendants' motion for summary judgment, Wilson offered a few selected pages from his memoir as evidence. The pages from Wilson's memoir suggested that Wilson had never confessed to murder, indicated that Jack Stamper had fabricated Wilson's statement and falsely claimed he confessed, and that a local sheriff had admitted at trial that Wilson never confessed to him personally. However, even if we assume Defendants read this memoir before publishing the articles at issue, it was written by Wilson himself, almost fifty years after the deaths of his mother and sister, and the few selected pages contained no disinterested citations or references to objective sources such as court records or transcripts.

¶37 Wilson also did not offer any evidence that he demanded a retraction of the 1963 article that could have alerted Defendants to any purported falsity. The

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[13] Although Steinbach disputes receiving a book from Wilson, we draw the inference that this occurred because we view the facts in favor of the "party against whom summary judgment was entered." *Simon*, 217 Ariz. 330, ¶ 13. To the extent Wilson suggests that Defendants published with actual malice because the 1963 article was created and obtained from hostile opponents of his or was published for monetary gain, we reject that argument. *See Heuisler v. Phx. Newspapers, Inc.*, 168 Ariz. 278, 282 (App. 1991) ("Actual malice, however, is not established through a showing of bad motives or personal ill-will.").

pages of the memoir offered as evidence merely narrate Wilson's recollection of the events. As such, Wilson's self-serving uncorroborated denials were not enough to raise serious doubts about the veracity of the 1963 reference to a confession. *See Harte-Hanks Cominc'ns, Inc.*, 491 U.S. at n.37 ("[T]he press need not accept 'denials, however vehement; such denials are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error.'" (quoting *Edwards v. Nat'l Audubon Soc'y, Inc.*, 556 F.2d 113, 121 (1977))); *Lohrenz v. Donnelly*, 350 F.3d 1272, 1285 (D.C. Cir. 2003) ("[U]nlike evidence that could be readily verified, ja subject's] denials did not give [defendant] 'obvious reasons' to doubt the veracity of her publication.") (citations omitted).

¶38 Next, Wilson argues Defendants should have had serious doubts that the 1963 article was true because all criminal charges were dismissed and Steinbach admitted she examined court records showing a jury had found Wilson lacked the mental capacity to present a defense due to amnesia[14] before they published the article. Wilson contends that due to the amnesia, a confession "was very unlikely" and he "could not have made a valid confession of a double murder under those circumstances." However, a finding of amnesia and the fact that a confession may have been inadmissible does not mean that a confession never occurred. *See Watkins v. Sowders*, 449 U.S. 341, 347

[14] Wilson has arguably waived this argument by failing to raise it below. *See Sobol*, 212 Ariz. 301, ¶ 7.

(1981) (an involuntary confession may be "inadmissible even if it is true"). Similarly, the lack of a conviction in this case does not mean that a confession did not occur. Wilson did not produce evidence to show that his criminal charges were dismissed at the prosecutor's request, as he contends, rather than on speedy trial grounds.[15] Therefore, we conclude this evidence was not enough to raise serious doubts about the veracity of the 1963 article.

¶39 Wilson contends R.D. Payne's declaration was evidence that defendants should have had serious doubts about the truthfulness of the 1963 article because Payne stated in his declaration that Wilson never confessed to him that he murdered anyone and Payne never told any reporter of such a confession.[16] However, this declaration was written after publication of the articles and Wilson offered no evidence suggesting Defendants knew of Payne's statements before publication. *See Bose Corp. v. Consumers Union*, 466 U.S. 485, 498 (1984) (independent evidence needed to

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[15] The public records relied on by Steinbach, and uncontested by Wilson, established that a jury found Wilson suffered from amnesia, the court stayed his trial, and he filed a motion to dismiss his case based on a claim that his right to a speedy trial had been denied. Neither party introduced an order showing why the case was dismissed and to the extent that Wilson claims on appeal that his first trial ended in a hung jury, he offered no evidence to support this, other than his own self-serving statements.

[16] To the extent Wilson claims Payne's declaration states that the publisher of the 1963 article – Jack Stamper – admitted under oath at two trials that he lied about a confession, the record does not support this. Payne's declaration makes no reference to Jack Stamper recanting at trial.

establish defendant "realized the inaccuracy of the statement, or entertained serious doubts about its truthfulness, at the time of publication"); *Kahl*, 856 F.3d at 118 ("The actual malice inquiry focuses on the defendant's state of mind at the time of publication.").

¶**40** Wilson argues Defendants failed to conduct a complete investigation and violated journalistic standards. However, Steinbach indicated that she interviewed sources, relied on court records, and relied on contemporaneous news articles. Even if we assume that Steinbach violated journalistic standards by not contacting Payne before publishing, the failure to do so would amount to negligence at most, not a reckless disregard for truth because "[a]ctual malice is subjective and not based on journalistic standards or their breach." *See Domhey*, 150 Ariz. at 488-89 ("failure to investigate, sloppy investigation, poor reporting practice and the like are not per se actual malice"); *Scottsdale Publ'g, Inc.*, 159 Ariz. at 86 (Actual malice is subjective and "is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." (quoting *St. Amant*, 390 U.S. at 731)); *see also Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 510 (1991) (mere negligence insufficient to meet actual malice standard).

¶**41** Moreover, the fact that Defendants gave Wilson's version of events and told readers that Wilson's murder charges were dismissed, greatly undermines Wilson's claim of actual malice. *See Tavoulareas v. Piro*, 817 F.2d 762, n.44 (D.C. Cir. 1987) (including subject's denials in report constitutes "an even-handed

approach that scarcely bespeaks the presence of actual malice"); *Biro v. Conde Nast*, 963 F. Supp. 2d 255, 283 (S.D.N.Y. 2013) (including plaintiff's denials "makes it even less plausible that [defendants] were behaving with actual malice"), *aff'd*, 807 F.3d 541 (2d Cir. 2015); *Suchomel v. Suburban Life Newspapers, Inc.*, 228 N.E.2d 172,176 (Ill. App. Ct. 1967) (no actual malice when reporting "went to great lengths to set forth both sides of the controversy" and "specifically reports and quotes plaintiff's denials of the charges").

¶**42** Lastly, Wilson argues Defendants should have had serious doubts about the truth of the 1963 article because he sent them a retraction demand. However, Wilson ignores the fact that his demand came after the first two articles were already published so Defendants could not have known about the assertions in his demand at the time of publishing. Although retraction demands can be probative of actual malice in some circumstances, and this demand could have caused Defendants to have serious doubts before publishing the third article, it was not probative in this case because the purported inaccuracies were not substantiated by any objective evidence – only Wilson's self-serving statements. *See Dombey*, 150 Ariz. at 489 (retraction demands may indicate malice when plaintiff cites specific inaccuracies and provides the facts to rebut them); *Montgomery v. Risen*, 197 F. Supp. 3d 219, 263 (D.D.C. 2016) ("[D]enial[s] only serve to buttress a case for actual malice when there is something in the content of the denial or supporting evidence produced

in conjunction with the denial that carries a doubt-inducing quality.").

¶43 In sum, the record supports the conclusion that Wilson has not met his burden of producing significant probative evidence for a jury to conclude by clear and convincing evidence that Defendants entertained a subjective doubt of truth about the articles' references to the 1963 article reporting that Wilson confessed to murder.

Threatening to Kill HOA President

¶44 Wilson argues that the trial court erred in granting summary judgment for Defendants because he introduced sufficient evidence that Defendants acted with actual malice when they published the "'threat to kill' language" because there is no proof he ever said those words to Dimovski.[17] The only portion of the August 2018 article that contains the words "threat to kill" is a statement whereby Defendants reported that Dimovski said, "Knowing what I know now, I think it was a threat to kill me, especially the fact that he has exposed his position on what he thinks of weapons. . . ."[18]

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[17] We do not address Wilson's argument that he was entitled to partial summary judgment because he essentially concedes on appeal that if he had presented sufficient evidence of actual malice it should be up to a jury to decide his case.

[18] The headline of this article was "HOA leader: Candidate said he'd kill me." Wilson cites *Kaelin v. Globe Commc'ns Corp.*, 162 F.3d 1036 (9th Cir. 1998), for the proposition that Defendants cannot defeat a claim of actual malice because they can be liable

¶45 Wilson's evidence of actual malice at summary judgment included that Defendants (1) wanted to "destroy [his] reputation and his life," (2) sought "monetary and journalistic gain," (3) ignored that Wilson, his wife, and three other HOA members, warned Gardiner that Dimovski was either untrustworthy or disliked Wilson, (4) ignored that Wilson and his wife stated Wilson never made any threats to kill, (5) "violated the model code of journalism," and (6) failed to obtain a copy of a Mexican police report before publishing. But, again, even taken together, these claims do not provide significant probative evidence for a jury to conclude by clear and convincing evidence that Defendants entertained a subjective doubt of truth.

¶46 Wilson's claims that Defendants sought to destroy his reputation, publish for monetary gain, and that Dimovski was untrustworthy or disliked him are not sufficiently probative because actual malice cannot solely be established through showings of bad motive or personal animosity. *See Heuisler v. Phx. Newspapers, Inc.*, 168 Ariz. 278, 282 (App. 1991). To the extent Wilson argues Defendants should have had serious doubts about the "'threat to kill' language" because he and his

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for the headline alone, irrespective of the body of the article. However, Wilson does not provide meaningful argument on this issue, and thus we decline to address it. *See* Ariz. R. Civ. App. P. 13(a)(7)(A) (requiring "supporting reasons for each contention"); *Ritchie v. Krasner*, 221 Ariz. 288, ¶ 62 (App. 2009) ("Opening briefs must present and address significant arguments, supported by authority that set forth the appellant's position on the issue in question."); *In re J.U.*, 241 Ariz. 156, ¶ 18 (App. 2016) (We "generally decline to address issues that are not argued adequately.").

wife denied that he used such language, their uncorroborated denials were not enough to raise serious doubts about the veracity of whether Wilson threatened to kill Dimovski. *See Montgomery*, 197 F. Supp. 3d at 263 ("[A]ny denial, standing alone, is insufficient to demonstrate actual malice and survive summary judgment.").

¶47 Wilson's claims that Defendants breached journalistic standards and failed to conduct sufficient research into a Mexican police report similarly fail because those are not the standards for producing probative evidence of actual malice. *See Scottsdale Publ'g, Inc.*, 159 Ariz. at 86. Gardiner indicated that he engaged in "careful and thorough news gathering, whereby [he] spoke with witnesses and reviewed available documents." Even if we assume the police report Wilson offered as evidence was seen by Defendants before publishing, the report states Wilson "verbally assaulted" Dimovski. Furthermore, after this lawsuit was filed Dimovski submitted a declaration confirming the statements attributed to him in the article were accurate, including his statement, "Knowing what I know now, I think it was a threat to kill me, especially the fact that he has exposed his position on what he thinks of weapons. . . ."

¶48 The fact that Defendants published Wilson's version of events and told readers that he denied threatening to harm Dimovski greatly undermines Wilson's claim of actual malice. *See Tavoulareas*, 817 F.2d at n.44; *Biro*, 963 F. Supp. 2d at 283; *Suchomel*, 228 N.E.2d at 176. In the article, Defendants reported that

Wilson and his wife claimed Dimovski was lying because Wilson never threatened to harm Dimovski, there was conflict between the HOA board and some of its residents, and that no charges were filed against Wilson at the HOA's request.

¶**49** In sum, the record supports the conclusion that Wilson has not met his burden of producing significant probative evidence for a jury to conclude by clear and convincing evidence that Defendants entertained a subjective doubt of truth about the article's statement that Dimovski said he thought Wilson threatened to kill him.[19]

Attorney Fees

¶**50** Defendants argue that pursuant to Rule 21, Ariz. R. Civ. App. P., we should award them attorney fees on appeal under A.R.S. § 12-349(A)(1), (2), (3).

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[19] In light of our disposition, Wilson's claims that the trial court's entry of summary judgment denied him a right to a jury trial necessarily fail. *See Cagle v. Carlson*, 146 Ariz. 292, 298 (App. 1985) ("[T]he granting of summary judgment does not deprive a plaintiff of his constitutional rights to a jury trial because, in such cases, there are simply no genuine issues of fact for a jury to consider."). Wilson's argument that there was a violation of the Anti-Abrogation Clause of the Arizona Constitution, *see* Ariz. Const art. XVIII, § 6, also fails because a failure of proof does not abrogate a plaintiff's right to bring the action and possibly recover damages. *Cf State Farm Ins. Cos. v. Premier Manufactured Sys., Inc.*, 217 Ariz. 222, ¶ 34 (2007) (no violation of Anti-Abrogation Clause where claimant was not deprived "of the right to bring the action" or "the possibility of redress for injuries"). Because it raises the same issues, we need not separately address Wilson's argument that the court erred in denying his motion for new trial.

However, we conclude Defendants have failed to adequately establish the appeal was brought without substantial justification under § 12-349(A)(1), which requires proof that the claim is "groundless and is not made in good faith." *See* § 12-349(F). Nor do we find the appeal was brought "solely or primarily for delay or harassment," § 12-349(A)(2), nor to "[u]nreasonably expand[] or delay[] the proceeding." § 12-349(A)(3). Accordingly, the attorney fees request is denied.[20] However, as prevailing party, Defendants are entitled to their costs on appeal upon compliance with Rule 21.

Disposition

¶51 For the foregoing reasons, we affirm the trial court's grant of summary judgment in favor of Defendants.

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[20] *See Fisher v. Nat'l Gen. Ins. Co.*, 192 Ariz. 366, ¶ 13 (App. 1998) (acknowledging preponderance of evidence standard for award under § 12-349).

ARIZONA SUPERIOR
COURT, PIMA COUNTY CASE NO. C20192032

HON. BRENDEN J GRIFFIN DATE:
February 19, 2020

BOBBY WILSON
Plaintiff

VS.

PHOENIX NEWSPAPERS, INC.,
GANNETT COMPANY, INC., and
HUGO PUBLISHING CO., INC.
Defendants

RULING

IN CHAMBERS RE PLAINTIFF'S MOTION FOR NEW TRIAL (DENIED)

On January 21, 2020, Plaintiff filed a Motion for New Trial. Briefing on this matter has been completed which the Court has reviewed in its entirety.

IT IS ORDERED that Plaintiff's Rule 59 Motion for New Trial is denied and the Judgment entered in this matter on January 10, 2020 is affirmed.

No further matters remain pending; therefore, this Ruling is entered under Rule 54(c), Ariz. R. Civ. P.

/s/ Brenden J. Griffin
HON. BRENDEN J. GRIFFIN
(ID: 4c426a8b-4211-41ac-ada6-262b29d38aa1)

cc: Daniel A. Arellano, Esq.
David J. Bodney, Esq.
Bobby Wilson

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ARIZONA SUPERIOR COURT
PIMA COUNTY

BOBBY WILSON, Plaintiff, vs. PHOENIX NEWSPAPERS, INC., GANNETT COMPANY, INC., HUGO PUBLISHING CO., INC., et al., Defendants.	NO. C20192032 **JUDGMENT** (Filed Jan. 10, 2020) As Amended by the Court (Assigned to the Hon. Brenden Griffin)

The Court, having considered Defendants' Motion for Summary Judgment and Plaintiff's Motion to Strike Defendants' Exhibits, Counter-Motion for Summary Judgments [sic] and Request for Rule 56(h) Sanctions, and having heard oral argument on these matters on December 2, 2019, rules as follows:

IT IS THEREFORE ORDERED:

1. Defendants' Motion for Summary Judgment is **GRANTED.**

2. Plaintiff's Counter-Motion for Summary Judgments is **DENIED.**

3. Plaintiff's Motion to Strike Defendants' Exhibits is **DENIED.**

4. Plaintiff's Request for Rule 56(h) Sanctions is **DENIED.**

IT IS FURTHER ORDERED that, there being no further matters that remain pending, final judgment is hereby entered under Arizona Rule of Civil Procedure 54(c).

DATED this 10th day of January, 2020.

/s/ Brenden J. Griffin
HON. BRENDEN J. GRIFFIN
(ID: 4c426a8b-4211-41ac-ada6-262b29d38aa1)

COURT NOTICE

RULE 5(a)(2)(A) ARCP REQUIRES THE ORIGINAL LODGING PARTY SERVE A COPY OF THIS SIGNED JUDGMENT ON ALL PARTIES TO THIS CASE

[SEAL]

Supreme Court
STATE OF ARIZONA

ROBERT BRUTINEL
Chief Justice

TRACIE K. LINDEMAN
Clerk of the Court

ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET, SUITE 402
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June 30, 2021

RE: BOBBY WILSON v PHOENIX NEWSPAPERS INC et al
Arizona Supreme Court No. CV-21-0066-PR
Court of Appeals, Division Two No. 2 CA-CV 20-0047
Pima County Superior Court No. C20192032

GREETINGS:

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

ORDERED: Petition for Review = DENIED.

Tracie K. Lindeman, Clerk

TO:
Bobby Wilson
David Jeremy Bodney
Daniel A Arellano
Jeffrey P Handler
kj

Additional material from this filing is available in the Clerk's Office.