TABLE OF CONTENTS

APPENDIX A

IN THE COURT OF APPEALS
STATE OF ARIZONA DIVISION ONE

MARK STUART, Plaintiff/Appellant, v. JIM LANE, et al., Defendants/Appellees.	Court of Appeals Division One No. 1 CA-CV 15-0746 Maricopa County Superior Court No. CV2013-006138

DIVISION ONE
FILED: **10/20/17**
AMY M. WOOD, CLERK
BY: **RB**

ORDER DENYING MOTION FOR RECONSIDERATION AND AMENDING THE MEMORANDUM DECISION BY INTERLINEATION

The court, Vice Chief Judge Peter B. Swann, Judge Kent E. Cattani, and Chief Judge Samuel A. Thumma, has received and considered Plaintiff/Appellant's motion for reconsideration. After consideration,

IT IS ORDERED denying Plaintiff/Appellant's motion for reconsideration.

IT IS FURTHER ORDERED, on the court's own motion, amending paragraph 48 of the Memorandum Decision filed on August 31, 2017 by interlineation, striking the crossed-out language ("But Stuart . . . (App. 2004).") and replacing it with the underlined language ("On this record . . . in camera review.") as follows:

¶48 Stuart argues that the superior court should have reviewed any allegedly privileged documents in camera before determining whether such documents could be inspected as public records. ~~But Stuart raises this argument for the first time on appeal and has thus waived it. *See Orfaly v. Tucson Symphony Soc'y*, 209 Ariz. 260, 265, ¶ 15 (App. 2004).~~ On this record, and given the analysis above, Stuart has not shown that the court abused its discretion by declining to conduct an in camera review. Accordingly, we affirm the superior court's ruling on Stuart's public records claims.

/s/

Kent E. Cattani, Presiding Judge

APPENDIX B

NOTICE: NOT FOR OFFICIAL PUBLICATION.

UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

MARK STUART, *Plaintiff/Appellant*,

v.

JIM LANE, *et al.*, *Defendants/Appellees.*

No. 1 CA-CV 15-0746

FILED 8-31-17

AMENDED PER ORDER FILED 10-20-17

Appeal from the Superior Court in Maricopa County

No. CV2013-006138

The Honorable Joshua D. Rogers, Judge

AFFIRMED

COUNSEL

Horne Slaton PLLC, Scottsdale
By Sandra L. Slaton
Counsel for Plaintiff/Appellant
Scottsdale City Attorney's Office, Scottsdale
By Eric C. Anderson
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge Peter B. Swann and Judge Donn Kessler(retired) joined.

C A T T A N I, Judge:

¶1 Mark Stuart appeals the superior court's entry of summary judgment for the City of Scottsdale (the "City"). For reasons that follow, we affirm summary judgment as well as the superior court's imposition of Rule 68 sanctions.

FACTS AND PROCEDURAL BACKGROUND

¶2 In 1996, the City entered into a Golf Course Concession Agreement ("GCCA") with Capital Realty ("Capital") for the construction and operation of a golf course. The golf course was to be located on land owned by the City and land owned by the United States Bureau of Reclamation ("BOR"). The City refers to the land subject to the GCCA as "the License

Area." The City has jointly developed and managed the BOR owned portion of the License Area, as well as certain adjacent BOR-owned land, for public recreation since 1982 under a Cost Sharing and Land Use Agreement ("CLUA").

¶3 The GCCA required Capital to build and maintain a golf course on the License Area at its own expense. Once the golf course became operational, Capital would pay the City a Percentage Use Fee ("PUF") of 2% of gross sales. The GCCA also required Capital to pay a Basin Management Fee ("BMF") of 2% of gross sales plus $1 per 9 holes of golf played at the course. The BMF would be increased to 4% of gross sales (plus the surcharge) "[u]pon repayment or refinancing of any construction lien for construction of the [golf course], but in no event later than the tenth annual anniversary of" the GCCA. The BMF could be used, at the City's discretion, "only to pay the costs of constructing, repairing and replacing capital improvements and other permanent improvements of all descriptions at or benefitting the License Area."

¶4 The City retained several rights in the License Area, including the right to carry out flood control and groundwater recharge operations. Although the City reserved the right to construct new improvements, the City could not make such improvements for "[c]ommercial uses and golf uses." The City would also retain title to any fixtures built by either party at the License Area if the GCCA were to terminate or expire. The GCCA is set to expire at the end of the CLUA, but will be automatically extended if the CLUA is extended. Under the GCCA, the City would "[i]n no

event . . . be obligated to compensate" Capital for any improvements made during the agreement period.

¶5 Capital and its successors in interest built and maintained a golf course at the License Area. The City regularly collected PUF and BMF payments; funds from the PUF went to the City's general fund, while funds from the BMF were managed in a separate account.

¶6 In 2011, Capital assigned its interest to White Buffalo Golf, LLC ("White Buffalo"). Shortly thereafter, the City and White Buffalo entered into a Golf Course Improvement Agreement ("GCIA"). Under the GCIA, White Buffalo advanced $200,000 to design upgrades to the golfcourse. White Buffalo paid another $500,000 toward the improvements, to be reimbursed by retaining the per-round BMF surcharge plus anadditional surcharge of $1 per 9 holes. The City also authorized the use of $500,000 from the BMF fund for the improvements. Finally, White Buffaloprovided over $250,000 of in-kind improvements, such as a screen to protect adjoining property, a custom clock, and specialized aeration.

¶7 A year later, the parties amended the GCCA (the "Third Amendment") to provide for an upgrade to the golf course clubhouse. Under the Third Amendment, the City would provide $1.5 million toward the clubhouse improvement project. White Buffalo was responsible for the rest of the money (approximately $850,000) necessary to complete the project. The Third Amendment also allowed White Buffalo to collect an additional surcharge of no more than $1 per 9 holes to fund clubhouse improvements

up to $500,000. White Buffalo also agreed to increase the PUF to 3% of gross sales for 20 years.

¶8 The City financed its portion of the clubhouse improvements through the issuance of a bond. The debt on the bond was to be serviced from the BMF fund, and under the anticipated payment schedule, $140,000 would be sufficient to cover the annual debt service on the bond. As part of the Third Amendment, White Buffalo agreed to pay at least $140,000 into the BMF fund each year (even if the amount required based on gross sales plus surcharge was less than $140,000).

¶9 The City Council approved the Third Amendment by a 6-1 vote. The dissenting member expressed a concern that the contract provided a subsidy to White Buffalo. The City Treasurer also expressed a concern about the adequacy of the consideration received by the City under the Third Amendment, but he did not testify at the council meeting. Nevertheless, the City moved forward with the Third Amendment, and all of the planned clubhouse improvements were completed by the end of 2013.

¶10 Stuart, a Scottsdale resident and business owner,subsequently filed a complaint against the City and several City officials challenging the Third Amendment.[1] The complaint alleged violations of the Gift Clause of the Arizona Constitution and the Anti-Subsidy Clause of the Scottsdale City Charter. *See*

---

[1] A co-plaintiff, Scottsdale resident John Washington, joined in the complaint but subsequently withdrew from the case.

Ariz. Const. art. 9, § 7; Scottsdale City Charter art. I, § 3(O).

¶11 While discovery was underway, the City filed a motion for summary judgment. The court denied the motion, but indicated that it would allow the City to file a new motion after sufficient discovery had been completed. Stuart then filed an amended complaint, adding several claims. In addition to the original claims, Stuart alleged that (1) § 4.5 of the GCCA, which established the Basin Management Fund, violated the Gift Clause and the Anti-Subsidy Clause; (2) the automatic renewal provision of the GCCA violated the Gift Clause and Anti-Subsidy Clause; and (3) the City had violated public records laws.

¶12 The City moved for summary judgment on all claims. Stuart filed a cross-motion for summary judgment on all of his claims other than the Gift Clause challenge to the Third Amendment and the Anti-Subsidy Clause challenge to the original GCCA. [2]

¶13 The superior court granted summary judgment to the City on all of Stuart's claims. The court ruled that Stuart lacked standing to challenge the Third Amendment because there was no evidence that the City expended any funds raised by taxation or that the City suffered any pecuniary loss. The court also ruled

---

[2] Stuart asserted that if the Court were to find that the Third Amendment violated the Anti-Subsidy Clause, there would be no need to engage in a Gift Clause analysis. And he indicated that a separate motion for partial summary judgment on the GCCA-related claims would be forthcoming, but he never filed such a motion.

that Stuart lacked standing to challenge the original GCCA, and that any claims related to that contract were barred by the one-year statute of limitations established by Arizona Revised Statutes ("A.R.S.") § 12-821.[3] Additionally, the court ruled that Stuart's claims challenging the GCCA's extension clause were not yet ripe, because no extension had occurred. Finally, the court granted summary judgment to the City on Stuart's public records claims, finding that Stuart had requested materials that were privileged, were non-existent, or did not constitute public records.

¶14 The superior court then granted the City's request for Rule 68 sanctions on the basis that Stuart had rejected the City's more favorable pretrial offer of judgment (dismissal, but with each side to bear its own costs). *See* Ariz. R. Civ. P. 68(g). The court denied Stuart's subsequent motions for new trial, and Stuart timely appealed. We have jurisdiction under A.R.S. § 12-2101(A)(1), (5)(a).

DISCUSSION

I. Summary Judgment Rulings.

¶15 A moving party is entitled to summary judgment if it "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). We review a grant of summary judgment de novo, and will affirm if it is correct for any reason.

---

[3] Absent material revisions after the relevant date, we cite a statute's current version.

S & S Paving & Constr., Inc. v. Berkley Reg'l Ins. Co., 239 Ariz. 512, 514, ¶ 7 (App. 2016).

A. Third Amendment to the GCCA (Claims 1 and 2).

¶16 Although we disagree with the superior court's ruling that Stuart lacks standing to bring the Gift Clause and Anti-Subsidy claims related to the Third Amendment, we nevertheless affirm the superior court's summary judgment ruling because the City is entitled to judgment as a matter of law.

1. Standing.

¶17 A person seeking redress in the courts generally must first establish standing by alleging "a distinct and palpable injury." *Sears v. Hull*, 192 Ariz. 65, 69, ¶ 16 (1998). Arizona law has long recognized that taxpayers have standing to enjoin the improper expenditure of state and municipal funds. *See Ethington v. Wright*, 66 Ariz. 382, 386–87 (1948). Taxpayer standing "is based upon the taxpayers' equitable ownership of such funds and their liability to replenish the public treasury for the deficiency which would be caused by the misappropriation." *Id.* at 386.

¶18 Here, the contract at issue authorized the City to spend up to $1.5 million on capital improvements to a golf course, and the City subsequently issued a municipal bond to pay for its portion of clubhouse improvements. This bond is "payable from and secured solely by a lien on the City's Excise Taxes."

Thus, Scottsdale taxpayers are directly funding the City's contribution to the improvements, and Stuart has standing to challenge the Third Amendment.

¶19 Relying on *Dail v. City of Phoenix*, 128 Ariz. 199 (App. 1980), the City argues that Stuart lacks standing because the City's bond payments will be reimbursed from the BMF fund. Generally, an individual taxpayer lacks standing unless he or she is "a contributor to the particular fund to be expended." *Smith v. Graham Cty. Cmty. Coll. Dist.*, 123 Ariz. 431, 433 (App. 1979). In *Dail*, this court concluded that a Phoenix resident lacked standing to challenge a contract under which the City of Phoenix would reimburse a real estate development company for building a water line by allowing the company to keep 35% of the revenue generated by sales of water to customers served by the system. 128 Ariz. at 200, 203. We held that the normal rationale for taxpayer standing did not apply to these circumstances because the contract did not involve the "expenditure of funds generated through taxation . . . or a transaction resulting in a pecuniary loss." *Id.* at 203.

¶20 Here, the debt service on the bond is guaranteed by the BMF, and this obligation is secured by White Buffalo's promise to pay at least $140,000 into the BMF fund annually. Nevertheless, the Third Amendment does not explicitly prevent the expenditure of taxpayer funds. The guarantee provision of the Third Amendment would not be necessary without an expenditure in the first place. And because the Third Amendment contemplates the

expenditure of City funds raised through excise taxes, Stuart has standing to challenge it.

2. Gift Clause Claim.

¶21 Under the Gift Clause, a municipality may not "give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation." Ariz. Const. art. 9, § 7. The Gift Clause prevents "depletion of the public treasury or inflation of public debt by engagement in non-public enterprise" and ensures that public funds are not "used to foster or promote the purely private or personal interests of any individual." *Town of Gila Bend v. Walled Lake Door Co.*, 107 Ariz. 545, 549 (1971) (citations omitted). We will uphold an expenditure challenged under the Gift Clause if "(1) it has a public purpose, and (2) the consideration received by the government is not 'grossly disproportionate' to the amounts paid to the private entity." *Cheatham v. DiCiccio*, 240 Ariz. 314, 318, ¶ 10 (2016). We take a "panoptic view of the facts . . . giv[ing] appropriate deference to the findings of the governmental body." *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 349 (1984).

¶22 Stuart appears to concede that the golf course serves a public purpose sufficient to satisfy the first prong of the Gift Clause analysis. [4] He alleges primarily that the City has received insufficient

---

[4] As addressed below in Section I.A.3., however, Stuart does argue that the Third Amendment lacks a "clearly identified public purpose" sufficient to satisfy the City's Anti-Subsidy Clause.

consideration in exchange for its new investments under the Third Amendment.

¶23 Stuart asserts that the Third Amendment is flawed because the City did not undertake adequate market research before entering the agreement. As evidence, he notes that the City did not first obtain an appraisal of the fair market rent of the golf course. He claims that the City thus lacked "particularized information" necessary to make an informed decision about whether the Third Amendment was supported by adequate consideration. *See Ariz. Ctr. for Law in the Pub. Interest v. Hassell*, 172 Ariz. 356, 369 (App. 1991).

¶24 Stuart's claim fails because an appraisal was not necessary in this context. The parties entered into the Third Amendment with the stated intention to make improvements to the golf course clubhouse. The contract limited the City's contribution to the project to $1.5 million. In exchange for the City's contribution to the project, White Buffalo agreed to pay the rest of the clubhouse improvement costs (worth approximately $850,000), and to increase the PUF from 2% of gross sales to 3% for 20 years (worth at least $520,000 even according to Stuart's expert's conservative estimate of $26,000 per year). White Buffalo agreed to make a yearly BMF payment of at least $140,000, enough to cover the City's bond obligations. Finally, and importantly, under the terms of the original GCCA, the City will keep title to the clubhouse improvements when the GCCA expires. *See Walled Lake Door*, 107 Ariz. at 549–50 (holding that a town's construction of a water line directly benefitting

one private company did not violate the Gift Clause in part because "ownership and control over the water line [were] to remain in the Town"). All told, the City promised to provide an initial investment of $1.5 million ($2.1 million after interest), and in exchange would receive title to improvements worth $2.3 million, plus increased PUF payments worth at least half a million dollars, plus a guarantee of payments sufficient to cover the City's bond obligations. Thus, the City received a significant benefit notwithstanding that White Buffalo also stood to benefit from the improvements.

¶25 It is unclear from the record whether the City or White Buffalo is entitled to keep the Third Amendment's new $500,000 Clubhouse Work Surcharge. The contract requires White Buffalo to "collect[]" the surcharge, but invoices suggest that White Buffalo will then pay the collected funds to the City. This discrepancy is immaterial because the Third Amendment satisfies the Gift Clause regardless of who keeps this surcharge. *See* Ariz. R. Civ. P. 56(a) (authorizing summary judgment absent genuine dispute of *material* fact). The Clubhouse Work Surcharge either constitutes $500,000 in extra consideration to the City, or it provides White Buffalo a City approved mechanism for accelerated cost recovery. If the latter theory applies, the City would also essentially be forbearing from its right to collect $15,000 in PUF and $20,000 in BMF from the surcharge, because the surcharge would be excluded from the calculation of gross sales. Given the equitability of the other contract terms, however, the

City's forbearance of $35,000 in future revenues would not render the Third Amendment "grossly disproportionate."

¶26 Stuart argues that the facts of this case parallel those of *City of Tempe v. Pilot Properties, Inc.*, 22 Ariz. App. 356 (App. 1974). In that case, this court reversed summary judgment that had upheld a contract under which the City of Tempe charged $1 annual rent to a private entity to construct and use a publicly owned baseball facility, and remanded for findings regarding the adequacy of the consideration. *Id.* at 359, 363.

¶27 Stuart claims that the Third Amendment reduces the City's "net rent" to less than zero annually, so it is analogous to a nominal rent scheme. But his interpretation is based on two erroneous assumptions. First, Stuart includes the fee that the City pays to BOR annually ($100,000 beginning in 2007 and increasing at 5% annually thereafter) as an operating cost included in the calculation of net rent. Although Stuart may be correct that the new revenues from the Third Amendment are insufficient to cover the City's ever-increasing obligations to BOR, the Third Amendment's relationship to the City's other pre-existing financial obligations does not bear on a Gift Clause analysis, which focuses solely on whether the City is receiving proper consideration for its *new* expenditures.

¶28 Second, Stuart suggests that the Third Amendment places an annual cap of $140,000 on White Buffalo's contributions to the BMF fund. But this misreads the parties' obligations under the Third Amendment, which instructs the parties to "[i]nsert a

new paragraph 4.5 in the [GCCA]" establishing a "Clubhouse Work Use Fee." Under this provision, White Buffalo will pay the City "an additional amount equal to the amount, if any, by which the amount of Basin Management Fee that [White Buffalo] paid to [the City] for that year was less than One Hundred Forty Thousand Dollars." Thus, the Clubhouse Work Use Fee is a guaranteed floor for White Buffalo's contributions, rather than a cap.

¶29 Stuart suggests to the contrary that the parties intended to replace original § 4.5 with the new § 4.5, thereby limiting White Buffalo's BMF payment obligations. But this was clearly not the parties' intention. When interpreting a contract, we apply a standard of reasonableness and consider the circumstances surrounding the agreement. *Malad, Inc. v. Miller*, 219 Ariz. 368, 371, ¶ 17 (App. 2008). New § 4.5 mentions White Buffalo's ongoing Basin Management Fund obligations, and the term "Basin Management Fee" is defined in original § 4.5. Accordingly, the new § 4.5 must supplement the original, not replace it. Moreover, the City and White Buffalo both appeared to understand during contract negotiations that new § 4.5 would operate as a safety net for the City's bond obligations, not a cap on White Buffalo's BMF payments. And they have performed accordingly, with White Buffalo remitting payments of $152,378.99 and $177,819.87 in the first two years since the Third Amendment was signed. Stuart's interpretation is thus unreasonable as a matter of law.

¶30 Finally, Stuart characterizes the Third Amendment as an attempt by the City to loan its credit to White Buffalo because the City will pay only 2.5% interest on its bond obligation, while White Buffalo would have likely paid a much higher rate if it had financed the project without any contribution from the City. But whether White Buffalo might have paid more under other financing scenarios is not relevant because the City received adequate compensation for its investment in the project. Accordingly, the superior court did not err by granting the City summary judgment on this Gift Clause claim.

3. Anti-Subsidy Clause Claim.

¶31 Stuart further argues that the Third Amendment contravenes the City's own Anti-Subsidy Clause, which provides:

> The city shall not give or loan its credit in aid of, nor make any donation, grant or payment of any public funds, by subsidy or otherwise, to any individual, association, or corporation, except where there is a clearly identified public purpose and the city either receives direct consideration substantially equal to its expenditure or provides direct assistance to those in need.

Scottsdale City Charter art. I, § 3(O). Stuart argues that the Third Amendment lacks a clearly identified public purpose and that the City is not receiving substantially equal consideration for its expenditure under the contract.

¶32 In the recitals to the Third Amendment, the parties stipulated that they entered into the agreement (1) to allow the City to temporarily collect increased PUF and (2) so the City could provide "construction and funding of certain capital repairs to the clubhouse at the Property."

Generally, "the primary determination of whether a specific purpose constitutes a 'public purpose' is assigned to the political branches of government," *Turken v. Gordon*, 223 Ariz. 342, 349, ¶ 28 (2010), and the courts will not override the political branch's assessment unless the governmental body authorizing the expenditure has "unquestionably abused" its discretion. *City of Glendale v. White*, 67 Ariz. 231, 237–38 (1948).

Here, the City views golf facilities as a desirable service for its citizens and an important source of tourism revenue. Because the clubhouse improvements serve the City's goal of providing golf amenities to its citizens, the Third Amendment satisfies the "clearly identified public purpose" prong of the Anti-Subsidy Clause.

¶33 Although the Anti-Subsidy Clause's requirement of "consideration substantially equal to its expenditure" has not been defined by any court, Stuart's argument fails under any reasonable interpretation of this term. As explained above, the City is expending $1.5 million (plus debt service) in exchange for at least $500,000 in increased PUF and title to $2.3 million in revenue-generating improvements to City land. And even assuming White Buffalo is entitled to keep the Clubhouse Work

Surcharge, the city is only forbearing $35,000 of future revenues by allowing White Buffalo to do so. By any construction of the term "substantially equal," the City has received adequate consideration, and we affirm summary judgment in favor of the City as to Stuart's Anti-Subsidy Clause claim regarding the Third Amendment.

4. Evidentiary Ruling Regarding Stuart's Expert.

¶34 Stuart asserts that the superior court improperly granted the City's motion to strike two declarations from his golf course appraisal expert, Albert Nava, because Nava's testimony was not timely disclosed. *See* Ariz. R. Civ. P. 26.1(a)(6), 37(c)(1). We review imposition of disclosure sanctions for an abuse of discretion, recognizing that a key consideration is the scope of prejudice to the party harmed by improper disclosure (which may be especially pronounced when disclosure does not occur until the eve of trial or consideration of a case-dispositive motion). *Zimmerman v. Shakman*, 204 Ariz. 231, 235–36, ¶¶ 10, 14, 16 (App. 2003).

¶35 Here, Stuart identified Nava as a possible expert witness in his pretrial disclosures and provided the City with a questionnaire that Nava had completed. The questionnaire did not, however, address opinions about the GCCA or the Third Amendment, and Nava responded to substantive questions about the golf course by saying he would have to do more research. Without any further

disclosures about Nava's anticipated testimony, Stuart included two declarations from Nava in his cross-motion for summary judgment, one of which contained opinions on the potentially deleterious effects of the Third Amendment.

¶36 The superior court did not abuse its discretion by striking Nava's declarations, which were submitted after the final disclosure deadline, because the City was prejudiced by Stuart's attempt to use Nava's testimony without prior disclosure. As the City noted in its motion to strike, there was no opportunity to depose Nava to ask him about his newly disclosed opinions or to have the City's experts examine those opinions because the City's renewed motion for summary judgment and Stuart's cross motion were already pending.

¶37 Moreover, consideration of Nava's declarations would not have changed the outcome. Nava's declaration reinforces Stuart's argument that the Third Amendment reduces the City's "net rent" to zero because of the City's obligations to BOR. But as explained in ¶ 27 above, the City's payments to BOR are irrelevant to the question of whether the Third Amendment is proper.

B. § 4.5 of the GCCA (Claims 3 and 4).

¶38 Stuart also challenges the superior court's grant of summary judgment in favor of the City on his claims that § 4.5 of the GCCA, which established the BMF, violates the Gift Clause and the Anti-Subsidy Clause. He asserts that because the GCCA only

restricts the use of BMF funds to "permanent improvements of all descriptions at or benefitting the License Area," the City is essentially remitting White Buffalo's rent payments back to White Buffalo, for White Buffalo's sole benefit.

¶39 Stuart does not have standing to challenge § 4.5 of the GCCA. Although the Third Amendment contemplates an expenditure of public funds, the original GCCA does not. (Nor does the language of new § 4.5, added by the Third Amendment.) Stuart has not identified how § 4.5 creates any actual or threatened expenditure from a fund to which he is a contributor, and he thus lacks standing to challenge that provision. *See Smith*, 123 Ariz. at 432–33.

¶40 Moreover, Stuart's claims regarding the original GCCA are barred by the one-year limitations period applicable to "[a]ll actions against any public entity or public employee." A.R.S. § 12-821. Such a cause of action "accrues when the damaged party realizes he or she has been damaged and knows or reasonably should know the cause, source, act, event, instrumentality or condition that caused or contributed to the damage." A.R.S. § 12-821.01(B). Although Stuart argues that the limitations period did not begin to run until he personally had reason to know about potential problems with the GCCA, Scottsdale taxpayers—who comprise the group allegedly damaged—had reason to know of any potential claim long before. The GCCA was approved in 1996, the work on the course was completed in 1998, and the course has operated continuously in the years since. While the City's approval of the GCCA at

an open meeting did not necessarily, in and of itself, begin the limitations period, *see Long v. City of Glendale*, 208 Ariz. 319, 325–26, ¶¶ 12–14 (App. 2004), the claim accrued, at the latest, when the City began work on the golf course—giving the residents of Scottsdale notice that their city council had approved the project—more than 15 years before Stuart brought this action.

¶41 The limitations period is not extended or restarted by the continued payments into the BMF fund. *See Mayer Unified Sch. Dist. v. Winkleman*, 219 Ariz. 562, 567, ¶¶ 19–20 (2009) (rejecting a "continuing violation" theory premised on "a new claim aris[ing] each moment that the [governmental entity] fails to obtain value" for the allegedly unconstitutional easements at issue). And Stuart is not exempted from the one-year limitations period simply because he characterizes his claim as "public interest litigation." As a general matter, the one-year statute of limitations of § 12-821 applies to "[a]ll" actions against any public entity. *See Flood Control Dist. v. Gaines*, 202 Ariz. 248, 252, ¶ 9 (App. 2002) ("The word 'all' means exactly what it imports. . . . A more comprehensive word cannot be found in the English language. Standing by itself the word means all and nothing less than all.") (citation omitted). Although under A.R.S. § 12-510 the State is exempt from most statutes of limitations, Stuart has not demonstrated how his suit as a private citizen seeking to void a municipal contract is in any way an action in the interest of and on behalf of the State.

Cf. Valley Bank & Tr. Co. v. Proctor, 47 Ariz. 77, 79 (1936).

C. Automatic Extension of the GCCA (Claims 6 and 7).

¶42 Stuart also challenges the superior court's grant of summary judgment in favor of the City on his claims that the GCCA's extension provision violates the Gift Clause and the Anti-Subsidy Clause. Under the terms of the GCCA, the contract will last until the end of the City's CLUA with BOR. If the CLUA is extended, the GCCA will automatically be extended as well. The CLUA is currently set to expire in 2032. Stuart argues that this is an impermissible gift because the City has a duty to independently analyze whether the contract should be renewed at the end of the contract term, rather than granting White Buffalo automatic extensions.

¶43 The superior court correctly concluded that Stuart lacks standing to bring this claim. There is no expenditure effected (or even made more likely) by the extension provision. *See Smith*, 123 Ariz. at 432–33. Additionally, the superior court properly concluded that even if Stuart had standing, the issue is not yet ripe, because the City and BOR have not indicated when or if the CLUA will be extended. *See Moore v. Bolin*, 70 Ariz. 354, 357 (1950) ("The court ordinarily will not decide as to future or contingent rights, but will wait until the event giving rise to rights has happened[.]") (citation omitted). Accordingly, we affirm summary judgment on Stuart's claims challenging the GCCA's extension provision.

D. Public Records (Claims 5 and 8).

¶44 Stuart next challenges the superior court's grant of summary judgment in favor of the City as to his claims that the City wrongfully denied two public records requests. Stuart's first request sought financial records that Capital and White Buffalo were required to provide to the City under § 14 of the GCCA. But the City apparently never collected these records. Stuart's second request sought "all legal guidance provided to the city council from the city attorney, or outside attorneys, regarding [the Anti-Subsidy Clause] and the guidance for its implementation." The court granted summary judgment to the City on both of these claims, concluding that (1) Stuart "ha[d] not demonstrated that [the § 14] documents constitute public records or that they are in the [City's] possession or control" and (2) because the City is "not required . . . to produce privileged documents, to create lists of privileged or other documents, or to provide or create documents that don't otherwise exist, at Plaintiff's request." We review the court's public records ruling de novo. *Phx. Newspapers, Inc. v. Ellis*, 215 Ariz. 268, 271, ¶ 13 (App. 2007).

¶45 A public record is (1) a record "made by a public officer in pursuance of a duty, the immediate purpose of which is to disseminate information to the public, or to serve as a memorial of official transactions for public reference"; (2) one "required to be kept, or necessary to be kept in the discharge of a duty imposed by law or directed by law to serve as a

memorial and evidence of something written, said or done"; or (3) a "written record of transactions of a public officer in his office, which is a convenient and appropriate method of discharging his duties, and is kept by him as such, whether required by . . . law or not." *Griffs v. Pinal County*, 215 Ariz. 1, 4, ¶ 9 (2007) (citation omitted). Any person may inspect a public record kept "in the custody of any officer." A.R.S. § 39-121. And public officials must "maintain all records . . . reasonably necessary or appropriate to maintain an accurate knowledge of their official activities and of any of their activities which are supported by monies from . . . any political subdivision of this state." A.R.S. § 39-121.01(B).

¶46 White Buffalo's financial records are not public records. Although the GCCA places a duty on White Buffalo to provide certain financial records to the City, it does not impose a corresponding duty on the City to collect such information. The City's revenue from the GCCA is based solely on White Buffalo's gross revenues and the number of rounds played per year; White Buffalo provides both pieces of information to the City regularly. The details of White Buffalo's finances (what it pays its employees, how it invests its profits, etc.) are irrelevant to the City's duty to collect fees calculated based on gross revenues and rounds of golf played.

¶47 Additionally, records of any advice given by the Scottsdale City Attorney regarding the Anti-Subsidy Clause are public records, but they are protected by the attorney–client privilege and thus are not subject to inspection. *See* A.R.S. § 12-2234(B); *Lake v. City of*

Phoenix, 222 Ariz. 547, 549, ¶ 8 (2009) ("Even if a document qualifies as a public record, it is not subject to disclosure if privacy, confidentiality, or the best interests of the state outweigh the policy in favor of disclosure."). And while Stuart argues that he was entitled to an index of the documents containing such advice from the city attorney, the City has stated that no such list exists, and "the law does not require a government entity to expend the time and resources to create such an index—a new public document—in order to satisfy a public records request." *See Judicial Watch, Inc. v. City of Phoenix*, 228 Ariz. 393, 400, ¶ 31 (App. 2011).

¶48 Stuart argues that the superior court should have reviewed any allegedly privileged documents in camera before determining whether such documents could be inspected as public records. On this record, and given the analysis above, Stuart has not shown that the court abused its discretion by declining to conduct an in camera review. Accordingly, we affirm the superior court's ruling on Stuart's public records claims.

II. Rule 68 Sanctions.

¶49 Stuart challenges the court's imposition of sanctions against him under Arizona Rule of Civil Procedure 68. We review the imposition of Rule 68 sanctions for an abuse of discretion, but review the court's interpretation of Rule 68 de novo. *Berry v. 352 E. Virginia, L.L.C.*, 228 Ariz. 9, 15, ¶ 31 (App. 2011).

¶50 In order to "encourage settlement and eliminate needless litigation," *Warner v. Sw. Desert Images, LLC*, 218 Ariz. 121, 138, ¶ 57 (App. 2008), Rule 68(a) allows any party to make to any other party "an offer to allow judgment to be entered." If the offeree rejects the offer and subsequently fails to "obtain a more favorable judgment," that party must pay, as relevant here, the offeror's reasonable expert witness fees and double taxable costs incurred post-offer. Ariz. R. Civ. P. 68(g)(1). Moreover, the offeree must serve written notice of any objections to the validity of the offer within 10 days of receiving the offer. Ariz. R. Civ. P. 68(d)(2). "The failure to serve timely objections waives the right to object to the offer's validity in any proceeding to determine sanctions under [Rule 68]." *Id.*; *see also Boyle v. Ford Motor Co.*, 235 Ariz. 529, 531–32, ¶¶ 11–15 (App. 2014).

¶51 Here, the City made a Rule 68 offer under which the action would be dismissed with each side to bear its own costs. Stuart did not accept this offer, nor did he file an objection to the validity of the offer under Rule 68(d)(2). Stuart did not obtain a more favorable outcome than the one offered by the City; instead, the City's success on summary judgment led to judgment wholly in its favor, and it further received a mandatory award of taxable costs as the successful party. *See* A.R.S. § 12-341. Accordingly, the court granted the City's request for over $26,000 in Rule 68 sanctions comprising expert fees and double taxable costs incurred after the offer.

¶52 Stuart argues that Rule 68 sanctions are incompatible with litigation in which a private party asserts a public right against government officials. He also argues that the City's offer of judgment was insufficient as a matter of law because it was unapportioned, *see* Ariz. R. Civ. P. 68(f), and that the offer violated the law of the case. But Stuart did not file any such objections to the validity of the offer as required by Rule 68(d)(2), so all such objections are waived. *See Boyle*, 235 Ariz. at 531–32, ¶¶ 11, 13.

¶53 Stuart also asserts that the superior court denied him due process by failing to hold an evidentiary hearing on the City's motion, arguing that under *Warner*, "due process demands that, before a party may properly be sanctioned, it must have had the ability to avoid that sanction." 218 Ariz. at 136, ¶ 51. But *Warner* stands only for the proposition that an offeree who lacks the legal ability to accept an offer of judgment—and thus had no meaningful opportunity to avoid its ramifications—cannot be sanctioned for failing to accept the offer. *Id.* at 136–37, ¶¶ 51, 54. *Warner* does not address, much less require, an evidentiary hearing before imposing Rule 68 sanctions on a litigant who had a prior opportunity (and power) to accept the offer. Moreover, Stuart had an opportunity to (and did in fact) oppose the City's request for sanctions. He thus received all process due before the imposition of Rule 68 sanctions.

¶54 Finally, Stuart claims that the City's expert costs were unreasonable. However, courts are "given wide latitude in assessing" the amount of taxable costs allowable under A.R.S. § 12-332. *Folwer v. Great*

Am. Ins. Co., 124 Ariz. 111, 114 (App. 1979). The City requested its costs related to the preparation of an appraisal of the License Area as it existed when the City and Capital entered into the GCAA. These costs are reasonably related to Stuart's claims, and the superior court did not abuse its discretion by granting them.

¶55 For the foregoing reasons, we affirm the judgment of the superior court granting summary judgment to the City on all of Stuart's claims. We also affirm the court's entry of Rule 68 sanctions against Stuart. In an exercise of our discretion, we decline the City's request for an award of attorney's fees on appeal under ARCAP 25.

AMY M. WOOD • Clerk of the Court

FILED: JT

APPENDIX C

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
03/09/2015 8:00 AM

CV 2013-006138 03/04/2015

JUDGE PRO TEM COLLEEN L. FRENCH
CLERK OF THE COURT M. Nielsen Deputy

MARK STUART, et al. MARK STUART
8629 E CHERYL DR
SCOTTSDALE AZ 85258
v.
JIM LANE, et al.
ROBERT BRUCE WASHBURN
ERIC C ANDERSON
CAROLYN JAGGER
NO ADDRESS ON RECORD

RULING

The Court has read and considered the following:
□ City Defendants Renewed Motion for Summary Judgment Re: Claims One and Two of Second Amended Complaint;

□ City Defendants' Statement of Facts in Support of Motions for Summary Judgment;
□ City Defendants' Motion for Summary Judgment Re: Claims Three Through Eight of Second Amended Complaint;
□ Plaintiff's Cross Motion for Partial Summary Judgment on Claims II, III, V, VII and VIII and Response to Defendants Motion for Summary Judgment;
□ Plaintiff's Statement of Facts in Support of Cross Motion for Summary Judgment;
□ Plaintiff's Corrected Statement of Facts in Support of Cross Motion for Summary Judgment;
□ Plaintiff's Notice of Errata;
□ City Defendants' Motion to Strike Plaintiff's Response and Cross-Motion for Summary Judgment and Accompanying Statement of Facts for Failure to Properly File;
□ Plaintiff's Notice of Errata;
□ City Defendants' Motion to Strike Plaintiff's Exhibit 2, Declarations of Albert Nava for Failure to Disclose;
□ Plaintiff's Response Re: Defendants' Motion to Strike of January 23, 2015;
□ Plaintiff's Response Re: Defendants' Motion to Strike Declaration of Nava;
□ City Defendants' Objections to Plaintiff's Corrected Statement of Facts in Support of Cross-Motion for Summary Judgment and City's Supplemental Statement of Facts in Support of Response to Motion for Summary Judgment;

□ City Defendants' Reply to Plaintiff's Response to Motion for Summary Judgment and City Defendants' Response to Cross-Motion for Summary Judgment; and
□ Plaintiff's Reply to Defendants' Response Re: Cross-Motion for Summary Judgment;

The Court has also considered all relevant statutes, procedural rules and case law.

A. City Defendants' Motion to Strike Plaintiff's Response and Cross-Motion For Summary Judgment and Accompanying Statement of Facts for Failure to Properly File

IT IS ORDERED denying the City Defendants' Motion to Strike Plaintiff's Response and Cross-Motion for Summary Judgment and Accompanying Statement of Facts for Failure to Properly File.

B. City Defendants' Motion to Strike Plaintiff's Exhibit 2, Declarations of Albert Nava for Failure to Disclose

This Court declines Plaintiff's request for oral argument on this issue, pursuant to Rule 7.1 (c)(2) ARCP.

The Declaration of Albert Nava, attached as Exhibit 2 to Plaintiff's Statement of Facts in Support of Motion for Summary Judgment Re: Plaintiff's Cross-MSJ, clearly contains statements that

constitute expert opinion testimony. Additionally, this expert opinion testimony was not timely disclosed. Therefore,

IT IS ORDERED granting City Defendants' Motion to Strike Plaintiff's Exhibit 2, Declarations of Albert Nava for Failure to Disclose.

C. City Defendants Renewed Motion for Summary Judgment Re: Claims One and Two of Second Amended Complaint

In his First Claim for relief in his Second Amended Complaint, Plaintiff contends that the Third Amendment to the Concession Agreement, which was executed in 2012, violates the Gift Clause of the Arizona Constitution. In his Second Claim for relief, Plaintiff contends that the Third Amendment also violates the Anti-Subsidy Clause of the Scottsdale City Charter.

The Court finds that Plaintiff does not have standing to raise these claims, as Plaintiff has presented no evidence that, in relation to the Third Amendment to the Concession Agreement, or any other amendment to the Concession Agreement or the Concession Agreement itself, that the City expended any funds raised by taxation or that the City has suffered any pecuniary loss. Therefore, Plaintiff's First Claim and Second Claim for relief must fail.

D. City Defendants' Motion for Summary Judgment Re: Claims Three Through

Eight of Second Amended Complaint

1. Third Claim for Relief

In his Third Claim for relief in his Second Amended Complaint, Plaintiff contends that Section 4.5 of the Concession Agreement violates the Anti-Subsidy Clause of the Scottsdale City Charter. The Court finds that Plaintiff does not have standing to raise this claim. Additionally, the claim must fail because the Anti-Subsidy Clause of the Scottsdale City Charter was not enacted until 2010, 14 years after Section 4.5 of the Concession Agreement was adopted. It is also clear that this claim is barred by the one-year statute of limitations mandated by A.R.S. § 12-821, which began to run in 1996. Therefore, Plaintiff's Third Claim for relief must fail.

2. Fourth Claim for Relief

In his Fourth Claim for relief in his Second Amended Complaint, Plaintiff contends that Section 4.5 of the Concession Agreement violates the Gift Clause of the Arizona Constitution. The Court finds that Plaintiff does not have standing to raise this claim. Moreover, the Court finds that this claim is barred by the one-year statute of limitations mandated by A.R.S. § 12-821, which began to run in 1996. Therefore, Plaintiff's Fourth Claim for relief must fail.

3. Fifth Claim for Relief

In his Fifth Claim for relief, Plaintiff claims that the Defendants violated Arizona's Public Records Laws by failing to provide financial records specified in Section 14 of the Concession Agreement in accordance with Plaintiff's demand. Plaintiff has not demonstrated that these documents constitute public records or that they are in the Defendants' possession or control. Therefore, Plaintiff's Fifth Claim for relief must fail.

4. Sixth Claim for Relief

In his Sixth Claim for relief, Plaintiff claims that the term contained in the 1996 Concession Agreement, which provides that the Agreement could be extended, violates the Gift Clause of the Gift Clause of the Arizona Constitution. This claim is barred by the one-year statute of limitations mandated by A.R.S. § 12-821. Additionally, because no such extension has been given, this claim is not ripe for review by this Court. Therefore, Plaintiff's Sixth Claim for relief must fail.

5. Seventh Claim for Relief

In his Seventh Claim for relief, Plaintiff contends that term contained in the 1996 Concession Agreement, which provides that the Agreement could be extended, violates the Anti- Subsidy Clause of the Scottsdale City Charter. This claims is barred by the one-year statute of limitations mandate by A.R.S. § 12-821. Additionally, because no such extension has

been given, this claim is not ripe for review by this Court. Therefore, Plaintiff's Seventh Claim for relief must fail.

6. Eighth Claim for Relief

In his Eighth Claim for relief, Plaintiff contends that Defendants violated Arizona's Public Records Laws by failing to produce certain requested documents, and seeks special action and injunctive relief. Defendants claim that the documents requested are either privileged as attorney-client communications or do not exist. The Court agrees with Defendants' position that they are not required, by Arizona's Public Records Laws, to produce privileged documents, to create lists of privileged or other documents, or to provide or create documents that don't otherwise exist, at Plaintiff's request. Therefore, Plaintiff's Eighth Claim for relief must fail.

Based upon all of the foregoing,

THE COURT FINDS that no genuine issues of material fact exist regarding any of Plaintiff's claims, and that Defendants' are entitled to summary judgment as a matter of law on all of Plaintiff's claims.

IT IS ORDERED granting City Defendants' Renewed Motion for Summary Judgment Re: Claims One and Two of Second Amended Complaint, and City Defendants' Motion for Summary Judgment Re: Claims Three Through Eight of Second Amended Complaint.

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

Case **No. CV2013-006138**
**JUDGMENT FOR THE DEFENDANTS
(Assigned to Judge Pro Tem Colleen
French)**

The Court on March 4, 2015, entered its minute entry granting the City Defendants' Motions for Summary Judgment as a matter of law on all of Plaintiffs Claims, and denied Plaintiffs Cross-Motion for Partial Summary Judgment on claims II, III, V, VII and VII; therefore,

IT IS ORDERED, ADJUDGED AND DECREED granting judgment in favor of the Defendants and dismissing all of Plaintiffs claims.

The Court finds that Defendants are the prevailing parties in this matter and having considered City Defendants' Statement of Verified Costs and supporting documentation,

IT IS FURTHER ORDERED awarding Judgment in favor of the City of Scottsdale and against Plaintiff Mark Stuart for taxable costs in the amount of Three Thousand Nine Hundred Eight and Twenty-Eight Hundredths Dollars ($3,908.28), pursuant to Ariz.Rev.Stat. *§§* 12-332, -341 and -346;

The Court also finds that Plaintiff Mark Stuart rejected a valid offer of judgment served by the Defendants which, if accepted, would have been more favorable to Plaintiff than this ultimate judgment; therefore,

IT IS FURTHER ORDERED awarding Judgment in favor of the City of Scottsdale and against Plaintiff Mark Stuart for sanctions pursuant to Rule 68, Ariz. R. Civ. Pro., in the amount of Twenty Six Thousand Two Hundred Seven and Sixteen Hundredths Dollars ($26,207 .16).

TOTAL AMOUNT OF JUDGMENT: $30,115.44

Interest shall accrue from the date of this signed Judgment at the rate of four and one quarter percent (4.25%) thereon per annum until paid. [footnote 1]

FINALLY, IT IS ORDERED that no further matters remain pending in this matter and this judgment shall be deemed final and entered pursuant to Rule 54(c), Ariz. R. Civ. Pro.

DONE IN OPEN COURT THIS 2nd day of June, 2015

/s/ Coleen French

Honorable Colleen French

Judge Pro Temp of the Superior Court

Footnote 1: Interest is calculated pursuant to A.R.S. § 44-I201(8). A prime rate of3.25 percent was obtained from Federal Reserve System Board of Governors Release H.15 (March 11, 20I5).

APPENDIX D

SCOTT BALES
CHIEF JUSTICE

JANET JOHNSON
CLERK OF THE COURT

Supreme Court
STATE OF ARIZONA
ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET, SUITE 402
PHOENIX, ARIZONA 85007-3231
TELEPHONE: (602) 452-3396

August 29, 2018

RE: MARK STUART v JIM LANE et al
Arizona Supreme Court No. CV-17-0311-PR
Court of Appeals, Division One No. 1 CA-CV 15-0746
Maricopa County Superior Court No. CV2013-006138

GREETINGS:
The following action was taken by the Supreme Court of the State of Arizona on August 29, 2018, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.
FURTHER ORDERED: Request for Attorneys' Fees = DENIED.

Janet Johnson, Clerk
TO: Scott H Zwillinger Eric C Anderson
Amy M Wood jd

APPENDIX E

https://leginfo.legislature.ca.gov/faces/codes

CODE OF CIVIL PROCEDURE - CCP
PART 2. OF CIVIL ACTIONS [307 - 1062.20]
(Part 2 enacted 1872.)
TITLE 14. OF MISCELLANEOUS PROVISIONS
[989 - 1062.20] ***(Title 14 enacted 1872.)***

CHAPTER 3. Offers by a Party to Compromise
[998- 998.]*(Chapter 3 added by Stats. 1969, Ch. 570.)*
998.
(a) The costs allowed under Sections 1031 and 1032 shall be withheld or augmented as provided in this section.
.....

(g) This chapter does not apply to either of the following:
(1) An offer that is made by a plaintiff in an eminent domain action.
(2) Any enforcement action brought in the name of the people of the State of California by the Attorney General, a district attorney, or a city attorney, acting as a public prosecutor.
(h) The costs for services of expert witnesses for trial under subdivisions (c) and (d) shall not exceed those specified in Section 68092.5 of the Government Code.
(i) This section shall not apply to labor arbitrations filed pursuant to memoranda of understanding under

the Ralph C. Dills Act (Chapter 10.3 (commencing with Section 3512) of Division 4 of Title 1 of the Government Code).
(Amended by Stats. 2015, Ch. 345, Sec. 2. (AB 1141) Effective January 1, 2016.)
(http://www.txcourts.gov/media/1443190/trcp-all-updated-with-amendments-effective-december-11-2018.pdf)

Texas Rules of Civil Procedure

Section 8 - Pre-Trial Procedure

RULE 167. OFFER OF SETTLEMENT; AWARD OF LITIGATION COSTS

167.1. Generally. Certain litigation costs may be awarded against a party who rejects an offer made substantially in accordance with this rule to settle a claim for monetary damages - including a counterclaim, crossclaim, or third-party claim - except in:

(a) a class action; (b) a shareholder's derivative action; (c) an action by or against the State, a unit of state government, or a political subdivision of the State; (d) an action brought under the Family Code; (e) an action to collect workers' compensation benefits under title 5, subtitle A of the Labor Code; or (f) an action filed in a justice of the peace court or small claims court. (emphasis added)

APPENDIX F

ARIZONA COURT OF APPEALS
DIVISION ONE

MARK STUART,
Plaintiff/Appellant,
v.
CITY OF SCOTTSDALE, MAYOR
LANE, et al.
Defendants/Appellees

No.: 1-CA-CV-15-0746
Maricopa County Superior Court
No.: CV2013-006138

Scott H. Zwillinger (019645) Scott Griffiths (028906)
GOLDMAN & ZWILLINGER PLLC
17851 North 85th Street, Suite 175
Scottsdale, AZ 85255
Main: (480) 626-8483 Facsimile: (480) 502-7500
E-mail: docket@gzlawoffice.com
Attorneys for Plaintiff/Appellant

MOTION FOR RECONSIDERATION

Pursuant to Arizona Rule of Civil Appellate Procedure 22 ("ARCAP"), Appellant Mark Stuart ("Stuart") respectfully requests that this Court reconsider the decision of August 31, 2017 (the "Decision"). Justice requires that this Court

reconsider the decision, because justice is premised upon due process of law. The record on appeal is incomplete and biased because it is limited by the lower court's ruling that Stuart lacked standing to pursue claims I and II. Due process requires a remand back to that point in time at which Stuart was denied standing. The record for appellate review is therefore incomplete.

Another case involving these same litigants is currently set for trial in October in superior court on a violation of the Anti-Subsidy Clause and the Gift Clause. The case below will inevitably be impacted by this court's ruling. Fundamental fairness requires reconsideration of this court's decision.

ARGUMENT

I. This Court Made the Following Legal Errors.

A. Stuart Has Been Denied Due Process of Law Because He is Entitled to Oral Argument on the Summary Judgment Motion, more Discovery and a Trial on the Merits.

This court determined that Stuart has standing to challenge the GCCA-3. ("Decision, ¶ 18) Lack of standing is the reason the trial court granted summary judgment to Scottsdale on Claims I and II. (Brief, 67) With standing, the summary judgment record would have developed very differently.

1. Stuart is Entitled to Oral Argument on the Summary Judgment Motion.

Judge French reversed Judge Duncan's ruling that oral argument would be scheduled on the summary judgment motions. (IR 199:2) Stuart requested oral argument twice in 2015, prior to the court's grant of summary judgment. (IR 287, 298) Ariz. Rule Civ. Proc. 56(c) mandated a hearing as part of the proceedings.

At a hearing Stuart would have created the following arguments and evidence of factual disputes in the record: (1) Stuart would have challenged the issuance of the bonds as a Gift Clause violation because it constitutes an impermissible loan of Scottsdale's credit to a corporation; (2) Demonstrated that White Buffalo had materially breached the GCCA; (3) Explained customary fiduciary practices of public entities when amending contracts with private parties, including treatment of material breaches of a contract; (4) Demonstrated how public entities in Arizona analyze a request to borrow money to invest in a private business venture; (5) Demonstrated how and why receiving title to depreciable golf course assets in twenty years or more has an objective fair market value of zero; (6) Demonstrated that both Scottsdale and the BOR were discussing the extension of the CULA and the GCCA and that there was already an implicit understanding and a meeting of the minds that the CULA and the GCCA would be extended; (7) Demonstrated that Scottsdale would lose its $100 million dollar investments at Westworld

if the CULA was not extended and therefore Scottsdale would necessarily extend the contract; (8) Demonstrated how the BOR ownership of the land affected the fair market value of Scottsdale's assets; (9) How and why the automatic extension provision makes the future valuation of the depreciable assets unknowable, or negligible; (10) Demonstrated the actual cash losses (outflows) to Scottsdale's general fund because of Section 4.5 of the GCCA; (11) Demonstrated that Stuart and other taxpayers had and would continue to pay higher taxes and fees because of these losses; (12) Demonstrated that the golf facility was in reality a private business venture and not a typical municipal golf course; (13) Demonstrated why the financial records for Claim Five were necessary to determine what fair market rent was in 1998 and how no person could determine fair market rent without these records; (14) Demonstrated that Scottsdale had reviewed the Nava appraisals more than two years before Stuart received them;(15) Demonstrated that White Buffalo was highly leveraged—mostly debt capital-- and thus a very high credit risk; (16) Demonstrated that Scottsdale's methods were designed to evade the restrictions of the Anti-Subsidy Clause. These issues identified above are essential inputs into the objective fair market value of the consideration Scottsdale is allegedly receiving. Some of these issues effect the analysis of standing for claims 3, 4, 6 and 7 and the public records analysis for claim 5.

2. Additional Discovery Would Have Demonstrated that Scottsdale Lacked a Factual Basis to Dispute Stuart's Evidence.

A summary judgment hearing would have allowed the factual disputes to be better defined and enabled additional discovery for issues 2, 6-11 and 14-16, to prove at trial that Scottsdale lacked any admissible evidence to demonstrate compliance with the Gift Clause or the Anti-Subsidy Clause.

3. A Trial on the Merits Allows Stuart to Fully Develop the Record and to Prove that Scottsdale is Sustaining a Loss.

At a trial on the merits Stuart could prove that the objective fair market value of the consideration Scottsdale claims to be receiving is zero. Scottsdale spent cash in 2013 to 2032 with a present value of about $2 million. In exchange, Scottsdale is receiving title to depreciable assets in 2033, or later if the GCCA is extended, with an objective fair market value of zero in 2013.

In effect, this court is forecasting how the evidence and arguments would have developed at summary judgment and at trial and essentially substituting its personal opinions for objective evidence that would have been created at trial. This violates due process. Summary judgment should not be used as a substitute for jury trials "even when the trial judge believes the

moving party should win the jury's verdict." *Orme School* , 161 Ariz. 310.

B. This Court Failed to Follow Controlling Legal Authority for Interpreting and Applying a Voter Enacted City Charter Amendment.

In *Paddock v. Brisbois*, 35 Ariz. 214 at 221 (1929), our Supreme Court explained how a city charter form of government works in Arizona:

The impotency of the legislature to set aside positive provisions of the Constitution is because what the people have put into that instrument is the paramount law. Likewise the legislative body of a city is impotent to change or alter by ordinance or resolution the organic law of the city. It is very familiar law that an ordinance is void which conflicts with the charter of the municipality. A charter is, so to speak, the municipal organic law which no ordinance may override. ... **"Every positive [constitutional] direction contains an implication against anything contrary to it, or which would frustrate or disappoint the purpose of that provision."** (citations omitted) (emphasis added)

The principles set forth in *Paddock, Id.*, are well settled law in Arizona. Our controlling law has mandated the following principles when interpreting and applying voter enacted laws and city charter amendments: (1) Voters' intentions, as expressed by the plain words of the law, are the only authority to be utilized by courts when interpreting and applying

a voter enacted law *Cave Creek Unif. Sch. Dist. v Ducey*, 308 P. 3d 1152 at 1158 , ¶ ¶ 21-22, (2013); (2) A City's Charter is a city's constitution and expressly limits the powers that may be exercised by elected officials or city employees, *Paddock,* 35 Ariz. 221; (3) A City's Charter expressly limits how a City may exercise its discretion when implementing a voter enacted law, *Paddock, Id.*; (4) Judicial construction of a city charter amendment is not allowed, *Jett v. City of Tucson*, 118 Ariz. 115 at 119 (1994); and (5) The intentions of legislators, lobbyists or other interested parties can never be considered to ascertain legislative intent, *Ariz. C.C.E.C v. Brain,* 322 P. 3d 1139 at 1142, ¶ 12 (2014).

This Court decided that the city council's decision regarding clearly identified public purpose was not subject to judicial review, because the city council's decision necessarily was consistent with voter intent. (Decision, **¶32)** By implication this court decided that the voter's intent to prohibit subsidies by requiring a clearly identified public purpose was not binding on the city council. This court's decision directly contravenes principles (1) to (5) above, overruling a decision of the supreme "political branch of government", the voters and the constitution—city charter.

This Court further decided that Stuart's interpretation of substantially equal consideration was unreasonable. (Decision, **¶33)** Scottsdale did not offer any interpretation of the Anti-Subsidy Clause. This court improperly assumed the role of advocate with this decision. This court's job is to enforce voter

intent, regardless of whether the court thinks the voters are being unreasonable.

In *Cave Creek*, 308 P. 3d at 1156-58, our supreme court explained that constitutional provisions absolutely can limit how legislators exercise their plenary powers. Scottsdale voters passed a constitutional amendment—city charter—intended to strictly limit how the city council spent public money. This court ruled that the Anti-Subsidy Clause is indistinguishable from the Gift Clause. By implication, this court decided that voters cannot restrict the city council's actions by amending the city charter.

C. <u>This Court Failed to Follow Controlling Legal Authority for Adjudicating Public Records Disputes.</u>

As explained below in Section II, Stuart requested that the court review the records sought in Claims Five and Eight several times.

Without the records Stuart sought in Claim Five, this court and the public have no ability to determine whether White Buffalo is accurately reporting its revenues and rounds of golf to Scottsdale. (Decision, ¶46) The public can't monitor the performance of public officials if the public can't verify actual performance of contractual obligations. The records Stuart sought in Claim Five will also demonstrate the anticipated rate of depreciation of the golf course improvements. The depreciation recorded in the balance sheet is an input into the calculation of the

objective fair market value of Scottsdale assets to be acquired in 2033, and most likely later. Neither this court nor Scottsdale explained how anyone could determine the objective fair market value of assets to be received more than twenty years hence without these financial records. The Nava appraisal, among other appraisals, indicate that these records are always used to calculate the fair market value of ownership interests in a golf course.

D. The Court Erroneously Ruled that Stuart Lacked Standing to Challenge Section 4.5 of the GCCA and Creation of the Basin Management Fund.

Establishing standing for Claims 3 and 4 necessarily requires resolving factual disputes. Oral argument at summary judgment would have created a more complete record demonstrating a material factual dispute whether Scottsdale was sustaining losses, or expending public monies, because of Section 4.5 of the GCCA. Additional discovery would have defined these losses and expenditures.

If Section 4.5 of the GCCA violates the Gift Clause, then it is an unlawful gift of public assets to a private party. Taxpayers may enjoin the unlawful payment of public money. *Henderson v. McCormick*, 70 Ariz. 19, 24, 215 P.2d 608, 611 (1950). Failure to receive fair market value rent or objectively fair compensation for the commercial use of its assets is an unlawful payment of public monies to White Buffalo and its predecessors. Taxpayers had standing to sue in *Ariz. Center for Law in the Public Interest v. Hassell*, 837

P.2d 158 (App. 1991) and *City of Tempe v. Pilot Properties*, 527 P.2d 515, 517 (1974). Concerning standing this situation is indistinguishable.

Scottsdale's general fund is being depleted, because Scottsdale is not receiving any cash inflows because of Section 4.5 of the GCCA. Scottsdale is receiving future title to depreciated golf course assets with an objective fair market value of zero, in 2033, rather than cash inflows into the general fund in the years 2001 to 2033. This is a loss to the general fund.

Stuart, and other taxpayers, have paid higher taxes and fees because of the shortfalls in the general fund created by Section 4.5. Just like the plaintiffs in *Pilot Properties* and *Arizona Center, Id.,* Stuart has standing to challenge this illegal gift of public monies to White Buffalo.

E. <u>This Court Failed to Follow Controlling Legal Authority Regarding Asserting the Statute of Limitations as a Defense in Public Interest Litigation.</u>

Scottsdale asserts the affirmative defense of statute of limitations under A.R.S. 12 - 821. Scottsdale must prove every element. *Glazer v State*, 347 P. 3d 1141 at 1145 (Ariz. 2015) "The proponent of an affirmative defense has the burden to prove it." This Court must also view the evidence presented by Scottsdale as proof in the light most favorable to Stuart, the non-moving party. *Glazer*, 347 P. 3d at 1148, ¶ 28-29. Scottsdale has not proved that the public knew that the Gift Clause was being violated because of Section

4.5 of the GCCA at the public meetings in 1996 and 1998, or at any time later.

Scottsdale argues throughout its response that receiving title to depreciated assets at the end of the GCCA satisfies the Gift Clause. Based on Scottsdale's arguments about the value of receiving these assets at a later date—the construction cost equals the objective fair market value, the public would have assumed that Scottsdale was complying with the Gift Clause. There is no contrary evidence in the record.

The date a violation occurs is not the date that a cause of action accrues for a Gift Clause challenge. *Mayer Unified School Dist. V. Winkleman*, 219 Ariz. 562 at 567 (2009). "...the violation here also occurred when the 09 easements were granted, even though the cause of action did not accrue until 1967." Some of the easements were granted thirty-eight years prior to claim accrual. The claims accrued because of a judicial determination that the state land trust was owed compensation for using its land for public road easements in 1967. Absent judicial determination that the GCCA violates the Gift Clause, no cause of action could have accrued.

Stuart is stepping into Scottsdale's shoes to void a contract and recover public monies for Scottsdale, on behalf of the public. A.R.S. 12-510 necessarily applies to Stuart. A new contract complying with the Gift Clause will be formed, and the new revenues will go into the general fund. This is implicit in the litigation. It was also argued explicitly below. This is the same fact set as *Pilot Properties*, *Arizona Center* and *Valley*

Bank v. Proctor, 53 P. 2d. 857 (1936). There is no controverting evidence in the record.

II. This Court Made the Following Erroneous Factual Determinations.

This court made inferences and conclusions from this incomplete record. Scottsdale presented no evidence in the record to controvert or even dispute the erroneous factual determinations identified below. Scottsdale offered only conclusory statements.

A. There is No Evidence in the Record Demonstrating that the Objective Fair Market Value of Receiving Title to Depreciable Golf Course Clubhouse Improvements in 2033, or later, is greater than zero.

Original cost and present market value are not equivalent terms. *United Cal. Bank v. Prudential Ins. Co., etc.*, 140 Ariz. 238 at 296 (App. 1984) (quoting *City of Phoenix v. Consolidated Water Co., 101 Ariz. 43 (1966).* This court determined that the "worth" of White Buffalo's improvements in 2013 was $850,000 in 2033. (Decision, ¶**24**) Scottsdale did not present any evidence that the cost of building golf course clubhouse improvements is equivalent to the objective fair market value of receiving title to these improvements in twenty years, or more. This exact issue was litigated and resolved in *Pilot Properties. (IR 260: 17, ¶¶ 57-58)* The Nava Appraisals directly

contradict this court's conclusion. (IR 236: 92,103,128,134; IR 237:64-65) A summary judgment hearing and additional discovery would have demonstrated that the following factors strongly indicate that the objective fair market value of these golf course improvements is almost certain to be zero: (1) the unavoidable depreciation of these assets; (2) these assets are not saleable; (3) these assets are part of a business arrangement that loses money for the owner; (4) the BOR owns the golf course improvements on its land -- thirteen of the eighteen holes of the golf course -- when the CULA expires; and (5) the BOR can force Scottsdale to pay it higher rent for the use of its land if the CULA is extended.

The objective fair market value of title to a money losing golf course facility is assumed to be zero. This is a direct inference from the Terry and Nava Affidavits (IR 233, 234), the city treasurer's report and deposition, and the appraisals submitted as part of the summary judgment motion. (IR 236-237; IR 256:38-39, 46-47,57) Scottsdale offered no evidence that receiving title to these depreciated assets has any objective fair market value greater than zero.

B. <u>There is No Evidence in the Record that the Objective Fair Market Value of White Buffalo's Credit Guarantee is Not Zero.</u>

Scottsdale did not offer any evidence to indicate how it determined that White Buffalo's promise to make a $140,000 minimum BMF payment was worth more than zero. White Buffalo did not pledge specific

assets, or make personal enforceable loan guarantees or provide a back-up letter of credit from a bank to guarantee re-payment. These devices are customary to create an enforceable re-payment guarantee. Without White Buffalo's financial records, the court has no factual basis to venture a guess about White Buffalo's creditworthiness. Based upon the evidence presented by Scottsdale, the credit guarantee is presumed to have a fair market price of zero. This conclusion follows directly from the city treasurer's report and the Terry Affidavit. (IR 187:62; IR 244: 130, 138—L15-25,139; IR 233: 3-4,6¶ 26)

C. <u>This Court Improperly Weighed the Evidence in the Record, or Determined That This Evidence Was False.</u>

This Court decided that the following evidence was not credible, reasonable or could not possibly be true: (1) Mr. Terry's expert analysis (IR 233); (2) The city treasurer's report and testimony (IR 187:60-62; IR 244); (3) The Nava Affidavits and appraisals of the golf course in 2010; (IR 234;IR 236-237) (4) the other municipal appraisals; (IR 256;257) (5) Customary practices for determining fair market compensation to a municipal golf course owner are necessary for determining the objective fair market value of the GCCA-3 to Scottsdale; and (6) City employees testimony that the GCCA-3 was not needed by the public.

D. This Court Overlooked the Following Reasonable Inferences from the Evidence in the Record.

The Terry and Nava Affidavits (IR 233, 234) imply that the objective fair market value of receiving title to depreciable golf course improvements in twenty years or later is negligible. The Nava appraisal (IR 236-237) states that only the net cash flows generated from the business are used in the calculations of objective fair market value of
the business assets. These appraisals support a reasonable inference that receiving title to these assets in twenty years or more has a fair market value of zero. The municipal golf course appraisals support an inference that it is customary practice among municipalities to receive title to golf course improvements and cash rent of six percent or more when renting their land to private entities for commercial golf courses. (IR 256: 46-47, 87-89)

E. Stuart Requested Court Review of the Records for Claims Five and Eight at Least Six Times Below.

Stuart asked the court to review the records as follows: (1) MSJ (IR 230: 4- L4 -- L27-28; 28—L17-18); (2) Reply to MSJ (IR 292: 6—L19-25; 8—L1-2); (3) Req. Oral Argument (IR 298: 2—L7-8); (4) Mot. Reconsideration (R 322: 13—L26-28; 14—L5-6) ;(5) Mot. New Trial (IR 354:10-L1-2; 13—L6-9); (6) Amend. Mot. New Trial (IR 363: 13—L3-4;14—L12-

14;15—L6-8); (7) Reply to Def. MNT (IR 367: 6 –L11-16); and (8) Hearing Mot. New Trial (IR 373).

F. The Exercise of the Option to Extend the GCCA is Imminent.

Scottsdale did not present any evidence to dispute the objective fair market value of this option. Scottsdale did not present any evidence that it did not intend to extend the CULA for another fifty years or longer. All the circumstantial evidence in the record indicates that Scottsdale will get an extension to the CULA, once the application process with the BOR is complete.

White Buffalo requested a twenty-five-year extension as part of the GCCA-3. (IR 266:12) Scottsdale agreed to seek an extension of the CULA. The BOR acknowledged that they were discussing the terms of the extension with Scottsdale. Scottsdale is currently seeking an extension of the CULA and the GCCA. (IR 243: 4, 5—L3-6,7— L20-25,8, 20—L16-19).

A proper summary judgment hearing and additional discovery would have shown that Scottsdale would have to extend the CULA with the BOR, otherwise it would lose all its $100 million investments at Westworld.

III. CONCLUSION

Appellant respectfully requests this court to review this motion and to order Scottsdale to respond directly to the points raised herein. Appellant requests that

this court vacate it memorandum decision and issue an order that comports with the applicable law and the factual record. Appellant prays that this court will grant this motion and remand this case to the trial court for a trial on the issues identified above, or alternatively, for further discovery and oral argument on the motion for summary judgment.

RESPECTFULLY SUBMITTED this 15th day of September, 2017.
By: */s/ Scott H. Zwillinger*

APPENDIX G

IN THE ARIZONA COURT OF APPEALS
DIVISION ONE

Mark Stuart
Appellant,

CA-CV 15-0746

v.

Superior Court
Case No. CV2013-006138

Mayor Jim Lane, et. al.
Appellee

APPELLANT'S REPLY BRIEF

Sandra Slaton, Bar No. 006454
HORNE SLATON, PLLC
6720 North Scottsdale Road, Suite 285
Scottsdale, AZ 85253
Tel: (480) 483-2178 Fax: (480) 367-0691
horne@horneslaton.com
Attorney for Plaintiff

VI. THE TRIAL COURT IMPROPERLY ASSESSED RULE 68 SANCTIONS AGAINST APPELLANT, A PUBLIC INTEREST LITIGANT.

Scottsdale fails to respond to: Whether Rule 68 Sanctions can be properly assessed in public interest litigation, against either party? Instead, Scottsdale focuses on the propriety of Rule 68 sanctions in regular civil litigation. Sanctioning a public interest litigant is contrary to Arizona's public policy of encouraging public interest litigation. Sanctions add another potential layer of expenses, in addition to the time involved and the normal costs incurred in litigation. Scottsdale fails to respond to this public policy argument.

Rule 68 sanctions are intended to promote settlement of private civil litigation. *See Warner v. Sw. Desert Images, LLC*, 218 Ariz. 121, 137, 180 P.3d 986, 1002 (App. 2008). There can be no settlement when one party (the public interest litigant) cannot be rewarded without his day in court. This Court should hold that disputes between the government and a public interest litigant should be resolved by the courts and not determined by the threat of Rule 68 sanctions. Sanctions would have a chilling effect on the judicial resolution of legitimate controversies between the government and its people. *See Wistuber*, 141 Ariz. at 350. As the *Wistuber* court stated, "Courts exist to hear such cases; we should encourage resolution of constitutional arguments in court rather than on the streets." *Id.*

Assuming that the public policy argument is not adopted, Rule 68 sanctions were still improper. Contrary to Scottsdale's argument, Rule 68(f) states clearly that unapportioned offers may not be made to multiple offerees. Ariz. R. Civ. P. 68. Scottsdale's offer was unapportioned. "Rule 68(f) requires that when there are multiple parties the offer must be apportioned as to the parties." *Douglas v. Governing Bd. of Window Rock Consol. Sch. Dist. No. 8*, 221 Ariz. 104, 109, 210 P.3d 1275, 1280 (App. 2009). Scottsdale instead relies on the original offer of judgment to both Appellant and the dismissed plaintiff. The offer of judgment was made in May, 2015 and Washington was dismissed in July, 2015. (IR 134; IR 154). No new offer was made to Appellant.

VII. ATTORNEYS' FEES AND COSTS

Contrary to Scottsdale's argument, Appellant has not sought a frivolous appeal. Appellant has not pursued a course of litigation that "ignored legal principles and sought to distort fact." (Response at 45). Appellant provided facts that are in the record on appeal and that Scottsdale was aware of as the litigant in the trial court. Appellant submits that Scottsdale's request for sanctions is yet another attempts to chill voters from engaging in the activity of ensuring those they elected to govern are doing so properly.[5] Walking in the footsteps of a long line of

[5] Indeed, Scottsdale has pursued a course of behavior against Appellant that threatens his ability as a citizen and taxpayer of Scottsdale from ensuring the government is doing their duty.

public interest litigants, Appellant has brought genuine issues to the lower court and this Court's attention. Taxpayers and voters have standing to sue to enforce the law. The statute of limitations should not run against those private citizens who assume the role of the state or body politic and challenge the actions of those elected to govern. The public must have adequate records in order to effectively monitor the performance of their government. Appellant has brought these claims in good faith and therefore should not be assessed attorney's fees.

Appellant also renews his request for an award of attorneys' fees and costs against Scottsdale rose in his opening brief. Appellant incorporates those arguments as if set forth in full here in. Appellant further requests that this Court award attorneys' fees and costs as a sanction against Scottsdale, pursuant to Ariz. R. Civ. App. P. 25. Scottsdale was a party to this case in the trial court. Nevertheless, Scottsdale misrepresented the record to this Court when it alleged that Appellant failed to provide support for his facts. This was a blatant attempt to again chill

---

Scottsdale even resorted to attempting to seek a debtor's exam for the judgment of attorney's fees at the lower level despite the fact that it was not awarded damages but simple fees and costs. (IR 387). Furthermore, Scottsdale was unwilling to work with Appellant when they requested a supersedeas bond prior to appeal despite the controlling case law preventing Scottsdale from demanding a bond at all. *See City Center Executive Plaza, LLC v. Jantzen,* 237 Ariz. 37, 42, 344 P.3d 339, 244 (App. 2015).

Appellant from seeking redress in a court for public interest litigation. Scottsdale's actions should not be condoned. Appellant requests that this Court send a message to Scottsdale that threats of sanctions and attorney's fees, based on inaccurate factual arguments no less, will not be accepted. Scottsdale's misrepresentation of the trial record before this Court was not just an innocent omission but a mammoth prevision of what happened below. Appellant's support in the trial record for his facts was overwhelming. It is beyond credulity that Scottsdale would claim otherwise. Therefore, it is requested this Court sanction Scottsdale pursuant to Rule 25.

CONCLUSION

For the foregoing reasons, it is requested that this Court reverse the lower court's granting of summary judgment in favor of the city Defendants and remand to the trial court for further proceedings consistent with this Court's decision and a trial on the merits. Further, Appellant requests this Court to reverse the trial court's decision on the Rule 68 sanctions. Appellant respectfully request reasonable attorneys' fees from this appeal. Finally, Appellant respectfully requests this Court to award sanctions against Scottsdale pursuant to Rule 25 for the reasons stated above.

RESPECTFULLY SUBMITTED this 5th day of July, 2015 **HORNE SLATON, PLLC**
By:/s/ Sandra Slaton Sandra Slaton Attorney for Appellant/Plaintiff

APPENDIX H

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

MARK STUART, Appellant, V.
CITY OF SCOTTSDALE, et al. Appellees.

No. CV-17-0311-PR
Appeals Case: CA-CV 15-0746
Superior Court Case No. CV2013-006138

PETITION FOR REVIEW

GOLDMAN & ZWILLINGER PLLC
Scott H. Zwillinger (019645) Scott Griffiths (028906)
17851 N. 85th Street, Suite 175
Scottsdale, Arizona 85255
Telephone: 480-626-8483
Email: Docket@gzlawoffice.com
Attorneys for Appellant Mark Stuart

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

INTRODUCTION

Both the Court of Appeals (the "COA") and City of Scottsdale ("Scottsdale") acknowledge that the land lease at issue in this matter has violated the Gift Clause since 1998. Despite the clear mandate of Arizona's Gift Clause and Scottsdale's Anti-Subsidy Amendment to the City Charter, the COA accepted Scottsdale's argument that the public should suffer losses, because the public did not learn of the losses until Petitioner's lawsuit. The COA's decision, if left to stand, unjustly rewards wrong-doers, encourages

back-door deals, and punishes the public by permitting private corporations to benefit from sweetheart deals while the taxpayers foot the bill.

Petitioner Stuart now seeks review of the COA's Memorandum Opinion in this matter (Opinion, App. 1:1-17) because it ignores decades of well-settled law and creates confusion about the application of Arizona's Gift Clause. The Opinion also nullifies Scottsdale's voter-enacted City Charter Amendment and opens the door to abuse of taxpayers by private businesses who are close to those public employees who award valuable contracts. The COA's ruling that Scottsdale was not required to produce a list of public records that were purportedly privileged renders any discovery of documentary evidence virtually impossible and permits governmental entities to simply ignore standard disclosure protocols, including privilege logs. Combined, the effect of the Opinion effectively renders the Gift Clause and City Charter meaningless and offers the public no means to challenge improper governmental spending. Accordingly, this Court should grant review, vacate the Opinion, and remand this case to the trial court for appropriate proceedings.

ISSUES PRESENTED FOR REVIEW

1. Whether the COA denied Petitioner due process by denying him the opportunity for oral argument on summary judgment and additional necessary discovery.
2. .....

3. Whether the COA ignored objective facts and customary fiduciary standards when assessing the adequacy of consideration for a Gift Clause challenge as set forth in *Turken v.Gordon*, 223 Ariz. 342 (2010).

4. Whether a public interest litigant bringing a Gift Clause action on behalf of the citizens of Scottsdale is exempt from the statute of limitations under A.R.S. § 12-510.

5. .....

6. Whether the COA improperly resolved factual disputes and failed to view the evidence and all reasonable inferences therefrom in light of the non-moving party when affirming summary judgment for Scottsdale.

7. Whether the COA incorrectly shifted the burden of demonstrating that disputed records are not public records from Scottsdale to Petitioner and incorrectly decided that documents about core governmental activities are not public records under A.R.S. § 39-121, without reviewing the records.

8. Whether the COA incorrectly applied controlling legal authority for assessing disclosure sanctions for allegedly late disclosure.

9. Whether assessing Ariz. R. Civ. P. Rule 68

sanctions against public interest litigants violates public policy and constitutional rights because it necessarily infringes on an individual's constitutional rights of free speech and to petition for the common good/redress under the U.S. and Arizona Constitutions.

LIST OF ADDITIONAL ISSUES PRESENTED TO BUT NOT DECIDED BY THE COURT OF APPEALS AND WHICH SHOULD BE DECIDED IF REVIEW IS GRANTED

1. Whether the rent payments received by Scottsdale for the exclusive use of its land and assets by a private business are public monies.

2. Whether Scottsdale can give itself consideration in a contractual arrangement with a private party.

3. Whether performing pre-existing obligations in a contract is lawful consideration for new promises and performance by Scottsdale.

4. Whether amending a contract creates a contract that relates back to the original contract for the purpose of A.R.S. § 12-821 and requires that all of the elements of consideration be analyzed together as required in *Turken* using customary fiduciary standards.

STATEMENT OF FACTS

I. BACKGROUND

In 2010, Scottsdale voters approved the Anti-Subsidy Clause to the City Charter in order to prohibit Scottsdale from awarding contracts to private businesses whose provision of goods and services do not clearly satisfy a public need and on terms that are not objectively fair and market value based. (App. 2: 18-22; IR 264: Ex. 19, 4,12, 16-18)

Since 1998, Scottsdale has leased its land and some related golf course assets to White Buffalo Golf, Inc. ("WBG"), a private and for-profit entity, through the Golf Course Concession Agreement ("GCCA"). (App. 1:2, ¶¶2-3) Scottsdale leases its land and assets to WBG for less than zero, which is obviously far below comparable lease rates. Thus, the GCCA creates losses for Scottsdale that are paid from the general fund or with other public monies. (App. 3: 23-28; IR 241:Ex. 3C, 2-4;IR233, Ex. 01, ¶¶ 19-20, 26; IR258, 4) WBG's ownership interest in the profits of the GCCA was appraised for $1.4 million in 2010. Scottsdale's ownership interest, because of guaranteed future losses and other special factors, necessarily has a market value of zero. (App. 4: 29,42-44; IR 236: 134-148) In other words, Scottsdale does not receive any return on the use of its resources, while WBG profits.

In 2012, Scottsdale amended the GCCA and invested $3.1 million in the golf course. ("GCCA3", App.3:27; IR 278: Ex. 1,5 ¶ 23) The City Treasurer

advised the City council to reject the GCCA3, because it violated the Anti-Subsidy Clause. (App.5:46-47 ;IR 187: 60-62; IR 244:8, 99-100) Petitioner filed suit to overturn the GCCA3 in June 2013, alleging that it violated both the Gift and Anti-Subsidy Clauses.

In his Amended Complaint, Petitioner challenged the GCCA3 as violative of the Gift Clause since inception (IR 136, IR 349). He added claims that Scottsdale violated public records law when it had not produced financial and policy records about the GCCA that explained how Scottsdale complied with the Gift and the Anti- Subsidy Clauses. (IR 183,13,¶ 43,¶ 45)

In March 2015, the trial court granted summary judgment to the City, *without oral argument*, on all claims based upon lack of standing and expired statute of limitations. (App 6: 50-52) In its ruling, the trial court failed to review any of the public records at issue.

On August 31, 2017, the COA affirmed the summary judgment against petitioner. (App 1: 2) The COA reversed the trial court's ruling on standing (App 1:5,¶ ¶16-18) stating that the record contained no factual disputes regarding compliance with the Gift and Anti-Subsidy Clauses. (App.1: 7, ¶24,9-10,¶30-¶33,¶37,¶ ¶ 42-43) It ruled that the statute of limitations precluded petitioner's Gift Clause claims, and that petitioner lacked standing to challenge the GCCA. (App 1:12, ¶ ¶ 38-41) The COA decided that the records petitioner sought were privileged, without reviewing the documents. Scottsdale did not produce any redacted records or make records in its possession

available for in-camera review. (App 1: 13-15, ¶¶ 44-48)

Petitioner filed a motion for reconsideration. He requested a remand to the trial court based upon violations of due process and other grounds. Petitioner provided the COA with a long list of evidence and facts that he would obtain and prove if allowed to proceed below. The motion for reconsideration was denied. This petition followed. (App 7: 54-57)

REASONS TO GRANT THIS PETITION

This case presents several issues of law of statewide importance that will very likely recur. Lower courts need clear guidance about properly applying the law. There are currently two ballot initiatives in Scottsdale seeking to amend the City Charter, and a citizen lawsuit asking a court to interpret and apply an existing voter enacted charter amendment governing the Scottsdale McDowell Sonoran Preserve (CV2017-055633). This Court needs to provide clear guidance on this issue. Otherwise, many citizens will be wasting time and money trying to fix problems in our communities, only to have the will of the voters nullified by the courts.

a) Due Process Requires Return to the Trial Court

The trial court's erroneous ruling on standing biased and influenced all of the related decisions below, effecting the entire framework of the case and

the record on appeal. After Scottsdale filed its second Motion for Summary Judgment, Judge Duncan ordered that she would set oral argument based upon the briefing schedule for this motion. (IR 199: 2 dated October 3, 2014.)

By rule, Petitioner was entitled to a hearing since the Court had previously scheduled oral argument for several different dates and averred that the Court would "schedule oral argument accordingly..." In pertinent part, Rule 56(c)(1) Ariz. R. Civ. P. reads: "...the court **must** set oral argument, unless it determines that the motion should be denied or the motion is uncontested...") Of course, Petitioner contested Scottsdale's Motion for Summary Judgment and the trial court ***granted*** summary judgment in favor of Scottsdale. The trial judge's decision on standing influenced all of the related decisions, including summary judgment, making a fair proceeding impossible. *Horne v. Polk,* 242 Ariz. 226, 394 P. 3d 651 at 656 (2017). The record for appeal was not fully developed, nor could it be without the requested hearing. Petitioner's request for reconsideration to the COA, was based in part on the inadequacy and incompleteness of the record. (App 7:55-57) Petitioner described the additional arguments and evidence of factual disputes he intended to introduce at the summary judgment hearing.

b) The Proper Application of a Voter Enacted City Charter Amendment Affects All Charter Cities Throughout This State

.....

c) Compliance with the Gift Clause Requires Objective Facts Based On Customary Fiduciary Practices

Turken v. Gordon, 223 Ariz. 342 (2010) is the controlling legal authority for Gift Clause analysis. However, in its Opinion, COA decided that objective analysis of consideration, guided by fiduciary standards, is no longer required (App 1: 7,¶¶ 23-25), and decided that fair market value is not relevant in the analysis. Implicitly, the COA directly rejected (holding that Tempe must receive fair market rent for its land) and *Turken,* 223 Ariz. at 350 (paying far too much for something creates a subsidy to the seller), *and City of Phoenix v. Consolidated Water Co.,* 101 Ariz. 43(1966) (holding that construction cost is not equal to market value.)

Summary judgment should not be used as a substitute for jury trials "even when the trial judge believes the moving party should win the jury's verdict." *Orme School v. Reeves*, 161 Ariz. 301 at 310 (1990). The COA decided factual disputes, failed to give petitioner the reasonable inferences inherent in his expert declarations and supporting evidence, and deferred to the City's totally subjective analysis to find compliance with the Gift Clause. (App. 1: 7-9) Petitioner had argued, based upon unbiased and uncontroverted expert affidavits, the City Treasurer's analysis and other market based data, that the City

needed to receive an additional $97,000 in cash per year, at a minimum, for the GCCA3 to comply with the Gift Clause. (App 3:27-28; App. 9:79-81; App. 5:46-47;IR 233:4;IR 234: : 4,¶¶ 13, 20-22) The COA determined that Scottsdale's future ownership of depreciable assets with a fair market value of zero, plus non-guaranteed cash payments spread over twenty years was good enough.(App.1: 7-8) Contrary to *Turken*, the COA determined that Scottsdale could give itself consideration in a contract. (App: 8, ¶ 24)

Additionally, the COA rejected all of Petitioner's arguments about lack of consideration based upon pre-existing obligations and customary fiduciary practices for analyzing major modifications to a contract. The COA decided that Scottsdale's subjective analysis was correct, and that Petitioner's analysis was wrong. As such the COA necessarily resolved factual disputes which are required to be resolved by a jury. Rule 56(a) Ariz. R. Civ. P.

d) A.R.S. § 12-510 Allows Public Interest Litigants to Bring Suit on Behalf of the City of Scottsdale Outside Of One Year

Since statehood, the statute of limitations has never been allowed to be a tool to allow the harvesting of ill-gotten gains taken from the state, at public expense. Since 1936, our law has recognized that actions brought on behalf of the state, or one of its subdivisions, by private citizens is brought on behalf of the state. *Valley Bank v. Proctor*, 47 Ariz. 77, (1936). If the COA's decision is allowed to stand, the public

will lose one of its strongest tools for fighting public corruption and malfeasance.

Recently, this court confirmed that the statute of limitations cannot be used as a defense to defeat suits brought by cities. "Statutes of limitations which govern between private individuals do not apply in proceedings on behalf of the state," *City of Phoenix v. Glenayre Electronics*, Inc. 242 Ariz. 139, 393 P. 3d 919 (2017) quoting *City of Bisbee v. Cochise Cty.* (Bisbee *III*), 52 Ariz. 1 (1938). The *nullum tempus* doctrine generally "applies not only to the state itself when suing in its own name, but to all of its subdivisions," including municipalities acting with a public purpose to recover tax related monies." *Glenayre*, 939 P. 3d at 922, ¶ 11.

The appeals court rejected petitioner's claim to exemption from the statute of limitations under A.R.S. § 12–510. (App: 15, ¶ 41) It is reasonable to infer that petitioner is seeking to void the GCCA in order to stem the losses to Scottsdale's treasury and that doing so will "recover tax related monies" as contemplated by *Glenayre* and increase payments into Scottsdale's treasury for the broad benefit of the public.

e) The City Must Prove That Petitioner Realized That The GCCA Violated the Gift Clause in Order to Invoke A.R.S. § 12-821 as An Affirmative Defense

.....

f) The Appeals Court Decided Factual Disputes Against Petitioner and Failed to Follow Rule

56, Ariz. R. Civ. P.

The COA disregarded long established summary judgment law. The COA decided factual disputes and ignored reasonable logical inferences from the evidence. For instance, the COA decided that Scottsdale's rent payments for the private for-profit use of its land and assets are not public monies. (App 1: 12,¶ 39) The COA decided that receiving a net rent of zero, and usually less, for the use of Scottsdale's land and assets did not violate the Gift Clause. The COA rejected Petitioner's expert affidavit, which stated that no entity had ever received a rent of zero for its golf course assets. (App. 1, ¶ 36; App 9: 79-80; IR 234: 4,¶¶ 13, 20-22) The COA rejected the reasonable inference, and the supporting facts, that land owners always receive the golf course improvements plus cash rent of at least six percent of gross revenues for the use of their land by a private for-profit business. The COA decided that the cost of constructing depreciable golf course assets is equivalent to the objective fair market price of these assets in twenty years, or more likely seventy years. (App. 1: 7-8, ¶¶ 24-28) The COA rejected the opinions of petitioners' experts, which stated that these depreciable assets had an objective fair market price of zero. (App. 3: 27-28; App. 9: 79-81; IR 233;IR 234) The COA decided that the end date of a contract is irrelevant to the determination of the objective fair market value of the cash flows in the contract. (App. 1: 7¶ ¶ 23-24, 11,¶ 37) The COA rejected customary fiduciary analysis of a golf course lease.

Scottsdale provided no expert analysis to contradict Petitioner's experts and substituted an alternative, ad hoc analysis. (IR 183: 9,¶ 28-29,10, ¶¶ 33-37) The COA accepted Scottsdale's analysis and rejected Petitioner's unbiased, objective analysis. Pursuant to Rule 56(a) Ariz. R. Civ. P., these factual disputes must be decided by a jury.

g) The Appeals Court Improperly Ruled on the Public Records Claims.

.....

h) The Appeals Court Changed the Law About Disclosure Sanctions.

The COA upheld a very severe disclosure sanction against Petitioner for allegedly late disclosure. Trial was more than seven months away. Scottsdale suffered no prejudice. The trial court's decision on standing probably influenced any decision not to hold a hearing on whether any late disclosure occurred. Petitioner was denied due process because the court refused to hold a hearing. The Opinion will encourage litigants to use the disclosure rules as weapons of destruction, rather than tools for discovering vital and relevant information. *Allstate Ins. v. O' Toole*, 182 Ariz. 284 at 287 - 288 , 896 P.2d 254 (1995) (disclosure rules are "not meant to be a weapon of destruction in the hands of 'win at all costs' litigators.")

This court should accept review of this issue to clarify that cooperation is mandatory and that

discovery and disclosure are not tools to undermine the search for justice.

i) Rule 68 Sanctions Against Public Interest Litigants Violates Constitutional Rights of Free Speech and Freedom of Petition Inherent In The United States And Arizona Constitutions.

"Substantive law is that part of the law which creates, defines and regulates rights." *Daou v. Harris*, 139 Ariz. 353 at 358 (1984). "The rules promulgated by this Court can only effect procedural matters and may not diminish or augment substantive rights." *State v. Birmingham*, 95 Ariz. 310 at 316 (1964).

The right to speak freely, publish freely and to petition for the common good are substantive rights guaranteed to every citizen by our constitution. Art. II, Sections 5 and 6. The First Amendment of the U.S. constitution prohibits government from abridging speech and the petition for redress of grievances, of any citizen.

"Resort to the courts to seek vindication of constitutional rights is a different matter .... from the use of the legal process for purely private gain." *NAACP v. Button*, 371 U.S. 415 at 444 (1963). Laws that chill speech, or suppress speech, or punish speech violate the First Amendment. *Ruiz v. Hull*, 191 Ariz. 441 at 453-54, ¶ 50, 957 P. 2d 984 (1998). "The right to petition is among the most precious liberties safeguarded by the Bill of Rights." (citations omitted)

Rules or laws that create a deterrent to speaking or petitioning "chill potential speech before it happens". These types of laws violate the First Amendment. *Ruiz*, 191 Ariz. at 456.

Public interest litigation is a recognized form of petition and expression protected by the First Amendment. The threat of sanctions against first amendment rights "may deter their exercise almost as potently as the actual application of sanctions." *Button v. NAACP*, 371 U.S. 415 at 432-33(1963).

An offer of judgment under Rule 68 gives a public interest litigant a simple choice: Give up your rights and avoid sanctions, or be monetarily sanctioned because you exercised your rights. Both alternatives, violate the constitutional rights of the litigant, the former much more severely than the latter. Rule 68 offers of judgment chill and threaten to suppress the right to petition. Rule 68 sanctions punish a litigant because the public grievance was resolved against the public. Rule 68 cannot be utilized as a means to suppress and punish the exercise of constitutional rights by public interest litigants. Rule 68 sanctions discourage the resolution of constitutional questions in court, contrary to our history and our policy. *Wistuber v. Paradise Valley*, 141 Ariz. 346 (1984).

CONCLUSION

.....

Dated this 6th day of December, 2017.
GOLDMAN & ZWILLINGER PLLC
/s/ Scott Zwillinger

Scott H. Zwillinger (019645)
Scott Griffiths (028906)
Attorneys for Appellant Mark Stuart