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11 *Attorneys for Defendant*

12 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
13 IN AND FOR THE COUNTY OF MARICOPA

14 THOMAS J. GUSICH, an individual,
15 Plaintiff,

16 v.

17 SUN CITY GRAND COMMUNITY
18 ASSOCIATION, INC., an Arizona
19 nonprofit corporation,
20 Defendant.

NO. CV2025-002634

**REPLY IN SUPPORT OF
DEFENDANT'S APPLICATION FOR
ATTORNEYS' FEES**

(Assigned to the Hon. Jennifer Ryan-
Touhill)

21 **I. INTRODUCTION.**

22 In October of 2024, Plaintiff sent a demand letter to the Association¹ threatening to
23 file a lawsuit and stating that "litigation was inevitable".² The Association tried several
24 times to resolve the parties' dispute out of court, but Plaintiff ultimately refused and filed
25 this lawsuit instead.³ Plaintiff was overwhelmingly voted out of office by his fellow
26 residents in February 2025. Rather than acknowledge the will of those residents, Plaintiff
27 doubled down and expanded his lawsuit by challenging the removal process and demanding
28 a full-blown injunction hearing with multiple witnesses and thousands of pages of exhibits.

¹ Capitalized terms not otherwise defined herein shall have the same meaning ascribed to them in the Association's Application for Attorneys' Fees and Costs ("Application").

² See Supplemental Declaration of Curtis Ekmark ("Supp. Decl."), attached hereto as **Exhibit A**, ¶ 4 & Exhibit 1 thereto.

³ See *id.*, ¶¶ 6-8.

1 In March of 2025, before filing its Motion to Dismiss and opposing the PI
2 Application, the Association sought once more to resolve the case and made a reasonable
3 proposal to settle.⁴ Plaintiff ignored that proposal.

4 In sum, Plaintiff rejected opportunities to resolve this matter and chose instead to
5 aggressively litigate, driving up costs. The Association had to defend itself. Plaintiff now
6 wants the Association to bear all the cost of defending itself – which cost will ultimately be
7 shouldered by the residents – and be relieved of the consequences of his choice to litigate.
8 The law and reason compel a different result.

9 The Association demonstrated in the Application that an award of attorneys’ fees
10 and costs is mandatory under Section 15.9 of the CC&Rs and A.R.S. § 33-1813, and that
11 the requested fees and costs are reasonable under all of the circumstances of this case.⁵ The
12 burden then shifted to Plaintiff to identify and demonstrate that specific time entries or work
13 performed was “clearly excessive”. See *McDowell Mountain Ranch Comm. Ass’n v.*
14 *Simons*, 216 Ariz. 266, 270-71, ¶ 20 (App. 2007). Plaintiff has not met that burden.

15 Plaintiff instead relies on generic, hackneyed arguments (*e.g.*, overstaffing,
16 unnecessary work, too many lawyers), which are insufficient under Arizona law to rebut a
17 supported fee application. Never one to leave an argument unmade no matter how thin,
18 Plaintiff also takes issue with the hourly rates that the Association agreed to pay Quarles.
19 Again, Arizona law is clear on this point – the rate that the client agrees to pay its lawyer is
20 *prima facie* evidence of its reasonableness. That another lawyer, including Plaintiff’s
21 counsel, may have agreed to handle the matter at a lower rate given the lawyer’s particular
22 circumstances (smaller firm, less overhead, different client base, etc.) is insufficient to rebut
23 that presumption. Put simply, Quarles’ rates were entirely reasonable. This was a highly
24 complex matter that posed an existential threat to the Association. Plaintiff challenged the
25 Association’s ability to govern and sought to disenfranchise thousands of his fellow
26 residents. In Plaintiffs’ own words, his claims were “*extraordinarily novel*” and he “*lodged*

27
28 ⁴ See *id.*, ¶ 8 & Exhibit 3 thereto.

⁵ Plaintiff is also entitled to an award of fees under A.R.S. § 12-341.01.

1 *novel legal issues without precedent*". Resp. at 2, 4 (emphasis added). Given the complexity
2 of the matter, a litigious Plaintiff, and the extraordinarily successful result, the requested
3 fees are reasonable.

4 For these reasons, and those set forth in the Application, the Court should grant the
5 Application in full and award the Association attorneys' fees in the amount of \$353,388 and
6 costs and expenses in the amount of \$355.85, for a total award of \$353,743.85.

7 **II. THE ASSOCIATION IS ENTITLED TO FEES ON THREE SEPARATE AND**
8 **INDEPENDENT GROUNDS.**

9 **A. The Association is Entitled to All Mandatory Fees Under the CC&Rs.**

10 The Association is entitled to a mandatory award of all fees it has incurred because
11 each of Plaintiff's claims falls within Section 15.9 of the CC&Rs. In the Response, Plaintiff
12 admits that his claim for indemnification (Count Three) is subject to a fee award under the
13 CC&Rs but asserts that the Association's defense of that claim should be arbitrarily limited
14 to "fifteen hours of work" or "\$6,000". Resp. at 8, 17. Plaintiff offers no support for that
15 self-serving contention, however. Plaintiff does not identify or otherwise challenge any
16 specific fees or time entries. And the fact remains that Plaintiff brought a dubious
17 indemnification claim, the Association was forced to defend against it, and the Association
18 should recover its fees for prevailing.

19 Now that he has lost, Plaintiff has reversed course entirely with respect to Count One
20 (the Grand Standards) and Count Two (the Petitions), and claims that these counts do not
21 fall under Section 15.9 because they did not seek to "enforce" a provision in the CC&Rs.
22 Plaintiff's assertion is belied by his own affirmative allegations. Plaintiff expressly alleged
23 in the FAC that Count One was subject to a fee award under the Governing Documents.
24 Plaintiff cannot "take back" that affirmative concession now that the Association has
25 prevailed. *See* FAC ¶¶ 15, 42, 52, 55; MTD Resp, at 8-9. With respect to Count Two
26 (Petitions), Plaintiff alleged that the Board lacked the authority to hold the election by
27 stating that A.R.S. § 33-1813 "expressly trumps any *contractual removal provision that*
28 *might exist in the Bylaws.*" MTD Resp. at 9-10 (emphasis added). Put simply, each of

1 Plaintiff's claims fall within the four corners of Section 15.9, and as the prevailing party,
2 the Association "*shall be entitled to recover from the other party* thereto as part of the
3 judgment, attorneys' fees and costs[.]" (Emphasis added).

4 **B. The Association is Entitled to Mandatory Fees Under A.R.S. § 33-1813.**

5 Plaintiff does not (because he cannot) dispute that Count Two falls squarely within
6 the provisions of A.R.S. § 33-1813(A)(4)(f), which state that the prevailing party in an
7 action concerning the removal of a board member is entitled to a mandatory fee award.
8 Instead, Plaintiff argues that the Association should be equitably estopped from a fee award
9 under A.R.S. § 33-1813, because the Association "changed tactics" and "asserted it was
10 conducting a recall election based on that statute, and belatedly took the position that it has
11 discretion not to follow that statute." Resp. at 4, 6. Plaintiff also argues the Association
12 should not be awarded fees because the claim was not resolved on the merits and "was only
13 part of this litigation." *Id.* at 7. These arguments do not make sense.

14 First, Plaintiff's assertion that the Association should be equitably estopped from a
15 statutory fee award for successfully defending a claim cannot be legitimately sustained.
16 Plaintiff filed a lawsuit challenging his removal. Plaintiff did not alter his position based on
17 action taken by the Association. He had the opportunity to make all his arguments, exercised
18 that opportunity, and lost. The fact the Association defended itself and prevailed does not
19 give rise to equitable estoppel.

20 Moreover, the Association did not "change tactics," and Plaintiff's assertion
21 otherwise is demonstrably incorrect. The Association consistently maintained that Plaintiff
22 was subject to removal under A.R.S. § 33-1813, the Bylaws, and Title 10, and that Count
23 Two was subject to dismissal on multiple independent bases. This Court agreed and held
24 that Plaintiff was properly removed pursuant to the Bylaws and Title 10. *See* Ruling at 7-8.
25 That the Court resolved the dispute by ruling on these dispositive grounds does not insulate
26 Plaintiff from his obligation to pay fees under A.R.S. § 33-1813(A)(4)(f). Plaintiff was
27 removed from the Board, and Plaintiff expressly challenged his removal on the basis that it
28

1 did not comply with A.R.S. § 33-1813. *See* FAC, ¶¶ 62-64. The Association prevailed on
2 that claim and is entitled to a mandatory award of its fees.

3 **C. The Association is Entitled to Fees Under A.R.S. § 12-341.01.**

4 Plaintiff pretends that he did not allege in the FAC that this dispute arises out of
5 contract and that the prevailing party should be awarded fees under A.R.S. § 12-341.01.
6 Plaintiff seeks to deflect scrutiny of his own allegations by asserting he “filed only a single
7 contract claim regarding indemnity, which was resolved on pure legal argument.” Resp. at
8 5. Undersigned counsel is unaware of any caselaw holding that the applicability of A.R.S.
9 § 12-341.01 turns on why Plaintiff lost on the merits, and Plaintiff hasn’t cited any such
10 authority. Here, Plaintiff expressly alleged that both Count One (Grand Standards) and
11 Count Three (Indemnification) arose out of contract and sought to recover attorneys’ fees
12 and costs under A.R.S. § 12-341.01. *See* FAC ¶¶ 55, 71. The Association prevailed on both
13 claims and is entitled to an award of fees under A.R.S. § 12-341.01.

14 **II. PLAINTIFF FAILS TO SHOW THAT THE WORK PERFORMED AND**
15 **RATES CHARGED ARE CLEARLY EXCESSIVE, LET ALONE**
16 **UNREASONABLE.**

17 Because each of Plaintiff’s claims falls within Section 15.9 of the CC&Rs, the
18 Association is contractually entitled to reimbursement of *all* attorneys’ fees and costs
19 incurred in defending itself. The Association’s Fee Application satisfied the requirements
20 of *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183 (App. 1983) and established that
21 the Association’s fees are *prima facie* reasonable and the Association is entitled to the full
22 amount of fees it incurred and is responsible for paying. *See McDowell Mountain*, 216 Ariz.
23 at 270-71, ¶ 20.

24 In the face of such showing, the burden shifts to the party opposing the fee
25 application to prove that the fees requested are “clearly excessive”. *Id.*; *see also Geller v.*
26 *Lesk*, 230 Ariz. 624, 628, ¶ 11 (App. 2012), *as amended* (Sept. 26, 2012). If that party fails
27 to make such a showing, the prevailing party is entitled to “full payment of the fees.” *Geller*,
28 230 Ariz. at 628, ¶ 11. Any objection to a fee application must demonstrate – with
specificity – why the time spent or work performed was unnecessary or unreasonable – or

1 in this case, clearly excessive. *Nolan v. Starlight Pines Homeowners Ass'n*, 216 Ariz. 482,
2 490-91, ¶¶ 38-9 (App. 2007). General allegations (*i.e.*, too many lawyers, too much time,
3 etc.) are insufficient as a matter of law to rebut the showing made in a supported fee
4 application. *Cook v. Grebe*, 245 Ariz. 367, 370, ¶ 12 (App. 2018); *Inspiration Consol.*
5 *Copper Co. v. Ariz. Dep't of Revenue*, 147 Ariz. 216, 234 (App.1985) (party's assertions
6 that amount requested far exceeded its own fees without references to specified billing items
7 insufficient). Here, Plaintiff fails to satisfy his high burden.

8 **A. Quarles' Hourly Rates Are Reasonable and Not Clearly Excessive.**

9 It is well settled that the rate the Association agreed to pay Quarles for this matter is
10 presumptively reasonable. *See Schweiger*, 138 Ariz. at 187-88 (App. 1983) (“[I]n corporate
11 and commercial litigation between fee-paying clients, there is no need to determine the
12 reasonable hourly rate prevailing in the community for similar work *because the rate*
13 *charged by the lawyer to the client is the best indication of what is reasonable under the*
14 *circumstances of the particular case.*”) (emphasis added).⁶ Here, Plaintiff proclaims that
15 the billing rates charged by Quarles are too high “for HOA litigation” because Plaintiff’s
16 lawyers charged him a lower hourly rate, another local lawyer charges a lower hourly rate,
17 and the Association’s insurer agreed to a \$400 hourly rate. Resp. at 9. These arguments
18 cannot be sustained.

19 First, Plaintiff’s suggestion that this was a typical dispute between an HOA and a
20 resident (a lawsuit over non-payment of assessments, deficient home maintenance, etc.) is
21 simply wrong. This case was high stakes, shareholder-like corporate litigation which posed
22 an existential threat to the Association. Plaintiff attacked the Association’s ability to govern
23 under the controlling contracts and law, challenged a recall that was initiated by thousands
24 of petitions, and sought to disenfranchise more than 4,000 members who voted
25 overwhelmingly to remove him from office. Plaintiff mounted a signature-by-signature,
26

27 ⁶ *See also State v. Mecham*, 173 Ariz. 474, 485 (App. 1992) (“In [litigation] cases involving
28 [fee-paying clients], ‘the rate charged ... is the best indication of what is reasonable under
the circumstances of the particular case.’”) (quoting *Schweiger*, 138 Ariz. at 187–88);
McDowell Mountain, 216 Ariz. at 270-71, ¶ 20.

1 ballot-by-ballot challenge that forced the Association to comb through more than one
2 thousand Petitions to respond to Plaintiff’s allegations.⁷ In Plaintiff’s own words – “*It is*
3 *extraordinarily novel*”; “*Tom lodged novel legal issues without precedent*”. Resp. at 2, 4
4 (emphasis added).

5 Second, Plaintiff suggests that the rate charged by his lawyers (Dessaules Law) and
6 another lawyer (Kevin Harper) would have been more appropriate in this case. That another
7 law firm might agree to charge a lower rate is insufficient to overcome the presumption that
8 the agreed-upon rate between the Association and Quarles is reasonable, let alone that it is
9 clearly excessive. Dessaules Law and Mr. Harper’s firm are excellent firms, but different
10 from Quarles in size, geographic reach, scope of practice, overhead, and in multiple other
11 ways. Using those firms as a benchmark for comparison is inapt. A large national firm
12 would have been more appropriate, but Plaintiff chose not to do that because it would have
13 shown that the rates and charges are similar to those of Quarles.

14 Given the serious issues at stake, the Association turned to good lawyers at a national
15 law firm⁸ to represent the Association. Plaintiff cannot legitimately dispute the quality and
16 results of Quarles’ representation of the Association. Quarles’ rates are reasonable and
17 comparable to those of similar firms and are more than justified by the results achieved in
18 this litigation. The Association agreed to pay Quarles’ rates and charges, which establishes
19 *prima facie* reasonableness under *Schweiger*. The evidence submitted with the
20 Association’s Application compellingly affirmed that presumption. And a comparison with
21 a different type of firm cannot overcome that presumption and evidence.

22 Finally, Plaintiff asserts that the Association’s fees are too high because the
23 Association’s insurer agreed to pay \$400 per hour for another law firm. Resp. at 4-5. The
24 lower rate an insurer negotiates in exchange for a volume of referrals is not comparable to
25 rates charged for matters by national commercial firms whose practices are not dedicated

27 ⁷ See Plaintiff’s Bench Brief, at 5 (“Hundreds of emails that it is anticipated the Association
28 will hold up as signatures to a petition are vague and do not expressly manifest an intent to
sign a petition to ask for the recall election of Gusich.”).

⁸ Quarles has 13 offices and more than 550 attorneys working across the country.

1 to insurance defense. Rather, the principles stated in *Schweiger* and the evidence submitted
2 with the application are determinative. Here, the Association and Quarles agreed to the
3 stated rates and charges, and the Fee Application is well supported by the evidence
4 submitted therewith.

5 **B. The Attorneys' Fees Requested are Reasonable and Not Clearly**
6 **Excessive.**

7 Plaintiff generically challenges certain work performed by the Association's
8 lawyers, but none satisfy Plaintiff's heavy burden.

9 The Ekmark Firm's Fees. Plaintiff alleges that the fees charged by the Ekmark firm
10 were excessive because Ekmark is "paid a \$24,000 monthly retainer" in addition to the fees
11 identified in Ekmark's itemized statement of fees. Resp. at 11. That assertion is incorrect.
12 Mr. Ekmark is not on a \$24,000 monthly retainer with the Association; he charges by the
13 tenth of an hour. Ex. A, ¶¶ 2-3.

14 Plaintiff also takes issue with the Ekmark fees because tasks were billed for .1 of an
15 hour that Plaintiff feels could have been performed in "seconds". That gripe is unsupported
16 speculation, and particularly ironic given that Plaintiff's counsel charged .1 for similar tasks
17 numerous times. See Resp., Exhibit G. Billing in six-minute increments is a widely accepted
18 and standard practice in the legal profession; that is why Plaintiff's counsel charged him the
19 same way.

20 Plaintiff does not (because he cannot) identify any tasks performed in .1 increments
21 that were inappropriate or excessive. Indeed, such entries include reviewing court orders,
22 communications with the Association regarding the lawsuit, work on case filings, etc. The
23 only specific entry that Plaintiff challenges is one concerning mediation, which Plaintiff
24 erroneously suggests is improper because the parties did not mediate. As noted above, the
25 Association attempted in earnest to mediate, but Plaintiff backed out without explanation.
26 See Ex. A, ¶¶ 6-7.

27 The Quarles Fees. Plaintiff attaches a handful of exhibits and generally alleges that
28 the Quarles application "is excessive and unreasonable in time expended, staffing, and

1 hourly rates, and should be rejected entirely or reduced to no more than \$12,000.” Resp. at
2 15. Plaintiff’s objections are not specific and are substantively deficient.

3 The Document Production Tasks (Exhibit F.5). Plaintiff claims that it was improper
4 for the Association’s lawyers to seek to recover charges for gathering, reviewing, and
5 producing documents in response to two document requests because the documents were
6 requested pursuant to A.R.S. § 33-1805 and that statute does not contain a fee provision.
7 Whether or not A.R.S. § 33-1805 has a fee provision is irrelevant. Plaintiff used A.R.S.
8 § 33-1805 to conduct discovery for this case. It was completely appropriate for the Ekmark
9 and Quarles firms to include time expended in responding to those requests, including
10 reviewing the documents to be produced for their relevance to the claims and defenses at
11 issue as part of the defense costs incurred by the Association.

12 The Fee Application Tasks (Exhibit F.5). Plaintiff alleges that it was inappropriate
13 for four lawyers between the Ekmark and Quarles firms to work on the Fee Application and
14 the time was excessive. However, Plaintiff does not identify any specific time entries that
15 were excessive or duplicative, and it is not unreasonable for four lawyers to work on discrete
16 aspects of a fee application. And while Plaintiff dismisses it as a “standard document”, the
17 Fee Application required research regarding three different fee provisions, briefing,
18 affidavits, and numerous time entries from two law firms that need to be reviewed and
19 redacted for privilege.

20 The TRO and Preliminary Injunction Entries (Exhibit F.8). Plaintiff’s Exhibit F.8
21 references time entries for work performed related to Plaintiff’s request for temporary
22 restraining order, Plaintiff’s PI Application, and preparation for an evidentiary hearing.
23 Plaintiff argues that the time and staffing were “excessive,” but does not identify any
24 specific tasks that are supposedly excessive, duplicative or overstaffed. Plaintiff also takes
25 issue with the Association’s lawyers’ conferences with each other. But partners, associates,
26 and other lawyers on the same defense team have to communicate with one another. It
27 strains credulity to suggest that such communications should not have occurred, and that
28 consequently charges for that communication are unreasonable. Indeed, Plaintiff did not

1 identify any specific items that he contends were duplicative or unnecessary, and his own
2 lawyers charged for conferences among the lawyers on his team.⁹ As Plaintiff concedes,
3 this case involved “novel” legal issues that required thorough study, research, and briefing.
4 Plaintiff further mounted a signature-by-signature, petition-by-petition challenge that
5 required the Association to carefully review and evaluate thousands of signatures and
6 petitions. Such tasks were important for the Association to rebut Plaintiff’s allegations and
7 defend against the requested injunction.

8 The Motion to Dismiss Tasks (Exhibit F-6 and F-7). Exhibit F-6 and F-7 apparently
9 concern charges related to the Association’s successful Motion to Dismiss. Plaintiff alleges
10 that the work was overstaffed but again does not identify any specific tasks to support such
11 assertion. Resp. at 16. It is Plaintiff’s burden to demonstrate the fees requested are clearly
12 excessive. Generic allegations of overstaffing, duplication, the task took too long, and the
13 like are insufficient.¹⁰ The time incurred was essential given the complexity, novelty, and
14 gravity of the issues.

15 **V. PLAINTIFF’S COMPLAINT OF FINANCIAL HARDSHIP IS NOT**
16 **RELEVANT AND RINGS HOLLOW.**

17 Plaintiff claims that a proposed fee award would be “financially ruinous”. Resp. at
18 16. However, financial hardship is not a factor courts consider in evaluating a mandatory
19 fee award. That is, the claimed hardship is not a hatch from which to escape a mandatory
20 award under the CC&Rs and A.R.S. § 33-1813(A)(4)(f). *See Wharton v. JR Prop. Holdings,*
21 *LLC*, 2024 WL 938950, ¶ 31 (App. Mar. 5, 2024) (holding that it is reversible error for a
22 trial court to consider the financial hardship of the losing party in awarding attorneys’ fees
23 pursuant to a fee shifting contractual provision).¹¹

24 _____
25 ⁹ See Resp., Ex. G, at Ex. 1, entries dated 5/6/25 (Joseph Halow, “Meet internally to discuss
26 witnesses for hearing,”; Hilary Narveson, “Meet with D. Wood and J. Halow and discuss
27 upcoming hearing,”; David Wood, “Meeting with H. Narveson and J. Halow to outline our
28 known exhibits and witness subpoenas for the evidentiary hearing.”).

¹⁰ Plaintiff also includes Exhibits F-3 and F-4, but he provides no explanation as to their
contents or otherwise articulate a basis to challenge the entries.

¹¹ The Association cites to this unpublished decision for its persuasive value pursuant to
Ariz. R. Sup. Ct. 111(c)(1)(C).

1 Financial hardship is only a factor considered in whether to award fees under A.R.S.
2 § 12-341.01, but even in that case the party making that contention must prove that a fee
3 award would cause “extreme hardship”. *Associated Indem. Corp. v. Warner*, 143 Ariz. 567,
4 570 (1985); *Moedt v. Gen. Motors Corp.*, 204 Ariz. 100, 105, ¶ 19 (App. 2002).

5 Plaintiff paid his own attorneys over \$120,000 for their work in this case. *See Resp.*
6 *at 1*. This demonstrates his ability and willingness to invest significant financial resources
7 into a legal strategy that he chose to escalate at every turn. He understood the high-stakes
8 nature of this dispute and accepted the financial risks involved. As detailed above and in
9 the Ekmark Supplemental Declaration (Ex. A), the Association attempted to resolve the
10 matter in its early stages, but Plaintiff did not respond to such efforts. Instead, Plaintiff
11 pressed forward with his misguided attempt to challenge the results of a fair vote. Plaintiff
12 cannot now credibly argue that a fee award is unfair or unexpected.

13 **III. CONCLUSION.**

14 For the foregoing reasons and those stated in its Application, the Association
15 requests that the Court order that the Association be reimbursed for the attorneys’ fees
16 (\$353,388) and expenses (\$355.85) it incurred, for a total award of \$353,743.85.

17 RESPECTFULLY SUBMITTED this 4th day of September, 2025.

18 QUARLES & BRADY LLP
19 Renaissance One
20 Two North Central Avenue
21 Suite 600
22 Phoenix, AZ 85004-2391

23 By: /s/ Lauren Elliott Stine
24 Lauren Elliott Stine
25 Daniel G. Roberts

26 *Attorneys for Defendant Sun City Grand*
27 *Community Association, Inc.*

28 **FILED** with the Clerk of the Court this 4th day of September, 2025, and

EXHIBIT A

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11 *Attorneys for Defendant*

12 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
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14 THOMAS J. GUSICH, an individual,
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17 SUN CITY GRAND COMMUNITY
18 ASSOCIATION, INC., an Arizona
19 nonprofit corporation,
20 Defendant.

NO. CV2025-002634

**SUPPLEMENTAL DECLARATION
OF CURTIS S. EKMARK IN
SUPPORT OF DEFENDANT'S
APPLICATION FOR ATTORNEYS'
FEES AND COSTS**

(Assigned to the Hon. Jennifer Ryan-
Touhill)

21 I, Curtis S. Ekmark, declare as follows:

22 1. I am submitting this Supplemental Declaration in support of Defendant Sun
23 City Grand Community Association's ("Defendant" or the "Association") Application for
24 Attorneys' Fees and Costs (the "Application"). I am competent to testify to the matters
25 contained herein. This is a supplement to my Declaration dated August 1, 2025, and
26 attached as Exhibit B to the Application.

27 2. I am counsel for the Association. As indicated in my August 1, 2025
28 declaration my former firm, CHDB Law LLP ("CHDB Law"), billed time representing the
Association in the above-captioned action between October 28, 2024 and February 28,
2025. CHDB Law was not on a retainer with the Association. CHDB Law charged the
Association an hourly rate for the work that I and others performed on behalf of the

1 Association in connection with this litigation.

2 3. Ekmark Pecor Law billed time representing the Association in connection
3 with the litigation between March 1, 2025, and July 31, 2025. Ekmark Pecor Law was not
4 and is not on a retainer with the Association. Ekmark Pecor Law charged the Association
5 an hourly rate for the work that I and others performed on behalf of the association in
6 connection with the Litigation.

7 4. On October 28, 2024, I received a letter from Jonathan Dessaulles of
8 Dessaulles Law Group, which was sent on behalf of Plaintiff Thomas Gusich ("Plaintiff").
9 A complete and authentic copy of the October 28, 2024 letter is attached hereto as **Exhibit**
10 **1**.

11 5. On November 14, 2024, I received another letter from Mr. Dessaulles, which
12 was sent on behalf of Plaintiff, and discussed mediation, among other things. A complete
13 and authentic copy of the November 14, 2024 letter is attached hereto as **Exhibit 2**.

14 6. Between October 31, 2024, and January 2025, the Association and Plaintiff,
15 through their respective counsel, discussed and attempted to schedule mediation concerning
16 the claims and issues raised in Plaintiff's October 28 and November 14, 2024 letters. In
17 those communications, the Association conveyed that it was interested in and willing to
18 mediate with Plaintiff with either of the two mediators proposed by Plaintiff, and that the
19 Association would agree to pay the mediator's fees and costs incurred in connection with
20 such mediation.

21 7. Despite the Association's willingness to mediate with mediators selected by
22 Plaintiff and despite the Association's agreement to pay for the cost of the mediator,
23 Plaintiff ultimately did not follow up to schedule the mediation and instead filed the
24 Complaint on January 22, 2025.

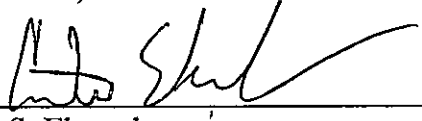
25 8. On March 23, 2025, the Association sent Plaintiff a settlement proposal. A
26 complete and authentic copy of that settlement proposal is attached hereto as **Exhibit 3**.
27 Plaintiff never responded to this proposal.

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I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

EXECUTED this 4th day of September, 2025.



Curtis S. Ekmark

EXHIBIT 1



Jonathan A. Dessaulles
jdessaulles@dessauleslaw.com

7243 North 16th Street
Phoenix, Arizona 85020
☎ 602.274.2360
dessaules.com

October 28, 2024

VIA EMAIL and FIRST-CLASS MAIL

Curtis Ekmark
CHDB LAW, LLP
1400 East Southern Ave., Suite 400
Tempe, Arizona 85282-5692
curtis.ekmark@chdblaw.com

Re: *Gusich adv. Sun City Grand Community Association, Inc.*

Dear Curtis:

As you know, we have been retained to represent Tom Gusich in the pending matter surrounding his alleged violation of the “Grand Standards of Behavior for Board Directors” purportedly adopted in April 2024 (the “Grand Standards”).¹

At the outset, please note our objection to the lack of due process or meaningful opportunity for Mr. Gusich to defend himself of these ridiculous charges. The Grand Standards, adopted (not coincidentally, it appears) just ten days after Mr. Gusich was elected to the Board of Directors, allow for escalating punishment of a director by other directors for violating the impermissibly vague and subjective standards of behavior foisted on him. It appears we are now at the second step, the public airing of the grievances, at which the other directors take turns excoriating Mr. Gusich in front of his friends and neighbors for breaching his fiduciary duty and harming the Association by asking questions about how the Association is managed, talking to those who provide services, and otherwise not doing things the way they want him to do things. It strikes us as defamatory and gratuitously malicious to hold an open meeting solely for the purpose of spelling out to the membership the various ways in which Mr. Gusich has breached his fiduciary duty to the Association. Those directors

¹ The version of the Grand Standards is neither signed nor dated, It also includes no place for a signature or date. The only version of the Grand Standards provided to our client, in fact, does not even appear to be a final, approved form as it contains what appears to be redlined edits. Please produce the official version of the Grand Standards immediately as well as any meeting minutes showing that it was adopted.

who speak or distribute materials to the membership, either at Thursday's meeting or otherwise, do so at their own peril.²

The second step of the Grand Standards mandate a show trial to gratuitously inform the membership about how bad Mr. Gusich is if he "continues to engage in damaging behavior." Although the Grand Standards contemplate in step one a "written list of the behaviors the Director is engaging in," Mr. Gusich was never provided that list. Nor was he invited to any board meeting that should have preceded punishment at either step one or step two. *McNally v. Sun Lakes Homeowners Ass'n #1, Inc.*, 241 Ariz. 1 (App. 2016). While we do appreciate it may be difficult to remember the pesky requirements of due process and the law when you're acting as prosecutor, judge, jury, **and** executioner on rules you have created and subjectively interpreted and applied, it looks far less malicious if the other board members actually followed the rules they created to legitimize their very public crusade of harassment and disparagement against Ms. Gusich (itself a violation of the same code of conduct). Mr. Gusich received formal notice of Thursday's hearing on late Friday afternoon. Even then, the notice lacks a bill of particulars or other documents one might expect for anything other than a show trial.

We offer the following in response to charges against him.

I. THE GRAND STANDARDS ARE INVALID, VOID, AND UNENFORCEABLE.

A. The Code of Conduct is an Ultra Vires Act that is Not Authorized By the Existing Declaration of Covenants, Conditions, and Restrictions.

The Declaration of Covenants, Conditions, and Restrictions for Sun City Grand, recorded with the Maricopa County Recorder's Office at Document Number 96-0491079, imposes restrictions on the use of property, not personal behavior. The Declaration is a contract between the Association and its members. *Ahwatukee Custom Estates Mgt. Ass'n v. Turner*, 196 Ariz. 631, 634, ¶5 (App. 2000). When interpreting a contract, "the words used will be given their normal ordinary meaning." *Korman v. Kieckhefer*, 114 Ariz.127, 129 (App. 1976). Courts generally apply a "standard of reasonableness." *Chandler Medical Bldg. Partners v. Chandler Dental Group*, 175 Ariz. 273, 277 (App. 1993).

² Please make sure that each director receives a copy of this letter as it includes a records preservation demand to make sure the directors do not delete, destroy, or alter evidence (intentionally or otherwise) that may be relevant in a future defamation action.

The Declaration provides that the Association “shall be the entity responsible for management, maintenance, operation, and control of the Area of Common Responsibility.” In its totality, Section 3.1 reads:

The Association shall be the primary entity responsible for compliance with and enforcement of this Declaration and such reasonable rules regulating use of the Properties as are adopted in accordance with the Governing Documents. The Association also shall be responsible for administering, monitoring compliance with, and enforcing the Design Guidelines after such time as the Declarant transfers its authority to enforce the Design Guidelines to the Association or when otherwise designated by the Declarant. The responsibilities of the Association may be delegated to committees or the Association may engage outside Persons to monitor and enforce this Declaration (including, without limitation, the Use Restrictions) and the Design Guidelines in accordance with policies established by the Board. The Association shall perform its functions in accordance with this Declaration, the By-Laws, the Articles, and Arizona law.

Nothing in Section 3.1 allows the Board of Directors to impose standards of behavior and penalize its members for violating those standards. A review of the rest of the Declaration fares no better for the Grand Standards. Article IV articulates the “rights and obligations of the Association.” They include, for example, the right to “acquire, hold, or dispose of tangible and intangible personal property and real property. Section 4.1. A review of the Use Restrictions in Article XII, surprisingly, reveals no power or right to impose behavior standards on board members or homeowners. After all, they are **use**, and not **behavior**, restrictions. And although Section 4.3 provides the Association “may exercise any right or privilege given to it expressly by this Declaration or the By-Laws or which may be reasonably implied from, or reasonably necessary to effectuate, any such right or privilege,” it is clear that no such express or implied right or privilege exists in the Declaration that might permit it to foist a code of conduct on its board members. Generally, the absence of any language expressly allowing the Board to adopt and enforce a code of conduct is fatal to the validity and enforceability of the Grand Standards.

As you know, and I’m sure you advised the Board, they have adopted a code of conduct that has no footing in the Declaration, Bylaws, or any other governing documents, rules or actions that are inconsistent with or contradict an entity’s foundational documents are considered *ultra vires* acts, meaning they are beyond the scope of the authority granted to the entity and are therefore void. *Lurie v. Arizona Fertilizer & Chem. Co.*, 101 Ariz. 482, 484-85 (1966) (actions taken by a corporation

that are beyond the powers granted to it are ultra vires); *Trico Elec. Co-op v. Ralston*, 67 Ariz. 358 (1948). The ultra vires doctrine which generally prohibits boards from doing exactly what this board did: engaging in activities beyond their authorized, enumerated, and even implied powers. *Id.*

The Board's power is not absolute. It has no more power to sanction a board member for his "behavior" or than it does for his clothing choices or hairstyles.

B. The Grand Standards Impose New Restrictions on Certain Members Untethered to the Original Declaration. It is a Clear Violation of *Kalway*, *Dreamland*, and *Shamrock*.

A handful of owners serving as the Board do not have the power to foist on other owners, including future board members, behavioral restrictions that find no authority in the original Declaration.

The Grand Standards impose entirely new restrictions on certain owners, namely board members, that did not exist before their adoption. As noted above, the restrictions spelled out in the Grand Standards are "entirely new and different in character, untethered to an original covenant." *Kalway v. Calabria Ranch HOA*, 252 Ariz. 532, ¶ 14 (2022). As the Arizona Supreme Court held "an HOA cannot create new affirmative obligations where the original declaration did not provide notice to the homeowners that they might be subject to such obligations." *Id.*; *Dreamland Villa Cmty. Club, Inc. v. Raimey*, 224 Ariz. 42, 50, ¶ 32 (App. 2010).

Kalway and *Dreamland* both dealt with attempts to amend the Declaration. In *Kalway*, the Arizona Supreme Court rejected the idea that fewer than all owners have the power to create such new restrictions:

Under general contract law principles, a majority could impose any new restrictions on the minority because the original declaration provided for amendments by majority vote. But allowing substantial, unforeseen, and unlimited amendments would alter the nature of the covenants to which the homeowners originally agreed. *See Dreamland*, 224 Ariz. at 51 ¶ 38. Thus, "[t]he law will not subject a minority of landowners to unlimited and unexpected restrictions on the use of their land merely because the covenant agreement permitted a majority to make changes to existing covenants." *Boyles v. Hausmann*, 246 Neb. 181, 517 N.W.2d 610, 617 (1994).

Kalway, ¶ 15; *see also Dreamland Villa*, ¶ 38.

Here, the Board attempted to add new restrictions via the adoption of a new rule. Such rules, however, are subject to the same requirements that are set forth in *Kalway*. If eighty percent of the owners are not allowed to adopt new restrictions, logic dictates that the handful serving on the board enjoy no greater luxury to foist new restrictions on the owners.

We recognize the Association adopted Bylaws in 2019 that purport to allow for the creation of a “Code of Conduct Committee.” However, the Court of Appeals held sixteen years earlier that new restrictions cannot be added via Bylaw or Rule. *Shamrock v. Wagon Wheel Park Homeowners Assn*, 206 Ariz. 42 (App. 2003).

C. The Grand Standards Purport to Impose Aspirational Behavioral Standards that are Vague, Ambiguous, and Subjective.

The Grand Standards add the following new restrictions (“GS _”):

1. “Directors shall act in good faith and in the best interests of the Association.”
2. “Directors shall act with civility at all times...conduct themselves at all times with civility and respect...[and] refrain from harassing or disparaging behavior.”
3. “Directors shall act as a unified body. No individual member of the Board shall be authorized to speak or act on behalf of the Board unless specifically authorized to do so in writing by the Board.”
4. “Directors will support the decisions of the majority of the Board regardless of the position the Director may have taken at the time of the vote. No Director may degrade the decisions of a majority of the Board, either verbally or in writing.”
5. “Directors shall not interfere with the day-to-day management of the Association.”
6. “Directors shall maintain confidentiality,” including with respect to matters (“contractual,” “financial,” “management”) that are not confidential under the Planned Community Act.

Because of the lack of information provided to Mr. Gusich regarding the nature of his violations of the Grand Standards, he has not been duly informed of which of the above provisions he has violated. Is he being accused of not acting “on good faith and in the best interests of the Association”? Not acting “civilly at all times”? Not acting as part of a “unified body”? That it is a majority of the Board who acts as judge, jury, and executioner with respect to any alleged violations of the Grand Standards, it would appear that a Board member, such as Mr. Gusich, could find himself in violation of the Grand Standards simply by disagreeing with the rest of the Board.

If three of five Board members decide it is in the best interests to double assessments, for example, the Grand Standards could be used to sanction a dissenting owner who disagrees and refuses to “support” the decisions of the majority. Because of the duty to act as a “unified body,” such a member could find himself or herself afoul of the Grand Standards simply for talking to his or her constituents or otherwise performing his or her fiduciary duty. In its *second* most absurdly undemocratic provision, the Grand Standards actually **require** Board members to “support the decisions of the majority regardless of the position the Director may have taken at the time of the vote.”³

Put simply, the Grand Standards muzzles dissenting Board members to “support,” and not “degrade,” the majority’s decision even if they believe the decision is not in the “best interests” of the Association. That strikes us as inconsistent with one’s fiduciary duty. If Mr. Gusich believes a Board decision is improper, illegal, in violation of the Association’s governing documents, and otherwise harmful to the Association, it would be a breach of his fiduciary duty to the Association to “support” and not “degrade” the decision. Indeed, a director who is attempting to comply with the Grand Standard 1 (“act in good faith and in the best interests of the Association”) very easily may find himself or herself in violation of GS 4 (“support the decisions regardless of the position the Director may have taken at the time of the vote”) if he speaks out against a decision, or does not “act civilly” (*e.g.*, use the tone of voice other board members find respectful, make a funny face while talking, or even talks too loud). It is impossible to reconcile blind adherence to the Grand Standards with a director’s fiduciary responsibility to the Association.

³ The first most absurdly undemocratic provision is GS 8 (“Directors may not endorse or comment on Board candidates during the election cycle. This includes comments made in writing or verbally”), followed by the third most undemocratic provision: the secret trials and public social execution. Since the Grand Standards were seemingly passed with the intention of providing board members a means for getting rid of an unwanted director who was duly elected, the Board’s full-throated embrace of anti-democratic tendencies is not particularly surprising.

We are aware of no law that requires all board members to “join the band,” so to speak, and support decisions that they, in good faith and in the performance of their fiduciary duties, opposed. Codes of Conduct are too often wielded as tools of oppression by boards to quell or silence opposition. The majority gets to decide who is violating it. The board gets to decide whether someone is acting “civilly,” with respect, or engaging in “harassing or disparaging behavior.”

Under your Grand Standards, a Board member can be found to be in violation simply for performing his fiduciary duties. If, for example, four of five board members vote, in a closed executive session, to take out a secured loan in the name of the Association and the fifth member believes such a loan is improper, illegal, in violation of the Association’s governing documents, and otherwise harmful to the Association and its members, he could easily find himself in violation of the Grand Standards if he does *any* of the following things:

- a. Speaks at the meeting in a way a majority of the others finds to be lacking “civility” or respect or with language or conduct the others deem not “professional” or is “harassing” or “disparaging.” (GS 2)
- b. Refuses, after a vote approving the loan, to “support” the outcome of the vote he still believes is improper, illegal, and harmful to the Association. (GS 4)
- c. Refuses to sign loan documents required by the decision. (GS 4)
- d. “Degrades” the decision by sharing his opinion with owners that he believes the decision is improper, illegal, and harmful to the Association. (GS 4)
- e. Even discloses anything about the executive session vote and deliberations. (GS 6)

The Grand Standards are too vague and ambiguous to put a director on notice of the specific conduct that might constitute a violation. Restatement (Second) of Contracts § 33 cmt. a) (“A contract provision is not enforceable “[i]f the essential terms are so uncertain that there is no basis for deciding whether the agreement has been kept or broken.”).

II. MR. GUSICH IS EXPECTED TO DEFEND HIMSELF, IN AN OPEN BOARD MEETING, BUT APPEARS HE HAS DELIBERATELY NOT BEEN PROVIDED SUFFICIENT INFORMATION TO DO SO.

We can only speculate as to what breaches the Board is alleging. We note that Rene Mitchell sent an email to some, but not all, homeowners, inviting them to attend a special meeting because Mr. Gusich has “repeatedly crossed the line by interfering with operational policy, exhibiting harassing behavior, personal attacks and making unfounded allegations.” The email offers no further details about these vague accusations other than to say “we” are asking Tom to:

- Stop interfering with operations
- Go immediately to the GM or BOD when concerned about policy violations
- Communicate in a civil and respectful way without using unfounded accusations.

Thus, Board Members have already begun defaming Mr. Gusich to his friends and neighbors. To the extent certain directors may be under the mistaken belief that an “open meeting” mandated by the Grand Standard might protect them from a defamation lawsuit, we trust you will inform them that is not the law. We also trust you will inform them of the potential for individual liability for their defamatory statements and that you will provide them with a copy of the attached decision in *Tarter v. Bendt*, 2021 WL 282265 (App. Jan. 28, 2021), in which the Court of Appeals upheld a jury verdict of \$150,000 for reputational harm, \$350,000 for emotional harm, and \$1 million in punitive damages against a homeowner for defaming a board member.

Please note Mr. Gusich does not consent to being defamed to the community, particularly on the basis of alleged Grand Standards violations that his accusers on the board are themselves violating. Mrs. Mitchell disclosed what the GS 6 describes as “confidential” information. Similarly, Mrs. Mitchell has violated GS 9 by engaging in “writing, publishing or speech making that defames any other member of the Board.”

Mr. Gusich has attempted to diligently carry out his duties as a Board member and fulfill his fiduciary duty to the Association. We have seen no evidence of any conduct that comes close to violating any valid restriction in the Declaration or Bylaws, acted

in bad faith, or otherwise not act in the best interests of the Association. It is the majority of the Board that is not.

The Board has a duty to act reasonably in the exercise of its enforcement powers. *See Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195 (App. 2007). The actions described above are not “reasonable” under any definition of the word.

III. LITIGATION HOLD DEMAND.

Based on the above, we believe litigation is not only foreseeable, but inevitable. We do not write this lightly as it is not Mr. Gusich’s intention or desire to sue. But the Board continues to apply an invalid and enforceable code of conduct against him, defaming him, and otherwise acting unreasonably. Legal action may be the only way to stop the targeted harassment of Mr. Gusich.

We hereby demand that each Board member and community manager preserves *all* documents, emails, or other records that relate to any of above issues. This demand extends to each Board member and community manager.

Please make sure they take affirmative steps to preserve and protect, and not destroy all documents, emails, text messages, social media messaging, and other documents. This preservation demand extends, but is not limited, to the following:

1. All computers or other devices on which data storage or communications can be facilitated (including laptops, phones, iPads or tablets);
2. Computers folders and files in any format saved on any computer or device;
3. Data storage devices, including but not limited to external hard drives and USB devices; and
4. All forms of paper or electronic communications, including but not limited to emails by, between, or among board members (including from personal, professional, or outside email accounts), posts on social media, text messages, direct messages, and any other form of online communications, messaging system or program.

We further demand that the Board members refrain from destroying, concealing, or altering evidence of any nature, in any way, and take affirmative steps to ensure that autodelete settings are turned off as of the receipt of this letter. If any of the Board

members have used an employer's or third-party email system or computers to communicate with other Board members, any vendor or potential vendor, we demand that that he or she inform their employer or the third-party of this litigation hold letter.

The failure to abide by the above may have legal consequences in any court case. We will pursue all available remedies for spoliation of evidence should this matter proceed to litigation and any evidence has not been preserved in contravention to the above preservation demand.

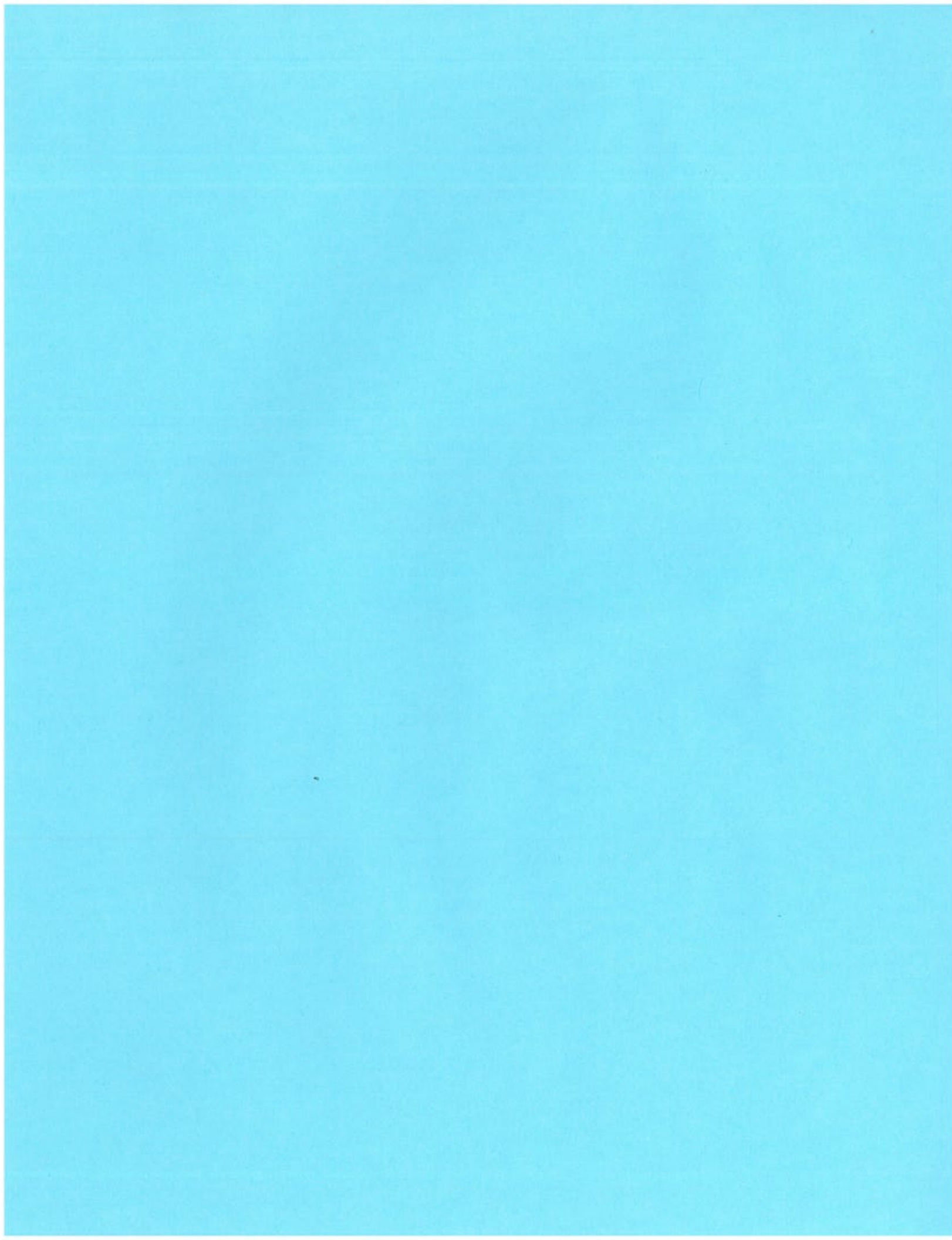
I will be in attendance at Thursday's open meeting if the Board intends to proceed with it. If you would like to talk before the meeting, feel free to give me a call.

Sincerely,

Jonathan A. Dessaulles

Jonathan A. Dessaulles

Enclosure





KeyCite Yellow Flag - Negative Treatment

Distinguished by [McCoy v. Hassen](#), Ariz.App. Div. 1, August 30, 2022

2021 WL 282265

Only the Westlaw citation is currently available.

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.

Court of Appeals of Arizona, Division 1.

Tim TARTER, et al., Plaintiffs/Appellees,

v.

Douglas BENDT, et al., Defendants/Appellants.

No. 1 CA-CV 19-0703

|

FILED 1/28/2021

Appeal from the Superior Court in Maricopa County No. CV2015-002596, The Honorable [Margaret R. Mahoney](#), Judge, **AFFIRMED**

Attorneys and Law Firms

Richards & Moskowitz, PLC, Phoenix By [William A. Richards](#), Shayna Gabrielle Stuart Counsel for Plaintiffs/Appellees

Jones Skelton & Hochuli, PLC, Phoenix By [Lori L. Voepel](#), Petra Lonska Emerson Counsel for Defendants/Appellants

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

MEMORANDUM DECISION

[MORSE](#), Judge:

*1 ¶1 Sonia and Douglas Bendt (“Bendts”) appeal the jury verdict for defamation in favor of Tim and Christina Tarter (“Tarters”). For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 The Bendts are a married couple who purchased a condominium in the Fairway Lodge community (“Fairway”)

in 2008. The Tarters are also a married couple who have lived in Fairway since 2013.

¶3 Fairway is a luxury condominium complex governed by a homeowner's association board (“Board”). Homeowners must pay \$795 monthly dues to the homeowner's association (“HOA”). Mr. Tarter and the Bendts ran in the 2013 HOA election. Mr. Tarter won a seat, and his fellow board members elected him president for 2014. During Mr. Tarter's term as HOA president, Mrs. Bendt launched a campaign, including a newsletter emailed to fellow HOA residents, attacking Mr. Tarter's reputation and his handling of the HOA presidency. The Tarters filed suit for defamation.

¶4 The Tarters' complaint identified many disparaging statements made by Mrs. Bendt in her July newsletter. The Tarters alleged that Mrs. Bendt's assertions were defamatory and caused her readers to falsely believe that: (1) Mr. Tarter lacked ethics and/or behaved unethically or illegally; (2) Mr. Tarter concealed material financial information from the HOA members; (3) Mr. Tarter misled HOA members and acted unlawfully; (4) Mr. Tarter conducted and facilitated “secret” Board meetings; and (5) Mr. Tarter wrongfully overspent HOA funds which would cause an increase in monthly HOA fees. Based on our review, at trial the parties focused on: (1) whether Mr. Tarter was asked to resign from the Board; (2) an \$8,000 payment to an exterminator; (3) a tree removal; (4) the Board's executive sessions; (5) \$40,000 in alleged overspending; and (6) the monthly HOA fees.

¶5 The Tarters introduced evidence that Mrs. Bendt called Mr. Tarter “idiot,” “fool,” “spineless,” “disgusting,” “chicken shit,” “lowlife,” “low-class sneak,” “unethical,” “lazy,” “weak,” and “a complete fake” in front of fellow HOA members. Additionally, Mrs. Bendt wrote emails calling Mrs. Tarter, whom she had never met, “a bitch” and a “drinking dog walker.” Mrs. Bendt also disparaged Mr. Tarter's legal education, insulted his alma matter, referred to him as a habitual liar, and unethical. Mrs. Bendt accused Mr. Tarter of violating his attorney ethical obligations, and wrote that he could be disciplined by the Arizona State Bar and investigated by the Attorney General (“AG”).

¶6 After an eight-day trial, the jury awarded the Tarters \$150,000 for reputational harm, \$350,000 for emotional harm, and \$1 million for punitive damages. The superior court awarded a further \$20,120.42 in taxable costs.

¶7 The superior court denied the Bendts' motions for judgment as a matter of law and a new trial. The Bendts timely appealed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and -2101(A)(1).

DISCUSSION

I. Sufficiency of the Evidence – Actual Malice.

¶8 The parties stipulated that Mr. Tarter, as the HOA president, was a limited purpose public figure. Thus, the Tarters were required to prove that Mrs. Bendt's defamatory statements were “made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). The Bendts assert that insufficient evidence was presented to prove “actual malice,” Mrs. Bendt reasonably believed certain claims about Mr. Tarter were true, and other claims were true or opinion.

*2 ¶9 Whether sufficient evidence supports a jury finding of “actual malice” is a “mixed question of law and fact subject to independent appellate review.” *Dombey v. Phx. Newspapers, Inc.*, 150 Ariz. 476, 486, 724 P.2d 562 (1986) (citing *Bose Corp. v. Consumers Union*, 466 U.S. 485, 511, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984)). In performing an “independent appellate review,” we “must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity.” *Id.* (quoting *Bose*, 466 U.S. at 514, 104 S.Ct. 1949). Our supreme court directs us that the “failure to investigate is not reckless disregard per se, but it provides some evidence of actual malice when the facts confronting defendant are such that no reasonable person would fail to investigate.” *Id.* at 487, 104 S.Ct. 1949 (first citing *St. Amant v. Thompson*, 390 U.S. 727, 731-32, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968); then citing *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1569 (D.C. Cir. 1984)). Finally, “[a]bsent an admission by the defendant that he knew his material was false or that he doubted its truth, a public figure must rely on circumstantial evidence to prove his case.” *Id.* (citation omitted).

¶10 The Bendts argue that “independent review” means de novo review and we should resolve factual disputes in their favor. But independent review is not equivalent to de novo review of all facts and issues. *Bose*, 466 U.S. at 514 n.31, 104 S.Ct. 1949; see also *Mandel v. Boston Phx., Inc.*, 456 F.3d 198, 208 (1st Cir. 2006) (“Independent review is not

a limitless ransacking of the record as a whole.”); *Smith v. Anonymous Joint Enter.*, 487 Mich. 102, 793 N.W.2d 533, 540 (Mich. 2010) (“Likewise, an appellate court should not conduct an independent review of credibility determinations, disregard findings of fact, or create new findings of fact.”). Instead, “the reviewing court must 'examine for [itself] the statements in issue and the circumstances under which they were made to see ... whether they are of a character which the principles of the First Amendment ... protect,'” but “credibility determinations are reviewed under the clearly-erroneous standard because the trier of fact has had the 'opportunity to observe the demeanor of the witnesses’” *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989) (first quoting *New York Times*, 376 U.S. at 285, 84 S.Ct. 710; then quoting *Bose*, 466 U.S. at 499-500, 104 S.Ct. 1949). Thus, our role is to “examine for ourselves' the factual record in full” and “accord credibility determinations the special deference to which they are entitled” *Newton v. Nat'l Broad. Co., Inc.*, 930 F.2d 662, 671 (9th Cir. 1990) (quoting *New York Times*, 376 U.S. at 285, 84 S.Ct. 710) (reading “*Bose* and *Harte-Hanks* as creating a 'credibility exception' to the *New York Times* rule of independent review”).¹

A. The Alleged Statements Were Provable as False.

¶11 On appeal, Mrs. Bendt asserts that her speech was opinion, used hyperbolic language, and was protected political speech. The Tarters assert part of this argument was waived. We assume without deciding that the Bendts preserved the issue.

¶12 “A statement regarding matters of public concern must be provable as false before a defamation action can lie.” *Turner v. Devlin*, 174 Ariz. 201, 205, 848 P.2d 286 (1993) (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16, 19-20 & n.6, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990)). We recently identified a three-factor test to determine whether a statement reasonably implies an assertion of objective fact rather than mere opinion or argument: “(1) whether the general tenor of the entire work negates the impression that the defendant was asserting an objective fact; (2) whether the defendant used figurative or hyperbolic language that negates that impression; and (3) whether the statement in question is susceptible of being proved true or false.” *Rogers v. Mroz*, — Ariz. —, —, 2020 WL 7223312, *9, ¶ 46 (App. Dec. 8, 2020) (citing *Obsidian Fin. Grp., LLC v. Cox*, 740 F.3d 1284, 1293-94 (9th Cir. 2014)).

*3 ¶13 In assessing the publication, the court must consider the totality of the circumstances and take the average reader or listener's viewpoint. *Phx. Newspapers, Inc. v. Church*, 103 Ariz. 582, 587, 447 P.2d 840 (1968) (finding editorial printed on the newspaper's front page was libelous per se).

¶14 Here, Mrs. Bendt made her statements in her newsletter titled "Fairway Times at the Biltmore" and described as an "independent newsletter." Although some newsletter statements identified in the complaint are not provably false, see *Pinal County v. Cooper*, 238 Ariz. 346, 351, ¶ 18, 360 P.3d 142 (App. 2015) (statement that someone should be fired is "not susceptible to proof of objective falsity"), several statements allege a provable statement of fact rather than opinion. For example, the complaint alleges that Mrs. Bendt wrote that (1) the HOA Board held a "secret meeting," (2) the Board violated the HOA's covenants, conditions, and restrictions ("CC&Rs"), (3) Mr. Tarter failed to provide timely notice of HOA meetings, and (4) owners faced "a serious monthly HOA fee increase due to [the Board's] overspending." Mrs. Bendt made similar statements in her September 2014 newsletter, including that the Board (1) violated CC&Rs, (2) failed to communicate with owners, (3) spent HOA funds without proper authorization, (4) had overspent by \$40,000, and (5) caused an imminent HOA fee increase. Whether Mr. Tarter or the Board committed these actions could be proved false.²

¶15 Although Mrs. Bendt's newsletter used hyperbolic language, other statements asserted facts and were believable. Indeed, the jury heard testimony that other HOA members interpreted Mrs. Bendt's accusations as fact. See *Yetman v. English*, 168 Ariz. 71, 80, 811 P.2d 323 (1991) (describing "important" evidence at defamation trial was the testimony of reporter who interpreted the remark as a defamatory accusation and expert witness opinions "that the remark was susceptible to the interpretation"); cf. *Rogers*, — Ariz. at —, 2020 WL at *8, ¶¶ 42-43 (holding that summary judgment should be granted when the plaintiff presents no evidence that reasonable listeners may interpret statements as implying an objective, verifiable defamatory fact). Considering the totality of the circumstances, we find that a reasonable person could interpret the newsletter's assertions as factual rather than hyperbolic, and it was proper to let the jury decide the issue. See *Yetman*, 168 Ariz. at 78-79, 811 P.2d 323 (holding that jury should determine whether ambiguous statements are fact or opinion).

¶16 Finally, the accusations are ones that could bring Mr. Tarter "into disrepute, contempt, or ridicule, or ... impeach [his] honesty, integrity, virtue, or reputation." *Godbehere v. Phx. Newspapers, Inc.*, 162 Ariz. 335, 341, 783 P.2d 781 (1989). Thus, they are actionable as defamatory. See *Dube v. Likins*, 216 Ariz. 406, 419, ¶¶ 45-46, 167 P.3d 93 (App. 2007) (finding "statements that [plaintiff] committed an 'indiscretion' or 'transgressions' in a way that was 'unauthorized' or 'contrary to [his] specific instructions'" were actionable as defamatory).

¶17 We note that in their opening brief, the Bendts did not contest that the false assertions about an imminent HOA fee increase were defamatory and made with actual malice. This Court will generally "uphold a general verdict if evidence on any one count, issue or theory sustains the verdict." *Murcott v. Best W. Int'l, Inc.*, 198 Ariz. 349, 361, ¶ 64, 9 P.3d 1088 (App. 2000). But a defamatory assertion can be "true" when not every detail is literally accurate; rather, the statement, as a whole, must be "substantially true." *Read v. Phx. Newspapers, Inc.*, 169 Ariz. 353, 355, 819 P.2d 939 (1991). Thus, we "make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Milkovich*, 497 U.S. at 17, 110 S.Ct. 2695 (quoting *Bose*, 466 U.S. at 499, 104 S.Ct. 1949).

B. The Jury Could Reasonably Find the Statements False.

*4 ¶18 On appeal, the Bendts claim that some of Mrs. Bendt's statements, such as the ones about the CC&Rs, the exterminator contract, the resignation, and the \$40,000 overspending, were true.

¶19 Substantial truth is an absolute defense in a defamation action. *Fendler v. Phx. Newspapers Inc.*, 130 Ariz. 475, 479, 636 P.2d 1257 (App. 1981). "Slight inaccuracies will not prevent a statement from being true in substance, as long as the 'gist' or 'sting' of the publication is justified." *Sign Here Petitions LLC v. Chavez*, 243 Ariz. 99, 107-108, ¶ 30, 402 P.3d 457 (App. 2017) (quoting *Read*, 169 Ariz. at 355, 819 P.2d 939). However, we must "resolve every conflict in the evidence and draw every reasonable inference in favor of the prevailing party." *St. Joseph's Hosp. & Med. Ctr. v. Reserve Life Ins. Co.*, 154 Ariz. 307, 312, 742 P.2d 808 (1987). The jury's role was "to determine factually whether an allegedly defamatory statement is true," *Fendler*, 130 Ariz. at 479, 636 P.2d 1257, and we will not reweigh the evidence on appeal, *Whitemore v. Amator*, 148 Ariz. 173, 175, 713 P.2d 1231

(1986). *Cf. also Rogers*, — Ariz. at —, 2020 WL at *7, ¶¶ 36, 40 (holding that summary judgment is appropriate when undisputed facts show alleged defamatory statements are substantially true).

¶20 Mr. Tarter, the past HOA president (“Moe”), the HOA Treasurer (“Steve”), and another Board member (“Deborah”) each testified that some or all of the statements were false. The jury also heard testimony that in 2015 the Board hired an independent audit firm to audit the HOA’s records, and the audit found “zero deficiencies.” To the extent there was a conflict in the evidence between Mrs. Bendt’s and other witnesses’ testimony, the jury resolved the conflict in favor of the Tarters and the jury’s determination was not clearly erroneous. *See Harte-Hanks*, 491 U.S. at 688, 109 S.Ct. 2678. The evidence, and the reasonable inferences therefrom, are sufficient to allow a reasonable jury to find the statements were false. *See Fendler*, 130 Ariz. at 479, 636 P.2d 1257.

¶21 The Bendts also claim on appeal that Mrs. Bendt’s statements about “secret meetings” were justified because the Board’s “executive sessions” violated Arizona’s open meeting law, and her criticisms were understood in the context of Fairway’s tradition of openness. The Tarters assert that these arguments are waived because the Bendts failed to raise them before the superior court. Assuming the Bendts adequately preserved the issue, sufficient evidence supports the jury’s determination. While the Bendts might disagree with the testimony of Mr. Tarter, Moe, Deborah, and Steve, or point to conflicting evidence, the jury could have reasonably found the statements about “secret meetings” and the “CC&R violations” related to meetings were false. We do not reweigh the evidence on appeal. *Whittemore*, 148 Ariz. at 175, 713 P.2d 1231.

C. The Jury Could Reasonably Find that Mrs. Bendt Acted with Reckless Disregard for the Truth.

¶22 Mrs. Bendt also asserts that she subjectively believed her statements were true, as they were supported by personal knowledge, information from trusted sources, and her research. She argues she relied on information from fellow HOA members, primarily Steve and Moe, and, thus, reasonably believed that certain defamatory statements were true. *See New York Times*, 376 U.S. at 287-88, 84 S.Ct. 710 (finding that defendants reasonably believed publication was true when they relied on the good word of reputable individuals). Mrs. Bendt claimed she relied on these individuals when she published that the HOA was “\$40,000 in the hole” and that the Board violated the CC&Rs.

*5 ¶23 If her claims were true, the Bendts might be entitled to relief. But the jury heard evidence that conflicted with her claims of reasonable reliance. Steve denied telling Mrs. Bendt about the HOA financials or about supposed secret meetings. He also presented an alternative characterization of the \$40,000 budget issue. Moe testified he did not think Mr. Tarter violated the CC&Rs in the tree removal matter, he never said so to Mrs. Bendt, and he did not recall passing information to her about the exterminator contract. Mrs. Bendt also claimed she relied on information from the HOA property manager about the exterminator contract and that Mr. Tarter lied during an HOA meeting about the property manager. But the property manager’s testimony supported Mr. Tarter’s version of events. Finally, Mrs. Bendt claimed Steve told her that Mr. Tarter and three other members of the Board had been asked to resign from the Board. But Steve testified that he did not ask anyone to resign. Mrs. Bendt admitted in her testimony that she had no confirmation whether her written statements about the resignations were true. In this light, we see no reason to second guess the factfinder’s rejection of Mrs. Bendt’s reasonable reliance claims. *See Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1070-71 (5th Cir. 1987) (noting courts have upheld actual malice findings when “the supposed source of the story disclaimed giving the information”).

¶24 Mrs. Bendt also asserts that she subjectively believed her comments about the alleged \$40,000 deficit. But Mrs. Bendt admitted that she never reviewed the HOA’s financial reports that were available to members. *See Dombey*, 150 Ariz. at 487, 724 P.2d 562 (noting that the failure to investigate “provides some evidence of actual malice”). And during the trial, Mrs. Bendt admitted that her statements regarding the \$40,000 deficit in her September 2014 newsletter were incorrect. Although Mrs. Bendt testified she sent a correction, she did not introduce a copy of the retraction nor provide a date on which it issued. Moreover, all of this occurred several months after Mrs. Bendt’s original statements regarding the deficit in July. *See Schwartz v. Worrall Publ’ns, Inc.*, 258 N.J.Super. 493, 610 A.2d 425, 431 (N.J. App. 1992) (noting “the failure to promptly retract may be relevant in evaluating” motive); *cf. Zerangue*, 814 F.2d at 1071 (noting that “a readiness to retract tends to negate ‘actual malice’”). The delay reduces the correction’s relevance. *See Glover v. Herald Co.*, 549 S.W.2d 858, 861 (Mo. 1977) (“[A]ctual malice is to be measured at the time of publication[.]”). Further, the absence of the correction from our record limits its mitigation value. *See Boswell*

v. Phx. Newspapers, Inc., 152 Ariz. 9, 19, 730 P.2d 186 (1986) (recognizing that a retraction could be considered in mitigation of damages). Thus, correction notwithstanding, the jury remained free to believe or disbelieve Mrs. Bendt's assertions that she subjectively believed her statements about the alleged \$40,000 deficit. See *Dombey*, 150 Ariz. at 490, 724 P.2d 562 (“Credibility determinations, the weighing of the evidence and the drawing of legitimate inferences are jury functions.” (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)); see also *Boswell v. Superior Court*, 125 Ariz. 307, 308, 609 P.2d 577 (1980) (holding the “sufficiency of a correction is a question of fact” for the jury). Additionally, the jury could consider that Mrs. Bendt's correction only covered one of the alleged defamatory statements. See *Dombey*, 150 Ariz. at 489, 724 P.2d 562 (failure to print retraction “may indicate the presence of actual malice”).

¶25 In short, the jury received sufficient evidence to find that Mrs. Bendt defamed Mr. Tarter with actual malice. As the superior court noted in its order denying the Bendt's post-judgment motions, “the trial evidence which established these challenged areas was more than sufficient under the law; in fact, it was both abundant and compelling.” See also *Soto v. Sacco*, 242 Ariz. 474, 478, ¶ 8, 398 P.3d 90 (2017) (recognizing that a trial judge plays a role akin to a “ninth juror” when ruling on a motion for new trial).

II. Evidentiary Issues.

¶26 At trial, the parties disputed the admissibility of some of Mrs. Bendt's emails. Those emails did not discuss the Tarters, were sent either before or after Mr. Tarter's term as president, and contained allegedly prejudicial character evidence. The Bendts also assert the court erred by admitting limited evidence of two prior lawsuits. “We will not disturb a trial court's rulings on the exclusion or admission of evidence unless a clear abuse of discretion appears and prejudice results.” *Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 506, 917 P.2d 222 (1996).

A. The Motions in Limine.

*6 ¶27 On appeal, the Bendts assert that the court erred by denying their motions in limine. In 2018, the Bendts filed six motions in limine to exclude numerous emails under various evidentiary theories, including prejudice. The motions listed 207 different proposed exhibits, but provided no content or analysis. After a hearing, the court denied the motions, noting the emails' admissibility was addressed in a prior 2016 ruling.

The Bendts moved for reconsideration, arguing that the 2016 ruling only addressed exclusion based on timely disclosure.

¶28 At a second hearing, defense counsel estimated she was seeking exclusion of a thousand pages of exhibits. The court denied the motion for reconsideration, noting that it did not find the motions in limine well-taken and that the court lacked information on the thousand pages of proposed exhibits to grant the motions. As the superior court explained, “that is not how a motion in limine works.” Defense counsel asked if the court's minute entry denying the motion would affirmatively allow the defense to “raise [Rule] 403 objections at trial.” The court declined to give “an advisory ruling about something that may happen at trial.” Later, the court noted that the defense could make specific objections under *Arizona Rule of Evidence (“Rule”) 403*, and granted a defense request to limit the use of an email with a racial slur.

1. Waiver.

¶29 “A properly filed motion *in limine* preserves appellant's objections on appeal without need for further objection if it sets forth specific grounds for the objections.” *Gibson v. Gunsch*, 148 Ariz. 416, 417, 714 P.2d 1311 (App. 1985). In determining whether a motion in limine has preserved an issue on appeal, “[t]he essential question is whether or not the objectionable matter is brought to the attention of the trial court in a manner sufficient to advise the court that the error was not waived.” *State v. Briggs*, 112 Ariz. 379, 382, 542 P.2d 804 (1975). We agree with the superior court that the Bendts' motions in limine were “improper.” The motions were overly broad, failed to make an argument or cite authority as to specific emails, and, thus, failed to bring issues to the court's attention in a manner allowing redress. See *State v. Lichon*, 163 Ariz. 186, 189, 786 P.2d 1037 (App. 1989) (holding that a perfunctory motion in limine considered in summary fashion did not preserve the issue for appeal). The motions in limine did not preserve blanket objections to all emails sent to third parties.

¶30 In their briefs, the Bendts identify 23 admitted exhibits they assert contain inadmissible evidence. The Bendts assert that “the trial court legally erred by not balancing *Rule 403* factors on the record for the appellate court to assess.” Yet for most of these exhibits the Bendts made no objection to prompt the court to make such a ruling. Indeed, it was defense counsel who moved for admission of Exhibit 254, which they now describe as “particularly troubling.” The Bendts' failure to file a proper motion in limine or object at trial deprived the court of a meaningful opportunity to consider the evidentiary

issues. See *Starkins v. Bateman*, 150 Ariz. 537, 544, 724 P.2d 1206 (App. 1986) (finding failure to lodge contemporaneous or continuing objection waived issue). Thus, in large part, the Bendts have failed to preserve this issue for appeal.

2. Exhibit 246.

¶31 At trial, the Bendts objected to Exhibit 246 on the ground that it was cumulative but do not reassert that argument on appeal. An “objection on one ground does not preserve the issue on another ground.” *State v. Lopez*, 217 Ariz. 433, 434, ¶ 4, 175 P.3d 682 (App. 2008). Thus, the Bendts did not preserve the objections to Exhibit 246.

3. Exhibit 13.

*7 ¶32 During the trial, the defendants objected to Exhibit 13. The transcript did not record the bench conference where the court and counsel discussed the objection. On appeal, the Bendts assert the exhibit was inadmissible under Rules 401, 403, and 404.

¶33 Evidence is relevant if it has any tendency to make a fact of consequence more or less probable than it would be without the evidence. Ariz. R. Evid. 401. In general, all relevant evidence is admissible, Ariz. R. Evid. 402, but may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, Ariz. R. Evid. 403. Furthermore, evidence of a person's character is not admissible to prove action in conformity therewith. Ariz. R. Evid. 404(a). Likewise, evidence of other acts is not admissible to prove character in conformity with those acts but may be admitted to prove motive, opportunity, or intent, among other things. Ariz. R. Evid. 404(b)(1)-(2).

¶34 Exhibit 13 consists of emails written by Mrs. Bendt to third parties disparaging other Board members, calling them “ridiculous,” “resentful,” “abrasive,” “arrogant,” “rude,” “sleazy,” “lower class,” “bottom feeders,” and a false accusation that one member was having an affair. The exhibit was relevant to rebut the defense's theory that Mrs. Bendt's defamatory statements were directed at problems in the community rather than at Mr. Tarter and other Board members personally. See *Harte-Hanks*, 491 U.S. at 667-68, 109 S.Ct. 2678 (“Although courts must be careful not to place too much reliance on such factors, a plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence, and it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry.” (citations omitted)). The exhibit was additionally

relevant to the Tarters' punitive damages claim. See *infra* ¶ 62; see also *Forquer v. Pinal County*, 22 Ariz. App. 266, 270, 526 P.2d 1064 (1974) (noting that “statements made by the tortfeasor following the accident showing malice or hostility, may be admissible on the issue of punitive damages”).

¶35 Although the exhibit included evidence of other acts of potential defamation, the exhibit was not used to show action in conformity. There was no dispute that Mrs. Bendt wrote the defamatory emails, the issue was whether she wrote them with actual malice. To that end, the exhibit was admissible to show Mrs. Bendt's motive and intent. See *Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 499, 733 P.2d 1073 (1987) (noting that when the defendant “did not deny its acts nor allege that they were unintentional,” testimony of past practices was still “relevant and admissible to prove [defendant's] improper motives”). Additionally, in a defamation case, the “meaning of words and statements should not be construed in isolation; rather, consideration should be given to the context and all surrounding circumstances, including the impression created by the words used and the expression's general tenor.” *Burns v. Davis*, 196 Ariz. 155, 165, ¶ 39, 993 P.2d 1119 (App. 1999); see also *Restatement (Second) of Torts* § 563 cmt. d (1977) (“The context of a defamatory imputation includes all parts of the communication that are ordinarily heard or read with it.”). Finally, we do not find the exhibit's relevance outweighed by any undue prejudice, especially when the jury received other evidence of these statements. See *Pub. Serv. Co. of Okla. v. Bleak*, 134 Ariz. 311, 322, 656 P.2d 600 (1982) (finding no prejudicial error where the statement “was merely cumulative to other evidence properly admitted”).

*8 ¶36 Thus, the Bendts have not demonstrated that the superior court abused its discretion in admitting the disputed exhibits.

B. Evidence of Other Lawsuits.

¶37 At trial, the jury heard testimony about two other lawsuits; one between the Bendts and the Fairway developer, and one by the Bendts against the 2016 HOA Board. The Bendts claim the trial court erred in either admitting the evidence of the prior lawsuits or, alternatively, not allowing the Bendts to introduce evidence of the second lawsuit's resolution. The Bendts' opening brief provides no discussion of the first lawsuit. Thus, we do not consider it. *Lohmeier v. Hammer*, 214 Ariz. 57, 64, ¶ 26 n.5, 148 P.3d 101 (App. 2006) (noting failure to develop an argument in opening brief will result in waiver). The Bendts argue the second lawsuit's result was admissible to show the bias of witnesses Deborah and the

successor HOA President (“Dan”). We review the trial court’s determination of relevance for an abuse of discretion. *State v. Kiper*, 181 Ariz. 62, 65, 887 P.2d 592 (App. 1994).

¶38 During the cross-examination of Dan, the superior court sustained the plaintiff’s objection to the admission of the minute entry from the 2016 lawsuit but permitted defense counsel to use Dan’s deposition in the 2016 lawsuit for impeachment purposes. See Ariz. R. Evid. 801(d)(1)(B)(i). The Bendts did not attempt to introduce the lawsuit during Deborah’s testimony. On appeal, the Bendts assert that it was error not to allow evidence of the case resolution “despite having allowed Bendts’ counsel to question [Dan] about his deposition in that matter.” The Bendts cite no legal authority to support this argument. The superior court found the 2016 lawsuit’s resolution irrelevant to the issue of defamation in 2014. We agree.

III. Evidence of Insurance.

A. Testimony.

¶39 The Bendts assert the superior court committed reversible error by admitting evidence of the Bendts’ insurance policy. Evidence that a person is insured against liability is not admissible to prove whether the person acted negligently or wrongfully, but it may be admitted for other purposes. See Ariz. R. Evid. 411. We review the superior court’s admission of evidence regarding insurance for an abuse of discretion. *Webb v. Webb*, 151 Ariz. 461, 465, 728 P.2d 680 (App. 1986). We will not disturb the admission of evidence “unless a clear abuse of discretion appears and prejudice results.” *Gemstar*, 185 Ariz. at 506, 917 P.2d 222.

¶40 The Bendts filed a motion in limine to exclude any reference to their liability insurance. The Tarters opposed, arguing that Mrs. Bendt considered the insurance coverage a shield allowing her to defame fellow HOA members and that the evidence could be admissible to show motive or intent. The court reserved ruling on the motion, noting there are “purposes for which it can properly be introduced.”

¶41 During opening statements, defense counsel told the jury that a key issue would be whether Mr. Tarter reasonably suffered fear, anxiety, or other emotional responses to Mrs. Bendt’s alleged defamatory statements. During Mr. Tarter’s cross-examination, defense counsel elicited from him that despite Mrs. Bendt’s statements that he could be disciplined by the Arizona State Bar and investigated by the AG, he is unaware if she ever actually reported him.

*9 ¶42 Dan testified that during his term as president, Mrs. Bendt made false reports about him multiple times to the California State Bar and instigated an unjustified AG investigation. On cross-examination, defense counsel asked Dan whether he had sued Mrs. Bendt for defamation. Dan said he had not. At a bench conference during the redirect examination of Dan, plaintiff’s counsel informed the court he intended to ask Dan why he had not sued Mrs. Bendt for defamation and expected the answer would be that Mrs. Bendt had a defamation insurance policy. Defense counsel objected on relevance and Rule 411 grounds. The superior court noted that defense counsel had “asked a very dangerous question” and found defense counsel had opened the door. The court and defense counsel then crafted a limiting instruction to be given to the jury after the anticipated answer.

¶43 When plaintiff’s counsel asked Dan why he did not file a defamation suit against Mrs. Bendt, Dan testified that one reason “was that it was known in the community that Mrs. Bendt had a \$2 million defamation insurance policy. And you’d have to have a lot of resources to stay in court for three, four years to fight and prove your point that you were defamed against an insurance company.” Defense counsel did not object to Dan’s reference to the policy’s amount. The court then gave the jury a limiting instruction.

¶44 When a defendant voluntarily makes evidence of the defendant’s insurance relevant, evidence of such insurance is admissible. *N. Ariz. Supply Co. v. Stinson*, 73 Ariz. 109, 112-13, 238 P.2d 937 (1951); see *Anderson Aviation Sales Co. v. Perez*, 19 Ariz. App. 422, 428, 508 P.2d 87 (1973) (finding answer on cross-examination that included insurance when discussing circumstances in which the witness would rent aircraft did not constitute grounds for mistrial). Here, the defense’s question opened the door and made the existence of insurance relevant. See *Pool v. Superior Court*, 139 Ariz. 98, 103, 677 P.2d 261 (1984) (“[W]here one party injects improper or irrelevant evidence or argument, the ‘door is open,’ and the other party may have a right to retaliate by responding with comments or evidence on the same subject.”); cf. *Ventura v. Kyle*, 825 F.3d 876, 884-85 (8th Cir. 2016) (finding counsel’s unsupported insurance reference was a “deliberate strategic choice to try to influence and enhance damages” and was improper (citation and internal quotation marks omitted)).³ Accordingly, the trial court did not abuse its discretion.

B. Jury Instruction.

¶45 On appeal, the Bendts also assert that the court failed to instruct the jury that insurance is not relevant to the calculation of damages. “We review a court’s jury instructions for an abuse of discretion. But we review whether a jury instruction correctly states the law de novo. In deciding this question, we review jury instructions in their totality.” *A Tumbling-T Ranches v. Flood Control Dist. of Maricopa Cnty.*, 222 Ariz. 515, 533, ¶ 50, 217 P.3d 1220 (App. 2009) (internal citations omitted). A court must provide a limiting instruction when evidence is admissible for one purpose and not another. *Ariz. R. Evid. 105*; see also *Readenour v. Marion Power Shovel, Inc.*, 149 Ariz. 442, 451-52, 719 P.2d 1058 (1986) (remanding for a new trial because the failure to grant a request for a limiting instruction permitted the jury to use the subsequent remedial evidence as proof that the product was defective and unreasonably dangerous). A jury instruction warrants reversal if it was “both harmful to the complaining party and directly contrary to the rule of law.” *Powers v. Taser Int'l, Inc.*, 217 Ariz. 398, 400, ¶ 12, 174 P.3d 777 (App. 2007) (corrected).

*10 ¶46 At trial, the Bendts requested that the court give the standard jury instruction for insurance coverage. See Rev. Ariz. Jury Instr. (“RAJI”) (Civil) Stand. 9 (6th ed. 2015) (“In reaching your verdict, you should not consider [or discuss] whether a party was or was not covered by insurance.”). The court declined, finding that the evidence was admitted at trial for a limited purpose. The Bendts then requested that the court give an instruction that the evidence could not be used for damages. See RAJI (Civil) Stand. 9 (“Insurance or the lack of insurance has no bearing on ... damages”). The Tarters opposed, arguing that the evidence went to the reasonableness of Mr. Tarter’s fear of future harm and humiliation. Noting the parties’ disagreement, the court redrafted the instructions.

¶47 After the defense rested, the court called a bench conference, provided its jury instruction to counsel, and noted that Mrs. Bendt had testified that she had lost her insurance policy because of the lawsuit. The court cautioned counsel that they could address it in closing arguments if they disagreed with the instruction. The court’s jury instruction stated:

Insurance. As you were instructed during the trial, evidence that a person was or was not insured against liability

is not admissible to prove whether the person acted wrongfully. But it may be considered for other relevant purposes such as when witness Dan [] testified regarding why he did not sue Mrs. Bendt. The attorneys may explain in their closing arguments whether they believe any evidence of insurance is relevant for purposes other than proving that Mrs. Bendt acted wrongfully.

Neither party addressed insurance during their closing arguments.

¶48 The Arizona Rules of Evidence bar consideration of insurance coverage to the issue of liability but do not expressly prohibit consideration of insurance on the issue of damages. See *Ariz. R. Evid. 411*. While such consideration is barred in the standard jury instruction promulgated by the Arizona State Bar, see RAJI (Civil) Stand. 9,⁴ the RAJIs have not been approved by the Arizona Supreme Court, *State v. Logan*, 200 Ariz. 564, 566, ¶ 12, 30 P.3d 631 (2001); see *Life Inv’rs Ins. Co. of Am. v. Horizon Res. Bethany, Ltd.*, 182 Ariz. 529, 532, 898 P.2d 478 (App. 1995) (“A jury instruction need not be a model instruction, as long as it does not mislead the jury when the instructions are read together and in light of each other.”).

¶49 Thus, the court’s instruction accurately conveyed the substance of Rule 411, the applicable legal standard. See *Filasky v. Preferred Risk Mut. Ins. Co.*, 152 Ariz. 591, 599, 734 P.2d 76 (1987) (“All we require of the trial judge is that he convey in his instructions to the jury the substance of the applicable legal standard.”). Moreover, the court’s instruction did not specifically endorse consideration of insurance for damages or any purpose beyond explaining Dan’s decision not to sue. And neither counsel argued that insurance was relevant to the issue of damages. See *State v. Johnson*, 205 Ariz. 413, 417, ¶ 11, 72 P.3d 343 (App. 2003) (“[I]n evaluating the jury instructions, we consider the instructions in context and in conjunction with the closing arguments of counsel.”); cf. *Ventura*, 825 F.3d at 885-86 (ordering new trial when counsel made improper statements about defendant’s insurance during the closing argument). The Bendts provide no other authority that the instruction misstated the law. See *S. Pac. Co. v. Barnes*, 3 Ariz. App. 483, 488, 415 P.2d 579 (1966) (“It is well-established in our law that the fact that evidence is not

admissible for one purpose does not exclude the evidence if it is admissible for another legitimate purpose.”).

*11 ¶50 The defense made the Bendt's insurance relevant and did not assert unfair prejudice at trial. Moreover, the court's instruction accurately stated the law, and neither party argued to the jury that insurance was relevant for an improper purpose. Accordingly, we cannot say the court abused its discretion by declining to give the RAJI standard instruction.

IV. Juror Bias.

¶51 Next, the Bendts assert that the court erred when it refused to strike Juror 1 for cause. On the fifth day of trial, Juror 1 informed the court that her daughter had attended the same law school as Mr. Tarter. Juror 1 revealed that she was “shocked” by Mrs. Bendt's disparaging statements about the school. The court questioned Juror 1, who said that the law school criticism seemed “an insignificant comment in the grand scope of things,” and asserted that she could remain fair and impartial. The court denied the Bendt's motion to disqualify. On the last day of trial, Juror 1 was randomly selected as the alternate.

¶52 A trial court must disqualify jurors who are “biased or prejudiced in favor of or against either of the parties.” A.R.S. § 21-211(4); *see also* *Ariz. R. Civ. P. 47(d)(1)(D)*. But “[t]he fact that a juror possesses certain opinions or preconceived ideas does not necessarily render that juror incompetent to decide fairly and impartially.” *State v. Clabourne*, 142 *Ariz.* 335, 344, 690 P.2d 54 (1984). The superior court is in the best position to determine a juror's impartiality based upon the juror's demeanor and credibility, and we will only reverse a determination that a juror is fair and impartial for an abuse of discretion. *Id.* at 344, 690 P.2d 54.

¶53 The Bendts argue that the failure to disqualify Juror 1 violated their due process rights because her verdict was likely based “on information gleaned from other sources.” However, Juror 1's selection as the alternate means that she did not render a verdict in the case. The Bendts also assert that Juror 1 had a personal interest in the outcome of the case. But Juror 1 stated that her daughter chose to attend the school without Juror 1's input and a limited connection to the school through her daughter does not rise to the level of personal interest that requires disqualification. *See State v. Acuna Valenzuela*, 245 *Ariz.* 197, 210, ¶ 32, 426 P.3d 1176 (2018) (“[A] juror who knows some of the people involved in a case is not automatically barred from serving on a jury.”); *cf. State v. Eddington*, 228 *Ariz.* 361, 363, ¶ 11, 266 P.3d

1057 (2011) (discussing non-pecuniary interests requiring juror disqualification). Finally, the Bendts argue that Juror 1 “participated in discussions with fellow jurors during the two-week trial [and her] inability to be impartial likely influenced her fellow jurors.” But the superior court questioned Juror 1 and found that she was forthcoming about her connection to the school, appeared open-minded to the case, and her answers were credible. *See State v. Reasoner*, 154 *Ariz.* 377, 384, 742 P.2d 1363 (App. 1987) (holding that a juror who assures the court that he or she can be fair and impartial need not be excused). Accordingly, we find no error.

V. Compensatory Damages.

¶54 The Bendts argue that the compensatory damages are not supported by evidence, are excessive, and that a new trial, or remittitur, should be ordered.

¶55 “It is ‘well settled in Arizona that the amount of an award for damages is a question peculiarly within the province of the jury, and such award will not be overturned or tampered with unless the verdict was the result of passion and prejudice.’” *In re Estate of Hanscome*, 227 *Ariz.* 158, 162, ¶ 12, 254 P.3d 397 (App. 2011) (quoting *Larriva v. Widmer*, 101 *Ariz.* 1, 7, 415 P.2d 424 (1966)); *see also Creamer v. Troiano*, 108 *Ariz.* 573, 576, 503 P.2d 794 (1972) (holding that unless a verdict is the result of passion or prejudice, we must affirm if the “case has been submitted on correct rulings and instructions, and the verdict is within the range of credible evidence”). We “will not disturb the damages awarded when there is evidence in the record to support the award,” and “the amount awarded does not shock the conscience.” *Higgins v. Assmann Elecs., Inc.*, 217 *Ariz.* 289, 295-96, ¶ 23, 173 P.3d 453 (App. 2007) (citation omitted). If the alleged defamatory statement involves a matter of public concern, compensation can only be awarded for actual injury. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350-51, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); *Boswell*, 152 *Ariz.* at 19, 730 P.2d 186. The Supreme Court in *Gertz* did not specifically define “actual injury” but noted “that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.” 418 U.S. at 350, 94 S.Ct. 2997.

*12 ¶56 The jury awarded the Tarters \$150,000 for reputational harm and \$350,000 for emotional harm. These awards are supported by sufficient evidence. *See Desert Palm Surgical Grp., P.L.C. v. Petta*, 236 *Ariz.* 568, 580, ¶ 30, 343 P.3d 438 (App. 2015) (noting that “once the jury

found [defendant's] statements were defamatory ... it was within the jury's province to consider any actual damage to Plaintiffs' reputations and/or any emotional damage or damage to sensibility”).

¶57 The Tarter's testified to the emotional harm caused by Mrs. Bendt, including the damage to their marriage and the fear and anxiety incurred by repeated allegations of dishonesty, law-breaking, and ethical violations. Testimony from other community members was consistent with the Tarters' claims of emotional suffering. The jury also heard substantial testimony about how Mrs. Bendt's newsletters had harmed Mr. Tarter's reputation in the community, including testimony about angry residents at HOA meetings and that members believed Mrs. Bendt's accusations about Mr. Tarter.

¶58 The Bendts rely on *Petta*, a defamation case where we concluded the jury's \$11 million compensatory damages award was unsupported by evidence, “shock[ed] the conscience,” and required a new trial. 236 Ariz. at 584, ¶ 45, 343 P.3d 438. There we found that “[t]he evidence on damages was noticeably thin, entirely subjective, and based solely on Plaintiffs' nonspecific, vague, and conclusory testimony.” *Id.* at 583, ¶, 343 P.3d 438 41. Here, the compensatory damage award was supported by evidence from multiple witnesses. See *supra* ¶ 57. Further, the verdict rendered in *Petta* “was approximately equivalent to the largest civil jury verdict in Arizona in 2013, [was] the thirtieth largest civil verdict in Arizona in the past ten years ... [and] nearly four times the verdict entered in the next largest defamation case.” *Id.* at 584, ¶, 343 P.3d 438 44 (citing Kelly W. MacHenry, *Arizona's Civil Verdicts 2013*, Ariz. Att'ny, 40, 50 (June 2014)). The same comparison cannot be made here. The Tarters's verdict did not rank among Arizona's top ten civil verdicts, see Carlie Tovrea & Alysha Green, *Arizona Civil Verdicts: 2019*, Ariz. Att'ny, 14-25 (June 2020), nor did they receive the largest compensatory damages award for defamation in 2019, cf. *Hinds v. Bales*, CV2018-001901, 2019 WL 6533031 (Maricopa Cnty. Sup. Ct. Oct 14, 2019) (judgment of \$722,082 for compensatory damages and \$277,918 punitive damages in a case arising under defamation and tortious interference with contract). Thus, *Petta* is distinguishable.

¶59 Given the foregoing, the jury's compensatory damages award was supported by evidence of actual injury, and we cannot say it shocks the conscience.

VI. Punitive Damages.

¶60 A jury may award punitive damages to punish a defendant for willful or malicious conduct and deter others from similar behavior. *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 306 n.9, 106 S.Ct. 2537, 91 L.Ed.2d 249 (1986) (citation omitted); see *Hudgins v. Sw. Airlines, Co.*, 221 Ariz. 472, 486, 489, ¶¶ 38, 50, 212 P.3d 810 (App. 2009) (recognizing that punitive damages should be awarded only in the most egregious cases and are not intended to compensate plaintiffs but to punish the wrongdoer and deter both the wrongdoer and others from future harmful conduct).

A. Evidence Supported the Punitive Damages Award.

¶61 To obtain punitive damages, “there must be evidence of an 'evil mind' and aggravated and outrageous conduct” that is “over and above that required for commission of a tort.” *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 331-32, 723 P.2d 675 (1986). The Bendts assert that the record “demonstrates a lack of malice” and that Mrs. Bendt's “conduct did not rise to the 'most egregious' level of cases in which juries may award punitive damages.”

*13 ¶62 The voluminous evidence is summarized by Dan's testimony: “[Mrs. Bendt's] commentary and her constant tirade through many emails to the broader community was we were bottom feeders, that we were poor, that we shouldn't live there, that we didn't have a right to be there, because we weren't as wealthy as her or didn't have as many assets as her or didn't dress as nice as her” The jury also heard evidence that Mrs. Bendt hoped some residents would “sell so we can get people that really belong at [Fairway].” And the record supports that Mrs. Bendt considered the Tarters part of the “low class” “bottom feeders” and “low price buyers,” she believed Mr. Tarter would be distraught at her accusations, her objective was to “place a leash” on the Board, and she was happy to be “so annoying!”

¶63 Thus, the Tarters proved the requisite “something more” to support the award of punitive damages. See *Rawlings v. Apodaca*, 151 Ariz. 149, 161, 726 P.2d 565 (1986); see also *Scottsdale Publ'g, Inc. v. Superior Court*, 159 Ariz. 72, 82 n.7, 764 P.2d 1131 (App. 1988) (discussing correlation between “actual malice” required to prove defamation and “evil mind” necessary to obtain punitive damages in a tort action).

B. The Punitive Damages Award was not Unconstitutional.

¶64 The Bendts argue that the punitive damage award was unconstitutional. The Tarters assert that we must defer to the discretion of the jury.

¶65 Punitive damage awards have substantive limits. *Sec. Title Agency, Inc. v. Pope*, 219 Ariz. 480, 501, ¶ 93, 200 P.3d 977 (App. 2008). “A grossly excessive punitive damage award violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution” *Hudgins*, 221 Ariz. at 489, ¶ 50, 212 P.3d 810; see *Hyatt Regency Phx. Hotel Co. v. Winston & Strawn*, 184 Ariz. 120, 134, 907 P.2d 506 (App. 1995) (“Arizona’s courts do not hesitate to overturn excessive or inadequate punitive damage awards.”). We review punitive damage awards de novo, considering the following guideposts “(1) the degree of reprehensibility of the defendant’s misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.” *Pope*, 219 Ariz. at 501, ¶ 94, 200 P.3d 977 (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003)).⁵

1. Reprehensibility.

¶66 The Supreme Court has identified several factors for courts to consider when determining the reprehensibility of the defendant’s conduct. See *State Farm*, 538 U.S. at 419, 123 S.Ct. 1513 (listing factors). Based on our previous descriptions of the relevant testimony, we find that the jury could have found at least one factor in that “the harm was the result of intentional malice.” *Id.*; see *Pope*, 219 Ariz. at 502, ¶ 98, 200 P.3d 977 (“Because First American acted with an evil mind, it necessarily acted with intentional malice for purposes of the *State Farm* reprehensibility guidepost.”). We conclude that Mrs. Bendt’s conduct, in this case, was sufficiently reprehensible to justify an award of punitive damages.

2. Ratio of Punitive to Compensatory Damages.

¶67 Regarding the second guidepost, the Supreme Court in *State Farm* declined to “impose a bright-line ratio which a punitive damages award cannot exceed,” but observed that “an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety.” 538 U.S. at 425, 123 S.Ct. 1513. The Supreme Court also stated that “[w]hen compensatory

damages are substantial, ... a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.” *Id.* at 425, 123 S.Ct. 1513.

*14 ¶68 We find the \$500,000 award for compensatory damages, in this case, is substantial. See, e.g., *Hudgins*, 221 Ariz. at 491, ¶ 58, 212 P.3d 810 (finding award of \$500,000 for emotional distress substantial); *Nardelli v. Metro. Grp. Prop. & Cas. Ins. Co.*, 230 Ariz. 592, 611, ¶ 96, 277 P.3d 789 (App. 2012) (finding “\$155,000 compensatory damage award was substantial”). On appeal, the Bendts assert that the ratio must be reduced to 1:1 as suggested in *State Farm* and applied in several recent Arizona cases. See *Hudgins*, 221 Ariz. at 492, ¶¶ 64-65, 212 P.3d 810 (reducing 8:1 ratio of punitive damages to 1:1); *Pope*, 219 Ariz. at 503-04, ¶¶ 104, 108, 200 P.3d 977 (reducing 5.7:1 ratio of punitive damages to 1:1); *Nardelli*, 230 Ariz. at 612, ¶ 100, 277 P.3d 789 (reducing 4:1 ratio of punitive damages to 1:1). But those cases involved punitive damage awards that met or exceeded *State Farm*’s vague line of “constitutional impropriety.” 538 U.S. at 425, 123 S.Ct. 1513; cf. *Nardelli*, 230 Ariz. at 611, ¶ 96, 277 P.3d 789 (trial court reduced 355:1 ratio of jury imposed punitive damages to 4:1). Here, the jury only awarded punitive damages at a 2:1 ratio. See *Zimmerman v. Direct Fed. Credit Union*, 262 F.3d 70, 82 (1st Cir. 2001) (holding that “the 2:1 ratio of compensatory to punitive damages awarded by the jury here presents no cause for concern”); cf. *Williams v. First Advantage LNS Screening Sols. Inc.*, 947 F.3d 735, 760-61 (11th Cir. 2020) (collecting circuit court cases and finding a “majority of the affirmed cases involved ratios of 2:1 or less”). Furthermore, this was not a case of economic damages, which are “less worthy of large punitive damages awards,” *Pope*, 219 Ariz. at 502-03, ¶ 96, 200 P.3d 977 (quoting *Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc.*, 181 F.3d 446, 467 (3d Cir. 1999)), but included damages for the emotional and reputational harm the Tarters suffered.

¶69 Considering the foregoing, we conclude the jury’s punitive damages award passes constitutional muster.

CONCLUSION

¶70 For the foregoing reasons, we affirm.

All Citations

Not Reported in Pac. Rptr., 2021 WL 282265

Footnotes

- 1 In a second notice of supplemental authority filed after oral argument, the Bendts argue the Arizona Constitution provides greater free speech protections than the First Amendment. Because the Bendts did not raise this argument in their opening brief, we do not consider it. See *Ritchie v. Krasner*, 221 Ariz. 288, 305, ¶ 62, 211 P.3d 1272 (App. 2009) (failure to present significant arguments in opening brief can result in waiver of issue on appeal).
- 2 See *Hansen v. Stoll*, 130 Ariz. 454, 458-59, 636 P.2d 1236 (App. 1981) (stating that a readily identifiable member of a defamed group may maintain a defamation action).
- 3 In their motion for new trial and on appeal, the Bendts assert the insurance evidence was unduly prejudicial. At trial, however, the Bendts only raised a Rule 411 objection and did not argue undue prejudice. Thus, we do not consider whether the probative value of the insurance was substantially outweighed by a danger of unfair prejudice. See *State v. Montano*, 204 Ariz. 413, 425, ¶ 58, 65 P.3d 61 (2003) (holding failure to object to evidence on Rule 403 grounds waived the objection); *Conant v. Whitney*, 190 Ariz. 290, 293, 947 P.2d 864 (App. 1997) (holding that issue raised for the first time in a new trial motion was waived on appeal); see also *Muehlebach v. Mercer Mortuary & Chapel, Inc.*, 93 Ariz. 60, 65, 378 P.2d 741 (1963) (holding that the mere mention of a defendants' liability insurance is not per se prejudicial).
- 4 The standard jury instruction was promulgated in 2005 and does not rely on Arizona authorities for the reference to damages. See RAJI (Civil) Stand. 9 (4th ed. 2005) (citing Shari Seidman Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 Va. L. Rev. 1857, 1910 (2001)); Judicial Council of California Civil Jury Instructions (2003-04), CACI No. 105).
- 5 Defamation is a common-law tort, “and we agree with the Tenth Circuit that ‘a violation of common law tort duties [may] not lend [itself] to a comparison with statutory penalties.’” *Pope*, 219 Ariz. at 501, ¶ 94 n.19, 200 P.3d 977 (quoting *Cont'l Trend Res., Inc. v. Oxy USA Inc.*, 101 F.3d 634, 641 (10th Cir. 1996)). We have previously declined to analyze the third guidepost when it neither weighs for nor against the punitive damages award. *Id.* We do so again here as “neither party points us to a civil penalty that is sufficiently analogous to allow for comparison.” *Id.*

EXHIBIT 2



Jonathan A. Dessaulles
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Phoenix, Arizona 85020
☎ 602.274.2360
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November 14, 2024

VIA EMAIL

Curtis Ekmark
CHDB LAW, LLP
1400 East Southern Ave., Suite 400
Tempe, Arizona 85282-5692
curtis.ekmark@chdblaw.com

Re: *Gusich/Sun City Grand Community Association, Inc.*

Dear Curtis:

Your client now suggests mediation after conducting a witch trial public denouncing Mr. Gusich for the vaguest of crimes in front of an audience that the video will show overwhelmingly were supportive of Mr. Gusich or, at a minimum, asking why the Board was creating a public spectacle under the guise of an open meeting.

The answer: The Board was conducting an open meeting to present non-specific accusations against Mr. Gusich because it had conveniently created a rule *requiring* it to conduct a public hearing. And it created the rule to use against Mr. Gusich. The open meeting began, innocently enough, with board members taking turns reading from a prepared script¹ to the audience accusing Mr. Gusich of being bad board member in their collective eyes to present Mr. Gusich in the false light of a lawless director who is intentionally obstructing the rest of them from accomplishing the work of the Association and causing some unspecified harm to the Association.

Mr. Gusich has no objection to mediation, provided (i) the Association will be footing the entire bill and (ii) the Board ceases making any public statements about Mr. Gusich. With respect to the latter, the Board sent an email blast that “The Board was particularly disappointed in several of the statements and allegations made by Director Tom Gusich. We will address those in the coming days.” While the statement itself is false (as the video shows one board member appearing to be reading from a statement under duress, and who later confirmed he did not agree

¹ Please make sure all copies of the document(s) read at the board meeting as well as all prior drafts are preserved.

with the statement), we will not agree to mediation if Mr. Gusich continues to be slandered and maligned in the court of public opinion. That is an unfair use of the Board's bully pulpit.

With respect to the cost of mediation, Mr. Gusich is entitled to indemnity under Arizona law. This includes not only the cost of mediation, but all fees he has incurred defending himself against these ridiculous accusations for actions he is taking in his capacity as a board member.

If the Board still wishes to utilize the services of a mediator, we propose Scott Bales or Peter Swann. Please let us know which of these mediators is acceptable.

Sincerely,

Jonathan A. Dessaulles

Jonathan A. Dessaulles

Enclosure

EXHIBIT 3

From: Curtis Ekmark
Sent: Sunday, March 23, 2025 5:32 PM
To: jdessaules@dessauleslaw.com
Cc: Lauren.Stine@quarles.com
Subject:

As you know, I represent Grand. The Board authorized the following settlement offer to Tom:

1. Tom pay \$100k to reimburse approximately half of the attorney's fees that he has caused so far;
2. Tom dismiss the lawsuit with prejudice; and
3. Tom forfeits his right to ever be on the Board or any Committee.

If your client is agreeable to these terms, let me know and we will draft a formal settlement agreement to be reviewed by the parties.

Please note that this offer will expire if not accepted within the next ten business days. If this matter proceeds to trial, the Association anticipates the fees will be substantially more and will seek reimbursement of all fees and costs from Tom.

God Bless,

Curtis S. Ekmark
Cell: 480-650-9433
curtis@ekmarkpecorlaw.com

The information in this e-mail is ATTORNEY-CLIENT PRIVILEGED AND CONFIDENTIAL and is intended solely for the use by the individual or entity named above. If you believe that it has been sent to you in error, do not read it. Please reply to the sender that you have received the message in error, then delete it.