ARIZONA ADR FORUM

EARLY SUMMER 2017

CONTENTS

From the Chair 1

Attorney Fee Award in Arbitration: Guidance for Arbitrators 2

Mediating Between Government Agencies 3

A Division 2 Case on Unconscionability and the Drafting of Arbitration Clauses 5

Real Resolutions for Real Estate 12

ASU CLE: Private Arbitration Update What is in a Name: Partial Final Award vs. Interim Award, and Why Does it Matter? 14

Entertainment: Censorship, Free Speech, Social Norms and The Law 18

Forms You May Find Useful 19

Recent Court Opinions 26

Upcoming 2017 CLE Schedule 48

2016/17 ADR Section Executive Council 49

From the Editor 50

EDITOR | THOM COPE

We welcome comments about this newsletter and invite you to suggest topics or submit an article for consideration. Email the Editor, Thom Cope at tcope@mcrazlaw.com

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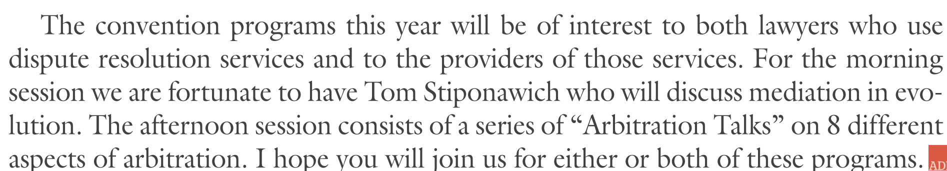
from the chair

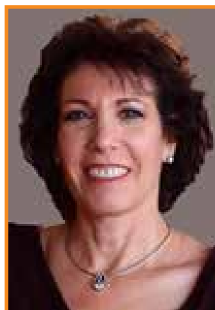
RENEE GERSTMAN

The ADR Section annual meeting and election of officers and executive council members will take place at 8:30 a.m. on Thursday June 15, 2017 just minutes before the ADR Section's Convention program. Please stop by to say hello and participate in the meeting. It has been a pleasure to serve this section as an officer for the last several years and I leave knowing that the section will be in the capable hands of Maureen Beyers, as Chair and her fellow officers – Robert Itkin (Vice Chair), Michele Feeney (Secretary) and Robert Copple (Budget Officer) – and the support of the members at large. Thank you to those council members whose terms have lapsed – Patrick Irvine and Jonathan Conant.

This past year the section focused its efforts on educating lawyers and ADR neutrals regarding dispute resolution processes. This was accomplished by presenting in person CLE, webinars and this newsletter. We also kept an eye on any proposed legislation and new case law that impacts dispute resolution processes both in and outside of the court system. As a section we have not made much use of the online community. Please don't be shy and feel free to share questions, comments or information about dispute resolution with the section through the online community.



The convention programs this year will be of interest to both lawyers who use dispute resolution services and to the providers of those services. For the morning session we are fortunate to have Tom Stiponawich who will discuss mediation in evolution. The afternoon session consists of a series of "Arbitration Talks" on 8 different aspects of arbitration. I hope you will join us for either or both of these programs.



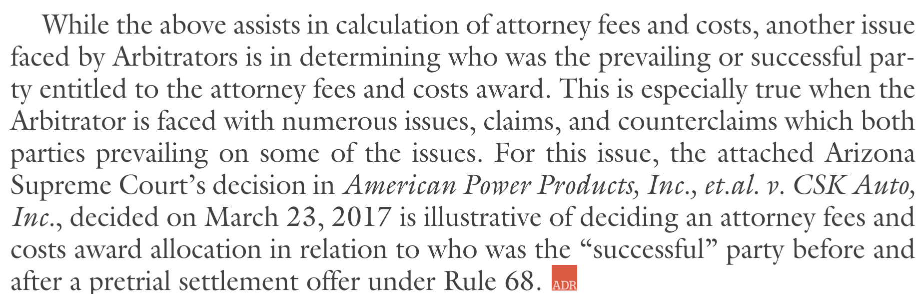
— Renee Gerstman, ADR Section Chair

By John Jozwick

ATTORNEY FEE AWARD IN ARBITRATION: Guidance for Arbitrators

For Arbitrators who are asked to award attorney fees and costs as part of the arbitration award, there have recent Arizona cases that help confirm the authority to award attorney fees and costs, as well as to help clarify how to determine who was the prevailing or successful party entitled to attorney fees and costs.

On the issue of confirming the authority to award attorney fees and costs, under Arizona's version of the Revised Uniform Arbitration Act ("RUAA"), A.R.S. §§ 12-3001 et.seq., "[a]n arbitrator may award reasonable attorney fees and other reasonable expenses of arbitration only if that award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding." A.R.S. §12-3021(B) (2016). This means that under the Arizona RUAA, the statute grants an arbitrator the same power the superior court has to award fees in a civil action (general rule is that attorney's fees are not allowed except where expressly provided for by either statute or contract). In the attached Arizona Court of Appeals Division One case *RS Industries, Inc. and Sun Mechanical Contracting, Inc., v. J. Scott and Beverly Candrian*, 377 P.3d 329 (2016), the court includes a discussion of attorney fees, and costs and expenses that you may find useful when deliberating on your attorney fee and cost award.



While the above assists in calculation of attorney fees and costs, another issue faced by Arbitrators is in determining who was the prevailing or successful party entitled to the attorney fees and costs award. This is especially true when the Arbitrator is faced with numerous issues, claims, and counterclaims which both parties prevailing on some of the issues. For this issue, the attached Arizona Supreme Court's decision in *American Power Products, Inc., et.al. v. CSK Auto, Inc.*, decided on March 23, 2017 is illustrative of deciding an attorney fees and costs award allocation in relation to who was the "successful" party before and after a pretrial settlement offer under Rule 68. ADR

MEDIATING BETWEEN GOVERNMENT AGENCIES

By Jason Houston

A LITTLE KNOWN ART IN THE DESIGN OF MEDIATION IS BECOMING MORE PREVALENT: **DISPUTES AMONG GOVERNMENTAL AGENCIES.**

DEPARTMENT OF LABOR

In 2001 the Department of Labor tested the use of ADR in selected administrative and federal court enforcement actions brought under a variety of statutes. The pilot had an 86% settlement rate. The factor that made this a notably high success rate was that these were all cases in litigation where prior settlement efforts had failed.

At the conclusion nearly all responders indicated they were highly satisfied with the process and results. Moreover, DOL learned that outside professional mediators, with only a basic substantive background, were able to resolve a high percentage of enforcement cases.

Unfortunately, the grant funds ran out and the pilot was terminated. The experience and knowledge in mediation gained will continue to be useful as more and more ALJs and Federal Courts turn to mandatory mediation efforts as part of the litigation process.

ARIZONA v. FEDERAL HIGHWAY ADMINISTRATION v. BLM

The Arizona DOT, the Bureau of Land Management and the Federal Highway Administration had a long-term project using Federal funds on BLM-managed land. At the least, this type of large, complex project is typically fraught with many potential difficulties. In order to improve the effectiveness of their efforts, the agencies tried using ADR. The result was a resounding success that set a model for multi-agency projects.

The mediator met with the agencies separately and jointly to define each one's issues and needs. The mediator organized

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interagency meetings, took notes and helped the team formalize an effective approach. Working relationships improved, allowing the agencies to successfully reduce duplication of work and minimize project delays.

INTERNAL REVENUE SERVICE

The mission of IRS Appeals is to resolve tax controversies, without litigation, fairly and impartially to both government and taxpayer. To meet these goals, IRS Appeals has adopted three ADR options, **Fast Track Settlement** (designed to help large and midsize businesses resolve disputes within 120-days); **Fast Track Mediation** (designed to help small business/self employed taxpayers resolve disputes within forty days); and **Post Appeals Mediation** (designed to help resolve disputes after good faith negotiations in Appeals have failed).

SECURITIES AND EXCHANGE COMMISSION

The Securities and Exchange Commission brought a civil injunctive action in federal district court against three auditors: the engagement partner, the senior manager and the manager, on a failed audit of a nonprofit healthcare organization. The complaint alleged that each of the auditors actively participated in a fraudulent scheme to mask the company's deteriorating financial condition. The Commission sought to permanently enjoin the three from violating the Securities Exchange Act of 1934 and the imposition of civil penalties. The matter ultimately settled and the district court entered judgments with the consent of all defendants.

This case was well suited to mediation because all parties were interested in settling. The case had the potential to drag on for years and would occupy many Commission staff working hours. Because the mediator was well versed in business and enforcement culture, he grasped the strengths and weaknesses and was able to use that knowledge to help the parties explore options.

DEPARTMENT OF THE NAVY v. EPA v. FLORIDA

Prior to 1993, working relationships among regulatory agencies and the Department of the Navy had become so adversarial that environmental disputes were being addressed only through formal legal channels with court recorders present at routine meetings. Agreeing that the existing situation would continue to fail, principals from DON, EPA and the State of Florida signed a charter formally establishing tiered partnering as a standard way of doing business. Tiered partnering facilitators help team members at three levels work across organizational boundaries.

Tier I members are engineers from DON, EPA, Florida and the clean-up contractor and work as a team to determine what remedies are best suited to accomplish the remediation goals.

Tier II members are managers who resolve policy conflicts between partners.

Tier III members are senior managers responsible for key environmental policy, programming and budgeting decisions.

This collaborative process has demonstrated an average 50% reduction in project cycle times, and is anticipated to generate hundreds of millions of dollars of cost avoidance. Building upon this success, tiered partnering is being expanded to encompass regulatory compliance, pollution prevention and environmental planning programs.

When we think of mediation, we usually envision business disputes, family issues or other daily travails of life. The typical complications that arise are usually due to personal agendas. But when governmental agencies can come together the personal intimacy is gone, making resolution non-emotional. ADR

By David C. Tierney

A DIVISION 2 CASE ON UNCONSCIONABILITY AND THE DRAFTING OF ARBITRATION CLAUSES.

The Gullett Nursing Home decision explains the limits of unconscionability

In 2000, the opinion in *Armendariz vs. Foundation for Health Psychcare Services, Inc.*, 6 P.3d 669, 984 (Cal. 2000) issued in California signaled the start of "open season" concerning "unconscionability" attacks on arbitration clauses in California. There are hundreds of appellate decisions in California, each one marking the spot where some transactional lawyer attempted to slant the "playing field" so as to advantage the stronger party in drafting the terms of an arbitration clause in some contract of adhesion. Clauses in leases, automobile sales documents, software purchase contracts, and employment agreements have been struck down in California on the grounds of (a) substantive unconscionability or (b) procedural unconscionability.

While Arizona has, in the last few years, commenced to see some unconscionability claims[1], a February, 2017, decision in Division Two of our Court of Appeals has spoken at length on both aspects of the unconscionability claim. *Gullett vs. Kindred Nursing Centers West, L.L.C.*; 758 Ariz. Adv. Rep. 12 (2/15/17 No. 2 CA-CV 2016-0049) contains an extended discussion of unconscionability. Plaintiff Jeffrey Gullett sought to sue Kindred for abuse and neglect he asserted had occurred concerning his deceased farther. The father upon being admitted to the Kindred Care and Rehabilitation Center had signed an "Alternative Dispute Resolution Agreement" indicating that any claims (arising out of his say in the institution) would be submitted to Arbitration. When son Jeffrey Gullett sued in Cochise county Superior Court, Kindred moved to compel arbitration and Gullett opposed, saying that the agreement was substantively unconscionable. The trial judge granted the Kindred motion to compel arbitration and denied Gullett's request for some discovery in the court proceedings so as to investigate if there had been any ***procedural*** unconscionability.

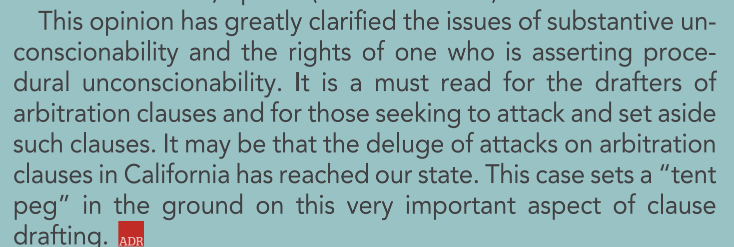
Focusing on aspects listed in the *Armendariz* case 16 years before, Gullett alleged that the clause:

Limited discovery unreasonably,

- Called for an arbitrator who would necessarily not be a neutral,
- Waived non-waivable remedies,
- Was not mutual in its effect upon the parties.

Judge Staring's opinion carefully examines each contention and finds that substantive unconscionability (relative fairness) was not violated by the clause, citing *Armendariz*, op. cit. For example, the restrictions on interrogatories and on depositions were not very severe; the arbitrator selection was not warped and offensive. This opinion will set practical limits to which clause-drafters in Arizona will have to pay close attention from now on. However, the Gullett decision goes on to state that the trial court erred in refusing to allow Gullett some discovery in the trial court by which Gullett could inquire into procedural unconscionability (basic fairness in the bargaining process- by which the father had agreed to the arbitration clause), citing our *Broemer* case, op. cit. (footnote above).

This opinion has greatly clarified the issues of substantive unconscionability and the rights of one who is asserting procedural unconscionability. It is a must read for the drafters of arbitration clauses and for those seeking to attack and set aside such clauses. It may be that the deluge of attacks on arbitration clauses in California has reached our state. This case sets a "tent peg" in the ground on this very important aspect of clause drafting. ADR



ENDNOTE

1. Arizona cases like *Broemer v. Abortion Services of Phoenix, Ltd.*,173 Ariz. 148, 840 P.2d 2013 (1992); *Maxwell v. Fidelity Financial Services, Inc.*, 184 Ariz. 82, 907 P.2d 51 (1995); *Harrington v. Pulte Home Corp.*, 211 Ariz. 241, 119 P.3d 1044 (Ct. App. 2005), *Clark v. Renaissance West, LLC*, 232 Ariz. 510, 307 P.3d 77 (Ct. App. 2013) and *Chang v. Siu*, 234 Ariz. 442, 323 P.3d 725 (App. 2014), have demonstrated that our state courts take seriously their duty to uphold clause-drafting fairness by finding "unconscionability" whenever it occurs, thus protecting the institution of arbitration. The most virulent trend nationally in arbitration is the constant struggle to define what constitutes "unconscionably drafted" arbitration clauses. For a prime example of that struggle one should read the very short decisions by the U.S. Supreme Court in *The Ritz-Carlton Development Co., Inc. v. Narayan* and the *Ritz-Carlton Development Co. v. Nath*, Docket Nos. 14-370-379 and 406. The U.S. Supreme Court vacated and remanded several Superior Court of Hawaii decisions, all dealing very strongly with unconscionability. The Hawaii Court had ruled that the arbitration clause being considered was unconscionable because it was a contract of adhesion with (1) limited discovery rights; (2) required the arbitration and all discovery facts to be confidential (thus limiting the locating of fact witnesses); (3) and prohibited punitive damages. The U.S. Supreme Court sent the case back under Section 2 of the FAA saying it appeared that Hawaii was too sensitive and, in effect, was treating arbitration agreements far different than all other contract clauses, thus raising the preemption issue under the FAA Section 2. But the *Ritz-Carlton* cases demonstrate the great struggle throughout the country as to the question of unconscionability.

The Gullett Nursing Home decision explains the limits of unconscionability.

foreclose judicially, as is done with a mortgage, the creditor can elect to waive the security . . . and sue on the note." *Bank One*, 188 Ariz. at 249. It argues that "beneficiary" and "creditor" were used interchangeably, and therefore only a beneficiary or creditor (not a lender) could redeem.

6. Helvetica's reliance on *Sitton v. Deutsche Bank Nat'l Trust Co.* is misplaced. There we decided that listing a defunct company as a lender was not a material misrepresentation in a deed of trust where MERS was the trust's beneficiary and lender's nominee. 233 Ariz. 215, 221, ¶¶27-28 (App. 2013). In that case, we found the borrower's rights were not affected, because MERS had the authority to assign the lender's rights to a new party or act on the lender's behalf, as it can here. *Id.* Giraudo is not a defunct lender and retains his rights under the deed of trust.

7. His primary argument is that this issue was already decided in *Helvetica II* when we said "[w]e recognize that after a judgment debtor applies for [a fair market value] determination, the right of redemption can still be exercised by 'creditors having a junior lien.'" 229 Ariz. at 332, ¶24 n.2 (quoting §12-1566(C)). He argues that by quoting and citing to §121566(C) we have already held that it controls the redemption price for junior lienholders. But in *Helvetica II* we noted only that junior lienholders retain a *right* to redeem. We did not decide the redemption price because it was not at issue in that appeal.

8. Helvetica's reading of §12-1285(B) would mean that the value of the foreclosed senior lien is unaffected by the foreclosure sale at all. This would allow the foreclosing senior creditor to exact its below-market-value bid, plus eight percent, plus the full balance of its lien from a junior lienholder. Here, Helvetica would net $432,000 more than was due on the deed of trust. Rather than discouraging senior creditors from making low bids at the foreclosure sale, this approach would create a windfall at the expense of junior lienholders. We see nothing in the language or purpose of the redemption statutes to support such a result.

Cite as
758 Ariz. Adv. Rep. 12

IN THE ARIZONA COURT OF APPEALS DIVISION TWO

Jeffrey GULLETT, Special Administrator of The Estate of Winford Gullett, on Behalf of The Estate of Winford Gullett, And Jeffrey Gullett, Special Administrator, For And on Behalf of Winford Gullett's Statutory Beneficiaries Pursuant to A.R.S. §12-612(A),
Plaintiff/Appellant,

v.

KINDRED NURSING CENTERS WEST, L.L.C., a Delaware Limited Liability Company, Dba Hacienda Rehabilitation And Care Center Nka Kindred Nursing and Rehabilitation-hacienda; Kindred Healthcare Operating, Inc., a Delaware Corporation; Kindred Healthcare, Inc., a Delaware Corporation; And Theresa Linnane, Administrator,
Defendants/Appellees.

No. 2 CA-CV 2016-0049
FILED: 02/15/17

Appeal from the Superior Court in Cochise County No. CV201500087 The Honorable Karl D. Elledge, Judge
AFFIRMED IN PART; VACATED IN PART AND REMANDED

ATTORNEYS:

Law Office of Scott E. Boehm, P.C., Phoenix By Scott E. Boehm and Wilkes & McHugh, P.A., Scottsdale By Melanie L. Bossie, Mary Ellen Spiece, and Ernest J. Calderon II Counsel for Plaintiff/Appellant

Quintairos, Prieto, Wood & Boyer, P.A., Phoenix By Anthony J. Fernandez, Vincent J. Montell, and Rita J. Bustos Counsel for Defendants/Appellees

Judge Staring authored the opinion of the Court, in which Presiding Judge Howard and Judge Espinosa concurred.

This opinion is subject to revision before publication in the Pacific Reporter.

STARING, Judge:

¶1 Jeffrey Gullett appeals the judgment compelling arbitration of his statutory claim for abuse and neglect of his late father Winford Gullett pursuant to Arizona's Adult Protective Services Act (APSA), A.R.S. §§46-451 to 46-459. He argues the arbitration agreement is substantively unconscionable and, alternatively, the trial court erred in failing to allow discovery and grant an evidentiary hearing on his claims of procedural unconscionability. For the reasons that follow, we affirm in part, vacate in part and remand for further proceedings.[1]

Factual and Procedural Background

¶2 In January 2013, Winford Gullett was admitted to Hacienda Care and Rehabilitation Center ("Hacienda"). On January 16, he signed an Alternative Dispute Resolution Agreement ("Agreement") that provides all claims arising out of any stay at Hacienda shall be submitted to arbitration. Winford remained at Hacienda until his death on February 21, 2013.

¶3 In February 2015, Jeffrey Gullett brought suit against appellee Kindred Nursing Centers West, L.L.C., doing business as Hacienda ("Kindred"), alleging it had abused and neglected Winford in violation of APSA, resulting in his death.[2] Kindred subsequently moved to compel arbitration pursuant to the Agreement. Gullett opposed the motion, claiming the Agreement was substantively unconscionable and discovery was required on the issue of procedural unconscionability.

¶4 Following a hearing in October 2015, the trial court granted Kindred's motion to compel arbitration and denied Gullett's request for an evidentiary hearing on the issue of procedural unconscionability. This appeal followed. We have jurisdiction pursuant to A.R.S. §12-2101(A)(1). *See S. Cal. Edison Co. v. Peabody W. Coal Co.*, 194 Ariz. 47, ¶¶16-20, 977 P.2d 769, 774-75 (1999) (order compelling arbitration appealable if certified pursuant to Rule 54(b), Ariz. R. Civ. P.).

Discussion

¶5 Gullett argues the Agreement is substantively unconscionable because it "severely limits discovery," requires that arbitration be administered by an administrator who "lacks neutrality," requires the forfeiture of non-waivable remedies, and does not impose mutual obligations on the parties.[3] He further argues the court erred by denying his request for an evidentiary hearing because he is entitled to conduct discovery to develop his claim of procedural unconscionability.

¶6 "The validity and enforceability of a contract and

The Gullett Nursing Home decision explains the limits of unconscionability.

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Provo, Utah

Gullett v. Kindred Nursing Centers West
758 Ariz. Adv. Rep. 12

13

arbitration clause are mixed questions of fact and law, subject to de novo review." *Estate of DeCamacho ex rel. Guthrie v. La Solana Care & Rehab, Inc.*, 234 Ariz. 18, ¶9, 316 P.3d 607, 609 (App. 2014). Pursuant to A.R.S. §12-3006(A), "[a]n agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable and irrevocable except on a ground that exists at law or in equity for the revocation of the contract." Accordingly, "[a]n arbitration agreement . . . is subject to the same defenses to enforceability as any other contract." *Dueñas v. Life Care Ctrs. of Am., Inc.*, 236 Ariz. 130, ¶6, 336 P.3d 763, 768 (App. 2014). Claims of substantive or procedural unconscionability are independent defenses to enforceability. *Id.* ¶7.

Substantive Unconscionability

¶7 "Substantive unconscionability concerns the actual terms of the contract and examines the relative fairness of the obligations assumed." *Maxwell v. Fid. Fin. Servs., Inc.*, 184 Ariz. 82, 89, 907 P.2d 51, 58 (1995). In determining whether a contract is substantively unconscionable, we look to see whether the "contract terms [are] so one-sided as to oppress or unfairly surprise an innocent party," whether there is "an overall imbalance in the obligations and rights imposed" by the contract, or whether there is a "significant cost-price disparity." *Id.* "The rules of contract interpretation apply equally in the context of arbitration clauses." *Estate of DeCamacho*, 234 Ariz. 18, ¶15, 316 P.3d at 611; *see also City of Cottonwood v. James L. Fann Contracting, Inc.*, 179 Ariz. 185, 189, 877 P.2d 284, 288 (App. 1994) ("Because of the public policy favoring arbitration, arbitration clauses are construed liberally and any doubts about whether a matter is subject to arbitration are resolved in favor of arbitration.").

Discovery

¶8 Gullett first argues the Agreement is substantively unconscionable "because it so limits discovery (and therefore witnesses) that [he would] be unable to prepare and present his APSA claims." "[A]rbitration is appropriate only '[s]o long as the prospective litigant effectively may vindicate' his or her rights in the arbitral forum." *Harrington v. Pulte Home Corp.*, 211 Ariz. 241, ¶42, 119 P.3d 1044, 1055 (App. 2005), *quoting Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (alteration in *Harrington*). But, "by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" *Gilmer*, 500 U.S. at 31, *quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). And, as our courts have consistently explained, "the primary purpose of arbitration is to provide an inexpensive and speedy final disposition of disputes, as an alternative to litigation." *Harrington*, 211 Ariz. 241, ¶42, 119 P.3d at 1055.

¶9 Prospective litigants "are at least entitled to discovery sufficient to adequately arbitrate their statutory claim," *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 684 (Cal. 2000), *criticized on other grounds by AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 340, 352 (2011), as part of being able to effectively vindicate their rights, *see Gilmer*, 500 U.S. at 28. "'[A]dequate' discovery does not mean unfettered discovery," however. *Fitz v. NCR Corp.*, 13 Cal. Rptr. 3d 88, 97 (Ct. App. 2004), *quoting Mercuro v. Superior Court*, 116 Cal. Rptr. 2d 671, 683 (Ct. App. 2002). Further, parties may agree to something less than the amount of discovery provided by the rules of civil procedure. *See id.*

¶10 The Agreement provides:

> Discovery may be initiated immediately after the Request is filed. The parties shall have the right to engage in discovery consistent with the Arizona Rules of Civil Procedure, subject to any restrictions contained in the applicable statutes, rules, and regulations . . ., and also subject to Rule 3.02 of the [Kindred Healthcare Alternative Dispute Resolution Rules of Procedure ("Kindred's Procedure")].

Kindred's Procedure limits discovery to the following:

> Permissible discovery shall include: a) 30 interrogatories inclusive of subparts; b) 30 requests for production of documents inclusive of subparts; c) 10 requests for admissions inclusive of subparts;
> depositions of not more than six (6) fact witnesses, and e) depositions of not more than two (2) expert witnesses.
> Where warranted, by agreement or by request to the presiding neutral, the parties may conduct such additional reasonable discovery as may be necessary or proper.

Gullett argues APSA claims typically require the testimony of "dozens of nursing home employees and experts from many professional fields" and usually involve "hundreds" of documents. Accordingly, he claims the limitations placed on him by Kindred's Procedure force him to "'proceed blindly' or forego the claims altogether, which (of course) is the nursing home's desired result."

¶11 In determining whether discovery limitations interfere with a litigant's ability to vindicate their claims, courts have considered the initial amount of discovery permitted as of right in conjunction with the burden imposed on the litigant in obtaining additional discovery. *See Ontiveros v. DHL Express (USA), Inc.*, 79 Cal. Rptr. 3d 471, 487 (Ct. App. 2008), *abrogated on other grounds as recognized by Tiri v. Lucky Chances, Inc.*, 171 Cal. Rptr. 3d 621, 635-36 (Ct. App. 2014). Discovery provisions may be substantively unconscionable when the amount of permitted discovery is so low and the burden to obtain additional discovery so high that the litigant is effectively unable to vindicate their claim. *See id.* ("We conclude that . . . the permitted amount of discovery is so low while the burden for showing a need for more discovery is so high that plaintiff's ability to prove her claims would be unlawfully thwarted by the discovery provision in the agreement."); *Fitz*, 13 Cal. Rptr. 3d at 97-100.

¶12 Kindred's Procedure permits relatively expansive discovery. Litigants are allowed thirty interrogatories, only ten less than the amount permitted under Rule 33(a)(2), Ariz. R. Civ. P., allowed thirty document production requests, compared to the ten requests permitted by Rule 34(b)(1), Ariz. R. Civ. P., and allowed ten admission requests, compared to the twenty-five permitted under Rule 36(a)(3), Ariz. R. Civ. P. They may obtain the depositions of six "fact" witnesses and two expert witnesses. Litigants may also conduct additional "reasonable discovery" by agreement or as permitted by the arbitrator as long as such discovery is

ARIZONA ADVANCE REPORTS

The Gullett Nursing Home decision explains the limits of unconscionability.

"necessary or proper." *See Dotson v. Amgen, Inc.*, 104 Cal. Rptr. 3d 341, 349 (Ct. App. 2010) ("We assume that the arbitrator will operate in a reasonable manner in conformity with the law.").

¶13 The discovery limitations imposed by the Agreement therefore are not as restrictive as those found in the cases on which Gullett primarily relies. In *Fitz*, for example, the employee-dispute resolution policy limited discovery to the depositions of two individuals and any expert expected to testify at the arbitration hearing. 13 Cal. Rptr. 3d at 91-92. Any additional discovery was permitted only on the condition the arbitrator found "a compelling need to allow it," and only after concluding "a fair hearing [would be] impossible without additional discovery." *Id.* (emphasis omitted). The court concluded the policy "fail[ed] to ensure that Fitz [was] entitled to discovery sufficient to adequately arbitrate her claims," because

> the burden the . . . policy imposes on the requesting party is so high and the amount of discovery the policy permits by right is so low that employees may find themselves in a position where not only are they unable to gain access to enough information to prove their claims, but are left with such scant discovery that they are unlikely to be able to demonstrate to the arbitrator a compelling need for more discovery.

Id. at 98, 100.

¶14 In *Ontiveros*, each party was limited to one deposition of an individual and any expert witness designated by another party. 79 Cal. Rptr. 3d at 476. Additional discovery could only be obtained by request to the arbitrator and only "upon a showing of substantial need." *Id.* The court found these terms unconscionable because the amount of permitted discovery was "so low while the burden for showing a need for more discovery [was] so high." *Id.* at 487.

¶15 Similarly, in *Ostroff v. Alterra Healthcare Corp.*, a personal injury suit against an assisted-living facility, the plaintiff was permitted to depose only the defendant's expert witness and none of the defendant's employees or any of the other residents at the facility. 433 F. Supp. 2d 538, 540, 545 (E.D. Penn. 2006). These limitations put the plaintiff "at a distinct disadvantage in arbitration, which . . . may well [have denied] her a 'fair opportunity to present [her] claims.'" *Id.* at 545, *quoting Gilmer*, 500 U.S. at 31 (alteration in *Ostroff*). The court found the discovery limits substantively unconscionable. *Id.* at 546.

¶16 Here, as noted, Kindred's Procedure allows for significant amounts of written discovery and depositions as a matter of right. And litigants may obtain additional "reasonable discovery" upon showing it is "necessary or proper." The amount of discovery is not so low and the burden to obtain more so high that the Agreement denies litigants the opportunity to conduct discovery sufficient to adequately arbitrate an APSA claim. *Cf. Dotson*, 104 Cal. Rptr. 3d at 347-50 (reversing unconscionability finding where agreement permitted one deposition of an individual and expert designated by opposing party and additional discovery "upon a showing of need"). The terms of the Agreement are not "so one-sided as to oppress or unfairly surprise an innocent party." *See Maxwell*, 184 Ariz. at 89, 907 P.2d at 58. We therefore conclude the trial court did not err in rejecting Gullett's claim that the Agreement is unconscionable in this respect.

Arbitration Administrator

¶17 Gullett next argues Kindred has "'stacked the deck' against [him] by mandating arbitrations be administered by . . . DJS Administrative Services, who handle[] everything from opening claims to hiring and scheduling arbitrators from the 'approved' list." According to Gullett, the administrator "lacks neutrality because [it] is financially dependent on defendants . . ., who pay [its] bills and provide most of [its] business."

¶18 A neutral arbitrator is no less crucial to the effective vindication of rights in arbitration than an impartial judge is in a courtroom. This is evident from the statutes mandating disinterested arbitrators, A.R.S. §12-3011(B), and the disclosure of interests and relationships, A.R.S. §12-3012, and from statutes providing remedies in the event an award is procured from an arbitrator who demonstrates partiality, A.R.S. §§12-3023(A)(2) and 12-1512(A)(2). Additionally, as noted, contract terms that are "so one-sided as to oppress or unfairly surprise an innocent party, [or create] an overall imbalance in the obligations and rights imposed by the bargain," are unconscionable. *Maxwell*, 184 Ariz. at 89, 907 P.2d at 58. It stands to reason, then, that arbitration terms that by themselves create a partial forum would be similarly unconscionable for failure to provide a person with the ability to effectively vindicate their rights before a neutral arbitrator. *See Falcone Bros. & Assocs., Inc. v. City of Tucson*, 240 Ariz. 483, ¶21, 381 P.3d 276, 283 (App. 2016) ("[A]rbitration agreements are unconscionable and unenforceable when they give an employer unrestricted control over the selection of arbitrators such that the employer's own managers can serve as the sole decision makers in the dispute."); *Stevens/Leinweber/Sullens, Inc. v. Holm Dev. & Mgmt., Inc.*, 165 Ariz. 25, 30, 795 P.2d 1308, 1313 (App. 1990) (arbitration provisions clearly lacking mutuality void for lack of consideration).

¶19 In *McMullen v. Meijer, Inc.*, 355 F.3d 485, 494 (6th Cir. 2004), the Sixth Circuit addressed the enforceability of the arbitrator selection procedure in an employer's termination appeal procedure (TAP) for its employees. The TAP "requir[ed] binding arbitration of all disputes arising out of termination of employment." *Id.* at 487. Once an arbitration hearing was requested, the TAP granted the company "the right to unilaterally select a pool of at least five potential arbitrators," and, "[t]hen, counsel for the company and the aggrieved employee mutually select[ed] an arbitrator from that pool by alternatively striking names until only one remain[ed]." *Id.* at 488. The court concluded the selection process gave the company exclusive control of the arbitrator panel and allowed it to create a "symbiotic relationship with its arbitrators" susceptible to "promulgat[ing] bias." *Id.* at 493. Accordingly, the procedure prevented the arbitration agreement "from being an effective substitute for a judicial forum because it inherently lack[ed] neutrality." *Id.* at 494. The court rejected the employer's argument that the "preferred method of challenging allegations of bias" would be to address them after the end of the arbitration process. The court reasoned that, "[w]hen the process used to select the arbitrator is fundamentally unfair . . . the arbitral forum is not an effective substitute for a judicial forum, and there is no need to present separate evidence of bias or corruption in the particular

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The Gullett Nursing Home decision explains the limits of unconscionability.

arbitrator selected." *Id.* at 494 n.7.

¶20In this case, the Agreement provides arbitration "will be conducted by an independent impartial entity that is regularly engaged in providing mediation and arbitration services." It also provides "DJS Administrative Services, Inc., . . . *may* serve as this independent entity." (Emphasis added.) And should DJS be "unwilling or unable to conduct the . . . arbitration, or the parties mutually agree that DJS should not conduct the . . . arbitration, then by mutual agreement the parties shall select another independent impartial entity that is regularly engaged in providing . . . arbitration services." Furthermore, regardless of which entity serves as administrator, Kindred's Procedure allows the parties to attempt to reach a consensus as to the presiding arbitrator.

> Upon receipt of a Demand by a party to commence the ADR process, the parties shall proceed to select . . . an arbitrator. . . . If the parties are unable to agree on an arbitrator then each party shall select an arbitrator and the two selected will choose a third who will serve as the presiding arbitrator.

Gullett is not limited to selecting an arbitrator from a list of arbitrators crafted by Kindred. *See McMullen*, 355 F.3d at 488, 493-94 (unconscionable where company could unilaterally select pool of arbitrators); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938-39 (4th Cir. 1999) (unconscionable where arbitrators selected from list created exclusively by employer).

¶21The selection process in the Agreement is similar to the procedure in *Bonded Builders Home Warranty Ass'n of Texas v. Rockoff*, No. 08-14-00090-CV, 2016 WL 3383461 (Tex. App. June 16, 2016). There, a homeowner, a home warranty provider, and a builder entered into a contract that required disputes to be resolved by arbitration. *Id.* at [2. The agreement permitted the homeowner to select an arbitration company from a list of approved arbitration companies provided for by the warranty provider. *Id.* The Texas Court of Appeals, applying the standard from *McMullen*, did not find the terms facially unconscionable. *Id.* at [8. The court considered the agreement's terms, which "requir[ed] the arbitration to be before a neutral third party," and precluded the warranty provider "from designating a captive arbitration company as a potential source for arbitrators." *Id.* The court also considered the availability of remedies should "the arbitrator fail[] that neutrality standard." *Id.* Lastly, the court noted *McMullen* and other federal cases had "invalidated schemes where one party designated a pool of specific *arbitrators*," whereas the agreement before them "designate[d] potential *arbitration companies*." *Id.* And, although the court recognized the possibility that the defendant "might only designate arbitration companies with only a few available arbitrators whom it trusts," nothing in the record suggested the company had done so in the past, and the court would not find unconscionability based only on "speculation."[4] Id.

¶22 Similarly, the Agreement here requires the arbitration "be conducted by an independent impartial entity," precluding Kindred from designating a captive arbitration company or a specific arbitrator.[5] And the Agreement does not require DJS Services to be the administrator of the arbitration. We agree with the trial court that Kindred's Procedure for selecting an arbitrator is not fundamentally unfair, and, thus, not unconscionable.

Forfeiture of Remedies

¶23 Gullett also maintains the Agreement is unconscionable because it requires forfeiture of statutory remedies not subject to waiver. We do not address this issue, however, because Gullett failed to raise the argument in the trial court. *See Winters v. Ariz. Bd. of Educ.*, 207 Ariz. 173, ¶13, 83 P.3d 1114, 1118 (App. 2004); *Douglas v. Vancouver Plywood Co.*, 16 Ariz. App. 364, 367, 493 P.2d 531, 534 (1972) (appellate review ordinarily "limited to those theories tried in the court below").

Mutuality

¶24 Additionally, Gullett claims the Agreement is unconscionable because although on its face it appears to be mutual, "it actually is not because [Kindred has] no claims for which [it is] giving up [its] rights to full discovery, judicial resolution and appeal." According to Gullett, only residents are subject to "abuse or neglect," and, therefore, "in actual practice, [Kindred has] no claims."

¶25 Preliminarily, "[s]ubstantive unconscionability concerns the actual terms of the contract and examines the relative fairness of the obligations assumed." *Maxwell*, 184 Ariz. at 89, 907 P.2d at 58. The Agreement requires both Kindred and Gullett to submit to arbitration in the event of a dispute. It provides:

> Any and all claims or controversies arising out of or in any way relating to this Agreement or the Resident's stay at the Facility including disputes regarding the interpretation of this Agreement, . . . whether for statutory, compensatory or punitive damages and whether sounding in breach of contract, tort or breach of statutory duties (including, without limitation, any claim based on violation of rights, negligence, medical malpractice, any other departure from the accepted standards of health care or safety or unpaid nursing home charges) . . . shall be submitted to alternative dispute resolution as described in this Agreement.

These terms reflect a mutual obligation to arbitrate, and the concerns we expressed in *Stevens/Leinweber/Sullens, Inc.*, do not exist here. 165 Ariz. at 30, 795 P.2d at 1313 (voiding arbitration provision allowing one party "absolute option of selecting either arbitration or litigation as the means of dispute resolution"). Kindred does not preserve for itself the right to opt out of the Agreement. Rather, it agrees to resolve all disputes, including "breach of contract [and] tort," through arbitration. Accordingly, the Agreement is not unconscionable for lack of mutuality.

Procedural Unconscionability

¶26 We now turn to Gullett's assertion he is entitled to discovery to develop a defense of procedural unconscionability. "Procedural unconscionability addresses the fairness of the bargaining process," including such concerns as "'unfair surprise,' fine print clauses, mistakes or ignorance of important facts or other things that mean bargaining did not proceed as it should." *Dueñas*, 236 Ariz. 130, ¶8, 336 P.3d at 768, *quoting Clark v. Renaissance W., L.L.C.*, 232 Ariz. 510, ¶8, 307 P.3d 77, 79 (App. 2013). Gullett argues he "does not know the facts supporting procedural unconscionability because [his father] is dead and the trial court would

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The Gullett Nursing Home decision explains the limits of unconscionability.

not allow [him] to take discovery on this or any other enforcement defense." Kindred counters he "failed to present any evidence and/or facts substantiating [any] alleged 'suspicions' that the . . . Agreement might be procedurally unconscionable." Kindred asserts Gullett "was required to provide something more than his 'suspicions' [to] the trial court to support the claim of procedural unconscionability but failed to do so."[6] We review a trial court's refusal to grant an evidentiary hearing for an abuse of discretion. *Pioneer Fed. Sav. Bank v. Driver*, 166 Ariz. 585, 589, 804 P.2d 118, 122 (App. 1990).

¶27In *Ruesga v. Kindred Nursing Centers West, L.L.C.*, we noted "courts 'have repeatedly analogized a trial court's duty in ruling on a motion to compel arbitration to its duty in ruling on a motion for summary judgment.'" 215 Ariz. 589, ¶23, 161 P.3d 1253, 1260 (App. 2007), *quoting Ex parte Greenstreet, Inc.*, 806 So. 2d 1203, 1207 (Ala. 2001). "[T]he court initially determines whether material issues of fact are disputed and, if such factual disputes exist, then conducts an expedited evidentiary hearing to resolve the dispute." *Id.* ¶24, *quoting Haynes v. Kuder*, 591 A.2d 1286, 1290 (D.C. 1991) (internal quotation marks omitted). In *Ruesga*, however, we did not address the question of whether a party opposing arbitration is entitled to conduct discovery for the limited purpose of establishing whether there exists a material issue of fact concerning procedural unconscionability.[7] We do so now.

¶28 Because of the similarity in approach, we look to case law concerning motions for summary judgment. To obtain summary judgment, "the moving party must come forward with evidence it believes demonstrates the absence of a genuine issue of material fact and must explain why summary judgment should be entered in its favor." *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, ¶14, 180 P.3d 977, 980 (App. 2008). Once a moving party meets its initial burden of production, the burden shifts to the non-moving party "to present sufficient evidence demonstrating the existence of a genuine factual dispute as to a material fact." *Id.* ¶26. The nonmoving party must point out ignored or overlooked evidence or explain why the motion should otherwise be denied.[8] Id.; *see also Orme Sch. v. Reeves*, 166 Ariz. 301, 310, 802 P.2d 1000, 1009 (1990) (summary judgment granted if party cannot respond with evidence demonstrating genuine issue of fact).

¶29Although Rule 56(b)(2), Ariz. R. Civ. P., permits a defendant to move for summary judgment "at any time after the action is commenced," a claimant is ordinarily entitled to a reasonable opportunity to conduct discovery in order to obtain evidence with which to oppose the motion. *See Celotex v. Catrett*, 477 U.S. 317, 322 (1986) ("after adequate . . . discovery and upon motion" summary judgment mandated when party "fails to make a showing sufficient to establish" essential element of case); *Guidotti v. Legal Helpers Debt Resolution, L.L.C.*, 716 F.3d 764, 772 (3d Cir. 2013) ("Because summary judgment can be supported or defeated by citing a developed record, courts must give the parties 'adequate time for discovery.'"), *quoting Celotex*, 477 U.S. at 322; *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1105-06 (9th Cir. 2000) ("The nonmoving party, of course, must have had sufficient time and opportunity for discovery before a moving party will be permitted to carry its initial burden of production by showing that the nonmoving party has insufficient evidence."); *Nat'l Bank of Ariz.*, 218 Ariz. 112, ¶24, 180 P.3d at 983 (non-moving party must receive "sufficient opportunity for discovery" before summary judgment granted for insufficient evidence).

¶30 Rule 26(b)(1), Ariz. R. Civ. P., provides, "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to . . . any party's claim or defense and proportional to the needs of the case." And the discovery rules "should be broadly and liberally construed to . . . promote justice." *U-Totem Store v. Walker*, 142 Ariz. 549, 552, 691 P.2d 315, 318 (App. 1984). "There seems to be little reason why litigants should be prevented from establishing legitimate claims in actions in which the admissible facts are to be found only in the files and minds of opposing parties." *Id.* at 553, 691 P.2d at 319, *quoting* Jack H. Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 Calif. L. Rev. 806, 817 (1981).

¶31 Further, "[a]lthough it is commonly said that the law favors arbitration, it is more accurate to say that the law favors arbitration of disputes that the parties have agreed to arbitrate." *S. Cal. Edison Co.*, 194 Ariz. 47, ¶11, 977 P.2d at 773; *see also Dueñas*, 236 Ariz. 130, ¶6, 336 P.3d at 768 (arbitration agreement subject to same enforceability defenses as other contracts); *Clark*, 232 Ariz. 510, ¶8, 307 P.3d at 79 (unconscionable contract unenforceable). "Given that '[t]he burden of proving a generally applicable contract defense lies with the party challenging the contract provision,'" the need for pre-arbitration discovery to determine whether an agreement to arbitrate was obtained under procedurally unconscionable conditions "is evident." *Guidotti*, 716 F.3d at 774 n.5 (citing cases where pre-arbitration discovery permitted to determine issues of unconscionability and whether parties agreed to arbitrate), *quoting Lloyd v. HOVENSA, LLC*, 369 F.3d 263, 274 (3d Cir. 2004). Accordingly, "a restricted inquiry into factual issues will be necessary to properly evaluate whether there was a meeting of the minds on the agreement to arbitrate, and the non-movant must be given an opportunity to conduct limited discovery on the narrow issue concerning the validity of the . . . agreement." *Id.* at 774 (citations and internal quotation marks omitted).

¶32 This approach is consistent with the requirement that when determining "whether an arbitration agreement is procedurally unconscionable, [a] court must examine each transaction on its own facts." *Dueñas*, 236 Ariz. 130, ¶9, 336 P.3d at 768; *see also Broemmer v. Abortion Servs. of Phx., Ltd.*, 173 Ariz. 148, 153, 840 P.2d 1013, 1018 (1992) (examining specific facts of case to find arbitration agreement unenforceable). Only Gullett's father and Kindred's representative were present when Kindred entered into the Agreement with Gullett's father, a man requiring in-patient care because of serious health problems, and who died approximately one month later. Gullett therefore cannot oppose arbitration on the basis of procedural unconscionability without being permitted limited discovery on that issue. The ability to mount a procedural unconscionability defense to arbitration should not depend on something as fortuitous as whether the individual who signed the agreement remains able to testify.

¶33 Limited discovery on the issue of procedural

The Gullett Nursing Home decision explains the limits of unconscionability.

unconscionability is consistent with Arizona public policy favoring arbitration. "The whole object of discovery is that mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Simpson v. Heiderich*, 4 Ariz. App. 232, 236, 419 P.2d 362, 366 (1966). Discovery would also prevent dispositions on the issue of procedural unconscionability "from becoming a guessing game." *U-Totem Store*, 142 Ariz. at 552, 691 P.2d at 318. And, because arbitration agreements are subject to the same enforceability defenses as any other contract, *Dueñas*, 236 Ariz. 130, ¶6, 336 P.3d at 768, it is the prerogative and obligation of courts to determine the validity of an arbitration agreement prior to enforcement, *see Guidotti*, 716 F.3d at 773, which cannot be done properly without an adequate vetting of the issue.

¶34 Finally, permitting limited discovery on the issue of procedural unconscionability need not result in protracted, inappropriate discovery. Trial judges have broad discretion to control the scope and extent of discovery. *Brown v. Superior Court*, 137 Ariz. 327, 331, 670 P.2d 725, 729 (1983) ("[I]n matters of discovery a trial court has broad discretion which will not be disturbed absent a showing of abuse."); *see also State Farm Mut. Auto. Ins. Co. v. Lee*, 199 Ariz. 52, ¶12, 13 P.3d 1169, 1174 (2000) (same). Further, Rule 26(b)(1)(B) requires a court to "limit the frequency or extent of discovery otherwise allowed by [the] rules" if, among other things, it determines the discovery is unreasonable or outside the permissible scope.[9] See also Rule 26(c)(1)(D), Ariz. R. Civ. P. (protective order "limiting the scope of discovery to certain matters"). We trust trial judges to use the tools at their disposal to appropriately limit discovery on the issue of procedural unconscionability in light of the facts of the particular case.[10]

Disposition

¶35 For the foregoing reasons, we affirm the trial court's decision finding the Agreement not substantively unconscionable. On the issue of procedural unconscionability, we vacate and remand the matter to the trial court for further proceedings consistent with this opinion.

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1. We also deny Gullett's December 13, 2016 motion requesting that we take judicial notice of a minute-entry ruling in *Johnston v. Kindred Nursing Centers West, LLC*, CV201600206 in Cochise County Superior Court.
2. Gullett's wrongful-death claim against Kindred is not subject to the Agreement, and has been stayed pending arbitration of the APSA claim.
3. Because we conclude the Agreement is not substantively unconscionable, we do not address Gullett's argument concerning severability.
4. Gullett has not provided any evidence that any of the arbitrators listed as connected to DJS Services are provided by Kindred to DJS Services.
5. Arizona also provides remedies in court should an arbitrator fail to be impartial or engage in other misconduct. *See* §§123023(A)(2) and 12-1512(A)(2).
6. The Agreement possesses attributes generally not indicative of procedural unconscionability. It is a separate document, and is not contained within any other agreement. *See Dueñas*, 236 Ariz. 130, ¶11, 336 P.3d at 769 (arbitration agreement not "inconspicuously bundled with other contractual terms"). It also states it "is not a precondition of admission or to the furnishing of services" and "may be cancelled by the resident" within thirty days of execution. *See id.* ¶¶11, 20.
7. We therefore disagree with Kindred's assertion during oral argument in this court that *Ruesga* fully disposes of the issue whether Gullett is entitled to conduct discovery concerning procedural unconscionability.
8. Rule 56(d)(5)(A), Ariz. R. Civ. P., permits a party opposing summary judgment to obtain discovery upon making the showing required by the rule. *See Simon v. Safeway, Inc.*, 217 Ariz. 330, ¶6, 173 P.3d 1031, 1034 (App. 2007); *Grand v. Nacchio*, 214 Ariz. 9, ¶72, 147 P.3d 763, 783 (App. 2006). Because we conclude a party opposing a motion to compel arbitration is entitled to discovery on the issue of procedural unconscionability, we do not analyze the issue under Rule 56(d).
9. "[S]ubstantial transactions," those involving significant risk, require greater scrutiny for procedural unconscionability than do "[r]outine transactions involving insignificant risk." *Dueñas*, 236 Ariz. 130, ¶9, 336 P.3d at 768.
10. We leave it to the trial court's discretion to determine the appropriate extent of discovery on the issue of procedural unconscionability in the proceedings on remand.

Cite as
758 Ariz. Adv. Rep. 17

IN THE SUPREME COURT OF THE STATE OF ARIZONA

EQUITY INCOME PARTNERS, LP, an Arizona Limited Partnership; Galileo Capital Partners Limited, a Cayman Islands Exempted Company,
Plaintiffs/Appellants,
v.
CHICAGO TITLE INSURANCE COMPANY, a Delaware Corporation,
Defendant/Appellee.

No. CV-16-0162-CQ
FILED: 02/07/17

United States District Court for the District of Arizona No. 2:11-cv-01614-SMM
Certified Questions from the United States Court of Appeals for the Ninth Circuit
Equity Income Partners, LP v. Chi. Title Ins. Co., 828 F.3d 1040 (9th Cir. 2016)
QUESTIONS ANSWERED

ATTORNEYS:
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Judge Barton authored the opinion of the Court, in which Chief Justice Bales, Vice Chief Justice Pelander, and Justices Brutinel and Bolick joined.

This opinion is subject to revision before publication in the Pacific Reporter.

JUDGE BARTON, opinion of the Court:

¶1 The United States Court of Appeals for the Ninth Circuit was recently asked to decide what impact, if

Real Resolutions FOR Real Estate

By Beth Jo Zeitzer
R.O.I. PROPERTIES

Using a special real estate commissioner brings third-party objectivity to the valuation and sale of disputed property.

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R.O.I. Properties is a full service Commercial Real Estate Brokerage firm, providing Acquisition, Sale, Property Management, Receivership and Special Commissioner services for Office, Industrial, Retail, Multi-Family, Subdivisions, Hospitality, Mini-Storageand Special-Use Assets/ Facilities. With over 100 years of combined real estate experience, R.O.I. is a market expert, equipped with a full spectrum of knowledge to identify, attract, qualify and close the ideal buyer/tenant for properties. As buyer or tenant broker/representative, R.O.I. is your/your clients dedicated advocate to strategically identify and proactively address property acquisitions and leases. In serving as Receiver, Property Manager and Special Commissioner, R.O.I. provides unsurpassed service to deliver physical and financial forensics, and on-site and back office property management services.

You've been appointed to a probate case with three children who have inherited farmland from their parents—and who have three radically different ideas about what to do next. The oldest child wants to stay on, working the land as mom and dad did for the past 40 years. The second wants to sell off the property while the market's hot. The third's got a crystal ball that says the market is going higher, and they want to hand on for maximum value. And all three have real estate brokers who they'd like to be a part of the decision.

In its current status, the situation isn't a quick or easy fix, and as a mediator or arbitrator, you have to navigate how to proceed with partitioning or liquidating the property. Given the complexities of real estate, however, it's

worth considering an option that's often underutilized: a special real estate commissioner. Although special real estate commissioners are often thought of as existing in the court-appointed realm, they can be a way of resolving disputes swiftly and inexpensively—particularly compared to attorney's fees and extended litigation.

Whether you suggest it to the disputing parties or make a recommendation to a judge, a special real estate commissioner serves the role of a neutral real estate broker. Their mission is to give you advice on how to value a property and get it sold for the highest and best price, so that all parties achieve a win.

Special Commissioner Appointments at a Glance

Three different types of disputes in particular may benefit from a special commissioner appointment:

Family Law

An example of this would be parties who don't know or can't agree on a real estate agent, perhaps because there is a lack of trust or a conflict of interest for one of the parties. In divorce cases, one spouse may cause issues in the sales process by limiting access to the jointly owned residence or failing to maintain the property adequately for viewings by prospective buyers. Such cases are governed by Rule 95G of the Arizona Rules of Family Law Procedure, implemented Jan. 1, 2006. This allows for the appointment of a real estate special commissioner to assist the parties with disposition of community real property when the parties are otherwise unable to agree on such issues.

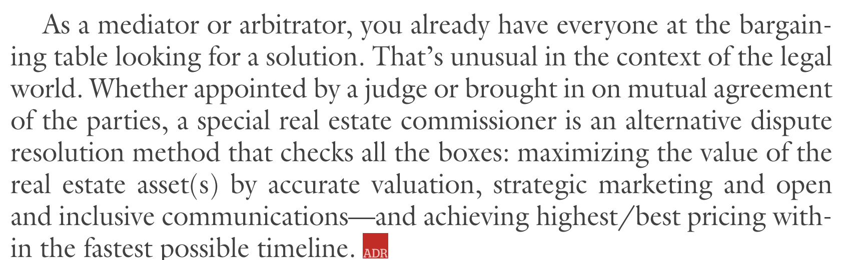
Probate/Contested Estates

As in the example at the top of this article, a special real estate commissioner can be used in contested estates where beneficiaries cannot agree on the disposition/distribution of assets, or in the case of a property that cannot be partitioned without prejudice to the owners and that cannot conveniently be allotted to any one party. This method of sale is governed by the authority of A.R.S. §14- 3911, Partition for the Purpose of Distribution.

Partition

Finally, there are the cases in which a property held by cotenants (e.g., joint tenants, tenants-in-common or community property) is incapable of fair division, sale or distribution of proceeds. In some cases, dividing and selling the property might depreciate the value (or be physically impossible, such as a single-family home), or the parties disagree on whether it should be sold or managed. In such cases, the special commissioner will be directed to sell the property and return the proceeds into court to be divided between the parties according to their respective interests—and after payment of any mortgages, liens, commissions and escrow fees. Here, the governing authority is A.R.S. §12-1218.B.

The qualifications of a special commissioner should include being a seasoned broker with broad experience in working with different types of properties and submarkets. In addition, you should place emphasis on finding someone who is familiar with working in an adversarial/ litigious environment. Finally, a special commissioner should be comfortable drafting motions and appearing and testifying in court to resolve matters related to the valuation, marketing, access and sale of real estate assets.



As a mediator or arbitrator, you already have everyone at the bargaining table looking for a solution. That's unusual in the context of the legal world. Whether appointed by a judge or brought in on mutual agreement of the parties, a special real estate commissioner is an alternative dispute resolution method that checks all the boxes: maximizing the value of the real estate asset(s) by accurate valuation, strategic marketing and open and inclusive communications—and achieving highest/best pricing within the fastest possible timeline. ADR

WHAT IS IN A NAME:

PARTIAL FINAL AWARD VS INTERIM AWARD

AND WHY DOES IT MATTER?

By Mark J. Heley

Courts, arbitrators and advocates frequently identify the concept of "finality" as one of the hallmarks and advantages of arbitration. In *Hall St. Assocs., L.L.C. v. Mattel, Inc.*,[1] the Supreme Court recognized that the FAA, sections 9 through 11, supported the national policy favoring arbitration and finality. Courts protect and promote the concept of "finality" through limited judicial review. When parties agree to arbitrate, many courts conclude that they necessarily agree to accept the resulting arbitration award as final and in essence forfeit the opportunity for judicial review of the arbitration result.[2]

While the concept of "finality" is part of the appeal of arbitration, the predisposition toward arbitration "finality" can create problems if applied to rob the arbitrator and parties of jurisdiction prematurely. Arbitrators and parties need to properly describe and characterize the award to help insure that final awards are treated as final. However, parties and arbitrators also need to pay equal attention to "interim" or "partial" awards to make sure they do not unwittingly lose or give up jurisdiction and authority before finally resolving all issues.

FINAL AWARDS AND THE DOCTRINE OF FUNCTUS OFFICIO

Typically, the arbitrator's award on the merits of a controversy between the parties will dispose of all issues raised in the demand and any counter-demand. Once the award is issued, courts will frequently apply the common-law doctrine of ***functus officio*** to arbitration awards governed by the Federal Arbitration Act. Functus officio is a Latin phrase meaning "having performed his or her office."[3] The doctrine of functus officio provides that, as a general rule, once an arbitrator has issued a final award, having fulfilled his function, the arbitrator is without authority to re-examine it.[4] The doctrine originated at a time when judges were hostile to arbitration and distrusted arbitrators' independence. The policy underlying this general rule reflects an "unwillingness to permit one who is not a judicial officer and who acts informally and sporadically, to re-examine a final decision which he has already rendered, because of the potential evil of outside communication and unilateral influence which might affect a new conclusion".[5]

Exceptions to the doctrine of ***functus officio*** have developed over time as arbitration has become more favored as a means of efficient dispute resolution.[6] Indeed, some courts have acknowledged the diminished role of functus officio, and suggested the concept is arguably 'hanging on by its fingernails'.[7] For example, parties are free to provide terms in their agreement to limit the application of functus officio.[8] Courts have also found exceptions to the doctrine of functus officio for procedural matters.[9] The Court in *Colonial Penn. Insurance Co. v. Omaha Indemnity Co.*, characterized functus officio as a "somewhat harsh doctrine" with a number of recognized exceptions, including the arbitrator's ability to adjudicate any issue submitted but not yet adjudicated in the award and the ability to clarify any ambiguity "where the award, although seemingly complete, leaves doubt whether the submission has been fully executed."[10]

While the doctrine may be subject to criticism and exceptions, it has still been applied by courts to terminate the arbitrator's authority over previously decided matters. However, given the plethora of ambiguous and contradictory decisions regarding functus officio, arbitrators, courts and practitioners must view the doctrine of functus officio in the context of the rapidly evolving caselaw.[11]

MODIFYING OR CORRECTING AN AWARD

The ability to modify or correct an award following its issuance is limited. Arbitrators do not have the ability to reconsider decisions or re-determine the merits of issues decided in an award. Instead, the applicable statutes or rules restrict the arbitrator's ability to correct or modify an award to very specific circumstances. The FAA allows for parties to modify or correct final arbitration awards in limited situations. The FAA sets out three separate grounds for such motions. These are 1) where there was evident miscalculation of figures or an evident mistake in the description of any person, property or thing referred to in the award; 2) where the arbitrators rule on a matter not submitted to them for consideration; and 3) where the award is imperfect in a matter of form not affecting the merits of the controversy. The RUAA essentially echoes these grounds. Similarly, the AAA Construction Rules and JAMS Rules also allow an arbitrator, under certain circumstances, to correct any clerical, typographical, technical, or computational errors in the award.[12]

Courts have construed this language quite narrowly. For example, courts have equated the term "miscalculation" with clerical error. The Fourth and Eleventh Circuits limit "miscalculation" to awards that contain a mathematical error on their face and the Fifth and Sixth Circuits limit the term to situations where there exists an indisputable error that lacks rational footing.[13] These cases are consistent with the overall policy supporting the finality of arbitration awards.

Parties seeking to modify or correct an arbitration award must also be aware of the strict time requirements that apply to such requests or motions. Under the FAA, the notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or its attorney within three months after the award is filed or delivered.[14] A motion to modify filed or served after this three-month period is time-barred.[15] The institutional

rules apply even shorter time limits. The JAMS rules, require that a motion to correct or modify the award be served within seven days of service of the Final or Partial Final Award. The AAA currently allows 20 days for such motions.[16]

INTERIM REMEDIES

Historically, barriers have existed that limit or preclude the ability of parties to an arbitration proceeding to obtain quick, emergency relief (e.g., an injunction or a provisional remedy). The Arizona version of the RUAA seeks to addresses this issue and provides parties to arbitration with greater flexibility and opportunities for interim relief. The AZ-RUAA includes language clarifying an arbitrator's power to grant interim remedies and goes so far as to provide for the power of a court to grant interim remedies before an arbitration is initiated and even after an arbitration has begun.[17] The AZ-RUAA makes clear that an arbitrator has broad power to grant interim relief:

> *The arbitrator may issue such orders for interim remedies, including interim awards, as the arbitrator finds necessary to protect the effectiveness of the arbitration proceeding and to promote the fair and expeditious resolution of the controversy, to the same extent and under the same conditions as if the controversy were the subject of a civil action.*

This section is intended to give arbitrators very broad authority. The Comments to the RUAA state:

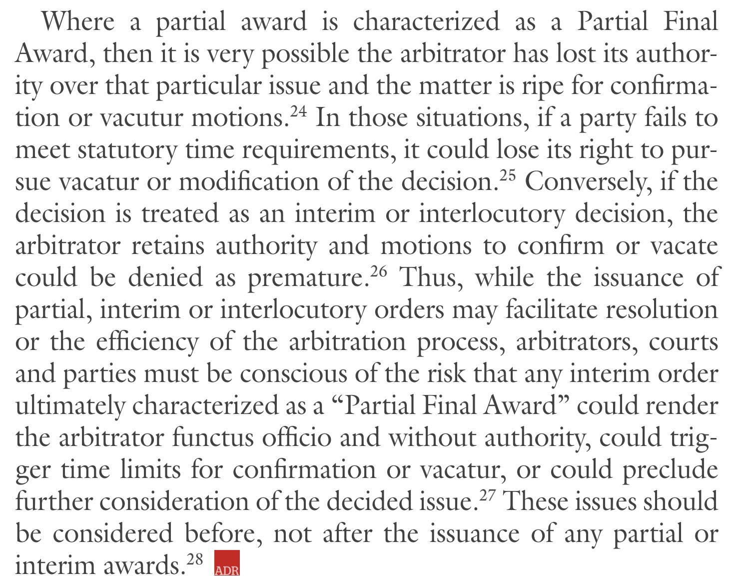
> *the case law, commentators, rules of arbitration organizations, and some state statutes are very clear that arbitrators have broad authority to order provisional remedies and interim relief … This authority has included the issuance of measures equivalent to civil remedies of attachment, replevin, and sequestration to preserve assets or to make preliminary rulings ordering parties to undertake certain acts that affect the subject matter of the arbitration proceeding.*

As set out above, Arizona Revised Statutes, section 12-3008, confirms that arbitrators may under certain circumstances issue "partial" or "interim" awards that do not resolve the entire case, but do finally determine certain issues. Arbitrators may also issue interim order or decisions that address legal or factual issues raised by the parties, but are not dispositive. The FAA as well as the rules of arbitral institutions also recognize this authority.[18] Partial final awards are typically treated as "final" and once issued may not be subject to reconsideration or review by the arbitrators under the doctrine of Functus Officio.[19] "Interim" or "Interlocutory" awards are not usually treated as "final" rulings and may not be subject to final confirmation. However, both the arbitration institution rules and the law in this area remain unclear as to the distinction between Partial Final Awards that may be subject to motions for confirmation and vacatur, and "interim" or "interlocutory" awards that are not final.

For example, the AAA Construction or Commercial Rules and the CPR Rules each allow the arbitrator to issue interim, interlocutory or partial orders or awards, but do not define these terms or distinguish between a Partial Final award and an interim or interlocutory award.[20] The JAMS Arbitration Rules provide slightly more guidance, and appear to distinguish between these different types of decisions. The JAMS rules indicate that Final or Partial Final Awards may be issued only after the close of the hearing. This suggests that "interim", "interlocutory" or "partial" awards may be issued prior to the close of the hearing.[21]

The characterization of partial awards as either a "Partial Final" award or as an interim or interlocutory award is much more than simply an academic or technical discussion. The characterization of the award by a court can dramatically impact the parties' rights and the arbitrators' or court's authority to review, modify, confirm or vacate the award. In particular, when reviewing any partial, interim or interlocutory orders or awards, the characterization of the award impacts at the very least some or all of the following concerns:

1. Whether the arbitrator has continuing authority to review, amend or finalize the award;
2. Whether the award commences statutory time limitations for seeking vacatur or confirmation;[22]
3. Is the award subject to immediate confirmation by the courts;[23]



Where a partial award is characterized as a Partial Final Award, then it is very possible the arbitrator has lost its authority over that particular issue and the matter is ripe for confirmation or vacutur motions.[24] In those situations, if a party fails to meet statutory time requirements, it could lose its right to pursue vacatur or modification of the decision.[25] Conversely, if the decision is treated as an interim or interlocutory decision, the arbitrator retains authority and motions to confirm or vacate could be denied as premature.[26] Thus, while the issuance of partial, interim or interlocutory orders may facilitate resolution or the efficiency of the arbitration process, arbitrators, courts and parties must be conscious of the risk that any interim order ultimately characterized as a "Partial Final Award" could render the arbitrator functus officio and without authority, could trigger time limits for confirmation or vacatur, or could preclude further consideration of the decided issue.[27] These issues should be considered before, not after the issuance of any partial or interim awards.[28] ADR

ENDNOTES

1. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 128 S. Ct. 1396, 170 L. Ed. 2d 254, 2008 U.S. LEXIS 2911, 76 U.S.L.W. 4168, 2008 AMC 1058, 21 Fla. L. Weekly Fed. S 121 (U.S. 2008).
2. *See Bowen v. Amoco Pipeline Co.*,254 F.3d 925, 933-936 (10th Cir. 2001)(quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (U.S. 1991) and citing additional cases).
3. Black's law Dictionary (10th Ed. 2014).
4. *Gov't of the Virgin Islands v. AFT, Local 1825*, 2014 V.I. LEXIS 57, 61 V.I. 34, 2014 WL 3767432 (V.I. Super. Ct. 2014)
5. *McClatchy Newspapers v. Central Valley Typographical Union No. 46*, 686 F.2d 731, 734 (9th Cir.), cert. denied, 459 U.S. 1071, 74 L. Ed. 2d 633, 103 S. Ct. 491 (1982); *Washington-Baltimore Newspaper Guild, Local 35 v. Washington Post Co.*, 143 U.S. App. D.C. 210, 442 F.2d 1234, 1238-39 (D.C. Cir. 1971); *see American Centennial Ins. Co. v. Arion Ins. Co.*, No. 88 Civ. 1665 (S.D.N.Y. April 13, 1990) (LEXIS, Genfed library, Dist file).
6. *See, e.g., Hyle v. Doctor's Assocs., Inc.*, 198 F.3d 368, 370 (2d Cir. 1999); *Clarendon Nat. Ins. Co. v. TIG Reins. Co.*, 183 F.R.D. 112, 116 (S.D.N.Y. 1998).
7. *Halliburton Energy Servs. v. NL Indus.*, 553 F. Supp. 2d 733, 2008 U.S. Dist. LEXIS 26299 (S.D. Tex. 2008)(referring to the "limited nature" of functus officio and noting exceptions).
8. *See Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468, 109 S. Ct. 1248, 103 L. Ed. 2d 488, 1989 U.S. LEXIS 1273, 57 U.S.L.W. 4295 (U.S. 1989)
9. *See United Steelworkers of Am. v. Ideal Cement Co., Div. of Ideal Basic Indus., Inc.*, 762 F.2d 837, 841 (10th Cir. 1985).
10. *Colonial Penn Ins. Co. v. Omaha Indem. Co.*, 943 F.2d 327, 1991 U.S. App. LEXIS 20626 (3d Cir. Pa. 1991).
11. For a survey discussion of cases applying functus office principles see J. Gaitis, *International Arbitration Procedure: The Need for a Rule Providing a Limited Opportunity for Arbitral Reconsideration of Reasoned Awards*, 15 Am. Rev. Int'l Arb. 9 (2004).
12. AAA CR-51. JAMS CR-24 (i).
13. *See AIG Baker Sterling Heights, LLC v. Am. Multi-Cinema Inc.*, 508 F.3d 995, 999-1001 (11th Cir. 2007); *Apex Plumbing Supply, Inc. v. U.S. Supply Co.*, 142 F.3d 188, 194 (4th Cir. 1998); *Nat'l Post Office Mailhandlers v. U.S. Postal Serv.*, 751 F.2d 834, 843-45 (6th Cir. 1985).
14. 9 U.S.C. § 12. *Gov't of the Virgin Islands v. AFT, Local 1825*, 2014 V.I. LEXIS 57, 61 V.I. 34, 2014 WL 3767432 (V.I. Super. Ct. 2014)
15. *See Taylor v. Nelson*, 788 F.2d 220, 225 (4th Cir. 1986) (finding that an attempt to vacate an arbitration award could not be made in opposing a later application to confirm because the three-month period had expired). *See also Chase v. Nordstrom*, Civ. No. CCB-10-2114, 2010 U.S. Dist. LEXIS 121523, 2010 WL 4789442, at *2 (D.Md. Nov. 17, 2010)
16. See AAA CR-51; JAMS CR-24 (j).
17. Ariz. Rev. Stat. Ann. § 12-3008.
18. See AAA CR-48; JAMS CR- 24 (e). The FAA references confirmation of an "award or partial award." In section 16(a)(1)(D).
19. *See Hill v. Wackenhut Services*, 971 F. Supp. 2d 5 (D.D.C. 2013). *See also Bosack v. Soward*, 586 F.3d 1096, 1103 (9th Cir. 2009) ("[F]*unctus officio* … forbids an arbitrator to redetermine an issue which he has already decided.") (emphasis added) (internal quotation marks omitted); *WMA Secs., Inc. v. Wynn*, 32 Fed. Appx. 726, 729 (6th Cir. 2002) ("[F]*unctus officio* prevents arbitrators from revisiting a final award.") (emphasis added); *International Broth.*, 109 F.3d at 1411 ("Once an arbitrator has made and published a final award … [he] can do nothing more in regard to the subject matter of the arbitration."). *But See Employers' Surplus Lines Ins. Co. v. Global Reinsurance Corp.*, 2008 U.S. Dist. LEXIS 8253, 2008 WL 337317 (S.D.N.Y. Feb. 6, 2008)(Arbitrator was not *functus officio* because the second liability finding in the Partial Final Award lacked finality, and therefore the Arbitrator acted within his powers when he reconsidered this finding and modified it in the Final Award).
20. AAA CR-48, CPR Rule 15.1.
21. See JAMS Rules 22(h) and 24(a).
22. Under the FAA, notice of a motion to vacate (or modify) an arbitration award "must be served upon the adverse party or his attorney within three months after the award is filed or delivered." Under the Revised Uniform Arbitration Act, the party seeking vacatur has 90 days from notice of the award. However, if the party alleges the "award was procured by fraud, corruption, or other undue means," the party has 90 days from when the fraud or corruption was known or should have been known. RUAA Section 23 (b); Ar
23. See J.Gaitis, *Finality, Ripeness, and Funcus Officio: the Interlocutory Arbitral Award Conundrum*, *Volume 7 ACCL Journal 1* (Summer 2013).
24. *Bosack v. Soward*, 586 F.3d 1096, 1103 (9th Cir. 2009) ("The Eighth Circuit has held that an interim award may be deemed final for *functus officio* purposes if the award states it is final, and if the arbitrator intended the award to be final").
25. *See La. Health Serv. Indem. Co. v. Gambro A B*, 756 F. Supp. 2d 760, 2010 U.S. Dist. LEXIS 135579 (W.D. La. 2010)(finding that party's motion to set aside order permitting class certification was barred by three month limitations period of FAA).
26. *See, e.g., Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 412 (2d Cir. 1980) (that district court should have dismissed petition as premature because interim arbitration award was not final).
27. See C.Sink and A. Bastianelli, Construction ADR, P276-279 (2014).
28. Arizona courts have remained relatively silent on the ability of parties to appeal partial final arbitration awards, and the distinction between partial final awards and interim awards. In *Cho v.American Bonding Co.*, 190 Ariz. 593 (Ariz. Ct. App. 1997), the Arizona court was asked to enforce a Hawaii judgment based on an arbitration award. One party moved to vacate the decision and award because, among other reasons, the arbitrators entered only a partial award. The court rejected the argument to vacate the arbitration award, but did not address the issue of the whether a partial final award impacted its decision.

ABOUT THE AUTHOR

MARK HELEY practices in the area of construction law and alternative dispute resolution and has been named a fellow in the American College of Construction Lawyers and the College of Commercial Arbitrators. He is also a member of the American Arbitration Association's panel of neutrals and has arbitrated a wide spectrum of construction disputes. Mark has mediated over 1,500 cases to conclusion with a focus on complex multi-party construction or commercial matters.

Mark represents clients in contract negotiations, risk management, claims and litigation matters on a wide range of matters, including landmark projects such as the US Bank Stadium, Hubert H. Humphrey Metrodome, Mall of America, Washington National Airport, Minneapolis-St. Paul Inter-national Airport and the Hiawatha Light Rail Corridor.

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ENTERTAINMENT:
Censorship, Free Speech, Social Norms and The Law

BY Jason Houston

History and time have provided some stark contrasts among bizarre legal issues in the world of intellectual properties. Consider these:

In 1930, a young foursome calling themselves *The Beverly Hill Billies* made their debut on Los Angeles radio, their act a blend of music and comedy. Generally regarded as the original Beverly Hill Billies, in 1963 the group sued and won a settlement from the producers of *The Beverly Hillbillies* television show for name infringement. The settlement included an undisclosed figure for the show's permanent use of the name.

Roy Rogers' 1937 *Hold That Critter Down* made reference to a jovial attack by a bunch of cowboys on a hired hand of Asian descent. The energetic song outlined what would amount to felonious assault with hate crime overtones by today's standards:

'… to the old cook shack we're headin'.
We'll throw the pie in the Chink cook's eye
and tie him up in his beddin'.
And we'll make him run to the tune of a gun…'

Louis Jordan's 1940's novelty recording *Pettin' and Pokin'* made hilarity of domestic violence.

Gone With the Wind literally opened the floodgates on acceptable vulgarity. "*Frankly my dear, I don't give a damn!*" reverberated from the lips of youth across America, setting a new standard: if celebrities can say it, it must be OK.

Arthur Godfrey's recording of *Too Fat Polka* was an cruel and insensitive attack on overweight women.

Stan Freberg's 1958 *Green Chritma* was a side-splitting attack on holiday commercialism. So feared was the tune in New York, the home turf of Madison Avenue ad agencies, radio stations throughout the region refused to play it under threat of losing sponsors.

Jimmy Dean's 1962 hit *Big Bad John* originally ended with the tag, "*At the bottom of this mine lies one hell of a man…*" Censors rallied after the first promotional copies were aired, causing Columbia to revise the line. "*At the bottom of this mine lies a big, big man…*" became the ending on copies of the record sold at retail.

Homer and Jethro spawned another successful exercise in censorship. Like contemporary Stan Freeburg and successor Weird Al Yankovic, the popular 50s duo specialized in parodying pop tunes of the day. *Joe Bean*, arguably a loose parody of *Swing Low Sweet Chariot*, told the story of a young cowboy who was hanged for a murder he didn't commit, despite a lifetime of murderous misdeeds. The song ends with Joe being hanged – and his gut-wrenching gulp as the gallows opens up. It was pulled before it ever became well known.

Forty years later, Johnny Cash covered the song with no ill effects. ADR

And the beat goes on…

FORMS YOU MAY FIND USEFUL

PAGE 20 — ARBITRATOR'S NOTICES TO UNREPRESENTED PARTIES AND NON-ARIZONA ATTORNEYS REGARDING VARIOUS ARIZONA LEGAL AND ETHICAL MATTERS

PAGE 25 — DECLARATION OF FOREIGN COUNSEL REGARDING MULTIJURISDICTIONAL PRACTICE OF LAW AND COMPLIANCE WITH ARIZONA ETHICAL RULE 5.5(c)

AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

In the Matter of the Arbitration between:		**ARBITRATOR'S NOTICES TO UNREPRESENTED PARTIES AND NON-ARIZONA ATTORNEYS REGARDING VARIOUS ARIZONA LEGAL AND ETHICAL MATTERS**
AAA Case Number: [*FILL IN]	)	
	)	
[*FILL IN],	)	[*FILL IN], AAA Case Administrator
Claimant,	)	T: [*FILL IN]
v.	)	E: [*FILL IN]
[*FILL IN],	)	
Respondent.	)	
	)	
	)	
	)	
	)	
	)	

All,

Thank you for allowing me to serve you as the arbitrator in the above matter. In reviewing the filings in this matter, I noticed one or more of the following "checked" facts or circumstances below in this proceeding (if a box isn't checked then I don't think that situation is present here):

There are *pro se*, **unrepresented natural person parties** (i.e., individuals not represented by lawyers who are "representing themselves") in this arbitration proceeding. [See ¶s1 and 3, below.];

There are **unrepresented Business Entity parties** (e.g., corporations, partnerships, limited liability companies, etc. not represented by lawyers) whose owners are (presumably) "representing" them. [See ¶s 1, 2 and 3, below.]; and/or

There are **non-Arizona lawyers** representing parties to this Arizona arbitration proceeding. [See ¶4, below.]

The existence of any of the above-checked facts or circumstances poses legal and/or ethical issues of which you all should be aware and that create legal and ethical obligations on my part as an attorney/arbitrator in this proceeding.

[*FILL IN]
AAA Case Number: [*FILL IN]
April 18, 2017
Page **2** of **5**

1. Ethical Disclosures by Arbitrator. Regarding **unrepresented parties**, the arbitrator discloses that the arbitrator is an attorney admitted to practice law in the State of Arizona. The arbitrator apprises any party to this proceeding that is not now, or may not in the future be, represented by counsel that Ethical Rule 2.4 of the Arizona Rules of Professional Conduct provides:

> ***Lawyer Serving as Third-Party Neutral.***
>
> *A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.*
>
> *A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.* [Emphasis added.]

The arbitrator hereby discloses that **the arbitrator is not representing any of the parties to this arbitration proceeding as a lawyer or advocate and cannot give legal advice to any unrepresented party.** The arbitrator instructs any counsel for the parties in this matter to communicate this to his or her respective clients and client representatives by forwarding a copy of this Notice to them and drawing their attention to this paragraph of the Notice.

2. Business Entity Parties Must Appear by Counsel. Regarding **unrepresented Business Entity parties,** the arbitrator apprises all such parties that Arizona law provides that they must be represented by counsel to appear in private arbitration proceedings in the State of Arizona. This means that such **unrepresented Business Entity parties** cannot be represented by their officers, managers, partners, members, employees or other "owners." See, e.g., Rule 31 of the Rules of the Supreme Court of Arizona regarding the "Regulation of the Practice of Law," which provides (in relevant part):

> *"(a) Supreme Court Jurisdiction Over the Practice of Law*
>
> *1. Jurisdiction. Any person or entity engaged in the practice of law or unauthorized practice of law in this state, as defined by these rules, is subject to this court's jurisdiction.*

2. Definitions.

A. "Practice of law" means providing legal advice or services to or for another by:

(1) preparing any document in any medium intended to affect or secure legal rights for a specific person or entity;

(2) preparing or expressing legal opinions;

(3) representing another in a judicial, quasi-judicial, or administrative proceeding, or other formal dispute resolution process such as arbitration and mediation;

(4) preparing any document through any medium for filing in any court, administrative agency or tribunal for a specific person or entity; or

(5) negotiating legal rights or responsibilities for a specific person or entity." [Underlined emphasis added.]

See also Arizona Ethical Rule ER 5.5 regarding the "Unauthorized Practice of Law" and UPL ADVISORY OPINION UPL 04-03 (December 2004) [regarding "Non-lawyer In-house Employee Legal Services"]. The arbitrator also notifies the parties that the State Bar of Arizona takes the position that a lawyer arbitrator that presides over a private arbitration hearing where there are **unrepresented Business Entity parties** 'aids and abets the unauthorized practice law' in the state. Hence, **THE ARBITRATOR NOTIFIES THE PARTIES THAT THE ARBITRATOR WILL NOT BE ABLE TO PERMIT OR ALLOW ANY EMPLOYEE, OFFICER, MEMBER, MANAGER OR PARTNER OF ANY BUSINESS ENTITY PARTY TO 'REPRESENT' ANY BUSINESS ENTITY PARTY TO, OR TO PRESENT EVIDENCE OR DOCUMENTS IN, THIS PROCEEDING UNLESS SUCH PERSON IS ACCOMPANIED BY A LAWYER AUTHORIZED TO REPRESENT THAT BUSINESS ENTITY IN THIS ARBITRATION PROCEEDING**. Please govern yourselves accordingly.

3. Unrepresented Parties of Any Kind Must Give Prompt Notice if they Hire a Lawyer. The arbitrator notes that it appears that there are one or more **unrepresented parties** in this proceeding. If any such party hereafter engages a lawyer to represent him, her or it in this proceeding then that party must promptly give notice of the same to the

other parties, the AAA and the arbitrator in the manner required by the AAA's Rules, which provide:[1]

> **Representation**. "*Any party may participate without representation (pro se), or by counsel or any other representative of the party's choosing, unless such choice is prohibited by applicable law.*[2] *A party intending to be so represented shall notify the other party and the AAA of the name, telephone number and address, and email address if available, of the representative at least seven calendar days prior to the date set for the hearing at which that person is first to appear. When such a representative initiates an arbitration or responds for a party, notice is deemed to have been given*." [Emphasis added.]

This applies to the initial preliminary hearing. **THIS RULE WILL BE ENFORCED.**

4. Non-Arizona Counsel Representing Parties to this Arizona Arbitration. The Arbitrator apprises all counsel in this matter that Arizona law provides that the "practice of law" in Arizona includes "*… representing another in a judicial, quasi-judicial, or administrative proceeding, or other formal dispute resolution process such as arbitration and mediation;…*" See Rule 31(a)(2)(A)(3) of the Rules of the Supreme Court of Arizona, quoted in ¶2, above. See also the State Bar of Arizona's UPL ADVISORY OPINION UPL 06-04 (April 2006) and Arizona Ethical Rule ER 5.5 regarding the "Unauthorized Practice of Law," which provides, in relevant part:

…

> *(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:*
>
> > *(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter.*
> >
> > *(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;*
> >
> > *(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or*

---

[1] See, e.g., AAA Commercial Arbitration Rule R-26 and Construction Industry Arbitration Rule R-27.

[2] For the reasons stated in ¶2, applicable Arizona law prohibits *pro se* representation in arbitration proceedings by Business Entities.

[*FILL IN]
AAA Case Number: [*FILL IN]
April 18, 2017
Page **5** of **5**

> *another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or*
>
> *(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.*

The arbitrator advises any non-Arizona attorney representing a party in this proceeding that any non-Arizona attorney will need to file an Affidavit or Declaration with the Tribunal avowing to such attorney's state of compliance with Arizona Ethical Rule ER 5.5(c) before first appearing in this proceeding. The arbitrator requests that any such Affidavit or Declaration be filed at least three calendar days before any initial appearance in this matter. The arbitrator, the AAA and counsel for all other parties will rely upon the same, and will not conduct any independent investigation of the matters attested to therein, in permitting non-Arizona counsel to appear and represent a party in the matter before this Tribunal.

PLEASE GOVERN YOURSELVES ACCORDINGLY.

Thank you all for your anticipated professional courtesy and cooperation in this matter.

DATED: Tuesday, April 18, 2017

____
[*FILL IN], Arbitrator

Copies of this NOTICE served by E-mail only on Tuesday, April 18, 2017 on:

[*FILL IN]

DECLARATION OF FOREIGN COUNSEL REGARDING MULTIJURISDICTIONAL PRACTICE OF LAW AND COMPLIANCE WITH ARIZONA ETHICAL RULE 5.5(c)

THE ARBITRATION TRIBUNALS OF THE AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration between:	) AAA Case Number: *_______________
	)
*_______________,	) **DECLARATION OF FOREIGN**
	) **COUNSEL REGARDING MULTI-**
Claimant,	) **JURISDICTIONAL PRACTICE OF**
v.	) **LAW AND COMPLIANCE WITH**
	) **ARIZONA ETHICAL RULE 5.5(c)**
*_______________,	)
	)
Respondent.	)
	)
	)
	)
________________________________	)

I, undersigned counsel, declare under penalty of perjury as follows:

1. I am an individual over eighteen years of age. I have personal knowledge of the facts attested to herein, and if called upon to testify to them as a witness I could and would competently testify under oath to the following facts:

2. I have read Arizona Ethical Rule ("ER") 5.5. and Arizona Unauthorized Practice of Law ("UPL") Advisory Opinion UPL 06-04.

3. I am a member of [*INSERT LAW FIRM NAME] (the "Firm"), a law firm in the State of [*FILL IN] with offices in the City of [*FILL IN]. The Firm's law practice is concentrated on the representation of [*FILL IN].

4. [*FILL IN] has been a Firm client for several years. Over the past several years the Firm has provided [*FILL IN] with legal services relating to [*FILL IN], and dispute resolution services, including representation in litigation and arbitration matters.

5. I am a member in good standing of the bar of the State of [*FILL IN]. I have never been suspended or disbarred from the practice of law in any jurisdiction.

6. I am also a member in good standing of certain federal courts, including [*FILL IN].

7. I have been practicing law for nearly [*FILL IN] years and concentrate on representation of [*FILL IN]. My representation of clients in such litigation and arbitration matters is an integral part of my law Firm's practice generally and its ongoing representation of [*FILL IN] with pending litigation or arbitration matters specifically.

8. The legal services that I will provide to [*FILL IN] in this arbitration are on a temporary basis during pendency of this arbitration proceeding, and arise out of and are related to the Firm's ongoing representation of [*FILL IN] in connection with its [*FILL IN].

9. There is no Arizona court or agency to which I could turn for *pro hac vice* admission about this arbitration proceeding.

10. For these reasons, I believe that my representation of [*FILL IN] in this matter is fully consistent with Arizona Ethical Rule 5.5(c), as interpreted in Arizona UPL Advisory Opinion UPL 06-04.

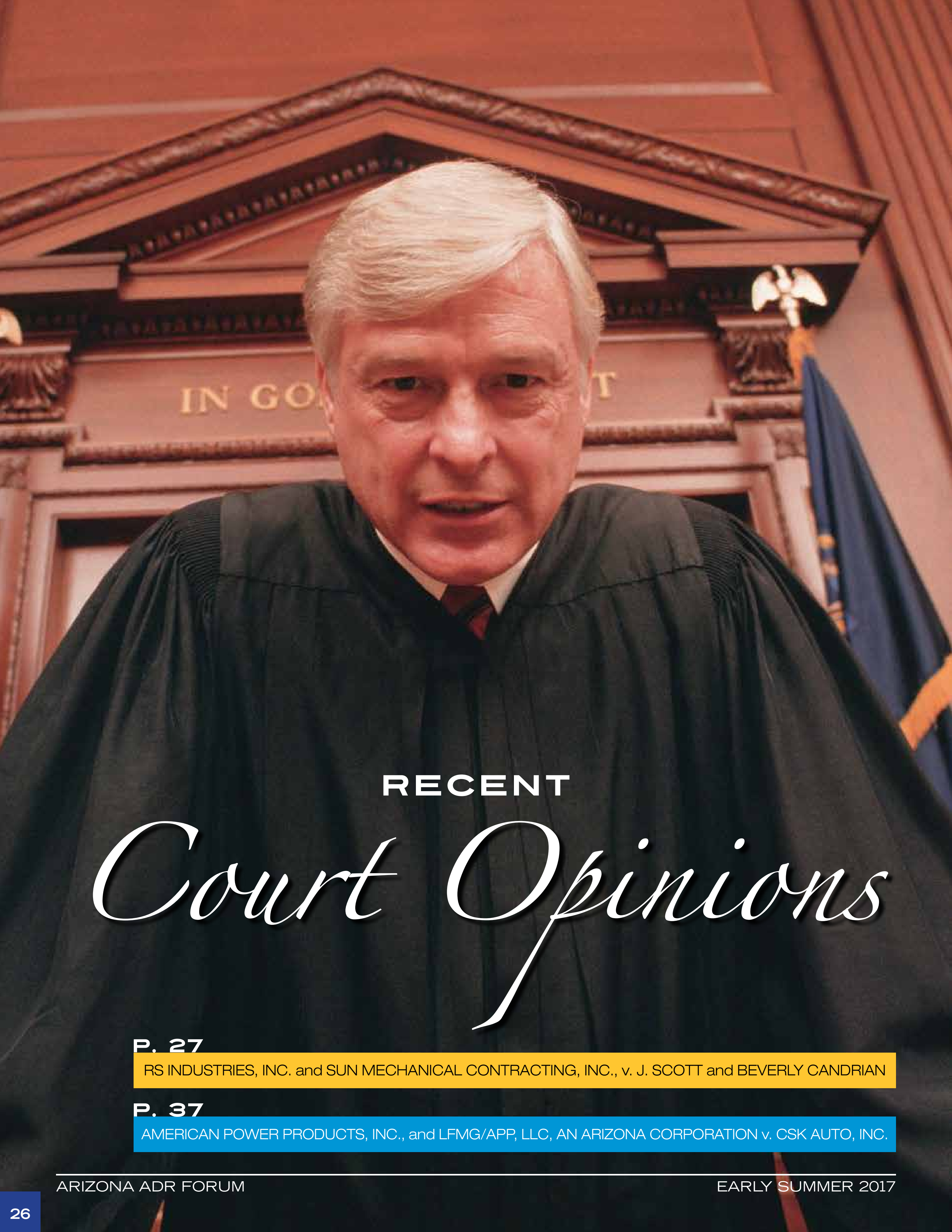
11. I understand that the American Arbitration Association, the Arbitrator(s) and counsel for all parties in this arbitration proceeding are relying upon the representations set forth herein in executing and performing their various roles and responsibilities in this arbitration proceeding and that they will not perform any independent investigation or due diligence concerning the representations set forth herein.

I declare under penalty of perjury that the foregoing is true and correct. Executed on Tuesday, April 18, 2017.

, Declarant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by placing a copy of the foregoing in U.S. Mail addressed to the following:
[*FILL IN]



RECENT Court Opinions

P. 27

RS INDUSTRIES, INC. and SUN MECHANICAL CONTRACTING, INC., v. J. SCOTT and BEVERLY CANDRIAN

P. 37

AMERICAN POWER PRODUCTS, INC., and LFMG/APP, LLC, AN ARIZONA CORPORATION v. CSK AUTO, INC.

RS INDUSTRIES, INC. AND SUN MECHANICAL CONTRACTING, INC., V. J. SCOTT AND BEVERLY CANDRIAN

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

RS INDUSTRIES, INC. and SUN MECHANICAL CONTRACTING, INC.,
Plaintiffs/Appellants,

v.

J. SCOTT and BEVERLY CANDRIAN,
Defendants/Appellees.

No. 1 CA-CV 15-0035
FILED 6-7-2016

Appeal from the Superior Court in Maricopa County
No. CV2014-009512
The Honorable Katherine M. Cooper, Judge

AFFIRMED

COUNSEL

Haralson, Miller, Pitt, Feldman & McAnally, PLC, Tucson
By Gerald Maltz
Counsel for Plaintiffs/Appellants

Rusing, Lopez & Lizardi, PLLC, Tucson
By Michael J. Rusing, P. Andrew Sterling
Co-Counsel for Defendant/Appellee

Thomas A. Zlaket, PLLC, Tucson
By Thomas A. Zlaket
Co-Counsel for Defendant/Appellee

RS INDUSTRIES, INC. AND SUN MECHANICAL CONTRACTING, INC., V. J. SCOTT AND BEVERLY CANDRIAN

OPINION

Presiding Judge Diane M. Johnsen delivered the opinion of the Court, in which Judge Patricia A. Orozco and Judge Kenton D. Jones joined.

J O H N S E N, Judge:

¶1 After an arbitrator ruled on several claims and made a significant award of attorney's fees and expenses, the superior court confirmed the award and granted more fees and expenses. On appeal, the parties dispute whether their arbitration agreement and applicable law authorize the awards of fees and expenses. We affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Scott and Beverly Candrian founded Sun Mechanical Contracting, Inc., a Tucson plumbing and HVAC contractor. In 2003, the Candrians entered into a series of agreements with RS Industries, Inc., an Iowa company, by which the Candrians exchanged their stock in Sun for a 25 percent interest in RS. Mr. Candrian agreed to serve as president of Sun, now wholly owned by RS, for ten years and, at the end of that period, RS would buy back the Candrians' stock in RS. Mr. Candrian was guaranteed a position on RS's board of directors so long as he owned RS stock; meanwhile, the Candrians continued to serve on the Sun board.

¶3 In late 2012, before time for the stock buy-back, RS accused Mr. Candrian of breaching his employment agreement and alleged that, as a result of his breach, the Candrians' stock in RS had no value. In response, the Candrians filed suit in federal district court, asking it to declare the value of the stock; several months later, Sun sued the Candrians in superior court, alleging $10.7 million in damages for breach of the employment agreement and seeking enforcement of newly passed corporate resolutions purporting to oust the Candrians from the Sun board. A month later, the district court dismissed the complaint in favor of arbitration. The parties eventually negotiated an arbitration agreement covering all their disputes, and the superior court stayed the state action pending arbitration.

¶4 The parties selected a Phoenix lawyer as their arbitrator. In the two court cases, they had made numerous filings and litigated an application for a temporary injunction. They continued to battle during the

run-up to the four-day arbitration. With several million dollars at stake, they retained expert witnesses, took depositions, propounded and responded to discovery requests, litigated discovery disputes, and briefed a motion by the Candrians for summary judgment. The arbitrator ultimately decided nearly all issues in favor of the Candrians, concluding they were owed $5,006,245 for their RS stock and that Mr. Candrian was due $77,000 in unpaid wages.

¶5 Having prevailed on the merits, the Candrians filed an application seeking $1,032,411.50 in attorney's fees and $211,240.41 in "costs." Over RS's objection, the arbitrator granted the Candrians nearly every dollar they had sought, citing as authority the arbitration agreement, RS bylaws, Iowa indemnity laws (one of the contracts referenced Iowa law) and Arizona Revised Statutes ("A.R.S.") section 12-341.01(A) (2016).[1] RS then filed a motion in superior court to vacate the arbitrator's award of attorney's fees and costs; the Candrians moved to confirm the award. After briefing and oral argument, the superior court denied the motion to vacate and confirmed the arbitration award in its entirety. The court then granted the Candrians attorney's fees and expenses of $54,781.33, along with taxable costs of $243, incurred in the confirmation proceeding.

¶6 RS timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-2101(A)(1) (2016) and -2101.01(A)(6) (2016).

DISCUSSION

A. Arbitrator's Award of Attorney's Fees and Costs.

1. Attorney's fees.

¶7 Arizona public policy favors arbitration as a speedy and affordable means of resolving disputes, and judicial review of an arbitrator's award is substantially limited by statute. *City of Cottonwood v. James L. Fann Contracting, Inc.*, 179 Ariz. 185, 189 (App. 1994). An arbitrator's decisions regarding questions of law and fact are final, and will not be disturbed unless the arbitrator has purported to decide a matter that is beyond the scope of the issues submitted for arbitration. *Smitty's Super-Valu, Inc. v. Pasqualetti*, 22 Ariz. App. 178, 180-81 (1974); *see also Hirt v. Hervey*, 118 Ariz. 543, 545 (App. 1978) ("[A]n arbitration award is not subject to attack merely because one party believes that the arbitrators erred with

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

respect to factual determinations or legal interpretations."). Indeed, under Arizona's version of the Revised Uniform Arbitration Act, A.R.S. §§ 12-3001 *et seq.*, as relevant to this appeal, an aggrieved party may petition the superior court to vacate an arbitration award only if the "arbitrator exceeded the arbitrator's powers." A.R.S. § 12-3023(A)(4) (2016). We review the superior court's decision to confirm an arbitration award in the light most favorable to upholding the decision and will affirm unless the superior court abused its discretion. *See Atreus Communities Group of Ariz. v. Stardust Dev., Inc.*, 229 Ariz. 503, 506, ¶ 13 (App. 2012).

¶8 RS does not contest the arbitrator's findings on liability and damages, but argues the arbitrator exceeded his authority when he awarded attorney's fees and expenses. By statute, "[a]n arbitrator may award reasonable attorney fees and other reasonable expenses of arbitration only if that award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding." A.R.S. § 12-3021(B) (2016). In that regard, § 12-3021(B) grants an arbitrator the same power the superior court has to award fees in a civil action. *See Sanders v. Boyer*, 126 Ariz. 235, 241 (App. 1980) (general rule is that attorney's fees are not allowed "except where expressly provided for by either statute or contract").

¶9 The arbitration agreement the parties negotiated stated:

> All Parties have the right to apply to the Arbitrator for recovery of reasonable attorney's fees incurred in connection with the arbitration, and also the authority to apply for reasonable attorneys' fees previously incurred in the lawsuits referenced in Recitals C [the prior district-court proceeding] and E [the prior state-court proceeding], under any applicable statute, rule, or contract.

After prevailing in the arbitration, the Candrians sought $611,693 in fees incurred in the two lawsuits before the arbitration began and $420,718.50 incurred in the arbitration. The arbitrator awarded them fees of $1,032,299.50.

¶10 Although RS broadly contends the arbitrator exceeded his powers, each argument RS raises to the fees award is a contention that the arbitrator ruled incorrectly, not that he lacked the power to rule. For example, RS argues the dismissals of the two lawsuits constituted res judicata against the Candrians, barring any fee award to them. It argues A.R.S. § 12-341.01, the Arizona statute that allows a court to grant fees to

the prevailing party in a "contested action arising out of a contract," did not apply because the buy-sell agreement specified that Iowa law would govern and the other claims were not sufficiently intertwined with claims under the employment agreement, to which Arizona law applied. And it argues the Iowa laws and the corporate bylaws the arbitrator cited do not permit a fees award under the circumstances presented here. All of these are arguments why the arbitrator assertedly erred in deciding to award fees, not arguments why he exceeded his authority in doing so.

¶11 RS further contends that under the language in the arbitration agreement quoted above, no fees could be granted except as provided by "applicable statute, rule, or contract." The Candrians interpret the agreement differently; they argue the "applicable statute, rule, or contract" language was intended to apply to a request for fees incurred in the lawsuits but not to a request for fees incurred in the arbitration itself. Regardless, by their agreement, the parties granted to the arbitrator the power to resolve any dispute about the meaning of the fees provision. Pursuant to A.R.S. § 12-3023(A), on appeal, we will not review the merits of an arbitrator's factual findings or legal conclusions. *See Atreus Communities*, 229 Ariz. at 506, ¶ 13 ("[T]he arbitrator's decisions are final and binding as to both issues of fact and law, regardless of the correctness of the decision.").

¶12 RS failed to show the arbitrator exceeded the powers granted to him by the law and the agreement to award reasonable attorney's fees incurred in the arbitration proceeding and in the two lawsuits that preceded the arbitration. *See* A.R.S. § 12-3023(A). The superior court accordingly did not err in confirming the fees award.

2. Costs/Expenses.

¶13 The Candrians asked the arbitrator to award them roughly $98,600 in expenses incurred in the pre-arbitration lawsuits and $112,600 in expenses incurred during the arbitration. The arbitrator's award of $211,240.41 in expenses included filing fees, deposition transcripts and videographer charges, costs of travel to attend depositions, expert witness fees, food and lodging during the arbitration (both sides had Tucson lawyers; the arbitration was conducted in Phoenix), copying costs, delivery expenses, parking, and the costs of preparing hearing exhibits.[2]

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[2] RS argues the arbitrator lacked the power to award computerized legal research costs as an expense. But costs of computerized legal research

¶14 As noted, A.R.S. § 12-3021(B) empowers an arbitrator to grant a party its "reasonable expenses of arbitration only if that award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding." Because the arbitration agreement here said nothing about expenses, the arbitrator had the power to award expenses only if authorized by law. This is the same rule that governs awards of litigation expenses during court proceedings. *See Schritter v. State Farm Mut. Auto. Ins. Co.*, 201 Ariz. 391, 392, ¶ 6 (2001) ("A party to a civil action cannot recover its litigation expenses as costs without statutory authorization.").

¶15 By statute, a successful party to a civil action in Arizona is entitled to recover "from his adversary all costs expended or incurred therein unless otherwise provided by law." A.R.S. § 12-341 (2016). But the statutes do not grant the prevailing party a right to recover every manner of litigation expense. Under A.R.S. § 12-332 (2016), the prevailing party in a civil action in superior court is allowed only its taxable costs, which are defined to include:

> 1. Fees of officers and witnesses.
>
> 2. Cost of taking depositions.
>
> 3. Compensation of referees.
>
> 4. Cost of certified copies of papers or records.
>
> 5. Sums paid a surety company for executing any bond or other obligation therein, not exceeding, however, one per cent on the amount of the liability on the bond or other obligation during each year it was in force.
>
> 6. Other disbursements that are made or incurred pursuant to an order or agreement of the parties.

A.R.S. § 12-332(A)(1)-(6); *see Reyes v. Frank's Serv. & Trucking, LLC*, 235 Ariz. 605, 608, ¶ 6 (App. 2014) (whether an expense is recoverable as a taxable cost is reviewed *de novo*).

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are recoverable as attorney's fees. *Ahwatukee Custom Estates Mgmt. Ass'n v. Bach*, 193 Ariz. 401, 404 (1999).

¶16 Some but not all of the expenses the arbitrator approved would be recoverable as taxable costs under § 12-332(A). For example, although a party may recover costs it incurs in deposing an opposing party's expert witness, the fees it pays its own expert witness are not recoverable. *See Reyes*, 235 Ariz. at 608-09, ¶ 8.[3] Other expenses, including those incurred for photocopying, facsimiles, shipping and travel expenses, are not recoverable as taxable costs. *See Bennett v. Baxter Group, Inc.*, 223 Ariz. 414, 423, ¶ 37 (App. 2010).

¶17 In granting the Candrians' request for expenses, however, the arbitrator cited Iowa indemnity statutes and RS bylaws. Iowa law allows a corporation to indemnify a director against liability under certain circumstances. *See* Iowa Code § 490.851(1) (2016). And the RS corporate bylaws provided that RS "shall indemnify each director . . . to the fullest extent possible, against all obligations, including attorney's fees . . . and reasonable expenses actually incurred by such director . . . upon claim made by [RS], any stockholder thereof or by any third party relating to his or her conduct as a director."

¶18 As with the attorney's fees award, RS argues the arbitrator exceeded his powers by granting the Candrians' request to be reimbursed for expenses that are not taxable costs. But as with the attorney's fees award, RS's argument in reality is that the arbitrator erred in interpreting the legal authorities he cited as allowing the expenses. By entering into the arbitration agreement, RS agreed the arbitrator's decisions in matters of law would be final. *See Atreus Communities*, 229 Ariz. at 506, ¶ 13. Under A.R.S. § 12-3023(A), we will not review whether the arbitrator correctly interpreted Iowa law and the RS bylaws to require RS to indemnify the Candrians for non-taxable expenses they incurred in the lawsuits and the arbitration. Accordingly, the superior court did not err in confirming the arbitrator's award of expenses.

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[3] Recoverable costs associated with depositions may include fees paid for court reporters and transcripts, reasonable travel expenses for attorneys and court reporters, and photocopies of deposition records, so long as they are "reasonably and necessarily incurred." *Reyes*, 235 Ariz. at 608-09, ¶¶ 8-12. Expenses associated with recording depositions are eligible for recovery as a taxable cost, "[b]ut when a party has chosen to incur expenses for both stenographic and video recording of a deposition, the trial court must determine the reasonableness and necessity of those expenses on a case-by-case basis." *Id.* at 611, ¶ 21.

B. Superior Court's Confirmation of the Arbitration Award.

1. Section 12-3025.

¶19 Under A.R.S. § 12-3025 (2016), a party may collect attorney's fees and expenses incurred in connection with an action to confirm an arbitration award. Subsection C of the statute states:

> On application of a prevailing party to a contested judicial proceeding under § 12-3022, 12-3023 or 12-3024, the court may add reasonable attorney fees and other reasonable expenses of litigation incurred in a judicial proceeding after the award is made to a judgment vacating an award without directing a rehearing or confirming, modifying or correcting an award.

A.R.S. § 12-3025(C).

2. Attorney's fees.

¶20 The Candrians were successful in confirming the arbitration award over RS's vigorous attempt to vacate it under A.R.S. § 12-3023, and thus were entitled to their reasonable attorney's fees pursuant to A.R.S. § 12-3025(C). RS acknowledges the power of the superior court to award fees in confirming the award, but argues the amount of fees the court awarded was unreasonable. RS contends the Candrians' fee application revealed "block-billing" by their lawyers and argues the court should not have awarded the fees of all three lawyers who traveled from Tucson to Phoenix so that one of them could participate in oral argument on the motion to confirm the award.

¶21 We review an award of attorney's fees for an abuse of discretion. *Motzer v. Escalante*, 228 Ariz. 295, 296, ¶ 4 (App. 2011). We will affirm the court's award of attorney's fees if there is a reasonable basis for doing so. *James L. Fann Contracting*, 179 Ariz. at 195. Although the better practice may be to avoid block-billing when it can be done reasonably, as the Candrians contend, no Arizona authority holds that a court abuses its discretion by awarding fees that have been block-billed. In its order granting the fees, the superior court noted it had reviewed the billing statements and found them sufficiently detailed. As for the presence of three lawyers at oral argument, the court found the Candrians had offered a reasonable explanation: "[T]here was a lot at stake . . . , and it took the collective expertise of three attorneys to ensure the best result for their clients. Reason enough." RS does not argue the Candrians' lawyers' hourly rates were excessive, that the total bill was too large, or that too many hours,

in total, were spent on the matter. Under these circumstances, we cannot conclude the court abused its discretion in awarding the Candrians their attorney's fees.

3. Expenses.

¶22 The superior court awarded about $3,350 in non-taxable expenses incurred in connection with the confirmation proceeding, including copying costs, delivery charges, travel and meals. By contrast to A.R.S. §§ 12-341 and -332, which allow the court to award a narrow class of "taxable" costs, A.R.S. § 12-3025(C) confers on the court a broader power to award "reasonable expenses of litigation."

¶23 Section 12-3025 is nearly identical to Section 25 of the Revised Uniform Arbitration Act. The comment to Section 25 explains it intended to "discourage" unfounded appeals of arbitration awards:

> Section 25(c) promotes the statutory policy of finality of arbitration awards by adding a provision for recovery of reasonable attorney's fees and reasonable expenses of litigation to prevailing parties in contested judicial actions to confirm, vacate, modify or correct an award. Potential liability for the opposing parties' post-award litigation expenditures will tend to discourage all but the most meritorious challenges of arbitration awards.

Unif. Arbitration Act § 25 cmt. 3 (Nat'l Conference of Comm'rs on Unif. State Laws 2000).

¶24 Interpreting § 12-3025(C) consistent with this underlying policy, we conclude that "expenses" as used in the statute necessarily must be broader than "costs" as used in §§ 12-341 and -332. Allowing a prevailing party to collect reasonable expenses of litigation beyond taxable costs serves the policy of promoting the finality of arbitration awards and deterring re-litigation of arbitrable issues. Moreover, as the comment to Uniform Arbitration Act Section 25 explains, parties may, if they choose, agree to waive this provision. Unif. Arbitration Act § 25 cmt. 6 (Nat'l Conference of Comm'rs on Unif. State Laws 2000) ("Section 25(c) is a default rule only because it is waivable . . . . If the parties wish to contract for a different rule, they remain free to do so.").

¶25 The parties here did not agree to preclude expense awards in connection with confirmation; as a result, the statutory default allowed the superior court to award reasonable expenses to the prevailing party.

CONCLUSION

¶26 For the foregoing reasons, we affirm the superior court's confirmation of the final arbitration award, including the arbitrator's awards of attorney's fees and expenses. We also affirm the court's separate grant of fees and expenses incurred in the confirmation proceeding. Pursuant to A.R.S. § 12-3025(C), we grant the Candrians their costs and reasonable attorney's fees on appeal, contingent on compliance with Arizona Rule of Civil Appellate Procedure 21.

Ruth A. Willingham · Clerk of the Court
FILED: AA

IN THE

SUPREME COURT OF THE STATE OF ARIZONA

**AMERICAN POWER PRODUCTS, INC., A CALIFORNIA CORPORATION;
LFMG/APP, LLC, AN ARIZONA CORPORATION,**
Plaintiffs/Counter-Defendants/Appellants/Cross-Appellees,

v.

CSK AUTO, INC., AN ARIZONA CORPORATION,
Defendant/Counter-Claimant/Appellee/Cross-Appellant.

No. CV-16-0133-PR
Filed March 23, 2017

Appeal from the Superior Court in Maricopa County
The Honorable George H. Foster, Jr., Judge
No. CV2005-019594
REVERSED AND REMANDED

Memorandum Decision of the Court of Appeals, Division One
1 CA-CV 12-0855
Filed May 19, 2016
VACATED IN PART

COUNSEL:

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Leon B. Silver (argued), Andrew S. Jacob, Gordon & Rees LLP, Phoenix, Attorneys for CSK Auto Inc.

VICE CHIEF JUSTICE PELANDER authored the opinion of the Court, in which CHIEF JUSTICE BALES and JUSTICES BRUTINEL and BOLICK joined. JUSTICE TIMMER dissented.

VICE CHIEF JUSTICE PELANDER, opinion of the Court:

¶1 Under Arizona law, a court may award reasonable attorney fees to the successful party in a contested contract action. A.R.S. § 12-341.01(A). If a party makes a written settlement offer that is rejected and the final judgment is more favorable to the offering party, that party "is deemed to be the successful party from the date of the offer." *Id.*

¶2 In this case, we address the interplay between this statutory provision and a contractual fee award provision when one party rejected the other's written settlement offer and later obtained a less favorable judgment. Because the contract does not itself define "prevailing party," but does incorporate Arizona law to determine the parties' rights and remedies, we hold that the statute applies for the purpose of determining the successful party. That is, the party that made the rejected offer is the successful party from the date of the offer.

I.

¶3 In 2003, American Power Products ("American") and CSK Auto ("CSK") entered into a Master Vendor Agreement ("MVA") under which American agreed to sell electric scooters and other items to CSK on an open account. The MVA provided that in the event of any action arising out of the agreement, "the prevailing party shall be entitled to recover . . . reasonable attorneys' fees." The agreement did not define "prevailing party." But the MVA included a broad choice-of-law provision that Arizona law would govern the parties' "rights and remedies" under the agreement.

¶4 In 2005, American sued CSK for breach of contract and negligent misrepresentation, seeking more than $5 million in damages. CSK asserted various affirmative defenses and counterclaims and sought damages of approximately $950,000. In 2011, several months before trial, CSK served American with an offer of judgment under Rule 68, Ariz. R. Civ. P., in the amount of $1,000,001, "inclusive of all damages, taxable court costs, interest and attorneys' fees." American did not accept the offer and, after trial, obtained a jury verdict in the amount of $10,733. The trial court later dismissed CSK's counterclaims with prejudice.

¶5 On the parties' post-trial claims for attorney fees, the trial court ruled that American was the "prevailing party" at trial despite American having asked the jury to award it over $10.8 million. Applying a totality-of-the-litigation test, the court reasoned that American "must be the prevailing party" because "after litigating all of the claims"

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and counterclaims, American "obtained relief in the form of monetary damages; [CSK] was awarded nothing." The trial court then awarded American $775,000 in attorney fees (American had requested almost $2 million), plus costs and interest on the verdict, for a total judgment of approximately $861,000. The court denied CSK's request for sanctions under Rule 68(g), Ariz. R. Civ. P., finding such sanctions inapplicable.

¶6 The court of appeals affirmed the fee award in favor of American. *Am. Power Products, Inc. v. CSK Auto, Inc.*, 1 CA-CV 12-0855, at *8 ¶ 14 (Ariz. App. May 19, 2016) (mem. decision).[1] The court reasoned that the trial court did not abuse its substantial discretion in identifying the "prevailing party" and "had a reasonable basis for finding that American was the prevailing party under the totality of the litigation test." *Id.* at *4 ¶ 6, *6 ¶ 9. Based on American having obtained a judgment less favorable than CSK's pretrial settlement offer, CSK argued that A.R.S. § 12-341.01(A) and Rule 68 precluded any award of fees American incurred after the date of the offer. In rejecting that argument, the court of appeals stated that "[w]hen attorneys' fees are based on a contract — as here — the contract controls to the exclusion of A.R.S. § 12-341.01(A)." *Id.* at *6 ¶ 11. The court, however, "reverse[d] the superior court's denial of CSK's Rule 68 sanction request and remand[ed] to the superior court for it to make the comparison required by Rule 68." *Id.* at *13 ¶ 30.

¶7 We granted review on the attorney fee question because the interplay between § 12-341.01 and contractual fee provisions presents legal issues of statewide importance that are likely to recur. We have jurisdiction under article 6, section 5(3) of the Arizona Constitution and A.R.S. § 12-120.24.

II.

¶8 The parties' MVA contained two provisions that are pertinent here:

> (d) Applicable Law. The MVA is made with reference to and under the laws of the State of Arizona which shall be deemed to govern the validity and interpretation of the MVA and the rights and remedies of the parties hereunder. Any legal action instituted by the parties arising out of this MVA shall be within, and the parties hereto stipulate to the jurisdiction of, the Courts of Maricopa County, Arizona.
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> . . .

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[1] The court of appeals' decision was rendered after we remanded the case to that court "for consideration of . . . the parties' claims for attorneys' fees, court costs, and other expenses." *American Power Products, Inc., v. CSK Auto, Inc.*, 239 Ariz. 151, 157 ¶ 21, 367 P.3d 55, 61 (2016).

> (f) Attorneys' Fees. In the event either party shall commence or be required to defend any action or proceeding against the other party arising out of this MVA, the prevailing party shall be entitled to recover from the other party its reasonable attorneys' fees and costs through all levels of proceedings as determined by the court.

As noted above, the MVA did not define "prevailing party."

¶9 In pertinent part, A.R.S. § 12-341.01 provides:

> A. In any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney fees. If a written settlement offer is rejected and the judgment finally obtained is equal to or more favorable to the offeror than an offer made in writing to settle any contested action arising out of a contract, the offeror is deemed to be the successful party from the date of the offer and the court may award the successful party reasonable attorney fees. This section shall not be construed as altering, prohibiting or restricting present or future contracts or statutes that may provide for attorney fees.

As originally enacted in 1976, § 12-341.01 contained provisions now mirrored in the first and third sentences of subsection (A). The second sentence of that subsection was added in 1999.

¶10 CSK acknowledges that the trial court and court of appeals correctly "equated 'prevailing party' in the MVA with 'successful party' in § 12-341.01(A)." *Am. Power Products, Inc.*, 1 CA-CV 12-0855, at *3 ¶¶ 5-6; *see Murphy Farrell Dev., LLLP v. Sourant*, 229 Ariz. 124, 132 ¶ 30 & n.8, 134 ¶ 36, 272 P.3d 355, 364 & n.8, 365 (App. 2012) (relying on cases decided under § 12-341.01 in determining which party was "the 'prevailing party' under the terms of the [parties'] Agreements" when those contracts mandated an award of fees to the "prevailing party" but did not define that term). Noting that "the parties expressly incorporated Arizona law into their contract" and "clearly intended to apply Arizona law to the entire [MVA]," however, CSK argues that both courts below erred in failing to apply "the definition in the second sentence of § 12-341.01(A)." Under that provision, CSK asserts, it is "the successful party after the date of its rejected settlement offer."

¶11 American counters, as the court of appeals determined, that the trial court had a reasonable basis for deeming American the prevailing party under the MVA and

did not abuse its discretion in awarding fees to American, particularly considering that CSK received nothing on its counterclaim for almost $1 million. Relying on the third sentence of § 12-341.01(A) and Arizona case law, American argues that the statute does not apply when, as here, a contract mandates an award of fees to the prevailing party. American further asserts that CSK's argument, by seeking a sanction not recognized by Rule 68, effectively would amend the rule so as to conflict with § 12-341.01.

¶12 We review de novo issues of statutory application and contract interpretation. *See Bell v. Indus. Comm'n*, 236 Ariz. 478, 480 ¶ 6, 341 P.3d 1149, 1151 (2015) (statutes); *Andrews v. Blake*, 205 Ariz. 236, 240 ¶ 12, 69 P.3d 7, 11 (2003) (contracts). A trial court's determination of which party is successful and thus entitled to a fee award generally will be upheld absent an abuse of discretion. *Murphy Farrell Dev.*, 229 Ariz. at 133 ¶ 31, 272 P.3d at 364; *Sanborn v. Brooker & Wake Prop. Mgmt., Inc.*, 178 Ariz. 425, 430, 874 P.2d 982, 987 (App. 1994). An error of law in reaching a discretionary ruling constitutes an abuse of discretion. *Twin City Fire Ins. Co. v. Burke*, 204 Ariz. 251, 254, 63 P.3d 282, 285 (2003).

III.

¶13 As noted above, § 12-341.01 does not "alter[], prohibit[] or restrict[]" contracts that "provide for attorney fees," nor may the statute "be construed" to do so. § 12-341.01(A). Based on that statutory language, our court of appeals has repeatedly stated that "the statute is inapplicable . . . [when] the parties have provided in their contract the conditions under which attorney's fees may be recovered." *Sweis v. Chatwin*, 120 Ariz. 249, 252, 585 P.2d 269, 272 (App. 1978); *see also Geller v. Lesk*, 230 Ariz. 624, 627 ¶ 9, 285 P.3d 972, 975 (App. 2012) (stating that parties' contractual attorney fee provision, "not the statute," governs an award of fees); *Lisa v. Strom*, 183 Ariz. 415, 418 n.2, 904 P.2d 1239, 1242 n.2 (App. 1995) (stating that "when a contract has an attorney's fee provision it controls to the exclusion of the statute"); *Connor v. Cal-Az Properties, Inc.*, 137 Ariz. 53, 55, 668 P.2d 896, 898 (App. 1983) (stating that "§ 12-341.01 is not to be considered" when parties' contract provides conditions under which attorney fees may be recovered). In *Sweis*, the parties' contract entitled the successful or prevailing party to a non-discretionary attorney fee award for enforcing the contract. 120 Ariz. at 251 n.2, 585 P.2d at 271 n.2. To apply § 12-341.01 in those circumstances, the court reasoned, would alter the agreement by "in effect cancel[ing] the unqualified contractual right to recover attorney's fees given to the successful party by their agreement, and substitute in its place the purely discretionary or permissive right given by the statute." *Id.* at 252, 585 P.2d at 272.

¶14 Relying on its prior case law and the third sentence of § 12-341.01(A), the court of appeals here rejected CSK's argument that, based on that subsection's second sentence, CSK was the prevailing party from the date of its offer, holding instead that "the contract controls to the exclusion of A.R.S. § 12-341.01(A)." *Am. Power Products,*

Inc., 1 CA-CV 12-0855, at *6 ¶ 11. To the extent prior case law broadly precludes application of § 12-341.01 whenever the parties' contract contains an attorney fee provision, regardless of its content, scope, and other provisions in the contract, we disagree. Rather, § 12-341.01 "is inapplicable by its terms if it effectively conflicts with an express contractual provision governing recovery of attorney's fees." *Jordan v. Burgbacher*, 180 Ariz. 221, 229, 883 P.2d 458, 466 (App. 1994) (disagreeing with *Connor*'s broad statement and observing that *Sweis* "did not hold that any express contractual provision for attorney's fees, however worded, 'preempts' A.R.S. section 12-341.01"); *cf. Tucson Estates Prop. Owners Ass'n, Inc. v. McGovern*, 239 Ariz. 52, 54-56 ¶¶ 7-14, 366 P.3d 111, 113-15 (App. 2016); (stating that when parties' contract has a unilateral provision mandating attorney fee recovery for only one party, § 12-341.01 applies to the other, successful party's claim for attorney fees and affords trial court discretion to award or deny fees under the statute); *Pioneer Roofing Co. v. Mardian Constr. Co.*, 152 Ariz. 455, 470-72, 733 P.2d 652, 667-69 (App. 1986) (same). Thus, rather than being completely supplanted by any attorney fee provision in the parties' contract, the statute — consistent with its plain language — applies to "any contested action arising out of contract" to the extent it does not conflict with the contract. § 12-341.01(A).

¶15 Our conclusion comports with the general rule in Arizona that contracts are read to incorporate applicable statutes. *See Banner Health v. Med. Sav. Ins. Co.*, 216 Ariz. 146, 150 ¶ 15, 163 P.3d 1096, 1100 (App. 2007) ("It has long been the rule in Arizona that a valid statute is automatically part of any contract affected by it, even if the statute is not specifically mentioned in the contract.") (internal citations and quotation marks omitted); *see also Yeazell v. Copins*, 98 Ariz. 109, 113-14, 402 P.2d 541, 544 (1965). Because the MVA here did not define "prevailing party" and expressly provided that Arizona law shall apply and govern "the rights and remedies of the parties," and because the second sentence of § 12-341.01(A) does not directly conflict with the MVA's attorney fee provision, that statutory provision is "incorporated by operation of law" into the MVA for the limited purpose of defining "successful party" under the circumstances presented here. *Banner Health*, 216 Ariz. at 150 ¶ 15, 163 P.3d at 1100.

¶16 Contrary to the dissent, *infra* ¶ 28, our opinion does not "change the meaning of 'the prevailing party' in the MVA," inasmuch as the MVA does not define that phrase or provide any other interpretative guidance. The dissent also downplays the MVA's broad, unqualified choice-of-law provision, under which the parties agreed that Arizona law would govern their rights and remedies under the MVA. As for there being two prevailing parties – American before CSK's offer, and CSK after its offer – that paradigm is implicitly contemplated and permitted by § 12-341.01(A)'s second sentence, which supplements, but does not alter, the MVA. *Cf. Hall v. Read Dev., Inc.*, 229 Ariz. 277, 283 ¶ 19, 274 P.3d 1211, 1217 (App. 2012) (recognizing that statute's second sentence could "potentially shift the 'successful party' designation for at least

part of the litigation"). And such a result is permissible even though § 12-341.01(A), like the MVA, limits attorney fee awards to "the" successful party.

¶17 American unpersuasively argues that the MVA's choice-of-law provision does not apply to the attorney fee provision because they are separate and the former is "general and all-embracing, and not specific to the fees provision." The choice-of-law provision is not limited, and the attorney fee provision does not exclude the former from applying to it. *See Bradley v. Bradley*, 164 P.3d 537, 542 (Wyo. 2007) (holding that broad, general language of choice-of-law provision in parties' agreement applied to other provisions when the agreement contained no specific provision indicating a different intent and "[o]ther provisions of the agreement [did] not specifically speak to choice of applicable law").

¶18 The courts below thus erred in failing to apply the definition of "successful party" under § 12-341.01(A)'s second sentence, which by its terms applies here given American's rejection of CSK's pretrial settlement offer under Rule 68 and the less favorable judgment American obtained after trial. As the court of appeals has observed, that statutory provision, "added in 1999, seemingly narrows the trial court's discretion in handling fee determination issues in contract cases, obligating the court to compare a written settlement offer against the 'judgment finally obtained.'" *Hall*, 229 Ariz. at 279 ¶ 9, 274 P.3d at 1213. That comparison, in turn, "potentially alter[s] the successful party designation from the date of the offer." *Id.* at 280 ¶ 10, 274 P.3d at 1214.

¶19 "[A]n offeror is the successful party, even if an offeree obtains a favorable judgment, if the offeror previously made a written offer for an amount equal to or greater than the final judgment." *Id.* at 279 ¶ 9, 274 P.3d at 1213. That is precisely the situation here. CSK's pretrial offer under Rule 68 in the amount of $1,000,001, "inclusive of all damages, taxable court costs, interest and attorneys' fees," was greater than the total judgment of approximately $861,000 (which included fees, costs, and interest on the $10,733 verdict) that American obtained. Thus, CSK "is deemed to be the successful party from the date of the offer." § 12-341.01(A). And from that point forward CSK is "entitled to recover from [American] its reasonable attorneys' fees" because the MVA expressly so provides. That is, the statute's discretionary feature, providing that "the court may award the successful party reasonable attorney fees," *id.*, is inapplicable here because, if applied, it would directly conflict with the MVA's mandatory fee provision and thereby impermissibly "alter[]" or "restrict[]" the parties' agreement. *Id.*; *see Murphy Farrell Dev.*, 229 Ariz. at 133 ¶ 32, 272 P.3d at 364 ("Unlike discretionary fee awards made pursuant to A.R.S. § 12-341.01(A), the trial court lacks discretion to deny a fee award required by the terms of the parties' contract."); *McDowell Mountain Ranch Cmty. Ass'n v. Simons*, 216 Ariz. 266, 269 ¶ 14, 165 P.3d 667, 670 (App. 2007) (same, citing cases).

¶20 Deeming CSK to be the prevailing party from the date of its settlement offer also furthers the policy of § 12-341.01 and Rule 68. As the court in *Hall* pointed out, "[t]he purposes of § 12-341.01(A) include: (1) mitigating 'the burden of the expense of litigation to establish a just claim or a just defense'; (2) encouraging 'more careful analysis prior to filing suit' by imposing the risk of paying the opposing party's attorneys' fees where legitimate settlement offers are rejected; and (3) promoting settlement and thus reducing caseloads involving contractual matters." *Hall*, 229 Ariz. at 282 ¶ 18, 274 P.3d at 1216. By rejecting CSK's settlement offer and choosing to instead pursue costly, protracted litigation, American cannot avoid the legal consequences, including attorney fee exposure as determined by the parties' agreement and compatible Arizona law that is specifically made applicable under the agreement's choice-of-law provision.

¶21 American unpersuasively asserts that imposing attorney fees against it by "incorporat[ing] only part of" § 12-341.01(A) fails to give "the type of fair warning the law should provide." On the contrary, the parties had adequate notice of their potential liability for attorney fees, given the MVA's broad incorporation of Arizona law, the clear definition of "successful party" in § 12-341.01(A)'s second sentence, and the lack of any inconsistency between that provision and the MVA's attorney fee provision.

¶22 Nor is American correct in arguing that CSK's position will "alter every contract mandating an award of attorneys' fees by forcing upon parties to contracts the standard established in the second sentence of A.R.S. § 12-341.01.A." Rather, we agree with American's assertion that parties should "have freedom to contract whether they want that standard to apply or not." As long as a contract is legal and enforceable, parties of course may fashion all aspects of an attorney fee provision, including a definition of "prevailing party" different from the statute, in whatever way they see fit. (Unlike the MVA, for example, a contract could not only specifically define "prevailing party" but also either include or exclude certain aspects of Arizona law from applying.)

¶23 Finally, we reject American's argument that the result here "conflicts with and supersedes Rule 68." As American conceded at oral argument in this Court, the sanctions prescribed in Rule 68(g) are separate and distinct from attorney fees. *Cf.* Ariz. R. Civ. P. 68, State Bar Committee Note (1992 Amendments) ("The term 'costs' in Rule 68 does not include attorneys' fees, even if they are recoverable in the action.") (citing *Boltz & Odegaard v. Hohn*, 148 Ariz. 361, 714 P.2d 854 (App. 1985)). Contrary to American's contention, an award of fees to CSK under the MVA, based on the statutory definition of "successful party" in § 12-341.01(A)'s second sentence, does not result in "*de facto* amendment of the rule . . . by imposing an additional sanction" not authorized by the rule. Nor does such an award run afoul of Rule 68(d)'s provision that "[e]vidence of an unaccepted offer is not admissible except in a proceeding to determine sanctions under this rule." Harmonizing the rule with the statute, we conclude that any such evidence is inadmissible at trial or other merits-related proceedings, but is not

barred for purposes of identifying the "successful party" under § 12-341.01(A) in separate post-trial proceedings regarding attorney fees. *See Hall*, 229 Ariz. at 283 ¶¶ 19-20, 274 P.3d at 1217 (harmonizing § 12-341.01(A) with Rule 68 to "conclude that comparing the 'judgment finally obtained' under § 12-341.01(A) to a settlement offer should involve only those reasonable fees and costs incurred as of the date the offer was made"); *see also State v. Hansen*, 215 Ariz. 287, 289 ¶ 7, 160 P.3d 166, 168 (2007) (stating that, whenever possible, we harmonize rules and statutes and read them in conjunction with each other).

IV.

¶24 For the reasons stated above, we reverse the trial court's award of attorney fees to American and its ruling that American was the prevailing party in the proceedings below even after CSK's settlement offer under Rule 68. We vacate paragraphs 6-16 of the court of appeals' decision and remand the case to the trial court for further proceedings to apportion fees and costs between CSK and American consistent with this opinion. On remand, CSK must establish, and the trial court should determine, what amount or percentage of CSK's fees (incurred after its settlement offer) was clearly attributable to defending against American's claims as opposed to the unsuccessful prosecution of CSK's counterclaim, on which CSK was not the prevailing party. Based on that determination, the trial court may then decide if, or by how much, CSK's fee award should be reduced. In the end, as CSK acknowledged at oral argument, the trial court in its discretion may consider all pertinent factors in determining the amount of reasonable fees CSK should be awarded. *Cf. Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 570-71, 694 P.2d 1181, 1184-85 (1985) (listing non-exclusive factors bearing on attorney fee awards under § 12-341.01); A.R.S. § 12-341.01(B) (providing that an award of reasonable fees under the statute "should be made to mitigate the burden of the expense of litigation to establish a just claim or a just defense").

¶25 Regarding American's attorney fees incurred before CSK's offer of judgment, this opinion does not alter the trial court's determination that American was the prevailing party up to that point. But American is not entitled to recover any fees incurred after CSK's offer. (CSK conceded at oral argument that American is entitled to recover its reasonable attorney fees incurred before the offer.) Therefore, on remand American must establish, and the trial court should determine, what amount or percentage of the court's $775,000 fee award to American was attributable to fees incurred after the offer, and the court should reduce American's fee award by that amount. American's request for attorney fees incurred in this Court is denied as it is not the prevailing party.

TIMMER, J., dissenting.

¶26 By its terms, § 12-341.01(A) cannot "alter[], prohibit[] or restrict[] . . . contracts . . . that may provide for attorney fees." By applying § 12-341.01(A) here, the majority has done just that. I respectfully dissent.

¶27 I begin with the plain language of the MVA. *Cf. Smith v. Melson, Inc.*, 135 Ariz. 119, 121, 659 P.2d 1264, 1266 (1983) ("A contract should be read in light of the parties' intentions as reflected by their language and in view of all the circumstances."). American and CSK agreed that "the prevailing party" in any lawsuit "shall be entitled to recover" its reasonable attorney fees. The parties did not define "the prevailing party," so the majority, noting the parties' agreement that Arizona law governs interpretation of the contract, skips to § 12-341.01(A) to supply a definition. *See supra* ¶ 15. In doing so, the majority ignores Arizona's "controlling rule of interpretation" that "requires that the ordinary meaning of language be given to words where circumstances do not show a different meaning applicable." *Brady v. Black Mountain Inv. Co.*, 105 Ariz. 87, 89, 459 P.2d 712, 714 (1969) (citing Restatement (First), Contracts § 235(A) (Am. Law Ins. 1932)). There is nothing ambiguous about the fee provision here. "The" indicates a particular party, and "prevailing" identifies that party as the one that wins the lawsuit. *See Smith,* 135 Ariz. at 121, 659 P.2d at 1266 (noting that "the" is "a definite article used in reference to a particular thing"); Webster's Third New International Dictionary 1797 (3d ed. 2002) (defining "prevail" in part as to "win," "triumph," or to be "successful"); Black's Law Dictionary 1298 (10th ed. 2009) (defining "prevailing party" as the one "in whose favor a judgment is rendered").

¶28 The majority uses § 12-341.01(A) to impermissibly alter the meaning of "the prevailing party" in the MVA. The second sentence in § 12-341.01(A) does not define the "successful party" in a lawsuit and thus does not shed light on the parties' use of "the prevailing party" in the MVA. Instead, the second sentence "deem[s]" the unsuccessful party in the lawsuit the "successful party," and thus eligible for a discretionary fee award, if the final judgment is "equal to or more favorable" than a previously rejected settlement offer. And that party is only considered "successful" from the offer date, meaning the other party can be "successful" and eligible for a fee award before the offer date. In essence, the second sentence serves as a fee-shifting device to encourage settlement; it does not apply to the party that prevails on the merits of the lawsuit. *Cf. Hall*, 229 Ariz. at 282 ¶ 18, 274 P.3d at 1216 ("The purposes of § 12-341.01(A) include . . . promoting settlements and thus reducing caseloads involving contractual matters."). Although it is appropriate to use tests developed under § 12-341.01(A) to identify the "prevailing party" overall in light of "multiple claims and varied success," *see Murphy Ferrell Dev.*, 229 Ariz. at 134 ¶ 36, 272 P.3d at 365, it is not appropriate to use § 12-341.01(A) to change the meaning of "the prevailing party" in the MVA.

¶29 Rather than respect the parties' intent to mandate a fee award for the single, prevailing party in the lawsuit, the majority uses the second sentence from § 12-341.01(A) to redefine "the prevailing party" and require awards for each party. There are now two prevailing parties—American before the settlement offer and CSK thereafter—and each must be awarded attorney fees. This interpretation alters the MVA's fee provision in violation of the third sentence in § 12-341.01(A). I would affirm the trial court's attorney fee award.

save the date: thursday, june 15, 2017 (8:45am–Noon)

The State Bar of Arizona ADR Section is presenting a morning seminar at this year's State Bar of Arizona Annual Convention. The seminar is entitled, **Mediation in Evolution: Challenges, Opportunities.** The interactive morning session will discuss trends, changes, challenges, and new tools for resolving disputes. (**see T-18 below**). Please join us for this engaging seminar. 3 CLE Ethics Credit hours are available upon completion.

save the date: thursday, june 15, 2017 (2:00pm–5:15pm)

The State Bar of Arizona ADR Section is also presenting an afternoon seminar at this year's Convention. The seminar entitled, **Arbitration Talks,** (**see T-27 below**). Please join us for this highly informative seminar. 3 CLE Ethics Credit hours are available upon completion.

2017 Seminars

Thursday Morning, June 15

T-18

THURSDAY, JUNE 15
8:45 A.M. – NOON

Mediation in Evolution:
Challenges, Opportunities

In this interactive program, Thomas Stipanowich, Law Professor and Academic Director of the internationally known Straus Institute for Dispute Resolution at Pepperdine University, discusses trends, changes, challenges, and new tools for resolving disputes, such as real-time approaches to conflict resolution; "med-arb"; and the role of lawyers, culture, science, and technology in shaping the evolution of mediation.

What You'll Learn:

1. Ways in which mediation processes are changing, and how to adapt to these changes
2. New and evolving mediation practices that can resolve disputes more efficiently and result in greater client satisfaction
3. Insights into conflict resolution and negotiation gained from modern scientific research

Presented by: Alternative Dispute Resolution Section

Chair: Steven P. Kramer, Law Office of Steven P. Kramer

Faculty: Thomas J. Stipanowich, Pepperdine University School of Law, Straus Institute for Dispute Resolution

3 CLE ETHICS CREDIT HOURS

Thursday Afternoon, June 15

T-27

THURSDAY, JUNE 15
2:00 P.M. – 5:15 P.M.

Arbitration Talks

Eight experienced arbitrators present "Talks," each limited to 15 minutes, addressing various aspects of the arbitration process. Topics include:

- Designing the process using a submission agreement
- Discovery and e-discovery plans
- Preparing for and participating in preliminary hearings
- Motion practice
- The hearing
- The award and its enforcement
- Limits to the arbitrator's authority
- Working with pro se litigants

Participants will have an opportunity to address questions to the presenters. The presentation concludes with a discussion of recent case law and legislative developments concerning arbitration.

What You'll Learn:

1. Tips and best practices for effectively participating in every phase of an arbitration proceeding, including how to design a well-functioning process
2. Pointers for navigating particular types of arbitration, including employment cases and those involving pro se litigants
3. Recent case law and legislative developments concerning arbitration

Presented by: Alternative Dispute Resolution Section

Chair: Steven P. Kramer, Law Office of Steven P. Kramer

Faculty: Shawn Aiken, Aiken Schenk Hawkins & Riccardi PC
Maureen Beyers, Beyers Law PLLC
Thom K. Cope, Mesch, Clark & Rothschild PC
Sherman D. Fogel, Sherman Fogel, Conflict Management & Dispute Resolution
Renee Gerstman, Wells & Gerstman PLLC
Patrick Irvine, Fennemore Craig PC
John Jozwick, Rider Levett Bucknall Ltd.
Amy Lieberman, Insight Employment Mediation LLC
David C. Tierney, Sacks Tierney PA

3 CLE ETHICS CREDIT HOURS

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from the editor

by Thom Cope

As always, this edition could not have been possible without the sterling efforts of section members responding to my call for articles. Thanks to all of you who contributed to the success of this newsletter. Again I encourage everyone with an idea for an article to contact me at any time. Or if you have published somewhere else, we can re-publish it for the benefit of our section members.

Also, there would be not be a newsletter without the assistance of the State Bar staff. Thanks to them as well.

I hope everyone has a hope everyone has a terrific summer. Be Well.

Thom Cope