

**APPLICATION FOR NOMINATION TO
JUDICIAL OFFICE**

**SECTION I: PUBLIC INFORMATION
(QUESTIONS 1 THROUGH 65)**

PERSONAL INFORMATION

1. Full Name: **Joshua Daniel Rogers**

2. Have you ever used or been known by any other name? **No** If so, state name:

3. Office Address: **Maricopa County Southeast Facility
222 East Javelina Avenue, Suite 3A
Mesa, Arizona 85210**

4. How long have you lived in Arizona? What is your home zip code?
20 years. 85204.

5. Identify the county you reside in and the years of your residency.
Maricopa County. 20 years.

6. If nominated, will you be 30 years old before taking office? yes no

If nominated, will you be younger than age 65 at the time the nomination is sent to the Governor? yes no

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6. List your present and any former political party registrations and approximate dates of each:

Republican – 1995 to present

(The Arizona Constitution, Article VI, § 37, requires that not all nominees sent to the Governor be of the same political affiliation.)

8. Gender: **Male**

Race/Ethnicity: **Caucasian**

EDUCATIONAL BACKGROUND

9. List names and locations of all post-secondary schools attended and any degrees received.

The Master's College (Santa Clarita, CA) – Bachelor of Arts in Political Studies

Pepperdine University School of Law (Malibu, CA) – J.D. (Juris Doctor)

10. List major and minor fields of study and extracurricular activities.

The Master's College (Undergraduate):

- **Majored in Political Studies with an emphasis in Political Theory**
- **Minored in Bible**
- **Legislative Intern to the Office of Congressman J.C. Watts, United States House of Representatives (1997)**

Pepperdine University School of Law:

- **Pepperdine Law Review, Staff**
- **Corporate and Securities Law Society, Co-Founding Member**

11. List scholarships, awards, honors, citations and any other factors (e.g., employment) you consider relevant to your performance during college and law school.

Undergraduate (The Master's College):

- **Summa Cum Laude**
- **Political Studies Student of the Year (1997-1998)**
- **Who's Who in American Colleges (1997-1998)**

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Law School (Pepperdine University School of Law):

- Graduated in top 10% of class
- Cum Laude
- Pepperdine Law Review, Staff
- Dean's Merit Scholarship (1998-2001)
- Brock Scholarship (2000-2001)
- DiLoreto Scholarship (2000-2001)
- Nicholson Scholarship (2000-2001)
- Purfield Scholarship (2000-2001)
- Witkin Award for Academic Excellence: Jurisprudence (Spring 2000)
- Witkin Award for Academic Excellence: International Public Law (Fall 2000)
- CALI Excellence for the Future Award: Jurisprudence (Spring 2000)
- CALI Excellence for the Future Award: International Public Law (Fall 2000)
- CALI Excellence for the Future Award: International Tax (Spring 2001)

PROFESSIONAL BACKGROUND AND EXPERIENCE

12. List all courts in which you have been admitted to the practice of law with dates of admission. Give the same information for any administrative bodies that require special admission to practice.

State of Arizona – October 29, 2001

State of Ohio (inactive) – November 28, 2002

State of Nevada (inactive) – December 18, 2003

United States District Court, District of Arizona – May 13, 2002

United States Court of Appeals for the Ninth Circuit – May 23, 2002

United States District Court, District of Colorado – October 23, 2003

United States Court of Appeals for the Tenth Circuit – January 12, 2004

13. a. Have you ever been denied admission to the bar of any state due to failure to pass the character and fitness screening? **No** If so, explain.
- b. Have you ever had to retake a bar examination in order to be admitted to the bar of any state? **No** If so, explain any circumstances that may have hindered your performance.

14. Describe your employment history since completing your undergraduate degree. List your current position first. If you have not been employed continuously since

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completing your undergraduate degree, describe what you did during any periods of unemployment or other professional inactivity in excess of three months. Do not attach a resume.

EMPLOYER	DATES	LOCATION
Superior Court of Arizona in Maricopa County (Judge)	09/15-present	Phoenix, AZ
Kunz Plitt Hyland & Demlong (Shareholder)	04/03-09/15	Phoenix, AZ
Shugart Thomson & Kilroy (Associate)	10/01-04/03	Phoenix, AZ

15. List your law partners and associates, if any, within the last five years. You may attach a firm letterhead or other printed list. Applicants who are judges or commissioners should additionally attach a list of judges or commissioners currently on the bench in the court in which they serve.

Prior to my appointment to the bench in 2015, my law partners and associates were as follows: Donald Kunz, Steven Plitt, Timothy Hyland, William Demlong, Connie Gould, Elliot Wernick, Daniel Maldonado, Steven Gross, John Wittwer, Jordan Plitt, Paige Pataky, Ryan Sandstrom, and Kimberly Suciu.

A list of judges and commissioners currently on the bench in the Superior Court of Arizona in Maricopa County is attached.

16. Describe the nature of your law practice over the last five years, listing the major areas of law in which you practiced and the percentage each constituted of your total practice. If you have been a judge or commissioner for the last five years, describe the nature of your law practice before your appointment to the bench.

Prior to my appointment to the bench, my practice involved representing insurance companies in analyzing and litigating complex insurance coverage matters and in defense of insurance bad faith claims (100%).

17. List other areas of law in which you have practiced.

Not applicable.

18. Identify all areas of specialization for which you have been granted certification by the State Bar of Arizona or a bar organization in any other state.

Not applicable.

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19. Describe your experience as it relates to negotiating and drafting important legal documents, statutes and/or rules.

Prior to taking the bench and throughout the entirety of my legal practice, I drafted extensive coverage opinions, pleadings, motions, appellate briefs, settlement agreements, and other legal documents. In addition, for approximately the past 11 years I have served on the State Bar of Arizona Civil Practice and Procedure Committee, during which time I have worked on the drafting and revision of various court rules and related petitions to the Arizona Supreme Court.

20. Have you practiced in adversary proceedings before administrative boards or commissions? **No** If so, state:

a. The agencies and the approximate number of adversary proceedings in which you appeared before each agency.

b. The approximate number of these matters in which you appeared as:

Sole Counsel: _____

Chief Counsel: _____

Associate Counsel: _____

21. Have you handled any matters that have been arbitrated or mediated? **Yes**
If so, state the approximate number of these matters in which you were involved as:

Sole Counsel: **20**

Chief Counsel: **10**

Associate Counsel: **10**

22. List at least three but no more than five contested matters you negotiated to settlement. State as to each case: (1) the date or period of the proceedings; (2) the names, e-mail addresses, and telephone numbers of all counsel involved and the party each represented; (3) a summary of the substance of each case: and (4) a statement of any particular significance of the case.

Hartford Fire Insurance Company v. Day and Sam, Inc., et al., Maricopa County Superior Court Case No. CV2007-018683

(1) Filed: 10/10/2007; Dismissed: 11/11/2010

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- (2) **Opposing counsel: Brian J. Campbell, bcampbell@campbellazlaw.com, (602) 254-5557 (Attorney for Day and Sam, Inc., New School for the Arts, and Ronald F. Caya).**
- (3) **This matter arose out of a lease agreement (the “Lease”) entered into between Day and Sam, Inc. (“Day and Sam”), the lessor, and New School for the Arts (“NSA”), the lessee. The Lease was subject to NSA’s right to cancel its obligations under the lease upon certain specified grounds provided that a notice of cancellation was delivered to Day and Sam on or before a certain date. It was alleged that NSA did not give timely notice of cancellation and that NSA breached the lease by executing a lease for another building.**

Originally, Day and Sam brought a lawsuit against NSA and Ronald F. Caya (“Caya”), who managed NSA, in Maricopa County Case No. CV2003-014208. Day and Sam then brought a second lawsuit against NSA in Maricopa County Case No. CV2004-019166. Subsequently, Case No. CV2003-014208 and Case No. CV2004-019166 were consolidated (the “Consolidated Action”).

Hartford Fire Insurance Company (“Hartford Fire”) provided an Educators Legal Liability insurance policy (the “Policy”) to NSA and NSA tendered to Hartford Fire the defense and indemnity of the Consolidated Action. The Policy provided coverage for “any misstatement, misleading statement, or omission by one or more ‘directors’ or ‘executive officers’” of the School, but excluded “[a]ny ‘claim’ arising out of the terms of any contractual obligation.” It also excluded “[a]ny loss or injury expected or intended from the standpoint of the insured,” and any claim “arising out of any dishonest, fraudulent, criminal or malicious act or omission of an insured.” Based upon these terms, Hartford Fire provided a reservation of rights defense to NSA in relation to the Consolidated Action.

Prior to a trial in the Consolidated Action, the parties entered into a Morris agreement whereby NSA and Caya agreed to the entry of a stipulated judgment against them in a certain amount in exchange for a covenant not to execute. The stipulated judgment was entered by the court and Hartford Fire intervened in the Consolidated Action for purposes of holding a reasonableness hearing.

Simultaneous with moving to intervene, Hartford Fire filed a declaratory judgment action seeking a declaration that the Policy issued to NSA did not provide coverage for the allegations made by Day and Sam against NSA in the Consolidated Action.

A two-day reasonableness hearing was held in the Consolidated

Action in May of 2009. The court in the Consolidated Action held that amount of the stipulated judgment was the reasonable settlement value of the case.

In the declaratory judgment action, the parties filed cross-motions for summary judgment on the issue of coverage for the stipulated judgment in the Consolidated Action under the Policy. The court in the declaratory judgment action found issues of fact which precluded summary judgment in either party's favor. The parties thereafter mediated the case and we reached a settlement prior to a trial taking place in the declaratory judgment action.

- (4) This case had significance for my client and the insurance industry because it involved the interpretation and application of an exclusion for claims arising out of contractual obligations. These types of exclusions are common in the industry but not part of the standard forms. Thus, guidance on this and similar exclusions could have been helpful to insurance carriers in light of the absence of such case law from the Arizona courts.

Anderson, et al., v. Everest National Insurance Company, et al., United States District Court, District of Arizona, Case No. CV-13-8017-PCT-JAT

- (1) Filed: 1/22/13; Closed: 9/17/14
- (2) Opposing counsel: John Chaix, john@chaixlaw.com, (602) 235-9399 (Attorney for James and Jane Anderson, et al.).

Counsel for Co-Defendants: Julie Maurer, Julie.Maurer@lewisbrisbois.com, (602) 385-7832 (Attorney for Chartis Specialty Insurance Company f/k/a American International Specialty Lines Insurance Company); Darrell S. Dudzik (Retired – current contact information unknown) (Attorney for Allied World National Assurance Company).

- (3) Empire Residential Sales, L.P. and Empire Residential Construction, L.P. (collectively “Empire”) built and sold townhome units in the Mountain Gate project (the “Project”) located in Clarkdale, Arizona. James and Jane Anderson, et al. (the “Homeowners”) were residents of the Project. On April 25, 2008, Empire, its parent companies, and affiliated companies (collectively the “Debtors”) filed a voluntary bankruptcy petition in the Riverside Division of the United States Bankruptcy Court for the Central District of California (“Bankruptcy Court”). The Homeowners and the Mountain Gate Townhouse Community Association (“Mountain Gate”) stipulated with the Debtors’ trustee to a modification of the automatic stay pursuant to 11 U.S.C. § 362. The Bankruptcy Court approved the stipulation. The modification allowed the Homeowners and Mountain Gate to pursue

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their claims based on damage caused by Empire. However, the Homeowners and Mountain Gate agreed only to execute judgment against Empire's insurers. Empire subsequently tendered its defense to various known insurers. Multiple insurers defended Empire upon a reservation of rights. A final arbitration hearing was conducted in May of 2012 and the award was confirmed by the Superior Court.

The Homeowners and Mountain Gate filed a declaratory judgment action to determine the availability of insurance coverage for the judgments.

My client was Everest National Insurance Company ("Everest"), one of the various insurers involved in the action, which issued a Commercial Excess Liability Policy to Empire Residential Construction/Aviat Homes LP and, pursuant to endorsement, Empire Partners, Inc. Everest took the position that all or part of the arbitration award was not covered under the Everest Policy because it did not meet the policy definitions of "occurrence" and/or "property damage," did not take place during the Everest Policy period, and/or fell within applicable policy exclusions. Everest also asserted that the coverage afforded under the Everest Policy was limited by the policy's "other insurance" provision which provides that the policy is excess over and will not contribute with any other insurance whether primary, excess, contingent, or on any other basis. Everest further asserted that any covered amount which could be allocated to the Everest Policy would fall under applicable deductibles and self-insured amounts.

Following the completion of discovery, as the parties were preparing motions for summary judgment, we were able to negotiate and reach an agreement regarding the settlement of this claim.

- (4) This case had significance for my client and the insurance industry because it involved the interpretation and application of self-insured retentions and deductibles, among other provisions, for which there is little or no case authority in Arizona.

American Family Mutual Insurance Company v. National Fire & Marine Insurance Co., et al., United States District Court, District of Arizona, Case No. CV-07-02237-PHX-NVW

- (1) Filed: 11/16/07; Closed: 2/15/12
- (2) Opposing counsel: Lynn M. Allen, lallen@tysonmendes.com, (480) 571-5031 (Attorney for American Family Mutual Ins. Co.).

Counsel for Co-Defendants: Jay Richard Graif, jgraif@gustlaw.com, (602) 257-7678 (Attorney for American Safety Indemnity Co.); Eric Edward Lynch, elynch@polsinelli.com; (602) 650-2068 (Attorney for Assurance Company Of America and Maryland Casualty Company); Kevin Charles Barrett, kbarrett@barrettmatura.com, (602) 792-5715 (Attorney for National Fire & Marine Insurance Co. and Owners Insurance Company). **There were numerous other attorneys involved in this matter for co-defendants so I have included a representative sampling of those involved.**

- (3) American Family Mutual Insurance Company (“American Family”) insured George F. Tibsherany Development Corp. (“GFTDC”) under a commercial general liability policy. GFTDC was the general contractor for the construction of the Astragal Luxury Villas (the “Villas”). GFTDC entered into subcontracts with numerous subcontractors to perform construction work at the Villas. The subcontracts required the subcontractors to maintain broad-form comprehensive general liability coverage and to cause their insurer(s) to name GFTDC as an additional insured on those policies.

On October 19, 2004, Astragal Condominium Unit Owners Association (“Astragal”) filed a lawsuit against GFTDC alleging defects in the construction of the Villas and implicating work performed by most of the subcontractors on the project. GFTDC filed a third-party complaint against the subcontractors. GFTDC also tendered its defense and request for indemnity as an additional insured to the known insurers for the subcontractors. None of the insurers for the subcontractors accepted GFTDC’s tender of defense.

American Family provided GFTDC with a defense to the Astragal lawsuit. American Family incurred significant sums in attorneys’ fees, costs, and expenses in defending GFTDC in the Astragal litigation. American Family also paid significant sums to settle the claims against GFTDC (in addition to payments made by the subcontractors’ insurers on behalf of the subcontractors).

American Family filed a declaratory judgment action against all of the insurers that issued liability policies to the subcontractors pursuant to which GFTDC was an additional insured. In the declaratory judgment action, American Family requested that the Court declare GFTDC’s rights and the defendant insurers’ additional insured obligations to GFTDC in the Astragal litigation. American Family also asserted causes of action for equitable contribution against each subcontractor’s insurers seeking reimbursement of their share of the defense costs and indemnity payments in the Astragal litigation.

Representing four separate insurers that were sued as part of the

declaratory judgment action, and following significant discovery and motion practice, I was able to negotiate a settlement with American Family for each of the four insurance carriers that I represented in this matter.

- (4) This case had significance for my client and the insurance industry because it involved numerous issues pertaining to the trigger and scope of coverage for additional insureds under general liability insurance policies.**

23. Have you represented clients in litigation in Federal or state trial courts? **Yes** If so, state:

The approximate number of cases in which you appeared before:

Federal Courts: **45**

State Courts of Record: **55**

Municipal/Justice Courts: **1**

The approximate percentage of those cases which have been:

Civil: **100%**

Criminal: _____

The approximate number of those cases in which you were:

Sole Counsel: **10**

Chief Counsel: **30**

Associate Counsel: **60**

The approximate percentage of those cases in which:

You wrote and filed a pre-trial, trial, or post-trial motion that wholly or partially disposed of the case (for example, a motion to dismiss, a motion for summary judgment, a motion for judgment as a matter of law, or a motion for new trial) or wrote a response to such a motion: **55%**

You argued a motion described above **50%**

You made a contested court appearance (other than as set forth in the above response) **20%**

You negotiated a settlement: **75%**

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The court rendered judgment after trial: 1%

A jury rendered a verdict: 0%

The number of cases you have taken to trial:

Limited jurisdiction court 0

Superior court 0

Federal district court 1

Jury 0

Note: If you approximate the number of cases taken to trial, explain why an exact count is not possible.

24. Have you practiced in the Federal or state appellate courts? **Yes** If so, state:

The approximate number of your appeals which have been:

Civil: 18

Criminal: 0

Other: 0

The approximate number of matters in which you appeared:

As counsel of record on the brief: 18

Personally in oral argument: 6

25. Have you served as a judicial law clerk or staff attorney to a court? **No** If so, identify the court, judge, and the dates of service and describe your role.

26. List at least three but no more than five cases you litigated or participated in as an attorney before mediators, arbitrators, administrative agencies, trial courts or appellate courts that were not negotiated to settlement. State as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency and the name of the judge or officer before whom the case was heard; (3) the names, e-mail addresses, and telephone numbers of all counsel involved and the party each represented; (4) a summary of the substance of each case; and (5) a statement of any particular significance of the case.

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**Lexington Insurance Company v. Hearthstone of Sun City, LLC, et al.,
United States District Court, District of Arizona, Case No. CV-09-00109-
PHX-FJM**

- (1) Filed: 01/16/09; Closed: 04/08/10
- (2) United States District Court, District of Arizona; The Honorable Frederick J. Martone
- (3) Opposing Counsel: Brian J. Campbell bcampbell@campbellazlaw.com, (602) 254-5557 and Claudia D. Work, claudia.work@dbshlaw.com, (602) 279-1900 (Attorneys for Hearthstone of Sun City, HSC Property, Unispec Facilities Management & Pamela and John Doe Tyler); Melanie L. Bossie, mbossie@brolaw.com, (602) 553-4552 (Attorney for Jeffrey Ernico, Barbara Ernico, Estate of Henry A. Ernico).
- (4) Evanston Insurance Company issued a claims-made policy providing professional and general liability insurance coverage to Hearthstone of Sun City, a care facility for elderly individuals. The Evanston policy had an effective date of January 30, 2006 to January 30, 2007. Lexington issued a claims made policy effective January 30, 2007 to January 30, 2008.

Henry Ernico was a resident at the Hearthstone facility from November 19, 2006 to January 16, 2007. On January 29, 2007, one day before the Evanston policy was to expire, Hearthstone sent Evanston and Lexington a "Possible Claim Reporting Log" containing 112 "claims or possible claims," including a notation for Henry Ernico.

Mr. Ernico died in February 2007, approximately one month after his discharge from Hearthstone. His family filed a lawsuit against the Hearthstone defendants on November 9, 2007, asserting claims of negligence, wrongful death, and vulnerable adult abuse and neglect. Both Evanston and Lexington denied coverage under their respective policies and filed declaratory judgment actions, which were consolidated into the present action. Evanston and the Hearthstone defendants reached a settlement of all claims and Evanston was dismissed from the case.

The United States District Court for the District of Arizona granted summary judgment in favor of Lexington with respect to Hearthstone's counterclaims for breach of contract and breach of the covenant of good faith and fair dealing. The remaining issue for trial was whether Lexington had a duty to defend and indemnify Hearthstone under the policy.

Following the trial to the court, the District Court concluded that based on the evidence and testimony presented at trial, Lexington satisfied its burden of showing that the prior acts exclusion in its policy applied to the claims made against the Hearthstone defendants arising from the Ernico litigation. The District Court found that Lexington demonstrated that prior to the inception of the Policy, Hearthstone foresaw or could have reasonably foreseen that the Ernico incident might result in a claim. Therefore, the District Court held that based on the prior acts exclusion, the Lexington Policy did not provide coverage for the claims related to the Ernico litigation.

- (5) This case was significant in that it provides practical guidance to insurance carriers on claims made policies relative to determining when a claim was made for purposes of assessing which policy is triggered.

U.S. Home Corporation v. Maryland Casualty Co., District of Arizona, Case No. CV-04-01150-PHX-FJM

- (1) Filed: 6/3/04; Closed: 12/20/05
- (2) United States District Court, District of Arizona; The Honorable Frederick J. Martone
- (3) Opposing Counsel: Arthur W. Pederson, apederson@shermanhoward.com, (602) 624-2704, and Nathaniel B. Rose, nathaniel.rose@fnf.com, (602) 889-8162 (Attorneys for U.S. Home Corporation).
- (4) Red Mountain Development Company ("Red Mountain") entered into a subcontract agreement with U.S. Home Corporation ("U.S. Home") to perform stucco work on numerous homes in a housing development. It was alleged that some of the stucco work performed by Red Mountain was defective. Red Mountain was insured under a commercial general liability policy with Maryland Casualty Co. ("Maryland") and it was alleged that the subcontract required U.S. Home to be named as an additional insured on the policy.

After receiving complaints from various homeowners, U.S. Home agreed with these homeowners to repair, remove, and replace the allegedly defective stucco on their homes. U.S. Home subsequently sent a letter to Maryland, notifying Maryland that the work performed by Red Mountain was allegedly defective and requested "that it be reimbursed as an additional insured under the policies for the damages identified herein." Following an investigation, Maryland advised U.S. Home that based upon the information provided, the claims were only for "repair of Red Mountain Development's stucco work" and not for "any alleged 'property damages' as consequential

or resulting from Red Mountain Development's work on the homes." Therefore, Maryland took the position that there was no coverage afforded for this loss.

U.S. Home brought a lawsuit against Maryland, alleging breach of contract, bad faith and seeking declaratory judgment against Maryland. The parties stipulated to the dismissal of the claim for bad faith and filed cross-motions for summary judgment on the issue of coverage for the costs to repair the stucco work performed by Red Mountain. The United States District Court for the District of Arizona granted Maryland's motion for summary judgment and denied U.S. Home's, finding that coverage was not available because there was no occurrence resulting in property damage.

U.S Home appealed this decision to the United States Court of Appeals for the Ninth Circuit. Following oral argument, the Ninth Circuit affirmed the decision of District Court, finding that the faulty stucco, standing alone, did not constitute an "occurrence" as defined in the insurance policy and that the cost of repairing the stucco did not constitute "property damage" under the language of the policy.

- (5) This case was significant to my client and the insurance industry because it confirmed the decision in *United States Fid. & Guar. Corp. v. Advance Roofing & Supply Co.*, 163 Ariz. 476, 482, 788 P.2d 1227, 1233 (App. 1989), finding no coverage for faulty workmanship, as well as the decision in *Lennar Corp. v. Auto-Owners Ins. Co.*, 214 Ariz. 255, 262, 151 P.3d 538, 545 (App. 2007), which was issued while we were awaiting oral argument before the Ninth Circuit. The decision in this case also effectively nullified a prior unpublished decision from the Ninth Circuit which erroneously applied the ruling in *University Mechanical Contractors of Arizona. Inc. v. Puritan Insurance Co.*, 150 Ariz. 299, 723 P.2d 648 (1986) in order to reach a contrary conclusion on this issue.

Mt. Hawley Insurance Company v. The Sahuaro Group, et al., Maricopa County Superior Court Case No. CV2010-022830

- (1) Filed: 8/2/10; Closed: 7/10/13
- (2) Maricopa County Superior Court: The Honorable Eileen S. Willett; and Court of Appeals of Arizona, Div. 1: The Honorable Diane M. Johnson, The Honorable Peter B. Swann, and the Honorable Randall M. Howe.
- (3) Opposing Counsel: Robert A. Royal, rroyal@tblaw.com, (602) 255-6011 (Attorney for World Travel Inns Limited Partnership VII).
- (4) World Travel Inns Limited Partnership VII ("World Travel") hired The

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Sahuaro Group ("Sahuaro"), as the general contractor for a hotel construction project. A month before the work was to be finished, Terry Haver, Sahuaro's principal and sole member, announced that Sahuaro would not complete the project unless World Travel advanced an additional \$100,000 not provided for in the contract. After World Travel refused Sahuaro's ultimatum, Sahuaro left the project without performing any additional work.

World Travel sued Sahuaro and other related parties for damages it sustained due to Sahuaro's abandonment of the project. The complaint alleged breach of contract, fraudulent misrepresentation, consumer fraud, fraudulent transfer, conversion, racketeering and negligence, and sought damages and attorney's fees and costs. World Travel obtained a large default judgment against all the defendants.

World Travel then turned to Mt. Hawley Insurance Company ("Mt. Hawley"), seeking recovery under a commercial general liability policy Mt. Hawley had issued to Sahuaro. Mt. Hawley filed a complaint seeking a declaratory judgment that the policy did not cover the default judgment. World Travel answered and counterclaimed for a declaration of coverage. On cross-motions for summary judgment, the superior court ruled there was no coverage because Sahuaro's abandonment of the project did not constitute an "occurrence" within the meaning of the policy issued by Mt. Hawley to Sahuaro.

World Travel appealed the superior court's entry of summary judgment in favor of Mt. Hawley. The Court of Appeals of Arizona affirmed the decision of the trial court, holding that Sahuaro's abandonment of the project was not an "occurrence" within the meaning of the insurance policy.

- (5) This case was significant in that it provided practical guidance to insurance carriers regarding the nature of an "occurrence" under occurrence-based general liability insurance policies.**

Prudential Property and Casualty Insurance Company v. Hansen, Maricopa County Superior Court Case No. CV 2007-022766

- (1) Filed: 12/11/07; Closed: 9/14/09**
- (2) Maricopa County Superior Court: The Honorable Larry Grant.**
- (3) Opposing Counsel: Mack T. Jones, mjones@bojolaw.com, (602) 536-5183 (Attorney for Denise Biro and John Doe Biro).**
- (4) On March 6, 2004, Derik D. Hansen ("Hansen") was involved in an automobile accident with Denise Biro ("Biro"). At the time of the**

accident, the vehicle driven by Hansen was owned by David R. Noland, d/b/a Kash n' Karry Auto Sales. At that time Hansen was an automobile detailer and had an ongoing business relationship with Kash n' Karry Auto Sales. The day before the accident, Hansen had driven the motor vehicle to his residence for the purpose of detailing the vehicle. He was also considering purchasing the vehicle from Kash n' Karry Auto Sales.

After completing the detailing of the vehicle, on March 6, 2004, Hansen was returning the motor vehicle to Kash n' Karry Auto Sales when he had an automobile accident with Biro.

Prudential Property and Casualty Insurance Company ("Prudential") had a policy of insurance with Roger and Deborah Hansen, the parents of Hansen. Hansen was listed under the policy as a licensed operator resident in the home. In the underlying lawsuit, Hansen made a demand upon Prudential to defend and provide coverage for the automobile accident. Thereafter, Prudential filed for a declaratory judgment to have the Court determine whether Prudential is obligated to provide insurance coverage to Hansen under the policy.

Prudential filed for summary judgment, arguing that its policy with Roger and Deborah Hansen had an auto business exclusion that precluded coverage. Biro opposed Prudential's motion and filed a Cross-Motion for Summary Judgment, arguing that the auto business exclusion did not apply because there was a dual purpose in Hansen's possession and use of the vehicle at the time of the accident. Specifically, Biro contended that Hansen was also considering purchasing the vehicle, which took this incident outside the auto business exclusion.

The trial court granted Prudential's motion for summary judgment, holding that the auto business exclusion applied to preclude coverage for Hansen. The Court further found that a dual purpose for Hansen's possession or use of the motor vehicle involved in the accident with Biro did not take the incident outside the auto business exclusion.

- (5) This case was significant to my client and the insurance industry because it addressed the novel issue of the application of the auto business exclusion and, more specifically, whether it still applied despite the presence of a dual purpose for the use of the vehicle.

**Mt. Hawley Insurance Company v. RC Lorenz Contracting Inc., et al.,
Maricopa County Superior Court Case No. CV 2010-033931**

- (1) Filed: 12/23/10; Closed: 4/4/12
- (2) Maricopa County Superior Court: The Honorable Mark Brain.

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- (3) **Opposing Counsel: Andrew Peshek, apeshek@gwhplaw.com, (480) 483-9700 (Attorney for RC Lorenz Contracting, Inc., Robert C. Lorenz, and Kim Ann Lorenz); Cassandra V. Meyer, cmeyer@cavanaghlaw.com, (602) 322-4052 (Attorney for Petree Shoppes at Cave Creek, L.L.C.).**
- (4) **Desierto Cielo, L.L.C. (“DC”) is an Arizona limited liability company which was formed in the year 2000 for the specific purposes of the development of a commercial real estate project commonly known as The Shoppes at Cave Creek (“The Shoppes”). On February 4, 2004, United Arizona Bank, N.A. conveyed to DC a certain piece of real property located in Maricopa County, Arizona. DC purchased the aforementioned real property for the purpose of developing the property for commercial use, i.e., The Shoppes.**

The general contractor for The Shoppes was Defendant RC Lorenz Contracting, Inc. (“RC”). RC hired numerous subcontractors to perform the actual construction on The Shoppes.

On March 28, 2006, Defendant Petree Shoppes at Cave Creek, L.L.C. (“Petree”) entered into a purchase agreement (the “Agreement”) with DC for the purchase of The Shoppes. The Shoppes was conveyed by DC to Petree pursuant to Warranty Deed on June 2, 2006.

On June 25, 2007, Petree filed a lawsuit against DC, RC, Defendants Robert C. Lorenz, aka Robin Lorenz, and Kim Ann Lorenz (collectively “Lorenz”), and others, in Maricopa County Superior Court, State of Arizona, bearing Civil Case No. CV2007-011122 (the “Underlying Lawsuit”).

Mt. Hawley Insurance Company issued a commercial liability policy, Policy No. MGL0138883 (the “Policy”), with a policy term running from March 31, 2004 to March 31, 2005, to DC and RC. On March 18, 2008, Mt. Hawley filed a declaratory judgment action against DC, RC, Lorenz, and Petree, in the United States District Court, District of Arizona, bearing Case No. CV08-00531-PHX-NVW (the “Declaratory Judgment Action”). On February 4, 2009, the United States District Court for the District of Arizona entered a judgment in the Declaratory Judgment Action finding: (1) there is no coverage for DC under the Mt. Hawley Policy for the claims made in the Underlying Lawsuit; (2) Mt. Hawley is not obligated to indemnify or pay any judgment or award of damages against DC in the Underlying Lawsuit; and (3) Mt. Hawley does not have a continued obligation to defend DC in the Underlying Lawsuit. The February 4, 2009 judgment in the Declaratory Judgment Action also stated that the claims against RC and Lorenz were dismissed without prejudice, with leave to re-file at any time.

On December 3, 2010, Petree filed a First Amended Complaint in the

Underlying Lawsuit. In addition to the numerous causes of action, the First Amended Complaint stated that Petree was also seeking attorneys' fees pursuant to A.R.S. § 12-341.01.

Mt. Hawley thereafter filed a declaratory judgment action asking for the court to determine coverage for the allegations of attorneys' fees. Mt. Hawley filed a motion for summary judgment on this issue. The court granted Mt. Hawley's motion for summary judgment regarding coverage for attorneys' fees holding that the only way the insured would have a judgment of attorneys' fees entered against it in the Underlying Lawsuit under A.R.S. § 12-341.01 was if they lose while defending a claim that "arises out of a contract," and such claims were not covered by the policy in the first place.

- (5) This case was significant to my client and the insurance industry because it addressed the novel issue of coverage for attorneys' fees awarded against an insured under A.R.S. § 12-341.01.**

27. If you now serve or have previously served as a mediator, arbitrator, part-time or full-time judicial officer, or quasi-judicial officer (e.g., administrative law judge, hearing officer, member of state agency tribunal, member of State Bar professionalism tribunal, member of military tribunal, etc.), give dates and details, including the courts or agencies involved, whether elected or appointed, periods of service and a thorough description of your assignments at each court or agency. Include information about the number and kinds of cases or duties you handled at each court or agency (e.g., jury or court trials, settlement conferences, contested hearings, administrative duties, etc.).

I served as a Judge Pro Tempore for the Maricopa County Superior Court (from 2012 to 2015) on the Civil and Civil ADR dockets. During that period of time, I presided over numerous mandatory settlement conferences.

I was appointed as a judge for the Superior Court of Arizona in Maricopa County in September of 2015, where I have served until the present. From September of 2015 through June of 2018, I was assigned to a civil calendar. During my civil rotation, there were hundreds of cases assigned to my division where I presided over approximately twenty jury trials and ten trials to the court. During that time, I also presided over hundreds of hearings where oral argument was presented on pre-trial and post-trial motions, e.g., motions to dismiss, motions for summary judgment, motions for judgment as a matter of law, motions for new trial, motions to compel discovery, etc.). Due to the load of juvenile calendars during this period of time, the civil judges were also assigned to handle juvenile severance trials, of which I presided over approximately six. I additionally handled several settlement conferences for other civil judges during that time.

From June of 2018 through the present, I have been assigned to a family court calendar. During my family rotation, I have presided over hundreds of contested evidentiary hearings, including hundreds of trials to the court.

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On August 7, 2019, I was assigned to serve in Division One of the Arizona Court of Appeals as a Judge Pro Tempore in order to aid and assist in the consideration and disposition of calendars until December 31, 2019. In that capacity, I sat on a panel in eleven separate matters (six civil, three criminal, and two juvenile) and delivered the decision in four of these matters.

On February 26, 2020, I was again assigned to serve in Division One of the Arizona Court of Appeals as a Judge Pro Tempore in order to aid and assist in the consideration and disposition of calendars until June 1, 2020. In that capacity, I sat on a panel in five separate matters (four criminal and one juvenile) and delivered the decision in one of these matters.

28. List at least three but no more than five cases you presided over or heard as a judicial or quasi-judicial officer, mediator or arbitrator. State as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) the names, e-mail addresses, and telephone numbers of all counsel involved and the party each represented; (4) a summary of the substance of each case; and (5) a statement of any particular significance of the case.

Christine Jones, et al. v. Michelle Reagan, et al., Maricopa County Superior Court Case No. CV2016-014708

- (1) A Verified Special Action Complaint for Injunctive, Mandamus and Declaratory Relief was filed on September 6, 2016, the evidentiary hearing to address the allegations was held on September 8, 2016, and an order on the preliminary injunction was issued on September 9, 2016.
- (2) Maricopa County Superior Court
- (3) Counsel for Plaintiffs: Joseph A. Kanefield, (602) 542-8080; Brett Johnson, bwjohnson@swlaw.com, (602) 382-6312; Judge Sara Agne, (602) 506-8288.

Counsel for Biggs for Congress: Kory A. Langhofer, kory@statecraftlaw.com, (602) 382-4078; Thomas Basile, tom@statecraftlaw.com, (602) 382-4066.

Counsel for Maricopa County Defendants: M. Colleen Connor, PinalCountyAttorney@Pinal.gov, (520) 866-6271; Andrea Cummings, cumminga@mcao.maricopa.gov, (602) 506-8541; Edward W. France III, (Retired – current contact information unknown).

Counsel for Defendant Arizona Secretary of State Michele Reagan: James Driscoll-MacEachron, james.driscoll-maceachron@eoc.gov, (602) 640-5010; Kara M. Karlson, Kara.Karlson@azag.gov, (602) 542-

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4951.

Counsel for Real Party in Interest Andy Biggs: Timothy La Sota, tim@timlasota.com, (602) 515-2649.

- (4) This action was an election dispute arising out of the Republican primary race for Arizona's Fifth Congressional District ("CD 5") in the August 30, 2016 Primary Election. The two candidates with the most votes in this race were Andrew Biggs and Christine Jones, and they were separated by a margin of nine votes out of a total of 50,447 votes cast between them.

The plaintiffs alleged that the Maricopa County Recorder or her delegates failed to comply with Arizona law in reviewing and processing certain early, provisional, and conditional provisional ballots cast during that election, which caused those votes not to be counted. Specifically, there were four general categories of improper conduct alleged by the plaintiffs: (1) the refusal to allow conditional provisional ballot voters to provide identification within five days after the Primary Election; (2) the rejection of early ballots of voters whose signature on the ballot affidavit purportedly did not match the signature on the voter's registration form; (3) the rejection of unsigned early ballots by failing to provide an opportunity to cure the defect; and (4) the rejection of provisional ballots cast in the wrong precinct where election officials failed to inform voters that their votes would not be counted if they vote in the wrong precinct. The plaintiffs requested the issuance of a preliminary injunction to enjoin the Board of Supervisors from completing, certifying, and delivering the official Maricopa County canvass until all votes required to be processed for voting in CD 5 were counted.

Following an evidentiary hearing on September 8, 2016, the Court granted the preliminary injunction only as to the final of the four categories of alleged improper conduct, i.e., rejection of provisional ballots cast in the wrong precinct where election officials failed to inform voters that their votes would not be counted if they vote in the wrong precinct. In its ruling, the Court recognized the legitimate interests in maintaining the precinct-based election system and rejecting ballots cast in the wrong precinct generally. The Court found that these interests, however, did not support the specific restriction at issue, i.e., the rejection of wrong precinct ballots based upon a policy of not advising voters in the wrong precinct that a provisional vote cast in the wrong precinct would not be counted. While the Court observed that "garden variety" errors by poll workers do not rise to the level of a deprivation of constitutional rights, the Court held that the error at issue was not garden variety but the result of a uniform procedure implemented by Maricopa County in instructing voters who are in the wrong precinct. As a

result of this procedure, the Court concluded that numerous voters were disenfranchised because they were either told by poll workers that their vote would count or, by silence, were misled to believe that their vote would count.

In the absence of the showing of a legitimate interest on the part of the County defendants to not tell voters in the wrong precinct that a provisional vote cast in the wrong precinct would not be counted, the Court found that the plaintiffs showed a strong likelihood of success on their equal protection claim on this issue. The Court also found that the other factors required for a preliminary injunction—irreparable injury, balance of hardships, and public policy—also weighed in favor of issuing the injunction on this issue. The Court therefore ordered that the provisional ballots of an additional eighteen (18) individuals be processed and counted by the Maricopa County Recorder as applicable to the races in each voter's correct precinct. The Court also ordered that the Maricopa County Board of Supervisors be prohibited from canvassing the results of the August 30, 2016 Primary Election, or delivering those results to the Secretary of State, until the additional votes were counted.

- (5) This case was significant because of the constitutional issues involved, the effect of the policy of Maricopa County resulting in the disenfranchisement of voters, and the tightly contested nature of the congressional race at issue.

Dennis Shane Hitzeman, et al. v. Michelle Reagan, et al., Maricopa County Superior Court Case No. CV2016-009704

- (1) The Expedited Challenge Pursuant to A.R.S. § 19-118(D) was filed on July 14, 2016, the evidentiary hearing to address the allegations was held on August 11, 2016, and an order was issued on August 19, 2016.
- (2) Maricopa County Superior Court
- (3) Counsel for Plaintiffs: Roopali H. Desai, rdesai@cblawyers.com, (602) 381-5478; Andrew S. Gordon, agordon@cblawyers.com, (602) 381-5460; D. Andrew Gaona, agaona@cblawyers.com, (602) 381-5486.

Counsel for Defendant Arizonans for Fair Wages and Healthy Families Supporting 1-24-2016: James E. Barton II, jim@bartonmendezsoto.com, (480) 637-0960; Israel G. Torres, Israel@TheTorresFirm.com, (602) 626-8805; Saman J. Golestan, cityattorney@peoriaaz.gov, (623) 773-7330.

Counsel for Defendant Arizona Secretary of State Michelle Reagan:
James Driscoll-MacEachron, james.driscoll-maceachron@eoc.gov,
(602) 640-5010.

- (4) The plaintiffs, which included Dennis Shane Hitzeman, a qualified Arizona elector, and the Arizona Restaurant and Hospitality Association, filed an Expedited Challenge Pursuant to A.R.S. § 19-118(D) to challenge the lawful registration of circulators employed to circulate petitions in support of the Fair Wages and Healthy Families Act, No. 1-24-2016 (the “Initiative”). The plaintiffs filed the challenge against the Arizona Secretary of State and Arizonans for Fair Wages and Healthy Families Supporting 1-24-2016 (the “Committee”), a political action committee formed to support the Initiative, alleging that numerous petition circulators were not lawfully registered with the Secretary of State and that all of the petition sheets circulated by those individuals were invalid and should be removed. The Committee filed a Motion to Dismiss the action, arguing that the Court lacked subject-matter jurisdiction and that the claims were untimely.

An evidentiary hearing was held on August 11, 2016, in which evidence was presented on the allegations made by the plaintiffs, as well as the issues raised by the Committee in its Motion to Dismiss. In the Court’s subsequent order dated August 19, 2016, the Court addressed all of the issues raised by the parties in order to permit an expeditious review of the matter by the Arizona Supreme Court.

Addressing first the Motion to Dismiss, the Court held that although it had jurisdiction to hear the plaintiffs’ claims, these claims were not timely filed under A.R.S. § 19-118(D). The issue turned on the interpretation of the word “days” as used in the statute. At that time, A.R.S. § 19-118(D) provided that a challenge to the lawful registration of circulators “may not be commenced more than five days after the date on which the petitions ... are filed with the secretary of state.” The Verified Complaint was filed seven days after the petitions were filed with the Secretary of State. The plaintiffs argued, however, that the “five days” did not include weekends and that the Verified Complaint was therefore timely filed.

The Court held that the ordinary meaning of the word “days” is “calendar days,” and absent the application of a specific qualifier, definition, or rule, “days” does not mean “days, except for weekends and legal holidays.” The Legislature did not include in the statute a definition for “days” and did not include an applicable qualifier or rule for the use of the word in this context. Further, the Court observed that in light of the rule of strict construction used in relation to the time elements in election statutes, Arizona courts have consistently interpreted the word “days” in election statutes as

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meaning calendar days. The Court therefore held that because the Verified Complaint was filed seven calendar days after the petitions were filed with the Secretary of State, the claims under A.R.S. § 19-118(D) were untimely. The Motion to Dismiss was granted on this basis.

Again, in order to address all of the issues for purposes of review by the Arizona Supreme Court, the Court also held that if the plaintiffs' claims under A.R.S. § 19-118(D) had been timely filed, the Court found invalid a score of petition sheets and individual signatures submitted by the Committee in support of the Initiative. The Court further held that if the claims under A.R.S. § 19-118(D) had been timely, these signatures would need to be removed by the Secretary of State from the number of eligible signatures.

The Arizona Supreme Court, in a per curiam decision, affirmed the trial court's granting of the Motion to Dismiss in the Under Advisement Ruling dated August 19, 2016, finding that "days" in this context means "calendar days".

- (5) This case was significant because of its implications with regards to the statutory procedure in challenging the lawful registration of petition circulators. Indeed, after this ruling, the language of A.R.S. § 19-118(D) was amended to provide that "[a] challenge may not be commenced more than ten business days after the date on which the petitions ... are filed with the secretary of state."

Renee Loncar v. Doug Ducey, et al., Maricopa County Superior Court Case No. CV2016-005335

- (1) The Complaint for Declaratory, Injunctive, and Other Relief was filed on April 21, 2016 and the Court's Under Advisement Ruling on the Motion to Dismiss was filed on March 14, 2017.

- (2) Maricopa County Superior Court

- (3) Counsel for Plaintiff: David Abney, abneymaturin@aol.com, (480) 734-8652; Joel B. Robbins, joel@robbinsandcurtin.com, (602) 285-0100.

Counsel for Defendants: Ann Hobart, Ann.Hobart@azag.gov, (602) 542-8347.

- (4) Plaintiff Renee Loncar, an employee of the State of Arizona, brought suit against the State of Arizona and its associated representatives (the "State") for discrimination under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the Privileges & Immunities and Preferential Treatment of Employees

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Clauses of the Arizona Constitution. Loncar filed this action after Loncar's long-time, male domestic partner was killed in an automobile accident. Loncar was unable to receive life insurance benefits through the State employee benefit program because her partner was not a "dependent" under A.R.S. § 38-651(O), which defines "dependent" to mean "a spouse under the laws of this state." As a result of a preliminary injunction entered by the United States District Court enjoining the State from enforcing A.R.S. § 38-651(O) against lesbian and gay State employees and domestic partners' children, same sex domestic partners were eligible to be "dependents" for purposes of State employee benefits at that time but different sex domestic partners were not. It was on this basis that Loncar claimed that she was discriminated against due to her gender.

The State filed a Motion to Dismiss arguing that Loncar failed to state a claim upon which relief could be granted because, among other things, A.R.S. § 38-651(O) did not confer any privilege on unmarried same-sex couples that it withheld from unmarried heterosexual couples. It was Loncar's position that the State withheld benefits to unmarried heterosexual couples based solely on her sex as a female, a protected class.

The Court granted the Motion to Dismiss. The Court held that Loncar does not fall within the protected class and may not bring a claim under the Preferential Treatment of Employees Clause for preferential treatment or discrimination because: (1) the plain meaning of the term, "sex" refers only to membership in a class delineated by gender, and not to sexual orientation; and (2) sexual orientation is not expressly included in the constitutionally protected class. The Court further held that the State did not violate the Equal Protection Clause or the Privileges & Immunities Clause because: (1) the State had a reasonable basis in these circumstances for providing life-insurance coverage to unmarried same-sex couples in complying with the District Court orders; and (2) as determined by the District Court, same-sex domestic partners were not similarly situated with opposite sex domestic partners for purposes of application of A.R.S. § 38-651(O), i.e., insurance benefits were available to heterosexual couples because there was no legal impediment to such couples, including Loncar and her partner, getting married.

This decision was appealed and, in a published opinion, the Court's dismissal of Loncar's claims was affirmed by the Arizona Court of Appeals.

- (5) This case was significant because of the constitutional issues involved and the wide-ranging impact the decision could have had**

with regard to State employee benefits.

Sarai Diaz Baldwin v. Ray D. Martinez, et al., Maricopa County Superior Court Case No. CV2018-008829

- (1) The Special Action Complaint was filed on June 13, 2018, an evidentiary hearing was held on June 19, 2018, and the Court issued its Under Advisement Ruling on June 19, 2018.
- (2) Maricopa County Superior Court
- (3) Counsel for Plaintiff: Roy Herrera, herrerar@ballardspahr.com, (602) 798-5430; Daniel A. Arellano, arellanod@ballardspahr.com, (602) 798-5436.

Counsel for Defendant Ray D. Martinez: William M. Fischbach, wmf@tblaw.com, (602) 255-6036.

Counsel for Defendant Arizona Secretary of State Michele Reagan: Kara M. Karlson, Kara.Karlson@azag.gov, (602) 542-4951; Joseph E. La Rue, laruej@mcao.maricopa.gov, (602) 506-3411; Vineet M. Shaw, Vineet.Shaw@azag.gov, (602) 542-8567.

Counsel for Maricopa County Defendants: M. Colleen Connor, PinalCountyAttorney@Pinal.gov, (520) 866-6271; Talia J. Offord, offordt@mcao.maricopa.gov, (602) 506-8541.

- (4) Defendant Ray D. Martinez sought the nomination of the Democratic Party for the office of State Senator for Legislative District 30 in the primary election to be held on August 28, 2018. Plaintiff Sarai Diaz Baldwin (“Diaz”) filed the Special Action Complaint challenging the legal sufficiency of the petition sheets and signatures contained in Martinez’s nomination petition filed with the Secretary of State.

The challenge was based upon numerous grounds, including the fact that many petitions identified the office for which nomination was being sought as simply “Senator” instead of specifically identifying the state senate legislative district. Baldwin asserted that this could cause confusion among the electors signing the petition because there was also a contested primary race for the United States Senate. Martinez argued that because the subject petitions referenced Legislative District 30 in another location in the petition, this rectified any possible confusion.

The Court found that because there are two offices of “senator” that qualified electors from Legislative District 30 could nominate, a signer would not automatically know that he was nominating a candidate for the office of the State Senate – Legislative District 30

versus the United States Senate. It was held that Martinez's nominating petitions which only list the office as "Senate" therefore do not substantially comply with statutory requirements for nomination petitions and the signatures obtained therein must not be counted.

The Court also found that the Maricopa County Recorder appropriately found 420 signatures to be invalid for the various reasons set forth in the certification provided. The Court found, however, that Baldwin did not meet her burden on her challenge to the validity of signatures collected by certain petition circulators alleged to have been ineligible.

Based upon the Court's findings, the Court concluded that an additional 98 signatures should be excluded from the count of valid signatures provided by the Maricopa County Recorder. This resulted in Martinez having failed to present a sufficient number of valid signatures to appear on the Democratic primary ballot.

In a panel consisting of Chief Justice Bales, Justice Pelander, Justice Bolick, and Justice Gould, the Arizona Supreme Court affirmed the order entered June 19, 2018.

- (5) This case was significant because of the impact it had on the Democratic candidates for State Senator for Legislative District 30 appearing on the ballot for the primary election held on August 28, 2018.

29. Describe any additional professional experience you would like to bring to the Commission's attention.

I have served on the State Bar of Arizona Civil Practice and Procedure Committee since 2010. During that time, I have been able to serve on various subcommittees and have represented the committee in speaking engagements at State Bar of Arizona conferences.

BUSINESS AND FINANCIAL INFORMATION

30. Have you ever been engaged in any occupation, business or profession other than the practice of law or holding judicial or other public office, other than as described at question 14? **No** If so, give details, including dates.
31. Are you now an officer, director, majority stockholder, managing member, or otherwise engaged in the management of any business enterprise? **No** If so,

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give details, including the name of the enterprise, the nature of the business, the title or other description of your position, the nature of your duties and the term of your service.

Do you intend to resign such positions and withdraw from any participation in the management of any such enterprises if you are nominated and appointed?
_____ If not, explain your decision.

32. Have you filed your state and federal income tax returns for all years you were legally required to file them? **Yes** If not, explain.
33. Have you paid all state, federal and local taxes when due? **Yes** If not, explain.
34. Are there currently any judgments or tax liens outstanding against you? **No** If so, explain.
35. Have you ever violated a court order addressing your personal conduct, such as orders of protection, or for payment of child or spousal support? **No** If so, explain.
36. Have you ever been a party to a lawsuit, including an administrative agency matter but excluding divorce? **No** If so, identify the nature of the case, your role, the court, and the ultimate disposition.
37. Have you ever filed for bankruptcy protection on your own behalf or for an organization in which you held a majority ownership interest? **No** If so, explain.
38. Do you have any financial interests including investments, which might conflict with the performance of your judicial duties? **No** If so, explain.

CONDUCT AND ETHICS

39. Have you ever been terminated, asked to resign, expelled, or suspended from employment or any post-secondary school or course of learning due to allegations of dishonesty, plagiarism, cheating, or any other "cause" that might

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reflect in any way on your integrity? **No** If so, provide details.

40. Have you ever been arrested for, charged with, and/or convicted of any felony, misdemeanor, or Uniform Code of Military Justice violation? **No**

If so, identify the nature of the offense, the court, the presiding judicial officer, and the ultimate disposition.

41. If you performed military service, please indicate the date and type of discharge. If other than honorable discharge, explain.

Not applicable.

42. List and describe any matter (including mediation, arbitration, negotiated settlement and/or malpractice claim you referred to your insurance carrier) in which you were accused of wrongdoing concerning your law practice.

Not applicable.

43. List and describe any litigation initiated against you based on allegations of misconduct other than any listed in your answer to question 42.

Not applicable.

44. List and describe any sanctions imposed upon you by any court.

Not applicable.

45. Have you received a notice of formal charges, cautionary letter, private admonition, referral to a diversionary program, or any other conditional sanction from the Commission on Judicial Conduct, the State Bar, or any other disciplinary body in any jurisdiction? **No** If so, in each case, state in detail the circumstances and the outcome.

46. During the last 10 years, have you unlawfully used controlled substances, narcotic drugs or dangerous drugs as defined by federal or state law? **No** If your answer is "Yes," explain in detail.

47. Within the last five years, have you ever been formally reprimanded, demoted, disciplined, cautioned, placed on probation, suspended, terminated or asked to resign by an employer, regulatory or investigative agency? **No** If so, state the circumstances under which such action was taken, the date(s) such action was

taken, the name(s) and contact information of any persons who took such action, and the background and resolution of such action.

48. Have you ever refused to submit to a test to determine whether you had consumed and/or were under the influence of alcohol or drugs? **No** If so, state the date you were requested to submit to such a test, type of test requested, the name and contact information of the entity requesting that you submit to the test, the outcome of your refusal and the reason why you refused to submit to such a test.
49. Have you ever been a party to litigation alleging that you failed to comply with the substantive requirements of any business or contractual arrangement, including but not limited to bankruptcy proceedings? **No** If so, explain the circumstances of the litigation, including the background and resolution of the case, and provide the dates litigation was commenced and concluded, and the name(s) and contact information of the parties.

PROFESSIONAL AND PUBLIC SERVICE

50. Have you published or posted any legal or non-legal books or articles? **Yes** If so, list with the citations and dates.

Books:

- **Associate Author, COUCH ON INSURANCE 3D**
- ***Arizona Tort Law Handbook (State Bar of Arizona 2012) (Co-author of the chapter on Insurance Bad Faith)***
- ***Construction Defects: Claims and Coverage: “Progressive Losses— Triggers of Coverage, Numbering of Occurrences and Allocation Among Successive Policies” (DRI Defense Library Series) (Ch. 3, Part II)***
- ***Catastrophe Claims: Insurance Coverage for Natural and Man-Made Disasters (fka CAT Claims). (ThomsonWest 2008) (Co-author of the chapter on Litigation Strategies)***

ACADEMIC JOURNALS AND LAW REVIEWS:

- ***The Battle to Define the Scope of Attorney-Client Privilege in the Context of Insurance Company Bad Faith: A Judicial War Zone.*** 14 U. N.H. L. REV. 105 (January 2016)
- ***Delay, Manipulation, and Controversy: The Impact Of The 2012 Amendments To 28 U.S.C. § 1446 On The Battles For Removal Of Cases To Federal Court.*** PHOENIX L. REV., Vol. 6, No. 2 (Spring 2013)
- ***The Practical Ramifications of Dual Sovereignty in Prosecuting Declaratory Judgment Actions Against State and Federal Governments.*** CONN. INS. L.J., Vol. 14.2, p. 445 (2007-2008)
- ***Charting A Course For Federal Removal Through The Abstention Doctrine: A Titanic Experience In The Sargasso Sea Of Jurisdictional Manipulation.*** Vol. 56 DEPAUL L. REV. 107 (Fall 2006)
- ***Judicial Abstinance: Ninth Circuit Jurisdictional Celibacy for Claims Brought Under the Federal Declaratory Judgment.*** 27 SEATTLE U. L. REV. 751 (Issue 3, Spring 2004)

OTHER PROFESSIONAL PUBLICATIONS:

- ***Proving The Content Of Lost Insurance Policies.*** Ins. Lit. Rptr., Vol. 36, No. 15 (September 10, 2014)
- ***Challenging Fraudulent Joinder, The Clock Is Ticking.*** The Voice, Vol. 11, No. 36 (September 12, 2012)
- ***The Perils Of Testing The Contours And Boundaries Of Morris Agreements.*** Common Defense (Spring 2011)
- ***Bad-Faith Cases: Preserving Affirmative Defenses.*** DRI For the Defense, Vol. 53, No. 5 (May 2011)
- ***Coverage Issues Associated With Federal Clean Water Act Violations For Discharging Land Fill Into Waterways.*** Ins. Lit. Rptr., Vol. 31, No. 13 (August 2009)
- ***A Proportional Methodology For Determining Covered Damages Where Continuous And Progressive Injury Is Involved.*** Ins. Lit. Rptr., Vol. 31, No. 11 (July 2009)
- ***Counting The Number Of "Occurrences" Where The Predicate Tort Involves A Pattern Of Conduct Or Interrelated Process.*** Ins. Lit. Rptr., Vol. 31, No. 7 (May 2009)

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- *Triggering Coverage in Construction Defect Cases*. e-Common Defense (November 2008)
- *Lennar Corp. v. Auto-Owners Insurance Co., Expanding Coverage For Faulty Workmanship Claims*. e-Common Defense (September 2008)
- *A Methodical Approach to Analyzing the Application of the Absolute Pollution Exclusion*, Insurance Litigation Reporter, Vol. 28, No. 19 (December 2006)

51. Are you in compliance with the continuing legal education requirements applicable to you as a lawyer or judge? Yes If not, explain.

52. Have you taught any courses on law or lectured at bar associations, conferences, law school forums or continuing legal education seminars? Yes If so, describe.

- **“Arizona Family Court Judges Share Top Mistakes Attorneys Make” (May 2021). Sponsored by the National Business Institute.**
- **"2020 Insurance Law Institute" (August 2020) (Topic: Judicial Panel). Sponsored by the State Bar of Arizona.**
- **“Candor, Confidences and Courtesy: Common Courtroom Conundrums” (February 2020). Sponsored by the State Bar of Arizona.**
- **“2018 Civil Practice and Procedure Symposium” (April 2018) (Topic: The 2018 Changes to Disclosure and Discovery Rules). Sponsored by the State Bar of Arizona.**
- **“Candor, Confidences and Courtesy: Common Conundrums 2018” (February 2018). Sponsored by the State Bar of Arizona.**
- **“As Judges See It: Best (and Worst) Practices in Civil Litigation” (June 2017). Sponsored by the National Business Institute.**
- **“Arizona Judges Speak: Evidence, E-Discovery and Changes You Need to Know!” (June 2016). Sponsored by the National Business Institute.**
- **"2016 Insurance Law Institute" (January 2016) (Topic: Judges Panel). Sponsored by the State Bar of Arizona.**
- **"2015 Insurance Law Institute" (January 2015) (Topic: Construction). Sponsored by the State Bar of Arizona.**

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- **“Litigating Insurance Coverage Claims: From Start To Finish” (December 2011) (Topic: Insurance Coverage Contract Language 101). Sponsored by the National Business Institute.**
- **“Arizona Insurance Coverage” (January 2011) (Topic: Insurance Coverage For Construction Defects). Sponsored by the State Bar of Arizona.**
- **“Insurance Coverage Litigation” (October 2010) (Topic: Common Types of Insurance Coverage Disputes). Sponsored by the National Business Institute.**
- **“Arizona Insurance Law” (January 2010) (Topic: Multiple Coverage Issues Relevant To Automobile Policies). Sponsored by the State Bar of Arizona.**
- **“Arizona Insurance Coverage” (January 2009) (Topic: Insurance Coverage For Construction Defects). Sponsored by the State Bar of Arizona.**
- **“Commercial Real Estate Leases” (October 2008) (Topic: Insurance Considerations for Commercial Leases). Sponsored by Law Seminars International.**
- **“Arizona Insurance Coverage” (January 2008) (Topic: Insurance Coverage For Construction Defects). Sponsored by the State Bar of Arizona.**
- **“Arizona Insurance Coverage” (January 2007) (Topic: Insurance Coverage For Construction Defects). Sponsored by the State Bar of Arizona.**
- **“The Construction Defects Litigation Explosion: Current Issues of Importance to Contractors” (October 2005) (Topic: Insurance Issues). Sponsored by The Southwest Builders Show.**
- **“Arizona Liability Insurance Coverage” (May 2004) (Topic: The “Where, What, When, Why and How” of an Occurrence). Sponsored by the State Bar of Arizona**

53. List memberships and activities in professional organizations, including offices held and dates.

State Bar of Arizona

State Bar of Nevada (Inactive)

State Bar of Ohio (Inactive)

Maricopa County Bar Association (2003-2015)

Arizona Association of Defense Counsel (2003-2015)

Have you served on any committees of any bar association (local, state or national) or have you performed any other significant service to the bar? **Yes**

List offices held in bar associations or on bar committees. Provide information about any activities in connection with pro bono legal services (defined as services to the indigent for no fee), legal related volunteer community activities or the like.

State Bar of Arizona, Civil Practice and Procedure Committee (2010-present)

54. Describe the nature and dates of any relevant community or public service you have performed.

I currently serve as a non-staff pastor at my church, Christ Church in Gilbert, Arizona. I was installed in this position in April of 2019 after one year of training. My wife and I also helped to lead a small group at our church, assist other small group leaders, perform marital and premarital counseling, and provide encouragement, accountability, and discipleship to other individuals within the church.

I served on the school board for my children's school, Ambassador Christian Academy in Queen Creek from 2014 through 2016.

From 2009 through 2014, I served as a deacon at a church my family and I formerly attended. I also provided legal services on a pro bono basis on various legal matters for our church during that time, including handling a minor lawsuit that was settled in 2014.

In approximately 2009, I coached my son's baseball team in a local youth baseball organization. In 2017, I was an assistant coach on my son's flag football team.

As a family, we also support and attend Special Olympics events, as our son has been actively involved in competing over the past few years.

In 2018, 2019 and 2021, I served as the judge for a moot court competition held by Classical Conversations homeschool groups.

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55. List any relevant professional or civic honors, prizes, awards or other forms of recognition you have received.

- **Top 50 Lawyer in Arizona “SOUTHWEST SUPER LAWYERS®” (2015)**
- **Super Lawyer for Insurance Coverage in “SOUTHWEST SUPER LAWYERS®” (2014 & 2015)**
- **Southwest Rising Stars in “SOUTHWEST SUPER LAWYERS®” (2012 & 2013)**
- **Martindale-Hubbell - AV® Preeminent Rating**

56. List any elected or appointed public offices you have held and/or for which you have been a candidate, and the dates.

Judge of the Superior Court of Arizona in Maricopa County (September 14, 2015 – present)

Have you ever been removed or resigned from office before your term expired? **No** If so, explain.

Have you voted in all general elections held during the last 10 years? **No** If not, explain.

I voted in all of the general elections during that period of time except for the general election in November of 2014. The reason I did not vote in that general election is that my family and I left the state on an unanticipated trip that resulted in me missing the election, and I was unable to obtain an absentee ballot.

57. Describe any interests outside the practice of law that you would like to bring to the Commission’s attention.

My primary interests outside of the practice of law are the five very special individuals that make up my unique and beautiful family. My wonderful wife Carie and I have four children, two of whom were adopted through the Arizona foster care system, and two of whom have significant special needs. We want each of them to experience all of the amazing things that life has to offer, regardless of any limitations that they may have, and we want them to show others just how much they have to contribute to the world around them. As a family, we enjoy the great outdoors of Arizona, taking many overnight camping trips throughout the year and often taking day trips to hike, fish, or ride off-road on our state's vast trail systems. We are also very active as a family in our church and its many family and youth activities. We encourage our children to serve the community by

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volunteering with them at organizations such as Feed My Starving Children, the Midwest Food Bank, and the Harvest Compassion Center. As an individual, in addition to my love for the outdoors, I enjoy reading biographical, historical, legal, and theological works and have been trying to build a collection of significant and hard-to-find books in these areas. I have also always loved painting in oils, especially landscapes. Although I do not get as many opportunities these days as I would like, I relish any chance to sit down at my easel and paint.

HEALTH

58. Are you physically and mentally able to perform the essential duties of a judge with or without a reasonable accommodation in the court for which you are applying? Yes

ADDITIONAL INFORMATION

59. The Arizona Constitution requires the Commission to consider the diversity of the state's population in making its nominations. Provide any information about yourself (your heritage, background, life experiences, etc.) that may be relevant to this consideration.

Diversity is an ever-present part of my life that continues to shape my character and my worldview. As I stated previously, my wife and I have four children, two of whom have special needs. More specifically, one of our children has Down Syndrome and another has cerebral palsy. The two of them face very distinct but significant challenges. As a father of children with different abilities, I live and feel deeply the struggles that my children endure. But I also get to experience all the joys that come with each new breakthrough, each new victory over those struggles. My wife and I work hard to make sure that our children get every opportunity to enjoy life to the fullest. And we work even harder to make sure that everyone around us can see and experience the joy and growth that the unique strength and qualities of our children bring to this world. Just as diversity has shaped and made my family what it is, it has shaped and made this community and this country what they are. It is this perspective that I bring to the bench—a perspective that understands, protects, appreciates, and celebrates the different backgrounds, heritages, experiences, and abilities that make up our community.

60. Provide any additional information relative to your qualifications you would like to bring to the Commission's attention.

During my years of practice before taking the bench, a majority of the assignments that I received from my clients involved drafting opinions regarding the coverage available under my clients' policies for a claim or loss submitted by the policyholder. The types of claims that I reviewed and analyzed for coverage were incredibly varied and complex, including, for example, environmental toxic torts, breach of contract, construction defects, sexual abuse, defamation, medical and professional malpractice, auto accidents, and personal injury claims. Indeed, practicing in that area of law allowed me to see and analyze the full spectrum of civil claims that are litigated before the courts. Further, these coverage opinions required a comprehensive analysis of the current state of the law pertaining to specific coverage issues. In accomplishing this and to best serve my client, I had to provide an unbiased view of what the law is and should be on these issues. I believe that all of this prepared me for the functions of a judicial officer, especially at an appellate level, because throughout the course of my practice I had to examine legal issues on a wide range of issues from an objective standpoint, make determinations in accordance with legal precedent, and compose comprehensive and well-reasoned opinions.

61. If selected for this position, do you intend to serve a full term and would you accept rotation to benches outside your areas of practice or interest and accept assignment to any court location? **Yes** If not, explain.
62. Attach a brief statement explaining why you are seeking this position.

In order to make a significant and positive impact on the lives of others, a person must be willing to humble themselves by setting aside their self-interest and putting the needs of others first—selfless, sacrificial service. When I entered the legal profession, I did so with the goal of serving the individuals or entities that I represented to the best of my ability by seeking justice on their behalf. Throughout the years of my legal practice, I believe I did this both effectively and ethically. At the same time, I served our courts through honesty, integrity, commitment to justice, and the time given as a Judge Pro Tempore. I also served the State Bar through my work on the Civil Practice and Procedure Committee and my fellow practitioners through my publications and teaching of CLE courses.

My passion for serving people intensified and matured during my time in practice, both professionally and personally, which led to my desire to become a judge of the Superior Court. I saw the bench as a new and greater opportunity to serve my neighbors—the people of Maricopa County and the State of Arizona. The bench has indeed provided a wider platform,

a greater sphere of influence to more positively affect the lives of the people of this community than I personally had as an attorney. In my almost six years as a judge, I hope and believe that I have served the people well in my judicial capacity and have made a difference in the lives of those who have appeared before me.

My desire to seek a position on the Arizona Court of Appeals is simply a continuation of the passion that brought me to the bench in the first place: to better serve the people of my community through the administration of justice and faithful application and interpretation of the law. I am humbled to have been entrusted with the responsibility of serving the people of Maricopa County and the State of Arizona on the Superior Court and am thankful for each day I get to try and make a difference in the lives of all who enter my courtroom. In the Court of Appeals, however, the decisions made often extend beyond the litigants in a particular case. Indeed, the opinions issued by judicial officers at the appellate level are used to guide the trial courts as they make rulings in other cases, thereby increasing the effect and influence of the appellate decisions made. In my passion to serve, I want the opportunity to have this kind of impact.

Service as a judge brings challenges. Certainly, many of the decisions I have made during the time that I have been on the bench have been difficult, both intellectually and emotionally. But I have learned that the scope of the impact one can have on the life of another is a direct corollary of one's willingness to face and persevere through such difficulties. My children, some of my greatest teachers, have taught me this truth. As a father with two children who have special needs, I have watched them struggle with bigger challenges than most people can even imagine. The things that most of us take for granted—walking, talking, eating, and even breathing—are issues that they have faced throughout their entire lives. Every day, they work to overcome those obstacles. When they succeed, no matter how little or insignificant that challenge may seem to others, it is a great victory for them, a victory won through hard work, perseverance, and commitment. And even when they don't succeed, their unwillingness to give up inspires others to persevere in the face of their own trials, especially me.

Achieving justice can be difficult. It only comes as a result of hard work, perseverance, and a tireless commitment to the truth. Justice also does not just come through major victories but through the minutia, the little things that other people may overlook or take for granted. As a judge on the Superior Court, I have sought to tackle every challenge, both big and small, and, inspired by my children, have faced them with the same type of determination. I would like the opportunity to do the same on the Court of Appeals.

63. Attach two professional writing samples, which you personally drafted (e.g., brief or motion). **Each writing sample should be no more than five pages in length, double-spaced.** You may excerpt a portion of a larger document to provide the writing samples. Please redact any personal, identifying information regarding the case at issue, unless it is a published opinion, bearing in mind that the writing sample may be made available to the public on the commission's website.

Please see the attached writing samples, both of which are excerpts from larger motions. The first sample is a portion taken from a motion for summary judgment filed in Lexington Insurance Company v. Hearthstone of Sun City, LLC, et al., United States District Court, District of Arizona, Case No. CV-09-00109-PHX-FJM. The second sample is a portion taken from a motion for summary judgment filed in Cline, et al. v. Contractors Bonding Insurance Company, et al., Maricopa County Superior Court Case No. CV2013-008019.

64. If you have ever served as a judicial or quasi-judicial officer, mediator or arbitrator, attach sample copies of not more than three written orders, findings or opinions (whether reported or not) which you personally drafted. **Each writing sample should be no more than ten pages in length, double-spaced.** You may excerpt a portion of a larger document to provide the writing sample(s). Please redact any personal, identifying information regarding the case at issue, unless it is a published opinion, bearing in mind that the writing sample may be made available to the public on the commission's website.

Please see the attached orders from the following cases: Christine Jones, et al. v. Michelle Reagan, et al., Maricopa County Superior Court Case No. CV2016-014708; Renee Loncar v. Doug Ducey, et al., Maricopa County Superior Court Case No. CV2016-005335; and Andrew Muscat, et al. v. Creative Innervations, et al., Maricopa County Superior Court Case No. CV2014-014300.

65. If you are currently serving as a judicial officer in any court and are subject to a system of judicial performance review, please attach the public data reports and commission vote reports from your last three performance reviews.

The public data report and commission vote report from the 2018 JPR cycle, as well as the public data report from the 2020 JPR cycle, are attached (there is no commission vote report from the 2020 JPR cycle because it was only a mid-term review).

**-- INSERT PAGE BREAK HERE TO START SECTION II
(CONFIDENTIAL INFORMATION) ON NEW PAGE --**

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Maricopa County

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Superior Court Judicial Officers



Judges are appointed through a merit process. Judicial candidates are selected for their legal ability and professional and personal achievements rather than their mastery of political campaigns.



Commissioners are appointed by the Court's Presiding Judge from attorneys who apply and are recommended by a selection committee made up of judges, lawyers and others. Commissioners handle specific assigned cases and uncontested matters.

Judicial Officer: All Officers

Department: All Departments

Judicial Officer	Phone	Location	Protocol	Department
ABRAMSON, Lindsay Court Commissioner	602.506.6081	Durango Facility-3280/10		All Departments

ADLEMAN, Jay Superior Court Judge	602.372.5497	South Court Tower-13115/8C		All Departments
AGNE, Sara Superior Court Judge	602.506.8288	Northeast Court-J/108	View	All Departments
ALBRECHT, Richard Court Commissioner	602.372.2403	East Court Building-813	View	All Departments
ALLEN, Glenn Court Commissioner	602.506.3151	South Court Tower-13303/6C	View	All Departments
ASH, Lori Court Commissioner	602.372.2961	Northeast Court-K/110		All Departments
ASTROWSKY, Brad Superior Court Judge	602.372.2048	Old Court House-102/104	View	All Departments
BACHUS, Alison Superior Court Judge	602.506.7569	Northeast Court-C/102		All Departments
BARTH, Michael Court Commissioner	602.506.0616	Southeast Facility-2B/202	View	All Departments
BELL, Christian Court Commissioner	480.344.2006	Desert Vista		All Departments
BERESKY, Justin Superior Court Judge	602.372.5074	Central Court Building-9D/904		All Departments
BERNICK, Harriet Court Commissioner	602.506.4203	Southeast Facility-3E/305		All Departments
BINGERT, Elizabeth Court Commissioner	602.372.9432	Intake, Transfer and Release Facility		All Departments
BLAIR, Michael Superior Court Judge	602.372.0305	Central Court Building-8C/803		All Departments
BLANCHARD, John Superior Court Judge	602.506.3005	Southeast Facility-4C/403	View	All Departments
BLANEY, Scott Superior Court Judge	602.372.1095	Northeast Court-D/107	View	All Departments
BODOW, Keelan Court Commissioner	602.372.1232	Southeast Juvenile-1105/5	View	All Departments

BOYLE, Joshua Court Commissioner	602.372.0382	Northeast Court-H/104		All Departments
BRAIN, Mark H. Superior Court Judge	602.372.1141	Old Court House-002/002	View	All Departments
BRICKNER, Nicole Court Commissioner	602.506.3366	Central Court Building-5G/507		All Departments
BRODMAN, Roger Superior Court Judge	602.372.2943	East Court Building-413	View	All Departments
BROOKS, Robert Superior Court Judge	602.372.3367	Durango Facility-2280/4		All Departments
BUSTAMANTE, Lori Superior Court Judge	602.506.0423	Durango Facility-2250/5	View	All Departments
CAMPAGNOLO, Theodore Superior Court Judge	602.372.0537	Northeast Court-F/111	View	All Departments
CARSON, Michelle Court Commissioner	602.506.7860	Northeast Court-B/103		All Departments
CLARKE, Terri Court Commissioner	602.372.3887	Central Court Building-5E/504		All Departments
CLICK, Stasy Superior Court Judge	602.372.3542	Northwest Regional Center-A/121		All Departments
COATES, Lindsey Court Commissioner	602.372.2017	Central Court Building-10E/1004	View	All Departments
COFFEY, Rodrick Superior Court Judge	602.372.1783	Southeast Facility-2E/205	View	All Departments
COHEN, Bruce Superior Court Judge	602.372.0686	Old Court House-101/103	View	All Departments
COHEN, Suzanne Superior Court Judge	602.372.1916	South Court Tower-13400/5B		All Departments
COMO, Gregory Superior Court Judge	602.372.0754	Central Court Building-6E/606		All Departments
CONTES, Connie Superior Court Judge	602.506.7768	Southeast Juvenile-1076-8/3	View	All Departments

COOPER, Katherine Superior Court Judge	602.506.8311	East Court Building-711		All Departments
COURY, Christopher Superior Court Judge	602.372.3876	East Court Building-914	View	All Departments
COVIL, Max Superior Court Judge	602.372.0394	Old Court House-106		All Departments
CRANDELL, Rusty Superior Court Judge	602.372.3140	Southeast Facility-2D/204		All Departments
CRAWFORD, Janice Superior Court Judge	602.372.0844	Southeast Juvenile-1113/9	View	All Departments
CULBERTSON, Kristin Superior Court Judge	602.372.4762	Southeast Juvenile-1003/7		All Departments
CUNANAN, David O. Superior Court Judge	602.372.1710	Old Court House-301/301		All Departments
DAVIS, Marvin Superior Court Judge	602.506.0306	Southeast Facility-4B/402		All Departments
DAVISON, Harla Court Commissioner	602.506.1190	Southeast Facility-3D/304		All Departments
DONNADIEU, Elisa Court Commissioner	602.655.1232	Maryvale (Mental Health Building)		All Departments
DOODY, John Court Commissioner	602.506.7822	Northeast Court-A/101	View	All Departments
DRIGGS, Adam Superior Court Judge	602.372.1083	Central Court Building-9C/903		All Departments
DUNCAN, Sally Schneider Superior Court Judge	602.506.9042	Old Court House-201	View	All Departments
DYER, Genene Court Commissioner	602.372.1979	Durango Facility-3295/7		All Departments
EDELSTEIN, Monica Superior Court Judge	602.372.0219	Central Court Building-6C/603		All Departments
FINK, Dean M. Superior Court Judge	602.506.3776	East Court Building-611		All Departments

FISH, Geoffrey Superior Court Judge	602.372.1771	South Court Tower-13110/7B	View	All Departments
FISK, Ronda Superior Court Judge	602.372.1011	Central Court Building-6F/605		All Departments
FOX, Dewain Superior Court Judge	602.372.2260	South Court Tower-13111/7C		All Departments
GARBARINO, David Court Commissioner	602.506.1746	South Court Tower-13310/2A		All Departments
GARFINKEL, Monica Court Commissioner	602.372.0001	Central Court Building-4C/402		All Departments
GATES, Pamela Superior Court Judge	602.506.6391	East Court Building-912		All Departments
GENTRY, Jo Superior Court Judge	602.372.3091	Central Court Building-7D/704		All Departments
GIALKETSIS, Cynthia Court Commissioner	602.372.0778	Southeast Juvenile-1068/2		All Departments
GIAQUINTO, Laura Court Commissioner	602.372.0555	South Court Tower-13302/6D		All Departments
GILLA, Marischa Court Commissioner	602.506.0959	South Court Tower-13315/2B		All Departments
GNEPPER, Gregory Court Commissioner	602.372.9432	Intake, Transfer and Release Facility		All Departments
GORDON, Michael Superior Court Judge	602.372.0762	Durango Facility-2290/2	View	All Departments
GREEN, Jennifer E. Superior Court Judge	602.506.0438	Central Court Building-7C/703	View	All Departments
GUYTON, Lauren Court Commissioner	602.372.3135	Durango Facility-3290/8		All Departments
HANNAH, John Superior Court Judge	602.372.0759	East Court Building-811	View	All Departments
HARMON, Melody Court Commissioner	602.506.6452	Durango Facility-3250/11	View	All Departments
HARRIS, Susan	602.372.4115	Central Court Building-3A		All

Special Master				Departments
HARTSELL, Roger Court Commissioner	602.506.1767	Central Court Building-LL201/LL2		All Departments
HERROD, Michael Superior Court Judge	602.372.0359	Durango Facility-2295/1	View	All Departments
HINZ, Richard Court Commissioner	602.506.0059	South Court Tower-13305/3B		All Departments
HOPKINS, Stephen Superior Court Judge	602.372.5561	Southeast Facility-2G/207		All Departments
HOSKINS, Nicolas Court Commissioner	602.506.7768	Southeast Juvenile-1076-8/3		All Departments
IRELAND, Jacki Court Commissioner	602.372.0048	Southeast Facility-4A/401		All Departments
JULIAN, Melissa Superior Court Judge	602.372.0935	Northeast Court-I/106	View	All Departments
KAPIO, Thomas Court Commissioner	602.506.1117	Southeast Facility-2A/201	View	All Departments
KAISER, Brian Court Commissioner	602.506.3915	Southeast Facility-3C/303		All Departments
KALMAN, Amy Court Commissioner	602.506.3381	East Court Building-512		All Departments
KEMP, Michael Superior Court Judge	602.372.0608	South Court Tower-13104/5D	View	All Departments
KIEFER, Joseph Superior Court Judge	602.372.6553	Northwest Regional Center-B/122		All Departments
KILEY, Daniel Superior Court Judge	602.372.3839	East Court Building-613	View	All Departments
KORBIN STEINER, Ronee Superior Court Judge	602.506.1927	South Court Tower-13102/6B	View	All Departments
KREAMER, Joseph Superior Court Judge	602.372.1764	Old Court House-205/207	View	All Departments
LABIANCA, Margaret				All

B. Superior Court Judge	602.372.1694	Central Court Building-9A/901	View	Departments
LAFAVE, Julie Court Commissioner	602.372.3839	East Court Building-613		All Departments
LAING, Utiki Spurling Court Commissioner	602.372.3021	Central Court Building-5B/503		All Departments
LANG, Todd Superior Court Judge	602.372.2322	Durango Facility-3285/9	View	All Departments
LEMAIRE, Kerstin Superior Court Judge	602.506.8245	Central Court Building-8A/801		All Departments
MAHONEY, Margaret R. Superior Court Judge	602.506.0387	East Court Building-411	View	All Departments
MANDELL, Michael Superior Court Judge	602.372.5052	Central Court Building-10A/1001		All Departments
MARQUOIT, Thomas Court Commissioner	602.372.0756	East Court Building-514		All Departments
MARTIN, Daniel Superior Court Judge	602.372.2925	East Court Building-412	View	All Departments
MARWIL, Suzanne Superior Court Judge	602.372.1828	Durango Facility-2245/6		All Departments
MATA, Julie Superior Court Judge	602.372.0825	Durango Facility-2285/3		All Departments
MCCARTHY, Steve Court Commissioner	602.372.9432	Intake, Transfer and Release Facility		All Departments
MCCOY, Scott Superior Court Judge	602.372.3603	East Court Building-612		All Departments
MCDOWELL, David Superior Court Judge	602.372.3518	Southeast Facility-4E/405		All Departments
MCGUIRE, J. Justin Court Commissioner	602.372.1878	South Court Tower-13309/3C		All Departments
MCLAUGHLIN, Jane Court Commissioner	602.506.6086	Northeast Court-E/109	View	All Departments

MEAD, Kathleen Superior Court Judge	602.506.2500	Central Court Building-13C/1303		All Departments
MIKITISH, Joseph Superior Court Judge	602.372.1547	East Court Building-913		All Departments
MILLER, Phemonia Court Commissioner	602.506.4572	South Court Tower-13311/2C		All Departments
MINDER, Scott Superior Court Judge	602.506.0221	Central Court Building-7A/701		All Departments
MITCHELL, Rodney Court Commissioner	602.372.9432	Intake, Transfer and Release Facility		All Departments
MORTON, Wendy Court Commissioner	602.506.2040	Durango West Facility/Cradle to Crayons-C2C 132A	View	All Departments
MOSKOWITZ, Frank Superior Court Judge	602.506.7140	South Court Tower-13314/8A		All Departments
MROZ, Rosa Superior Court Judge	602.372.0384	South Court Tower-13103/6A	View	All Departments
MULLENEAUX, Christine Court Commissioner	602.506.0862	Central Court Building-5F/506	View	All Departments
MULLINS, Karen Superior Court Judge	602.372.1160	Durango Facility-2245/6	View	All Departments
MYERS, Sam Superior Court Judge	602.372.2940	Old Court House-202/202	View	All Departments
NADZIEJA, Tracy Court Commissioner	602.372.0986	Central Court Building-8D/804		All Departments
NEWCOMB, Casey Court Commissioner	602.506.3809	Northwest Regional Center-C/123		All Departments
NICHOLLS, Suzanne Superior Court Judge	602.372.0901	Central Court Building-6B/602		All Departments
NOTHWEHR, Richard L. (Rick) Court Commissioner	602.372.2490	Central Court Building-5C/502	View	All Departments
OWENS, Bernard C. Court Commissioner	602.506.6452	Durango Facility-3250/11	View	All Departments

PALMER, David Superior Court Judge	602.372.3980	Central Court Building-7B/702	View	All Departments
PALMER, Brian Court Commissioner	602.372.0270	East Court Building-513		All Departments
PINEDA , Susanna C. Superior Court Judge	602.372.2958	Northwest Regional Center-D/124	View	All Departments
POLK, Jay Superior Court Judge	602.372.0879	East Court Building-511	View	All Departments
PONCE, Adele Superior Court Judge	602.372.2168	Southeast Facility-2C/203		All Departments
POPHAM, Gary Court Commissioner	602.372.3131	Northeast Court-C/105		All Departments
POPKO, Sigmund Court Commissioner	602.372.0268	Southeast Juvenile-1064/1		All Departments
RAHAMAN, Ashley Court Commissioner	602.372.3707	Southeast Facility-1A/101		All Departments
RASSAS, Michael Superior Court Judge	602.506.0428	Central Court Building-6A/601		All Departments
RECKART, Laura Superior Court Judge	602.506.5861	Central Court Building-13D/1304		All Departments
ROGERS, Joshua Superior Court Judge	602.506.1603	Southeast Facility-3A/301		All Departments
RUETER, Jeffrey Superior Court Judge	602.372.5465	Southeast Juvenile-1079-1081/4	View	All Departments
RUSSELL, Andrew Court Commissioner	602.372.0859	Southeast Facility-4D/404		All Departments
RYAN, Timothy J. Superior Court Judge	602.372.3081	South Court Tower-13201/5A	View	All Departments
RYAN-TOUHILL, Jennifer Superior Court Judge	602.372.0920	South Court Tower-13105/5C	View	All Departments
SACCONE, Nicholas Court Commissioner	602.506.4527	South Court Tower-13304/3D		All Departments

SANDERS, Teresa A. Superior Court Judge	602.506.4791	Central Court Building-9B/902		All Departments
SCHWARTZ, Aryeh D. Superior Court Judge	602.506.3892	Northeast Court-L/112	View	All Departments
SELZER, Sarah Court Commissioner	602.372.8852	MIHS Campus Annex		All Departments
SEYER, David Court Commissioner	602.372.9432	Intake, Transfer and Release Facility		All Departments
SINCLAIR, Joan Superior Court Judge	602.372.4553	East Court Building-911	View	All Departments
SMITH, Shellie Court Commissioner	602.506.4067	Central Court Building-5D/505		All Departments
SMITH, James D. Superior Court Judge	602.372.5945	East Court Building-814	View	All Departments
SPENCER, Barbara L. Court Commissioner	602.372.0987	Central Court Building-10D/1002		All Departments
STARR, Patricia Superior Court Judge	602.506.4164	Central Court Building-13A/1301	View	All Departments
STEPHENS, Sherry K. Superior Court Judge	602.506.4818	East Court Building-712		All Departments
STOUTNER, Nicole Court Commissioner	602.372.2053	Durango Facility-1215/A		All Departments
SUKENIC, Howard Superior Court Judge	602.506.8214	South Court Tower-13108/7A	View	All Departments
SVOBODA, Pamela Superior Court Judge	602.372.1983	Durango Facility-3245/12		All Departments
TEM, Pro Special Master	.	Central Court Building-		All Departments
THOMASON, Timothy Superior Court Judge	602.506.0573	East Court Building-713	View	All Departments
THOMPSON, Peter Superior Court Judge	602.372.3579	Southeast Facility-2F/206		All Departments
UDALL, David K.				All

Superior Court Judge	602.506.5514	Southeast Juvenile-1090-1092/6		Departments
VAN WIE, Annielaurie Court Commissioner	602.372.2471	Old Court House-007/005		All Departments
VANDENBERG, Lisa Ann Superior Court Judge	602.372.6595	Central Court Building-5A/501	View	All Departments
VIOLA, Danielle Superior Court Judge	602.506.3442	East Court Building-714	View	All Departments
WALTON, Dawn Court Commissioner	602.372.9432	Intake, Transfer and Release Facility		All Departments
WARNER, Randall Superior Court Judge	602.372.2966	East Court Building-414	View	All Departments
WASHINGTON, Eartha K. Court Commissioner	602.506.5349	Central Court Building-LL200/3	View	All Departments
WEIN, Kevin Superior Court Judge	602.506.7618	Old Court House-001/001	View	All Departments
WELTY, Joseph C. Superior Court Judge	602.372.2537	Old Court House-5th Floor		All Departments
WESTERHAUSEN, Tracey Superior Court Judge	602.506.6251	Central Court Building-6D/604		All Departments
WHITE, Susan Court Commissioner	602.506.3857	East Court Building-812		All Departments
WHITEHEAD, Chuck Superior Court Judge	602.372.8496	South Court Tower-13109/7D		All Departments
WHITTEN, Christopher Superior Court Judge	602.372.1164	Old Court House-303	View	All Departments
WILLIAMS, Paula Court Commissioner	602.372.0425	Southeast Facility-3B/302		All Departments
WINGARD, William Court Commissioner	602.506.4569	Central Court Building-13B/1302		All Departments
WOO, Cassie Superior Court Judge	602.372.3592	Southeast Juvenile-1093/8	View	All Departments

YOST, Joshua Court Commissioner	602.372.0740	South Court Tower-13308/3A	View	All Departments
ZABOR, Melissa Court Commissioner	602.372.4516	Central Court Building-10C1003		All Departments

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Original text

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1 Manager and Claims Representative for Evanston) the January 2007 Claim Log for
2 Hearthstone. Included on page 3 of the 2007 Claim Log was an entry for patient Henry
3 Ernico which stated “Unavoidable wound progression, son is an attorney, he has
4 requested form to obtain medical records. Have not rec’d formal request to date.”
5 (LSSF ¶ 6). On the same day, Glenn de Souza, the Principal Officer of Hearthstone,
6 also sent an e-mail to Doug Nelson with the subject line “Claims reporting.” The e-
7 mail stated:

8 I have attached two logs of **claims and potential claims** for
9 Hearthstone of Sun City and Hearthstone of Mesa. Please let
10 me know if you have any questions about these claims.” The
11 e-mail contained an attachment titled “HSC Prof Liab Claims
12 Report 1-06 thru 1-07.pdf.

13 (LSSF ¶ 7) (emphasis added).

14 Later that year, when Hearthstone was served with the Ernico Lawsuit, on
15 December 6, 2007, Mr. de Souza on the same date sent a letter to Doug Nelson of
16 Assurance Agency. The letter stated:

17 Enclosed is a complete copy of a claim package received by
18 UNISPEC [Hearthstone] via mail from a local law firm, Wiles and
19 McHugh. Please promptly tender this claim on our behalf to our
20 incumbent carrier. **We also recommend tendering the claim to
21 our former carrier (Evanston Insurance Company) who was
22 notified of this claim** near the end of our policy period.

23 (LSSF ¶ 9) (emphasis added).

24 II. LEGAL ARGUMENTS

25 A. **The Policy’s Prior Acts Exclusion Bars Coverage For The Ernico 26 Lawsuit**

27 The claims made Lexington Policy is expressly designed not to provide
28 insurance coverage for claims that an Insured foresees might result prior to Policy
29 inception. Fundamental to a claims made policy is when the insured becomes aware of

1 an event that could result in liability. *See Sletten v. St. Paul Fire and Marine Ins. Co.*,
2 161 Ariz. 595, 597, 780 P.2d 428, 430 (Ct. App. 1989). Therefore, it is common for a
3 claims made policy to contain a knowledge of prior claims or prior acts exclusion. The
4 Lexington Policy contained just such an exclusion, which provides as follows:

5 B. We will not defend or pay claims for:

6 2. Prior Acts

7 Any liability arising out of acts, errors or omissions of
8 which an Insured had knowledge prior to the inception
9 date of the **policy period**, if, as of such date, an
Insured could reasonably foresee a claim might
10 **result.**

11 (LSSF ¶ 3) (emphasis added).

12 Courts interpreting similar prior acts exclusions in professional liability policies
13 have found that the exclusion does not require that the insured have evidence that a
14 claimant is actually contemplating suit. For example, the Supreme Court of New
15 Hampshire held that “[n]othing in the policy language suggests that the insured must
16 have evidence that the claimant is actually contemplating a suit against it. Rather, the
17 exclusion bars coverage if the insured ‘knew or could have reasonably foreseen that [a
18 prior] act, error or omission might be the basis for claim or suit.’” *International Surplus*
19 *Lines Ins. Co. v. Manuf. & Merchants Mut. Ins. Co.*, 140 N.H. 15, 20, 661 A.2d 1192,
20 1195 (N.H. 1995) (holding that one shareholder calling a corporate director inept during
21 a meeting was sufficient to support the conclusion that the director could have
22 reasonably foreseen he would get blamed).

23 The evidence leaves no doubt that prior to inception of the Lexington Policy,
24 Hearthstone reasonably foresaw a claim might result from the Ernico matter.
25 Hearthstone has admitted this in its pleadings. Hearthstone has stated in its responsive
26 pleading to Evanston’s Motion for Summary Judgment that “both Hearthstone and

1 Evanston were aware of the claim [Ernico claim] as early as March 26, 2006.
2 (Hearthstone’s Response to Evanston’s Motion for Summary Judgment, (Doc. 28), p.
3 10, Ins. 7-8). The Lexington Policy did not incept until January 30, 2007. (LSSF ¶ 1).

4 The basis for this admission is clear from the underlying facts. Prior to the
5 inception date of the Lexington Policy—January 30, 2007—Mr. de Souza, the Principal
6 Officer of Hearthstone, emailed Steven Shawbel (Senior Claims Specialist with Markel
7 Shand, Inc., Underwriting Manager and Claims Representative for Evanston) a January
8 2007 Claim Log for Hearthstone. Included on page 3 of the 2007 “Claim Log” was an
9 entry for patient Henry Ernico which stated “Unavoidable wound progression, son is an
10 attorney, he has requested form to obtain medical records. Have not rec’d formal
11 request to date.” (LSSF ¶ 6). Hearthstone’s log was expressly titled “Possible Claim
12 Reporting Log January 2007.” (LSSF ¶ 5).

13 The “Claim Log” was also transmitted to Doug Nelson at Assurance Agency
14 through an e-mail created by Mr. de Souza, which stated:

15 I have attached two logs of claims and potential claims for
16 Hearthstone of Sun City and Hearthstone of Mesa. Please let
me know if you have any questions about these claim.

17 (LSSF ¶ 7) (emphasis added). Furthermore, the “SUBJECT” line of the e-mail was
18 “Claims Reporting.” (LSSF ¶ 7) (emphasis added). The title of the e-mail was “HSC
19 Prof Liab Claims Report 1-06 thru 1-07.pdf.” (LSSF ¶ 7); (emphasis added).

20 Hearthstone has admitted in its pleadings that the “Claim Log” Hearthstone
21 created is a Patient Claim & Possible Claim Reporting Log that was periodically
22 updated and provided to Hearthstone’s insurers to fulfill Hearthstone’s obligation to
23 notify its insurer of any potential or actual claims made on a timely basis. (LSSF ¶ 4).
24 Thus, the Claim Log was specifically designed by Hearthstone to record and report
25 claims and potential claims to its insurance carriers. By Mr. de Souza’s own words—in
26

1 his e-mail to Doug Nelson—the Claim Log reported both claims and potential claims
2 that Hearthstone believed should be reported to their insurance carrier. (LSSF ¶ 7).

3 When Hearthstone was subsequently served with a formal lawsuit in the Enrico
4 matter, Hearthstone’s principal, Mr. de Souza, forwarded the Complaint on to his
5 insurance agent. In the transmittal letter he stated: “[w]e also recommend tendering the
6 claim to our former carrier (Evanston Insurance Company) who was notified of this
7 claim near the end of our policy period.” (LSSF ¶ ¶9-10) (emphasis added).

8 The forgoing fact unequivocally demonstrate that Hearthstone was aware of the
9 Ernico claim, or at the least, reasonably foresaw that a claim might arise from the
10 Ernico matter prior to inception of the Lexington Policy. Reference to the Ernico
11 matter was placed in a “Claim Log” which was used exclusively for reporting claims to
12 Hearthstone’s insures. (LSSF ¶¶ 4, 6-7)). The Claim Log was identified as containing
13 both claims and potential claims. (LSSF ¶ 7). Hearthstone’s principal Mr. de Souza
14 specifically stated in a letter that Evanston Insurance Company was notified of the
15 Ernico claim near the end of the Evanston policy period. (LSSF ¶ 9). Hearthstone has
16 admitted that it was aware of the Ernico Claim as early as March 26, 2006—well before
17 the Lexington Policy incepted. (Hearthstone’s Response to Evanston’s Motion for
18 Summary Judgment, ((Doc. 28), p. 10, lns. 7-8). In light of these facts, it is undeniable
19 that prior to inception of the Lexington Policy, Hearthstone had knowledge that a claim
20 might result from the Ernico matter. Accordingly, the prior acts exclusion is applicable
21 and precludes coverage in this matter.

22 **B. Lexington is Entitled to Summary Judgment on Hearthstone’s Claims**
23 **For Bad Faith, Breach Of Contract, And Punitive Damages**

24 Hearthstone, on February 1, 2009, filed a Counterclaim against Lexington
25 alleging bad faith and breach of contract. Lexington moves at this time for summary
26 judgment on these claims.

1 **1. Hearthstone Cannot Establish A Claim For Bad Faith**

2 To succeed on a cause of action for bad faith, the party making the claim must
3 show (1) the absence of a reasonable basis for denying benefits of the policy and (2) that
4 the insurer acted consciously or recklessly in disregarding the lack of a reasonable basis
5 for denying the claim. *Regal Homes, Inc. v. CNA Ins.*, 171 P.3d 610, 621 (Ct. App.
6 2007); *Noble v. National American Life Ins. Co.*, 128 Ariz. 188, 190, 624 P.2d 866,
7 868 (1981) (holding that “[t]o show a claim for bad faith, a plaintiff must show the
8 absence of a reasonable basis for denying the benefits of the policy and the defendant’s
9 knowledge or reckless disregard of a lack of a reasonable basis for denying the claim.”).
10 *See also, Farr v. Transamerica Accidental Life Insurance Co.*, 145 Ariz. 1, 5, 699
11 P.2d 376, 380 (Ct. App. 1984) (stating that “[w]hile the tort of bad faith is often referred
12 to as an intentional one, the cause of action is established if the plaintiff demonstrates
13 that the defendant had knowledge of or recklessly disregarded the lack of a reasonable
14 basis for denying the claim.”).

15 Even in accordance with this standard, an “insurance company may still
16 challenge claims which are fairly debatable.” *Noble*, 128 Ariz. at 190, 624 P.2d at 868.
17 Under Arizona law, if there is a question of fact as to whether an insurer owes benefits
18 under the policy, then the claim is fairly debatable. When a claim is fairly debatable,
19 the insurance company cannot be liable for acting in bad faith by declining to pay such
20 claim immediately. *Lasma Corp. v. Monarch Ins. Co.* 764 P.2d 1118, 1122 (1988);
21 *Regal Homes, Inc. v. CNA Ins.*, 171 P.3d 610, 621 (Ct. App. 2007). The Federal
22 District Court of Arizona in *Knoell v. Metropolitan Life Ins. Co.*, 163 F.Supp.2d 1072,
23 1075 (D.Ariz. 2001), expressly adopted this rule holding that when a claim is “fairly
24 debatable,” the insurance company will not be liable for acting in bad faith by declining
25 to pay such claim immediately. In *Knoell*, the court, accordingly, concluded that when
26

1 | there is a question of fact as to liability on the underlying policy, then as a matter of law,
2 | the carrier cannot be liable for bad faith.

3 | In the present case, Hearthstone alleges that Lexington acted in bad faith by
4 | repeatedly denying it owned a duty to defend and indemnify Hearthstone. (Doc. 6). At
5 | this time, Lexington is actively defending Hearthstone in the Ernico Lawsuit subject to a
6 | reservation of rights. Lexington has a good faith belief that its policy of insurance does
7 | not obligate it to defend or indemnify Hearthstone. It is Arizona black letter law that a
8 | carrier is not liable for bad faith when a no coverage judicial determination is made.
9 | *Manterola v. Farmers Ins. Exh.*, 200 Ariz. 572, 579, 30 P.3d 639, 646 (Ct. App. 2001)
10 | (“a bad faith claim based solely on a carrier’s denial of coverage will fail on the merits
11 | if a final determination of no coverage is ultimately made”). In the event the relief
12 | Lexington is seeking from the Court is ordered, there is no legal basis for bad faith as a
13 | matter of law. Alternatively, if the Court rules against Lexington, it will continue its
14 | defense of Hearthstone subject to its judicial rights. Under either outcome, Hearthstone
15 | has failed to make any evidentiary showing that Lexington has acted in bad faith.
16 | Simply disagreeing over policy interpretation is not bad faith.

17 | **2. Hearthstone Cannot Establish A Claim For Breach of** 18 | **Contract**

19 | An insurance policy requires, among other things, that the insurer defend and
20 | indemnify its insured. Lexington is currently defending Hearthstone against the Ernico
21 | Lawsuit subject to a reservation of rights. The issue of Lexington’s indemnity
22 | obligation is before this Court for a judicial determination. There is no basis to support
23 | Hearthstone’s breach of contract claim. If the Court finds in Lexington’s favor, there
24 | can be no breach of contract as a matter law because there would be a judicial
25 | determination that no contractual obligations are owed. If the Court finds against
26 | Lexington, Lexington will continue to honor its defense and indemnity obligation subject

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7 jdr@kunzlegal.com

8 Attorneys for Defendant
9 Contractors Bonding and
10 Insurance Company

11 **IN THE SUPERIOR COURT OF ARIZONA**

12 **COUNTY OF MARICOPA**

13 MICHAEL CLINE and HANNA CLINE,
14 husband and wife, AMERICAN POLISH
15 CUISINE, LLC dba SOUTHBANK GRILL, an
16 Arizona legal entity,

17 Plaintiffs,

18 vs.

19 CONTRACTORS BONDING and
20 INSURANCE COMPANY, a licensed
21 insurance company; TRIGON INSURANCE
22 SOLUTIONS, INC. a licensed insurance
23 agency, MARTHA ANN GALA and JOHN
24 DOE GALA, husband and wife, JOHN DOES
25 and JANE DOES I-X; BLACK AND WHITE
26 CORPORATIONS, PARTNERSHIPS OR
ENTITIES I-X,

Defendants.

Case No. CV2013-008019

**MOTION FOR SUMMARY
JUDGMENT RE: INSURANCE
ISSUES**

(Hon. John Rea)

(Oral Argument Requested)

22 Defendant Contractors Bonding and Insurance Company (“CBIC”), by and through
23 counsel undersigned, hereby moves this Court pursuant to Rule 56 of the Arizona Rules of
24 Civil Procedure for judgment in its favor and against Plaintiffs Michael Cline and Hanna Cline
25 and American Polish Cuisine, LLC dba Southbank Grill as to all claims. This motion is more
26

1 fully supported by the accompanying memorandum of points and authorities and separate
2 statement of facts.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **I. FACTUAL BACKGROUND**

5 In 2008, Plaintiff American Polish Cuisine LLC d/b/a Southbank Grill ("Southbank")
6 sought assistance from an independent insurance agent, defendant Martha Ann Gala ("Gala") at
7 defendant Trigon Insurance Solutions, Inc. ("Trigon"), in procuring an insurance policy for
8 Southbank's restaurant operations. (Separate Statement Of Facts In Support Of Defendant
9 Contractors Bonding And Insurance Company's Motion For Summary Judgment Re: Insurance
10 Issues ("SOF") ¶¶ 1-3). The principals of Southbank, Przemyslaw Wnek and Maria Wnek, had
11 an insurance agent relationship with Trigon and Gala which began a couple of years prior to
12 obtaining a policy for Southbank. (SOF ¶ 4). Specifically, Trigon and Gala had procured
13 insurance for the Wneks for a construction business that the Wneks operated for a couple of
14 years prior to opening Southbank. (SOF ¶ 5). Pursuant to this relationship, Gala assisted
15 Southbank in procuring commercial property and general liability insurance policy no.
16 A31ABF859 ("Policy") with CBIC, subject to the terms, conditions, limitations and exclusions
17 contained therein. (SOF ¶ 6). Gala states that she discussed liquor liability coverage with
18 Southbank, and Southbank declined Gala's offer of assistance in procuring that coverage. (SOF
19 ¶ 7). In contrast, Southbank claims that Gala never discussed liquor liability coverage with
20 Southbank. (SOF ¶ 8).

21
22
23
24 On or about November 23, 2011, Plaintiff Michael Cline was involved in an automobile
25 accident which he alleges was caused by the negligence of an intoxicated driver who was over-
26 served alcohol at Southbank. (SOF ¶ 9). Mr. Cline alleges he suffered injuries as a result of the

1 collision. (SOF ¶ 10). Plaintiffs filed suit against various parties, including the allegedly
2 intoxicated driver and Southbank on April 2, 2012 in Maricopa County Superior Court Case
3 No. CV2012-005412. (SOF ¶ 11).

4 Southbank sent a copy of the complaint filed in Maricopa County Superior Court Case
5 No. CV2012-005412 to CBIC and requested a defense of that action. (SOF ¶ 12). Based upon
6 the clear and unambiguous terms of the Policy, CBIC determined that there was no coverage
7 available for the underlying lawsuit and therefore declined to defend Southbank in that action.
8 (SOF ¶ 13). Specifically, the Policy provides:

9
10 **2. Exclusions**

11 This insurance does not apply to:

12 ...

13 **c. Liquor Liability**

14 "Bodily injury" or "property damage" for which any insured may
be held liable by reason of:

- 15 (1) Causing or contributing to the intoxication of any person;
16 (2) The furnishing of alcoholic beverages to a person under the
legal drinking age or under the influence of alcohol; or
17 (3) Any statute, ordinance or regulation relating to the sale,
gift, distribution or use of alcoholic beverages.

18 This exclusion applies only if you are in the business of
19 manufacturing, distributing, selling, serving or furnishing alcoholic
beverages.

20 (SOF ¶ 14).

21 Southbank filed a notice of termination on or about June 29, 2012. (SOF ¶ 15).
22 Southbank thereafter entered into a *Morris*-type agreement whereby Southbank agreed to the
23 entry of a stipulated judgment in the amount of \$2 million dollars in favor of the Plaintiffs and
24 purportedly assigned to Plaintiffs Southbank's rights as against Trigon and CBIC in exchange
25 for a covenant not to execute the judgment against Southbank's assets. (SOF ¶ 16).
26

1 On August 20, 2013, Plaintiffs filed their Second Amended Complaint against Trigon
2 and CBIC. As it pertains to CBIC, the Second Amended Complaint includes causes of action
3 for (1) Insurance Producer Negligence, (2) Negligent Misrepresentation, (3) Consumer Fraud,
4 and (4) Doctrine of Reasonable Expectations. (SOF ¶ 17).

5 **II. LEGAL ARGUMENTS**

6 **A. CBIC Is Entitled To Summary Judgment On Southbank's Claims For** 7 **Insurance Producer Negligence, Negligent Misrepresentation, And** 8 **Consumer Fraud**

9 **1. CBIC Cannot Be Directly Liable For Insurance Producer Negligence** 10 **Because CBIC Is Not An Insurance Producer**

11 In order to establish a claim for professional negligence against an insurance producer,
12 Plaintiffs must prove: (1) the insurance producer had a duty to the plaintiff; (2) the insurance
13 producer's conduct fell below the standard of care, thus breaching the duty; (3) the plaintiff
14 suffered damage; and (4) the insurance producer's breach was the cause of plaintiff's damages.
15 *Ferguson v. Cash, Sullivan & Cross Ins. Agency, Inc.*, 171 Ariz. 381, 384, 831 P.2d 380, 383
16 (App. 1991). An insurance producer must exercise reasonable skill, care and diligence in
17 carrying out the producer's duties in procuring insurance. *Darner Motor Sales, Inc. v.*
18 *Universal Underwriters Ins. Co.*, 140 Ariz. 383, 398, 682 P.2d 388, 403 (1984).

19 In the present case, although CBIC is included in the cause of action, Plaintiffs do not
20 appear to contend that CBIC had a duty to Southbank as an insurance producer. *See* Exhibit
21 "E" to SOF, at pp. 12-13. Instead, the allegations are made solely against Defendants Trigon
22 and Gala, which makes sense because Defendants Trigon and Gala were the insurance broker
23 that Southbank retained to assist them in procuring insurance coverage for their restaurant
24 business. (SOF ¶ 18). In contrast, CBIC is the insurance company that ultimately issued the
25
26

1 insurance Policy that Defendants Trigon and Gala helped Southbank to procure. Because
2 CBIC is simply the insurance company and not the insurance producer, CBIC cannot be
3 directly liable for negligence as an insurance producer.

4 **2. CBIC Cannot Be Directly Liable For Negligent Misrepresentation**
5 **Because CBIC Did Not Make Any Of The Alleged**
6 **Misrepresentations To Southbank**

7 Under Arizona law, the elements of a claim for negligent misrepresentation under
8 Arizona law are governed by Restatement (Second) of Torts § 522, which provides: “One who,
9 in the course of his business, profession or employment, or in any other transaction in which he
10 has a pecuniary interest, supplies false information for the guidance of others in their business
11 transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance
12 upon the information, if he fails to exercise reasonable care or competence in obtaining or
13 communicating the information.” *Standard Chartered PLC v. Price Waterhouse*, 190 Ariz. 6,
14 31, 945 P.2d 317, 342 (Ct. App. 1996) (quoting Restatement (Second) of Torts § 522).

15
16 In this case, Plaintiffs claim that “Defendants Trigon and Gala negligently
17 misrepresented that the Policy issued was adequate and provided indemnity for the usual risks
18 inherent with [Southbank’s] business, with the intention that [Southbank] would act on that
19 representation, which it reasonably did, and Trigon and Gala had knowledge of that reliance.”
20 (SOF ¶ 19). Thus, the allegations forming the basis of the Plaintiffs’ Negligent
21 Misrepresentation claim are limited to representations made by Defendants Trigon and Gala,
22 not representations made by CBIC.

23
24 Indeed, in deposition testimony, Southbank admits that CBIC did not make any
25 representations to Southbank about the coverage provided under the Policy. (SOF ¶ 20).
26 Southbank’s 30(b)(6) representative, Maria Wnek, testified:

1 Q. Did you ever have any communications directly with CBIC?

2 A. I would like to say yes, that I was trying to communicate with CBIC at one
3 time maybe in regard to a statement, but in regards to a statement.

4 Q. A "statement," as in a premium statement?

5 A. Yes, they would come --

6 Q. Okay.

7 A. -- come in, but not that I recall.

8 Q. But you never had any discussions with or conversations with anyone at CBIC
9 with regard to what coverage was actually provided under the policy?

10 A. No, no.

11 (SOF ¶ 21). Likewise, Przemyslaw Wnek testified:

12 Q. Did you have any conversations with CBIC, the insurance company, at any
13 point?

14 A. No.

15 (SOF ¶ 22). Because the allegations forming the basis of the Negligent Misrepresentation
16 claim are limited to representations made by Defendants Trigon and Gala, CBIC cannot be
17 directly liable for the claim for Negligent Misrepresentation.

18 **3. CBIC Cannot Be Directly Liable For Consumer Fraud Because**
19 **Plaintiffs' Allegations Do Not Meet The Elements Of A Claim For**
20 **Consumer Fraud**

21 Similar to the claim of Negligent Misrepresentation, the claim for Consumer Fraud
22 requires a false promise or misrepresentation. Specifically, "[t]he elements of a private cause
23 of action under the [A]ct are a false promise or misrepresentation made in connection with the
24 sale or advertisement of merchandise and the hearer's consequent and proximate injury." *Castle*
25 *v. Barrett-Jackson Auction Co., LLC*, 229 Ariz. 471, 473, 276 P.3d 540, 542 (Ct. App. 2012)
26 (quoting *Dunlap v. Jimmy GMC of Tucson, Inc.*, 136 Ariz. 338, 342, 666 P.2d 83, 87 (Ct.
App.1983)). Damage or injury occurs when the consumer relies on the misrepresentation even
though the reliance is not reasonable. *Correa v. Pecos Valley Dev. Corp.*, 126 Ariz. 601, 605,

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

9/9/16 10:30 am

CV 2016-014708

09/09/2016

HONORABLE JOSHUA D. ROGERS

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Deputy

CHRISTINE JONES, et al.

JOSEPH KANEFIELD
BRETT W JOHNSON

v.

MICHELE REAGAN, et al.

JAMES DRISCOLL-MACEACHRON

COLLEEN CONNOR
KORY A LANGHOFER
TIMOTHY A LASOTA
ATTORNEY GENERAL
COUNTY ATTORNEY CCC
COURT ADMIN-CIVIL-CCC
DOCKET-CIVIL-CCC

UNDER ADVISEMENT RULING

Following an evidentiary hearing on September 8, 2016, this Court took under advisement Plaintiff's application for preliminary injunction. The Court has considered Plaintiff's Motion for Temporary Restraining Order (With Notice) and Motion for Order Setting Hearing on Preliminary Injunction, the memoranda submitted in support thereof and in opposition thereto, and all of the evidence and testimony presented at the evidentiary hearing which took place on September 8, 2016. The Court's findings are set forth below.

I. Factual Background

Arizona's Primary Election was held on August 30, 2016. In the Republican primary race for Arizona's Fifth Congressional District ("CD 5"), the two candidates with the most votes were Andrew Biggs and Christine Jones. The final count has these two candidates separated by a margin of nine votes out of a total of 50,447 votes cast between them. The Maricopa County

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

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Board of Supervisors is scheduled to meet on September 9, 2016 at 10:30 a.m. in order to canvass the returns of the August 30, 2016 Primary Election and deliver the canvass to the Secretary of State.

Plaintiffs allege that the Maricopa County Recorder or her delegates have failed to comply with Arizona law in reviewing and processing certain early, provisional, and conditional provisional ballots cast during the August 30, 2016 Primary Election, which has caused those votes not to be counted. Plaintiffs have asked this Court to issue a preliminary injunction which would enjoin the Board of Supervisors from completing, certifying and delivering the official Maricopa County canvass until all votes required to be processed for voting in CD 5 are counted.

There are four general categories of improper conduct alleged by Plaintiffs: (1) the refusal to allow conditional provisional ballot voters to provide identification within five days after the Primary Election; (2) the rejection of early ballots of voters whose signature on the ballot affidavit purportedly did not match the signature on the voter's registration form; (3) the rejection of unsigned early ballots by failing to provide an opportunity to cure the defect; and (4) the rejection of provisional ballots cast in the wrong precinct where election officials failed to inform voters that their votes would not be counted if they vote in the wrong precinct.

II. Analysis

A party seeking a preliminary injunction has the burden of proof to show: (1) a strong likelihood of success on the merits, (2) a possibility of irreparable injury if the injunction is not granted, (3) a balance of hardships weighing in his favor, and (4) public policy favoring the requested relief. *TP Racing, L.L.P. v. Simms*, 232 Ariz. 489, 495, ¶ 21, 307 P.3d 56, 62 (App. 2013) (citing *Shoen v. Shoen*, 167 Ariz. 58, 63, 804 P.2d 787, 792 (App. 1990)). Each of these elements is discussed below.

A. A strong likelihood of success on the merits

As to each of the first three categories of conduct Plaintiffs allege to be unlawful in this case, the Court finds that Plaintiffs have failed to show a strong likelihood of success.

The Court recognizes that “ ‘voting is of the most fundamental significance under our constitutional structure.’ ” *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)). “It does not follow, however, that the right to vote in any manner ... [is] absolute. *Id.* Instead, the States retain the power to regulate their elections. As the United States Supreme Court stated in *Burdick*, “[c]ommon sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; ‘as a practical matter, there must be a substantial regulation of

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-014708

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elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.” *Id.* (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). In other words, facilitating the right to vote necessitates express structures and procedures to ensure that this right is exercised fairly, honestly, and orderly.

The Arizona Legislature has created this framework both through the establishment of the relevant statutory scheme, *see* A.R.S. § 16-101, *et seq.* and A.R.S. § 19-101, *et seq.*, and, as part of that scheme, by empowering the Secretary of State to create a manual of necessary elections procedures, a manual which is then reviewed and approved by the attorney general and the governor. A.R.S. § 16-452 (2016).

Turning to the specific laws at issue in this case, on the claim that the Maricopa County Recorder has improperly refused to allow conditional provisional ballot voters to provide identification within five days after the Primary Election, Plaintiffs do not argue that the imposition of such a deadline is itself improper. Instead, the issue is merely whether the right deadline provided under the State of Arizona Elections Procedure Manual (the “Manual”) has been utilized by the Maricopa County Recorder. This issue is addressed only in the Manual, which provides in pertinent part:

Conditional Provisional Ballot for No Identification

If the elector does not provide identification as required by ARS § 16-579(A), the elector shall be issued a conditional provisional ballot. The conditional provisional ballot shall be placed in a provisional ballot envelope. The provisional ballot envelope shall indicate that the elector did not provide identification. The poll worker shall notify the elector that he or she must provide identification as required by ARS § 16-579(A) to the County Recorder or to an official deemed acceptable by the County Recorder. The poll worker shall provide the elector with instructions on how, when, and where the elector can provide proof of identification. The proof of identification must be received by the County Recorder's office by 5:00 p.m. on the fifth business day after a general election that includes an election for a federal office or 5:00 p.m. on the third business day after any other election for the provisional ballot to be processed and counted.

Manual p. 153.

Although the election at issue is not a “general election that includes an election for a federal office”, Plaintiffs nevertheless contend that the applicable deadline in this case is the “fifth business day” based upon the language of A.R.S. § 16-401. The Court does not agree.

A.R.S. § 16-401(A) provides:

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A primary election shall be held, the voters shall vote therein, the method of voting shall be followed, the votes shall be counted and canvassed, the returns shall be made, all in the same manner as provided for a general election and shall otherwise conform to the laws governing general elections except as otherwise specifically provided. All provisions of other laws governing elections not in conflict and including registrations and qualifications of voters are made applicable to and shall govern primary elections.

A.R.S. § 16-401(A) (2016). Despite Plaintiffs' arguments to the contrary, this language does not result in the application of the fifth business day deadline set forth in the Manual to a primary election. While a primary election will generally "conform to the laws governing general elections" this is only true when not "otherwise specifically provided." In this case, pursuant to the power granted her by the Legislature, the Secretary of State has otherwise specifically provided in the Manual.

The fifth business day deadline applies only to a specific type of election, i.e., a "general election that includes an election for a federal office". The "third business day" deadline applies to "any other election". By its plain terms, this would include primary elections as well as general elections which do not include an election for federal office. This conclusion is confirmed by the Manual itself. The Manual contains a schedule of events which were specific to the elections of 2013 and 2014. In relation to the primary election of 2014, the "last day for identification verification for conditional provisional ballots" was stated to be August 29, 2016, which is expressly identified as "3 business days" following the election. Manual p. 250. The Manual similarly states that the "last day for identification verification for conditional provisional ballots" for the November 5, 2013 general election, which presumably did not include an election for federal office, was November 8, 2013, which is again expressly identified as "3 business days" following the election. Manual p. 240. For all these reasons, the Court finds that Plaintiffs have failed to show a strong likelihood of success on this issue.

As it pertains to the signature mismatches, Arizona law requires the County Recorder to "compare the signatures thereon with the signature of the elector on his registration form." A.R.S. § 16-550 (2016). This process is an essential procedural safeguard to prevent fraud and ballot tampering. *Reyes v. Cuming*, 191 Ariz. 91, 93, 952 P.2d 329, 331 (App. 1997). *See also* Ariz. Const. art. VII, § 12 ("There shall be enacted registration and other laws to secure the purity of elections and guard against abuses of the elective franchise."). For these same reasons, the early ballot voter is statutorily required to "complete and sign the affidavit". A.R.S. § 16-548 (2016).

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These laws, like all election regulations, have an impact on the right to vote, but it can hardly be said that the enforcement of the laws at issue unconstitutionally burdens or interferes with the rights of voters. These laws do not place severe restrictions on the rights of Arizona voters but instead imposes only “reasonable, nondiscriminatory restrictions” upon the First and Fourteenth Amendment rights of voters [and, as such], “the State’s important regulatory interests are [] sufficient to justify” the restrictions.” *Burdick*, 504 U.S. at 434. This is especially true in light of the evidence of certain policies which have been fairly, uniformly, and equally implemented by the County whereby those voters whose either did not sign the affidavit or their signatures do not match their registration form are contacted and they can then sign or their signature can be verified. For these reasons, the Court finds that Plaintiffs have failed to show a strong likelihood of success on the signature mismatches and unsigned ballots as well.

The final category, i.e., the rejection of provisional ballots cast in the wrong precinct where election officials failed to inform voters that their votes would not be counted if they vote in the wrong precinct, presents a different problem. The issue is not the State’s policy of rejecting all provisional ballots cast by voters at the wrong precinct. Indeed, Plaintiffs do not appear to contest the constitutionality of this policy or otherwise disagree with the significant interest of the State in maintaining such a policy generally. What Plaintiffs argue is unconstitutional is the application of this policy in those circumstances where the ballot was disqualified based on poll worker error.

While the Court agrees with Defendants that “garden variety” errors do not rise to the level of a deprivation of constitutional rights, the Court does not believe that the nature of the poll worker error in this case is can be accurately described as “garden variety.” Instead, the error is the result of a uniform procedure implemented by Maricopa County in instructing voters who are in the wrong precinct. This procedure is set forth in Maricopa County’s ePollbook, which instructs the poll workers how to direct each voter. Relevant to these circumstances, it specifically tells poll workers: “Direct voter to correct precinct. Is voter willing to go to that precinct? If not, the voter may vote provisionally.” Such a provisional vote will never be counted, *see* Manual p. 185, but there is nothing in this directive that advises poll workers of this fact. To the contrary, these instructions in the ePollbook suggest that the voter still has a legitimate opportunity to vote, just by provisional ballot. The testimony presented at the hearing also confirms that the fact such a provisional vote will never be counted is something unknown to the poll workers and they do not receive any training which either informs them of this fact or advises them to tell the voters that their vote will not be counted if cast in the wrong precinct. As a result, numerous voters who were either told by poll workers that their vote would count or, by silence, were misled to believe that their vote would count, were disenfranchised.¹

¹ Evidence was also presented that 728 voters countywide had their provisional ballot rejected as a result of voting in the wrong precinct.

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Because of the systemic nature of the policy of the County, the Court finds that the burden on Maricopa County voters is severe. Further, the Court finds an absence of a legitimate interest on the part of the County defendants to not tell voters in the wrong precinct that a provisional vote cast in the wrong precinct will not be counted, a fact of which County officials are well aware. Again, while the Court recognizes the legitimate interests in maintaining the precinct-based election system and rejecting ballots cast in the wrong precinct generally, Defendants do not show how these interests support the specific restriction in this case, i.e., the rejection of wrong precinct ballots where based upon a policy of not advising voters in the wrong precinct that a provisional vote cast in the wrong precinct will not be counted. *See Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 597 (6th Cir. 2012).

In the absence of such an interest, the Court finds that Plaintiffs have shown a strong likelihood of success on their equal protection claim on this issue.

B. Irreparable injury not remediable by damages if the requested relief is not granted

The Court finds that irreparable injury will occur in this case if an injunction is not granted on the sole issue discussed above. Such disenfranchisement cannot be remedied by law and the failure to include these votes may affect the outcome of this election in light of the narrow margin at issue.

C. Balance of hardships

To meet the burden showing that the balance of hardships favors it, Plaintiffs "may establish either 1) probable success on the merits and the possibility of irreparable injury; or 2) the presence of serious questions and 'the balance of hardships tip sharply'" in his favor." *Shoen v. Shoen*, 167 Ariz. 58, 63, 804 P.2d 787, 792 (Ct. App. 1990) (quoting *Justice v. Nat'l Collegiate Athletic Ass'n*, 577 F.Supp. 356, 363 (D.Ariz. 1983)). Plaintiffs have shown both a strong likelihood that they will succeed on the merits against Defendants on the issue discussed previously and that irreparable injury will occur. Therefore, Plaintiffs have established that the balance of hardships favors them on this issue.

D. Public policy favors the requested relief

Based upon the rights affected in this case by the disenfranchisement of voters, public policy favors the requested relief.

Therefore,

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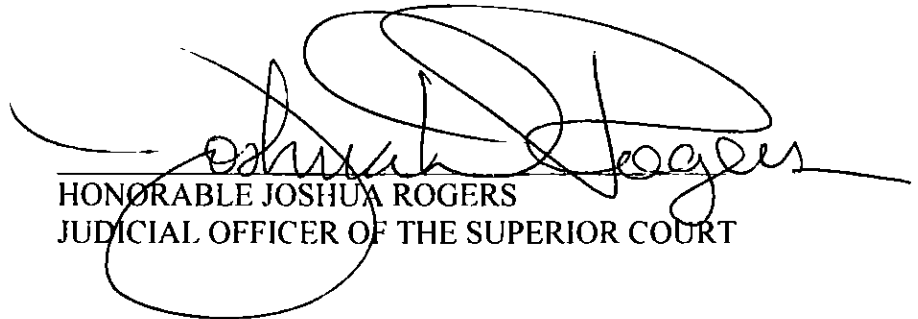
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IT IS ORDERED that the provisional ballots of the following eighteen (18) individuals be processed and counted by the Maricopa County Recorder as applicable to the races in each voter's correct precinct: Tera Allen, Melissa Faust, Kathleen E. Giebelhausen, James Grimes, Lisa Wieduwilt, Robert J. Wieduwilt, Jose Smith, Adam Wallace Albright, Mark Allen Atkins, Thomas Roger Barnhart, Ken Raymond Bisso, Tyler Jonathan Brown, Kathe Luise Crawford, James David Cronk, Dawn Marie Homan, Kristian James Homan, Rhoda Kimball, and Harold R. Wearne.

IT IS FURTHER ORDERED that the Maricopa County Board of Supervisors is prohibited from canvassing the results of the August 30, 2016, Primary Election, or delivering those results to the Secretary of State, until the votes referenced above are counted.

IT IS FURTHER ORDERED that all remaining relief requested by Plaintiffs is denied.



HONORABLE JOSHUA ROGERS
JUDICIAL OFFICER OF THE SUPERIOR COURT

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MARICOPA COUNTY

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03/08/2017

HONORABLE JOSHUA D. ROGERS

CLERK OF THE COURT
S. Ortega
Deputy

RENEE LONCAR

JOEL B ROBBINS

v.

DOUG DUCEY, et al.

ANN HOBART

UNDER ADVISEMENT RULING

Pending before the Court is Defendants' Motion to Dismiss. The Court has considered the Motion, the memoranda submitted in support thereof and opposition thereto, the arguments of counsel and the relevant law. For the reasons set forth below, the Motion is granted.

I. FACTUAL BACKGROUND

Plaintiff Renee Loncar has been a State of Arizona employee since August 2006. In 2008, the Arizona Department of Administration and Personnel Board ("ADOA") enacted rules establishing certain benefits for the "domestic partners" of State employees, which applied regardless of the gender or sexual orientation of the domestic partners. Loncar identified Christopher Kutcher as her dependent for purposes of State employee benefits, including as a covered party for State employee life insurance benefits.

In 2010, the Arizona Legislature enacted A.R.S. § 38-651(O), which defines "dependent" to mean "a spouse under the laws of this state." When Section 38-651(O) became effective, Kutcher could no longer be a "dependent" for purposes of State employee benefits, including life insurance.

On July 23, 2010, the District Court entered a preliminary injunction enjoining the State "from enforcing A.R.S. § 38-651(O) to eliminate family insurance eligibility for lesbian and gay State employees and domestic partners' children." *Collins v. Brewer*, 727 F. Supp. 2d 797, 815 (D. Ariz. 2010). The Ninth Circuit Court of Appeals subsequently affirmed this preliminary

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injunction in *Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011). Thus, as of July 2010, same-sex domestic partners were eligible to be “dependents” for purposes of State employee benefits, but different sex domestic partners were not. After same-sex marriage became legal in Arizona on October 17, 2014, the District Court dissolved the preliminary injunction effective December 31, 2014.

Kutcher was killed in an automobile accident on June 7, 2014. Loncar was unable to receive life insurance benefits through the State employee benefit program following his death because Kutcher was not a “dependent” under A.R.S. § 38-651(O). On April 21, 2016, Loncar filed this lawsuit seeking a declaration that the distinction in State benefits between employees in same-sex domestic partnerships and different sex domestic partnerships violated heterosexual domestic partners’ rights under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, and the Privileges & Immunities Clause (Article II, Section 13) and the Preferential Treatment of Employees Clause (Article II, Section 36) of the Arizona Constitution. Loncar also seeks life insurance proceeds to which she would have been entitled had she been permitted to identify Christopher Kutcher as her dependent at the time of his death in 2014.

II. DISCUSSION

Dismissing a complaint for failure to state a viable claim is not favored under Arizona law; the court will not grant such a motion unless it is “certain that the plaintiff would not be entitled to relief under any state of facts susceptible of proof under the claim stated.” *Sun World Corp. v. Pennysaver, Inc.*, 130 Ariz. 585, 586 (App. 1981). “The question is whether enough is stated which would entitle the plaintiff to relief upon some theory to be developed at trial. The purpose of the rule is to avoid technicalities and give the other party notice of the basis for the claim and its general nature.” *Guerrero v. Copper Queen Hosp.*, 112 Ariz. 104, 106-107 (1975). In considering the motion, the court will assume the truth of all allegations contained in the complaint. *Bloxham v. Glock, Inc.*, 203 Ariz. 271, 273 (App. 2003). In the present case, it is certain that Plaintiff would not be entitled to relief under any state of facts susceptible of proof under the claim stated.

A. Preferential Treatment of Employees Clause of the Constitution of the State of Arizona

Article II, section 36 of the Constitution of the State of Arizona provides that “[t]his state shall not grant preferential treatment to or discriminate against any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education or public contracting.” Ariz. Const. art. II, § 36. Plaintiff argues that by enforcing the District Court’s injunction not to enforce A.R.S. § 38-651(O)’s ban on domestic-

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partner benefits for same-sex couples without also voluntarily lifting the ban for heterosexual couples, the State violated the forgoing provision by granting preferential treatment to a group of State employees on the basis of “sex.” This argument is without merit.

According to its express terms, the Preferential Treatment of Employees Clause protects a limited class of persons. Protection thereunder is limited to individuals or groups where there is preferential treatment “on the basis of race, sex, color, ethnicity or national origin” As Plaintiff conceded at oral argument, sexual orientation is not expressly included in the constitutionally protected class.

Further, while never interpreted relevant to this provision, the term “sex” as used in other contexts has consistently been held to refer to gender and not sexual orientation. *See, e.g., Bibby v. Philadelphia Coca Cola Bottling Co.*, 85 F. Supp. 2d 509, 515-16 (E.D. Pa. 2000), *aff’d*, 260 F.3d 257 (3d Cir. 2001) (holding that discrimination on the basis of sexual orientation is not discrimination on the basis of sex under Title VII of the Civil Rights Act of 1964); *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1084–85 (7th Cir. 2000) (observing that “Congress intended the term ‘sex’ to mean ‘biological male or biological female,’ and not one’s sexuality or sexual orientation” and thus “harassment based solely upon a person’s sexual preference or orientation (and not on one’s sex) is not an unlawful employment practice under Title VII.”); *Simonton v. Runyon*, 232 F.3d 33, 36 (2d Cir. 2000) (holding that “[b]ecause the term ‘sex’ in Title VII refers only to membership in a class delineated by gender, and not to sexual affiliation, Title VII does not proscribe discrimination because of sexual orientation.”); *Kiley v. Am. Soc. for Prevention of Cruelty to Animals*, 296 F. App’x 107, 109 (2d Cir. 2008) (holding that because sexual orientation was not included in the category of “sex”, an individual may not bring a claim under Title VII for discrimination based on sexual orientation); *see also Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984) (“The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men.”). The Court likewise finds that based upon the plain meaning of the term, “sex” refers only to membership in a class delineated by gender, and not to sexual orientation or affiliation. Plaintiff therefore does not fall within the protected class and may not bring a claim under the Preferential Treatment of Employees Clause for preferential treatment or discrimination based on sexual orientation.

B. The Equal Protection Clause of the Constitution of the United States and the Privileges and Immunities Clause of the Constitution of the State of Arizona

Amendment XIV of the Constitution of the United States provides in pertinent part: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;” U.S. Const. amend. XIV. Similarly, Article II, section 13 of the Constitution of the State of Arizona provides that “[n]o law shall be enacted granting to any

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citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations.” Ariz. Const. art. II, § 13. Plaintiff does not assert that A.R.S. § 38-651(O), as written, violates either of the forgoing equal protection guarantees. Instead, Plaintiff contends that the State violated both of the forgoing equal protection provisions when it “reacted to the Arizona federal district court’s injunction by extending life-insurance coverage to unmarried LGBT couples while illogically, arbitrarily, and unfairly denying life-insurance coverage to unmarried heterosexual couples.” Response at p. 6. The Court does not agree.

In discussing these two provisions, it has been observed that “[t]he effects of the federal and state equal protection guarantees ‘are essentially the same,’ each generally requiring the law treat all similarly situated persons alike,” *State v. Panos*, 239 Ariz. 116, 118, ¶ 7, 366 P.3d 1006, 1008 (App. 2016) (citations omitted). “These guarantees do not prohibit all classification of persons, however, but only those which are ‘unreasonable.’ ” *Id.* (quoting *State v. Lowery*, 230 Ariz. 536, 541, ¶ 13, 287 P.3d 830 (App. 2012)). “Unless it implicates a suspect classification or a fundamental right, [courts] will uphold legislation that is “ ‘rationally related to a legitimate government purpose.’ ” *Lowery*, 230 Ariz. at 541, ¶ 13, 287 P.3d at 835 (quoting *State v. Navarro*, 201 Ariz. 292, 298, ¶ 25, 34 P.3d at 977 (App. 2001)).

There is no dispute that Plaintiff is not a member of a suspect class and it is equally undisputed that employment benefits do not involve a fundamental right. Thus, as Plaintiff concedes, classification by the State which results in some inequality is not unconstitutional if it is “predicated on some reasonable basis.” Reply at p. 6 (citing *Prescott Courier, Inc. v. Moore*, 35 Ariz. 26, 33, 274 P. 163, 165 (1929) (“The Legislature may classify, but the classification must be predicated on some reasonable basis, which will promote a legitimate purpose of legislation.”)). *See also Fisher v. Edgerton*, 236 Ariz. 71, 80, ¶ 28, 336 P.3d 167 (App. 2014) (observing that “[e]ven if the classification results in some inequality, it is not unconstitutional if it rests on some reasonable basis.”).

Despite Plaintiff’s claims to the contrary, the State had a reasonable basis in these circumstances for providing life-insurance coverage to unmarried same-sex couples versus, i.e., the District Court in *Collins v. Brewer*, as affirmed by the Ninth Circuit Court of Appeals, specifically instructed the State to do so. Plaintiff contends that the District Court never ordered the State to implement an approach that only provided benefits to unmarried same-sex couples. Response at p. 9. However, that is in fact what the District Court ordered. The order provides:

It is **FURTHER ORDERED** that plaintiffs' motion for preliminary injunction at docket 31 is **GRANTED** as follows:

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- 1) Defendants are enjoined from enforcing A.R.S. § 38–651(O) to eliminate family insurance eligibility for lesbian and gay State employees, and their domestic partners and domestic partners' children who satisfy the criteria set forth in Ariz. Admin. Code § R2–5–101;
- 2) Defendants are required to make available family health insurance coverage for lesbian and gay State employees, including plaintiffs, who satisfy the relevant eligibility criteria set forth in Ariz. Admin. Code § R2–5–101 to the same extent such benefits are made available to married State employees;
- 3) The preliminary injunction shall take effect within ten (10) business days and shall remain in effect pending trial in this action or further order of the court.

Collins, 727 F. Supp. 2d at 815. Thus, the State did exactly what it was instructed to do (or not do) by the District Court.

It should also be noted that this order was made based upon the District Court's determination that same-sex domestic partners were not similarly situated with opposite sex domestic partners for purposes of application of A.R.S. § 38-651(O). *Id.* at 803. More specifically, the District Court adopted the argument of the plaintiffs that “ ‘Section O deliberately classifies State employees into two groups-heterosexual employees who are offered a way to qualify for family health insurance, and lesbian and gay State employees who are deprived of any way to qualify for those benefits,’ ” and thus held that “[w]hile Section O is not discriminatory on its face, as applied Section O ‘unquestionably imposes different treatment on the basis of sexual orientation,’ and makes benefits available on terms that are a legal impossibility for gay and lesbian couples.” *Collins*, 727 F. Supp. 2d at 803.

Plaintiff suggests that the State, in complying with the above-quoted order from the District Court, should have voluntarily extended insurance benefits to heterosexual domestic partners as well or, as raised at oral argument, the State could have alternatively provided benefits only to those same-sex domestic partners who provided an affidavit or declaration that they would have gotten married if it had been legal. As it has been observed, however, while “[t]here may be other, and perhaps better, ways of achieving the goal of fairness in this area”, this “does not mean that the method the [State] selected is irrational.” *Church v. Rawson Drug & Sundry Co.*, 173 Ariz. 342, 350-51, 842 P.2d 1355, 1363-64 (App. 1992). The rational basis test also does not require the State to choose “the least intrusive, nor most effective, means of achieving its goals.” *State v. Hammonds*, 192 Ariz. 528, 532, ¶ 15, 968 P.2d 601 (App. 1998) (citing *Ohio Bureau of Emp't Servs. v. Hodory*, 431 U.S. 471, 491, 97 S.Ct. 1898, 52 L.Ed.2d

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513 (1977)). Again, “[e]ven if the classification results in some inequality, it is not unconstitutional if it rests on some reasonable basis.” *Id.* at 351, 842 P.2d at 1364.

In sum, compliance with an order from the United States District Court for the District of Arizona, as affirmed by the Ninth Circuit Court of Appeals, which was based upon the determination that same-sex domestic partners were not similarly situated with opposite sex domestic partners, is a reasonable basis for the State to extend insurance benefits to same-sex domestic partners and not heterosexual domestic partners. Indeed, as recognized by the District Court, insurance benefits were available to heterosexual couples because there was no legal impediment to such couples, including Plaintiff and Mr. Kutcher, getting married. This fact remained true even after the State complied with the District Court’s order. The State’s action therefore did nothing to prevent Plaintiff from obtaining these benefits and did not violate either the federal and state equal protection guarantees.

Therefore,

IT IS ORDERED granting Defendants’ Motion to Dismiss.

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MARICOPA COUNTY

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03/29/2016

HONORABLE JOSHUA D. ROGERS

CLERK OF THE COURT
S. Ortega
Deputy

ANDREW MUSCAT, et al.

ROBERT A BUTLER

v.

CREATIVE INNERVISIONS, et al.

ROBERT GRASSO JR.

NATHAN T METZGER

UNDER ADVISEMENT RULING

Pending before the Court is Defendants' Joint Motion for Judgment on the Pleadings. The Court has considered the Motion, the memoranda submitted in support thereof and opposition thereto, the arguments of counsel and the relevant law.

A motion for judgment on the pleadings pursuant to Rule 12(c) of the Arizona Rules of Civil Procedure tests the sufficiency of the complaint in stating a claim for relief. *Giles v. Hill Lewis Marce*, 195 Ariz. 358, 359, 988 P.2d 143, 144 (Ct. App. 1999); *Food for Health Co. v. 3839 Joint Venture*, 129 Ariz. 103, 106, 628 P.2d 986, 989 (Ct. App. 1981). "A motion for judgment on the pleadings for the purposes thereof admits all material allegations of the opposing party's pleadings, and all allegations of the moving party which have been denied are taken as false so that a motion for judgment on the pleadings is only granted if the moving party is clearly entitled to judgment." *Food for Health*, 129 Ariz. at 106, 628 P.2d at 989 (citing *Jamison v. Southern States Life Insurance Co.*, 3 Ariz.App. 131, 412 P.2d 306 (1966)). Judgment should be entered for the defendant if the complaint fails to state a claim for relief. *Giles*, 195 Ariz. at 359, 988 P.2d at 144 (citing *Shannon v. Butler Homes, Inc.*, 102 Ariz. 312, 428 P.2d 990 (1967)). Consistent with the forgoing, the Court finds that judgment should be entered for Defendants because Plaintiffs' complaint fails to state a claim for relief.

The following facts are alleged in the Complaint. Plaintiff Andrew Muscat is and was an incompetent and profoundly disabled person, duly diagnosed and receiving services from the Arizona Department of Economic Security/Division of Developmental Disabilities. The myriad

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of mental and cognitive impairments afflicting Mr. Muscat made impulse control considerably more difficult for him than it is for the typical person. Based upon an incident which took place in June of 2008, Mr. Muscat was convicted of child abuse, a sexually motivated offense and a class 4 felony. He was consequently placed on lifetime probation.

In December of 2011, Mr. Muscat was placed in a Division of Developmental Disabilities approved group home owned by Defendant Creative Innervations, L.L.C. (“Creative Innervations”). In September of 2012, a representative of the Division of Developmental Disabilities met with representatives of Creative Innervations and established an Individual Support Plan (“ISP”) for Mr. Muscat. The ISP required that a one-on-one staff person from Creative Innervations be with Mr. Muscat both in the group home and out in the community and remain with him at all times. Further, as part of the ISP, while in the community, if Mr. Muscat needed to use the restroom, the one-on-one staff person from Creative Innervations was required to go into the restroom with him. The purpose of having this one-on-one supervision was to protect Mr. Muscat from harm due to his lack of impulse control.

On or about December 27, 2012, Mr. Muscat’s one-on-one staff member from Creative Innervations, Defendant Temitayo Akande, drove Mr. Muscat to a local church to participate with Detour Company Theater. Mr. Akande instructed Mr. Muscat to get out of the car and go into the church alone, unattended and unsupervised. While he was left unattended and unsupervised, Mr. Muscat allegedly followed a child into the restroom and inappropriately touched the child.

On or about November 26, 2013, Mr. Muscat was arrested for the December 27, 2012 incident. As a result of being left unattended and unsupervised by Creative Innervations and Mr. Akande, Mr. Muscat has been sentenced to eight years in the department of corrections.

The Complaint asserts causes of action against both defendants for Negligence and Violation of the Adult Protective Services Act, and asserts a cause of action for Negligent Hiring/Supervision/Training against Creative Innervations only. The Complaint seeks damages on behalf of both Mr. Muscat and Plaintiff Marcie Beman, his mother, resulting from the incarceration of Mr. Muscat.

Defendants argue that they are entitled to judgment on the pleadings because the nature of the action in this specific factual circumstance does not present a cognizable claim as all of the alleged injuries and damages suffered by Plaintiffs are the legal consequences of Mr. Muscat’s own criminal conduct. More specifically, Defendants contends that these claims are barred by the “wrongful conduct” rule. The Court agrees.

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The “wrongful conduct” rule, also referred to as the “unlawful acts” or “unlawful conduct” rule, has long existed as a fundamental common law maxim. *See, e.g., Higgins v. McCrea*, 116 U.S. 671, 686 (1886) (“No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff’s own stating or otherwise, the cause of action appear to rise *ex turpi causa*, or the transgression of a positive law of the country, then the court says he has no right to be assisted.”); *Levy v. Kansas City, Kan.*, 168 F. 524, 525-26 (8th Cir. 1909) (“‘*Ex dolo malo non oritur actio*’ is a maxim which lies at the foundation of a general rule of public policy, the rule that the courts will not sustain an action which arises out of the moral turpitude of the plaintiff or out of his violation of a general law enacted to carry into effect the public policy of the state or nation.”); *Hunter v. Wheate*, 289 F. 604, 606 (D.C. Cir. 1923); *Gulf, C. & S.F. Ry. Co. v. Johnson*, 71 Tex. 619 (Tex. 1888); *McDonald v. Hall*, 193 Mich. 50, 159 N.W. 358 (1916). Under the wrongful conduct rule “[a] person generally cannot maintain an action if he or she must rely, in whole or in part, on an illegal or immoral act or transaction to which he or she is a party, in order to establish a cause of action. Moreover, a person cannot maintain a claim for damages based on his or her own wrong or caused by his or her own neglect.” 1A C.J.S. Actions § 68 (2016); *see also* 1 Am. Jur. 2d Actions § 39 (2016) (“[n]either law nor equity may be invoked to redress a wrong that has resulted from the injured party’s own wrongful conduct. The courts refuse to aid those whose cause of action is based on their own illegal conduct, or upon their own dishonest or tortious acts, or upon their own moral turpitude.”).

With regards to this rule, it has been observed:

This rule promotes the desirable public policy objective of preventing those who knowingly and intentionally engage in an illegal or immoral act involving moral turpitude from imposing liability on others for the consequences of their own behavior. Even so, such a rule derives principally not from consideration for the defendant, “but from a desire to see that those who transgress the moral or criminal code shall not receive aid from the judicial branch of government.”

Oden v. Pepsi Cola Bottling Co. of Decatur, 621 So. 2d 953, 955 (Ala. 1993) (quoting *Bonnier v. Chicago, B. & Q. R.R.*, 351 Ill.App. 34, 51, 113 N.E.2d 615, 622 (1953), *rev’d on other grounds*, 2 Ill.2d 606, 119 N.E.2d 254 (1954) (citations omitted)). It has further been explained that if the common law wrongful conduct rule were not recognized, several unacceptable consequences would result:

First, by making relief potentially available for wrongdoers, courts in effect would condone and encourage illegal conduct Second, some wrongdoers would be able to receive a profit or compensation as a result of their illegal acts. Third, . . .

SUPERIOR COURT OF ARIZONA
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the public would view the legal system as a mockery of justice. Fourth, . . . wrongdoers would be able to shift much of the responsibility for their illegal acts to other parties.

Orzel by Orzel v. Scott Drug Co., 537 N.W.2d 208, 213 (Mich. 1995).

Although never applied in the tort context, this common law rule has in fact long been followed and applied by the Arizona courts. In *Farragut Baggage & Transfer Co. v. Shadron Realty Inc.*, the Arizona Court of Appeals stated that “[a] plaintiff cannot recover where his cause of action cannot be established without showing that he has broken the law.” 18 Ariz. App. 197, 200, 501 P.2d 38, 41 (1972). Similarly, in *Northen v. Elledge*, the Arizona Supreme Court applied the general rule that “a plaintiff cannot recover where his cause of action cannot be established without showing that he has broken the law, whatever his claim in justice may be upon the defendant.” 72 Ariz. 166, 172-73, 232 P.2d 111, 115 (1951).

Plaintiffs’ complaint and all of the causes of actions stated therein are based solely upon the illegal conduct of Mr. Muscat and the injuries and damages claimed are based solely upon Mr. Muscat’s resulting incarceration from this illegal conduct. The Court therefore holds that under the wrongful conduct rule and Arizona law, Plaintiffs cannot maintain this action or seek the requested damages because it resulted from Mr. Muscat’s own illegal conduct and cannot be established absent a showing that he has broken the law. This conclusion applies equally to the claims of Plaintiff Marcie Berman as her claims are merely derivative of the claims and conduct of Mr. Muscat.

Plaintiffs raise two constitutional arguments to challenge the application of this rule and entry of judgment on the pleadings in this case. First, Plaintiffs argue that this ruling violates the anti-abrogation clause of Article 18, Section 6, of the Arizona Constitution.¹ Article 18, Section 6, of the Arizona Constitution states: “The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation.”

The anti-abrogation clause generally protects the right to file certain claims. In *Lerner v. DMB Realty, LLC*, the Arizona Court of Appeals stated that “to be protected by the anti-abrogation clause, a cause of action must have existed at common law or have found its basis in

¹ Plaintiffs also cite article 2, § 31 which similarly protects the recovery of damages. “No law shall be enacted in this State limiting the amount of damages to be recovered for causing the death or injury of any person.” “No separate analysis is necessary for this provision as it serves essentially the same purpose as article 18, § 6.” *Goodman v. Samaritan Health Sys.*, 195 Ariz. 502, 506 n.2, 990 P.2d 1061, 1065 (Ct. App. 1999).

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

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the common law at the time the constitution was adopted.” 234 Ariz. 397, 406, ¶ 36, 322 P.3d 909, 918 (Ct. App. 2014) (quoting *Dickey v. City of Flagstaff*, 205 Ariz. 1, 3, ¶ 9, 66 P.3d 44, 46 (2003)) (internal quotation marks omitted). As a result, in assessing whether a claim is protected under the anti-abrogation clause, it must first be determined “whether the right to file a negligence claim was among ‘those wrongs traditionally recognized at common law’ including ‘the right of people to seek remedy by due course of law for injury to their lands, goods, person, or reputation.’” *US Airways, Inc. v. Qwest Corp.*, 238 Ariz. 413, 361 P.3d 942, 947 (Ct. App. 2015) (quoting *Boswell v. Phoenix Newspapers, Inc.*, 152 Ariz. 9, 17–18, 730 P.2d 186, 194–95 (1986) (quoting Proposed Constitution of 1891, art. 2, § 15) (internal quotation marks omitted)).

Although negligence actions are part of Arizona's common law, a negligence action against an individual or entity for allowing the plaintiff to commit a crime which results in the plaintiff's incarceration is not. Plaintiffs did not cite, and the Court did not find, any common law cases that allowed a party to sue another individual or entity for such alleged negligence. Indeed, Plaintiffs admit there is no authority which recognizes such a cause of action in Arizona. Therefore, the anti-abrogation clause does not operate to preclude the operation of the wrongful conduct rule under the circumstances of the present case. *Cf. Miel v. State Farm Mutual Automobile Insurance Co.*, 185 Ariz. 104, 111, 912 P.2d 1333, 1340 (Ct. App. 1995) (upholding the dismissal of claim by an insured against its insurer for “negligent claims handling” despite anti-abrogation objection because “no cause of action has ever been recognized for negligence in a case like this”); *Ramirez v. Health Partners of Southern Arizona*, 193 Ariz. 325, 334, 972 P.2d 658, 667 (Ct. App. 1998) (finding no “common law action for negligence in the organ donation context”); *Goodman*, 195 Ariz. at 509, 990 P.2d at 1068 (holding that anti-abrogation clause did not apply to negligent peer review in connection with admittance to a hospital staff because no common law right of action for money damages either existed or would have been recognized in Arizona before 1971).

Plaintiffs also claim that application of the wrongful conduct rule and entry of judgment on the pleadings in this case would violate Article 18, Section 5, of the Arizona Constitution. This section provides: “The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury.” Contrary to Plaintiffs' assertions, however, this is not an issue of contributory negligence. Instead, this is an issue of illegal conduct and whether such illegal conduct can form the basis for a cognizable claim for recovery of damages under Arizona law. The defense of contributory negligence and this provision of the Arizona Constitution can never be implicated if the cause of action at issue is not a cognizable claim, even if it generally sounds in negligence. *See Miel*, 185 Ariz. at 111, 912 P.2d at 1340 (finding that dismissal was appropriate because no cause of action has ever been recognized for negligent claims handling). Therefore, because this case does not involve a valid claim under Arizona law, Article 18, Section 5, of the Arizona Constitution is not implicated under the circumstances of this case.

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Therefore,

IT IS ORDERED granting Defendants' Joint Motion for Judgment on the Pleadings.

IT IS FURTHER ORDERED that this matter will be dismissed without prejudice in **30 days** unless a form of final judgment is lodged or the deadline is otherwise extended by the Court.

ARIZONA COMMISSION ON JUDICIAL PERFORMANCE REVIEW

Superior Court

Name of Judge:	Total Surveys: 88					Assignment: Civil					Cycle: Mid-Term Review																					
MCCIV-14	ATTORNEY					LIT/WIT/PRO PER					JUROR					STAFF																
Hon. Joshua D. Rogers	UN	PO	SA	VG	SU	39	Resp	Mean	UN	PO	SA	VG	SU	19	Resp	Mean	UN	PO	SA	VG	SU	20	Resp	Mean	UN	PO	SA	VG	SU	10	Resp	Mean
Section I: Legal Ability	0	1	4	14	14	32	3.3																									
Legal reasoning ability	0	1	5	13	16	35	3.3																									
Knowledge of substantive law	0	1	3	17	12	33	3.2																									
Knowledge of rules of evidence	0	0	4	11	12	27	3.3																									
Knowledge of rules of procedure	0	0	3	16	14	33	3.3																									
Section II: Integrity	0	0	0	5	12	17	3.7	0	0	0	3	13	16	3.8	0	0	2	3	14	19	3.7	0	0	0	3	3	6	3.5				
Basic fairness and impartiality	0	1	2	14	19	36	3.4	0	1	0	4	14	19	3.6	0	0	2	2	16	20	3.7	0	0	0	4	4	8	3.5				
Equal treatment regardless of race	0	0	0	3	11	14	3.8	0	0	0	3	13	16	3.8	0	0	2	2	14	18	3.7	0	0	0	3	3	6	3.5				
Equal treatment regardless of gender	0	0	0	5	11	16	3.7	0	0	0	3	14	17	3.8	0	0	2	3	15	20	3.7	0	0	0	4	3	7	3.4				
Equal treatment regardless of religion	0	0	0	3	10	13	3.8	0	0	0	3	12	15	3.8	0	0	2	2	14	18	3.7	0	0	0	3	3	6	3.5				
Equal treatment regardless of national origin	0	0	0	4	11	15	3.7	0	0	0	3	12	15	3.8	0	0	2	3	14	19	3.6	0	0	0	3	3	6	3.5				
Equal treatment regardless of disability	0	0	0	2	11	13	3.8	0	0	0	3	13	16	3.8	0	0	2	3	13	18	3.6	0	0	0	3	3	6	3.5				
Equal treatment regardless of age	0	0	0	4	13	17	3.8	0	0	0	3	14	17	3.8	0	0	2	3	15	20	3.7	0	0	0	4	3	7	3.4				
Equal treatment regardless of sexual orientation	0	0	0	2	10	12	3.8	0	0	0	3	12	15	3.8	0	0	2	3	13	18	3.6	0	0	0	2	3	5	3.6				
Equal treatment regardless of economic status	0	0	0	4	10	14	3.7	0	0	0	3	13	16	3.8	0	0	2	2	15	19	3.7	0	0	0	3	4	7	3.6				
Section III: Communication Skills	0	0	5	12	17	35	3.3	0	0	2	3	10	15	3.5	0	0	2	2	16	20	3.7	0	0	1	6	2	9	3.1				
Clear and logical communications																	0	0	1	6	2	9	3.1									
Clear and logical oral communications and directions	0	1	5	11	20	37	3.4																									
Clear and logical written decisions	0	0	6	12	12	30	3.2																									
Gave all parties an adequate opportunity to be heard	0	0	4	13	20	37	3.4																									
Explained proceedings (to the jury)								0	0	3	3	12	18	3.5	0	0	2	1	17	20	3.8											
Explained reason for delays								0	0	1	3	7	11	3.5	0	0	3	3	14	20	3.6											
Clearly explained the juror's responsibilities																	0	0	2	2	16	20	3.7									
Section IV: Judicial temperament	0	0	3	9	22	34	3.5	0	1	0	2	16	19	3.8	0	0	2	2	16	20	3.7	0	0	1	5	3	9	3.2				
Understanding and compassion	0	0	2	11	17	30	3.5	0	1	0	3	13	17	3.6	0	0	2	2	15	19	3.7	0	0	1	4	2	7	3.1				
Dignified	0	0	2	9	23	34	3.6	0	0	1	1	17	19	3.8	0	0	2	2	16	20	3.7	0	0	1	5	3	9	3.2				
Courteous	0	0	3	10	23	36	3.6	0	1	0	1	17	19	3.8	0	0	2	2	16	20	3.7	0	0	1	5	3	9	3.2				
Conduct that promotes public confidence in the court	0	1	3	9	23	36	3.5	0	1	0	1	17	19	3.8	0	0	2	1	17	20	3.8	0	0	1	6	2	9	3.1				
Patient	0	1	3	8	23	35	3.5	0	0	1	2	16	19	3.8	0	0	2	2	16	20	3.7	0	0	0	5	4	9	3.4				
Section V: Administrative Performance	0	0	4	10	19	34	3.5	0	0	1	4	14	19	3.7	0	0	2	2	15	20	3.7	0	0	1	6	2	8	3.1				
Punctual in conducting proceedings	0	0	3	12	21	36	3.5	0	0	1	5	13	19	3.6	0	0	3	4	13	20	3.5	0	0	1	7	1	9	3.0				
Maintained proper control of courtroom	0	1	2	13	20	36	3.4	0	0	1	4	14	19	3.7	0	0	2	2	16	20	3.7	0	0	2	6	1	9	2.9				
Prompt in making rulings and rendering decisions	0	0	5	10	17	32	3.4																									
Was prepared for the proceedings	0	0	4	9	23	36	3.5	0	0	1	3	15	19	3.7	0	0	2	1	17	20	3.8	0	0	0	7	2	9	3.2				
Respectful treatment of staff																	0	0	0	6	3	9	3.3									
Cooperation with peers																	0	0	1	3	3	7	3.3									
Efficient management of calendar	0	0	4	8	16	28	3.4										0	0	2	4	1	7	2.9									
Section VI: Settlement Activities	0	0	3	2	6	11	3.3																									
Appropriately promoted or conducted settlement	0	0	3	2	6	11	3.3																									

UN=Unacceptable, PO=Poor,
 SA=Satisfactory, VG=Very Good,
 SU=Superior

Category summaries are averages and may not add up due to rounding.

Surveys were distributed to court
 users from 02/2017 - 05/2017

ARIZONA COMMISSION ON JUDICIAL PERFORMANCE REVIEW

Superior Court

Name of Judge: MCCIV-14 Hon. Joshua D. Rogers	Total Surveys: 88					39 Mean	Assignment: Civil					19 Mean	Cycle: Mid-Term Review					20 Mean	STAFF					10 Mean
	UN	PO	SA	VG	SU		UN	PO	SA	VG	SU		UN	PO	SA	VG	SU		UN	PO	SA	VG	SU	
Section I: Legal Ability	0%	2%	12%	45%	42%	3.3																		
Legal reasoning ability	0%	3%	14%	37%	46%	3.3																		
Knowledge of substantive law	0%	3%	9%	52%	36%	3.2																		
Knowledge of rules of evidence	0%	0%	15%	41%	44%	3.3																		
Knowledge of rules of procedure	0%	0%	9%	48%	42%	3.3																		
Section II: Integrity	0%	1%	1%	27%	71%	3.7	0%	1%	0%	19%	80%	3.8	0%	0%	11%	14%	76%	3.7	0%	0%	0%	50%	50%	3.5
Basic fairness and impartiality	0%	3%	6%	39%	53%	3.4	0%	5%	0%	21%	74%	3.6	0%	0%	10%	10%	80%	3.7	0%	0%	0%	50%	50%	3.5
Equal treatment regardless of race	0%	0%	0%	21%	79%	3.8	0%	0%	0%	19%	81%	3.8	0%	0%	11%	11%	78%	3.7	0%	0%	0%	50%	50%	3.5
Equal treatment regardless of gender	0%	0%	0%	31%	69%	3.7	0%	0%	0%	18%	82%	3.8	0%	0%	10%	15%	75%	3.7	0%	0%	0%	57%	43%	3.4
Equal treatment regardless of religion	0%	0%	0%	23%	77%	3.8	0%	0%	0%	20%	80%	3.8	0%	0%	11%	11%	78%	3.7	0%	0%	0%	50%	50%	3.5
Equal treatment regardless of national origin	0%	0%	0%	27%	73%	3.7	0%	0%	0%	20%	80%	3.8	0%	0%	11%	16%	74%	3.6	0%	0%	0%	50%	50%	3.5
Equal treatment regardless of disability	0%	0%	0%	15%	85%	3.8	0%	0%	0%	19%	81%	3.8	0%	0%	11%	17%	72%	3.6	0%	0%	0%	50%	50%	3.5
Equal treatment regardless of age	0%	0%	0%	24%	76%	3.8	0%	0%	0%	18%	82%	3.8	0%	0%	10%	15%	75%	3.7	0%	0%	0%	57%	43%	3.4
Equal treatment regardless of sexual orientation	0%	0%	0%	17%	83%	3.8	0%	0%	0%	20%	80%	3.8	0%	0%	11%	17%	72%	3.6	0%	0%	0%	40%	60%	3.6
Equal treatment regardless of economic status	0%	0%	0%	29%	71%	3.7	0%	0%	0%	19%	81%	3.8	0%	0%	11%	11%	79%	3.7	0%	0%	0%	43%	57%	3.6
Section III: Communication Skills	0%	1%	14%	35%	50%	3.3	0%	0%	14%	21%	66%	3.5	0%	0%	12%	10%	78%	3.7	0%	0%	11%	67%	22%	3.1
Clear and logical communications																		0%	0%	11%	67%	22%	3.1	
Clear and logical oral communications and directions	0%	3%	14%	30%	54%	3.4																		
Clear and logical written decisions	0%	0%	20%	40%	40%	3.2																		
Gave all parties an adequate opportunity to be heard	0%	0%	11%	35%	54%	3.4																		
Explained proceedings (to the jury)							0%	0%	17%	17%	67%	3.5	0%	0%	10%	5%	85%	3.8						
Explained reason for delays							0%	0%	9%	27%	64%	3.5	0%	0%	15%	15%	70%	3.6						
Clearly explained the juror's responsibilities												0%	0%	10%	10%	80%	3.7							
Section IV: Judicial temperament	0%	1%	8%	27%	64%	3.5	0%	3%	2%	9%	86%	3.8	0%	0%	10%	9%	81%	3.7	0%	0%	9%	58%	33%	3.2
Understanding and compassion	0%	0%	7%	37%	57%	3.5	0%	6%	0%	18%	76%	3.6	0%	0%	11%	11%	79%	3.7	0%	0%	14%	57%	29%	3.1
Dignified	0%	0%	6%	26%	68%	3.6	0%	0%	5%	5%	89%	3.8	0%	0%	10%	10%	80%	3.7	0%	0%	11%	56%	33%	3.2
Courteous	0%	0%	8%	28%	64%	3.6	0%	5%	0%	5%	89%	3.8	0%	0%	10%	10%	80%	3.7	0%	0%	11%	56%	33%	3.2
Court that promotes public confidence in the court	0%	3%	8%	25%	64%	3.5	0%	5%	0%	5%	89%	3.8	0%	0%	10%	5%	85%	3.8	0%	0%	11%	67%	22%	3.1
Patient	0%	3%	9%	23%	66%	3.5	0%	0%	5%	11%	84%	3.8	0%	0%	10%	10%	80%	3.7	0%	0%	0%	56%	44%	3.4
Section V: Administrative Performance	0%	1%	11%	31%	58%	3.5	0%	0%	5%	21%	74%	3.7	0%	0%	12%	12%	77%	3.7	0%	0%	12%	66%	22%	3.1
Punctual in conducting proceedings	0%	0%	8%	33%	58%	3.5	0%	0%	5%	26%	68%	3.6	0%	0%	15%	20%	65%	3.5	0%	0%	11%	78%	11%	3.0
Maintained proper control of courtroom	0%	3%	6%	36%	56%	3.4	0%	0%	5%	21%	74%	3.7	0%	0%	10%	10%	80%	3.7	0%	0%	22%	67%	11%	2.9
Prompt in making rulings and rendering decisions	0%	0%	16%	31%	53%	3.4																		
Was prepared for the proceedings	0%	0%	11%	25%	64%	3.5	0%	0%	5%	16%	79%	3.7	0%	0%	10%	5%	85%	3.8	0%	0%	0%	78%	22%	3.2
Respectful treatment of staff																		0%	0%	0%	67%	33%	3.3	
Cooperation with peers																		0%	0%	14%	43%	43%	3.3	
Efficient management of calendar	0%	0%	14%	29%	57%	3.4												0%	0%	29%	57%	14%	2.9	
Section VI: Settlement Activities	0%	0%	27%	18%	55%	3.3																		
Appropriately promoted or conducted settlement	0%	0%	27%	18%	55%	3.3																		

UN=Unacceptable, PO=Poor,
SA=Satisfactory, VG=Very Good,
SU=Superior

Category summaries are averages and may not add up due to rounding.

Surveys were distributed to court
users from 02/2017 - 05/2017

ARIZONA COMMISSION ON
JPR
 JUDICIAL PERFORMANCE REVIEW

Vote Meeting – June 1, 2018

JUDGE NUMBER	MEETS STANDARDS	DOES NOT MEET STANDARDS	ABSTAINING
MCCIV-14	27	0	0
MCCIV-22	27	0	0
MCCRI-10	27	0	0
MCCRI-40	27	0	0
MCFAM-03	27	0	0
MCFAM-04	27	0	0
MCFAM-11	18	1	8
MCFAM-12	27	0	0
MCFAM-13	27	0	0
MCFAM-17	26	0	1
MCFAM-18	27	0	0
MCFAM-20	27	0	0
MCFAM-21	27	0	0
MCFAM-41	20	0	7
MCFAM-42	27	0	0
MCJUV-03	20	0	7

ARIZONA COMMISSION ON JUDICIAL PERFORMANCE REVIEW

Superior Court

Name of Judge: MCFAM-13 Hon. Joshua Rogers	Total Surveys: 90					Assignment: Family					Cycle: Mid-Term Review															
	ATTORNEY					LIT/WIT/PRO PER					JUROR					STAFF										
	SU	VG	SA	PO	UN	41 Resp Mean	SU	VG	SA	PO	UN	42 Resp Mean	SU	VG	SA	PO	UN	0 Resp Mean	SU	VG	SA	PO	UN	7 Resp Mean		
Section I: Legal Ability	22	9	5	1	1	37	3.3																			
Legal reasoning ability	22	8	6	1	0	37	3.4																			
Knowledge of substantive law	21	8	4	3	1	37	3.2																			
Knowledge of rules of evidence	23	7	5	1	1	37	3.4																			
Knowledge of rules of procedure	21	12	4	0	1	38	3.4																			
Section II: Integrity	21	5	3	0	1	30	3.5	23	10	2	1	0	36	3.5	0	0	0	0	0	0	0	0	0	0	7	3.7
Basic fairness and impartiality	26	8	5	0	2	41	3.4	22	14	4	1	0	41	3.4	0	0	0	0	0	0	0	0	0	0	7	3.7
Equal treatment regardless of race	23	4	3	0	0	30	3.7	23	9	3	0	0	35	3.6	0	0	0	0	0	0	0	0	0	0	7	3.7
Equal treatment regardless of gender	24	7	3	0	2	36	3.4	25	11	3	1	0	40	3.5	0	0	0	0	0	0	0	0	0	0	7	3.7
Equal treatment regardless of religion	17	3	2	0	0	22	3.7	23	10	2	1	0	36	3.5	0	0	0	0	0	0	0	0	0	0	7	3.7
Equal treatment regardless of national origin	23	4	2	0	0	29	3.7	23	10	2	0	0	35	3.6	0	0	0	0	0	0	0	0	0	0	7	3.7
Equal treatment regardless of disability	16	3	2	0	0	21	3.7	21	10	2	0	0	33	3.6	0	0	0	0	0	0	0	0	0	0	7	3.7
Equal treatment regardless of age	22	3	4	0	1	30	3.5	24	10	2	0	0	36	3.6	0	0	0	0	0	0	0	0	0	0	7	3.7
Equal treatment regardless of sexual orientation	18	4	2	0	0	24	3.7	22	10	2	1	0	35	3.5	0	0	0	0	0	0	0	0	0	0	7	3.7
Equal treatment regardless of economic status	23	5	5	0	1	34	3.4	22	10	2	1	0	35	3.5	0	0	0	0	0	0	0	0	0	0	7	3.7
Section III: Communication Skills	25	6	5	1	2	40	3.3	20	11	7	1	0	38	3.3	0	0	0	0	0	0	0	0	0	0	7	3.7
Clear and logical communications																										
Clear and logical oral communications and directions	24	8	6	2	1	41	3.3																			
Clear and logical written decisions	24	5	4	2	2	37	3.3																			
Gave all parties an adequate opportunity to be heard	28	6	4	0	3	41	3.4																			
Explained proceedings (to the jury)								22	11	8	0	0	41	3.3	0	0	0	0	0	0	0	0	0	0		
Explained reason for delays								17	11	5	1	0	34	3.3	0	0	0	0	0	0	0	0	0	0		
Clearly explained the juror's responsibilities															0	0	0	0	0	0	0	0	0	0		
Section IV: Judicial temperament	29	7	4	1	1	41	3.5	28	8	4	0	0	40	3.6	0	0	0	0	0	0	0	0	0	0	7	3.6
Understanding and compassion	26	8	5	1	1	41	3.4	24	10	5	0	1	40	3.4	0	0	0	0	0	0	0	0	0	0	7	3.6
Dignified	29	8	3	0	0	40	3.7	29	7	4	0	0	40	3.6	0	0	0	0	0	0	0	0	0	0	7	3.7
Courteous	30	7	3	0	1	41	3.6	31	5	5	0	0	41	3.6	0	0	0	0	0	0	0	0	0	0	7	3.6
Conduct that promotes public confidence in the court	28	5	4	1	3	41	3.3	27	9	3	1	0	40	3.6	0	0	0	0	0	0	0	0	0	0	7	3.7
Patient	30	6	3	1	1	41	3.5	29	9	2	0	0	40	3.7	0	0	0	0	0	0	0	0	0	0	7	3.6
Section V: Administrative Performance	24	8	4	1	1	39	3.4	26	9	3	1	1	40	3.5	0	0	0	0	0	0	0	0	0	0	7	3.6
Punctual in conducting proceedings	27	8	4	1	0	40	3.5	25	11	3	1	0	40	3.5	0	0	0	0	0	0	0	0	0	0	7	3.6
Maintained proper control of courtroom	28	7	3	0	2	40	3.5	27	9	3	0	0	39	3.6	0	0	0	0	0	0	0	0	0	0	7	3.4
Prompt in making rulings and rendering decisions	19	9	6	1	2	37	3.1																			
Was prepared for the proceedings	25	8	4	0	2	39	3.4	25	8	3	2	2	40	3.3	0	0	0	0	0	0	0	0	0	0	7	3.6
Respectful treatment of staff																										
Cooperation with peers																										
Efficient management of calendar	22	8	5	1	1	37	3.3																			
Section VI: Settlement Activities	18	2	3	1	0	24	3.5																			
Appropriately promoted or conducted settlement	18	2	3	1	0	24	3.5																			

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Surveys were distributed to court users from 02/2019 - 05/2019

ARIZONA COMMISSION ON JUDICIAL PERFORMANCE REVIEW

Superior Court

Name of Judge: MCFAM-13 Hon. Joshua Rogers	Total Surveys: 90					Assignment: Family					Cycle: Mid-Term Review														
	ATTORNEY					41	LIT/WIT/PRO PER					42	JUROR					0	STAFF					7	
	SU	VG	SA	PO	UN	Mean	SU	VG	SA	PO	UN	Mean	SU	VG	SA	PO	UN	Mean	SU	VG	SA	PO	UN	Mean	
Section I: Legal Ability	58%	23%	13%	3%	2%	3.3																			
Legal reasoning ability	59%	22%	16%	3%	0%	3.4																			
Knowledge of substantive law	57%	22%	11%	8%	3%	3.2																			
Knowledge of rules of evidence	62%	19%	14%	3%	3%	3.4																			
Knowledge of rules of procedure	55%	32%	11%	0%	3%	3.4																			
Section II: Integrity	72%	15%	10%	0%	2%	3.5	63%	29%	7%	2%	0%	3.5	0%	0%	0%	0%	0%	0.0	71%	29%	0%	0%	0%	3.7	
Basic fairness and impartiality	63%	20%	12%	0%	5%	3.4	54%	34%	10%	2%	0%	3.4	0%	0%	0%	0%	0%	0.0	71%	29%	0%	0%	0%	3.7	
Equal treatment regardless of race	77%	13%	10%	0%	0%	3.7	66%	26%	9%	0%	0%	3.6	0%	0%	0%	0%	0%	0.0	71%	29%	0%	0%	0%	3.7	
Equal treatment regardless of gender	67%	19%	8%	0%	6%	3.4	63%	28%	8%	3%	0%	3.5	0%	0%	0%	0%	0%	0.0	71%	29%	0%	0%	0%	3.7	
Equal treatment regardless of religion	77%	14%	9%	0%	0%	3.7	64%	28%	6%	3%	0%	3.5	0%	0%	0%	0%	0%	0.0	71%	29%	0%	0%	0%	3.7	
Equal treatment regardless of national origin	79%	14%	7%	0%	0%	3.7	66%	29%	6%	0%	0%	3.6	0%	0%	0%	0%	0%	0.0	71%	29%	0%	0%	0%	3.7	
Equal treatment regardless of disability	76%	14%	10%	0%	0%	3.7	64%	30%	6%	0%	0%	3.6	0%	0%	0%	0%	0%	0.0	71%	29%	0%	0%	0%	3.7	
Equal treatment regardless of age	73%	10%	13%	0%	3%	3.5	67%	28%	6%	0%	0%	3.6	0%	0%	0%	0%	0%	0.0	71%	29%	0%	0%	0%	3.7	
Equal treatment regardless of sexual orientation	75%	17%	8%	0%	0%	3.7	63%	29%	6%	3%	0%	3.5	0%	0%	0%	0%	0%	0.0	71%	29%	0%	0%	0%	3.7	
Equal treatment regardless of economic status	68%	15%	15%	0%	3%	3.4	63%	29%	6%	3%	0%	3.5	0%	0%	0%	0%	0%	0.0	71%	29%	0%	0%	0%	3.7	
Section III: Communication Skills	64%	16%	12%	3%	5%	3.3	52%	29%	17%	1%	0%	3.3	0%	0%	0%	0%	0%	0.0	71%	29%	0%	0%	0%	3.7	
Clear and logical communications																				71%	29%	0%	0%	0%	3.7
Clear and logical oral communications and directions	59%	20%	15%	5%	2%	3.3																			
Clear and logical written decisions	65%	14%	11%	5%	5%	3.3																			
Gave all parties an adequate opportunity to be heard	68%	15%	10%	0%	7%	3.4																			
Explained proceedings (to the jury)							54%	27%	20%	0%	0%	3.3	0%	0%	0%	0%	0%	0.0							
Explained reason for delays							50%	32%	15%	3%	0%	3.3	0%	0%	0%	0%	0%	0.0							
Clearly explained the juror's responsibilities													0%	0%	0%	0%	0%	0.0							
Section IV: Judicial temperament	70%	17%	9%	1%	3%	3.5	70%	20%	9%	0%	0%	3.6	0%	0%	0%	0%	0%	0.0	63%	37%	0%	0%	0%	3.6	
Understanding and compassion	63%	20%	12%	2%	2%	3.4	60%	25%	13%	0%	3%	3.4	0%	0%	0%	0%	0%	0.0	57%	43%	0%	0%	0%	3.6	
Dignified	73%	20%	8%	0%	0%	3.7	73%	18%	10%	0%	0%	3.6	0%	0%	0%	0%	0%	0.0	71%	29%	0%	0%	0%	3.7	
Courteous	73%	17%	7%	0%	2%	3.6	76%	12%	12%	0%	0%	3.6	0%	0%	0%	0%	0%	0.0	57%	43%	0%	0%	0%	3.6	
Conduct that promotes public confidence in the court	68%	12%	10%	2%	7%	3.3	68%	23%	8%	3%	0%	3.6	0%	0%	0%	0%	0%	0.0	71%	29%	0%	0%	0%	3.7	
Patient	73%	15%	7%	2%	2%	3.5	73%	23%	5%	0%	0%	3.7	0%	0%	0%	0%	0%	0.0	57%	43%	0%	0%	0%	3.6	
Section V: Administrative Performance	63%	21%	11%	2%	4%	3.4	65%	24%	8%	3%	2%	3.5	0%	0%	0%	0%	0%	0.0	57%	43%	0%	0%	0%	3.6	
Punctual in conducting proceedings	68%	20%	10%	3%	0%	3.5	63%	28%	8%	3%	0%	3.5	0%	0%	0%	0%	0%	0.0	57%	43%	0%	0%	0%	3.6	
Maintained proper control of courtroom	70%	18%	8%	0%	5%	3.5	69%	23%	8%	0%	0%	3.6	0%	0%	0%	0%	0%	0.0	43%	57%	0%	0%	0%	3.4	
Prompt in making rulings and rendering decisions	51%	24%	16%	3%	5%	3.1																			
Was prepared for the proceedings	64%	21%	10%	0%	5%	3.4	63%	20%	8%	5%	5%	3.3	0%	0%	0%	0%	0%	0.0	57%	43%	0%	0%	0%	3.6	
Respectful treatment of staff																				57%	43%	0%	0%	0%	3.6
Cooperation with peers																				71%	29%	0%	0%	0%	3.7
Efficient management of calendar	59%	22%	14%	3%	3%	3.3														57%	43%	0%	0%	0%	3.6
Section VI: Settlement Activities	75%	8%	13%	4%	0%	3.5																			
Appropriately promoted or conducted settlement	75%	8%	13%	4%	0%	3.5																			

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