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Arizona Corporation Commission
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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS
BOB STUMP, CHAIRMAN
GARY PIERCE
BRENDA BURNS
BOB BURNS
SUSAN BITTER SMITH

IN THE MATTER OF THE FORMAL COMPLAINT AGAINST MOHAVE ELECTRIC COOPERATIVE, INC. FILED BY ROGER AND DARLENE CHANTEL	DOCKET NO. E-01750A-09-0149 MOHAVE ELECTRIC COOPERATIVE, INCORPORATED'S SUPPLEMENTAL DOCUMENTS

Mohave Electric Cooperative, Inc. ("MEC"), under the instructions of the Administrative Law Judge in her of June 2, 2014 Procedural Order, submits the following documents as additional support for its legal positions, including the primary position that the Complainants have amply litigated to adjudication, or have had the opportunity to litigate and/or assert all claims and issues arising from Complainants' construction of a survivalist structure in MEC's prescriptive easement and the resulting events leading up to the termination of services.

1. September 30, 2008 Informal ACC Complaint
2. March 24, 2009 ACC Complaint
3. May 5, 2009 ACC Complaint
4. MEC's June 3, 2011 Motion for Summary Judgment in Mohave County Superior Court
5. Chantel's June 7, 2011 "Request to the Court to Deny Motion for Summary Judgment" in Mohave County Superior Court
6. Chantel's January 10, 2012 "Motion to Have a Judicial Determination on all Counts in this Case" in Mohave County Superior Court
7. Chantel's February 27, 2012 Response to MEC's Motion for Reconsideration of Summary Judgment in Mohave County Superior Court

Arizona Court of Appeals Proceeding

8. Chantel's August 30, 2012 Opening Brief
9. MEC's October 15, 2012 Answering Brief and Appendix
10. April 16, 2013 Memorandum Decision of the Court of Appeals

Legal Authorities

11. *Advance Auto and Indem. Ins. Co. of N. Am. v. Craft*, 63 Va.App. 502, 759 S.E.2d 17 (Va.App.2014)
12. *Contempo-Tempe Mobile Home Owners Ass'n v. Steinert,* 144 Ariz. 227, 696 P.2d 1376 (1985)
13. *Electrical Dist. No. 2 v. ACC*, 155 Ariz. 252, 745 P.2d 1383 (1987)
14. *Hall v. Lalli,* 194 Ariz. 54, 977 P.2d 776 (1999)
15. *John Munic Enter., Inc. v. Laos,* 235 Ariz. 12, 326 P.3d 279 (2014)
16. *Red Bluff Mines, Inc. v. Ind. Com'n of Az.,* 144 Ariz. 199, 696 P.2d 1348 (1984)
17. *State v. Farley,* 106 Ariz. 119, 471 P.2d 731 (1970)
18. *Tucker v. Hinds County*, 558 So.2d 869 (1990)
19. Arizona Constitution art. 6 § 17
20. A.R.S. § 1-201
21. A.R.S. § 40-285
22. Ariz. R. Civ. P. 38
23. A.A.C. R14-2-202
24. A.A.C. R14-2-203
25. A.A.C. R14-2-211

DATED this 30th day of July, 2014.

CURTIS, GOODWIN, SULLIVAN,
UDALL & SCHWAB, P.L.C.

By: Larry K. Udall

Michael A. Curtis
Larry K. Udall
501 East Thomas Road
Phoenix, Arizona 85012-3205
Attorneys for Mohave Electric
Cooperative, Incorporated

PROOF AND CERTIFICATE OF MAILING

I hereby certify that on this 30th day of July, 2014, I caused the foregoing document to be served on the Arizona Corporation Commission by delivering the original and thirteen (13) copies of the above to:

Docket Control
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

COPY of the foregoing hand-delivered
this 30th day of July, 2014 to:

Belinda A. Martin, Administrative Law Judge
Hearing Division
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

Janice Alward, Esq.
Legal Division
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

Steve Olea, Director
Utilities Division
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

COPY of the foregoing mailed
this 30th day of July, 2014 to:

Roger and Darlene Chantel
10001 E. Highway 66
Kingman, Arizona 86401

Mary Walker

Exhibit 1

Note: John Williams has Complete file on Chantel

ARIZONA CORPORATION COMMISSION

UTILITY COMPLAINT FORM

Investigator: Richard Martinez Phone: (520) 628-6556 Fax: (520) 628-6559

Priority: Respond Within Five Days

Complaint No. 2008 - 71811 Date: 9/30/2008

Complaint Description: 06Z Disconnect/Terminations - Other
N/A Not Applicable

	First:	Last:
Complaint By:	Roger	Chantel
Account Name:	Roger Chantel	Home: (000) 000-0000
Street:	10001 E. Hwy 66	Work: (000) 000-0000
City:	Kingman	CBR:
State:	AZ Zip: 86401	is:

Utility Company. Mohave Electric Cooperative, Inc.

Division: Electric

Contact Name: Paula Griffes Contact Phone: (928) 758-0520

Nature of Complaint:

**********(Reference Inquiry # 71469)**********

Received the following correspondence:

September 24, 2008

Roger Chantel
10001 E. Hwy 66
Kingman, AZ 86401

Arizona Corporation Commission Complaint Department
1200 1W. Washington St.
Phoenix, AZ 85007

Re: EMERGENCY REQUEST

Mohave Electric Cooperative (MEC) placed power lines over my property without a right-of -way. That is one problem. The unsafe problem is that MEG placed their poles approximately 694 feet apart. The normal placement is about 300 Feet apart. What is happening is that the long span is causing the lines to have a large sag in them and the poles are starting to bend. The older they get the greater chance they have of failing and causing some major damage or killing a member of my family. I took this matter into my own hands by designing a functional piece of art work that is made out of concrete and placed it on my property to take up slack if the line every felt down. This art work was placed on my property in such a location that it could prevent the line from moving on to my equipment destroying some of my future projects as well as destroying my green house. MEC's higher management got mad at me for trying to prevent damage to my property. They claimed that my art work was not in compliance with the National Electric Safety Code. If that was true the solution could have been corrected by putting a pole in the middle of the 694 feet and raising the lines to comply with what they claimed was wrong. Instead they turned vindictive toward me and joined someone in Mohave County and

ARIZONA CORPORATION COMMISSION

UTILITY COMPLAINT FORM

claimed that my art work was a building, MEC's management turned off my electricity. They claimed that they we re requested by the planning department to do so. They did not notify me that they were turning off my electricity. The planning and zoning did not give me written notice that they were requesting MEC to turn off my electricity. If MECs actions were inside of the law they should be able to supply a letter from Mohave County requesting that my service at 10001 E. Hwy 66 Kingman, AZ be disconnected. They should be able to supply you with this letter within 24 hours from request. If they fail to provide a letter stating that Mohave County requested they turn off my electricity, one can only conclude that MEC turned off my power because they were mad at me. I am asking you to issue an order to turn my electricity back on at my place of residence, I believe that their action was intended to be malicious and they want to do harm to me. They stated in a letter to me that I had to pay them for the money they spent to reroute power around my property before they would re-hook up electricity to my house.

Never once in seven years with MEC have I ever been late on my payment:. By MEC turning off the electricity to my place of residence, it has caused my wife and I great hardships. Our water pump cannot run without electricity, so we have to find a way to get water to cook, clean, shower, flush toilets, water all of our fruit trees and vegetable garden plus our animals' watering dish will not fill automatically. All of this could cause death to the plants, animals and it could cause sanitation and health problems. I have a medical condition known as Sleep Apnea, which requires that 1 use a C-Pap machine during sleep. Without electricity I can't use my machine. If this machine is not used during sleep, my breathing stops and this could result in possible organ failure or even death.

I need your help getting me electricity turned back on. If MEC refuses to turn my electricity back on, then it should be the Commission's responsibility to require MEC to bring their lines into some kind of safety standard of only having 300 feet between poles. I will be out of the country until the 14th of October and I would like to have my electricity up and running by that date. I pray you can do something regarding MEC's malicious mistreatment to its customers. Maybe you need to turn parts of MEC's territory over to another utility company.

Respectfully submitted,
Roger Chantel

****

Please investigate this on-going matter and report your findings to the ACC.
End of Complaint

Utilities' Response:

Investigator's Comments and Disposition:

Pending
End of Comments

Date Completed:

Complaint No. 2008 - 71811

Exhibit 2

FORMAL COMPLAINT

ORIGINAL

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ROGER and DARLENE CHANTEL
10001 E. HWY. 66
KINGMAN, ARIZONA 86401
PHONE 928 757-9755

Arizona Corporation Commission
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FORMAL COMPLAINT FILED AGAINST
MOHAVE ELECTRIC COOPERATIVE

DOCKET NO. E-01750A-09-0149

EMERGENCY
FORMAL COMPLAINT FILED AGANST MOHAVE ELECTRIC COOPERATIVE
FOR UNNECESARY LINE EXTENSION BILL

This formal complaint is filed against Mohave Electric Cooperative, the management of the Mohave Electric Cooperative, the Board of Directors and Executive Officer Robert E. Broz.

Roger and Darlene Chantel are filing this emergency formal complaint based on the following: This is an emergency because the temporary electrical equipment that the Chantels are using is wearing out and could fail any day.

Mohave Electric Cooperative (hereinafter referred to as MEC) have high powered transmission lines that transmit high voltage electricity over our property. A few years ago I, Roger Chantel, noticed that a section of this high voltage transmission line that exists on our property was showing signs of sagging. I contacted MEC about the line and they did nothing to correct the unsafe condition. I contacted a number of government authorities and asked them if they would have MEC correct the unsafe condition. The ones that did respond claimed they did not have jurisdiction over the utility company. During the examination of the documents of record I discovered that MEC did not have a recorded right-of-way to transmit high powered electricity across our property. I contacted MEC about the right-of-way issue. Their response was, if I wanted their poles moved off of my property I would have to pay to have them moved. I was a little set back by this response. I monitored the unsafe condition that existed on our property for a few years. The large span of 694 between poles was causing the pole on my property to bend to a point that it was evident that it was just a matter of time before it would break and these high power lines would fall and cause a great deal of damage to our property and possibly life. After not receiving any help from government agencies it appeared that I was going to have to provide for our own safety when it came to the unsafe conditions of these high powered electric lines that existed on our property. After a long time and great consideration of the unsafe dangerous condition that existed on our property, I decided to create a functional art work that would protect us and our property from the dangers of these unsafe electric lines that were on our property. I started constructing my art work in the location on our property that I felt would provide the safest conditions for my family and the grandkids that travel over

most of the area that these unsafe lines where located in. Sometime after I started construction of my art work, representatives of MEC stopped by and told me that I was building a structure in their utility right-of-way easement. I informed the representative that MEC did not have a right-of-way across my property to transmit high voltage electricity. They became upset over that statement and went to the government authority known as Mohave County Building and Zoning Department and made false claims to them that they had a legal easement over my property. MEC claimed to Mohave County that my art work was unsafe and violated National Electrical Safe Code rule 234 table 234-1. MEC requested a letter from the county authorities to have our electricity disconnected. MEC built an alternative extension line around our property to service the rail road with power. On September 16, 2008, MEC disconnected the electricity to our place of residence. An emergency informal complaint was filed with the Arizona Corporation Commission. (ACC) MEC said they would not reinstate our electricity until we paid, in full, the bill of $12,135.09 plus enter into a contract to pay for building a new three phase system around our property. This bill was created by MEC's actions of creating a line extension around our property. MEC claimed that my art work was in violation of the NESC rule 234 table 234-1 and that is why they built the new line extension around our property. MEC claimed that my actions were the reason they had to build this line extension. The reason all of this is in front of the Commission is because of MEC's actions of disconnecting our electricity to our place of residence.

I informed MEC and the Commission that I have a medical condition that requires full time continuous electricity supplied to our place of residence and that I needed my electricity reinstated to our place of residence. To this day MEC has made no effort to reinstate my electricity for the purpose of health reasons.

MOHAVE ELECTRIC CLAIMS CHANTELS HAD AN UNSAFE BUILDING CONDITION ON CHANTEL'S PROPERTY

In August of 2008 an MEC representative claimed that the art work that I was creating was in violation of some kind of electrical code. MEC did not discuss with me which electrical codes nor did they present a copy of any electrical codes that they claimed I was in violation of. I had no idea of what kind of electrical code violation MEC was referring to. MEC claimed that this so called violation was so serious and was so large that it merited the action of disconnecting the electricity to our place of residence. MEC contacted the Mohave County Planning Department and had Darrel Reidel and had a representative of Mohave Electric Cooperative come to our property and made a determination that there was some kind of safety violation. When I asked the representative of MEC for a written confirmation of what I was in violation of he replied, "We cannot give you that information". The meeting held on September 12, 2008 by the two above mentioned individuals appeared to be some kind of conclusion to conspire together to do harm to me. The reason I believe this is because the Mohave County Planning Safety Director (hereinafter referred to as MCP) did not even inspect my art work. It appeared that these two individuals made some kind of arrangement with one another so MCP could issue a letter of disconnect to MEC. We never did get any type of letter from MCP stating that they issued a letter of disconnect to MEC. On September 16, 2008 MEC had one of their linemen come to our door at about 4:00 P.M. and told my wife that they were

disconnecting our electricity. We did not have any kind of notice that MEC was going to disconnect our electricity on that day. We were not prepared to be without electricity. I have Sleep Apnea, which requires full time electricity to run my breathing machine. I went without my breathing machine for a number of days. After a period of time I was finally able to acquire some batteries, inverters and generators to supply enough power to run my breathing machine, but even today there are times when we do not have enough electricity to run our house and supply our needs.

If the Commissioners were to examine the ACC's records, you would find that a number of ACC workers tried to have us informed of our electricity disconnection. MEC was so adamant about turning off our electricity that most of the ACC employees did not have the authority to reject MEC's insistence to turn off our electricity.

LEGAL ISSUES AND FACTS

1. MEC claimed that I was building an art work or some type of structure in their (MEC's) right-of way.
2. FACT: MEC does not have a right-of-way over our property.
3. MEC claimed that my Art Work (structure) was in violation of National Electric Safety Code (hereinafter referred to as NESC) rule 234 table 234-1
4. FACT: According to rule 234 table 234-1 the distance should be 10 feet 6 inches above the top of a structure. MEC's engineering department reported to Tom Longtin on September 14, 2008 that the distance from MEC's line to the structure was 10 feet 6 inches, which Tom Longtin stated in his testimony to the ACC. My art work was not in violation of NESC like MEC claimed to Deb Reagan of the ACC. Even if it were to be in violation of the NESC, it did not merit turning off the electricity to our residence. Even if it were to be in violation it would not have been an unsafe condition to any general public because our property is fenced off from the general public and they do not have access to it. MEC wanted to damage us and our reputation to a point that they could cause government agencies to look at us as the persons that were doing wrong. All of MEC's claims are to take attention away from the fact that they do not have the right to transmit high voltage electricity over our property.
5. MEC failed to comply with NESC of maintaining safe electric lines and A.C.C. R14-2-208-1, which states that MEC is the responsible party for the safe transmission of electricity across our property.
6. MEC made false representation to government officials that I was in violation of NESC 234 Table 234-1.
7. MEC violated A.C.C. R14-2-211-A-2 and A.C.C. R14-2-211-A-5-a. & b. by refusing to reinstate Chantels electricity .
8. MEC failed to give legal notice in accordance to A.C.C. R14-2-211-D.
9. MEC failed to give legal written notice of termination in accordance to A.C.C. R14-2-211-E.
10. MEC violated A.C.C. 1 4-2-1616 CODE OF CONDUCT. If the ACC does not do something to maintain this code of conduct, every utility company will have no respect for the ACC. If that happens, every Arizona citizen will suffer.

MOHAVE DID NOT HAVE TO REQUEST THAT THE CHANTEL'S ELECTRICITY BE TRUNED OFF

1. MEC could have corrected the unsafe condition that existed on our property by adding one pole to lift up the unsafe lines.
2. MEC could have followed the Mohave County Planning letter that was sent to them telling them to "de-energize the line close to the building being constructed".
3. MEC disconnected the entire high powered transmission line over our property so they would not have to pay electrical transmission fees that I am charging them.
4. MEC's main reason for disconnecting our electricity was with the intent to cause us physical and financial harm.
5. MEC was informed that I have a medical need for full time electricity and even today they do not take that need into account.
6. MEC's actions are to cause harm to us without any regard to the law or the authorities of the ACC.

DAMAGES DONE BY MEC's ACTION OF TURNING OFF THE CHANTEL'S ELECTRICITY

1. MEC failed to notice us.
2. MEC's actions caused me to have an extended time without my breathing machine. As a result from the lack of the correct amount of oxygen, my thinking and judgment was impaired. This caused me to have an accident just a few days after we were without electricity. I had a broken clavicle and broken ribs.
3. MEC's actions caused great stress and anxiety to occur in our lives.
4. MEC's unjust taking of our electricity caused us to be treated as second rate citizens.
5. MEC's actions and false claims with governmental authorities caused mistrust and doubt in governing authorities and their actions.
6. MEC's actions caused me to break my clavicle and ribs, in which I was in great pain for months. This and the amount of work that my wife had to do to try and provide some kind of temporary electricity for my breathing machine caused such great mental and physical damage that she has lost faith that government is beneficial or has any concerns for the citizens it rules over.
7. MEC's disconnection of our electricity has caused the use of unstable electricity, which has caused damage to most of our electrical appliances.
8. MEC's disconnection of our electricity has damaged our green house operations as well as our landscaping.
9. These are just a few damages that we have experienced because of MEC's action of disconnecting our electricity unjustly and without legal merit.

MEC's MANAGEMENT MISREPRESENTATION OF ISSUES TO ACC EMPLOYEES

1. MEC's management made false claims to ACC employees that my art work was in violation of NESC at the time they requested the ACC employees to give them permission to disconnect our electricity.
2. MEC's management made false claims to ACC employees about the art project being a public safety issue.
3. MEC's management failed to disclose to ACC employees that I was concerned about the unsafe high voltage transmission lines that were on our property.
4. MEC's management failed to disclose to ACC employees that they did not have any recorded right-of-way to transfer high voltage electricity over our property.

MEC's management has caused so much damage and violated a number of State Statues and ACC Rules that I can only suggest a few possible directions that the ACC may want to proceed. I have no idea as to how concerned the Commissioner are about other members of the Cooperative or if the ACC even has the legal authority to correct the great many wrongs that have occurred.

RESPONSIBILITY

Is the MEC management responsible for the misrepresentation of issues to the ACC or are the members responsible because they have allowed these managers to represent the members?

If the Commission decides that MEC management has misrepresented the issue to the Commission, I suggest the following:

The line extension bill that MEC is billing us, become null and void.

My bill to MEC, be recognized as a valid bill for transmitting high voltage electricity over our property without a recorded easement.

The Commission order MEC's management to make cash payments to us for any extra electricity that we may provide into the grid system. These payments would be based on the same rate and surcharges that MEC was charging us. This appears to be within the new Commissioners' energy green plan.

IF the Commission feels that it is the members' responsibility to employ competent management employees, then it is the members' responsibility to make sure that MEC management complies with the rules set forth by the State and the Commission. The Commission can claim it does not have jurisdiction or it can create some other type of ruling. This will support my claim that we can cancel our membership in the Cooperative and move forward with a multimillion dollar law suit against all parties that are responsible for these injustices.

CONCLUSION

It appears that either MEC's management misrepresented the issues of this complaint to ACC employees or there are some employees within the ACC that are conspiring with MEC's management to protect them from assuming their responsibility of correcting the issues in this complaint.

The Chantel's ask for some kind of assistance to help get their lives back together.

Dated 3-21-09

Roger Chantel Roger Chantel

One original filed with the Arizona Corporation Commission along with thirteen copies submitted to the Docket Control on this _____ day of March, 2009.

One copy sent by U.S. mail to Robert E. Broz, Executive Officer of Mohave Electric Cooperative.

Darlene Chantel

Darlene Chantel

Exhibit 3

NOTE FILE NO. 1234-7-44-1
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AND INITIALED CB

ROGER and DARLENE CHANTEL
10001 E. HWY. 66
KINGMAN, ARIZONA 86401
PHONE (928) 757-9755

FORMAL COMPLAINT FILED AGAINST
MOHAVE ELECTRIC COOPERATIVE

DOCKET NO. E-01750A-09-0149

Roger and Darlene Chantel filed an informal complaint in accordance to ACC rule 14-2-212. The Commission has developed a set of rules for utilities and customers to use and follow if there are any unsafe conditions or any type of dispute over a bill that a utility has submitted to the customers that they supply service to. The Chantel's have done everything they know how to do to file the proper proceeding to the ACC.

ACC rule 14-2-212 B. CUSTOMER BILL DISPUTE

1. Any utility customer who disputes a portion of a bill rendered for utility service shall pay the undisputed portion of the bill and notify the utility's designated representative that such unpaid amount is in dispute prior to the delinquent date of the bill.
2. Upon receipt of the customer notice of dispute the utility shall:
    a. Notify the customer within five working days of the receipt of the written dispute notice.
    b. Initiate a proper investigation as to the source of the dispute.
    c. Withhold disconnection of service until the investigation is completed and the customer is informed of the results. Upon request of the customer the utility shall report the results of the investigation in writing.
    d. Inform the customer of his right of appeal to the Commission.

If the Commission fails to have a hearing on the above ACC rules it will not know if the utility violated them.

ACC Rule 14-2-212 C. COMMISSION RESOLUTION OF SERVICE AND BILL DISPUTES

1. In the event a customer and utility cannot resolve a service or bill dispute, the customer shall file a written statement of dissatisfaction with the Commission; by submitting such notice to the Commission, the customer shall be deemed to have filed an informal complaint against the utility.

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The Commission has established the informal complaint process, so the utility company can make some effort to resolve the differences that may exist between the customer and the utility company. The Commission holds hearings to determine how much effort a utility company has put forth to resolve the differences between the utility company and its customers.

If the Commission fails to have a hearing on the issues in this complaint, the general public should start to question why the Commission is in existence.

ACC Rule 14-2-208 PROVISION OF SERVICE

1. Utility's responsibility

    a. Each utility shall be responsible for the safe transmission and distribution of electricity.

Without a hearing the Commission will not be able to determine if MEC has safe transmission lines.

ACC Rule 14-2-207 LINE EXTENSIONS

A. General Requirements

4. Where the utility requires an applicant to advance funds for a line extension, the utility shall furnish the applicant with a copy of the line extension tariff of the appropriate utility prior to the applicant's acceptance of the utility's extension agreement.
5. All line extension agreements requiring payment by the applicant shall be in writing and signed by each party.

B. Minimum Written Agreement Requirements

1. Each line extension agreement shall, at the minimum, include the following information:
    a. Name and address of applicant or applicants;
    b. Proposed service address or location;
    c. Description of requested service;
    d. Description and sketch of the requested line extension;
    e. The cost estimate to include materials, labor, and other costs as necessary;
    f. Payment terms;
    g. A concise explanation of any refunding provisions, if applicable;

h. Utility's estimated start date and completion date for construction of the line extension, and
i. A summary of the results of the economic feasibility analysis performed by the utility to determine the amount of advance required from the applicant for proposed line extension.

2. Each applicant shall be provided with a copy of the written line extension agreement.

The Chantel's claim they did not enter into a line extension agreement. Since they did not enter into a line extension agreement they claim they do not owe the bill submitted by the utility.

The utility claims that the Chantel's constructed their art work in the utility's right-of- way. The Chantel's claim that MEC does not have a recorder right-of-way where construction is located.

MEC claims that there was a severe safety violation that placed the general public at a dangerous risk and that is why MEC should disconnect the Chantel's electricity. These are just a few of the misrepresentations that MEC has presented to the Commission and its employees.

If the Commission, for some unknown reason, refuses to examine MEC's actions in this complaint it would lead the general public to believe that the elected officials have abandoned the laws set forth by previous Commissioners.

The Commission will never know how much suffering MEC has caused the Chantel's.
I believe if Mr. Broz, of MEC, would sit down with me we could probably resolve the few important issues in this complaint and there would be no need for a hearing.

There is the other side of this complaint and how large it could become as we proceed into the legal process; the new laws that will be presented to the State Legislatures, the press releases, and the news articles that will be generated over the subject matter in this complaint, the time the Commissioner and the ACC employees will spend under oath in legal depositions and testifying in these legal proceedings. This could grow into a large event and be in the news for 3 to 6 years. I am not in favor of spending 6 years of my life bringing forth the truth about this complaint.

Respectfully submitted on May 5, 2009

Roger Chantel

ORIGINAL mailed this 5th day of May, 2009 to:

Docket Control
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, AZ 85007

COPIES mailed on the 5th day of May, 2009 to:

Lyn Farmer, Chief Hearing Officer
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, AZ 85007

Janice Alward, Legal Division
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, AZ 85007

Ernest Johnson, Utilities Division
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, AZ 85007

Michael A. Curtis
Larry K. Udall
501 East Thomas Road
Phoenix, AZ 85012-3205
Attorneys for Mohave Electric Cooperative

Roger Chantel

Exhibit 4

The Law Offices of
CURTIS, GOODWIN, SULLIVAN,
UDALL & SCHWAB, P.L.C.
501 East Thomas Road
Phoenix, Arizona 85012-3205
Telephone (602) 393-1700
firm@cgsuslaw.com
Michael A. Curtis (#001876)
Mcurtis401@aol.com
Larry K. Udall (#009873)
ludall@cgsuslaw.com

Attorneys for Mohave Electric Cooperative, Inc.

FILED
BY _____
2011 JUN -3 AM 11: 04
VIRLYNN TINNELL
SUPERIOR COURT CLERK

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MOHAVE

DUSTIN R. CHANTEL and ELIZABETH D. CHANTEL, husband and wife, Plaintiffs, v. MOHAVE ELECTRIC COOPERATIVE, INC., an Arizona non-profit corporation; JOHN and JANE DOES, I-X; BLACK and WHITE CORPORATIONS I–X, Defendants.	CASE NO. CV 2009-2574 DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON ALL COUNTS OF PLAINTIFFS (Assigned to The Honorable Lee F. Jantzen) (*Oral Argument Requested*)

Pursuant to Rule 56, *Arizona Rules of Civil Procedure*, Mohave Electric Cooperative, Inc. ("MEC") moves for summary judgment on all counts in Plaintiffs' Complaint, there being no genuine issues of material fact and no basis for reasonable individuals to differ on the outcome of Plaintiffs' claims.

This lawsuit arises out of the Plaintiffs' construction of a survivalist building (referred to hereafter as the "Artwork") in MEC's prescriptive utility easement where MEC

has had overhead distribution lines for many decades (the construction of which was in violation of industry standards for overhead clearance) and which Artwork was built without a Mohave County building permit. Furthermore, the Artwork was constructed using extremely unorthodox construction methods, this fact being one of the apparent grounds for Mohave County instructing MEC to de-energize it lines over the Chantel property and failed to give MEC notice of its construction of the Artwork, a violation of A.R.S. § 40-360.41.

The Plaintiffs' have contended that: 1) the survivalist structure is "artwork" and therefore not subject to the Mohave County building code; and 2) the Artwork was built to protect themselves from MEC's distribution lines. These contentions are inextricably tied to the Arizona Corporation Commission's ("ACC") oversight and jurisdiction on such matters. In addition, to this lawsuit, Plaintiffs have filed complaints at the ACC and in Mohave County Superior Court (CV2009-0058, dismissed by Judge Chavez), all of which proceedings were resolved in favor of MEC.

For each of the claims Plaintiffs have asserted in their Complaint: 1) they have failed to either make or to assert a *prima facie* showing of all elements necessary for each of their asserted causes of action through their Complaint and their Disclosure Statements (as supplemented); and 2) reasonable individuals would not differ as to the outcome if the evidence Plaintiffs have identified in the Disclosure Statements, along with Mr. Chantel's testimony (taken in a deposition) were submitted to a jury. Additionally, Plaintiffs' Disclosure Statement supports MEC's contention that this matter is subject to the ACC's jurisdiction.

This Motion is supported by the following Statement of Facts and Memorandum of Points and Authorities, from which paragraph therein will be identified as "SOF ¶ __".

MEMORANDUM OF POINTS AND AUTHORITIES

FACTS

In the summer of 2008, Plaintiffs started the construction of a survivalist concrete building on their rural 10 acre property east of Kingman (the "Artwork"). (SOF ¶ 2). When Mohave County officials observed the construction at a distance, it was obvious that the building was not being constructed under conventional building construction principles. (SOF ¶¶ 3, 4). When asked by the Special Services Department Staff of Mohave County to apply for a building permit, the Chantels stated that the building was "art work" and refused to submit a building permit application. (SOF ¶ 46).

The Plaintiffs never obtained a building permit for the 6,200 square foot Artwork. (SOF ¶ 49).

About the same time that Mohave County was raising concerns about the construction issues, MEC became aware and had its own concerns that the Artwork was being constructed in MEC's prescriptive easement (for distribution lines that had existed for many decades). (SOF ¶¶ 8-14).

MEC personnel measured the distance between the distribution lines and the Artwork and determined that the distance was short of the requirements of industry standards. (SOF ¶ 9).

On or about August 7, 2008, Darrell Riedel of Mohave County's Special Services Department issued a stop order regarding the Plaintiffs' building under MEC's distribution line for which MEC had either prescriptive or express easement rights. (SOF ¶ 7).

On or about August 18, 2008, Darrell Riedel of the Mohave County Special Services Department contacted Mr. Williams of MEC and informed him that Plaintiff said that he would cooperate and planned to get a building permit. However, Mr. Riedel explained to Mr. Williams that Plaintiffs' building could never qualify for a permit because the structure

did not comply with County building codes. (SOF ¶ 10).

Because of building code issues and other legitimate concerns, the Mohave County Special Services Department issued a letter to MEC on or about September 12, 2008 instructing MEC to immediately de-energize the electric line directly over the Artwork. (SOF ¶ 11).

After the MEC transmission and power lines over the Plaintiffs' premises were de-energized, Plaintiffs filed an informal complaint with the ACC against MEC on or about September 30, 2008 (the "2008 Informal Complaint"). (SOF ¶ 21). In response to, and as an absolution of the alleged wrongdoing against Mohave in the 2008 Informal Complaint, Steven Olea prepared a report (the "Olea Report") absolving MEC of any wrongdoing or violation of its tariffs in the deenergizing of the distribution lines and the termination of power to the Plaintiffs.[1] The Olea Report exhaustively addressed all of the Plaintiffs' allegations in the 2008 Informal Complaint (which allegations continue in the 2009 Formal Complaint and the Supplement). (SOF ¶ 24).

The Olea Report also notes that Mohave County personnel advised the Plaintiffs that if they did not dismantle the structure on their property, their electric service might require termination for reasons the County articulated to the Plaintiffs. (SOF ¶ 25).

A line drop from the overhead distribution lines served both the Plaintiffs' residence and a nearby railroad train signal. Had Plaintiffs engaged in any conduct on the Artwork that might cause the circuit breaker to open, power to the railroad train signal would had been cut, creating an unacceptable risk. (SOF ¶ 13).

Plaintiff Chantel could not identify any basis for the claim of ejectment in his Complaint. (SOF ¶ 50).

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[1] A copy of the Olea Report is attached to the Court's copy of this Motion as a courtesy.

MEC has had transmission poles along Highway 66 for at least 40 years. SOF ¶ 29.

DISCUSSION

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c)(1); *Orme School v. Reeves*, 166 Ariz. 301, 305, 802 P.2d 1000, 1004 (1990). Moreover, summary judgment should be granted when 'reasonable people could not differ' as to the facts presented by the evidence or the inferences to drawn therefrom." *Id.* at 304, 802 P.2d at 1003 (*quoting, Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

I. **<u>There are no Material Issues of Fact</u>.**

The crux of this case is – the Plaintiffs constructed, directly under MEC's distribution lines (in violation of A.R.S. § 40-360.41) a 6,200 square foot structure built under unproven construction techniques (inspired from Heaven, Mr. Chantel's own words), without a permit, and without allowing the inspection of the structure. Mohave County instructed MEC to de-energize all transmission and power lines over the Plaintiffs' property and MEC complied. The majority of the material facts presented reflect the actions of the Plaintiffs above are uncontested and come from Plaintiff Chantel's own deposition, Disclosure Statements or from the Olea Report.

The Plaintiffs received reasonable and adequate warning from MEC and Mohave County regarding the issues created by the Artwork. Although the clearance shortage of the MEC distribution lines over the Artwork was not great, it still created almost strict liability for MEC if any incident with injury occurred there – MEC had actual knowledge of a structure in its utility easement that had inadequate clearance and which had construction issues.

Plaintiffs filed an informal complaint with the ACC, and the allegations of MEC's alleged wrongdoings were quickly dispatched in favor of MEC by Steven Olea, an

ACC Utilities Division official. MEC was absolved of any wrongdoing by the state agency imbued with the power to oversee wrongful conduct by a utilities company. All of the foregoing facts are not in dispute. They alone are sufficient to resolve all of the Plaintiffs' allegations in favor of MEC. MEC owed no absolute duty to deliver power under any circumstance to the Plaintiffs. Consequently, Plaintiffs' entire Complaint is easily disposed of on summary judgment for MEC.

II. Plaintiffs Have Not Alleged or Demonstrated *Prima Facie* Cases For Each of the Seven Counts and Reasonable Persons Would Not Differ On The Outcome.

Summary judgment is appropriate when a plaintiff fails to assert evidence essential for a *prima facie* showing of the necessary elements for each claim. *See*, *Hydroculture, Inc. v. Coopers & Lybrand*, 174 Ariz. 277, 283, 848 P.2d 856, 862 (App. 1992). The following analysis compellingly demonstrates that the Plaintiffs have not even asserted *prima facie* cases or presented evidence for a *prima facie* case for all of their causes of action presented in their Complaint, as supplemented by their Disclosure Statement.[2]

Since most of Plaintiffs' claims are based on or arise from MEC's de-energizing of the power line to the Plaintiffs' residence, MEC reasserts its position that the Plaintiffs' claims are properly under the jurisdiction of the ACC.

MEC addresses each of the individual counts found in Plaintiffs' Complaint and summarizes the compelling evidence and legal arguments supporting summary judgment.

COUNT ONE - Alleged Breach of Contract

For a *prima facie* case, Black Letter law requires Plaintiffs to identify a contract

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[2] Plaintiffs' case is entirely based on the actions MEC took (de-energizing the power line to the Plaintiffs' residence) when MEC was instructed to do so and because MEC also concluded that the Plaintiffs' newly constructed Artwork Structure posed serious risks due to violations of industry standards for clearance between a structure and high voltage electric distribution lines.

and or the specific terms of the alleged contract. They have not done so. Arizona law requires that an enforceable contract have consideration, a mutuality of obligation and clear terms to permit parties to determine obligations. *See, Malcoff v. Coyier*, 14 Ariz.App. 524, 484 P.2d 1053 (1971).[3] Plaintiffs have not identified any contract that purports to obligate MEC to supply uninterrupted power. There is no express or oral contract between MEC and the Plaintiffs that creates any duty for delivery of power. No case has been found by undersigned counsel that holds that a contract exists between a cooperative utility company and its cooperative member for the unconditional delivery of power in exchange for monthly payment. The fact that MEC delivers power to its customers in a safe and reliable manner does not give Plaintiffs the right to characterize that as a contractual obligation. Utilities do not contractually guarantee their services to customers. Thus, for Plaintiffs to contend that MEC has a contractual obligation is simply a ruse for the Plaintiffs to bootstrap themselves to claim that such an alleged contractual obligation has been breached. There is no contract between the Plaintiffs and MEC for the delivery of uninterrupted electricity. In any event, if such a contractual relationship were to exist under case law, then the breach of such common law obligation would require the ACC's scrutiny and expertise under the primary jurisdiction doctrine. The foregoing supports the dismissal of Count One.

COUNT TWO - Alleged Breach of Covenant of Good Faith and Fair Dealing

A cause of action for an alleged breach of the covenant of good faith and fair dealing requires some form of valid, contractual relationship with definable terms. *See, Rawlings v. Apodaca*, 151 Ariz. 149, 153,726 P.2d 565, 569 (1986). Without a valid, underlying contract between Plaintiffs and MEC, there can be no implied covenants of good faith and fair dealing; they do not exist between Plaintiffs and MEC. MEC is entitled to

[3] The Plaintiffs' Application for cooperative membership and the cooperative bylaws do not constitute a contract for unconditional delivery of power.

summary judgment.

COUNT THREE - Quiet Title

For a *prima facie* case, Plaintiffs must comply with the statutory scheme found at A.R.S. § 12-1101, *et seq*. To quiet title to property, written demand must be given, along with a $5 bill or check and a quit claim deed. Plaintiffs have not alleged compliance with state law in the Complaint or in their Disclosure Statement. Consequently, Plaintiffs cannot quiet title to MEC's prescriptive utility easement which has existed for at least 40 years by the actual presence of the poles. Plaintiffs seem to claim they want "control" over the prescriptive utility easement MEC has sought to abandon once the Plaintiffs permit MEC to remove its poles and distribution line cable.[4] Plaintiffs are not entitled to any recovery of legal fees of costs because they have failed to comply with the requirements of A.R.S. § 12-1102 B.[5]

COUNT FOUR - Ejectment

This statutory cause of action requires, for a *prima facie* claim, the allegation that Plaintiffs have been dispossessed of their land, which Plaintiffs have not alleged nor which ever occurred. Plaintiffs only allege they are the rightful owners of the Property. That is inadequate; they must allege they have been dispossessed and that they are entitled to immediate possession (see A.R.S. § 12-1251). Plaintiff Chantel admitted that he has not been dispossessed of his property (SOF 52). Plaintiffs have no cause of action for ejectment, they have not been dispossessed of their real property. No further analysis is required.

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[4] The existence of MEC's prescriptive utility easement is beyond dispute – it exists as a matter of law.

[5] A case similar in facts is *Municipal Electric Authority of Georgia v. Gold-Arrow Farms*, 625 S.E.2d 57 (2005) where a homeowner built a garage under high voltage distribution lines in the utility company's utility easement. The homeowner was found in trespass of the utility company's easement. Similarly, the Plaintiffs have trespassed on the prescriptive utility easement of MEC (case attached).

COUNT FIVE - Recovery of Rents

For *a prima facie* claim for rent under A.R.S. § 12-1271, one of the statutory grounds must be alleged.[6] Plaintiff admits in deposition that MEC has a presence that exceeded 10 years, giving MEC's prescriptive utility easement.[7] There are no issues of fact; Plaintiffs have simply alleged a cause of action for which they cannot make a *prima facie* claim. MEC never had any form of possession of any of the Plaintiffs' land (apart from a prescriptive utility easement arising from the presence of MEC's poles for in excess of ten years). Plaintiffs have not alleged that any party other than themselves had possession. Therefore, MEC was unable to collect rent from any third party and it never occupied the premises. MEC simply had a prescriptive utility easement in which it never quieted title to the easement. That fails to give any ground for a cause of action denominated as Recovery of Rents.

COUNT SIX - Negligence

For a *prima facie* claim, Plaintiffs must contend that MEC owed a recognized duty to them[8] (*see, Tamsen v. Weber,* 166 Ariz. 364, 802 P.2d 1063 [(Div.I 1990), which also cites the established case law that judge makes determination of whether a duty exists]. MEC has no duty under the common law for the delivery of electric power. Any duties MEC owes are found in its tariffs with the ACC and in its membership bylaws. There is no common law duty for a utility company to unconditionally deliver power to a resident within the utility

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[6] The statutory grounds are: 1) rent is due under a lease; 2) lands are occupied without any agreement for rent or tenant has overstayed a lease; 3) before purchase agreement is consummated, seller terminates agreement because of buyer's non-compliance; and 4) where possessor of premises sold under judgment of court refuses to surrender possession.

[7] The prescriptive easement was effectively abandoned by MEC's withdrawal of its power line to the Plaintiffs' residence, which was also confirmed in writing.

[8] In its pleadings, Plaintiffs suggest two duties: 1) an unconditional duty for the delivery of electric power; and 2) a duty to maintain transmission poles at a distance under 600 feet. There is no legal support for either suggested duty. This Court can rely on ACC's determination that MEC did no wrong and breached no duties. Moreover, whether MEC did not meet industry standards is a matter for the ACC and over which this Court has no jurisdiction.

company's certificated area of convenience. If any tariffs or other statutory or administrative duties have been breached, those breaches must be addressed by the ACC. The Plaintiffs sought to address their grievance with MEC by filing both an informal and a formal complaint with the ACC. The informal complaint was summarily dismissed by Steven Olea through his November 5, 2008 report. The Plaintiffs decided to abandon their pursuant of a formal Complaint before the ACC when they concluded that matters were not going in their favor and they filed a complaint with the Mohave County Superior Court.

Since Plaintiffs cannot point to a common law duty for the delivery of electricity to their residence, the Court's inquiry should cease here and Plaintiffs' claim for negligence should be summarily dismissed. However, even if a duty existed, MEC has not breached any conceivable duty. Further, if MEC owed a duty to supply power or to supply uninterrupted power, such purported duty was not breached because MEC only terminated Plaintiffs' access to MEC power.

Additionally, if MEC owed a duty to the Plaintiffs, then Plaintiffs waived that duty when they: 1) constructed a 6,200 square foot building in violation of the Mohave County building codes (the principal factor in Mohave County instructing MEC to de-energize the electric line to the Plaintiffs' residence); and 2) constructed the building too close to the MEC overhead distribution lines.

Plaintiffs contend that MEC breached its (alleged) duty by "allowing too great of distance between the wooden poles supporting the Old Line on the Property and wrongfully disconnecting the electricity to the Chantels' residence". First, this feigned issue can solely be resolved by the ACC. In any event, if that alleged breach is the strongest argument for a breach of the (unsubstantiated) duty for delivery of power, Plaintiffs have no damages because the distance between the distribution line poles has not produced any injuries or damages for the Plaintiffs! MEC's counsel has not found any case law that supports Plaintiffs' contention

and Plaintiffs have not cited any evidence in either their Disclosure Statement or in their Response to MEC's Rule 12(b)(6) Motion to Dismiss. If any duty exists and is owed by MEC (as an ACC-regulated cooperative) to the Plaintiffs, whether this duty was breached is clearly within the oversight of the ACC for adjudicating.

COUNT SEVEN - Intentional Infliction of Emotional Distress

This purported cause of action relates directly to the allegations that Mohave's removal of the overhead distribution lines and the connection to the Plaintiff's residence violated ACC rules and procedures. The primary jurisdiction doctrine squarely applies to bring this matter under the ACC's jurisdiction. The ACC has found no wrongdoing in MEC's actions and neither should this Court.

Punitive/Exemplary Damages

This is not a cause of action; it is a remedy which must be associated with appropriate causes of action. Moreover, punitive damages cannot be awarded in contractual matters [*see, Continental Nat'l Bank v. Evans,* 107 Ariz. 378, 382, 489 P.2d 15, 19 (1971); *see also Rawlings,* 151 Ariz. at 161-62, 726 P.2d at 577-78] and cannot be awarded in tort unless there is clear and convincing evidence that a defendant had evil motives and presented great risk of harm to others. *Wyatt v. Wehmueller*, 167 Ariz. 281, 806 P.2d 870 (1991). The primary consideration in determining the propriety of punitive damages is reprehensibility of conduct and severity of harm. *Hooper v. Truly Nolen of America, Inc.* 832 P.2d 709 (App. Div 1 1992). Unquestionably, the best arbiter of whether MEC's conduct was worthy of severe sanction is the ACC's utility division, where scrutiny of Arizona's utility companies is a daily event. Steven Olea, an officer of the ACC utilities division, had the opportunity to scrutinize MEC's conduct and found no improprieties of any kind. MEC asks this Court to make the same determination.

III. Additional Evidence Supports MEC's Affirmative Defense of Lack of Jurisdiction for this Motion for Summary Judgment.

MEC previously filed a Rule 12 (b)(6) motion to dismiss in this proceeding, based on the defense that this Court lacks jurisdiction over claims arising from the Plaintiffs' wrongful conduct that led to the disconnect of power to the Plaintiffs' residence (at the instruction of Mohave County). This matter originated in ACC proceedings from which the Plaintiffs sought to change the forum when they learned that the ACC could not award punitive damages. Ironically, the principal basis for the Plaintiffs' construction of the Artwork is their theory that the MEC poles on their property were too distant apart. When MEC advised Plaintiffs that Plaintiffs' claims for punitive damages could not be determined by the ACC, Plaintiffs moved for change of venue from the ACC to Mohave County Superior Court. Moreover, nowhere in the deposition of Mr. Chantel did he articulate any claim that was not overwhelmingly based on his claim that MEC's poles were too far apart." Mr. Chantel's deposition testimony lacks any evidence of wrong-doing on the part of MEC.

The Plaintiffs have also contended that two Arizona appellate decisions provided grounds for their lawsuit to go forward in Mohave County Superior Court even though the termination of service is clearly an ACC matter (see, A.A.C. R14-2-211). The first case, *Qwest Corp. v. Kelly*, 204 Ariz. 25, 59 P.3d 789 (Div. II App. 2003), pertained to a fraudulent misrepresentation claim (involving tenants who purchased a monthly inside wire maintenance service from Qwest). The matter at hand deals with MEC termination of service to Plaintiffs. The second case, *Campbell v. Mountain States Telephone & Telegraph Co.*, 120 Ariz. 426, 586 P.2d 987 (Div. I App. 1978), dealt with the telephone company intentionally interfering with a customer's telephone service. Those two cases involved utility companies whose conduct was beyond the ACC's jurisdiction over service and termination issues. That is not so here. Plaintiffs' service was terminated for valid reasons which the ACC has supported. There was no wrongful conduct. Moreover, Plaintiffs have raised bogus defenses to Mohave

County's stop work orders, Mohave County's instruction to MEC to disconnect service to Plaintiffs, and MEC's subsequent disconnection of service to Plaintiffs (e.g. Plaintiffs' building was "artwork " and didn't need a building permit; MEC's poles were too far apart, etc.), all of which have been and should be resolved (as legitimate or bogus defenses to Mohave County and MEC's actions) by the ACC, not a court of general jurisdiction.

IV. **Attorneys Fee are Warranted.**

Plaintiffs' Complaint was brought after the Utility Division of the ACC investigated the Plaintiffs' grievances. Mr. Steven Olea of the ACC prepared a report and found absolutely no wrongdoing on MEC's part. Plaintiffs have not presented any additional evidence over what they presented for Mr. Olea's review when he summarily dismissed the Plaintiffs' informal complaint filed with the ACC. Plaintiffs have not been able to make even a *prima facie* case for any of the claims presented in their Complaint and lack any evidence of MEC acting wrongfully or breaching any duty. Accordingly, this lawsuit has been brought for harassment purposes, without substantial justification, has not been made in good faith, and is without any merit. MEC will file an application for attorney's fees under A.R.S. §§ 12-341.01 C and 349.

V. **MEC Reasserts the Jurisdiction of the ACC over Plaintiffs' Claims.**

MEC acknowledges its earlier Motion to Dismiss was based on the legal argument that the ACC had jurisdiction over Plaintiffs' allegations and had summarily dealt with them under Plaintiffs' informal complaint. After conducting forum shopping by filing a Petition for Writ of Mandamus in Mohave County Superior Court (where Judge Chavez concluded that the ACC had jurisdiction), the Plaintiffs filed a formal complaint with the ACC. However, when Plaintiffs' discovered (when advised by MEC's counsel) they could not pursue tort claims and punitive damages in an ACC matter, they sought removal to this Court. MEC now alleges that with the additional information gleaned from Plaintiff Chantel's deposition,

and the presentation of extrinsic evidence, the evidence now clearly demonstrates that the bulk of Plaintiffs' claims (purportedly arising under contract, quasi-contract or tort), belong before the ACC.

VI. **Conclusion**.

Reasonable persons would not differ because there are no genuine issues of material fact; Plaintiffs have failed to allege *prima facie* claims that can withstand a motion for summary judgment. There are no material issues of fact relative to what occurred when MEC responded to Mohave County's instruction to it to de-energize the power line that crossed over the Plaintiffs' Artwork and also acted on its own concerns and knowledge that the Artwork had inadequate clearance. The only bad conduct was on the part of the Plaintiffs.

Plaintiffs are categorically unable to demonstrate that MEC's de-energizing of the power line to their residence was improper, wrongful, or the breach of any contractual or case law-created duty. Steve Olea, a senior officer in the Utilities Division of the ACC determined, in a written response to the Plaintiffs' informal Complaint, that MEC had acted properly. The Plaintiffs' lawsuit is nothing more than an attempt to "forum shop" after concluding they could not prevail on their "appeal" of their informal complaint before the ACC, which appeal is pending. Accordingly, MEC respectfully urges this Court to grant its Motion for Summary Judgment against all of Plaintiffs' counts.

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DATED this 2nd day of June, 2011.

CURTIS, GOODWIN, SULLIVAN,
UDALL & SCHWAB, P.L.C.

By: _____
Michael A. Curtis
Larry K. Udall
501 East Thomas Road
Phoenix, Arizona 85012-3205
Attorneys for Mohave Electric
Cooperative, Inc.

Original of the foregoing mailed
this 2nd day of June, 2011, to:

Clerk of Court
Mohave County Superior Court
401 E. Spring Street
P.O. Box 7000
Kingman, Arizona 86402

Copy of the foregoing mailed
this 2nd day of June, 2011 to:

The Honorable Lee F. Jantzen
Mohave County Superior Court
P.O. Box 7000
Kingman, Arizona 86402-7000

Mr. and Mrs. Chantel
10001 East Highway 66
Kingman, Arizona 86401

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West Reporter Image (PDF)

276 Ga.App. 862, 625 S.E.2d 57, 05 FCDR 3798

Briefs and Other Related Documents
Judges and Attorneys

Court of Appeals of Georgia.
MUNICIPAL ELECTRIC AUTHORITY OF GEORGIA et al.
v.
GOLD-ARROW FARMS, INC. et al.
Georgia Power Company
v.
Gold-Arrow Farms, Inc. et al.
Interstate Fibernet, Inc.
v.
Gold-Arrow Farms, Inc. et al.

Nos. A05A1400, A05A1401, A05A1402.
Nov. 29, 2005.
Reconsideration Denied Dec. 14, 2005.
Certiorari Denied May 8, 2006.

Background: Property owners brought action against electric utilities and telecommunication providers, alleging that utilities exceeded the scope of easement across owners' land when they leased excess capacity in fiber optic line to telecommunication companies for general telecommunications. The Superior Court, Decatur County, Porter, J., granted property owners partial summary judgment. Defendants appealed.

Holdings: The Court of Appeals, Andrews, P.J., held that:
(1) easements unambiguously allowed for electric communication lines without any limit prohibiting use for general telecommunications;
(2) easements permitted construction of fiber optic communication line; and
(3) utility was not entitled to dismissal of owners' claims based on claim that telecommunications company could have forced utility to place line through condemnation.

Affirmed in part, reversed in part, and remanded in part.

West Headnotes

[1] KeyCite Citing References for this Headnote

372 Telecommunications
372III Telephones
372III(D) Franchises or Licenses and Rights of Way
372k795 Right of Way or Other Interest in Private Land
372k796 k. In General. Most Cited Cases

Easements that allowed electric utilities to construct electric transmission, distribution, and communication lines across property owners' land unambiguously granted easements for electric communication lines without any limit prohibiting use for general telecommunications; there was no language in the easements that indicated the term "communication lines" excluded general telecommunications or was limited to electric industry uses, and thus, nothing prevented utilities from contracting with telecommunication companies to allow companies to sell, lease, or license telecommunications capacity across lines.

[2] KeyCite Citing References for this Headnote

141 Easements
141II Extent of Right, Use, and Obstruction
141k39 Extent of Right
141k42 k. By Express Grant or Reservation. Most Cited Cases

Construing the language in express easements is governed by the rules of contract construction.

[3] KeyCite Citing References for this Headnote

141 Easements
141II Extent of Right, Use, and Obstruction
141k61 Actions for Establishment and Protection of Easements
141k61(9.5) k. Trial. Most Cited Cases

Generally construing the language of an express easement presents a question of law for the court, unless the language presents an ambiguity that cannot be resolved by the rules of construction.

[4] KeyCite Citing References for this Headnote

141 Easements
141II Extent of Right, Use, and Obstruction
141k39 Extent of Right
141k42 k. By Express Grant or Reservation. Most Cited Cases

The cardinal rule of construction of an express easement is to ascertain the intent of the parties.

[5] KeyCite Citing References for this Headnote

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k147 Intention of Parties
95k147(2) k. Language of Contract. Most Cited Cases

Where the contract terms are clear and unambiguous, the court will look to that alone to find the true intent of the parties.

[6] KeyCite Citing References for this Headnote

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k143.5 k. Construction as a Whole. Most Cited Cases

95 Contracts KeyCite Citing References for this Headnote
95II Construction and Operation
95II(A) General Rules of Construction
95k147 Intention of Parties
95k147(3) k. Construing Whole Contract Together. Most Cited Cases

To determine the intent of the parties, all the contract terms must be considered together in arriving at the construction of any part, and a construction upholding the contract in whole and every part is preferred.

[7] KeyCite Citing References for this Headnote

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k151 Language of Instrument
95k152 k. In General. Most Cited Cases

When the language employed by the parties in their contract is plain, unambiguous, and capable of only one reasonable interpretation the language used must be afforded its literal meaning and plain ordinary words given their usual significance.

[8] KeyCite Citing References for this Headnote

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k143 Application to Contracts in General
95k143(2) k. Existence of Ambiguity. Most Cited Cases

An "ambiguity" in a contract is defined as duplicity, indistinctness, an uncertainty of meaning or expression used in a written instrument, of doubtful or uncertain nature, wanting clearness or definiteness, difficult to comprehend or distinguish, of doubtful purport, and open to various interpretations.

[9] KeyCite Citing References for this Headnote

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k169 k. Extrinsic Circumstances. Most Cited Cases

Where ambiguities exist, the court may look outside the written terms of the contract and consider all the surrounding circumstances to determine the parties' intent.

[10] KeyCite Citing References for this Headnote

157 Evidence
157XI Parol or Extrinsic Evidence Affecting Writings
157XI(D) Construction or Application of Language of Written Instrument
157k448 k. Grounds for Admission of Extrinsic Evidence. Most Cited Cases

Parol evidence may not be considered unless the written instrument is ambiguous.

[11] KeyCite Citing References for this Headnote

372 Telecommunications
372III Telephones
372III(D) Franchises or Licenses and Rights of Way
372k795 Right of Way or Other Interest in Private Land

372k796 k. In General. Most Cited Cases

Easements that permitted electric utilities to construct electric communication lines across land also permitted the construction of fiber optic communication line; placing fiber optic line on the easements instead of electric communication line was an accommodation to technology within the scope of the easement and amounted to a change in the degree of use rather than the kind of use.

[12] KeyCite Citing References for this Headnote

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(A) Issues and Questions in Lower Court
30k169 k. Necessity of Presentation in General. Most Cited Cases

The Court of Appeals is for the correction of errors, and where the trial court has not ruled on an issue, the Court of Appeals will not address it.

[13] KeyCite Citing References for this Headnote

372 Telecommunications
372III Telephones
372III(D) Franchises or Licenses and Rights of Way
372k795 Right of Way or Other Interest in Private Land
372k796 k. In General. Most Cited Cases

The contract between electric utility and telecommunication company, which allowed for placement of fiber optic communication line on utility's easements, was not simply an agreement to allow right-of-way use, but rather it was a contract in which the parties negotiated mutually beneficial terms for operation of a shared fiber optic communication system, which included the right to use utility's structures on the easements at issue that could not have been obtained by condemnation, and thus, utility was not entitled to dismissal of landowners' claims that easements did not authorize placement of fiber optic line based on claim that telecommunications company could have forced utility to place line through condemnation.

***58** Alston & Bird, Peter M. Degnan, David M. Meezan, King & Spalding, Nolan C. Leake, John S. Darden, Atlanta, Troutman Sanders, Daniel S. Reinhardt, Scott A. Farrow, Michael E. Johnson, Thomas E. Reilly, Floyd & Lambert, George C. Floyd, Bainbridge, McNatt & Greene, Hugh B. McNatt, Atlanta, Friend, Hudak & Harris, William D. Friend, Charles A. Hudak, Bouhan, Williams & Levy, Roy E. Paul, Leamon R. Holliday III, Savannah, for appellants.

Kirbo & Kendrick, Bruce W. Kirbo, Bruce W. Kirbo, Jr., David A. Kendrick, Bainbridge, for appellees.

Minor, Bell & Neal, Charles J. Bethel, Mark M. Middleton, amici curiae.

ANDREWS, Presiding Judge.

***862** These appeals concern whether express easements originally granted to Georgia Power Company (GPC) to construct and operate "electric transmission, distribution and communication lines" not only permit the electric transmission and distribution lines constructed across the easements, but also permit a fiber optic communication line constructed across the easements and used for the purpose of general telecommunications. The owners of land traversed by the easements, **Gold-Arrow** Farms, Inc., Sugar Plum Properties Associates, Ltd., A.E. Hester, and Jerry L. Jones (the plaintiffs), filed an action against GPC, **Municipal Electric Authority** of Georgia (MEAG), Georgia Public Web, Inc. (GPW), and Interstate Fibernet, Inc. (IFN) (the defendants). GPC and MEAG are the electric power companies which currently own the easements. IFN contracted with GPC to construct, operate, and share a fiber optic communication line across the GPC-owned easements, and GPW contracted with MEAG to lease a fiber optic communication line constructed by MEAG across the

easements currently owned by MEAG. Under the contracts, IFN and GPW offered telecommunications services by selling, leasing, or licensing communication capacity in the fiber optic line to third-party telecommunication***59** companies for the purpose of transmitting general telecommunications. The plaintiffs concede that the easements permit the fiber optic line to the extent it is used for the purpose of transmitting internal communications by GPC and MEAG necessary for operation of their electric transmission and distribution lines. But the plaintiffs allege that the defendants exceeded the scope of the easements when communication capacity in the fiber optic line in excess of that used internally by GPC and MEAG was either used, or was sold, leased or licensed to telecommunication companies, for the purpose of general telecommunications. In addition to seeking class action certification to represent similarly situated landowners, the plaintiffs seek the award of actual and punitive damages based on claims for trespass on the easements, breach of the easement agreements, malicious interference with the easements, unjust enrichment, estoppel, and breach of the duty of good faith and fair dealing. The plaintiffs also seek injunctive and declaratory relief.

The plaintiffs moved for partial summary judgment on the declaratory relief sought in count six of their amended complaint in ***863** which they asked the trial court to declare that the easements limit use of the fiber optic line to internal communications by GPC and MEAG related to their transmission and distribution of electricity, and that use of the line for general telecommunications, or the sale, lease or license of the line to others for general telecommunications, exceeds the scope of the easements. The defendants responded and filed cross-motions for summary judgment on all of the plaintiffs' claims contending that use of, or sale, lease or license of the fiber optic line for the purpose of general telecommunications is within the scope of the easements. The trial court granted the plaintiffs' motion for partial summary judgment and denied the defendants' cross-motions for summary judgment. In the three appeals consolidated for this opinion, all the defendants (MEAG and GPW in Case No. A05A1400, GPC in Case No. A05A1401, and IFN in Case No. A05A1402) claim that the trial court erred by granting partial summary judgment to the plaintiffs and by denying their cross-motions for summary judgment.

GPC originally acquired the eight easements at issue by express grant from the plaintiffs or their predecessors in title. The easements were conveyed by virtually identical form instruments dating from 1953 to 1981, which granted GPC and its successors and assigns easements to construct and operate "electric transmission, distribution and communication lines..." Pursuant to the rights granted in the easements, GPC and MEAG (which currently owns three of the easements) constructed and operate electric transmission and distribution lines suspended overhead on a system of towers, poles, lines, and other structures spanning across the easements. The fiber optic communication line was subsequently placed across the easements by GPC, IFN, and MEAG in the mid to late 1990s. To accomplish this, the fiber optic line was placed inside the existing static wire which was part of and ran across the top of the electric transmission and distribution system. The line consists of a bundle of hair-thin optical glass fibers, each fiber having the capacity to communicate large amounts of information by transmitting audio, video, or data signals along the length of the fiber in the form of light pulses. Because of the large communication capacity in the fiber optic line, it serves a dual communication purpose: a small part of the communication capacity in the line provides GPC and MEAG with internal communications necessary for the operation of their electric transmission and distribution systems, and the remaining communication capacity in excess of that used internally by GPC and MEAG is sold, leased or licensed under the agreements with IFN and GPW for the purpose of general telecommunications.

The parties and the trial court agreed, and we concur, that the language in the easements granting the right to construct "electric ***864** transmission, distribution and communication lines ..." grants the right to construct electric transmission lines, electric distribution lines, and electric communication lines. Accordingly, the meaning of the grant to construct "electric communication lines" across the easements was the central issue ****60** before the trial court on summary judgment. In moving for partial summary judgment, the plaintiffs argued that, in a definitional sense, a fiber optic communication line cannot be an electric communication line because a fiber optic line uses glass fibers to transmit light pulses and the glass does not conduct electricity. Nevertheless, the plaintiffs argued that, in another sense, a fiber optic communication line qualifies as an electric communication line under the easement if it is used only for internal communications by GPC and MEAG related to their operation of the electric transmission and distribution system. Based on these arguments, the

plaintiffs contended that, to the extent the fiber optic communication line is used for purposes of general telecommunications unrelated to the electric system, it is not an electric communication line and it exceeds the scope of the easements. The plaintiffs argued that the language of the easements unambiguously supports their contentions, but if the trial court found the easements were ambiguous, that the court should resolve the ambiguity in their favor by considering matters outside the easements showing that, when the easements were granted to GPC, there was no intent to grant a general telecommunication easement because GPC was in the electric power business, not the general telecommunication business.

In opposition to these arguments, the defendants contended that, by granting the right to construct electric communication lines, the easements unambiguously granted, without limitation, the right to construct lines over which communications are transmitted by electricity, for example, a telephone line. The defendants further contended that, because the easements were unambiguous, matters outside the easements could not be used to explain their meaning. The defendants argued that the fiber optic communication line was an advance in communication technology over an electric communication line with no change in the physical use of the easements or additional burden on the servient estates. Accordingly, the defendants contended that, whether used for general telecommunications or for internal communications, use of the fiber optic communication line instead of an electric communication line is merely a change in the manner or degree of the granted use to accommodate a new technology and is within the scope of the easements. Finally, the defendants contended that, as exclusive easements in gross, the easements were divisible, and that the sale, lease, or license of ***865** communication capacity in the fiber optic line to third-party telecommunication companies was done within the scope of the easements and without imposing any unreasonable burden on the servient estates.

The trial court agreed with the defendants to the extent it found that a fiber optic communication line was the technologically advanced equivalent of an electric communication line within the meaning of the easements. However, after finding that the easements permitted the construction of a fiber optic communication line in the place of an electric communication line, the trial court considered whether the easements permitted use of the line for general telecommunications and concluded that "the meaning of the easements on this point cannot be determined merely from the unambiguous language of the easements." The trial court examined all the language contained in the virtually identical form instruments granting the easements and found that "[t]he easements have no language limiting the purpose or subject matter of the communications or defining 'communications.' " Nevertheless, the trial court found that each easement had a title naming a transmission line over which the easement was to pass and that the title did not mention communications. The court also noted that there were other references in the easements to "transmission lines" or to "said line or lines." Based on this analysis, the trial court found that the easements had a "very explicit electric supply purpose," and that there was a lack of language in the easements "suggesting that they provide a freestanding public telecommunications purpose." The trial court concluded that

> the only plausible interpretation of the explicit reference in the easement to "electric transmission, distribution and communication lines" is "transmission, distribution, and communication lines for the electric industry." This Court, therefore, finds that these easements by their own terms ***61** clearly and unambiguously limit easement uses to electric industry uses.

The trial court continued its analysis by proceeding to examine matters outside the language of the easements to find "the intent of the parties" based on "the attendant circumstances existing at the time each easement was created." Examination of these matters led the trial court to further conclude that

> [b]ased upon the corporate purposes set forth in the Georgia Power Company Charter and applicable corporate resolutions at the time of creation of the easements, this Court concludes that Georgia Power did not manifest an intent at ***866** the time the easements were created to acquire a general communications use.

Based on these conclusions, the trial court agreed with the plaintiffs that the easements permitted construction of the fiber optic communication line for the purpose of internal communications by GPC

and MEAG directly related to the electric transmission and distribution system, but it exceeded the scope of the easements to use the line for the purpose of general telecommunications. Accordingly, the trial court granted the plaintiffs' motion for partial summary judgment on the declaratory relief sought under count six of the amended complaint.

[1] 1. We agree with the defendants that the trial court erroneously construed the language of the easements and erred by granting partial summary judgment in favor of the plaintiffs.

[2] [3] [4] [5] [6] [7] [8] [9] [10] Construing the language in the express easements at issue is governed by the rules of contract construction. *Irvin v. Laxmi, Inc.*, 266 Ga. 204, 205, 467 S.E.2d 510 (1996). Generally, this presents a question of law for the court, unless the language presents an ambiguity that cannot be resolved by the rules of construction. *Hardman v. Dahlonega-Lumpkin County Chamber of Commerce*, 238 Ga. 551, 553, 233 S.E.2d 753 (1977); *Imerys Marble Co. v. J.M. Huber Corp.*, 276 Ga. 401, 403, 577 S.E.2d 555 (2003). The cardinal rule of construction is to ascertain the intent of the parties. *Irvin*, 266 Ga. at 205, 467 S.E.2d 510. "Where the contract terms are clear and unambiguous, the court will look to that alone to find the true intent of the parties." *Southern Fed. Sav. & Loan Assn., etc. v. Lyle*, 249 Ga. 284, 287, 290 S.E.2d 455 (1982); *Park 'N Go of Ga. v. U.S. Fidelity etc. Co.*, 266 Ga. 787, 791, 471 S.E.2d 500 (1996). To determine the intent of the parties, all the contract terms must be considered together in arriving at the construction of any part, and a construction upholding the contract in whole and every part is preferred. *Cole v. Thrasher*, 246 Ga. 683, 684, 272 S.E.2d 696 (1980); *McCann v. Glynn Lumber Co.*, 199 Ga. 669, 674, 34 S.E.2d 839 (1945). "[W]hen the language employed by the parties in their contract is plain, unambiguous, and capable of only one reasonable interpretation ... the language used must be afforded its literal meaning and plain ordinary words given their usual significance...." *Wolverine Ins. Co. v. Jack Jordan, Inc.*, 213 Ga. 299, 302, 99 S.E.2d 95 (1957). " 'Words generally bear their usual and common signification; but technical words, or words of art, or [words] used in a particular trade or business, will be construed, generally, to be used in reference to this peculiar meaning ...' [OCGA § 13-2-2(2)]." *Pace Constr. Corp. v. Houdaille-Duval-Wright Div., etc.*, 47 Ga. 367, 368, 276 S.E.2d 568 (1981). An "[a]mbiguity is defined as duplicity, indistinctness, an uncertainty of meaning or expression used in a ***867** written instrument, and also signifies of doubtful or uncertain nature; wanting clearness or definiteness; difficult to comprehend or distinguish; of doubtful purport; open to various interpretations." (Citation and punctuation omitted.) *Early v. Kent*, 215 Ga. 49, 50, 108 S.E.2d 708 (1959). "Where ... ambiguities exist, [the court] may look outside the written terms of the contract and consider all the surrounding circumstances to determine the parties' intent." *Lyle*, 249 Ga. at 287, 290 S.E.2d 455. "Parole evidence may not be considered unless the written instrument is ambiguous." *Irvin*, 266 Ga. at 205, 467 S.E.2d 510.

Applying these principles to construction of the easements at issue, we find that the terms of the express easements clearly and unambiguously granted easements for electric communication lines without any limit prohibiting use for general telecommunications.****62** All of the easements were conveyed to GPC by form instruments using virtually identical language. The easements grant GPC and its assigns the right to construct "electric transmission, distribution and communication lines" across the subject land. There is no dispute that this language granted the right to construct electric transmission lines, electric distribution lines, and electric communication lines. As the trial court correctly found, there is nothing in the easements which defines electric communication lines or limits the purpose for which the lines can be used. The fact that GPC was also granted easements for electric transmission and distribution lines does not limit the easement granted for electric communication lines. Although the trial court found there was a lack of language in the easements specifically stating that the easements for electric communication lines could be used for general telecommunications, the lack of such language does not prohibit a general telecommunications use, nor does it create an ambiguity as to whether that use was permitted. To the contrary, the easements for electric communication lines were granted without express limitation. As the trial court found in its order, citing to 18 Encyclopedia Britannica at 66 (15th ed.1974), the usual and common meaning of "electric communications" has been defined as "the instantaneous transfer, by electrical means, of intelligence over distance." When the easements at issue were granted to GPC dating from 1953 to 1981, the usual and common meaning of the words "electric communication lines" included general telecommunication uses such as telephone or telegraph lines, which communicate information over

lines by electrical means.[FN1] ***868** There is no evidence that the words " electric communication lines" were technical words, words of art, or words with a particular trade or business meaning that were understood to exclude general telecommunications or were limited to electric industry uses. See OCGA § 13-2-2(2). Moreover, nothing prevented GPC or MEAG from acquiring the easements for electric communication lines by express grant, and then contracting to allow IFN and GPW to sell, lease, or license telecommunications capacity.

FN1. For example, in *Goldberg v. Sweet*, 488 U.S. 252, 254, 109 S.Ct. 582, 102 L.Ed.2d 607 (1989), a case dealing with telecommunications issues in interstate commerce, the court noted that traditional communication technology, where "telephone calls were relayed through electric wires," was giving way to advanced fiber optic and other technologies. See also "Telegraph" defined as: "A communication system that transmits and receives simple unmodulated electric impulses, especially one in which the transmission and reception stations are directly connected by wires." American Heritage Dictionary (3rd ed. 1992).

The trial court also found that other terms in the easements showed that they excluded a general telecommunications use. Each easement is generally titled "Easement For Right-Of-Way," followed one line down by a name referring to the location of a transmission line. For example, directly under the general title, one of the easements refers by name to "Thomasville-Florida State Line Transmission Lines." The fact that the easements are referenced by a transmission line name and grant easements for electric transmission lines and electric distribution lines provides no basis for concluding that the easement granted for electric communication lines was limited to uses related to the transmission and distribution lines. Each easement also contains several paragraphs appearing after the description of the servient estate and prior to the habendum clause. Those paragraphs variously provide: (1) that GPC agrees to pay for damages to crops, fruit trees, or fences caused by construction or maintenance of "said transmission lines," except those likely to endanger or interfere with "said lines," and that crops and fruit trees damaged in the construction or maintenance of "said transmission lines" shall remain the property of the owner, (2) that GPC will pay for timber cut in the initial clearing and construction of "said transmission lines," and (3) that the grantor reserves the right to use the land upon which "said transmission lines" may be erected for agriculture or other purposes not inconsistent with the rights granted, provided the use shall not interfere with the operation of "said line or lines." Again, whether the references in these paragraphs to "said transmission lines" or to "said line or lines" was intended as a shorthand reference to all the easements granted, ****63** or referred only to the electric transmission easement, nothing in these paragraphs limits or is inconsistent with the plain language granting an easement for electric communication lines.

The plain and unambiguous language used by the parties granted easements for electric communication lines without placing any limitation that would prohibit use for general telecommunications. ***869** The only reasonable interpretation that can be given is that "electric communication lines" means what it literally says-an easement for communication lines that use electricity to transmit communications over the lines. *Wolverine Ins. Co.*, 213 Ga. at 302, 99 S.E.2d 95. Nothing in the language of the easements supports the trial court's conclusion that the easements unambiguously limit electric communication lines to "electric industry uses." Because the language of the easements was unambiguous, the easements were the only evidence that could be considered in ascertaining the intent of the parties. *Lyle*, 249 Ga. at 287, 290 S.E.2d 455; *Park 'N Go*, 266 Ga. at 791, 471 S.E.2d 500. It follows that the trial court also erred by considering matters outside the easements to find that the parties intended to exclude a general telecommunication use.

[11] ☑ 2. The easements permitting the construction of electric communication lines also permitted construction of the fiber optic communication line.

The trial court agreed in principle that the easements for electric communication lines permitted use of fiber optic communication lines as an accommodation for new technology. Nevertheless, the trial court held that no such accommodation was permitted for general telecommunications use

because using the fiber optic line for general telecommunications exceeded the scope of the easements. As we held in Division 1, supra, the trial court erred by construing the easements to prohibit use for general telecommunications. It follows that placing the fiber optic communication line on the easements instead of an electric communication line was an accommodation to technology within the scope of the easement.

Generally, "the manner, frequency, and intensity of use of the servient estate may change to take advantage of developments in technology ..." as long as the change does not "cause unreasonable damage to the servient estate or unreasonably interfere with its enjoyment." Restatement (Third) of Property: Servitudes § 4.10 cmt. f; see *Corley v. Entergy Corp.*, 246 F.Supp.2d 565, 578 (E.D.Tex.2003) ("The use of a fiber optic line is simply a technologically advanced means of accomplishing the communicative purpose of transmitting voice and data."). The rule recognizes that uses reasonably necessary for enjoyment of an easement may change over time with technology and promotes productive use of the land. Restatement (Third) of Property: Servitudes § 4.10 cmts. b, c, and f. Because this kind of change in the use of an easement amounts to change in the degree of use rather than in the kind of use, it remains within the scope of and does not violate the existing easement. See *Faulkner v. Ga. Power Co.*, 243 Ga. 649, 650, 256 S.E.2d 339 (1979); *Kerlin v. Southern Bell Tel. etc. Co.*, 191 Ga. 663, 667-670, 13 S.E.2d 790 (1941).

3. The defendants contend that the trial court should have ruled in favor of their claims that the easements were divisible.

870** In their amended complaint, the plaintiffs not only contended that use of the fiber optic line for general communications exceeded the scope of the easements, but also contended that, when the defendants sold, leased, or licensed the line to various third-party telecommunication companies for the purpose of general telecommunications, this resulted in transfer and division of nonexclusive easements in a manner that unreasonably burdened the servient estates and exceeded the scope of the easements. See Restatement (Third) of Property: Servitudes § 5.9. In ruling on the plaintiffs' motion for partial summary judgment and the defendants' motions for summary judgment, the trial court found the easements did not permit a general telecommunications use. Accordingly, the court ruled that the defendants could not divide what they did not possess, and that it was not necessary to address the plaintiffs' additional contentions. The defendants contend that the trial court should have ruled in favor of the arguments in their motions that the easements at issue were exclusive easements*64** in gross that were properly transferred and divided, and therefore the court should have granted their motions for summary judgment.

[12] ☑ Because we ruled in Division 1, supra, that the trial court erred by finding that the easements excluded use for general telecommunications, we agree that the court should have addressed these additional issues. But "[t]his court is for the correction of errors, and where the trial court has not ruled on an issue, we will not address it." (Punctuation and footnote omitted.) *Carver v. Empire Fire & Marine Ins. Co.*, 270 Ga.App. 100, 105, 605 S.E.2d 842 (2004). Accordingly, the case is remanded for the trial court to address these issues in a manner consistent with this opinion.

4. In addition to the arguments for summary judgment advanced by all the defendants, GPC sought summary judgment on the basis that: (1) it only used the easements for electric industry purposes, a use the plaintiffs concede was authorized, and (2) even if the plaintiffs' erroneous claim that the easements excluded a general telecommunications use is accepted, GPC did nothing more than enter into a contract with IFN authorizing IFN to use, lease, or license the easements for general telecommunications. GPC claims the trial court erred by denying its motion for summary judgment on these grounds.

In support of these grounds, GPC relies on *Tompkins v. Atlantic Coast Line R. Co.*, 89 Ga.App. 171, 79 S.E.2d 41 (1953) and *Davis v. Williams Communications, Inc.*, 258 F.Supp.2d 1348 (N.D.Ga.2003) (citing *Tompkins*). In *Tompkins* and *Davis*, railroad companies which held easements for tracks across the plaintiffs' land entered into ***871** agreements to allow utility companies to place lines on the easements. The plaintiffs claimed that the utility lines were not authorized under the railroad easements, and sought compensation from the railroad companies for the encroachment. In both

cases, the court held that the utility companies could have acquired the right to place their lines on the railroad easement by condemnation, and the fact they accomplished by contract with the railroad companies what they could have forced by condemnation entitled the railroads to dismissal of the claims for compensation. *Tompkins*, 89 Ga.App. at 177-178, 79 S.E.2d 41; *Davis*, 258 F.Supp.2d at 1350-1353. GPC argues that its contract with IFN authorizing placement of the fiber optic communication line was, likewise, forced by threat of condemnation, so it cannot be held liable.

[13] ☑ We find no merit in GPC's argument. The contract between GPC and IFN was originally between IFN's predecessor, MPX Systems, Inc., and the Southern Development & Investment Group, Inc., acting on behalf of various wholly-owned subsidiaries of The Southern Company, including GPC. The contract was a complex agreement governing joint use, operation and maintenance of a fiber optic communication system over a wide area, which allowed placement of the fiber optic communication line at issue on the GPC electric transmission and distribution system of towers, poles and lines, and allowed GPC to enjoy the benefits of a low-cost internal fiber optic communication system. Even if IFN's predecessor, MPX, had condemnation power to place the fiber optic communication line on GPC's easement right-of-way,[FN2] it is clear that the contract between IFN and GPC was not simply an agreement to allow right-of-way use which was directly forced by the power of condemnation. It was a contract in which the parties negotiated mutually beneficial terms for operation of a shared fiber optic communication system, which included the right to use GPC structures****65** on the easements at issue that could not have been obtained by condemnation. Under these circumstances, we find no basis for concluding that, when GPC contracted for placement of the fiber optic communication line on the easements, it did by contract what it would otherwise have been forced to do by condemnation. Accordingly, *Tompkins*, supra, and *Davis*, supra, are ***872** distinguishable, and the trial court did not err by denying GPC's motion for summary judgment on these grounds.

FN2. In *Tompkins*, supra, and *Davis*, supra, the power to condemn the railroad right-of-way for placement of the utility lines existed under OCGA § 46-5-1(a), which specifically gives any telegraph or telephone company the right of condemnation to construct and operate its lines "on, along, and upon the right of way and structures of any railroads...." This section gives no specific right to condemn power company rights-of-way or structures, but it does allow condemnation "where necessary, under or over any private lands...." assuming the section applies to the present case, and assuming the "private lands" provision could include the GPC easement rights-of-way at issue, it plainly does not include condemnation of structures such as power company towers, poles, and lines.

Judgment affirmed in part, reversed in part and remanded in part.

PHIPPS and ADAMS, JJ., concur.

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Briefs and Other Related Documents (Back to top)

- A05A1401 (Docket) (Mar. 23, 2005)
- A05A1400 (Docket) (Mar. 23, 2005)
- A05A1402 (Docket) (Mar. 23, 2005)

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Exhibit 5

NOTE FILE NO. 1234-7-44-2
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Roger Chantel
10001 E. Hwy. 66
Kingman, AZ 86401

MOHAVE COUNTY SUPERIOR COURT
OF THE STATE OF ARIZONA

Re: Case No CV 2009-2574

Request to the Court to deny
Motion for Summary Judgment

If the Court decides to have an oral argument the Plaintiffs request this Court not to set the date until a new attorney has been assigned to this case.

To Judge Lee Jantzen,

The defendant's attorney's known as CURTIS, GOODWIN, SULLIVAN, UDALL & SCHWAB, P.L.C., have filed a Motion for Summary Judgment with this court making outrageous claims that there are no genuine issues of material facts. They go on to make ludicrous claims about how "reasonable individuals" would not differ on the outcome of the points that have been filed with this court. Please note your honor, I am just an average Arizona citizen that has read some of the laws that surround the wrong doing that this legal firm is doing. The argument for this summary judgment appears to be the same arguments that were presented to the court when this law firm filed legal documents for a dismissal of this case. The court denied their request. This Motion for Summary Judgment contains the same arguments that were previously presented to the court and denied and should therefore be denied.

Both parties agree that the issue in this case is a safety issue. As presented to the court in prior filings the safety issue started prior to 2006 when 4 or 5 poles that had the same condition that exist on this property, blew over and caused a long period of electrical outage. In Exhibit 7 of defendant's Motion for Summary Judgment they state that these lines were built in 1949, which makes them approximately 62 years old. They have had very little maintenance done to these lines. They do not comply with present day codes. If you read what this legal firm has filed with the court it becomes very clear they are aware of the safety

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CURTIS, GOODWIN, SULLIVAN, UDALL & SCHWAB, P.L.C.

violations they are committing. This legal firm's misrepresentation of the facts surrounding the safety issue is to avoid the safety issues that are dangerous to the general public. They have submitted volumes of papers making claims that my art work is the focal point. The only true safety violation is the distance from Mohave Electric Cooperative's (MEC's) lines to the top of my art work. This legal firm has submitted thousands of words about how I am not cooperative and I am not willing to work with them. One of the main issues in this case is MEC's lack of willingness to take responsibility and correct the unsafe line conditions that exist. At the beginning of this conflict I tried to talk to MEC representatives about their out dated unsafe lines that were on this property. I tried to suggest a reasonable fix to the problem, which was to place one pole between the long span that existed over my art work. This would stabilize the lines and would bring the lines into compliance with today's standards. It would raise the lines high enough so they would be in compliance with today's codes. This would have cost a few thousand dollars. MEC representatives would do nothing to try and work we me. They claimed they were just going to turn this matter over to their attorney. We are approaching $200,000 in attorney fees and have not even begun to address the unsafe line conditions that exist in this area. These unsafe line conditions are present throughout this neighborhood. I have always tried to do my part by going through the legal system to try and right these wrongs. It doesn't appear to be working, I need help.

ONE: RIGHT OF WAY ISSUES The legal representatives of this firm claim to the court that MEC has a prescriptive easement. They claim that this prescriptive easement was granted to MEC because of the long length of time that their lines existed on this property. They claim to the court that these lines transmit high voltage electricity. These licensed legal representatives have presented a number of references to Arizona Revised Statutes such as A.R.S. 40-360.41. They make unfounded claims that some kind of violation exists. This law seems to state the DEFINITIONS OF HIGH VOLTAGE POWER LINES AND SAFETY RESTRICTIONS. Other A.R.S. statutes clearly outline what the distances should be. These licensed legal representatives are intentionally misleading this court by failing to supply the court with all the surrounding laws. They have only claimed that MEC has a prescriptive easement. Normally prescriptive easements are only recognized when individuals use a piece of land for ingress or egress for a long period of time. Prescriptive easements are usually not recognized or granted to utility companies because it does not have a defined or designated area. A defined or designated

area is a requirement that is needed for construction companies, government agencies, courts and individuals so that it is clear to all parties what they can or cannot do within this area. If it is not granted by a court or documented in records, no one knows the boundaries or who would be liable if someone was injured on the property near the high voltage lines. This creates a great amount of confusion in the construction industry. By these licensed legal representatives claiming that there is a prescriptive right of way, it prevents state officials from issuing safety violations. When they claimed a prescriptive easement they clouded the title to this property. They know that their claim of a utility easement clouds the issue for the Mohave County Special Service Department's ability to issue a permit under their standard of easement claims. This legal firm has misrepresented the truth in this case. They claimed that I did not file for a building permit. The only way that the truth can be brought to light is for this court to do everything possible to bring this case to trial.

These legal representatives rely heavily on a document called the Olea Report. I have made claims that this law firm has been associated with special interest groups that have influenced state employees to create reports in favor of MEC. The only way that we can establish my claim or their claim is to take this case to trial and let a jury decide. Every issue in the complaint filed with this court has a genuine issue of material facts. Both parties are reasonable individuals in accordance to Rule 56 of Arizona Rules of Civil Procedure. Both sides have generated thousands of words surrounding the issues in this case.

THE FACTS ARE:

1. MEC is mandated by law to provide safe transmission of electricity.
2. MEC has unsafe line conditions all through this area.
3. MEC does not have a recorded right of way to transmit high voltage electricity across this particular piece of property.
4. MEC's claim of a prescriptive easement has not been established.
5. MEC disconnected the electricity to my place of residence, which appears to have been done with intent to do harm.
6. This legal firm has filed a number of frivolous motions and documents.

7. The actions of this legal firm have generated large amounts of fees that cooperative members have to pay and have cost me large amounts of unnecessary attorney fees as well.

Listed below are the actions of this legal firm.

They have filed a long list of requests to this court and the ACC asking both authorities to dismiss the actions that have been filed about all of the wrongdoings that this legal firm and its clients are doing. They have filed with this court a request to dismiss this case. It was denied. They used the same arguments in their request for Motion for Summary Judgment as in their request for dismissal. It is my belief that this firm was part of a scheme to have my attorney of record withdraw from this case and are now taking advantage of this by filing for a summary judgment. They knew this would put me at a great they disadvantage if they filed this request with the court at this time.

This legal firm mentions Mohave County Superior Court Case CV 2009-0058. This law firm filed for legal fees with the court. After reviewing the document submitted to the court by this legal firm, Honorable Judge Chavez determined that they over billed this action by more the 75% of what it should have been. This can only be interpreted as a wrongdoing. They have since continued to file unfounded frivolous pleadings with the court with the intent to create and bill large amounts of attorney fees to prevent this case from going to court. **These are facts that are on file in the court system.**

Somewhere along the line it becomes the court's responsibility to build and maintain honor and integrity within the system. How can the average citizen believe in the system if they do not see the system making efforts to right some of these wrongs?

Listed below are some of the wrongs in and around this case.

1. It is wrong for MEC to have unsafe lines on this property and in this area. The law demands all utilities to maintain safe electrical lines and poles in all communities.
2. It is wrong for any utility company to disconnect any utility service without advance written notice.

3. It is wrong for a utility company not to respond to a medical need of its customers. The law demands utilities to provide services to customers that medically need them.
4. It is wrong when you have a time line that sets a case for trial and your legal representation is allowed to withdraw at a critical point in the case.
5. It is wrong for a legal firm, knowing you have no legal representation, to file in the court for a summary judgment using the same arguments that were previously denied by the court when this law firm filed for a motion to dismiss.

These are just a few of the wrong doings.

It is clear that laws exist and that you have the power to issue a judgment against this law firm for all of the frivolous legal filings and the unethical conduct of misuse of its knowledge of the law to enhance its material wealth at the expense of the average citizen of Arizona. What would be right is for this court to enter a judgment against this law firm for their frivolous filing of documents, unethical conduct and their misuse of legal powers to file false claims of legal fees. Some kind of action is needed to get this case back on course. The amount that is needed to reinstate legal counsel to this case is estimated somewhere around $30,000 to $40,000. A judgment in this amount could be used to reinstate legal counsel and would be the needed step to move this case to trial.

It should be noted that this document is the presentation of an individual that has read the laws, but does not hold a license to practice law.

Respectfully submitted,

Roger Chantel

Roger Chantel
Signed this 7th day of June, 2011
Copy sent to:
Larry Udall and
Shared with the general public as a plea for help

Exhibit 6

NOTE FILE NO. 8234-7-44-2
XEROX ALL PLEADINGS ✓
COPIES TO MAC LKW MAW
STAMPED ✓ DATE 1/25/12
ROUTED TO MAC LKW MAW
DO NOT FILE UNTIL
ALL ITEMS CHECKED
AND INITIALED CB

Dustin Roger and Elizabeth D. Chantel
10001 E. Hwy 66
Kingman, AZ 86401

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MOHAVE

DUSTIN R. CHANTEL, and ELIZABETH D. CHANTEL

Plaintiffs,

vs.

MOVHAVE ELECTRIC COOPERATIVE, INC., an Arizona non-profit corporation; JOHN and JANE DOES 1-X: BLACK and WHITE
COPORATIONS I-X

Defendant

Case No.: CV2009-02574

MOTION TO HAVE A JUDICIAL DETERMINATION ON ALL COUNTS IN THIS CASE

MOHAVE ELECTRIC COOPERATIVE INC., an Arizona non-profit corporation.

Counterclaimant

vs.

DUSTIN R. CHANTEL and ELIZABETH D. CHANTEL, husband and wife

Counterdefendants

This is a request by the plaintiffs to the court to accept this motion as a cooperative motion submitted by the plaintiffs and supported by points of authorities submitted by their attorney of record if it pleases the court to rule on this motion.

RECEIVED
JAN 11 2012
CURTIS, GOODWIN, SULLIVAN, UDALL, & SCHWAB, PLC

In 1949, Mohave Electric Cooperative (hereinafter referred to as MEC) filed an application for a right of way easement with the United States of America. This right of way easement location is described in degrees, minutes and feet on the map submitted (Exhibit A). In 1950, documents confirming the right of way were executed (Exhibit B). This right of way easement existed for a period of 50 years and expired in the year 2000. MEC did not have a utility easement over government land between the years of 2000 and 2004. In 2004, MEC entered into a new contract under Title V of the Federal Land Policy and Management Act of October 21, 1976, 43 U.S.C. 1761. This contract is known by Serial Number AZA-32288 (Exhibit C). In this contract MEC stated that their right of way was located in T. 23 R. 14 Section 4 N 1/2, NE 1/4, SE 1/4. Please note that the plaintiffs' land is located in section 5. MEC is claiming the right to use the plaintiffs' land located in Section 5 (See map in Exhibit A). On the map included with Exhibit C, the blue line denotes the legal right of way granted to MEC by the Bureau of Land Management (hereinafter referred to as the BLM). On this same map, the red line to the south of the blue line denotes the actual location of MEC's transmission lines.

MEC's legal counsel claims that MEC has a right to use the land indicated by the red line for the transmission of high voltage electricity. MEC's counsel has made statements to this court that these poles and lines have been in this location for over 50 years and that, for this reason, they are entitled to a prescriptive right of way. Please note that the plaintiffs' property is abutted on both sides by Federal and State lands. **28 U.S.C. 2409a** does not permit utility companies to claim or have a prescriptive right of way over Federal or State land. **Cracchiolo v. Arizona, 6 Ariz. App. 597, 600, 435 P.2d 726 (Ct. App. 1967)**. Since it is evident that MEC cannot have a prescriptive right of way on Federal or State lands, it is unreasonable to believe that a utility company can have a prescriptive

right of way across a small piece of private land that is bordered on both sides by Federal and State land.

The MEC attorney in this case has not presented evidence to this court that MEC has any kind of easements or rights to use the plaintiffs' property for the transmission of high voltage electricity. MEC has admitted that they have re-routed their high voltage transmission lines around the plaintiffs' property. However, the abandoned lines and poles are still on the plaintiffs' property. The plaintiffs consider said poles and lines to present a danger to them and their property due to the fact that the poles are leaning, the lines are alternately sagging or stretched tight, and MEC does not appear to be properly maintaining them. These dangerous conditions have continuously worsened during the past three years, and it is the plaintiffs' fear that a strong wind could blow the poles down and snap the lines. It appears that MEC's legal argument regarding a prescriptive right of way across the plaintiffs' property has been presented to the court for the purpose of increasing the cost of legal fees and putting the plaintiffs in a position of financial difficulty.

On June 6, 2004, the Manager of Operations and Engineering for MEC, Thomas Longtin, signed a contract with the BLM stating that MEC had a right of way easement located in a survey location known as S65 Degrees by 37 Minutes East for a distance of 2582 Feet. This contract, Serial Number AZA-32288, is included in Exhibit C and the distance referred to in the contract is indicated by the blue line on the map inside of Exhibit C.

In 2005, the plaintiff sent MEC representative Steve McArthur a letter asking him to supply all of the information that MEC had on file about MEC's right of way through the plaintiffs' property (Exhibit D). A copy of this letter was sent to the law firm of Curtis, Goodwin, Sullivan, Udall & Schwab. At that time, neither recipient of this letter responded in a timely manner, so another letter was sent to Arizona Corporation Commissioner Kristin Mayes

informing the commission of the right of way issue. This letter is also included in Exhibit D. In 2006, the plaintiff received a letter from Mr. McArthur, stating that if plaintiff wanted MEC's poles off of plaintiff's property, plaintiff would have to pay to have them removed. This was the first response plaintiff had received from Mr. McArthur since the letter sent in 2005, and did not include any of the information requested in said letter. The plaintiff recently requested a copy of Mr. McArthur's letter from MEC (Exhibit E).

On April 4, 2008, MEC's management personnel, Thomas Longtin, signed a contract known as R/W No. 17-1750 with the State of Arizona, stating that MEC has a right of way that continues onto State land from the existing right of way from the BLM (Exhibit F).

The Law Firm of Curtis, Goodwin, Sullivan, Udall & Schwab has been representing MEC for a number of years and was the legal representative of MEC during the signing of the contracts in 2004 and 2008. One can only assume that this law firm had knowledge of these contracts, yet this law firm has repeatedly submitted legal claims on a number of frivolous motions claiming that their client, MEC, had a right to use the plaintiffs' property. These legal claims are in direct contradiction to the most recent right of way contracts signed by this law firm's client, MEC. These legal claims also deny that MEC has trespassed on the plaintiffs' property, should be ejected from the plaintiffs' property, and should owe the plaintiffs rent for using their property without a legal right of way. These repeated claims of prescriptive right of way, in spite of signed contracts to the contrary, appear to the plaintiffs to be filed with malicious intent and the plaintiffs petition this court for justice.

Plaintiffs submit a copy of PLAINTIFFS' THIRD SUPPLEMENTAL DISCLOSURE STATEMNT (Exhibit H). In "D Ejectment" (Right of Recovery) and **A.R.S. 12-1251** the owner has a right of entitlement to immediate possession and full use of the property. In "E Recovery of Rent" and **A.R.S. 12-1271 (2)** the owner of said property is entitled to rents of

the property while it is being used by MEC. Please refer to plaintiffs' billing statement for recovery of rent (Exhibit G).

Additionally, the plaintiffs petition the court to make a decision on the right of way issue because of the previously mentioned dangerous condition of MEC's abandoned poles and lines. This danger is considered life-threatening because the winds which frequent our area in all seasons propose a possibility that these unmaintained and abandoned poles and lines could fall. Not only could this directly damage property and kill persons in the vicinity of the lines and poles, it could also damage the plaintiff's only source of electricity. Were this source of electricity to be damaged, the indirect threat to life would be the discontinuation of the plaintiff's breathing machine that sustains his quality of life.

There is no dispute that MEC is occupying the plaintiffs' property by the presence of MEC's poles. The law firm of Curtis, Goodwin, Sullivan, Udall & Schwab has submitted pictures and made claims that these lines are located on the plaintiffs' property, which means that these lines and poles are not located in the right of ways that the management of MEC has agreed to in the previously mentioned contracts with Federal and State organizations.

Prior to 2007, the plaintiff's experience with MEC convinced him that this corporation was unconcerned with the presence of power lines on property on which they had no prescriptive right of way, unconcerned about the danger presented by the poorly maintained poles and lines, and unconcerned about their responsibility to move these poles and lines. As a result, the plaintiff determined that he would be solely responsible for his own protection and began to plan accordingly. In 2007, the plaintiff began construction of a structure on his property, located between the leaning poles, underneath the most significantly sagging lines, with the intention of protecting life, limb, and property in the event that the lines and poles were to fall. The earth preparation phase began in the middle of 2007. In

the first part of 2008, the concrete work began on the structure. It should be noted here that this structure was specifically designed to withstand the weight and current of falling power lines and poles while protecting its contents from damage. In August, 2008, when the framework construction began, MEC claimed that the plaintiffs could not use the area of the plaintiffs' property that exists under MEC's high voltage power lines. MEC made claims with the ACC that plaintiff had constructed a building in their right of way and was in violation of National Electric Safety Codes. The true facts are that MEC was negligent in placing their lines on this property outside of their contracted right of way. Exhibit J shows that MEC led ACC representatives to believe that there was no right of way issue, in spite of the fact that MEC did not have a recorded right of way across this property. Exhibit J implies that MEC took the action to move their lines and poles under the pretense of the plaintiffs violating a safety issue in the National Electric Safety Code. MEC persisted in misleading representatives of the ACC in stating that there was "no issue of right of way". Evidence submitted in this complaint shows that the right of way issue existed as early as 2005. In Exhibit J, MEC falsely claims that they are willing work at correcting the problems in this complaint, yet fails to supply any substantial evidence to support this claim. MEC requested that the Mohave County Building Department (since then renamed to Mohave County Development Services Department), issue a service disconnect. Mohave County issued a service disconnect to de-energize the line close to the building being constructed (Exhibit J). MEC made a special effort to de-energize the lines that run the full length of the plaintiffs' property. It is clear that MEC's actions far exceeded the order issued by the County of Mohave. **R14-2-211** requires MEC to give written notice of termination. MEC did not give an advance written warning to the plaintiffs that they were going to disconnect electricity to the plaintiffs' place of residence.

R14-2-211 A 5, b requires MEC to provide continuous electricity to customers with "life supporting equipment used in the home that is dependent on utility service for operation of such apparatus." Subsequent to the discontinuation of electricity to the plaintiff's place of residence in 2008, the plaintiff notified the ACC and MEC of his medical need for continuous electricity (Exhibit K). It is now 2012 and MEC has still made no effort to supply the plaintiff with continuous electricity. This can only be interpreted by the plaintiff as complete disregard by MEC for his health and well-being.

In September of 2008, MEC de-energized the lines on the plaintiffs' property and moved the lines onto ADOT's right of way. They were so intent on punitive action against the plaintiffs that they put all of the members of MEC, as well as the government and the rail road, which transports freight and military equipment through this area, at risk. By their own admission in Exhibit K, MEC claimed that "**Important Note: the de-energized line (three phase line) now prohibits our (MEC) ability to back-feed a three phase line in the event of a power outage, which compromises MEC integrity.**" This strongly indicates that MEC clearly lacks concern of the plaintiffs, the members of the cooperative, or the citizens in the community. It should be clear to this court and other authorities that they will need to take extreme action to bring this utility into compliance with the standards set forth by the ACC and to promote a high ethical and moral responsibility to the laws and the citizens in the community.

MEC no longer uses these de-energized lines and poles, nor have they made any repairs on them. One can only conclude that after more three years of not being used or maintained that they have been abandoned. **R14-2-202 B** requires a utility to file an application for discontinuance or abandonment of utility service. Exhibit L is a letter to the ACC asking for a copy of MEC's application for removal of abandoned poles and lines on this property.

One of the poles in the abandoned lines has been bending a little more each year. The reason for the bending and cracking in the pole is the long distances between poles and the fact that this line does not comply with the current standards set forth by the ACC in **R14-2-208 F,1.** Exhibit M is a map and pictures of another area that has these long distances between poles. There were some high winds in the area a few years back and about five poles and lines blew over in the area. Exhibit M is a map and pictures of the replacement poles standing directly next to the stumps of the broken poles. This exhibit shows two things: 1. The long distance between MEC poles is not unique to the plaintiffs' property and 2. Even when the potential danger of these unsafe poles is realized, MEC does not correct the problem. This location is along Highway 66, a few miles from the plaintiffs' property, and demonstrates the approximate distance between poles as those on the plaintiffs' property.

It is the plaintiff's belief that similarly spaced poles blew down in one area, it is not unreasonable to assume that they can also blow down on the plaintiffs' property. The older the poles get, the greater the chances are that the abandoned and unmaintained poles and lines on plaintiffs' property will probably be damaged by some kind of weather conditions. It is the plaintiffs' belief that if high winds were to occur in this area like before the old poles and lines could blow over, thus causing significant damage to the plaintiffs' solar system, residence, and personal safety. Of equal or greater concern to the plaintiffs is the tension that is occurring on the other side of the sagging lines. If one of these lines were to snap it could cause a whipping effect that could short the solar electricity in plaintiff's house, completely destroy his solar system, and/or cause great bodily injury or death to occupants of the property or travelers on Highway 66. At the very least, this would leave the plaintiff without any electricity to run his BiPAP machine. At the very worst, innocent people could lose their lives. MEC's statements and its

presentations to this court clearly show that MEC has continuously refused to take responsibility for and correct these dangerous conditions.

BREACH OF CONTRACT

In the year 2000, I, Roger Chantel, plaintiff, contacted the service office of Mohave Electric Cooperative (hereinafter referred to as MEC) for the purpose of having electricity delivered to 10001 E. Hwy 66, Kingman, AZ. I was informed that I would have to meet certain terms. These terms are as follows:

1. I must obtain a membership certificate from MEC Board of Directors (Exhibit N).
2. I must pay a fee for this membership certification. Exhibit N shows that a $5.00 fee was paid for the membership certificate.
3. I was to grant them a 16 foot service right of way to deliver electricity to my place of residence (Exhibit N).
4. I was required to pay a meter reading fee each month (Exhibit N).
5. I was required to pay for all electricity delivered to that meter and for the cost of reading the meter (Exhibit N).

In return, **A.A.C. R14-2-208 A (1) and (2)** and **R14-2-211 A (5) (b)** requires MEC to do the following:

1. Be responsible for the safe transmission and distribution of electricity until it passes the point of delivery to the customer.
2. Be responsible for maintaining in safe operating condition all meters, equipment, and fixtures installed on the customer's premises by the entity for the purposes of delivering electric service to the customer.
3. Not terminate residential service where the customer has an inability to pay and has life supporting equipment used in the

home that is dependent on utility service for operation of such apparatus.

BAD FAITH AND UNREASONABLE CONDUCT

MEC acted in bad faith by claiming that they had a right to trespass on the plaintiffs' property. They exhibited malicious intent by claiming that there was a safety violation that was extreme enough to have the plaintiffs' electricity disconnected without written warning. The logical fix for the problem would have been to add one pole and lift the lines up to standard height. This fix would have brought MEC's unsafe lines into compliance with **ACC R14-2-208 F,1.** MEC's conduct continued to become more unreasonable and dangerous by refusing to reinstate plaintiff's electricity when MEC became aware of a medical need for continuous electricity. Exhibit L shows the medical prescription proving the need for a machine to have continuous electricity to provide quality of life. It can only be assumed that the reason for MEC not reconnecting the plaintiff's electricity was either a complete disregard for the plaintiff's physical well-being or deliberate and malicious infliction of mental and physical stress and financial damage. MEC stated that they would not reinstate the electricity to the plaintiffs' place of residence until the plaintiffs paid the line movement cost and a reinstate fee of approximately $19,000 plus other fees, which brought the cost of reinstating the electricity to the plaintiffs' residence to somewhere between $45,000 to $55,000. As if that was not bad enough, MEC filed Summary Judgments with the court claiming that they were entitled to all of their costs incurred and attorney fees which was somewhere around $100,000 to $150,000.

MEC has been using and trespassing on the plaintiffs' property since the year 2000. Their bad faith action has caused the plaintiffs to bill MEC for the use of said property (Exhibit G).

The plaintiffs would not be experiencing this legal action if MEC had been reasonable and made a sincere and cooperative effort to correct the problem.

NEGLIGENCE

This action would not be in front of this court if MEC had not been negligent by placing their poles and lines outside of their contracted right of way with the State of Arizona and the United States of America. All of the actions of MEC has caused the plaintiffs large degrees of mental stress and has increased the plaintiff's anxiety attacks related to Post Traumatic Stress Disorder from the events he experienced in Vietnam. Since returning from Vietnam, the plaintiff has spent most of his life in sparsely populated areas. In this case, the plaintiff has done everything he knows how to do to work things out within the governmental and corporate systems. The plaintiff has been trying to comply with all known corporate and judicial parameters by contacting all of the authorities that he knows in hopes of recovering all the costs that he has incurred. If the plaintiff has offended the court in any way he sincerely apologizes.

The plaintiff still believes that MEC's abandoned poles present a threat to him and the property that he lives on. The plaintiff is asking this court to make a decision on the issues in this case. If the court makes a decision in the plaintiff's favor, the plaintiff asks the court to make the judgment complete and enforceable so the unsafe poles and lines can be corrected prior to the onset of the spring winds.

There are many reasons why attorneys might petition the court to give them permission to leave this case and why no attorney will sign on to this case. They see that this defendant has violated its

contracts with the Federal Government, the State of Arizona, and the plaintiffs. They see that opposing counsel has unethically inflated their fees as determined by Judge James Chavez early on in these legal matters. (Exhibit I). They see that MEC and its attorneys have continuously filed frivolous and unsupported motions in this court and seem determined to do so indefinitely. They may become discouraged and doubt that justice will ever be served. When upstanding attorneys witness immoral and unethical abuse of the law and the court, such as has been done by MEC and its attorneys in this case, they wish to distance themselves. The easiest way for attorneys to address this problem is to ask the court to be relieved as the attorney of record. This creates difficulty for plaintiffs such as those in this case, as it limits their ability to procure and retain excellent legal counsel. The plaintiffs are not asking this court to infringe on any attorney's rights. The plaintiffs are only asking this court for equal rights to be defended in a court of law. The plaintiffs only ask this court to have the attorney of record remain on this case in order to supply the court with Points of Authorities that support the legal theories in the Motion for Judgment and any filings that the defendants may file with this court.

The facts and the evidence presented in this motion show the bad faith action and where MEC was negligent. It shows that MEC trespassed on the plaintiffs' property. It is clear that MEC claimed right of way on the plaintiffs' property where right of way did not exist. Throughout the whole of this lengthy legal proceeding MEC admits to no wrong doing. Their continuous filing of frivolous motions, their refusal to address safety issues, their failure to honor contracts, and their unwillingness to conduct business in the best interest of the community proves that the court must take extreme action. The plaintiffs respectfully request that the court rule in their favor on the following counts:

1. Plaintiffs ask this court to rule for the plaintiffs on Count One, breach of contract.
2. Plaintiffs ask this court to rule for the plaintiffs on Count Two, breach of the covenant of good faith and fair dealings.
3. Plaintiffs ask this court to rule for the plaintiffs on Count Six or F in filed documents, negligence.
4. Plaintiffs ask this court to grant them attorney fees and cost of suit.
5. If the court rules on any counts the plaintiffs have asked for the plaintiffs ask this court to rule in such away that the ruling will be enforceable and the plaintiffs can be assured of experiencing safe conditions on the property before the spring winds occur.
6. Plaintiffs ask this court to rule for the plaintiffs on any other issues that the court may deem as needed to provide justice for the plaintiff.

The plaintiffs also respectfully request that this court apply Civil Code 68 to a judgment in the plaintiff's favor. It is the plaintiffs' belief that a swift judgment in their favor will send a strong message to MEC and their attorneys that this court will not tolerate corporate abuse of power; that contracts must be honored, whether with the Federal government, the State government, or the individual citizen; and that the court will not indefinitely entertain frivolous and time-consuming motions filed with the intent of clouding the key issues.

Dated this 9 day of January, 2012

Roger Chantel

Elizabeth D. Chantel

Plaintiffs

COPY of the forgoing delivered
This 10th day of January, 2012 to:

Clerk of Court
Mohave County Superior Court
401 E. Spring Street
P.O. Box 7000
Kingman, Arizona 86402

The Honorable Lee F. Jantzen
Mohave County Superior Court
P.O. Box 7000
Kingman, Arizona 86402-7000

COPY of the foregoing mailed
This 10th day of January, 2012 to:

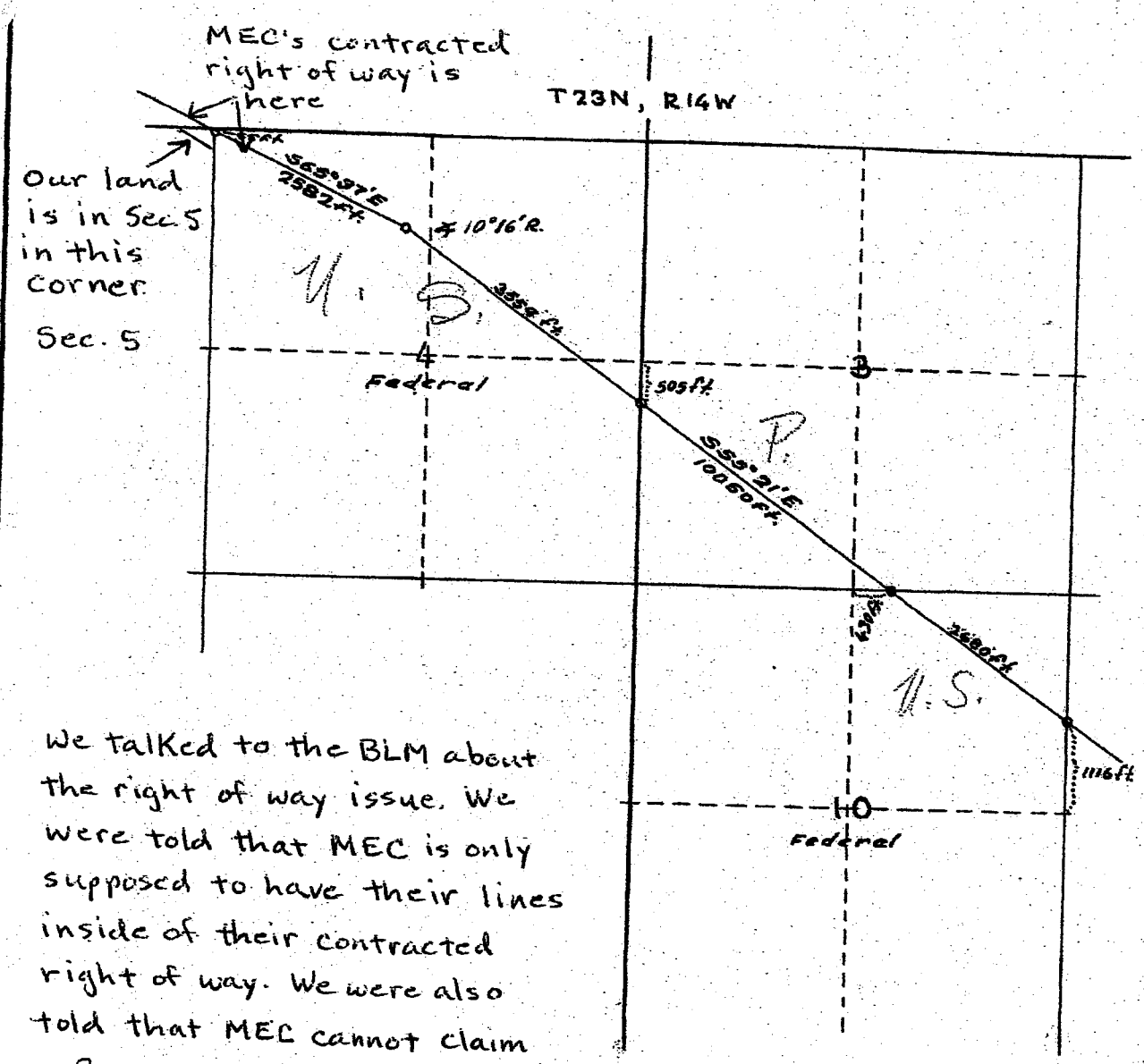
The Offices of Curtis, Goodwin,
Sullivan, Udall & Schwab, P.L.C.
501 East Thomas Road
Phoenix, Arizona 85012-3205

The Dodds Law Firm, P.L.C.
14239 W. Bell Rd., Suite 204
Surprise, Arizona 85374

Elizabeth D. Chantel

EXHIBIT "A"

Roger & Darlene Chantel



We talked to the BLM about the right of way issue. We were told that MEC is only supposed to have their lines inside of their contracted right of way. We were also told that MEC cannot claim a Prescriptive right of way on Federal lands. MEC's contracted right of way is located to the north corner of our land, not through it on the south side as they have been claiming.

file

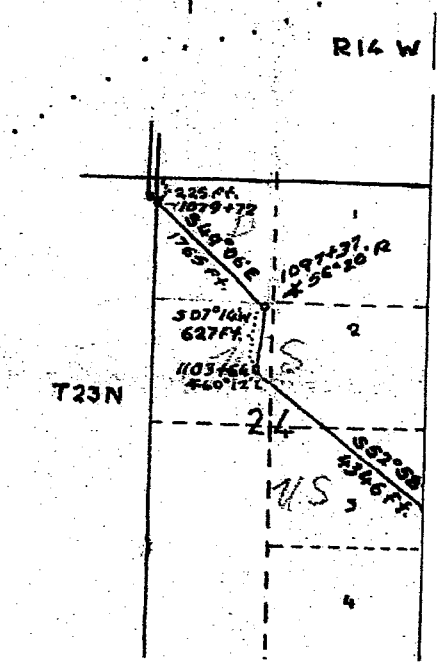


EXHIBIT "B"

COPY FOR REGIONAL ADMINISTRATOR

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Land and Survey Office
Phoenix, Arizona
August 23, 1950

DECISION

Mohave Electric
Cooperative, Inc.

Phoenix 066238
Transmission Line Right-of-Way

Right-of-Way Approved

On September 26, 1949, the Mohave Electric Cooperative, Inc., filed application, Phoenix 066238, and on October 17, November 3, 1949, January 30, and March 23, 1950, supplemental applications, under the Act of March 4, 1911 (36 Stat. 1253; 43 U.S.C. sec. 961) for right of way for an electric transmission line affecting public lands in T. 15 N., Rs. 12 and 13 W.; T. 16 N., R. 13 W.; T. 16½ N., R. 13 W.; T. 17 N., R. 13 W.; T. 18 N., R. 13 W.; T. 19 N., R. 13 W.; T. 21 N., R. 15 W., T. 23 N., Rs. 13, 14 and 15 W.; and T. 24 N., R. 13 W., G. & S. R. M., Arizona.

The application has been examined and found to conform to the regulations. The Regional Administrator of this Bureau, the Geological Survey and the Bureau of Reclamation have submitted favorable reports.

Accordingly, pursuant to the above mentioned act and the regulations thereunder (43 CFR, Part. 245), and to all future regulations issued thereunder which are pertinent to power projects, and to all valid existing rights, an easement is hereby granted the Mohave Electric Cooperative, Inc., for a right of way over public lands for the construction, operation and maintenance of an electric transmission line for a period not to exceed fifty years, on the location shown on the above mentioned maps filed in the Land and Survey Office, Phoenix, Arizona, serial 066238, but reserving rights of way for canals and ditches constructed under authority of the United States, and further subject to the reservation to the United States of all fissionable source materials in accordance with the provisions of the Act of August 1, 1946 (60 Stat. 755; 42 U.S.C. sec. 1801).

No rental payment will be required since the use and occupancy of the land is for a Rural Electrification Administration Cooperative project (Title 43, CFR. sec. 245.14 (b); Circular 1461a).

Send the form and the [illegible] supply [illegible]

8/25/50
Mr Britt and Mr. Gibbons:
Suggest you prepare a form letter for these R/W cases to eliminate much of the typing.
L. B. Lindley
Acting R.A.

Ma

One tracing map and a copy of this decision will be retained for t files of the Land and Survey Office. The duplicate map and a copy of this decision are being transmitted to the Bureau of Land Management, Washington, D. C. The original of this decision is being forwarded to the applicant. Copies of this decision are being forwarded to the Bureau of Reclamation and Regional Administrator of this Bureau. Two copies are being forwarded t the Geological Survey.

Thos. P. Britt,
Manager

JHB:adw

EXHIBIT "C"

FORM 2800-14
(August 1985)

Issuing Office
Kingman Field Office

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
RIGHT-OF-WAY GRANT/TEMPORARY USE PERMIT

SERIAL NUMBER AZA-32288

---

1. A right-of-way is hereby granted pursuant to Title V of the Federal Land Policy and Management Act of October 21, 1976 (90 Stat. 2776; 43 U.S.C. 1761).

2. Nature of Interest:

   a. By this instrument, the holder:

   Mohave Electric Cooperative
   Post Office Box 1045
   Bullhead City, AZ 86430

   receives a right to construct, operate, maintain, and terminate a 14.4 kv overhead electric line with associated guy anchors, on public lands described as follows:

   Gila and Salt River Meridian

   T. 15N., R 12W.,
   sec 14 W½NW¼;
   sec 32 NW¼,SW¼NE¼,SE¼;
   T. 15N., R. 13W.,
   sec 24 E½NW¼;
   T. 16N., R. 13W.,
   sec 04 E½NE¼;
   T. 16½N., R. 13W.,
   sec 21 lot 3;
   sec 21 SW¼SE¼;
   sec 28 SW¼NE¼,N½SE¼;
   sec 33 E½NE¼,E½SE¼;
   T. 17N., R. 13W.,
   sec 10 W½NW¼;
   sec 15 W½E½;
   sec 26 W½NW¼,NW¼SW¼;
   sec 35 E½W½;

T. 18N., R. 13W.,
sec 34 SE¼SE¼;
sec 35 W½NW¼;
T. 23N., R. 13W.,
sec 20 SE¼;
sec 26 SW¼,E½NW¼,NW¼NE¼;
T. 23N., R. 14W.,
sec 04 N½,NE¼SE¼;
sec 10 NE¼.

b. The permit area granted herein is 20 feet wide, 59,136 feet long for a 14.4 kV electrical power pole. The total right-of-way contains 27.15 acres, more or less.

c. This instrument shall terminate on 30 years from its effective date unless prior thereto, it is relinquished, abandoned, terminated, or modified pursuant to the terms and conditions of this instrument or any applicable federal law or regulation.

d. Notwithstanding the early relinquishment, abandonment, or termination, the provisions of this instrument, to the extent applicable, shall continue in effect and shall be binding on the holder, its successors, or assignees, until they have fully satisfied the obligations and/or liabilities accruing herein before or on account of the prior termination, of the grant.

3. Rental:

For and in consideration of the rights granted, the holder agrees to pay the Bureau of Land Management fair market value rental as determined by the authorized officer unless specifically exempted from such payment by regulation. Provided, however, that the rental may be adjusted by the authorized officer, whenever necessary, to reflect changes in the fair market rental value as determined by the application of sound business management principles, and so far as practicable and feasible, in accordance with comparable commercial practices.

4. Terms and Conditions:

a. This grant or permit is issued subject to the holder's compliance with all applicable regulations contained in Title 43 Code of Federal Regulations part 2800.

b. Upon grant termination by the authorized officer, all improvements shall be removed from the public lands within 90 days, or otherwise disposed of as provided in paragraph (4)(d) or as directed by the authorized officer.

c. Each grant issued for a term of 20 years or more shall, at a minimum, be reviewed by the authorized officer at the end of the 20th year and at regular intervals thereafter not to exceed 10 years. Provided, however, that a right-of-way or permit granted herein may be reviewed at any time deemed necessary by the authorized officer.

e. Failure of the holder to comply with applicable law or any provision of this right-of-way grant or permit shall constitute grounds for suspension or termination thereof.

f. The holder shall perform all operations in a good and workmanlike manner so as to ensure protection of the environment and the health and safety of the public.

g. Any Cultural and/or paleontological resource (historic or prehistoric site or object) discovered by the holder, or any person working on his behalf, on public or Federal land shall be immediately reported to the authorized officer. Holder shall suspend all operations in the immediate area of such discovery until written authorization to proceed is issued by the authorized officer. An evaluation of the discovery will be made by the authorized officer to determine appropriate actions to prevent the loss of significant cultural or scientific values. The holder will be responsible for the cost of evaluation and any decision as to proper mitigation measures will be made by the authorized officer after consulting with the holder.

h. The holder shall conduct all activities associated with the construction, operation, and termination of the right-of-way within the authorized limits of the right-of-way.

i. Construction sites shall be maintained in a sanitary condition at all times; waste materials at those sites shall be disposed of promptly at an appropriate waste disposal site. "Waste" means all discarded matter including, but not limited to, human waste, trash, garbage, refuse, oil drums, petroleum products, ashes, and equipment.

j. Holder shall remove only the minimum amount of vegetation necessary for the auguring of pole holes. Topsoil shall be conserved during excavation and reused as cover on disturbed areas to facilitate regrowth of vegetation.

k. Construction holes left open over night shall be covered. Covers shall be secured in place and shall be strong enough to prevent livestock or wildlife from falling through and into a hole.

l. The power line shall meet minimum standards recommended in "Suggested Practices for Raptor Protection on Power Lines, The State of the Art in 1996" Avian Power Line Interaction committee (APLIC), 1996. Edison Electric Institute/Raptor Research Foundation, Washington D.C.

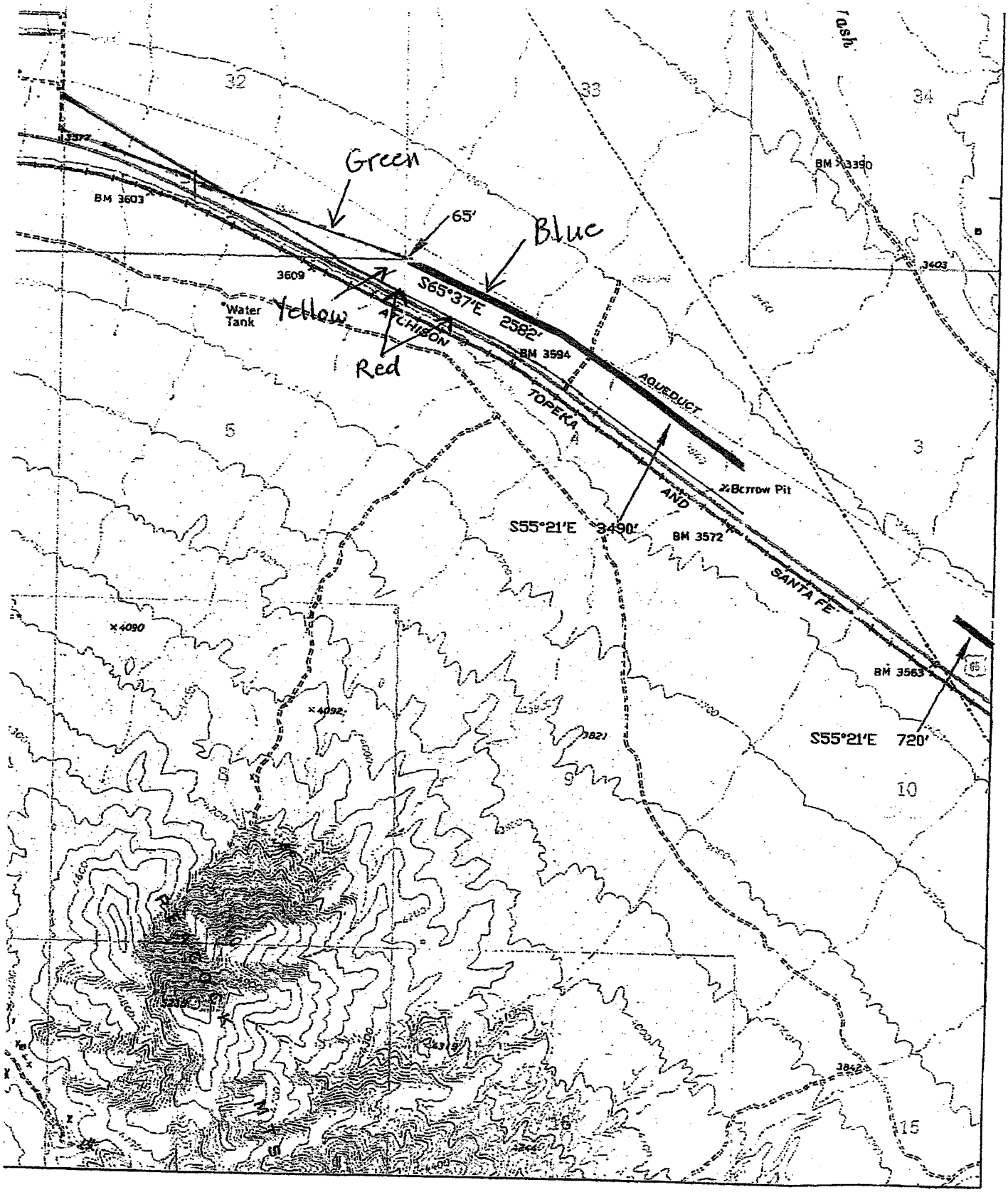
m. Keep surface disturbing activities to a minimum. Cross country driving should only be permitted rather than the balding of a road. Plant spacing and slope would allow for cross-country driving.

n. Avoid running over/crushing plants along the right-of-way. Drive around plants where possible.

IN WITNESS WHEREOF, The undersigned agrees to the terms and conditions of this right-of-way grant or permit.

Thomas Longtin	
(Signature of Holder)	(Signature of Authorized Officer)
Manager of Operations & Engineering	Acting Field Manager
(Title)	(Title)
6/9/2004	6/15/04
(Date)	(Effective Date of Grant)

AZA-32288



—— Actual Location of MEC's lines (Red)

▬▬ 2004 Right of way contract w/ BLM (Blue)

—— 2008 Right of way contract w/ State (Green)

Chantel property (Yellow)

EXHIBIT "D"

November 14, 2005

Roger Chantel
10001 E. Hwy. 66
Kingman, AZ 86401

Mohave Electric Cooperative
Stephen McArthur
P.O. Box 1045
Bullhead City, AZ 86430

Dear Mr. McArthur,

I am planning to build some new structures on my property located at 10001 E. Hwy. 66 and the property has an APN of 313-11-006. Mohave Electric Cooperative has four power poles on my property that may affect the design and location of these structures. I had a title company research the property for easements. The only easement they could find on record was the one that I gave to MEC in 2001 to my house.

I am including a copy of the recorded easement MEC has in the public records. According to this document, this easement does not include my property. I am also including a survey map of the property, which shows the location of MEC's poles and the easement that was granted to MEC in 2001. If you would be so kind as to supply me with any information, within 15 days of this letter, as to what the Cooperative may have on file concerning the location and placement of these power poles, I would greatly appreciate it.

Respectfully,

Roger Chantel

Roger Chantel

Copy sent to:

Curtis, Goodwin, Sullivan,
Udall & Schwab, P.L.C.

December 8, 2005

Roger Chantel
10001 E. Hwy 66
Kingman, AZ 86401

Arizona Corporation Commissioners
Kristin K. Mayes
1200 W. Washington St.
Phoenix, AZ 85007

Dear Commissioner,

You are probably aware of the conflicts of Mohave Electric Cooperative's efforts to block electric service to some property that I own in Mohave County. I would like to bring it to the Commission's attention that Mohave Electric Cooperative is not only trying to block electric service, but they are illegally transmitting electric power over my property and if that isn't enough they are using my property to provide electricity to the railroad for a fee. A proposal, to resolve all of the issues I have with Mohave Electric Cooperative, has been sent to Teena Wolfe. If you have an interest in seeing these issues resolved you can contact Teena Wolfe.

I am a strong believer in God and my goal is to have a Merry Christmas. If we cannot put together a settlement I will be consulting with the spiritual realm and asking for assistance in formulating strategies on how to solve these issues.

Have a Merry Christmas. As for next year, only time will tell.

Respectfully,

Roger Chantel

EXHIBIT "E"

January 6, 2012

Roger Chantel
10001 E. Hwy. 66
Kingman, AZ 86411

Board of Directors of
Mohave Electric Cooperative
P.O. Box 1045
Bullhead City, AZ 86430

Dear Sirs,

My name is Roger Chantel and we have had an ongoing dispute for a period of time. One of the issues is the cooperative's property that has been abandoned on this property. I have informed you and your legal counsel of the problem of these poles and lines being in an unsafe condition. Nothing has been done to remove these abandoned poles and lines, which are still located on the property.

I have been trying to find a way to resolve the issues that surround are differences. You can help by supplying me with a copy of all letters that Steve McArthur sent to me in 2006. I will need a copy of all repairs and maintenance records of lines along Highway 66 from mile marker 66 to mile marker 80 in the years of 2000 to 2008.

Please send a copy of this information to Honorable Lee F. Jansen to the Superior Court of Arizona, County of Mohave, Case No. CV2009-02574, Attn. Honorable F. Lee Jansen at P.O. Box 7000, Kingman, Arizona 86402-7000.

I will need a copy of this information also. We will need this information by January 20, 2012.

Sincerely,

Roger Chantel

EXHIBIT "F"

STATE LAND DEPARTMENT
STATE OF ARIZONA

Right of Way

R/W No. 17-1750

THIS RIGHT OF WAY ("Right of Way") is entered into by and between the State of Arizona (as "Grantor") by and through the Arizona State Land Department and

MOHAVE ELECTRIC COOPERATIVE, INC.

("Grantee"). In consideration of payment and performance by the parties of each of the provisions set forth herein, the parties agree as follows:

EXTENT OF DOCUMENT

"Additional Conditions", "Exhibits", and "Appendixes" are an integral part of this document. In case of a conflict between the printed boiler document and the additional conditions, exhibits, or appendixes, the applicable additional condition, exhibit, or appendix shall be considered the governing document and supersede the printed ~~boiler, but~~ only to the extent necessary to implement the additional condition, exhibit, or appendix, and only if the additional condition, exhibit, or appendix does not conflict with governing state or federal law.

ARTICLE 1
SUBJECT LAND

1.1 Grantor grants to Grantee a Right of Way on, over, through, and across the State lands described in Appendix A attached hereto ("Subject Land").

1.2 Grantee makes use of the Subject Land "as is", and Grantor makes no express or implied warranties as to the physical condition of the Subject Land.

ARTICLE 2
TERM

2.1 The term of this Right of Way commences on March 13, 2008 ("Commencement Date"), and expires on March 12, 2018 ("Expiration Date"), unless sooner canceled or terminated as provided herein or as provided by law.

ARTICLE 3
RENT

3.1 Rental is due in advance for the term of this Right of Way document.

3.2 If the Grantee should fail to pay rental when due, or fail to keep the covenants and agreements herein set forth, the Commissioner, at his option, may cancel said Right of Way or declare the same forfeited in the manner provided by law.

ARTICLE 4
PURPOSE AND USE OF SUBJECT LAND

4.1 The purpose of this Right of Way is the location, construction, operation, and maintenance of:

an overhead 14.4kV electric distribution line.

4.2 No material may be removed by Grantee or its contractors without the written approval of the Grantor.

4.3 Grantee shall not exclude from use the State of Arizona, its lessees, or grantees, or the general public the right of ingress and egress over this Right of Way.

4.4 Grantee shall acquire required permits prior to construction, and adhere to all applicable rules, regulations, ordinances, and building codes as promulgated by the local jurisdiction and any applicable State or Federal agencies.

4.5 All use of State land outside the Right of Way must be applied for and authorized in accordance with applicable law.

4.6 Grantee shall not sublet or assign this Right of Way or any portion thereof without the written consent of the Grantor.

4.7 The Grantor retains ownership of the Subject Land. The use of this Right of Way is to be non-exclusive. This Right of Way is sold subject to existing reservations, easements, or rights of way heretofore legally obtained and now in full force and effect.

4.8 When necessary for Grantee's reasonable use of this Right of Way for the purposes for which the grant is made, it shall be deemed to include the rights in, upon, over, and across the described Subject Land to erect, construct, reconstruct, replace, repair, and maintain the facilities authorized by this Right of Way.

4.9 Grantee shall have the right to erect, maintain, and use gates in all fences under the control of the Grantor which now cross or shall hereafter cross said Right of Way, and to trim, cut, and clear away trees or brush whenever in its judgment the same shall be necessary for the convenient and safe exercise of the right herein provided.

4.10 Grantee shall not fence any portion of this Right of Way unless specifically authorized in the attached additional conditions without prior written consent of Grantor, nor shall Grantee exclude from the use of the surface thereof the State of Arizona or its lessees or grantees as reserved in Paragraph 10.1.

ARTICLE 5
CONFORMITY TO LAW

5.1 This Right of Way is subject to applicable laws and covenants relating to State lands.

ARTICLE 6
CANCELLATION, TERMINATION AND ABANDONMENT

6.1 This Right of Way is subject to cancellation pursuant to A.R.S. § 38-511.

6.2 If at any time the Right of Way ceases to be used for the purpose for which it was granted, it shall become void, and the right to use the Subject Land and all the rights of Grantee hereunder shall revert to the Grantor.

6.3 Upon revocation or termination of the Right of Way, the Grantee shall remove all equipment or facilities, and so far as is reasonably possible, restore and/or rehabilitate the Subject Land to its original condition, and to the satisfaction of the Grantor.

ARTICLE 7
ENVIRONMENTAL INDEMNITY

7.1 Grantee shall protect, defend, indemnify, and hold harmless the Grantor from and against all liabilities, costs, charges, and expenses, including attorneys' fees and court costs arising out of (or related to) the presence of (or existence of) any substance regulated under any applicable federal, state, or local environmental laws, regulations, ordinances, or amendments thereto because of: (a) any substance that came to be located on the Right of Way due to Grantee's use or occupancy of the lands by the Grantee before or after the issuance of the Right of Way; or (b) any release, threatened release, or escape of any substance in, on, under, or from the Right of Way that is caused, in whole or in part, by any conduct, actions, or negligence of the Grantee, regardless of when such substance came to be located on the Right of Way.

7.2 For the purposes of this Right of Way the term "regulated substances" shall include substances defined as "regulated substances", "hazardous waste", "hazardous substances", "hazardous materials", "toxic substances", or "pesticides" in the Resource Conservation and Recovery Act, as amended by the Hazardous and Solid Waste Amendments of 1984; the Comprehensive Environmental Response, Compensation, and Liability Act; the Hazardous Materials Transportation Act; the Toxic Substance Control Act; the Federal Insecticide, Fungicide, and Rodenticide Act; the relevant local and state environmental laws, and the regulations, rules and ordinances adopted, and publications promulgated pursuant to the local, state, and federal laws. This indemnification shall include, without limitation, claims, or damages arising out of any violations of applicable environmental laws, regulations, ordinances, or subdivisions thereof, regardless of any real or alleged strict liability on the part of Grantor. This environmental indemnity shall survive the expiration or termination of this Right of Way and/or any transfer of all or any portion of the Subject Land and shall be governed by the laws of the State of Arizona.

7.3 In the event any such action or claim is brought or asserted against the Grantor, the Grantee shall have the right, subject to the right of the Grantor, to make all final decisions with respect to Grantor's liability for claims or damages, (i) to participate with Grantor in the conduct of any further required cleanup, removal, or remedial actions and/or negotiation and defense of any claim indemnifiable under this environmental indemnity provision, having reasonable regard to the continuing conduct of the operation/business located on the Subject Land and (ii) to participate with the Grantor in negotiating and finalizing any agreement or settlement with respect to any such claim or cleanup.

ARTICLE 8
INSURANCE REQUIREMENTS

8.1 Grantee shall maintain in full force a commercial general liability insurance policy during the Right of Way term affording protection to the limit of not less than one million dollars. This policy shall contain a provision that Grantor, named as an additional insured, shall be entitled to recovery for any loss occasioned to it, its agents, and employees. Further, the policy shall provide that Grantee's coverage is primary over any other insurance coverage available to the Grantor, its agents, and employees. Insurance policies must contain a provision that the Grantor shall receive an advance 30 day written notice of any cancellation or reduction in coverage.

ARTICLE 9
ENVIRONMENTAL MATTERS

9.1 Grantee shall strictly comply with Environmental Laws relating but not limited to hazardous and toxic materials, wastes, and pollutants. Compliance means the Grantee shall act in accordance with the necessary reporting obligations, obtain and maintain all permits required, and provide copies of all documents as required by Environmental Laws. For purposes of this Right of Way the term "Environmental Law" shall include but not be limited to any relevant federal, state, or local laws, and applicable

regulations, rules and ordinances, and publications promulgated pursuant thereto, including any future modifications or amendments relating to environmental matters.

ARTICLE 10
RESERVATIONS; RELINQUISHMENTS

10.1 Grantor reserves the right to grant other rights in, upon, over, and across the described Subject Land for any purpose whatsoever not inconsistent or incompatible with the use allowed by this indenture, and the Grantee agrees not to exclude the Grantor or its lessees or grantees from the use of the Subject Land herein described.

10.2 Grantor reserves all natural resources, timber, and minerals (including oil or gas) in or upon the described Subject Land, and the right to grant leases, permits, easements, and/or rights of way to extract such resources as provided by law and in a manner not inconsistent or incompatible with Grantee rights hereunder. Where inconsistent or incompatible uses exist, the Grantor will require the applicant therefor to indemnify Grantee for loss it might suffer by reason of such use.

10.3 Grantor reserves the right to relinquish to the United States pursuant to the U.S. Act of August 30, 1890, land needed for irrigation works in connection with a government reclamation project.

ARTICLE 11
LOCATION, CONSTRUCTION AND MAINTENANCE

11.1 Grantee shall ensure full compliance with the terms and conditions of this Right of Way by its agents, employees, and contractors (including sub-contractors of any tier), and the employees of each of them and shall include the terms and conditions in all contracts and sub-contracts which are entered into by any of them.

11.2 Failure or refusal of Grantee's agents, employees, contractors, sub-contractors, or their employees to comply with these terms and conditions shall be deemed to be the failure or refusal of Grantee.

ARTICLE 12
NATIVE PLANTS AND ARCHAEOLOGICAL RESOURCES

12.1 If the removal of plants protected under the Arizona Native Plant Law is necessary to enjoy the privilege of this Right of Way, the Grantee hereunder must obtain the written permission of the Grantor and the Arizona Department of Agriculture prior to removal of those plants.

12.2 Grantee shall promptly notify the Commissioner of the amount of flora, if any, which will be cut, removed, or destroyed in the construction and maintenance of said Right of Way and shall pay the Grantor such sum of money as the Commissioner may determine to be the full value of the flora to be so cut, removed, or destroyed. Grantee

shall notify the Grantor and the Arizona Department of Agriculture 30 days prior to any destruction or removal of native plants to allow salvage of those plants where possible.

12.3 Prior to surface disturbance, the Grantee hereof shall provide evidence of archaeological clearance to the Department. Archaeological surveys and site mitigation must be conducted in accordance with rules and regulations promulgated by the Director, Arizona State Museum. In the event additional archaeological resources are detected by Grantee after receipt of archaeological clearance, all work shall cease and notification shall be given to the Director, Arizona State Museum, and Grantor.

ARTICLE 13
GRANTEE SHALL PROTECT AND RESTORE THE SUBJECT LAND

13.1 Grantee shall be required, upon completion of Right of Way construction, to make such rehabilitation measures on the State lands, including but not limited to restoration of the surface, revegetation, and fencing as determined necessary by the Grantor.

13.2 Grantee shall conduct all construction and maintenance activities in a manner that will minimize disturbance to all land values including but not limited to vegetation, drainage channels, and streambanks. Construction methods shall be designed to prevent degradation of soil conditions in areas where such degradation would result in detrimental erosion or subsidence. Grantee shall take such other soil and resource conservation and protection measures on the Subject Land under grant as determined necessary by the Grantor.

13.3 Costs incurred by the Grantee in complying with restoration and rehabilitation requirements, as determined by the Department, on State lands shall be borne by the Grantee.

13.4 Grantee shall conduct its operations on the Subject Land in such a manner as is consistent with good environmental practices. Grantee shall exert reasonable efforts to avoid damage of protected flora, and restore the surface to its condition prior to the occupancy thereof by Grantee.

ARTICLE 14
MISCELLANEOUS

14.1 The described Subject Land shall be used only for the purpose stated in Paragraph 4.1, and as may be further detailed elsewhere.

14.2 This Document is submitted for examination and shall have no binding effect on the parties unless and until executed by the Grantor (after execution by the Grantee), and until a fully executed copy is delivered to the Grantee.

14.3 In the event of a dispute between the parties to this Right of Way, it is agreed to use arbitration to resolve the dispute, but only to the extent required by A.R.S. § 12-1518. In no event shall arbitration be employed to resolve a dispute which is otherwise subject to administrative review by the Department.

14.4 The Grantor does not represent or warrant that access exists over other State lands which intervene respectively between the above Right of Way and the nearest public roadway.

14.5 Grantee agrees to indemnify, hold, and save Grantor harmless against all loss, damage, liability, expense, costs, and charges incident to or resulting in any way from any injuries to person or damage to property caused by or resulting from the use, condition, or occupation of the Subject Land.

14.6 If for any reason the State of Arizona does not have title to any of the Subject Land described herein, this Right of Way shall be null and void insofar as it relates to the land to which the State has failed to receive title.

14.7 Every obligation of the State under this Right of Way is conditioned upon the availability of funds appropriated or allocated for the payment of such obligation. If funds are not allocated and available for the continuance of this Right of Way, this Right of Way may be terminated by the State at the end of the period for which funds are available. No liability shall accrue to the State in the event this provision is exercised, and the State shall not be obligated or liable for any future payments or any damages as a result of termination under this paragraph.

14.8 The parties agree to be bound by applicable State and Federal rules governing Equal Employment Opportunity, Non-discrimination and Disabilities, including Executive Order No. 99-4.

14.9 Within 30 days of project completion, Grantee shall submit a completed certificate of construction (copy attached).

STATE OF ARIZONA LAND DEPARTMENT
1616 W. ADAMS
PHOENIX, AZ 85007

RUN DATE 20-MAR-2008
RUN TIME: 10:37:46
APPENDIX A
PAGE: 001

KE-LEASE#: 017-001750-00-001 APPTYPE: RENEWAL

AMENDMENT#: 0

LAND#	LEGAL DESCRIPTION	AUS	ACREAGE
21.0-N-15.0-W-32-08-030-9000	M&B THRU S2 NE	0.00	2.500
23.0-N-13.0-W-02-08-030-9001	M&B THRU NW NWSW	0.00	2.500
23.0-N-15.0-W-02-08-030-9003	M&B THRU SESE	0.00	0.570
23.0-N-15.0-W-32-08-030-9003	M&B THRU SW N2	0.00	4.400
24.0-N-14.0-W-32-08-030-9003	M&B THRU S2	0.00	3.850
24.0-N-15.0-W-36-08-030-9004	M&B THRU SE	0.00	1.360
	TOTALS:	0.00	15.180

IN WITNESS HEREOF, the parties hereto have signed this Right of Way effective the day and year set forth previously herein.

STATE OF ARIZONA, GRANTOR
Arizona State Land Commissioner

By: _____ APR 17 2008
Date

(SEAL)

ARIZONA STATE LAND DEPARTMENT 1915

MOHAVE ELECTRIC CO-OP, INC.
GRANTEE

Thomas Pongratz 4/15/2008
By **Date**

_____

Box 1045
Address

BULLHEAD CITY AZ 86430
City **State Zip**

GRANTEE'S CERTIFICATE OF CONSTRUCTION

RIGHT OF WAY NUMBER: _____

NAME OF GRANTEE: _____

DATE ISSUED: _____

PERMITTED USE: _____

LAND DEPARTMENT ADMINISTRATOR: _____

DATE CONSTRUCTION STARTED: _____

DATE CONSTRUCTION COMPLETED: _____

I hereby certify that the facilities authorized by the State Land Commissioner, were actually constructed and tested in accordance with the terms of the grant, in compliance with any required plans and specifications, and applicable Federal and State laws and regulations.

_____

Grantee's Signature **Date**

_____

Title

Return To: **Arizona State Land Department**
R/W Section
1616 W. Adams Street
Phoenix, AZ 85007

EXHIBIT "G"

Date: November 1, 2011
Statement # 132

Roger Chantel
10001 E. Hwy. 66
Kingman, AZ 86401

BILL TO Mohave Electric Cooperative
P.O. Box 1045
Bullhead City, AZ 86430-1045

Comments

DATE	DESCRIPTION	BALANCE	AMOUNT
10-3-2011	Last Statement Balance	$102,490.27	
11-1-2011	Service and Finance Charges	$ 1,662.35	
	Statement Total		$104,152.62

EXHIBIT "H"

NOTE FILE NO. 1234-744-2
XEROX ALL PLEADINGS ✓
COPIES TO MAC

STAMPED — DATE —
ROUTED TO MAC
DO NOT FILE UNTIL
ALL ITEMS CHECKED
AND INITIALED MAW

Jonathan A. Dessaules, State Bar No. 019439
Douglas C. Wigley, State Bar No. 027223
DESSAULES LAW GROUP
2700 North Central Avenue, Suite 1250
Phoenix, Arizona 85004
Tel. 602.274.5400
Fax 602.274.5401
jdessaules@dessauleslaw.com
dwigley@dessauleslaw.com

Attorneys for Plaintiffs

IN THE SUPERIOR COURT OF ARIZONA

COUNTY OF MOHAVE

DUSTIN R. CHANTEL and ELIZABETH D. CHANTEL, husband and wife, Plaintiffs, vs. MOHAVE ELECTRIC COOPERATIVE, INC., an Arizona non-profit corporation; JOHN and JANE DOES I-X; BLACK and WHITE CORPORATIONS I-X, Defendants.	Case No. CV2009-02574 **PLAINTIFFS' THIRD SUPPLEMENTAL DISCLOSURE STATEMENT**

DESSAULES LAW GROUP
2700 N. Central Avenue, Suite 1250
Phoenix, AZ 85004
Tel. 602.274.5400 Fax. 602.274.5401

Plaintiffs Dustin R. Chantel and Elizabeth D. Chantel, by and through undersigned counsel, make the following supplemental disclosures pursuant to Rule 26.1 of the Arizona Rules and Civil Procedure. Changes and or additions from Plaintiffs' prior disclosure statement(s) are indicated in **bold** type. Plaintiffs reserve the right to seasonably supplement this disclosure statement as additional, relevant information becomes available.

I. FACTUAL BASES OF CLAIMS AND DEFENSES.

Since December 1999 and to the present date, the Chantels owned real property located at 10001 East Highway 66, Kingman, Arizona 86401 (the "Property"). At all material times the Chantels have been customers of MEC, who delivered electrical power to the Chantels' residence, which is located on the Property. The Chantels and MEC had a contractual

RECEIVED
MAY 26 2011
CURTIS, GOODWIN, SULLIVAN, UDALL, & SCHWAB, PLC

relationship in which MEC was obligated to provide the safe delivery of electricity to the Chantels' residence in exchange for payment from the Chantels. The Chantels have always made timely payments to MEC.

At all times since the Chantels have owned the Property, an overhead electrical power line has run across the southern portion of the Property (the "Old Line"), generally running in an east-west direction. Defendant MEC is the owner and operator of the Old Line. Defendant MEC has no recorded easement or right-of-way for the portion of the Old Line located on the Property. MEC has asserted that it received permission from prior owners of the Property to run the Old Line across the Property. Prior to September 16, 2008, the Chantels' residence received electricity from another overhead electrical power line that was connected to the Old Line. Numerous wooden poles support the Old Line. The average distance between most of the wooden poles along the Old Line is approximately 300 feet. However, a distance of approximately 700 feet exists between two wooden poles that cross the Chantels' Property.

MEC, pursuant to Arizona Administrative Code § 14-2-208(F), is required to construct and maintain wooden power poles such as the ones located on and around the Chantels' Property in accordance with the 1997 ANSI C2 National Electrical Safety Code, which permits a maximum distance of 300 feet to exist between power poles of the type at issue. In or around 2006, the Chantels noticed the power lines connected to the Old Line were hanging dangerously low over the Property and certain wooden poles from the Old Line that are located on the Property were bending and cracking. Since 2006, the Chantels have expressed their safety concerns regarding the low hanging power lines and the bending and cracking power poles to, among others, Defendant MEC and requested that MEC repair the Old Line. Despite numerous requests from the Chantels, Defendant MEC failed to repair the Old Line or otherwise take any action to correct the dangerous condition of the power poles and the lines.

During the summer of 2008, the Chantels began building, at a substantial cost, a functional piece of artwork under the low hanging power lines to catch or deflect any lines or

wooden poles that might break and fall in order to protect themselves, their guests and invitees, and their property from the dangers posed by the power poles and lines. On or about September 16, 2008, Defendant MEC built a new overhead electrical power line that ran parallel to the Old Line, but was located immediately south of the Property (the "New Line"), approximately 75 feet away from the Old Line. Immediately after the completion of the New Line, and without any substantial warning, MEC abruptly disconnected the electricity to the Chantels' residence. After their electricity was disconnected, the Chantels made numerous requests to MEC asking it to reinstate electricity. MEC refused, and continues to refuse, to reinstate electricity to the Chantels' residence unless the Chantels pay approximately $12,000 for the costs of building the New Line. As a result of Defendant MEC's disconnection of electricity, the Chantels have been forced to find alternative sources of electricity, including, but not limited to, generators and solar power systems, at considerable cost. The generators that the Chantels have been using, in addition to being very costly, are not an adequate source of electricity because they cannot provide the constant supply of electricity necessary to power the Chantels' residence, including a medical device that Dustin R. Chantel relies on. The solar system that the Chantels have been using, in addition to being very costly, is not an adequate source of electricity because weather conditions affect its ability to provide the constant supply of electricity necessary to power the Chantels' residence. As a result of Defendant MEC's disconnection of electricity, Dustin R. Chantel suffered physical injuries.

II. LEGAL THEORY SUPPORTING CLAIMS AND DEFENSES

A. Breach of Contract.

In order to prove a breach of contract claim, a plaintiff is required to prove the existence of the contract, breach, and damages resulting from the breach. Coleman v. Watts, 87 F.Supp.2d 944, 955 (D.Ariz. 1998) (citing *Clark v. Compania Ganadera de Cananea, S.A.*, 95 Ariz. 90, 387 P.2d 235, 237 (1963). The plaintiffs must also establish with sufficient specifity

the obligations involved in the contract. *Id.* (citing *Savoca Masonry Company, Inc. v. Homes and Son Construction Company, Inc.*, 112 Ariz. 392, 542 P.2d 817, 819 (1975).

At all times relevant to the events described in the Complaint, a contractual relationship between Plaintiffs and Defendant, as customer and electricity provider, existed. Defendant breached the contract by allowing the power poles along the Old Line to bend and crack, which created a dangerous condition on Plaintiffs' Property. Additionally, Defendants breached the contract by wrongfully, and without proper notice, shutting off the electricity to the Plaintiffs' residence. This breach has caused Plaintiffs damages, including, but not limited to, the costs of constructing the protective structure and replacement sources of power.

B. Breach of the Covenant of Good Faith and Fair Dealing.

Arizona law implies a covenant of good faith and fair dealing in all contracts. *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 490, 38 P.3d 12, 28 (2002). MEC's actions, as alleged above, constitute a breach of the implied covenant of good faith and fair dealing. The Chantels have been damaged as a direct and proximate result of MEC's breach of the implied covenant of good faith and fair dealing.

C. Quiet Title/Declaratory Judgment.

Pursuant to A.R.S. § 12-1101, "[a]n action to determine and quiet title to real property may be brought by any one having or claiming an interest therein, whether in or out of possession, against any person or the state when such person or the state claims an estate or interest in the real property which is adverse to the party bringing the action."

MEC, through its placement of the Old Line on the Chantels' Property, has asserted an interest in the Property that is adverse to Plaintiffs' ownership interest. This placement of the Old Line has, and continues, to be an unauthorized use and possession of the Chantels' Property. The Chantels' ownership interest in the Property is superior to MEC's purported interest in the Property.

An actual controversy has arisen and now exists between the parties as to their respective rights, status, and obligations regarding the Property. The Chantels are entitled to a judicial determination of the parties' respective rights, status, and obligations regarding the Property. This controversy will continue until resolved by this Court. The Chantels are entitled to a declaratory judgment that they are the rightful owners of the Property.

D. Ejectment (Right of Recovery).

Pursuant to A.R.S. § 12-1251, "[a] person having a valid subsisting interest in real property and a right to immediate possession thereof may recover the property by action against any person acting as owner, landlord or tenant of the property claimed." The Chantels are the rightful owners of the Property and are entitled to all interests in the Property thereof. MEC continued use and possession of the Property through its placement of the Old Line on the Property is tantamount to MEC acting as the owner, landlord, or tenant of the Property. The Chantels are entitled to immediate possession and full use of the Property.

E. Recovery of Rent.

Pursuant to A.R.S. § 12-1271(2), "[a] person entitled thereto may bring an action for and recover rent, or a fair and reasonable satisfaction for the use and occupation of real property in the following cases . . . [w]hen lands are held and occupied without a special agreement for rent, or when a tenant remains in possession after termination of his right of possession." The Chantels are the rightful owners of the Property and are entitled to all interests in the Property thereof. MEC's continued unauthorized use and possession of the Property through its placement of the Old Line on it, entitles the Chantels to recover rents or the fair and reasonable satisfaction for MEC's unauthorized use and possession of the Property.

F. Negligence.

"In order to maintain a negligence claim, 'a plaintiff must prove four elements: (1) a duty requiring the defendant to conform to a certain standard of care; (2) a breach by the defendant of that standard; (3) a causal connection between the defendant's conduct and the resulting injury;

and (4) actual damages.'" *Ritchie v. Krasner*, 221 Ariz. 288, 295, 211 P.3d 1272, 1279 (Ct. App. 2009) (quoting *Gipson v. Kasey*, 214 Ariz. 141, 143, ¶ 9, 150 P.3d 228, 230 (2007)). "A duty may arise even in the absence of a formal relationship." *Id.* (quoting *Stanley v. McCarver*, 208 Ariz. 219, 221, 92 P.3d 849, 851 (2004). "It can arise from a relationship between the parties, a contractual relationship, or any number of other types of contacts." *Id.* "A special or direct relationship, however, is not essential in order for there to be a duty of care." *Id.* (quoting *Gipson* at 145, 150 P.3d at 232).

MEC owed a duty to the Chantels to provide the safe delivery of electricity to their residence. MEC breached that duty by, among other things, allowing too great of distance between the wooden poles supporting the Old Line on the Property, allowing the wooden poles to bend and crack, and wrongfully disconnecting the electricity to the Chantels' residence. MEC's negligence is the direct and proximate cause of Dustin R. Chantel's physical injuries.

G. Intentional Infliction of Emotional Distress.

Arizona has adopted the Restatement (Second) of Torts version of the intentional infliction of emotional distress claim, which requires three elements: "*first*, the conduct by the defendant must be "extreme" and "outrageous"; *second*, the defendant must either intend to cause emotional distress or recklessly disregard the near certainty that such distress will result from his conduct; and *third*, severe emotional distress must indeed occur as a result of defendant's conduct." *Ford v. Revlon, Inc.*, 153 Ariz. 38, 43, 734 P.2d 580, 585 (1987) (emphasis in original) (citing *Watts v. Golden Age Nursing Home*, 127 Ariz. 255, 258, 619 P.2d 1032, 1035 (1980)). The underlying acts must be "so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Mintz v. Bell Atl. Sys. Leasing Int'l, Inc.*, 183 Ariz. 550, 554, 905 P.2d 559, 563 (Ct. App. 1995) (quoting *Cluff v. Farmers Ins. Exchange*, 10 Ariz.App. 560, 562, 460 P.2d 666, 668 (1969)).

MEC's acts, conduct, and omissions, as aforesaid, amounted to extreme and outrageous conduct that was intended to cause emotional distress to the Chantels and/or was done with reckless disregard for the near certainty that such distress would result from its conduct. MEC's extreme and outrageous conduct caused the Chantels severe emotional distress.

H. Punitive/Exemplary Damages.

Pursuant to A.R.S. § 40-423(A):

> If any public service corporation does or permits to be done anything forbidden or declared to be unlawful, or omits to do anything required to be done, by the constitution or laws of the state, or by orders of the commission, the corporation is liable to the persons affected thereby for all loss, damages or injury caused thereby or resulting therefrom. If the court finds that the act or omission was willful, it may also award exemplary damages.

MEC's acts, conduct, and omissions, as aforesaid, were done intentionally, with an evil mind, and/or with conscious, calculated, and outrageous disregard for the substantial risk of harm to the Chantels, knowing that its acts, conduct, and omissions were conducted for its own exclusive interest, thereby entitling the Chantels to an award of punitive and/or exemplary damages in an amount appropriate to punish Defendants and set an example.

III. WITNESSES EXPECTED TO TESTIFY AT TRIAL

Plaintiffs anticipate calling the following individuals as trial witnesses to testify consistent with the pleadings, disclosure statements, and any facts obtained during discovery:

1. Dustin R. Chantel, c/o Jonathan A. Dessaules, Dessaules Law Group, 2700 North Central Avenue, Suite 1250, Phoenix, Arizona 85004. Mr. Chantel is expected to testify in support of the claims set forth in the Complaint and this disclosure statement.

2. Elizabeth D. Chantel, c/o Jonathan A. Dessaules, Dessaules Law Group, 2700 North Central Avenue, Suite 1250, Phoenix, Arizona 85004. Mrs. Chantel is expected to testify in support of the claims set forth in the Complaint and this disclosure statement.

3. Mohave Electric Cooperative, Inc., c/o Larry Udall, Curtis, Goodwin, Sullivan, Udall & Schwab, P.L.C., 501 East Thomas Road, Phoenix, Arizona 85012. A representative(s)

of MEC is/are expected to testify about the events surrounding MEC's actions in shutting off the power to the Chantels' residence, MEC's presence on the Property, MEC's construction of the New Line, and the claims set forth in the Complaint and this disclosure statement.

4. Mohave County, 700 West Beale Street, Kingman, Arizona 86401. A representative(s) of Mohave County is expected to testify about the events surrounding MEC's action is shutting off the power to the Chantels' residence.

5. Thomas Longtin, Mohave Electric Cooperative, Inc., c/o Larry Udall, Curtis, Goodwin, Sullivan, Udall & Schwab, P.L.C., 501 East Thomas Road, Phoenix, Arizona 85012. Mr. Longtin is MEC's Manager of Operations and Engineering and is expected to testify about the events surrounding MEC's shutting off the power to the Chantels' residence, the old line that runs across the Chantels' property, and the new line that MEC constructed next to the Chantels' property.

6. J. Tyler Carlton, Mohave Electric Cooperative, Inc., c/o Larry Udall, Curtis, Goodwin, Sullivan, Udall & Schwab, P.L.C., 501 East Thomas Road, Phoenix, Arizona 85012. Mr. Carlton is the Chief Executive Officer of MEC and is expected to testify about the events surrounding MEC's shutting off the power to the Chantels' residence, the old line that runs across the Chantels' property, the new line that MEC constructed next to the Chantels' property, and the Chantels' membership with MEC.

7. Lyn R. Opalka, Mohave Electric Cooperative, Inc., c/o Larry Udall, Curtis, Goodwin, Sullivan, Udall & Schwab, P.L.C., 501 East Thomas Road, Phoenix, Arizona 85012. Mr. Opalka is the President of the Board of Directors of MEC and is expected to testify about the events surrounding MEC's shutting off the power to the Chantels' residence, the old line that runs across the Chantels' property, the new line that MEC constructed next to the Chantels' property, and the Chantels' membership with MEC

8. Darrell Riedel, County of Mohave, Arizona, 700 West Beale Street, Kingman, Arizona 86401. Mr. Riedel is an employee of Mohave County's Planning and Zoning

Department and is expected to testify regarding MEC's requests that Mohave County order MEC to shut off the power to the Chantels' residence, and any licenses, permits, or regulatory issued relating to the old line located on the Chantels' property and the new line that MEC constructed next to the Chantels' property.

9. Simon J. Farrow, M.D., 2911 North Tenaya Way, Suite 100, Las Vegas, Nevada 89128. Dr. Farrow is expected to testify regarding his medical examination(s) of Plaintiff Dustin R. Chantel.

10. Michael Sheehy, D.O., Kingman Regional Medical Center, 3269 Stockton Hill Road, Kingman, Arizona 86409. Dr. Sheehy is expected to testify regarding his medical examination(s) of Plaintiff Dustin R. Chantel.

11. Any and all physicians, psychiatrists, psychologists, and/or counselors that have treated and counseled Plaintiff Dustin R. Chantel regarding his medical conditions that require constant electrical service to his residence and injuries caused by MEC's actions.

12. Any individual named or identified in any discovery response.

13. Any individual named, identified, mentioned, referenced or discussed in any document produced in this matter.

14. Without waiving any objection thereto, any witness or knowledgeable person identified by any party to this litigation.

Plaintiffs will seasonably supplement this disclosure when additional witnesses are identified and when further details regarding the anticipated testimony of the identified witnesses is discovered.

IV. OTHER PERSONS WITH PERTINENT KNOWLEDGE

1. Arizona Corporation Commission, Utilities Division, 1200 West Washington Street, Phoenix, Arizona 85007. Commissioners and/or staff may have knowledge or

EXHIBIT "I"

The Law Offices of
CURTIS, GOODWIN, SULLIVAN,
UDALL & SCHWAB, P.L.C.
501 East Thomas Road
Phoenix, Arizona 85012-3205
Telephone (602) 393-1700

Larry K. Udall (#009873)

Attorney for Mohave Electric Cooperative, Inc.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MOHAVE

ROGER CHANTEL and DARLENE CHANTEL, husband and wife, Petitioners, v. **MOHAVE ELECTRIC COOPERATIVE, INC.,** Respondent.	**CASE NO. CV 2009-0058** **ATTORNEY'S AFFIDAVIT IN SUPPORT OF MOTION FOR ATTORNEYS FEES** **(Assigned to the Honorable James Chavez)**

STATE OF ARIZONA)
) ss
County of Maricopa)

Larry K. Udall, being first duly sworn, deposes and says:

1. I, Larry K. Udall, am an attorney licensed to practice law in the State of Arizona since October of 1984 in both the United States District Court of Arizona and all state courts in Arizona.

2. Michael A. Curtis is an attorney licensed to practice law in the State of Arizona. He has been actively engaged in the practice of law in Arizona for more than 30 years.

3. William P. Sullivan is an attorney licensed to practice law in the State of Arizona and has practiced since 1979.

4. Attached to this Affidavit are the billings, which contain a specific description of all time records by all lawyers and paralegals at the law firm of Curtis, Goodwin, Sullivan, Udall & Schwab, P.L.C., who worked on the file in question.

5. The billing sheets are prepared and based on the amount of time expended and measured in tenths of an hour with a brief description of the work performed on a daily basis for the amount of charges for the time involved. These billing sheets are, in turn, based upon individual time sheets maintained by myself, the lawyers and paralegals at Curtis, Goodwin, Sullivan, Udall & Schwab, P.L.C. More specifically the lawyers and paralegals at Curtis, Goodwin, Sullivan, Udall & Schwab, P.L.C., fill out time sheets for work performed and then these time sheets are entered into computer forms and submitted to the firm's accounting department. The information is then entered into a computer system where the data is stored and thereafter bills are prepared and rendered to clients about every month reflecting the work performed, the charges and the costs incurred. Clients forward their remittance to Curtis, Goodwin, Sullivan, Udall & Schwab, P.L.C., in response to statements or invoices mailed to said clients. These practices and procedures are standard to the law firm of Curtis, Goodwin, Sullivan, Udall & Schwab, P.L.C., and are within its normal business operations and were followed in this case.

6. After review of all of the billing statements, I have determined that all entries set forth on said billing statements are related to this action and were appropriately and reasonably incurred.

7. The billing rates that have been specified are the billing rates charged for Larry K. Udall (LKU), William P. Sullivan (WPS) and Michael A. Curtis (MAC) are respectively $250.00, $275.00 and $350.00 per hour.

8. The billing rates that have been charged for my paralegal, Mary A. Walker (MAW) are at a rate of $95.00 per hour.

9. For the accounting period of December 1, 2008 through February 19, 2009, the total of 62.9 hours of attorney time (LKU – 57.2, WPS – 2.5 and MAC – 1.2 hours) and 2.0 hours of paralegal time was expended on all aspects of this judicial proceeding, including preparation of the

Motion to Dismiss, preparation for the oral argument and attendance at the oral argument. During these periods, Affiant, was the primary attorney on this matter, and oversaw all attorney and paralegal work and reviewed the time submitted. The rates and time expended are reasonable and within the normal and customary rates and practices customarily incurred by Arizona attorneys in this type of matter.

10. After reviewing all time sheets and evaluating the efforts that were necessary for this matter, your Affiant believes that the amounts billed and charged were reasonable and appropriate, and have been paid by the Defendant. Therefore the undersigned counsel requests, on behalf of the Defendant that an award of $ 15,597.50 in attorneys fees be granted.

11. Affiant also notes that through May 1, 2006, Mohave Electric Cooperative expended approximately $26,053.75 in legal fees to deal with other frivolous matters the Petitioners brought before the Arizona Corporation Commission.

12. I have read and reviewed the foregoing and accompanying Application for Attorney's Fees and believe the facts contained therein to be true and correct of my own personal knowledge.

13. Further Affiant sayeth naught.

Larry K. Udall

SUBSCRIBED AND SWORN TO BEFORE ME this 20th day of February, 2009 by Larry K. Udall.

Mary Walker
Notary Public

My Commission Expires:

OFFICIAL SEAL
MARY WALKER
NOTARY PUBLIC - State of Arizona
MARICOPA COUNTY
My Comm. Expires June 29, 2012

The Law Offices of
Curtis, Goodwin, Sullivan,
Udall & Schwab, P.L.C.
501 East Thomas Road
Phoenix, Arizona 85012
Telephone (602) 393-1700
Facsimile (602) 393-1703

February 20, 2009
Invoice # 14431

Mohave Electric Cooperative Inc.
Mr. Robert Broz, CEO
P. O. Box 1045
Bullhead City, AZ 86430

Re: Mohave Electric Cooperative, Inc. adv. Chantel (ACC) (05
I.D. 1234-07044- MAC

For Services Rendered Through February 20, 2009

Previous Balance		$ 2,362.31
Net Payments		<2,362.31>
Current Fees	15,597.50	
Current Disbursements	239.04	
Total Due		$ 15,836.54

The Law Offices of

Curtis, Goodwin, Sullivan, Udall & Schwab, P.L.C.

February 20, 2009
Invoice # 14431

Mohave Electric Cooperative Inc.

Re: Mohave Electric Cooperative, Inc. adv. Chantel (ACC) (05
I.D. 1234-07044- MAC

Date	Description of Services	Atty	Hours
12-09-08	Review documents for Superior Court and internal conference with Larry K. Udall;	MAC	0.3
12-17-08	Conference with Larry K. Udall on pleadings;	MAC	0.1
12-22-08	Conference with Larry K. Udall on pleadings;	MAC	0.1
01-07-09	Review drafts of pleadings;	MAC	0.2
01-09-09	Review drafts of pleadings;	MAC	0.1
01-12-09	Review of statutory scheme for writs of mandamus; outline motion to dismiss;	LKU	1.7
01-13-09	Telephone conference with William P. Sullivan regarding legal issues for dismissal; draft motion to dismiss;	LKU	2.2
01-14-09	Further preparation of Motion to Dismiss; review of documents; legal research regarding same;	LKU	4.2
01-15-09	Revisions to draft Motion to Dismiss;	LKU	4.3
01-16-09	Revisions to draft Motion to Dismiss; legal research and review of MEC's documents;	LKU	5.3
01-19-09	Preliminary review of Motion to Dismiss and provide comments to Larry K. Udall;	WPS	0.9
01-19-09	Conference with Michael A. Curtis and William P. Sullivan regarding Chantel Petition for Mandamus;	LKU	0.4
01-20-09	Communication with Larry K. Udall regarding draft Motion to Dismiss;	WPS	0.3
01-21-09	Revisions to Motion to Dismiss; conference with Michael A. Curtis and William P. Sullivan;	LKU	2.5
01-22-09	Internal Discussions regarding Motion to Dismiss;	WPS	0.4
01-22-09	Conference with Michael A. Curtis and William P. Sullivan on issues for dismissal of complaint; revisions to draft motion to dismiss;	LKU	2.2

The Law Offices of

Curtis, Goodwin, Sullivan, Udall & Schwab, P.L.C.

February 20, 2009
Invoice # 14431

Re: Mohave Electric Cooperative, Inc. adv. Chantel (ACC) (05
I.D. 1234-07044- MAC

Date	Description of Services	Atty	Hours
01-23-09	Office conference with Michael A. Curtis regarding Motion to Dismiss; revisions to Motion;	LKU	2.2
01-27-09	Phone conferences with court staff regarding hearing and re-scheduling; e-amil to client regarding scheduling of oral argument; draft proposed order;	LKU	1.6
01-28-09	Communication with court regarding presence of court reporter at oral argument;	MAW	0.1
01-28-09	Preparation of draft order of dismissal; conference with Michael A. Curtis regarding draft order;	LKU	0.6
01-29-09	Various communications with P. Griffis, Michael A. Curtis and Larry K. Udall regarding hearing involving Chantel;	WPS	0.9
01-29-09	Office conference with Michael A. Curtis and William P. Sullivan regarding hearing; e-mail to Paula Griffis regarding hearing;	LKU	0.5
01-30-09	Office conference with Michael A. Curtis regarding R. Broz' concerns with draft order; revisions; email to Paula Griffis regarding revisions; Paula's email regarding approval of order;	LKU	0.8
02-03-09	Prepare for oral argument on Motion to Dismiss;	LKU	1.3
02-04-09	Prepare for oral argument on Motion to Dismiss Application for Writ of Mandamus;	LKU	3.5
02-05-09	Prepare for and attend oral argument hearing in Kingman;	LKU	8.5
02-06-09	Preparation of Motion for Award of Attorney Fees and Affidavit in Support of Attorney Fees; review of billing statements to incorporate into Affidavit; docket		

The Law Offices of

Curtis, Goodwin, Sullivan, Udall & Schwab, P.L.C.

February 20, 2009
Invoice # 14431

Re: Mohave Electric Cooperative, Inc. adv. Chantel (ACC) (05
I.D. 1234-07044- MAC

Date	Description of Services	Atty	Hours
	deadlines; office conference with Larry K. Udall regarding same; prepare amended order granting Motion to Dismiss;	MAW	1.0
02-06-09	Preparation of Application for legal fees; forwarding of Order dismissing Chantel's lawsuit to client;	LKU	2.3
02-09-09	Telephone conferences with County officials regarding file; revise application for attorney's fees;	LKU	1.5
02-10-09	Chantel: Telephone conference with Mohave County Staff regarding MEC easement on Chentel property; revise Motion for Attorneys' Fee;	LKU	1.7
02-11-09	Office conference with Larry K. Udall regarding statement of costs; telephone conference with clerk regarding payment of fee; prepare Statement of Costs; discuss same with Larry K. Udall; finalize for filing; prepare letter to clerk regarding payment and filing;	MAW	0.2
02-11-09	Revisions to Application for Attorney's fees;	LKU	2.5
02-16-09	Revisions to Application for attorney's fees; legal research on Chantel's property sales; legal research on attorney's fees issues;	LKU	3.7
02-17-09	Review of Chantel's demand for rent; conference with Michael A. Curtis regarding issues;	LKU	0.3
02-18-09	Revisions to Application for Attorneys Fees;	LKU	1.5
02-19-09	Chantel: Redraft of attorney fee brief; conference with Larry K. Udall;	MAC	0.4
02-19-09	Finalize Application for attorney's fees;		

The Law Offices of

Curtis, Goodwin, Sullivan, Udall & Schwab, P.L.C.

February 20, 2009
Invoice # 14431

Mohave Electric Cooperative Inc.

Re: Mohave Electric Cooperative, Inc. adv. Chantel (ACC) (05
I.D. 1234-07044- MAC

Date	Description of Services	Atty	Hours
	gathering exhibits; telephone conference with Michael A. Curtis and staff for finalizing;	LKU	1.9
02-19-09	Review of Application for Attorney Fees;	MAW	0.7
	Total Fees	$	15,597.50

Date	Disbursement Description	Amount
01-14-09	Filing Materials & Expense	20.00
02-10-09	Court Clerk Fees; Copy of Easement; Mohave County Recorder's Office	4.00
02-11-09	Filing/Recording Fee; Filing Fee; Mohave County Superior Court	178.00
	Inside Document Reproduction	32.00
	Postage	5.04
	Total Disbursements	$ 239.04

Client | Matter | Billing | Work-in-Process | A/R Summary | A/R Ledger | Aging | Task | Adv Dep/Trust |

Last Bill	05/01/2006	$2,362.31	Adv Deposit Balance	$0.00
Last Payment	05/15/2006	$2,362.31	Trust Balance	$0.00
Last A/R Write-Off		$0.00	Total Discounts	$0.00
Last Rebill				

	Total	Fees	Costs	Interest
Current WIP	$15,556.54	$15,317.50	$239.04	$0.00
A/R Balance	$0.00	$0.00	$0.00	$0.00
Total Billed	$26,053.75	$24,732.50	$1,321.25	$0.00
Total Paid	$26,053.75	$24,732.50	$1,321.25	$0.00
Total A/R Write-Offs	$0.00	$0.00	$0.00	$0.00
Total WIP Cost Write-Offs			$0.00	
Total Fee Mark Up		($4,052.00)		

(•) Matter Level
( ) Client Level

Close

The Law Offices of
CURTIS, GOODWIN, SULLIVAN,
UDALL & SCHWAB, P.L.C.
501 East Thomas Road
Phoenix, Arizona 85012-3205
Telephone (602) 393-1700

Larry K. Udall (#009873)
Attorney for Mohave Electric Cooperative, Inc.

DT: ____ BY ____
2009 MAR 18 AM 8:42
VIRLYNN TINNELL
SUPERIOR COURT CLERK

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MOHAVE

ROGER CHANTEL and DARLENE CHANTEL, husband and wife, Petitioners, v. **MOHAVE ELECTRIC COOPERATIVE, INC.,** Respondent.	**CASE NO. CV 2009-0058** **JUDGMENT** **(Assigned to the Honorable James Chavez)**

This Court, having received: Mohave Electric Cooperative's Application for Attorney Fees (regarding this Court's granting of the Motion to Dismiss for Petitioners' Petition for Writ of Mandamus); the Petitioners' Response thereto; and Mohave Electric's Reply;

and this Court, having concluded that Petitioners' Petition was groundless and without any merit;

IT IS THEREFORE adjudged and decreed that Mohave Electric Cooperative, Inc. shall have judgment against the Petitioners, Roger Chantel and Darlene Chantel, jointly (including as a martial community obligation) and severally, for the sum of Five Thousand Dollars ($5,000.00), accruing interest at the rate of 10% per annum until paid in full.

DATED 3/17/09

Judge of the Mohave County Superior Court

S8015CV20090058

F:\1234\-7\-7-44 - Chantel\Pleadings\Judgment.doc

COUNTY OF MOHAVE } SS.
I, VIRLYNN TINNELL, Clerk of the Superior Court of the State of Arizona in and for the County of Mohave do hereby certify the foregoing to be a full, true and correct copy of the original on file in my office.
WITNESS my hand and seal of said Court this 6 day of May 2009
Karen Sethler
Clerk/Deputy Clerk

SCAN

EXHIBIT "J"

Please investigate this on-going matter and report your findings to the ACC.
End of Complaint

Utilities' Response:

10/08 - Email from MEC @ 3:53 PM:

Mr. Martinez:

On behalf of Mr. Longtin, and per our conversation today, Mohave Electric's response to the Chantel complaint is below:

- The power line was built in 1949 no issue of right of way.

ARIZONA CORPORATION COMMISSION

UTILITY COMPLAINT FORM

- The constructed building (referenced as art in complaint) is a safety issue (National Electric Safety Code - NESC); constructed to close to the three phase 14,400/24,900 KV line.

- Mohave Electric asked Mr. Chantel to stop construction so we could reroute the line, at his cost, due to safety issues. Mr. Chantel refused to work with Mohave Electric to move line.

- Mr. Chantel ignored the safety issues.

- Mohave County tried to work with Mr. Chantel on several occasions regarding no permits and safety issues - with no result.

- **Mohave County sent Mohave Electric a letter requesting that the electric be de-energized on the lines close to the building being constructed.**

- Due to safety issues, on 9/16/08 the line was de-energized which also required that Mohave Electric build a line around this area to a railroad sight, to supply temporary power to that sight. Mohave Electric is billing Mr. Chantel for the costs associated with the temporary line to the railroad sight.

- Mohave Electric is willing to work with Mr. Chantel to rebuild the three phase line, in a new location, following safety regulations.

- Important Note: The de-energized line (three phase line) now prohibits our ability to back-feed a three phase line in the event of a power outage, which compromises Mohave Electric's system integrity.

Thank you.

Paula Griffes

(Medical issues not addressed in bullet point above)

10-20 eml from MEC, (Tom thought I wanted the info to provide to customer, I advised, MEC must provide this info to the customer via a letter, he will prepare a letter & have ready for later this week, **see below**)

Connie:

RE: Roger Chantel

EXHIBIT "K"

January 29, 2009

Roger Chantel
10001 E. Hwy 66
Kingman, AZ 86401

Mohave Electric Cooperative
928 Hancock Road
Bullhead City, AZ 86430

To the Board Members and managing staff of Mohave Electric Cooperative

I, Dustin Roger Chantel (hereinafter referred to as Roger Chantel) request that I be placed on Mohave Electric Cooperative's medical list because I have a medical condition that requires continuous electric service without disruption. I have been diagnosed with Sleep Apnea and the treatment of this condition is the need for a breathing machine which requires continuous electric service. I am supplying you a copy of the prescription of the machine that I am required to use in order to maintain my health.

This is a formal request to reinstate the electricity to my place of residence at 10001 E. Hwy 66 Kingman, AZ 86401. This is a request for reinstatement of my electricity upon the receipt of this letter. YOUR IMMEDEATE ACTION TO THIS MATTER WOULD BE GREATLY APPRECIIATED.

Sincerely,

Roger Chantel

Roger Chantel

EXHIBIT "L"

SUNIL SANTHANA, M.D., P.C.
PULMONARY-CRITICAL CARE
3003 HIGHWAY 95, SUITE 101
BULLHEAD CITY, AZ 86442
1401 BAILEY AVENUE
NEEDLES, CA 92363
(928) 758-5500
(760) 326-6266
DEA # BS 5705398 2/2004
UC # 26044(AZ) / A76291(CA)

NAME Chandler Dustin AGE

ADDRESS DATE 6/18/02

℞ Dx Sleep Apnea
AHI 20 RDI 35
(1) Respironics BiPAP
machine. IPAP 18 cmH2O
EPAP 13 cmH2O
(2) Pediatric Standard Mirage
nasal mask
(3) Humidifier heated Humidifier

REFILL ____ TIMES

DISPENSE AS WRITTEN

SUBSTITUTION PERMISSIBLE

Reviewed By

INTEGRA SLEEP SOLUTIONS,LLC.

SLEEP STUDY REPORT
PHYSICIAN'S IMPRESSION

Patient:	CHANTEL,DUSTIN	**Date of study:**	06/24/02
DOB:	03/09/1947	**MedicalRecord:**	585-86-0743
Referring Physician:	LAWRENCE MD, JAMES,	**Consulting Physician:**	Simon J. Farrow MD

(This report represents the interpreting physician's clinical impression from review of available information about the patient including the actual polysomnogram and quantitative analysis of the polysomnogram as set out in the full report of which the impression forms only a part. It should not be considered to stand alone as the full report.)

The subject of investigation is a 55 year(s) old male who has been referred for evaluation of possible obstructive sleep apnea and trial of treatment if appropriate.

The first part of this recording demonstrated severe obstructive sleep apnea with an overall apnea/hypopnea index of 20, and apnea/hypopnea index of 58 when the patient was supine, respiratory disturbance index of 35 overall and lowest recorded blood oxygen saturation of 85%.

The patient's sleep related ventilation disorder was not adequately controlled at tolerated CPAP pressure. It was well-controlled using BiPAP at 18/13 cm H2O with a ResMed standard Mirage nasal mask and inline heated humidifier.

No disturbances of cardiac rhythm were recorded.

No periodic limb movements of sleep were recorded.

Impression: this recording demonstrates a significant sleep related ventilation disorder which was adequately controlled with BIPAP apparatus and settings as above which are therefore recommended.

780.53-Hypersomnia with sleep apnea

Simon J. Farrow
Certified by the American Board of Sleep Medicine
May 28, 2002

INTEGRA SLEEP SOLUTIONS, LLC
8675 W. Spring Mountain Road, Ste. 106
Las Vegas, NV 89117
Tel: (702) 980-8447
Fax: (702) 304-9222

Overnight Polysomnography with CPAP\BiPAP Titration

Patient Name:	Chantel, Dustin	**Date of Study:**	05-24-2002
DOB:	03-09-1947	**Medical Record:**	565-66-0743
Referring Physician:	James Lawrence, MD	**Consulting Physician:**	Simon Farrow, MD

PROCEDURE: An all-night comprehensive sleep study was performed in which the following medical parameters were recorded using the SANDMAN® computerized polygraph. The study was attended by a polysomnography technologist and reviewed by **Simon Farrow, MD,** *Diplomate, American Board of Sleep Medicine.*

The overnight sleep study recorded:

Central Electroencephalogram (C3 and C4)	Occipital Electroencephalogram (O1 and O2)
Electromyography (chin and anterior tibialis)	Electrocardiogram using Lead II
Abdominal and Thoracic Respiratory Effort	Body Position
Nasal/Oral Airflow	Oxygen Saturation via Pulse Oximetry
Electro-oculogram (LEOG & REOG)	A microphone was used to monitor tracheal sound and snoring.

PATIENT BACKGROUND:

AGE: 55 HEIGHT: 6'0" WEIGHT: 255.0 lbs.

NECK SIZE: 18 inches

MEDICATIONS: None Listed

BECK DEPRESSION INVENTORY: 7 (NORMAL ≤ 9)

EPWORTH SLEEPINESS SCALE: 18 (NORMAL ≤ 9)

REASON FOR STUDY: Possible Obstructive Sleep Apnea

BLOOD PRESSURE: Start of Study: 136\84 End of Study: 132\80

OVERVIEW: The patient slept with the head of the bed flat utilizing 1 pillow. The sleep onset latency was 6.4 minutes and no REM onset. Obstructive apnea and hypopnea was observed and occurred at an overall rate of 20.0/hour and 58.1/hour in the supine body-position. Apnea, hypopnea, plus snore arousals (RDI) occurred at an overall rate of 34.7/hour and 61.9/hour in the supine position. Light-Loud snoring was noted and disturbed sleep at a rate of 14.7/hour. The lowest recorded oxygen saturation during sleep was 84.5% from a baseline of 96.4%. Mouth breathing was observed. There were no leg movements. There were a total of 2 spontaneous arousals for a total EEG arousal index of 2.7/hour.

The patient was fitted with a Resmed standard Mirage nasal mask and CPAP was initiated at 4cm.H_2O and titrated to 12cm.H_2O. BiPAP was initiated with IPAP ranges of: 12cm.H_2O – 18cm.H_2O and EPAP ranges of: 7cm.H_2O – 16cm.H_2O. An inline-heated humidifier was utilized during the recording. A chinstrap was not utilized. The sleep onset latency was 0.9 minutes and REM onset latency at 11.5 minutes. While CPAP\BiPAP titration was administered, oxygen saturation during sleep varied from 84.5% to 99.0%. REM (30.3%) rebound occurred during CPAP\BiPAP titration. No apnea or hypopnea was observed with an IPAP of 18cm.H_2O and EPAP of 13cm.H_2O. Snoring was eliminated with a IPAP of 18cm.H_2O. There were no leg movements. There were a total of 40 spontaneous arousals for a total EEG arousal index of 10.6/hour. In the a.m., the patient reported their sleep to be the same as usual. The recording started at 23:32:26 and ended at 05:32:49.

SLEEP ARCHITECTURE:	- DIAGNOSTIC -		- CPAP -	
Total Sleep Time (TST):	45.0	minutes	227.4	minutes
Total Time in Bed (TIB):	65.1	minutes	295.3	minutes
Sleep Efficiency:	69.2	percent	77.0	percent
Latency to Sleep Onset:	6.4	minutes	0.9	minutes
Latency to REM Onset:	N.A	minutes	11.5	minutes

SLEEP STAGES:	- DIAGNOSTIC -			- CPAP -		
	Minutes	%TST	Normals	Minutes	%TST	Normals
Stage 1:	12.5	27.8	(2%-5%)	36.0	15.8	(2%-5%)
Stage 2:	32.5	72.2	(45%-55%)	121.4	53.4	(45%-55%)
Stage 3:	N.A	0.0	(3%-8%)	1.0	0.4	(3%-8%)
Stage 4:	N.A	0.0	(10%-15%)	N.A	0.0	(10%-15%)
REM Sleep:	N.A	0.0	(20-25%)	69.0	30.3	(20-25%)

AROUSING ACTIVITY:	- DIAGNOSTIC -		- CPAP -	
	Number	# per hour	Number	# per hour
EEG Arousals (Spontaneous):	2	2.7	40	10.6
Respiratory Arousals (Total):	15	20.0	8	2.1
Snoring Arousals:	11	14.7	5	1.3
LEG Movement Arousals:	0	0.0	0	0.0
ARM Movement Arousals:	0	0.0	0	0.0

DISCUSSION: Prior to CPAP\BIPAP titration, total Non-REM sleep was 45.0 minutes and total REM sleep was N.A minutes. There were 32 stage shifts, N.A REM period(s), and 3 awakenings. The longest of all apneas and hypopneas was 29.0 seconds with a mean of 20.7 seconds.

During CPAP\BIPAP titration, there was 1.6 minutes of sleep spent with the oxygen saturation < 90%. Total Non-REM sleep was 158.4 minutes and total REM sleep was 69.0 minutes. There were 94 stage shifts, 3 REM period(s), and 16 awakenings. The longest of all apneas and hypopneas was 40.8 seconds with a mean of 21.7 seconds.

RESPIRATORY EVENTS:	- DIAGNOSTIC -	- CPAP -
Apneas:	3	8
Central apneas:	0	0
Mixed apneas:	0	0
Obstructive apneas:	3	8
Hypopneas:	12	20
Total Apneas & Hypopneas:	15	28
Apnea Hypopnea Index (AHI):	20.0/hr	7.4/hr
Snoring Arousals:	11	5
Resp. Disturbance Index (RDI):	34.7/hr	8.7/hr

Apneas were scored and defined as a complete cessation of airflow for 10 seconds or greater, with or without arousal activity.

Hypopneas were scored and defined as a decrease in airflow for 10 seconds or greater associated with at least a 4% oxygen desaturation, with or without arousal activity.

AHI = apneas + hypopneas

RDI = apneas + hypopneas + snore arousals

CPAP/BIPAP TITRATION:

Pressure Level (cm. H_2O)	TIMES			RESPIRATORY DISTURBANCES								OXIMETRY		
	TRT (min.)	REM (min.)	Non REM (min.)	Apnea Cen.	Apnea Obs.	Apnea Mxd.	Hypop-neas	Total Resp. Events	AHI	Snore Arousal	RDI (Resp. + Snore)	Max. SpO_2% (TRT)	Min. SpO_2% (TRT)	Mean SpO_2% (TRT)
	Cpap Tags													
0	0.6	0.4	0.2	-	-	-	-	-	-	-	-	97.0	88.5	91.5
4	6.1	-	5.2	-	-	-	3	3	34.4	-	34.4	97.0	85.5	93.1
6	65.8	12.5	49.8	-	-	-	2	2	1.9	1	2.9	98.0	83.5	94.3
8	11.5	-	11.5	-	-	-	1	1	5.2	-	5.2	97.0	93.0	95.0
10	17.0	6.6	10.4	-	5	-	-	5	17.6	1	21.1	97.0	88.5	93.8
12	28.5	17.5	9.5	-	-	-	4	4	8.9	2	13.3	99.0	90.5	95.0
IPAP/EPAP	BiPAP Tags													
12/7	2.3	-	2.3	-	-	-	3	3	76.9	-	76.9	99.0	91.5	95.4
13/9	2.1	-	2.1	-	-	-	-	-	-	-	-	97.5	92.5	95.4
14/11	10.5	-	10.5	-	3	-	-	3	17.2	-	17.2	97.5	92.5	95.1
16/13	19.7	-	19.7	-	-	-	6	6	18.3	1	21.4	99.0	92.5	95.7
18/16	131.2	32.0	37.2	-	-	-	1	1	0.9	-	0.9	99.0	90.5	95.5

BODY POSITION:	%TST		AHI		RDI		Minimum SpO_2	
	Diagnostic	CPAP	Diagnostic	CPAP	Diagnostic	CPAP	Diagnostic	CPAP
Supine:	34.4%	100.0%	58.1/hr	7.4/hr	61.9/hr	8.7/hr	84.5%	84.5%
Left-Side:	0.0%	0.0%	N.A/hr	N.A/hr	N.A/hr	N.A/hr	N.A%	N.A%
Right-Side:	65.6%	0.0%	0.0/hr	N.A/hr	20.3/hr	N.A/hr	90.5%	N.A%
Prone:	0.0%	0.0%	N.A/hr	N.A/hr	N.A/hr	N.A/hr	N.A%	N.A%
Upright:	0.0%	0.0%	N.A/hr	N.A/hr	N.A/hr	N.A/hr	N.A%	N.A%

SLEEP STAGES:	TIME (min.)		AHI		RDI		Minimum SpO_2	
	Diagnostic	CPAP	Diagnostic	CPAP	Diagnostic	CPAP	Diagnostic	CPAP
REM Sleep:	N.A	69.0	N.A/hr	3.5/hr	N.A/hr	6.1/hr	N.A%	88.5%
Non-REM Sleep:	45.0	158.4	20.0/hr	9.1/hr	34.7/hr	9.8/hr	84.5%	84.5%

OXIMETRY SUMMARY:	- DIAGNOSTIC -				- CPAP -			
	Wake	Non-REM	REM	TST	Wake	Non-REM	REM	TST
Baseline SpO_2:	97.1%	96.4%	N.A%	96.4%	97.3%	97.0%	96.0%	96.9%
Minimum SpO_2:	91.0%	84.5%	N.A%	84.5%	83.5%	84.5%	88.5%	84.5%
Maximum SpO_2:	99.0%	99.0%	N.A%	99.0%	99.0%	99.0%	97.5%	99.0%
Mean SpO_2:	95.2%	93.8%	N.A%	93.8%	95.5%	95.0%	94.5%	94.8%
Time spent at < 90% SpO_2:	0.0 min.	3.1 min.	N.A min.	3.1 min.	0.2 min.	1.2 min.	0.4 min.	1.6 min.

	TST spent at *	% TST *	TST spent at *	% TST *
90% – 100% SpO_2:	41.9 min.	93.1%	225.8 min.	99.3%
80% – 89% SpO_2:	3.1 min.	6.9%	1.6 min.	0.7%

* *Data in columns totaling less than 100% of TST indicates 'bad data' marked on SpO_2 channel.*

CARDIAC EVENTS: Prior to CPAP\BIPAP titration; average heart rate (wake): 72.5 bpm. Mean Heart rate (Non-REM sleep): 70.4 bpm. Minimum heart rate (TST): 64.4 bpm. Maximum heart rate (TST): 78.0 bpm.

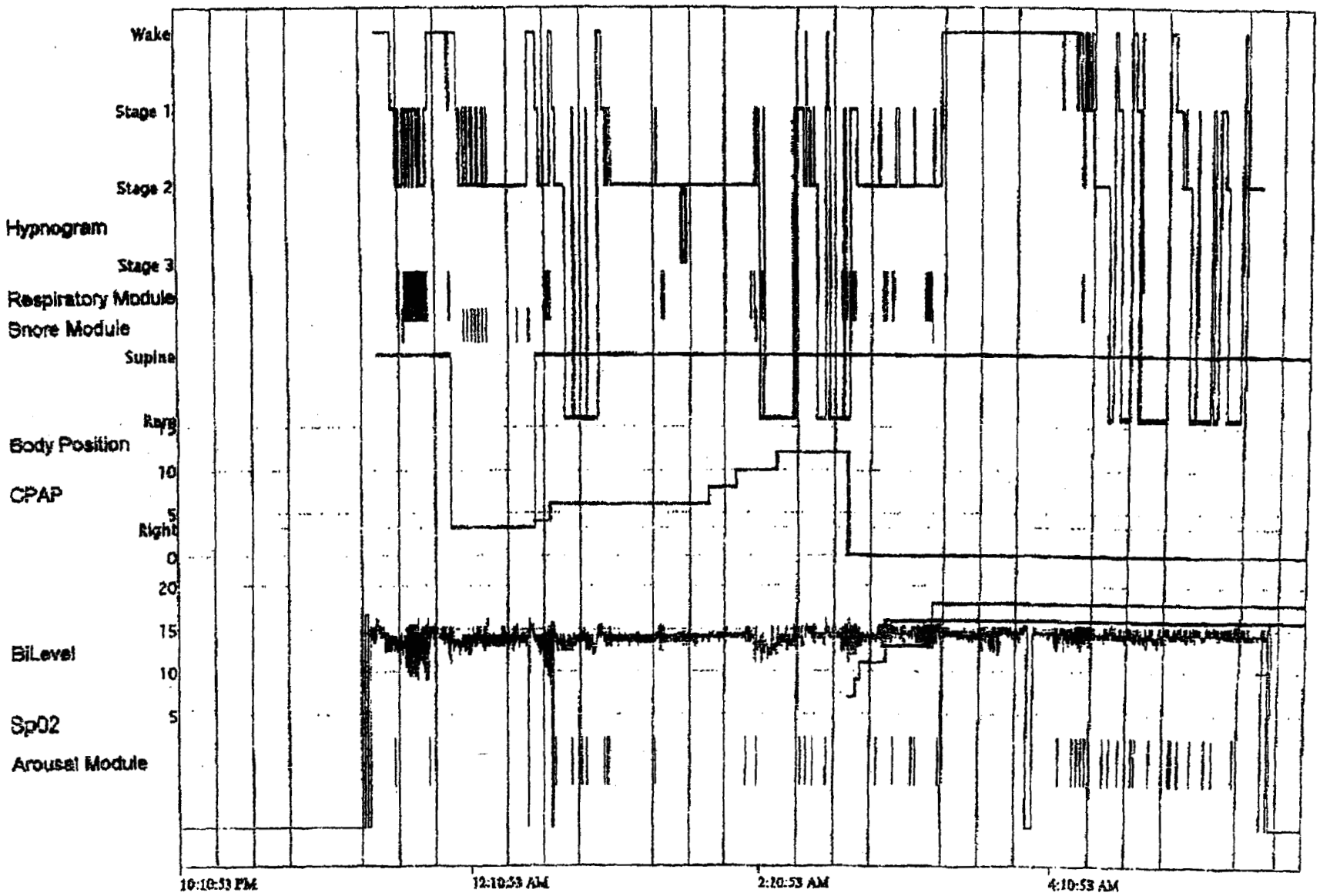
During CPAP\BIPAP titration; average heart rate (wake): 70.6 bpm. Mean Heart rate (Non-REM sleep): 71.4 bpm. Mean heart rate (REM sleep): 72.8 bpm. Minimum heart rate (TST): 59.4 bpm. Maximum heart rate (TST): 96.5 bpm.

MUSCLE MOVEMENT:		- DIAGNOSTIC -		- CPAP -	
		Number	# per hour	Number	# per hour
LEG Movements	Total:	N.A	0.0/hr	N.A	0.0/hr
	Arousals:	N.A	0.0/hr	N.A	0.0/hr
	Non-Arousals:	N.A	0.0/hr	N.A	0.0/hr
ARM Movements	Total:	N.A	0.0/hr	N.A	0.0/hr
	Arousals:	N.A	0.0/hr	N.A	0.0/hr
	Non-Arousals:	N.A	0.0/hr	N.A	0.0/hr

EEG: Prior to CPAP\BIPAP titration, sleep onset latency occurred at 6.4 minutes and no REM onset. There was no Delta and REM sleep. There were 3 wake after sleep onset periods of 8.5, 3.5, and 4.5 minutes, respectively. There were a total of 2 spontaneous arousals for a total EEG arousal index of 2.7/hour.

During CPAP\BIPAP titration, REM (30.3%) rebound occurred. There were 2 wake after sleep onset periods of 48.5 and 5.5 minutes, respectively. There were a total of 40 spontaneous arousals for a total EEG arousal index of 10.6/hour.

Patient Name: Chantel, Dustin
Subject Code: DC052402
Study Date: 5/24/2002



January 6, 2012

Roger Chantel
10001 E. Hwy. 66
Kingman, AZ 86411

Arizona Corporation Commission
Chairman Gary Pierce

Dear Mr. Pierce

I am requesting some information from the Arizona Corporation Commission (hereinafter referred to as the ACC). I would be grateful if you would assist me in getting copies of some information that I believe may be on file with the ACC.

In 2008 Mohave Electric Cooperative (hereinafter referred to as MEC) discontinued electrical service to some property that I own. According to **R14-2-202 B, 1 "Any utility proposing to discontinue or abandon utility service currently in use by the public shall prior to such action obtain authority therefor from the Commission."** The area that was discontinued was located between Mile Marker 75 and Mile Marker 78. I would like a copy of the letter from the Commission granting MEC the right to discontinue service to this area. **R14-2-202 B** requires MEC to submit an application to the ACC. **R14-2-202 B, 2** states **"The utility shall include in the application, studies of past, present and prospective customer use of the subject service plant, or facility as is necessary to support the application."** I would like a copy of this application also.

Please send a copy of the above mentioned information to Honorable Lee F. Jansen. The mailing address is: Superior Court of Arizona, County of Mohave, Attn. Honorable Lee F. Jansen, Case No. CV2009-02674, P.O. Box 7000 Kingman, Arizona 86402-7000.

This information is needed by January 15, 2012. If this information is not provided, we can conclude that MEC did not file an application in accordance with **R14-2-202 B**.

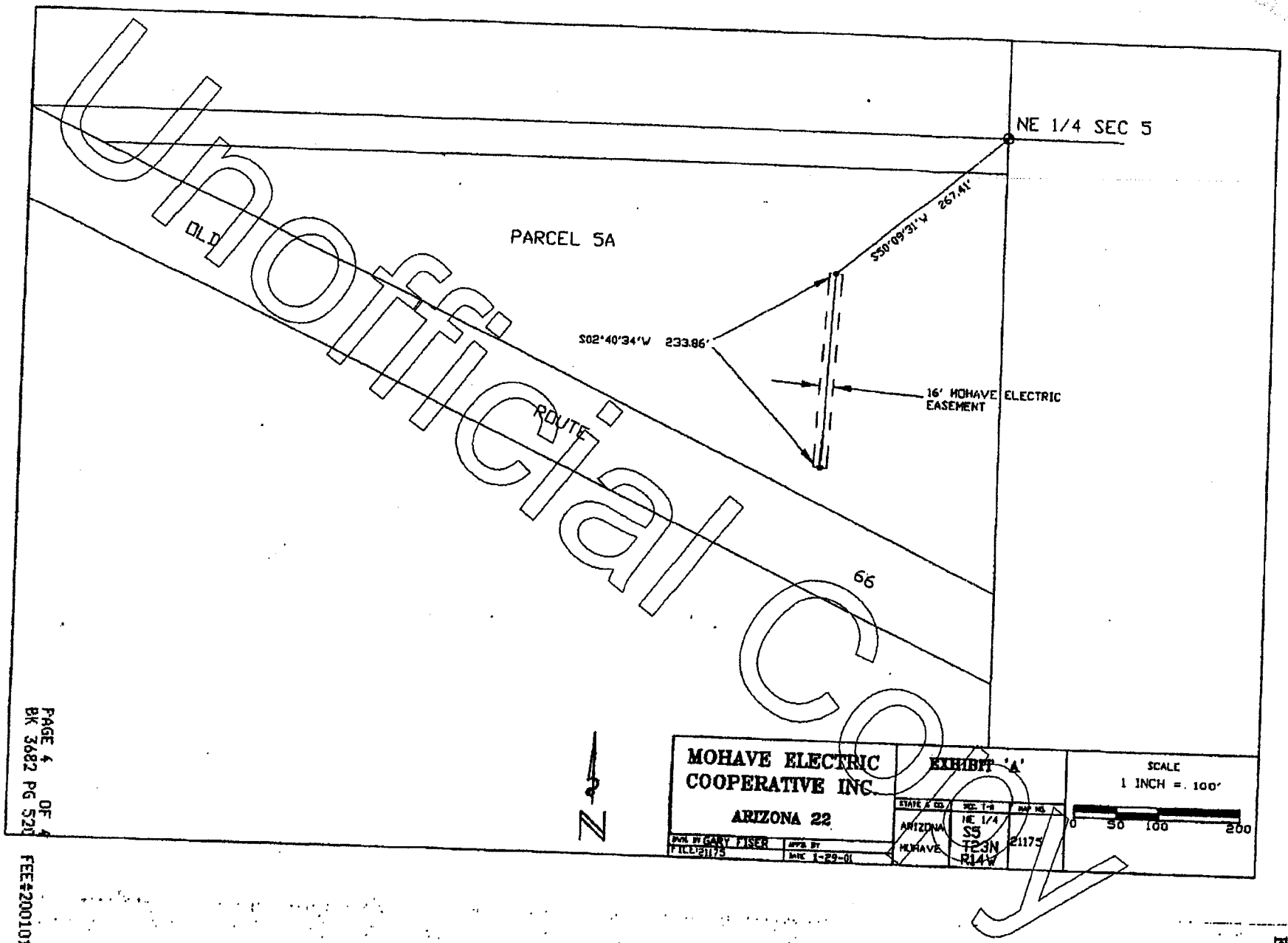
I will be looking forward to receiving a copy of this application by January 20, 2012.

Sincerely,

Roger Chantel

Roger Chantel

EXHIBIT "N"



Unofficial Copy

When recorded return to:
Mohave Electric Cooperative
P.O. Box 1045
Bullhead City, AZ. 86430

February 12, 2001

RIGHT OF WAY EASEMENT

Easement Number 01x024

KNOW ALL MEN BY THESE PRESENTS, that we, the undersigned (whether one or more),

Chan Lan Trust

for a good and valuable consideration, the receipt of which is hereby acknowledged, hereby irrevocably grants, assigns and conveys unto Mohave Electric Cooperative, Inc., a cooperative corporation (hereinafter called the "Cooperative"), whose post office address is P.O. Box 1045, Bullhead City, Arizona 86430, and to it's successors and assigns, perpetual rights to enter upon the lands of the undersigned, situated in the State of Arizona, and more particularly described as follows:

A sixteen (16) foot Mohave Electric Utility Easement located within the NE¼ NE¼ of Section 5, T23N, R14W, County of Mohave, State of Arizona. Easement is best described on the attached labeled Exhibit "A".

and to construct, operate, rebuild, patrol, and maintain on the above-described lands and/or in or upon all streets, roads, or highways abutting said lands, an electric transmission or distribution line or system, and to cut and trim trees and shrubbery that may interfere with or threaten to endanger the operation and maintenance of said line or system. The undersigned agree that this right of way easement shall remain clear of any obstructions which would impair vehicular access to these facilities, or which would endanger or interfere with these facilities. The expenses associated with any relocation, modification, or adjustment of these facilities shall be paid for by the requesting party. The undersigned agree that all poles, wires, and other facilities installed on the above described lands at the Cooperative's expense shall remain the property of the Cooperative, with removal at the option of the Cooperative, upon termination of service to or on said lands.

Unofficial Copy

2001010401 BK 3682 PG 517
OFFICIAL RECORDS OF MOHAVE COUNTY
JOAN MC CALL, MOHAVE COUNTY RECORDER
02/23/2001 08:45A PAGE 1 OF 4
MOHAVE ELECTRIC COOPERATIVE
RECORDING FEE 9.00

Name Roger Chantel

Address P.O. Box 4281

Kingman, AZ 86402

Membership _____ Date 3-6-00 Amount 5.00

Mohave Electric Cooperative, Incorporated

Organized Under the Laws of Arizona

Membership Certificate

In Witness Whereof:

The Cooperative has caused this certificate to be signed by its President and Secretary and its corporate seal to be hereunto affixed.

Lyn R. Brock

President

Secretary

(Corporate Seal)

MOHAVE

electric cooperative

A Touchstone Energy Cooperative

P.O. Box 2000
Bullhead City, Arizona 86430
(928) 763-1100

CHANTEL, ROGER 1901 10
CHAN-LAN TRUST
10001 E HWY 66
KINGMAN AZ 86411-2028

ACCOUNT NUMBER	096680-001
INVOICE DATE	10/27/08
PAGE NUMBER	1

SUB ACCT	SERVICE LOCATION		DESCRIPTION		AMOUNT
001	10001 HIGHWAY 66		KWH USED	0	.00
	RATE-101 MULTIPLIER-	1	CUSTOMER CHARGE		9.50
	METER 99685497		STATE TAX		.53
	READ 09/19 69302		COUNTY TAX		.02
	READ 10/21 69302				
				TOTAL	10.05
			VOLUNTARY DONATION		1.00

BALANCE FORWARD	CURRENT AMOUNT	CURRENT DUE DATE	TOTAL AMOUNT DUE
.00	10.05	11/06/08	10.05

TOTAL WITH VOLUNTARY From The Heart DONATION 11.05

"FROM THE HEART" IS YOUR OPPORTUNITY TO VOLUNTARILY HELP COMMUNITY MEMBERS IN NEED. SIMPLY ADD $1.00 TO YOUR BILL PAYMENT TO VOLUNTARILY SUPPORT THIS GREAT CAUSE.

Please mail stub with payment or bring entire bill with payment to:

ACCOUNT CHANTEL, ROGER 96680-001
Invoice Date 10/27/08
Total Amt Due 10.05
TOTAL WITH DONATION 11.05

Mohave Electric Cooperative, Inc.
P.O. Box 2000
928 Hancock Road
Bullhead City, AZ 86430

PLEASE DO NOT FOLD

0000966800010000010050000011051

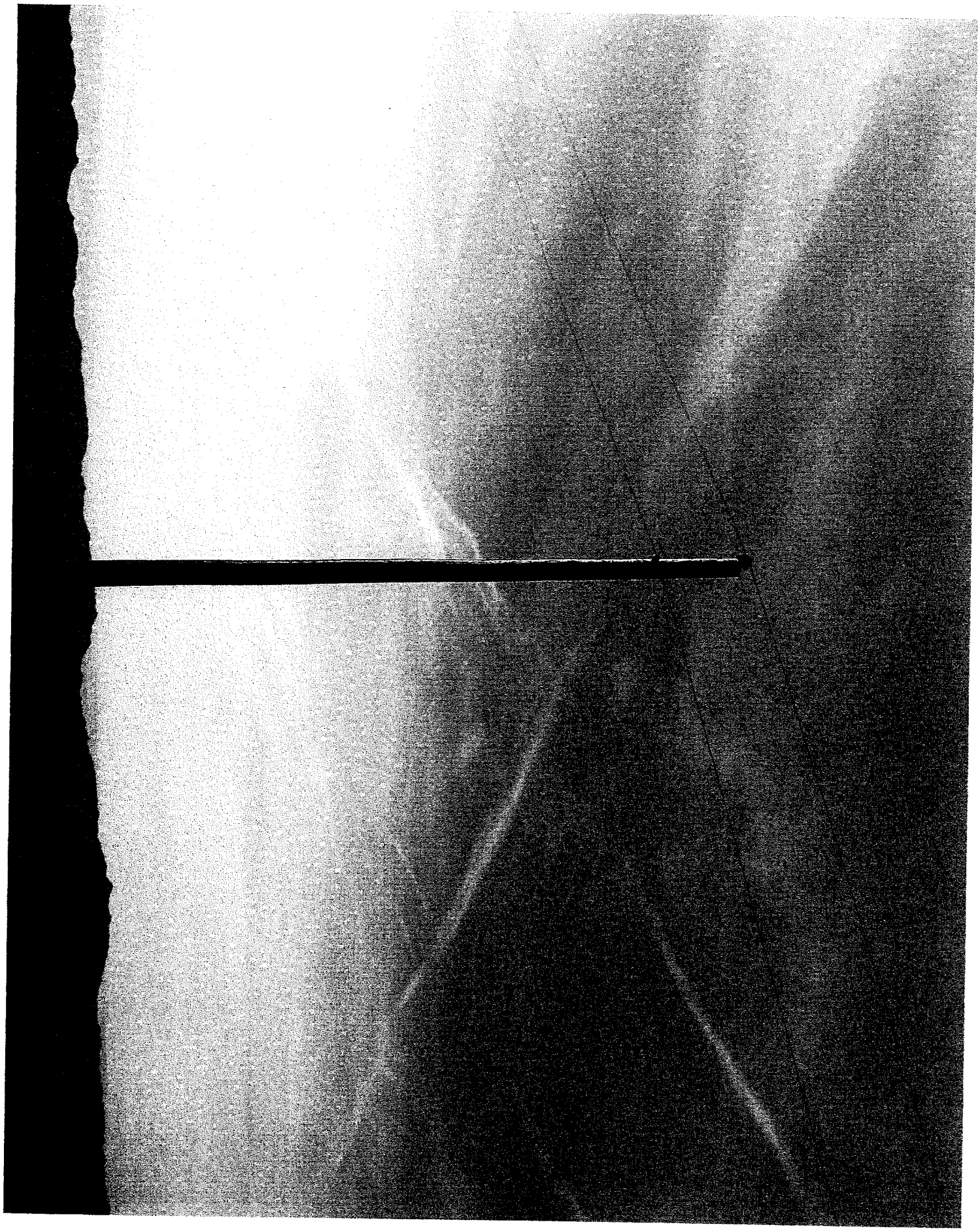
EXHIBIT "M"

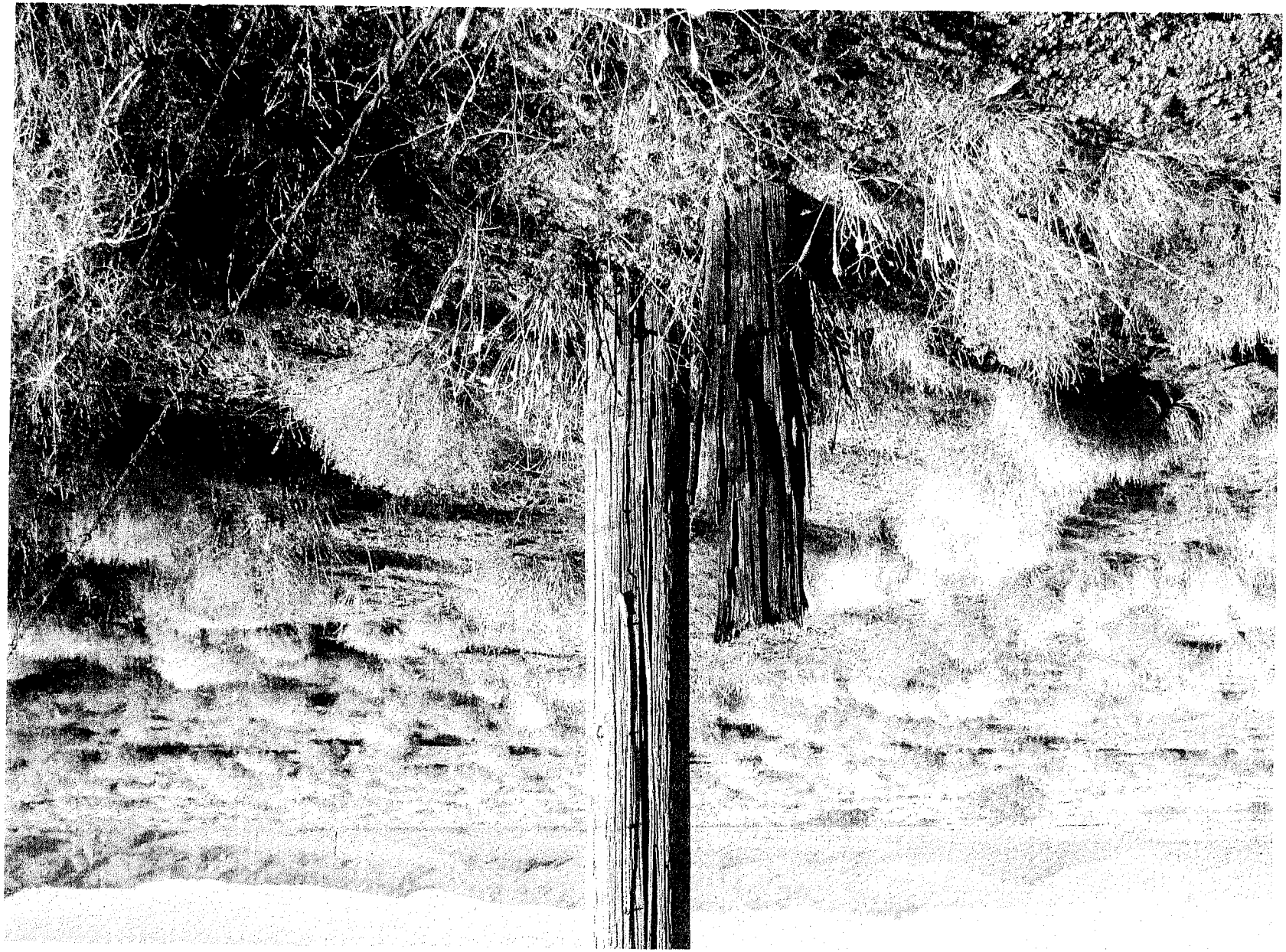
These pictures show what the old lines look like vs. the new lines. The old lines have cross T's on them and the new ones don't have cross T's on them. There are five of these new poles that were replaced when the winds blew them down. Please notice in one of the pictures, the new pole is placed directly next to the old pole stump. The last picture shows a pole that was shattered and another pole was placed directly next to the shattered pole.

These poles are at an approximate distance of 700 feet apart, which are not unique to the plaintiffs' property.

Plaintiffs have requested MEC to supply maintenance records of this area to the plaintiffs and the court. (See Exhibit E)

The map indicates the area along Hwy. 66 which is the approximate location of these poles.





N
Old Pole
Mile Marker 68
New Poles
HWY 66
Distance - approximately 700 feet apart
Kingman

Exhibit 7

NOTE FILE NO. 1234-7-44
XEROX ALL PLEADINGS ✓
COPIES TO MAC LKU MAW Tmy
STAMPED ✓ DATE 3/5/12
ROUTED TO MAC LKU MAW Tmy
DO NOT FILE UNTIL ALL ITEMS CHECKED AND INITIALED CB

FILED
BY:
2012 FEB 27 PM 3:23
VIRLYNN TINNELL
SUPERIOR COURT CLERK

Dustin Roger and
Elizabeth D. Chantel
10001 E. Hwy 66
Kingman, AZ 86401

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MOHAVE

DUSTIN R. CHANTEL, and ELIZABETH D. CHANTEL
Plaintiffs,

vs.

MOVHAVE ELECTRIC COOPERATIVE, INC., an Arizona non-profit corporation; JOHN and JANE DOES 1-X: BLACK and WHITE COPORATIONS I-X
Defendant.

Case No.: CV2009-02574

RESPONSE TO DEFENDANT'S MOTION FOR RECONSIDERATION OF SUMMARY JUDGMENT

The Plaintiffs, by order of this Court, file a response to the Defendant's Motion for Reconsideration of Summary Judgment because they are without legal representation at this time.

PLAINTIFFS' UNDERSTANDING AND SUMMARY OF THE RECENT EVENTS

The Court is aware that the Plaintiffs' original attorney was granted permission by the Court to leave this case. During the time that the Plaintiffs did not have an attorney of record, MEC's attorney, Larry Udall, filed the Defendant's original Motion for Summary Judgment on all counts in the original complaint filed with this Court and a Motion for Summary Judgment of the counter claim.

RECEIVED
FEB 29 2012
CURTIS, GOODWIN, SULLIVAN, UDALL & SCHWAB, PLC

In MEC'S most recent filing of a Motion for Reconsideration of Summary Judgment, sent to the court on January 18, 2012, Mr. Udall claims that the Plaintiffs did not present any genuine issues of material fact within 60 days of the November 9, 2011, oral argument. By Mr. Udall's own admission in his Summary of Oral Argument and Recent Events, the 60-day time frame was approximate and there was no specific date established by the court for the Plaintiffs' discovery and presentation of additional facts. It was the Plaintiffs' understanding at the time this Court gave them additional time for discovery that they had until the January 26, 2012, hearing to present such material evidence. Since the Plaintiffs' evidence was filed with the Court on January 10, 2012, well in advance of the January 26, 2012, hearing, Mr. Udall's claim is invalid.

It would also appear that Mr. Udall is well aware of the Plaintiffs' submission of new evidence on January 10, 2012, as he seeks to use a portion of it out of context in MEC's defense in his most recent Motion for Reconsideration of Summary Judgment. The evidence Mr. Udall refers to in Exhibit B of this motion is a photograph of MEC poles, located along Highway 66 between Mile Markers 67 and 68. The Plaintiffs submitted this photograph and others as recent evidence, showing broken and replaced MEC poles close up and from a distance. These photographs, as a group, demonstrate the reality of unsafe poles breaking during inclement weather. Mr. Udall attempts to use only the long-distance photograph as evidence that MEC's poles are "sturdy" and implies that these are the poles in question on the Plaintiffs' property, rather than similar poles located several miles away. To borrow a phrase from page 3 of Mr. Udall's recent filing, "this contention is ludicrous."

The Defendant's attorney also references letters written by the Plaintiff in 2005 as supposed evidence that the Plaintiffs

were not concerned about the safety of MEC's power poles and lines on their property until after the contested building was constructed. This assumption on Mr. Udall's part is erroneous, as the purpose of these letters was to establish MEC's right, or lack thereof, to have the poles there in the first place. Mr. Udall's presentation of two letters as definitive proof of what the Plaintiffs "truly believed" regarding the safety of MEC's lines and poles is not only narrow in relationship to the scope of this case but also incredibly presumptuous.

The Defendant's counsel has spent an excessive amount of time and energy arguing that the Plaintiffs are not truly concerned about the safety of MEC's lines and poles on their property. Mr. Udall's arguments regarding evidence are focused solely on the issue of safety and disregard completely whether or not MEC has or has ever had a legal right to erect the unsafe poles on the Plaintiffs' property. Mr. Udall repeatedly insists that the Plaintiffs have failed to submit any newly discovered evidence or newly alleged material issues of fact. This is not true. The Plaintiffs submitted the following new evidence on January 10, 2012:

1) Reference to **28 U.S.C. 2409a**, which does not permit utility companies to claim or have a prescriptive right-of-way over Federal or State land. This forces the Defendant to enter into contracts with Federal and State entities in order to establish right-of-way across the State lands to the west of the Plaintiffs' property and the Federal lands to the east of the Plaintiffs' property.
2) A map showing MEC right of way as contracted with the Federal Bureau of Land Management (BLM), beginning in 1949. This map demonstrates that the transmission line

right-of-way lies north of the Plaintiffs' property line and does not cross it.

3) A contract between MEC and BLM, signed in 1950, approving the transmission line right-of-way, and establishing a lease of Federal land for a period not to exceed 50 years.

4) A Right-of-Way Grant/Temporary Use Permit, granted to MEC in 2004, which renews the original right-of-way across BLM land from 1950, a full four years after the original contract's maximum term.

5) A contract between MEC and the Arizona State Land Department, signed in 2008, establishing right-of-way across State land. As with the Federal contract, the Defendant's right-of-way across State of Arizona land lies to the north of the Plaintiffs' property and does not cross it.

6) Arguments that the Defendant's claim to prescriptive right-of-way across the Plaintiffs' property is nullified by the fact that the aforementioned contracts with Federal and State entities establish a right-of-way that, if followed, allows direct connection of power lines between State and Federal lands without need to cross the Plaintiffs' property. If not followed, as is the current case, the Defendant is in violation of the aforementioned **28 U.S.C. 2409a**, as their claim to a prescriptive right-of-way across the Plaintiffs' property puts them outside of the contracted Federal and State boundaries and effectively attempts to force a prescriptive right-of-way across these government lands which abut the Plaintiffs' property to the east and the west.

THE PLAINTIFFS THEREFORE ASK THIS COURT to deny the Defendant its Motion for Reconsideration of the Summary Judgment on Counts 1, 2, and 6 and its Motion for Reconsideration on the Counterclaim.

Dated this 25th February, 2012

COPY of the forgoing delivered
This 27th day of February, 2012 to:

Clerk of Court
Mohave County Superior Court
401 E. Spring Street
P.O. Box 7000
Kingman, Arizona 86402

The Honorable Lee F. Jantzen
Mohave County Superior Court
P.O. Box 7000
Kingman, Arizona 86402-7000

COPY of the foregoing mailed
This 27th day of February, 2012 to:

The Offices of Curtis, Goodwin,
Sullivan, Udall & Schwab, P.L.C.
501 East Thomas Road
Phoenix, Arizona 85012-3205

Elizabeth D. Chantel

Exhibit 8

COURT OF APPEALS DIVISION ONE
STATE OF ARIZONA
FILED
AUG 30 2012
RUTH WILLINGHAM, CLERK
BY

COURT OF APPEALS
STATE OF ARIZONA
DIVISION 1

DUSTIN R. CHANTEL and ELIZABETH D. CHANTEL, husband and wife,

Plaintiffs/Appellants,

v.

MOHAVE ELECTRIC COOPERATIVE, INC., an Arizona non-profit corporation,

Defendant/Appellee.

No. 1 CA-CV 12-0411

Mohave County Superior Ct.
No.
S8015CV200902574

APPELLANTS' OPENING BRIEF

DUSTIN R. CHANTEL and ELIZABETH D. CHANTEL,
Husband and Wife
Plaintiffs-Appellants Pro Se
10001 E. Highway 66
Kingman, AZ 86401
(928) 757-9755

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STATEMENT OF THE CASE

This case concerns the failure of the Mohave Electric Cooperative, Inc. ("MEC") to remedy unsafe conditions it allowed to exist on Plaintiffs' property and subsequently shutting off power to their residence. After MEC failed to respond to Plaintiffs' repeated demands to correct dangerously low hanging and unsafe power lines and unsafe poles, Plaintiffs erected a functional art structure on the property as a safety measure.

Plaintiffs thereafter filed this lawsuit seeking relief on multiple grounds, contending, among other things, that MEC solicited and obtained a cut-off order from the County. Count I of the complaint alleged breach of contract. Count II of the complaint alleged breach of the covenant of good faith and fair dealing. Count III of the complaint sought to quiet title and a declaration of the rights of the parties. Count IV of the complaint alleged ejectment. Count V of the complaint sought recovery of rent, more specifically MEC's continued unauthorized use and possession of the property through its placement of the old line on it, entitled the Plaintiffs to recover rents or damages for use and occupancy. Count VI of the complaint alleged negligence. Count VII alleged intentional infliction of emotional

distress. Count VII sought punitive damages.

MEC filed a counterclaim, seeking recovery of legal fees expended in the case.

On November 9, 2011, the Court heard a motion for summary judgment filed by MEC. At that time, plaintiffs withdrew counts 3 and 4 of the complaint and the Court thereupon dismissed those counts without prejudice. At that same hearing, the Court denied MEC's motion to dismiss counts I, II and IV. It also denied MEC's motion for summary judgment on its counterclaim. The Court dismissed all other counts.

MEC sought reconsideration and plaintiffs sought reconsideration and a judicial determination of all counts in the complaint. That motion was heard on March 28, 2012, and decision was reserved. The Court issued a memorandum granting MEC's motion and denying Plaintiffs' motion. Judgment was entered on June 25, 2012, awarding defendants $127,525 in counsel fees, finding the Plaintiffs' action was not brought in good faith, citing A.R.S. § 12-341.01 (A) and (C) and § 349, and as well the costs sought by MEC in building a new High Voltage Transmission Line around Plaintiffs' property.

Plaintiffs filed a timely notice of appeal from the final judgment. This Court

has jurisdiction. A.R.S. § 12-2101(A)(1).

STATEMENT OF THE FACTS

The facts, viewed in the light most favorable to the plaintiffs, as they must be at this stage, are taken from the complaint and the motion papers submitted by plaintiff. The record received from the Clerk of the Superior Court was not numbered, so this convention is necessary.

Plaintiffs have owned real property located at 10001 East Highway 66, Kingman, Arizona 86401, since December 1999. They have been customers of MEC, who delivered electrical power to their residence located on that property. The parties had a relationship obligating MEC to provide the safe delivery of electricity to their residence for which they would be invoiced. Plaintiffs have always made timely payments to MEC.

Since the Plaintiffs have owned the property, an overhead electrical power line has run across the southern portion of the Property, generally running in an east-west direction, which is owned and operated by MEC, and has been referred to as the "old line" in the court papers. MEC has no recorded easement or right-of-way for the portion of the line which is located on the Plaintiffs' property. MEC has asserted that it received permission from prior owners of the property to run

the line across the property.

Prior to September 16, 2008, the residence received electricity through a service line that was connected to the High Voltage Transmission Line. Numerous wooden poles support the old line. The average distance between most of the wooden poles along the old line is approximately 300 feet. A distance of approximately 700 feet, however, exists between two wooden poles that cross the Plaintiffs' property.

Pursuant to Arizona Administrative Code § 14-2-208(F), MEC is required to construct and maintain wooden power poles, such as the ones located on and around the Plaintiffs' property, and comply with the 1997 ANSI C2 National Electrical Safety Code, which permits a maximum distance of 300 feet to exist between power poles of the type at issue.

Sometime around 2006, the Plaintiffs noticed the power lines connected to the old line were hanging dangerously low over their property and certain wooden poles from the old line that are located on the property were bending and cracking. Plaintiffs immediately and continuously expressed their safety concerns regarding the low hanging power lines and the bending and cracking power poles to, among others, MEC and requested that MEC repair the old line.

Despite numerous requests from the Plaintiffs, Defendant MEC failed to repair the old line or otherwise take any action to correct the dangerous condition of the power poles and the lines.

During the summer of 2008, the Plaintiffs began building, at a substantial cost, a functional piece of artwork under the low hanging power lines to catch or deflect any lines or wooden poles that might break and fall in order to protect themselves, their guests and invitees, and their property from the dangers posed by the power poles and lines.

On or about September 16, 2008, Defendant MEC built a new overhead electrical power line that ran parallel to the old line, but was located immediately south of the property, approximately 75 feet away from the old line. Immediately after the completion of this new line, and without any substantial warning, MEC abruptly disconnected the electricity to the Plaintiffs' residence.

After their electricity was disconnected, Plaintiffs filed an informal complaint, number 2008-71811 with the Arizona Corporation Commission. By letter dated November 5, 2008, the Commission advised Plaintiffs that it could not order MEC to restore electric power as this became a matter for Mohave County, as it was a "public health and safety issue []."

Plaintiffs also made numerous requests to MEC asking it to reinstate electricity. MEC refused, and continues to refuse, to reinstate electricity to the residence unless they pay approximately $47,912.04, plus accruing interest and costs for building the new line. As a result of MEC's disconnection of electricity, Plaintiffs have been forced to find alternative sources of electricity, including, but not limited to, generators and solar power systems, at considerable cost.

The generators and solar systems that Plaintiffs have been using, in addition to being very costly, are not an adequate source of electricity because they cannot provide the constant supply of electricity necessary to power the residence, including a medical device that Plaintiff Dustin R. Chantel relies on. Weather conditions affect the solar systems as well as its ability to provide the constant supply of electricity necessary to power the Chantels' residence. As a result of MEC's disconnection of electricity, Dustin R. Chantel has suffered physical injuries.

ISSUES PRESENTED

Whether plaintiffs are entitled to injunctive relief and money damages for wrongful termination of electrical service.

Whether plaintiffs are entitled to recover use and occupancy for the placement of utility lines over their property without obtaining their consent.

Whether there was any basis for the imposition of sanctions for the commencement of an action challenging the wrongful termination of electric service.

ARGUMENT

DEFENDANT'S TERMINATION OF ELECTRICAL SERVICES CONSTITUTES TORTIOUS CONDUCT FOR WHICH PLAINTIFFS MAY OBTAIN INJUNCTIVE RELIEF AND DAMAGES

A. Standard of Review

This Court reviews a grant of summary judgment de novo, viewing the evidence and reasonable inferences in the light most favorable to the party opposing the motion. *Andrews v. Blake*, 205 Ariz. 236, 240 ¶ 12, 69 P.3d 7, 11 (2003). Summary judgment is appropriate only if no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(c)(1); *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).

The imposition of sanctions under § 12-349 is reviewed de novo. *See City of Casa Grande v. Ariz. Water Co.*, 199 Ariz. 547, 555, P 27, 20 P.3d 590, 598 (App. 2001) (stating that this court reviews the trial court's findings of fact under a clearly erroneous standard, but its application of § 12-349 is a question of law reviewed de novo). The question of legal entitlement to attorneys' fees A.R.S. § 12-341.01 is a question of law reviewed de novo. *Chaurasia v. General Motors Corp.*, 212 Ariz. 18, 26, P 24, 126 P.3d 165, 173 (App. 2006) (application of

A.R.S. § 12-341.01 (A) to particular claim presents question of statutory interpretation subject to de novo review).

B. Wrongful Termination of Electric Service is Actionable Tortious Conduct

Although the remedies applicable to wrongful termination of electric service have not been directly addressed by the Arizona courts, other courts, including the United States Supreme Court, have done so and have found that it is actionable tortious conduct, and whether the electric service was wrongfully terminated is a question of fact. *See* 15 Am Jur Proof of Facts 2d 125, *Wrongful Termination of Electric Service*, collecting authorities and discussing the elements of proof.

In *Memphis Gas, Light & Water Div. v. Craft*, 436 U.S. 1 (1978), plaintiffs, homeowners, brought a civil rights action under 42 U.S.C. § 1983, in which they asserted entitlement to a hearing before the power company cut off their utilities service. The Supreme Court affirmed the finding of the Sixth Circuit court that plaintiffs were entitled to a certain amount of due process under U.S. Const. amend. XIV before defendant gas and water company cut off their utilities service. Under state law, utilities services could not be cut off if the bill was the subject of a bona fide dispute. Plaintiffs were not provided adequate notice because they were not informed of the procedures available to resolve their dispute with defendant.

Some procedure, including some sort of hearing, had to be available for complainants such as plaintiffs, prior to termination, considering the importance of utilities to everyday life, and the magnitude of the deprivation consumers would suffer if utilities were terminated. Simply stated, ". . . the cessation of essential services for any appreciable time works a uniquely final deprivation." 436 U.S. at 11.

Plaintiffs' complaint, and supporting evidence, are congruent with *Walton Electric Membership Corporation v. Snyder*, 270 Ga. 62, 508 S.E.2d 167 (1998). In that case, plaintiff customer married a woman with an outstanding balance on her electric bill to the defendant electric membership corporation. The defendant added the overdue amount to plaintiff's bill and plaintiff refused to pay it. Defendant shut off plaintiff's electric service. Plaintiff was forced to pay the bill under protest and filed an action for the wrongful termination of a utility.

The trial court found in plaintiff's favor and awarded him punitive damages. The Georgia Supreme Court affirmed because it found that the termination was not simply a breach of a contractual obligation because a public duty also existed. The Court also affirmed the punitive damages award because defendant's powers were statutory and there was no statutory exemption from liability for punitive damages.

The Court explained:

> [Defendant] Walton argues that no tort liability may lie because its termination of [plaintiff] Snyder's electric service was, if in any way wrong, simply the breach of a contractual obligation. However, in some instances the breach of a contractual duty may also constitute a tort. (Citations omitted).
>
> A tort may lie, even when a contract exists, when a public duty also exists. * * * An EMC is a business of a public nature designed to meet a public necessity, in the same manner as is a gas company. (Citation omitted.) The statutory scheme giving rise to EMCs is similar to the grant of a franchise from the state to operate a utility for the benefit of the citizenry, and this grant imposes a duty to the public. (Citation Omitted). Thus, this duty may provide a basis for tort liability even when a contract exists for the provision of electric service. Accordingly, the tort of wrongful termination of utilities has been recognized. * * *

270 Ga. at 63, 508 S.E.2d at 168-69.

This decision is hardly unique. For example, a similar analysis may be found in *Lanni v. Rochester Gas & Electric Corp.*, 120 Misc. 2d 644, 466 N.Y.S.2d 248 (Rochester City Ct. 1983); *Hall v. Consolidated Edison*, 104 Misc. 2d 565, 428 N.Y.S.2d 837 (Sup. Ct. 1980); and *Pompeii Estates v Consolidated Edison Co.*, 91 Misc. 2d 233, 397 N.Y.S.2d 577 (Civil Ct. Queens Co. 1977). Other cases are collected in Jim Rossi, *The Common Law "Duty To Serve" and Protection of Consumers in an Age of Competitive Retail Public Utility Restructuring*, 51 Vand.

L. Rev. 1233 (1988).

Arizona's public policy is identical. *See* Ariz. Rev. Stat. §§ 40-207, 40-209. Ariz. Admin. Code R14-2-208(A)(1) makes the utility responsible for safe transmission and distribution of electricity until it passes the point of delivery to the customer, and R14-2-206(B)(2) requires the utility to pay for the service line.

More important, R14-2-207(A) and R14-2-211(A)(8) provide that disconnection is not permitted where there is a legitimate dispute over a bill. R14-2-211(A)(5) and (6) prohibits termination for the simple reason that one of the plaintiffs has life saving medical equipment that must be functional.

There is no proof in this record that there has been compliance with any of these regulatory provisions. Hence, the determination of the Superior Court cannot stand.

There has been some dispute concerning the right of way. Plaintiffs offered proof that the defendant never obtained an easement, but that proof was ignored by the Superior Court. The answer is provided by Ariz. Admin. Code R14-2-208(C), which provides that a customer is required to give the utility an adequate right of way and, upon a failure to do so, the utility may deny service.

Plaintiffs in fact gave MEC a 16 foot service line right of way in 2001 when

they first connected their power service. This is verified on a survey map. The right of way is recorded in instrument number 2001-010401 Book 3682, page 517. This Court may take judicial notice of that document. *See Bolin v. Superior Court*, 85 Ariz. 131, 333 P.2d 295 (1958) (court may take judicial notice of records of secretary of state).

This right of way came from their High Voltage Transmission Line to Plaintiffs' residence. The issue about the right of way is that MEC does not have a contracted right of way across the southern portion of Plaintiffs' property for the High Voltage Transmission Lines. The survey map shows that MEC has a contracted easement right of way somewhere other than where they placed their lines. The contract number is AZA-32288 with the United States Interior Department Bureau of Land Management, a matter of which this Court may take judicial notice. *See State v. Rojers*, 216 Ariz. 555, 169 P.3d 651 (App. 2007). Again, MEC did not acquired a right of way across the small section of Plaintiffs' property at the north corner where these lines should have crossed if MEC had not been negligent in placing their High Voltage Transmission Lines in 1950.

Obviously, the utility cannot have it both ways. Since the plaintiffs were denied service, there was no right of way. They are entitled to recover for use and

occupancy during this period. A.R.S. § 12-1271(2); *cf. Stapley v. Amer. Bathtub Liners, Inc.*, 162 Ariz. 564, 568, 785 P.2d 84, 88 (App. 1989).

C. No Basis for Sanctions

Inasmuch as we have shown that the causes of action are meritorious, and erroneously dismissed by the Superior Court, there is *perforce* no basis for sanctions. Even if this Court were to disagree, the sanctions would have to be set aside, for the simple reason that the Superior Court denied an initial motion to dismiss, describing it as a "close call." By definition, a "close call" cannot be frivolous.

A.R.S. § 12-349 allows for an award of fees in any civil action in which a lawyer or party (1) brings or defends a claim without substantial justification (defined by § 12-349(F) to mean one that "constitutes harassment, is groundless and is not made in good faith"), (2) brings or defends a claim solely or primarily for delay or harassment, (3) unreasonably expands or delays the proceeding, or (4) engages in abusive discovery. Section 12-350 requires a court to set forth the specific reasons for an award under § 12-349. *See State v. Richey*, 160 Ariz. 564, 565, 774 P.2d 1354, 1355 (1989).

The Superior Court made none of the findings required by section 12-350. It

simply stated a bunch of conclusions that mirror 349.

In addition, the superior court should not have awarded attorneys' fees to defendants under A.R.S. § 12-341.01 because, as observed above, the action lies in tort, not contract. The duty is statutory and attorneys' fees are not available. *See Morris v. Achen Constr. Co.*, 155 Ariz. 512, 514, 747 P.2d 1211, 1213 (1987).

CONCLUSION

The judgment should be reversed and the matter remanded for further proceedings.

Dated: August 29, 2012

Respectfully submitted,

DUSTIN R. CHANTEL and ELIZABETH D. CHANTEL

Dustin R Chantel Elizabeth D. Chantel

Husband and Wife
Plaintiffs-Appellants Pro Se
10001 E. Highway 66
Kingman AZ 86411-2028
(928) 757-9755

Certificate of Compliance

Pursuant to ARCAP 14, I certify that the attached brief

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_____ Uses monospaced type of no more than 10.5 characters per inch and

XX Does not exceed 40 pages (opening and answering briefs) or 20 pages (reply briefs).

8-29-2012
Date

Signature of Attorney or Unrepresented Party

PROOF OF SERVICE

The undersigned on August 30, 2012 mailed a true copy of this brief to the Attorney for the Appellee at:

Curtis, Goodman, Sullivan, Udall & Schwab, P.L.C.
501 East Thomas Road
Phoenix AZ 85012-3205

Elizabeth D. Chantel

Exhibit 9

COURT OF APPEALS

DIVISION ONE

DUSTIN R. CHANTEL and ELIZABETH D. CHANTEL, husband and wife, **Appellants,** **v.** **MOHAVE ELECTRIC COOPERATIVE, INC., an Arizona non-profit corporation,** **Appellee.**	**CASE NO. 1 CA-CV 12-0411** Mohave County Superior Court Cause No. S8015CV2009-02574

APPELLEE'S ANSWERING BRIEF

Michael A. Curtis, State Bar No. 001876
mcurtis401@aol.com
Larry K. Udall, State Bar No. 009873
ludall@cgsuslaw.com
501 East Thomas Road
Phoenix, Arizona 85012-3205
Telephone: (602) 393-1700

Attorneys for Appellee Mohave Electric Cooperative, Incorporated

File: 1234-007-0044-0003; Desc: Answering Brief ; Doc#: 141237v1

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STATEMENT OF THE CASE

Appellants (the "Chantels") filed their eight count complaint in Mohave County Superior Court (No. S-8015-CV-2009-02574) on November 20, 2009.[1] A year earlier the Arizona Corporation Commission's ("Commission" or "ACC") Assistant Director of the Utilities Division (Mr. Steven Olea)[2] determined Mohave Electric Cooperative, Incorporated ("MEC" or "Appellee") had acted in accordance with Commission rules in de-energizing its electric lines and terminating Appellants' electric service[3] at Mohave County's direction.[4] MEC's action was necessary to address an obvious public health and safety hazard created by Appellants' willful construction of a 6,200 square foot survivalist structure (the "Structure") directly beneath MEC's electric lines[5] in disregard of Mohave County

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[1] Record on Appeal Item 1 ("ROA" 1); Appendix C.

[2] Mr. Olea is now the ACC's Director of Utilities.

[3] Exhibit A to ROA 69; Appendix D, Mr. Olea's November 5, 2008 determination, filed in response to Appellants' informal complaint to the ACC, is included as Appendix D. The Appellants subsequently filed a formal complaint with the ACC, but they stayed the ACC proceeding to pursue the superior court action.

[4] ROA 50, ¶ 9, 11, 19 & 20; Appendix E.

[5] A picture of the Structure is found in Appendix B-3.

stop work orders[6] and in violation of the National Electric Safety Code ("NESC"). The same lines also provided service to a nearby train signal.[7] Appellants' superior court complaint alleged MEC's failure to properly maintain its poles and lines on their property constituted a Breach of Contract (Count 1), Breach of Covenant of Good Faith and Fair Dealing (Count 2), Negligence (Count 6), Intentional Infliction of Emotional Distress (Count 7) and asserted Appellants were entitled to Quiet Title/Declaratory Judgment (Count 3), Ejectment (Count 4), Recovery of Rents (Count 5) and Punitive and Exemplary Damages (Count 8).[8]

MEC filed an Answer[9] and, with leave of court, an Amended Counterclaim seeking to recover the costs it incurred addressing the unsafe conditions created by Appellants' unauthorized construction of the Structure, including de-energizing the lines, establishing temporary service to a railroad signal and ultimately installing permanent alternative lines.[10]

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[6] ROA 11 and 50; Appendices E and L.

[7] ROA 50 ¶ 9; Appendix E.

[8] ROA 1; Appendix C.

[9] ROA 12.

[10] ROA 33.

Appellants expressly withdrew Count 3 (Quiet Title/Declaratory Judgment) and Count 4 (Ejectment).[11] On May 21, 2010, the trial court granted MEC Summary Judgment on Count 5 (Recovery of Rents), Count 7 (Infliction of Emotional Distress) and Count 9 (Punitive and Exemplary Damages).[12] Although considering it a close call and with the expectation and avowal of Appellants that additional discovery would be forthcoming,[13] the trial court denied MEC's motion for summary judgment on Count 1 (Breach of Contract), Count 2 (Breach of Covenant of Good Faith and Fair Dealing), Count 6 (Negligence) and on its Counterclaim, and set a status conference for January 26, 2012.[14]

The only additional discovery pursued by Appellants was to request copies of any correspondence that may have been sent from MEC's comptroller in 2006.[15] Appellants also inadequately responded to MEC's second set of requests for production of documents, and second and third sets of requests for admissions and

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[11] ROA 63, pp. 9 – 10; ROA 108, p.2; Appendix A.

[12] ROA 70; Appendix A-1; ROA 108, p.2; Appendix A.

[13] ROA 108 at p. 3; Appendix A, ROA 97; Appendix A-2.

[14] *Id.* (The trial court's May 21, 2012 ruling (ROA 97) ordered count 3 (Quiet Title) and count 4 (Ejectment) dismissed without prejudice based upon Appellants withdrawal of the claims).

[15] ROA 77 at p.2, fn 1.

interrogatories, which MEC propounded on September 15, 2011 and November 23, 2011.[16]

On additional motions by both Appellants[17] and MEC,[18] the trial court granted MEC summary judgment on Count 1 (Breach of Contract), Count 2 (Breach of Covenant of Good Faith and Fair Dealing), Count 6 (Negligence) and on its Counterclaim, awarding MEC damages, court costs, attorney's fees and accrued and accruing interest.[19] The ruling was reduced to formal judgment dated July 2, 2012.[20] Prior thereto, Appellants filed a premature Notice of Appeal on May 31, 2012 and re-filed a Notice of Appeal on July 5, 2012.

This Court has jurisdiction over this appeal pursuant to A.R.S. § 12-2101(B).

STATEMENT OF FACTS

Appellants' only citation to the record to support its "Statement of the Facts" ("SOF") is a general reference to "the complaint and the motion papers submitted

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[16] ROA 85, Exhibits A, B and C.

[17] ROA 75 & 82.

[18] ROA 85, 88 and 89.

[19] ROA 108 and 97; Appendices A and A-2.

[20] ROA 108; Appendix A.

by plaintiff." (Opening Brief at 3) Rule 13(a)4, ARCAP, requires "facts relevant to the issues presented for review, with appropriate references to the record." Where, as here, the statement of facts in an opening brief does not make appropriate references to the record and contains numerous factual assertions for which there was no record support, the appellate court will disregard it. *Flood Control Dist. of Maricopa Co. v. Conlin*, 148 Ariz. 66, 68, 712 P.2d 979, 981 (App. 1985).[21]

The material facts are undisputed. MEC is a not-for-profit, member-owned and operated electric cooperative providing electric service in northwest Arizona. (ROA 33, ¶ 1) MEC is regulated by the ACC as a public service corporation. (Article 15 § 3, Arizona Constitution) Appellants were customers of MEC (ROA 33, ¶ 6)[22] prior to their creating the unsafe condition by constructing the "Structure" under the very electric lines MEC used to serve them. (ROA 33, ¶ 8; ROA 50, Appendix E; ROA 59, Appendix F) The electric lines that were providing

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[21] As discussed at pp. 12-13, infra, Appellants also failed to specify those paragraphs in MEC's Statements of Facts supporting its Motions for Summary Judgment it disputed or to provide controverting affidavits as required under Rule 56(c)(2) and (e), A.R.C.P.

[22] By applying for MEC membership Appellants agreed to pay for all power used, to give easements or right-of-way across their property, and to comply with the Bylaws, and all adopted rules and regulations. (ROA 59, ¶ 2; Appendix F)

service to the Appellants had been in place decades before Appellants purchased their property. (ROA 50, ¶¶ 28-29; Appendices E and I) The electric lines serving Appellants also provided service to a Burlington Northern Santa Fe ("BNSF") train signal on nearby train tracks. (ROA 50 ¶ 13; Appendices E and H)

The Appellants willfully and intentionally constructed the Structure under MEC's electric lines and did so without securing permits from Mohave County. (ROA 50 ¶ 2; Appendix E). The Structure is approximately 200 feet from the Appellants' residence and was built using unproven and unrecognized construction techniques. (ROA 50, ¶¶ 2-6, 45; Appendix E)[23] Appellants claimed the construction plans were "divinely inspired." (ROA 50, ¶ 2; Appendix E) The Structure is made of sprayed on cement over a canvas type material on arched supports. Plaintiff mixed the cement and did not acquire commercially prepared cement for the Structure. (ROA 50, ¶ 4; Appendix E)

On August 15, 2008, Mike Dorman, one of Mohave County's building inspectors, advised Mr. John Williams (an MEC employee) that the County was in

[23] Appellants contended the Structure was artwork and refused to apply for a building permit. (ROA 50, ¶ 6; Appendix E, ROA 59, ¶8; Appendix F; Appendix H)

the process of getting a deputy sheriff to accompany a building inspector to shut down the construction. (ROA 50, ¶ 8; Appendix E; ROA 59, ¶ 10; Appendices F H) On August 18, 2008, Mr. Williams and Darrell Riedel (a building inspector for Mohave County) went to Appellants' property and Mr. Williams determined that the clearance between the electric lines and the Structure was in violation of the National Electric Safety Code ("NESC"). (ROA 50 ¶ 8, Appendices E and H) Appellants were informed at that time that construction on the Structure had to cease and Appellants briefly halted construction. (ROA 50, ¶ 9; Appendices E and H)

An accident or event at the Structure not only could endanger the Structure and life and other property on Appellants' property, but could prevent MEC from supplying continuous, uninterrupted power to the nearby railroad signal. (ROA 50, ¶ 13; Appendices E, H and I) The result could be a catastrophic event. In short, the Structure created the potential for a serious train accident. (*Id.*)

Appellants commenced construction on the Structure again. Concerned with the public health and safety, Mr. Dorman on September 12, 2008, instructed MEC to de-energize the overhead electric lines. (ROA 50, ¶ 11; Appendices E and H)

On September 13, 2008, Mr. Williams undertook a second measurement and confirmed the Structure violated NESC clearance requirements. (ROA 50, ¶ 12; Appendices E and H)

After mailing Appellants notice on or about September 15, 2008 of the continuing violation and Mohave County's direction (ROA 50, ¶ 14 and 16; Appendices E and H), MEC consulted with Ms. Ragan and Mr. Olea of the ACC about the situation. (ROA 50, ¶ 17; Appendices E and H) Then, on or about September 16, 2008, Appellant, Darlene Chantel, was contacted by MEC's personnel at approximately 3:20 p.m. and was informed that the power lines would be de-energized due to the safety issues. (ROA 50 ¶ 18; Appendices E and H) MEC then proceeded to de-energize the lines and to install a temporary line to provide service to the BNSF Railroad train signal. (ROA 50, ¶ 19; Appendices E and H)

When the Appellants took no action to address the unsafe condition created by the Structure, MEC proceeded to install a permanent addition to its system to provide service to the train signal without utilization of the de-energized lines. (ROA 59 ¶ 24; Appendices F and J) MEC incurred $47,882.04 in costs and accrued service charges to de-energize the lines and install first temporary and then

permanent service to the train signal. (ROA 59; ¶29; Appendices F and J) Such costs would not have been incurred but for the unsafe condition created by Appellants. The trial court correctly awarded MEC these costs, attorney's fees and court costs incurred in defending this action, plus accrued and accruing interest.

Appellants make various immaterial and unsupported assertions in their SOF, such as allegations that: 1) there is an absolute maximum distance allowed between utility poles (¶ 2, p. 4, Opening Brief);[24] 2) Appellants immediately and continuously expressed their safety concerns regarding low hanging power lines and bending and cracking power poles on their property (¶ 3, p. 4, Opening Brief);[25] 3) that MEC had no recorded easement or right-of-way for the portion of

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[24] As Mr. Olea stated at page 4 of his determination (ROA 69, Exhibit 2; Appendix D): "Two final issues you have raised are the distance between utility poles and the resulting amount of the sag that results. MEC places its poles based upon issues of clearance from the ground to wire and from pole to pole. These standards are dictated by professional code. According to MEC, the lines in question were built within code specifications in 1949 and remain within tolerances today."

[25] On November 14 and December 8 of 2005, Appellants forwarded correspondence, respectively to Stephen McArthur (MEC's Comptroller) and the ACC that do not mention the alleged safety concerns relating to the lines or poles on his premises. (ROA 55; Appendix B-1) On August 13, 2008, Appellants sent correspondence to the Mohave County Attorney complaining of various issues, but did not mention safety issues, only his intent to build the Structure and equal

its lines located on Appellant's property (¶ 3, p. 3, Opening Brief)[26] and 4) that the generators and solar system Appellants currently utilize are inadequate and very costly (¶ 2, p. 6, Opening Brief). All such irrelevant and unsupported allegations should be disregarded by the Court.

ISSUES PRESENTED

1. Whether the Appellants have abandoned or waived an appeal of the trial court's grant of summary judgment on MEC's counterclaim and Appellants' claims of breach of contract, breach of covenant of good faith and fair dealing, recovery of rents, negligence and intentional inflection of emotional distress and punitive/exemplary damages and its dismissal without prejudice of their quiet title and ejectment claims.

2. Whether Appellants are entitled to present a new claim/theory – "wrongful termination" of electric account for recovery (and claim entitlement to monetary and injunctive relief) for the first time on appeal.

3. Whether the trial court's grant of summary judgment to MEC on all counts raised in Appellants Complaint, not withdrawn by Appellants, should be affirmed.

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treatment issues relating to County permits. (ROA 68, Exhibit 1; Appendix B-2); Appellants never presented any competent evidence supporting their claim that MEC's poles were in poor condition. (ROA 64 and 66)

[26] Appellant acknowledged the existence of the MEC poles on his premises when he purchased his residence; the lines and poles were likely set over forty years ago. (ROA 50, ¶¶ 28, 29; Appendix E)

4. Whether the trial court's grant of summary judgment on MEC's Counterclaim should be affirmed.

5. Whether the award of MEC's legal fees is supported by law.

ARGUMENT

I. STANDARD OF REVIEW.

When reviewing a grant of summary judgment, the Court's role "is to determine whether there is any genuine issue of material fact underlying the adjudication, and, if not, whether the substantive law was correctly applied." *Long v. Buckley,* 129 Ariz. 141, 142, 629 P.2d 557, 558 (App. 1981). The trial court's determination is reviewed de novo viewing the evidence and reasonable inferences in the light most favorable to the party opposing summary judgment. *Chalpin v. Snyder*, 220 Ariz. 413, 418, 207 P.3d 666, 671 (App. 2008).

Where no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law, then summary judgment is appropriate. *Id.* Summary judgment is also appropriate when a plaintiff fails to assert evidence essential for a *prima facie* showing of the necessary elements for each claim. *See, Hydroculture, Inc. v. Coopers & Lybrand*, 174 Ariz. 277, 283, 848 P.2d 856, 862 (App. 1992).

Where, as here, the Appellants failed to specify those paragraphs of MEC's statement of facts they opposed as required by Rule 56(c), ARCP, or to present controverting evidence through affidavit or otherwise as required by Rule 56(e), ARCP, Appellants may not rest upon the mere allegations or denials contained in the pleadings, but must set forth specific facts showing that there is a genuine issue for trial. *Northern Contracting Co. v. Allis-Chalmers Corp.*, 117 Ariz. 374, 376-77, 573 P.2d 65, 67-68 (1977). Additionally, if summary judgment is correct for any reason, even a reason which was not considered by the trial court, the summary judgment should be affirmed. *Gary Outdoor Advert. Co. v. Sun Lodge, Inc.*, 133 Ariz. 240, 242, 650 P.2d 1222, 1224 (1982); *Glaze v. Marcus*, 151 Ariz. 538, 540, 729 P.2d 342, 344 (App. 1986).

As to the standard of review for attorney's fees, the issue of whether the claim arises out of an express or implied contract is a matter of statutory interpretation and is reviewed de novo. *See* A.R.S. § 12-341.01(A); *Hampton v. Glendale Union High Sch. Dist.*, 172 Ariz. 431, 433, 877 P.2d 1166, 1168 (App. 1992).

The trial court's ruling granting attorney's fees will not be set aside unless it lacks any reasonable basis and the record is to be viewed in the light most

favorable to upholding the lower court's decision. *Berry v. 352 E. Virginia, L.L.C.*, 228 Ariz. 9, 13,¶¶ 21-22, 261 P.3d 784, 788 (App. 2011). The amount of the award is reviewed solely for abuse of discretion. *See, e.g., In Re Marriage of Robinson and Thiel*, 201 Ariz. 328, 335 ¶ 20, 35 P.3d 89, 96 (App. 2001).

II. NO GENUINE ISSUES OF MATERIAL FACT EXIST.

Appellants presented no affidavits or other form of evidence to the trial court contesting the material facts relevant to their complaint:

- MEC's lines were in place decades prior to Appellants' acquisition of the property;
- Appellants built the Structure without securing permits from Mohave County;
- Appellants ignored stop work orders issued by Mohave County;
- the Structure was built under MEC's lines;
- the Structure's proximity to MEC's lines violated the NESC and created a threat to public health and safety;
- MEC de-energized the lines at the direction of Mohave County;
- Arizona Administrative Code ("A.A.C.") R14-2-211(B) and MEC Service Rules and Regulations Subsection 111-B (Appendix R)

provide independent authority for MEC to terminate electric service *without notice* to protect the public health and safety;

- MEC notified both the Appellants and the ACC prior to de-energizing the line;
- the amount MEC incurred to de-energize and replace the electric lines; and
- the amount of attorney's fees and costs incurred by MEC in connection with this action.

See Statement of Facts, *supra* for relevant citation to the record.

Nowhere in their Opening Brief do Appellants point to one contested fact that precluded granting MEC summary judgment on its Counterclaim and on all counts of Appellants' Complaint that Appellants had not unilaterally withdrawn below.

MEC was and is entitled to summary judgment as a matter of law on its Counterclaim and Counts 1, 2, 5, 6, 7 and 8 of Appellants Complaint based upon the law and the uncontested material facts.

III. APPELLANTS HAVE ABANDONED OR WAIVED THE CLAIMS RAISED BY THEIR COMPLAINT.

Appellants' Opening Brief violates Rule 13(a)(6) ARCAP by failing to present and address any significant argument that supports the counts contained in their Complaint and on which MEC was granted summary judgment. As such Appellants should be deemed to have waived or abandoned all claims not supported by authority on appeal. *Ritchie v. Krasner*, 221 Ariz. 288, ¶ 62, 305, 211 P.3d 1272, 1289 (App. 2009); *State v. Moody,* 208 Ariz. 424, 452 n. 9, ¶ 101, 94 P.3d 1119, 1147 n. 9 (2004).

Appellants Opening Brief presents argument only relating to 1) an alleged tortious termination of electric service (which as discussed *infra* was not argued below), 2) whether MEC's lines were located in an easement or right of way (although Appellants had withdrawn their cause of action for quiet title/declaratory action resulting in its dismissal without prejudice) and 3) whether there was a legal basis to award MEC attorney's fees. In fact, Appellants now assert "the action lies in tort, not contract." (Opening Brief at 15) Appellants' neither argue nor provide support to overturn the trial court's grant of summary judgment to MEC on its Counterclaim or on Appellants' claims of Breach of Contract (Count 1), Breach of Covenant of Good Faith or Fair Dealing (Count 2), Recovery of Rent (Count 5),

Negligence (Count 6), Intentional Infliction of Emotional Distress (Count 7) or for an award of Punitive or Exemplary Damages (Count 8). These counts are not even mentioned in the Opening Brief and have not been preserved on appeal and must not be considered by this Court. *Robert Schalkenbach Found. v. Lincoln Found. Inc.*, 208 Ariz. 176, 180, ¶ 17, 91 P.3d 1019, 1023 (App. 2004).

As noted, Appellants expressly withdrew Count 3 (Quiet Title/Declaratory Judgment) and Count 4 (Ejectment). (ROA-63, pp. 9-10) These counts were dismissed without prejudice. (ROA 97; Appendix A-2) Therefore, there is no appealable, final judgment as to Counts 3 and 4. *Osuna v. Wal-Mart Stores, Inc.*, 214 Ariz. 286, 389, ¶ 9, 151 P. 3d 1267, 1270 (App. 2007). The final form of judgment entered July 2, 2012 reflects that both Counts 3 and 4 had been withdrawn. (ROA 108; Appendix A) Importantly, Appellants never presented any argument below or in its Opening Brief that the withdrawal and dismissal without prejudice was unjustified or improper. Therefore, there is no appellate jurisdiction to consider the second issue listed in Appellants' Opening Brief at p. 7 (Whether plaintiffs are entitled to recover use and occupancy for the placement of utility lines over their property without obtaining their consent) and it cannot be the

subject of an appeal. *See Webber v. Grindle Audio Prod., Inc.*, 204 Ariz. 84, 90, ¶ 26, 60 P.3d 224, 230 (App. 2002).

IV. APPELLANTS IMPERMISSABLY ASSERT A NEW THEORY OF LIABILITY-TORTIOUS TERMINATION OF SERVICE-NOT ARGUED BELOW.

Neither Appellants' complaint nor their pleadings below ever mention a cause of action for the tort of wrongful termination of service. The complaint merely asserts that termination occurred "without substantial warning." (ROA 1, ¶ 22; Appendix C) The thrust of Appellants' complaint was that MEC's poles and wires were unsafe (ROA 1 at ¶¶ 17 - 19; Appendix C) and that MEC's breach of some duty related thereto caused Appellants to build their Structure. (ROA 1 at ¶ 20; Appendix C)

Nonetheless, the primary argument presented in Appellants' Opening Brief is a new claim of tortious termination of electrical services. Appellants even assert on appeal that their action lies exclusively in tort. (Opening Brief at 15) Arizona case law is clear that a party cannot raise new theories on appeal to seek reversal of summary judgment. *Cahn v. Fisher*, 167 Ariz. 219, 221, 805 P.2d 1040, 1042 (App. 1990). Hence, this Court must not entertain or address Appellants' new, non-meritorious claim, of tortious termination of service.

Appellants concede that Arizona courts have never recognized a cause of action for tortious termination of service. (Opening Brief at p. 9) Where such actions are recognized, the cases have usually involved a wrongful termination for nonpayment, especially where the customer had no personal obligation for the debt. *See, e.g., Walton Elec. Membership Corp. v. Snyder*, 270 Ga. 62, 508 S.E. 2d 167 (1998). Here, instead of being de-energized due to Appellants' nonpayment, MEC's lines were de-energized upon Mohave County's direction in order to eliminate a threat to the public health and safety created by Appellants intentional and wilfull disregard of stop work orders and other verbal and written warnings. Moreover, the procedure MEC followed in disconnecting service was in accord with A.A.C. R14-2-211(B) and MEC Service Rules and Regulations Subsection 111-B.[27] Article 15, § 3 of the Arizona Constitution vests the ACC with power to "make reasonable rules, regulations, and orders, by which such [public service] corporations shall be governed in the transaction of business within the State . . ."[28]

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[27] The text of A.A.C. R14-2-211(B) and MEC Subsection 111-B are set forth in Appendix R.

[28] The text of Article 15, Section 3, Ariz. Const. is set forth in Appendix Q.

Several jurisdictions have upheld summary judgments for power companies sued for terminating service in response to the directive of a governmental agency and/or to address public safety concerns. For example, the Mississippi Supreme Court upheld summary judgment in a power company's favor where service was terminated at a building department official's request after the patron failed to secure a permit and remedy a hazardous condition on his property. *Tucker v. Hinds County*, 558 So. 2d 869, 875-76 (Miss. 1990). Holding a public utility commission's rules and regulations had the force of law, the South Carolina Supreme Court upheld the suspension of electric service without notice in accordance with the company's own rules where it could reasonably anticipate a condition dangerous to life and property. *Carroway v. Carolina Power & Light Co.,* 226 S.C. 237, 84 S.E.2d 728 (1954). Summary judgment in favor of a utility was also upheld where a hotel's electric service was shut off in accord with the rules of the public utility commission pursuant to an order by the city's electrician who had found electrical code violations at the hotel. *Windsor Hotel Co. v. Central Maine Power Co.,* 250 A.2d 194 (Me.1969). These courts recognize that the utility could be liable for damage to life and property if it failed to act after being informed of the hazardous condition. It would be untenable for a utility to

be potentially liable when acting to protect life and property both for terminating service or for failing to do so.

Appellants have presented no facts that begin to demonstrate that MEC breached any duty owed Appellants. As found by the trial court: "The only legitimate safety issue in this case has been raised by MEC since the beginning and is what prompted the lines to be de-energized. MEC was not negligent in de-energizing the power poles. MEC had no choice due to actions by [Appellants].". (ROA 108 at p. 3; Appendix A) Even if this Court could consider it, there is no merit to this new claim raised for the first time on appeal.

V. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT ON COUNTS 1, 2, 5, 6, 7 AND 8 OF APPELLANTS' COMPLAINT.

While Appellants' failure to comply with Rule 13(a)(6) waives or abandons the various claims raised in their Complaint, MEC briefly addresses each count below.

A. Breach of Contract – Count 1

A breach of contract action arises out of the violation of a specifically enumerated duty. *Resolution Trust Corp. v. Western Technologies, Inc.*, 179 Ariz. 195, 199, 877 P.2d 294, 298 (App. 1994). An enforceable contract is formed

through "an offer, an acceptance, consideration, and sufficient specification of terms". *See K–Line Builders, Inc., v. First Fed. Sav. & Loan Ass'n,* 139 Ariz. 209, 212, 677 P.2d 1317, 1320 (App. 1983). The party asserting the existence of a contract bears the burden of proof. *See Graham v. Asbury,* 112 Ariz. 184, 185, 540 P.2d 656, 657 (1975); *Berthot v. Security Pac. Bank of Ariz.,* 170 Ariz. 318, 324, 823 P.2d 1326, 1332 (App. 1991)." *U S W. Communications, Inc. v. Ariz. Corp. Comm'n,* 197 Ariz. 16, 22, 3 P.3d 936, 942 (App. 1999).

The trial court properly found that "the only contract between the parties is the original contract where Plaintiffs joined the cooperative. Plaintiffs have not shown any specific terms of the contract being violated by MEC." (ROA 97; Appendix A-2) A copy of the contract is set forth in Appendix K. (ROA 63, Exhibit 2) Below, Appellants claimed MEC breached its contract by failing to maintain safe poles and wires. (ROA 1 ¶ 59; Appendix C) The trial court concluded that Appellants never "provided any evidence that the power lines were an actual safety concern . . . [or] that those concerns would have warranted allowing [Appellants] to construct the building to protect them . . ." (ROA 108; Appendix A) Moreover, it is undisputed that MEC continuously provided electricity to Appellants up until the Appellants created the unsafe condition

resulting in Mohave County instructing MEC to de-energize its lines. Summary judgment is appropriate where, as here, Appellants have not identified any material issues of fact and the moving party is entitled to judgment as a matter of law. *McAlister v. Citibank,* 171 Ariz. 207, 211, 829 P.2d 1253, 1257 (1992); *Orme School v. Reeves,* 166 Ariz. 301, 309-10, 802 P.2d 1000, 1008-1009 (1990); Ariz. R. Civ. P. 56(c)(1). The trial court acted properly in granting MEC summary judgment on Count 1.

B. Breach of Covenant of Good Faith and Fair Dealing – Count 2

A *prima facie* cause of action for an alleged breach of the covenant of good faith and fair dealing requires some form of valid, contractual relationship with definable terms. *See Rawlings v. Apodaca*, 151 Ariz. 149, 153,726 P.2d 565, 569 (1986). The trial court correctly ruled that "having found that there has been no breach of contract there can be no finding MEC has breached any contractual obligation to deal in good faith." (ROA 108, p. 2; Appendix A) Covenants of good faith and fair dealing do not exist in a vacuum. *See Taylor v. State Farm Mut. Auto Ins. Co.*, 185 Ariz. 174, 176, 913 P.2d 1092, 1094 (1996) (explaining the general rule that "the underlying contract provides the basis for a bad faith action"). MEC was properly granted summary judgment on Count 2.

C. Recovery of Rents – Count 5

To state a *prima facie* claim for rent under A.R.S. § 12-1271, Appellants must be "entitled to" rent for one of the statutory grounds.[29] Appellants, on appeal, assert MEC has no easement, right of way or agreement to occupy their property with utility poles and lines. Not only did Appellants voluntarily withdraw their Quiet Title and Ejectment claims below, they also agreed, as a condition of receiving electric service, to grant MEC "easements or rights of way across [their] property, for construction, use and operation of power lines necessary for the servicing of members in this area." (ROA 59, ¶¶ 2 and 3; Appendices F and O) Moreover, MEC's poles and lines had existed on Appellants' property for a period far exceeding 10 years prior to filing of their complaint. An action for recovery of land beyond 10 years is precluded by A.R.S. §12-526. "It long has been recognized in Arizona that an oral or parol grant of title to real property, while unenforceable because of the Statute of Frauds, will, when coupled with possession, give rise to the beginning of an adverse possession." *Paxson v. Glovitz*, 203 Ariz. 63, 68, 50

[29] The statutory grounds are: 1) rent is due under a lease; 2) lands are occupied without any agreement for rent or tenant has overstayed a lease; 3) before purchase agreement is consummated, seller terminates agreement because of buyer's non-compliance; and 4) where possessor of premises sold under judgment of court refuses to surrender possession.

P.3d 420, 425 (App. 2002). Appellants failed to allege a *prima facie* claim for rents under A.R.S. §12-1271. MEC was and is entitled to summary judgment on Count 5.

D. Negligence – Count 6

A *prima facie* negligence claim must allege four elements: "(1) a duty requiring the defendant to conform to a certain standard of care; (2) a breach by the defendant of that standard; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) actual damages." *Ontiveros v. Borak,* 136 Ariz. 500, 504, 667 P.2d 200, 204 (1983) (citing William L. Prosser, *Handbook of the Law of Torts* § 30, at 143 (4th ed.1971)). The first element, whether a duty exists, is a matter of law for the court to decide. *Gipson v. Kasey*, 214 Ariz. 141, 143, ¶ 9, 150 P.3d 228, 230 (2007).

In their pleadings, Appellants suggested two duties owed to Appellants: 1) an unconditional duty to deliver electric power; and 2) a duty to maintain transmission poles at a distance of no more than 300 feet apart. The legal authorities cited by Appellants in their Opening Brief, pages 10-11, do not support a claim that MEC owed Appellants such duties. At most, the authorities Appellants cite arguably support a duty to use reasonable care when terminating

service (an argument not raised below). Assuming *arguendo* that MEC has such a duty, Appellants did not present a single fact indicating MEC breached that duty by de-energizing its lines at the direction of Mohave County in order to address its public health and safety concern created by the Appellants' own willful actions. Nor do Appellants address the fact that MEC acted in accord with A.A.C. R14-2-211(B) and MEC Service Rules and Regulations Subsection 111-B. In fact, MEC went well beyond the rules' requirement by providing Appellants oral and written notification of the consequences of Appellants' actions prior to de-energizing the lines. (ROA 50, ¶¶ 9, 14, 16, 18 and 19; Appendix H)

As to the distance between poles, Judge Jantzen found (as already noted) Appellants never "provided any evidence that the power lines were an actual safety concern . . . [or] that those concerns would have warranted allowing [Appellants] to construct the building to protect them . . ." (ROA 108; Appendix A, ROA 97; Appendix A-1) MEC was and is entitled to summary judgment on Count 6.

E. Intentional Infliction of Emotional Distress – Count 7

In order to present a *prima facie* claim of intentional infliction of emotional distress, Appellants were required to allege with demonstrable evidence that MEC's conduct was reckless or intentional and extreme and outrageous,

demonstrating a causal connection between the conduct and the emotional distress, and that the emotional distress is severe. *Lindsey v. Dempsey*, 153 Ariz. 230, 233, 735 P.2d 840, 843 (App. 1987) (upholding the grant of summary judgment due to a lack of evidence of an intent to ruin the plaintiff's coaching career). Whether a defendant's conduct may be regarded as extreme and outrageous is initially examined by the court as a matter of law. Restatement of Torts 2d §46 comment h. Appellants presented no such evidence relating to MEC below and has pointed to nothing in the record that could allow this Court to conclude MEC acted with intent to harm Appellants. The trial court properly granted MEC summary judgment on Count 7.

F. Punitive/Exemplary Damages – Count 8

This is not a cause of action at all. It is a remedy which must be associated with appropriate causes of action. Moreover, punitive damages cannot be awarded in contractual matters, *Continental Nat'l Bank v. Evans,* 107 Ariz. 378, 382, 489 P.2d 15, 19 (1971); *Rawlings,* 151 Ariz. at 161-62, 726 P.2d at 577-78 and cannot be awarded in tort unless there is clear and convincing evidence that a defendant had evil motives and presented great risk of harm to others. *Wyatt v. Wehmueller*, 167 Ariz. 281, 806 P.2d 870 (1991). The primary consideration in determining the

propriety of punitive damages is reprehensibility of conduct and severity of harm. *Hooper v. Truly Nolen of America, Inc.*, 171 Ariz. 692, 832 P.2d 709 (App. 1992).

The uncontested facts demonstrate MEC acted in accordance with direction from Mohave County, A.A.C. R14-2-211(B) and MEC Subsection 111-B and only after repeated notice to Appellants that the Structure being constructed without authority was creating a danger to the public. In response to Appellants informal complaint, the ACC advised Appellants that MEC had not engaged in any wrongful conduct. (ROA 69; Appendix D) The grant of summary judgment on Count 8 should be affirmed.

VI. MEC WAS PROPERLY GRANTED SUMMARY JUDGMENT ON ITS COUNTERCLAIM.

A. Appellants are Responsible for Costs They Caused MEC to Incur.

Appellants, neither below nor in their Opening Brief, present any argument that the trial court erred in granting summary judgment on MEC's Counterclaim. Below, Appellants argued only that their actions in building the Structure were justified due to the unsafe condition of MEC's poles and lines. However, Appellants presented no evidentiary support of their claim that MEC's poles and lines were unsafe or that the Structure would in some way address the unsafe

condition. To the contrary, all evidence demonstrated that it was Appellants' Structure that created the hazardous condition. (ROA 108, p. 3; Appendix A)

Under A.A.C. R14-2-208(B)(3) Appellants are liable for MEC's costs arising from the customer's neglect, carelessness or misuse. Under A.A.C. R14-2-206(C)(2) the customer is liable for MEC's costs in remedying hazardous conditions created by the customer.[30] Appellants failed to exercise "reasonable care" to prevent loss when they built (using unsound construction methods) the Structure without adequate clearance under MEC's electric lines. The Arizona legislature has recognized the inherent danger of working in close contact with high voltage lines, subjecting persons to civil penalties payable to the state for failing to comply with A.R.S. § 40-360.41 *et seq*. (dealing with working around high voltage overhead lines). The Appellants have presented no legal or factual basis to overturn the grant of summary judgment on MEC's Counterclaim and the judgment should be affirmed.

B. Appellants Violated MEC's Membership Application Agreement, Appellee's Rules and the Bylaws.

Appellants' actions occurred while they were members of MEC. Their

[30] Copies of A.A.C. R14-2-206 and A.A.C. R14-2-208 are set forth in full in Appendix P.

membership bound them to obey MEC's Bylaws, Rules and Regulations, as well as MEC's tariffs (which require the cooperative members to abide by the Bylaws, Rules and Cooperative Regulations). Bylaws, Art 1, Sec 1(c) (ROA 59, Exhibit 3; Appendix O) Violation of MEC's Bylaws, Rules and Regulations make the Appellants responsible for MEC's losses. MEC's losses are: 1) the disconnect costs ($12,135.09); 2) rerouting costs for the distribution lines ($23,145.47); and 3) service charges (through date of judgment $12,601.48). Appellants did not contest the amount of damages incurred by MEC, below or in the Opening Brief and the trial court's judgment should be affirmed.

VII. MEC IS ENTITLED TO AN AWARD OF LEGAL FEES

The trial court's Judgment (ROA 108; Appendix A) language underscores the grounds for attorney's fees:

> As to MEC's request for attorney's fees, the Court finds that: MEC did not do anything wrong by de-energizing the transmission lines above the Building; the Plaintiffs have failed to raise a prima facie case on any of their complaint's counts; Plaintiff's material allegations are unsubstantiated; and it would have been preferable for the safety issues to have been raised before the ACC. Based on those findings, the Plaintiffs' cooperative membership (a form of contract), the Plaintiffs' allegations in Counts 1 and 2 (alleging a contract and breach thereof), and the unsubstantiated and frivolous allegations in Plaintiffs' Complaint bring this matter squarely under the provisions of A.R.S. § 12-341.01 – this matter partially arises

> out of contract and the evidence is clear and convincing that this lawsuit has been a form of harassment, without substantial jutification and groundless and not brought in good faith.

Appellants did not contest the Application for Attorney's Fees (ROA 101), Statement of Costs (ROA 100) or Form of Judgment (ROA 99) in the trial court. The failure to raise specific, as opposed to generalized objections before the trial court precludes raising the issue on appeal. *Nolan v. Starlight Pines Homeowners Ass'n*, 216 Ariz. 482, 491,¶¶ 37-39, 167 P.3d 1277, 1286 (App. 2007). Here the Appellants only alleged that they should not be penalized for pursuing remedies in court. (ROA 63, p. 14; ROA 65, p. 7) Appellants filed no objection below to the amount of attorneys fees claimed or the lack of specific findings in support of an award under A.R.S. §§ 12-341.01(A), 12-341.01(C) or 12-349. The Arizona Supreme Court has specifically held that a party waives, and cannot appeal the failure to set forth such findings if they fail to raise the objection below. *Trantor v. Fredrikson*, 179 Ariz. 299, 301, 878 P.2d 657, 659 (1994).

On appeal, Appellants contend the award of attorneys fees was improperly awarded under A.R.S. § 12-349 and that the matter lies exclusively in tort, making A.R.S. § 12-341.01 inapplicable. (Opening Brief at 14-15) A review of Counts 1 and 2 of Appellants' Complaint (ROA 1) and MEC's Amended Counterclaim

(ROA 33) quickly belies Appellants claim that this action sounds solely in tort and does not arise out of contract, but instead sounds solely in tort. Appellants have not provided any basis for this Court to find the level of the award to be arbitrary. The award was duly supported by an uncontested Attorney's Affidavit. (ROA 101)

Since A.R.S. §12-341.01(A) provides an independent legal basis for the award of attorneys fees, there is no need for this Court to determine whether the record provides clear and convincing support for an award under A.R.S. §12-341.01(C) and/or an award under A.R.S. §12-349.[31] Suffice it to say, in ruling that the statutory criteria were met, the trial court found no merit in the arguments advanced by Appellants and deemed their motivation in pursuing the claims inappropriate. Viewing the record in the light most favorable to upholding the trial court's judgment, the award is not arbitrary and should be affirmed.

VIII. CONCLUSION.

This is not a typical disconnect of utility services case. The Appellants willfully constructed an unpermitted structure directly under MEC's electric lines

[31] Nonetheless, the Court's findings for attorney's fees in the judgment satisfy and award under those grounds.

in a manner posing a hazard to themselves and the public. MEC de-energized the lines when directed to do so by Mohave County, but only after providing oral and written notice to Appellants. Appellants' actions caused MEC to incur substantial costs in de-energizing and re-routing a portion of its electric distribution system. As reflected above, the trial court properly granted MEC summary judgment on Counts 1, 2, 5, 6, 7 and 8 of Appellants' Complaint and on MEC's Counterclaim. The award of damages, court costs and attorney's fees to MEC is supported by law and the record. The Judgment should be affirmed in its entirety and MEC should be awarded its attorney's fees incurred on appeal pursuant to A.R.S. §§, 12-331, 12-332, 12-341, 12-341.01and Rule 21, ARCAP.

RESPECTFULLY SUBMITTED this 15th day of October, 2012.

CURTIS, GOODWIN, SULLIVAN,
UDALL & SCHWAB, P.L.C.

By: /s/ Larry K. Udall
Michael A. Curtis
Larry K. Udall
501 East Thomas Road
Phoenix, Arizona 85012-3205
Attorneys for Mohave Electric
Cooperative, Incorporated
Appellee

CERTIFICATE OF COMPLIANCE

Pursuant to ARCAP 14, I certify that the attached brief uses proportionately spaced type of 14 points or more, is double-spaced (except for Headings, Footnotes and Quotations) using a Roman font and contains 6,040 words. I further certify that the foregoing brief does not exceed 40 pages.

CURTIS, GOODWIN, SULLIVAN,
UDALL & SCHWAB, P.L.C.

By: /s/ Larry K. Udall
Larry K. Udall

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Appellee's Answering Brief has been electronically filed with the Clerk of the Court for the Arizona Court of Appeals for Division 1 by using AZ TurboCourt system on October 15, 2012.

Two copies of the foregoing mailed this 15th day of October, 2012, to:

Dustin R. Chantel
Elizabeth D. Chantel
10001 East Hwy 66
Kingman, Arizona 86401

/s/ Larry K. Udall

COURT OF APPEALS

DIVISION ONE

DUSTIN R. CHANTEL and ELIZABETH D. CHANTEL, husband and wife, **Appellants,** **v.** **MOHAVE ELECTRIC COOPERATIVE, INC., an Arizona non-profit corporation, JOHN and JANE DOES I – X; BLACK AND WHITE CORPORATIONS I – X,** **Appellees.**	**CASE NO. 1 CA-CV 12-0411** Mohave County Superior Court Cause No. S8015CV2009-02574

APPELLEE'S APPENDIX TO ITS ANSWERING BRIEF

Michael A. Curtis, State Bar No. 001876
mcurtis401@aol.com
Larry K. Udall, State Bar No. 009873
ludall@cgsuslaw.com
501 East Thomas Road
Phoenix, Arizona 85012-3205
Telephone: (602) 393-1700

Attorneys for Appellee Mohave Electric Cooperative, Incorporated

A Judgment (ROA 108)

A-1 Minute Entry of November 9, 2011 (ROA 70)

A-2 Minute Entry of May 21, 2012 (ROA 97)

B Chronology of Purported "Safety Issues" Over Poles and Lines; (ROA 83; Exhibit A)

B-1 Chantel 11/14/05 Letter to MEC; Chantel 12/8/05 Letter to ACC (ROA 83, Exhibit B

B-2 Chantel 8/13/08 Letter to County Attorney (ROA 68, Exhibit A)

B-3 Picture of Structure (ROA 83, Exhibit C)

C Complaint (ROA 1)

D Steven Olea Report (ROA 69, Exhibit 2)

E Statement of Fact for Motion for Summary Judgment on all Counts of Plaintiffs (without exhibits) (ROA 50)

F Statement of Fact for Motion for Summary Judgment re MEC's Counterclaim (without exhibits) (ROA 59)

G Report of Dennis Hughes in support of Motion for Summary Judgment (ROA 59, Exhibit 8 to Counterclaimants Statement of Facts in Support of Its Motion for Summary Judgment on Its Claim)

H Affidavit of John Williams in support of Motion for Summary Judgment (ROA 50, Exhibit 3 to Statement of Facts in Support of Its Motion for Summary Judgment on all Counts of Plaintiffs and ROA 59, Exhibit 5 to Counterclaimants Statement of Facts in Support of Its Motion for Summary Judgment on Its Claim)

I Affidavit of Tom Longtin in support of Motion for Summary Judgment (ROA 50, Exhibit 5 to Statement of Facts for Motion for Summary Judgment on all Counts of Plaintiffs and ROA 59, Exhibit 6 to Counterclaimants Statement of Facts in Support of Its Motion for Summary Judgment on Its Claim)

J Affidavit of Arden Lauxman in support of Motion for Summary Judgment (ROA 59, Exhibit 7 to Counterclaimants Statement of Facts in Support of Its Motion for Summary Judgment on Its Claim)

K Chantel Application for Membership and Electric Service (ROA 59, Exhibit 2 to Counterclaimants Statement of Facts in Support of Its Motion for Summary Judgment on Its Claim)

L September 15, 2008 Mohave County Stop Work Order (ROA 50, Exhibit 2 to Statement of Facts for Motion for Summary Judgment on all Counts of Plaintiffs)

M September 15, 2008 Notice Letter (ROA 50, Exhibit 5 to Statement of Facts for Motion for Summary Judgment on all Counts of Plaintiffs)

N September 17, 2008 Facsimile (ROA 50, Exhibit 6 to Counterclaimants Statement of Facts in Support of Its Motion for Summary Judgment on Its Claim)

O MEC Bylaw Art. 1, Sec. 1

P A.A.C. R14-2-206 and A.A.C. R14-2-208

Q Art. 15, § 3, Ariz. Const.

R A.A.C. R14-2-211 and MEC Rule Subsection 111-B

DATED this 15th day of October, 2012.

CURTIS, GOODWIN, SULLIVAN,
UDALL & SCHWAB, P.L.C.

By: /s/ Larry K. Udall

Michael A. Curtis
Larry K. Udall
501 East Thomas Road
Phoenix, Arizona 85012-3205
Attorneys for Mohave Electric
Cooperative, Incorporated
Appellee

APPENDIX A

Judgment Dated July 2, 2012

ROA 108

FILED

BY:

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VIRLYNN TINNELL
SUPERIOR COURT CLERK

The Law Offices of
CURTIS, GOODWIN, SULLIVAN,
UDALL & SCHWAB, P.L.C.
501 East Thomas Road
Phoenix, Arizona 85012-3205
Telephone (602) 393-1700
firm@cgsuslaw.com
Michael A. Curtis, Esq. #001876
Mcurtis401@aol.com
Larry K. Udall, Esq. #009873
ludall@cgsuslaw.com

Attorneys for Mohave Electric Cooperative

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MOHAVE

DUSTIN R. CHANTEL and ELIZABETH D. CHANTEL, husband and wife, Plaintiffs, v. MOHAVE ELECTRIC COOPERATIVE, INC., an Arizona non-profit corporation; JOHN and JANE DOES, I-X; BLACK and WHITE CORPORATIONS I–X, Defendants.	CASE NO. CV 2009-2574 **JUDGMENT** (Assigned to The Honorable Lee F. Jantzen)
MOHAVE ELECTRIC COOPERATIVE, INC., an Arizona non-profit corporation; Counterclaimant, v. DUSTIN R. CHANTEL and ELIZABETH D. CHANTEL, husband and wife, Counterdefendants.	

The Court took under advisement several motions after the March 28, 2012 oral argument:

S8015CV200902574
11
lesc: Judgment 05 22 12; Doc#: 128959v1

1) Plaintiffs' Motion to Have a Judicial Determination on All Counts;

2) Plaintiffs' Motion for Reconsideration to Reinstate Counts 4, 5 and 8;

3) Defendant's Motion for Reconsideration of Summary Judgment on Counts 1, 2 and 6;

4) Defendant's Motion for Striking of Plaintiffs' Motion for Reconsideration;

5) Defendants' Motion for Order on its Request to Admit Not Answered; and

6) Defendant's Motion for Sanctions for Plaintiffs' Failure to Answer Interrogatories.

The Court has reviewed the pleadings, the relevant codes, statutes and case law and the oral argument of the two parties. The Court has also considered the whole history of this file including prior rulings on motions. This case arises from Plaintiffs' construction in 2008 of a 6,200 square foot building (the "Building"), originally described by Plaintiffs as "Artwork," with insufficient clearance under Defendant Mohave Electric Cooperative ("MEC") transmission lines, resulting in the Mohave County Special Services Division ("MCSSD") directing MEC to de-energize the transmission lines over the Building. After the transmission lines over the Building were de-energized, Plaintiffs initially pursued MEC in Arizona Corporation Commission ("ACC") informal and formal complaint proceedings. The informal proceeding was resolved in MEC's favor. Before any hearing was conducted on the subsequent formal complaint Plaintiffs brought before the ACC, Plaintiffs filed this lawsuit with eight counts against MEC.

On November 9, 2011 during oral argument, Plaintiffs withdrew Count 3 (Quiet Title) and Count 4 (Ejectment).

On November 9, 2011 after oral argument, the Court granted MEC's Motion for Summary Judgment on Count 5 (Recovery of Rents), Count 7 (Intentional Infliction of Emotional Distress) and on Count 8 (Punitive Damages).

The Court has reviewed Plaintiffs' Motion for Reconsideration and the Response filed by MEC. Plaintiffs have not that raised any additional issues of fact since oral argument. Accordingly,

IT IS ORDERED denying Plaintiffs' Motion for Reconsideration on Count 5 (Recovery of

Rents), Count 7 (Intentional Infliction of Emotional Distress) and on Count 8 (Plaintiffs' request for punitive damages).

At that same hearing on November 9, 2011 the Court denied Defendant's Motion for Summary Judgment as it related to Count 1 (Breach of Contract), Count 2 (Breach of Covenant of Good Faith) and Count 6 (Negligence) and MEC's Motion for Summary Judgment on MEC's Counterclaim against Plaintiffs. This denial was a close call by the Court and done with the expectation and avowal by Plaintiffs that additional discovery would be forthcoming. Since that time Plaintiffs have not provided sufficient additional discovery to address the main issues that they have raised in any of the pending causes of action. In retrospect, the Court's denial of MEC's entire motion was incorrect.

With regard to Count I (Breach of Contract), the only contract between the parties is the original contract where Plaintiffs joined MEC as members. Plaintiffs have not shown any specific terms of the contract being violated by MEC. Plaintiffs now argue that they built the Building as a "safety" concern due to the position and condition of the MEC transmission lines. However, that issue was only raised in one letter in 2006 to MEC and that letter is not sufficient to show that safety from the transmission lines was the reason for the construction of the Building. Plaintiffs never took their alleged concerns to the ACC before constructing the Building, nor have they provided any evidence that the transmission lines were an actual safety concern. Nor does any evidence exist that, even assuming legitimate safety concerns existed at the time, that those concerns would have warranted allowing Plaintiffs to construct the Building to protect them from the transmission lines. The evidence shows that MCSSD's direction to MEC to de-energize the transmission lines over the Building was based on safety concerns that included the insufficient clearance between the Building and MEC's transmission lines.

With regard to Count 2 (Breach of Contractual Obligation to Deal in Good Faith), having found that there has been no breach of contract, this Court finds that there is no basis to find that

MEC has breached any contractual obligation to deal in good faith.

With regard to Count 6 (Negligence), Plaintiffs have failed to show MEC's actions to be negligent in any manner. The "safety" concern recently emphasized by Plaintiffs as the reason for the construction of the Building is a recent purported concern raised by the Plaintiffs that has no merit. The only legitimate safety issues in this case have been raised by MEC since the beginning and are what led to the transmission lines to be de-energized. MEC was not negligent in de-energizing the transmission lines. MEC had no choice in its course of action due to actions by the Plaintiffs and the mandate from the MCSSD. Under industry guidelines, the Building was constructed too close to the already existing transmission lines. The Plaintiffs constructed the Building without notice to the County or MEC, without permission and without addressing various legal issues. Had the Plaintiffs' conduct been otherwise, there might have been a resolution without MEC being obligated to de-energize the transmission lines. Based on the foregoing,

IT IS ORDERED granting MEC's Motion for Reconsideration on Counts 1, 2 and 6.

IT IS FURTHER ORDERED granting MEC's Motion for Summary Judgment on Counts 1 (Breach of Contract), Count 2 (Breach of Contractual Obligation to Deal in Good Faith) and Count 6 (Negligence).

IT IS FURTHER ORDERED granting MEC's Motion for Summary Judgment on MEC's Counterclaim against Plaintiffs Dustin Roger Chantel and Elizabeth D. Chantel, both jointly as husband and wife and individually, in the Motion's stated amounts for: 1) disconnect costs ($12,135.09); rerouting costs for the distribution lines ($23,145.47); and 3) service charges (amount requested and not objected to - $12,601.48) – for a total amount of **$47,912.04,** bearing interest at the rate of ~~ten percent~~ 4.25 percent per annum on the principal from the date of entry of Judgment until satisfied.

As to MEC's request for attorney's fees, the Court finds that: MEC did not do anything wrong by de-energizing the transmission lines above the Building; the Plaintiffs have failed to raise a *prima facie* case on any of their Complaint's counts; Plaintiffs' material allegations are unsubstantiated; and

it would have been preferable for the safety issues to have been raised before the ACC. Based on those findings, the Plaintiffs' cooperative membership (a form of contract), the Plaintiffs' allegations in Counts 1 and 2 (alleging a contract and breach thereof), and the unsubstantiated and frivolous allegations in Plaintiffs' Complaint bring this matter squarely under the provisions of A.R.S. §12-341.01 – this matter partially arises out of contract and the evidence is clear and convincing that this lawsuit has been a form of harassment, without substantial justification and groundless and not brought in good faith. Accordingly, the provisions of paragraphs A and C of §12-341.01 and §349 are deemed satisfied for the awarding of attorney's fees. Accordingly,

IT IS FURTHER ORDERED that MEC or its assignee is awarded attorney's fees in this matter the sum of $127,525, to accrue interest at the legal interest rate of ~~ten percent (10%)~~ 4.25 percent per annum until paid in full and costs in the amount of $178.

IT IS FURTHER ORDERED denying MEC's Motion for Sanctions for Plaintiffs' Failure to Answer Interrogatories and Requests to Admit.

Based on the rulings above, the Court finds Plaintiffs' Motion for Judicial Determination of all Counts is moot.

DATED June 25, 2012.

MOHAVE COUNTY SUPERIOR COURT

The Honorable Lee F. Jantzen

APPENDIX A-1

Minute Entry Dated November 9, 2011

ROA 70

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IN THE SUPERIOR COURT
MOHAVE COUNTY, STATE OF ARIZONA

Judge: Honorable Lee Jantzen
Division: 4 Courtroom: D
Court Reporter: Sandy Ong-Wolf

Virlynn Tinnell, Clerk of Superior Court
By: Kari Dubay, Deputy Clerk
Hearing Date: 11/09/2011

DUSTIN R. CHANTEL and ELIZABETH D. CHANTEL, husband and wife, **Plaintiffs,** vs. **MOHAVE ELECTRIC COOPERATIVE, INC., an Arizona non-profit corporation; JOHN and JANE DOES, I-X; BLACK and WHITE CORPORATIONS I-X,** **Defendants.**	**CASE NO: CV-2009-02574** **MOTION FOR SUMMARY JUDGMENT** **START: 1:31 P.M.**
MOHAVE ELECTRIC COOPERATIVE, INC., an Arizona non-profit corporation, **Counterclaimants,** vs. **DUSTIN R. CHANTEL and ELIZABETH D. CHANTEL, husband and wife,** **Counterdefendants,**	

APPEARANCES: Dan Dodds, Attorney for and with Plaintiff(s); Larry Udall, Attorney for and with Defendant(s).

This is the time set for hearing on two Motions for Summary Judgment; one filed by Defendant Mohave Electric Cooperative; and the other filed by Counterclaimant Mohave Electric Cooperative.

The Court acknowledges it has seen and reviewed the Motions and the Responses.

Counsels present arguments.

Discussion ensues.

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IT IS ORDERED granting the Motion for Summary Judgment as to Count 5 with regards to the rent.

IT IS FURTHER ORDERED granting the Motion for Summary Judgment as to Count 7, intentional infliction of harm.

IT IS FURTHER ORDERED granting the Motion for Summary Judgment with regards to punitive damages.

With regards to Count 1, Breech of Contract, Count 2, Breech of Covenant Good Faith and Count 6, Negligence Claim;

Discussion ensues.

IT IS ORDERED denying the Motion for Summary Judgment by the Defendant.

IT IS FURTHER ORDERED denying the Motion for Summary Judgment by the counterclaimants.

Discussion now ensues regarding the status of this case.

Mr. Dodd's makes statements and requests he be allowed to speak with his client and Mr. Udall to discuss the possibility of a resolution.

The Court proposes setting this matter for a Status Conference in approximately 60-days; counsels concur.

IT IS ORDERED setting this matter for a **Status Conference on Thursday, January 26, 2012 at 1:30 p.m.,** at which parties may appear telephonically. The Plaintiff is instructed to initiate the call.

The Court recesses at 2:46 p.m.

cc:

Dan R Dodds *
THE DODDS LAW FIRM PLC
Attorney for Plaintiffs/Counterdefendants

Larry K Udall *
CURTIS GOODWIN SULLIVAN UDALL & SCHWAB PLC
Attorney for Defendants/Counterclaimants

Honorable Lee Jantzen *
Division 4

APPENDIX A-2

Minute Entry Dated May 21, 2012

ROA 97

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MOHAVE

HONORABLE LEE F. JANTZEN
DIVISION IV *je
DATE: May 21, 2012

NOTICE/RULING/ORDER

DUSTIN R. CHANTEL and
ELIZABETH D. CHANTEL, husband
and wife,
Plaintiffs,

vs. **No. CV-2009-02574**

MOHAVE ELECTRIC COOPERATIVE, INC.,
an Arizona non-profit corporation;
JOHN and JANE DOES, I-X; BLACK and
WHITE CORPORATIONS I-X,
Defendants.

The Court took under advisement several motions after the March 28, 2012 oral argument. Those motions included Plaintiffs' Motion to Have a Judicial Determination on All Counts, Plaintiffs' Motion for Reconsideration to Reinstate Counts 4, 5 and 8; Defendant Motion for Reconsideration of Summary Judgment on Counts 1, 2 and 6; Defendant's Motion for Striking of Plaintiffs' Motion for Reconsideration; and Defendant Motion for Sanctions for Plaintiffs' Failure to Answer Interrogatories.

The Court has reviewed the pleadings, the relevant codes, statutes and case law and the oral argument of the two parties. The Court has also considered the whole history of this file including prior rulings on motions.

This case arises with the Plaintiffs building in 2008 a 6,200 square foot building, originally described by Plaintiffs as "Artwork," too closely underneath Defendant Mohave Electric Cooperative (hereinafter "MEC") power lines, resulting in the Mohave County Special Services Division (hereinafter "MCSSD") directing MEC to de-energize the power lines. Plaintiffs then filed this lawsuit alleging multiple torts against MEC.

On November 9, 2011 during oral argument, Plaintiffs withdrew Count 3, Quiet

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Title; and Count 4, Ejectment. If the Court has not done so already, based on Plaintiffs' withdrawal of the claims, **IT IS ORDERED dismissing Count 3, Quiet Title and Count 4, Ejectment without prejudice.**

On November 9, 2011 after oral argument, the Court granted MEC's Motion for Summary Judgment on Count 5, Recovery of Rents; Count 7, Intentional Infliction of Emotional Distress and on Plaintiffs' request for punitive damages. The Court has reviewed Plaintiffs' Motion for Reconsideration and the Response filed by MEC. Nothing has changed that raised any additional issues of fact since oral argument.

IT IS ORDERED denying Plaintiffs' Motion for Reconsideration on Count 5, Recovery of Rents; Count 7, Intentional Infliction of Emotional Distress and on Plaintiffs' request for punitive damages.

At that same hearing on November 9, 2011 the Court denied Defendant's Motion for Summary Judgment as it related to Count 1: Breach of Contract; Count 2: Breach of Covenant of Good Faith; and Count 6: Negligence and MEC's Motion for Summary Judgment on MEC's Counterclaim against Plaintiffs. This denial was a close call by the Court and done with the expectation and avowal by Plaintiffs that additional discovery would be forthcoming. Since that time Plaintiffs have not provided sufficient additional discovery to address the main issues that they have raised that might give rise to any of the pending causes of action. In retrospect, the Court denial of MEC's entire motion was incorrect.

With regard to Count I: Breach of Contract, the only contract between the parties is the original contract where Plaintiffs joined the cooperative. Plaintiffs have not shown any specific terms of the contract being violated by MEC. Plaintiffs now argue that they built their building as a "safety" concern due to the position and condition of the MEC power lines. However, that issue was only raised in one letter in 2006 to MEC that is not sufficient to show that safety from the power lines was the reason for the construction of the building. Plaintiffs never took their concerns to the ACC, nor have they provided any evidence that the power lines were an actual safety concern. Nor does any evidence exist that, even assuming legitimate safety concerns existed at the time, that those concerns would have warranted allowing Plaintiffs to construct the building to protect them from these defensive lines. The evidence shows that MCSSD

direction to MEC to de-energize the power lines was based on safety concerns from having Plaintiffs' building having inadequate clearance from the power lines.

With regard to Count II: Breach of Contractual Obligation to Deal in Good Faith, having found that there has been no breach of contract there can be no finding MEC has breached any contractual obligation to deal in good faith.

With regard to Count VI: Negligence, Plaintiffs have failed to show MEC's actions to be negligent in any manner. Once again, the "safety" concern recently emphasized by Plaintiffs as the reason for building is more of a recent concern raised by the Plaintiffs that is without merit. The only legitimate safety issue in this case has been raised by MEC since the beginning and is what prompted the lines to be de-energized. MEC was not negligent in de-energizing the power poles. MEC had no choice due to actions by the Plaintiffs. The Plaintiffs' building is too close to the already existing power lines. Plaintiffs' building was built without warning, without permission and without finalizing legal issues that might have led to a resolution short of MEC being obligated to turn off the power.

IT IS ORDERED granting MEC's Motion for Reconsideration on Counts 1, 2 and 6. IT IS FURTHER ORDERED granting MEC's Motion for Summary Judgment on Counts 1, Breach of Contract, Count 2, Breach of Contractual Obligation to Deal in Good Faith and Count 6, Negligence.

IT IS FURTHER ORDERED granting MEC's Motion for Summary Judgment on MEC's Counterclaim against Plaintiffs.

The Court finds that MEC did not do anything wrong by turning off the power to the power lines above the Plaintiffs' building, that the Plaintiffs have failed to raise a *prima facie* case on any of the seven counts in the Complaint and that the matter of safety would have most appropriately raised before the ACC. Based on those findings, **IT IS FURTHER ORDERED that MEC is awarded attorney's fees in this matter.**

IT IS FURTHER ORDERED denying MEC's Motion for Sanctions for Plaintiffs Failure to Answer Interrogatories.

Based on the rulings above, the Court finds Plaintiffs' Motion for Judicial Determination of all Counts is moot.

Counsel for MEC is directed to file a Judgment consistent with the above rulings.

cc:

Roger and Elizabeth Chantel
10001 East Highway 66
Kingman AZ 86401
Plaintiffs Pro Per

Michael A. Curtis*
Larry K. Udall
CURTIS, GOODWIN, SULLIVAN, UDALL & SCHWAB, P.L.C.
Attorneys for Defendant

Honorable Lee F. Jantzen
Division IV

APPENDIX B

Chronology

Exhibit A to ROA 83

CHRONOLOGY OF PURPORTED "SAFETY ISSUES"
OVER POLES AND LINES

11-14-05 Chantel sends letter to Stephen McArthur (MEC's Comptroller) explaining his desire to build on his premises and complaining of MEC's poles on his property BUT DID NOT EXPRESS ANY SAFETY CONCERNS.

12-8-05 Chantel writes letter to ACC expressing all of his issues with MEC (line extension issues and utility easement issues) BUT FAILS TO MENTION ANY SAFETY CONCERNS CAUSED BY MEC'S POLES.

Summer of 2008 – construction starts on 6,200 square foot Artwork – no plans used by Plaintiffs and no construction permit applied for.

8-7-08 Mohave County issues and delivers stop order to Chantels in early stage.

8-13-08 Chantel sends letter to Mohave County Attorney complaining of various issues (Exhibit 1 to Reply for MSJ -2) CHANTEL DOESN'T MENTION SAFETY ISSUES – only advises of "artwork" and equal treatment issues for permits.

8-18-08 MEC conducts 1st of two measurements on clearance between Artwork and transmission lines. As the case cited by Plaintiffs demonstrates, even inadequate clearance of just inches practically creates strict liability or negligence per se for a utility company.

9-15-08 MEC delivers letter to Chantels advising of imminent power shut-off.

9-16-08 MEC contacts ACC and explains its dilemma and crisis – ACC oks power de-energizing. Power shut off occurs and lines rerouted.

9-30-08 Plaintiffs first apparent mention of "safety concerns" stated in informal complaint filed with Arizona Corporation Commission.

PLAINTIFF NEVER HAD SAFETY ISSUES OVER MEC'S POLES AND TRANSMISSION LINES WHEN THE PLAINTIFFS CONSTRUCTED THEIR ARTWORK.

APPENDIX B-1

Letter to MEC dated November 14, 2005
and
Letter to ACC dated December 8, 2005

Exhibit B to ROA 83

November 14, 2005

Roger Chantel
10001 E. Hwy. 66
Kingman, AZ 86401

Mohave Electric Cooperative
Stephen McArthur
P.O. Box 1045
Bullhead City, AZ 86430

Dear Mr. McArthur,

I am planning to build some new structures on my property located at 10001 E. Hwy. 66 and the property has an APN of 313-11-006. Mohave Electric Cooperative has four power poles on my property that may affect the design and location of these structures. I had a title company research the property for easements. The only easement they could find on record was the one that I gave to MEC in 2001 to my house.

I am including a copy of the recorded easement MEC has in the public records. According to this document, this easement does not include my property. I am also including a survey map of the property, which shows the location of MEC's poles and the easement that was granted to MEC in 2001. If you would be so kind as to supply me with any information, within 15 days of this letter, as to what the Cooperative may have on file concerning the location and placement of these power poles, I would greatly appreciate it.

Respectfully,

Roger Chantel

Roger Chantel

Copy sent to:

Curtis, Goodwin, Sullivan,
Udall & Schwab, P.L.C.

December 8, 2005

Roger Chantel
10001 E. Hwy 66
Kingman, AZ 86401

Arizona Corporation Commissioners
Kristin K. Mayes
1200 W. Washington St.
Phoenix, AZ 85007

Dear Commissioner,

You are probably aware of the conflicts of Mohave Electric Cooperative's efforts to block electric service to some property that I own in Mohave County. I would like to bring it to the Commission's attention that Mohave Electric Cooperative is not only trying to block electric service, but they are illegally transmitting electric power over my property and if that isn't enough they are using my property to provide electricity to the railroad for a fee. A proposal, to resolve all of the issues I have with Mohave Electric Cooperative, has been sent to Teena Wolfe. If you have an interest in seeing these issues resolved you can contact Teena Wolfe.

I am a strong believer in God and my goal is to have a Merry Christmas. If we cannot put together a settlement I will be consulting with the spiritual realm and asking for assistance in formulating strategies on how to solve these issues.

Have a Merry Christmas. As for next year, only time will tell.

Respectfully,

Roger Chantel

APPENDIX B-2

Letter to County Attorney dated August 13, 2008

Exhibit A to ROA 68

AUG 18 2008
MOHAVE COUNTY PLANNING & ZONING
BY

file

August 13, 2008

Roger Chantel
10001 E. Hwy 66
Kingman, AZ 86401

Matt Smith
Mohave County Attorney Office
315 4th Street
Kingman, AZ 86401

Dear Mr. Smith,

I am writing you this letter because our little area has been experiencing turmoil for a number of years. When I first moved out to this area I promoted the idea of people getting the necessary permits. When county departments and their employees failed to assist the people in this area I helped the people fill out the necessary papers to get their permits and even assisted people that bought property in this area that were from out of state. We were moving along as a community. Then a few years back a number of people moved into the area and did not acquire any type of permits. The people in the area, including myself, felt that the type of sewage systems these people were using were not adequate for the number of people that were located on the property. A year or two ago I sent county departments a letter telling them that some of the sewage waste could be causing above ground bacteria, which could be spread to schools by the children that lived on the property that had improper waste disposal systems. It appeared that the county had little concern about the complaint and abandoned their responsibility regarding the acquiring of permits in the area. If you would check the records you will find that all of my projects were permitted prior to this time. I have a history of trying to protect each individual's property rights.

The following issue will be in your department in the near future. The reason it will be in your department is that Mohave Electric placed a power line through the middle of my property without getting an easement. I informed them that I was going to create some art on my property and that it may be under their power lines. They told me I would have to pay them if I wanted their power lines moved. They didn't seem to be concerned about me creating some art on my

property. The other day they stopped by and told me I could not create my art under their power lines. They went to the planning department and claimed I was building a structure and that I did not have a building permit. Now we have an issue with the planning department. They are claiming that my art work is a structure. I checked the county regulations to see what the requirements were for my art work. When checking county employee certifications on inspections it appeared that Mohave County does not employ any certified individuals that can inspect the art creation procedure that I am using. Yet they still claim it is a structure. I think that certain individuals within the planning department are taking special steps to discriminate against me because I am a visionary and I work very hard to protect all of my individual rights afforded by law and by the Constitution of the United States.

I am requesting that you investigate the complaint I submitted a while back regarding the people who did not acquire the necessary permits or are not in compliance with county law in this area. I and a number of other people feel that the only way the law can be administered justly and fairly is to have every person in the area brought into compliance. Anything less would be a pure act of discrimination by only attacking my piece of art and reclassifying it as a structure and requiring me to obtain permits.

I am also requesting the county to check on the people in the planning department that are performing discrimination actions as well as jeopardizing my art work.

I am also asking that Mohave Country government departments not become involved with Mohave Electric regarding our right-a-way dispute.

Part of your job as an elected official of this county is to see that the law is administered justly and fairly. May God give you wisdom in this matter.

Respectfully submitted,

Roger Chantel
Union Carpenter/Visionary

Copy sent to Chris Ballard Planning and Zoning Director

APPENDIX B-3

Picture of Structure

Exhibit C to ROA 83

APPENDIX C

Complaint

ROA 1

FILED

BY:_____

2009 NOV 20 AM 11:59

MARLYNN TINNELL
SUPERIOR COURT CLERK

Jonathan A. Dessaules, State Bar No. 019439
Douglas C. Wigley, State Bar No. 027223
DESSAULES LAW GROUP
2700 North Central Avenue, Suite 1250
Phoenix, Arizona 85004
Tel. 602.274.5400
Fax 602.274.5401

Attorneys for Plaintiffs

IN THE SUPERIOR COURT OF ARIZONA

COUNTY OF MOHAVE

DUSTIN R. CHANTEL and ELIZABETH D. CHANTEL, husband and wife, Plaintiffs, vs. MOHAVE ELECTRIC COOPERATIVE, INC., an Arizona non-profit corporation; JOHN and JANE DOES I-X; BLACK and WHITE CORPORATIONS I-X, Defendants.	Case No. CV2009-02574 **VERIFIED COMPLAINT**

Plaintiffs Dustin R. Chantel and Elizabeth D. Chantel, husband and wife, by and through undersigned counsel, for their verified Complaint against Defendant Mohave Electric Cooperative, Inc., alleges as follows:

JURISDICTION AND PARTIES

1. Plaintiffs Dustin R. Chantel and Elizabeth D. Chantel (the "Chantels"), husband and wife, are residents of Mohave County, Arizona.

2. Upon information and belief, Defendant Mohave Electric Cooperative, Inc. ("MEC") is a non-profit corporation authorized to do business and doing business in Arizona.

3. The true identities of John and Jane Does I-X and Black and White Corporations I-X are presently unknown, but such people and entities were joint tortfeasors or otherwise

legally responsible in some manner for the events and actions that are the subject of this Complaint and contributed to Plaintiffs' damages. Plaintiffs will seek leave of Court to amend this Complaint to show the true names, capacities and relationships when they have been ascertained.

4. The events alleged in this Complaint occurred in Mohave County, Arizona. Defendant is or was present in Arizona, doing business in Arizona, and/or caused events to occur in Arizona out of which Plaintiffs' causes of action arise. The real property that is the subject of this lawsuit is located in Mohave County, Arizona. The amount in controversy exceeds the minimal jurisdictional amount.

5. Jurisdiction and venue are proper in this Court.

GENERAL ALLEGATIONS

6. Since December 1999 and to the present date, the Chantels owned real property located at 10001 East Highway 66, Kingman, Arizona 86401 (the "Property") and with the following legal description:

> THAT PORTION OF SECTION 5, LYING NORTH AND EAST OF U.S. HIGHWAY 66, TOWNSHIP 23 NORTH, RANGE 14 WEST OF THE GILA AND SALT RIVER BASE AND MERIDIAN, MOHAVE COUNTY, ARIZONA.

7. At all material times the Chantels have been customers of MEC, who delivered electrical power to the Chantels' residence, which is located on the Property.

8. The Chantels and MEC had a contractual relationship in which MEC was obligated to provide the safe delivery of electricity to the Chantels' residence in exchange for payment from the Chantels.

9. The Chantels have always made timely payments to MEC.

10. At all times since the Chantels have owned the Property, an overhead electrical power line has run across the southern portion of the Property (the "Old Line"), generally running in an east-west direction.

11. Defendant MEC is the owner and operator of the Old Line.

12. Defendant MEC has no recorded easement or right-of-way for the portion of the Old Line located on the Property.

13. MEC has asserted that it received permission from prior owners of the Property to run the Old Line across the Property.

14. Prior to September 16, 2008, the Chantels' residence received electricity from another overhead electrical power line that was connected to the Old Line.

15. Numerous wooden poles support the Old Line. The average distance between most of the wooden poles along the Old Line is approximately 300 feet. However, a distance of approximately 700 feet exists between two wooden poles that cross the Chantels' Property.

16. MEC, pursuant to Arizona Administrative Code § 14-2-208(F), is required to construct and maintain wooden power poles such as the ones located on and around the Chantels' Property in accordance with the 1997 ANSI C2 National Electrical Safety Code, which permits a maximum distance of 300 feet to exist between power poles of the type at issue.

17. In or around 2006, the Chantels noticed the power lines connected to the Old Line were hanging dangerously low over the Property and certain wooden poles from the Old Line that are located on the Property were bending and cracking.

18. Since 2006, the Chantels have expressed their safety concerns regarding the low hanging power lines and the bending and cracking power poles to, among others, Defendant MEC and requested that MEC repair the Old Line.

19. Despite numerous requests from the Chantels, Defendant MEC failed to repair the Old Line or otherwise take any action to correct the dangerous condition of the power poles and the lines.

20. During the summer of 2008, the Chantels began building, at a substantial cost, a functional piece of artwork under the low hanging power lines to catch or deflect any lines or wooden poles that might break and fall in order to protect themselves, their guests and invitees, and their property from the dangers posed by the power poles and lines.

21. On or about September 16, 2008, Defendant MEC built a new overhead electrical power line that ran parallel to the Old Line, but was located immediately south of the Property (the "New Line"), approximately 75 feet away from the Old Line.

22. Immediately after the completion of the New Line, and without any substantial warning, MEC abruptly disconnected the electricity to the Chantels' residence.

23. After their electricity was disconnected, the Chantels made numerous requests to MEC asking it to reinstate electricity.

24. MEC refused, and continues to refuse, to reinstate electricity to the Chantels' residence unless the Chantels pay approximately $12,000 for the costs of building the New Line.

25. As a result of Defendant MEC's disconnection of electricity, the Chantels have been forced to find alternative sources of electricity, including, but not limited to, generators and solar power systems, at considerable cost.

26. The generators that the Chantels have been using, in addition to being very costly, are not an adequate source of electricity because they cannot provide the constant supply of electricity necessary to power the Chantels' residence, including a medical device that Dustin R. Chantel relies on.

27. The solar system that the Chantels have been using, in addition to being very costly, is not an adequate source of electricity because weather conditions affect its ability to provide the constant supply of electricity necessary to power the Chantels' residence.

28. As a result of Defendant MEC's disconnection of electricity, Dustin R. Chantel suffered physical injuries.

COUNT ONE
(Breach of Contract)

29. The Chantels incorporate the foregoing allegations as though fully set forth herein.

30. At all time mentioned herein, a valid and binding contract existed between MEC and the Chantels.

31. MEC has breached its contractual obligations owed to the Chantels.

32. The Chantels have been damaged, in an amount to be proven at trial, as a direct and proximate result of MEC's breach.

33. The Chantels have incurred special damages, including, but not limited to, the cost of constructing the artwork and finding alternative sources of electricity.

34. In addition to recovery of the damages discussed above, the Chantels are entitled to a permanent injunction ordering MEC to perform under its contract with the Chantels by reestablishing power to the Chantels' residence and maintaining the safe delivery of that power.

35. The Chantels are entitled to costs of suit and reasonable attorneys' fees pursuant to A.R.S. §§ 12-341 and 12-341.01.

COUNT TWO
(Breach of the Covenant of Good Faith and Fair Dealing)

36. The Chantels incorporate the foregoing allegations as though fully set forth herein.

37. Arizona law implies a covenant of good faith and fair dealing in all contracts.

38. MEC's actions, as alleged above, constitute a breach of the implied covenant of good faith and fair dealing.

39. The Chantels have been damaged as a direct and proximate result of MEC's breach of the implied covenant of good faith and fair dealing.

40. The Chantels are entitled to their attorneys' fees pursuant to A.R.S. § 12-341.01.

COUNT THREE
(Quiet Title/Declaratory Judgment)

41. The Chantels incorporate the foregoing allegations as though fully set forth herein.

42. MEC has asserted an interest in the Property that is adverse to the Chantels' ownership interest and MEC has wrongfully used and possessed the Property.

43. The Chantels claim an ownership interest in the Property that is superior to MEC's purported interest in the Property.

44. This cause of action is brought pursuant to A.R.S. § 12-1101, *et seq.*

45. Based upon the foregoing, the Chantels are entitled to an order quieting title to the Property in their favor.

46. An actual controversy has arisen and now exists between the parties as to their respective rights, status, and obligations regarding the Property. The Chantels are entitled to a judicial determination of the parties' respective rights, status, and obligations regarding the Property. This controversy will continue until resolved by this Court.

47. The Chantels are entitled to a declaratory judgment that they are the rightful owners of the Property.

COUNT FOUR
(Ejectment)

48. The Chantels incorporate the foregoing allegations as though fully set forth herein.

49. The Chantels are the rightful owners of the Property and are entitled to all interests in the Property thereof.

50. This cause of action is brought pursuant to A.R.S. § 12-1251, *et seq.*

51. MEC continues to use and possess the Property through its placement of the Old Line on the Property.

52. The Chantels are entitled to immediate possession and full use of the Property.

COUNT FIVE
(Recovery of Rents)

53. The Chantels incorporate the foregoing allegations as though fully set forth herein.

54. The Chantels are the rightful owners of the Property and are entitled to all interests in the Property thereof.

55. This cause of action brought pursuant to A.R.S. § 12-1271.

56. The Chantels are entitled to recover rents or the fair and reasonable satisfaction for MEC's unauthorized use and possession of the Property.

COUNT SIX
(Negligence)

57. The Chantels incorporate the foregoing allegations as though fully set forth herein.

58. MEC owed a duty to the Chantels to provide the safe delivery of electricity to their residence.

59. MEC breached that duty by, among other things, allowing too great of distance between the wooden poles supporting the Old Line on the Property and wrongfully disconnecting the electricity to the Chantels' residence.

60. MEC's negligence is the direct and proximate cause of Dustin R. Chantel's physical injuries.

61. The Chantels have sustained damages in an amount to proven at trial.

COUNT SEVEN
(Intentional Infliction of Emotional Distress)

62. The Chantels incorporate the foregoing allegations as though fully set forth herein.

63. MEC's acts, conduct, and omissions, as aforesaid, amounted to extreme and outrageous conduct that was intended to cause emotional distress to the Chantels and/or was done with reckless disregard for the near certainty that such distress would result from its conduct.

64. MEC's extreme and outrageous conduct caused the Chantels severe emotional distress.

COUNT EIGHT
(Punitive/Exemplary Damages)

65. The Chantels incorporate the foregoing allegations as though fully set forth herein.

66. This cause of action brought pursuant to A.R.S. § 40-423.

67. MEC's acts, conduct, and omissions, as aforesaid, were done intentionally, with an evil mind, and/or with conscious, calculated, and outrageous disregard for the substantial risk of harm to the Chantels, knowing that its acts, conduct, and omissions were conducted for its

own exclusive interest, thereby entitling the Chantels to an award of punitive and/or exemplary damages in an amount appropriate to punish Defendants and set an example.

WHEREFORE, Plaintiffs request the following relief:

(A) Awarding judgment in Plaintiffs' favor and against Defendant MEC on all claims;

(B) For all damages incurred by Plaintiffs, to be proven at trial, as a result of Defendant MEC's actions;

(C) For an award of punitive damages to Plaintiffs and against Defendant MEC in an amount appropriate to punish Defendants and set an example;

(D) Awarding Plaintiffs their costs of suit and reasonable attorneys' fees pursuant to A.R.S. §§ 12-341 and 12-341.01; and

(E) Awarding Plaintiffs such further relief as this Court deems just and proper.

JURY DEMAND

Plaintiffs request a jury trial on all questions raised by this Complaint.

DATED this 17th day of November 2009.

DESSAULES LAW GROUP

By: _____
Jonathan A. Dessaules
Douglas C. Wigley
Attorneys for Plaintiffs

APPENDIX D

Steven Olea Report

Exhibit 2 to ROA 69

COMMISSIONERS
MIKE GLEASON - Chairman
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
KRISTIN K MAYES
GARY PIERCE

BRIAN C. MCNEIL
Executive Director

ARIZONA CORPORATION COMMISSION

November 5, 2008

Mr. Roger Chantel
10001 E. Hwy. 66
Kingman, AZ 86401

RE: Informal Complaint No 2008-71811

Dear Mr. Chantel:

The Arizona Corporation Commission ("Commission") has reviewed your informal complaint, filed September 30, 2008. After receiving your call, Staff of the Commission's Utilities Division ("Staff") contacted Mohave Electric Cooperative ("MEC" or "Company") to begin its investigation. Having heard from both sides in this dispute, Staff has arrived at the following operative facts:

At some time prior to September 12, 2008, you began the construction of some type of structure on your property. The structure was being erected in the area directly beneath the lines used by MEC to provide electrical service to your house. MEC states that the area occupied by the structure falls within MEC's utility easement, limiting MEC's access to the line. The construction came to the attention of Mohave County Planning and Zoning ("MCPZ"). Because the construction constituted a public safety hazard, MCPZ issued Stop Work Orders and advised you that your electric service could be disconnected if the structure were completed. You met with representatives of both MCPZ and MEC, and the issue was discussed. At some point thereafter, construction was completed.

On September 12, 2008, MCPZ issued a letter to MEC ordering the Company to immediately de-energize the line being used to provide service to your property. MEC contacted Staff, and Staff recommended that MEC make an effort to contact you personally prior to de-energizing the line. Because the line was also being used to serve a railroad signal, de-energizing it would result in cutting power to the signal, an obviously unacceptable situation. It was therefore necessary for MEC to re-route the line to avoid your property and continue to serve the signal. MEC did so, at a cost of approximately $12,000.00. Construction was completed on the re-routed line on September 16, 2008. MEC then spoke with Mrs. Chantel at your residence, and the line serving your residence was then de-energized on that same day.

On October 21, 2008, MEC sent you a bill for the cost of re-routing service around your property. Although you have paid your monthly electric service bill, you have not paid MEC the re-routing charges, and MEC has refused to reinstate your service.

In your complaint, you have asked Staff to review several issues. Staff hereby provides its findings:

The primary relief you have requested is that the Commission order MEC to reinstate your electric service. Unfortunately, the Commission can not do that. The property that is the subject of this dispute is located within Mohave County. As a political subdivision of the State of Arizona, Mohave County has jurisdiction over public health and safety issues within the County. If an agency of Mohave County has interpreted Mohave County's own statutes and determined that the structure on your property constitutes a danger to the health and/or safety of the public within Mohave County, then the County has authority to take action to remedy such situations. Because MEC provides service within the County, MEC is subject to the authority of the County. MEC has no choice but to follow the lawful orders of MCPZ. Since the reason MCPZ ordered MEC to de-energize the power lines to your home resulted from the County's interpretation and enforcement of its own statutes, the Commission is without authority to order MEC to take any action contradictory to what MCPZ has directed them to do. Therefore, the Commission can not order MEC to reinstate your electric service under these conditions.

At some point, the structure at issue was labeled "art work", but frankly, the label does nothing to change the nature of the dispute. If Mohave County has found that the "art work" on your property compromises the safety of the Mohave County public, the County has the authority to take action in the public's interest.

Although A.A.C. R14-2-206(C)(2) provides additional authority for MEC to have disconnected your service in the instant circumstances, MEC did not rely on that rule in this matter. The instant dispute resulted entirely from the findings made by Mohave County. In any case, it appears that your dispute over the structure is between yourself and Mohave County. Only Mohave County has the authority to grant you the relief you have requested. The Commission is not the proper forum in which to resolve this dispute.

Also at issue in your complaint is the manner in which service was terminated. The Commission does have procedures in place governing the disconnection of service. Specifically, A.A.C. R14-2-211(C) authorizes a utility to terminate service subject to the notification requirements of R14-2-211(D).

Mohave County has stated that during the previously-mentioned meeting which took place between you, Mohave County, and MEC, you were advised that if you did not remove the structure from your property, your electric service could be terminated. Once the County ordered MEC to de-energize the line, the actual termination work took a period of four days to complete. During that time, you were aware of the nature of the

activity. Mrs. Chantel was provided with formal notice of the disconnection on the final day of the project. Given that you were formally told disconnection would result from a failure to cease construction, it can not be argued that you did not have the notice called for in the rule.

Further, R14-2-211(B) allows termination ***without*** notice due to the existence of an obvious hazard to the public safety or health of the general public. Mohave County found such a safety hazard. Clearly the dispute in this matter results from Mohave County's findings and again, the Commission is not the proper forum in which to dispute those findings.

It is important to note that pursuant to A.A.C. R14-2-211(B)(2), once service has been terminated, the utility is not required to restore service until the conditions which resulted in disconnection have been corrected. As it applies to your dispute here, until Mohave County finds that the safety issue has been resolved, MEC is not required to restore your service. In addition, you have raised the issue as to whether or not MEC has the proper easements required to service your property. R14-2-206(C) provides that a failure of the customer to grant the easements necessary to provide service may constitute grounds for a utility's refusal to provide service. If it is your assertion that MEC does not have the proper easements, that issue should be resolved within any discussion of restoration of service.

You have raised the issue as to whether service might be restored to your residence using the newly-constructed line currently being used to circumvent your property and provide service to a railroad signal crossing. Unfortunately, such an arrangement is not possible. The line in question is being used merely as a backup line and has not been built according to the specification required for primary residential service. Providing service using the new line would in itself constitute a safety issue, and the utility is prohibited from doing so.

As an additional concern, you have raised the issue of medical treatment for sleep apnea. However, as R14-2-211 makes clear, the utility is only prevented from termination of service in cases where the customer has a medical need coupled with an inability to pay. The termination of service to your property did not result from an inability to pay. In your case, termination resulted from a refusal to abide by County ordinance and Commission rules. While the Commission is certainly sympathetic to your needs, MEC's decision to terminate your service appears to conform to Commission rules and procedures, and the Staff finds that no action is warranted.

Additionally, you have questioned the authority of the utility to charge you for construction costs associated with the re-routing of your service line. However, such charges are fully within MEC's authority. R14-2-206(C)(2), mentioned previously, mandates that any utility encountering the safety issues at issue here take the steps necessary to eliminate the safety issue and authorizes the utility to do so at the customer's expense. MEC is clearly acting within its authority.

Two final issues you have raised are the distance between utility poles and the resulting amount of line sag that results. MEC places its poles based upon issues of clearance from ground to wire and from pole to pole. These standards are dictated by professional code. According to MEC, the lines in question were built within code specifications in 1949 and remain within tolerances today. Based upon this limited inquiry, the Staff does not believe that MEC's lines are out of compliance with any of the Commission's mandates.

Based upon these facts and circumstances, Staff does not believe that MEC is in violation of Commission rules or procedures, and this informal complaint will be dismissed and closed.

If you have further questions regarding this matter, you may contact Vicki Wallace at 602-542-0818 or Connie Walzcak at 602-542-0291.

Sincerely,

Vicki Wallace for

Steven Olea,
Assistant Director
Utilities Division

Cc: rogerchantel@frontiernet.net (letter also sent via e-mail at customer request)

APPENDIX E

Defendant's Statement Of Facts In Support Of Its Motion For Summary Judgment On All Counts Of Plaintiffs (without Exhibits)

ROA 50

The Law Offices of
CURTIS, GOODWIN, SULLIVAN,
UDALL & SCHWAB, P.L.C.
501 East Thomas Road
Phoenix, Arizona 85012-3205
Telephone (602) 393-1700
firm@cgsuslaw.com
Michael A. Curtis (#001876)
Mcurtis401@aol.com
Larry K. Udall (#009873)
ludall@cgsuslaw.com

Attorneys for Mohave Electric Cooperative, Inc.

FILED
BY _____
2011 JUN -3 AM 11: 04
VIRLYNN TINNELL
SUPERIOR COURT CLERK

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MOHAVE

DUSTIN R. CHANTEL and ELIZABETH D. CHANTEL, husband and wife, Plaintiffs, v. MOHAVE ELECTRIC COOPERATIVE, INC., an Arizona non-profit corporation; JOHN and JANE DOES, I-X; BLACK and WHITE CORPORATIONS I–X, Defendants.	CASE NO. CV 2009-2574 DEFENDANT'S STATEMENT OF FACTS IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT ON ALL OF PLAINTIFFS' COUNTS (Assigned to The Honorable Lee F. Jantzen)

Pursuant to Rule 56, *Arizona Rules of Civil Procedure*, Mohave Electric Cooperative, Inc. ("MEC") presents its allegations of facts in support of its Motion for Summary Judgment against Dustin R. Chantel (known as "Roger") and Elizabeth Chantel (collectively, the "Plaintiffs") on all counts. References to the Roger Chantel (also referred to as "Plaintiff") deposition (the "Deposition") dated August 17, 2010 will be made by "RC Depo p. __:__". Only cited references in the deposition transcript are attached hereto as **Exhibit 1**. All exhibits cited hereafter are incorporated by reference.

FACTS

1. Plaintiff has been retired for a few years (RC Depo p. 9: 9-10) and owns acreage in Shadow Mountain Estates and Shadow Mountain Estates II (east of Kingman), which he sells in various sized lots. (RC Depo p. 28).

2. In the summer of 2008, Plaintiff commenced the construction of a survivalist structure of approximately 6,200 square feet on his property only a short distance from his residence, which he has claimed is artwork (the "Artwork"). (RC Depo p. 23: 10).

3. Plaintiff did not use any architectural blueprints or industry-recognized construction practices for the construction of the Artwork. Plaintiff claims the construction plans were "divinely inspired." (RC Depo pp. 23-24: 24-3).

4. The Artwork is made of sprayed on cement over a canvas type material on arched supports. (RC Depo p. 77: 16-20). Plaintiff mixed the cement and did not acquire commercially prepared cement for the Artwork. (RC Depo p. 25: 15-18).

5. Those who assisted the Plaintiff in the construction of the Artwork were residents at a Kingman men's mission shelter not possessing any particular skills. (RC Depo p. 24: 16-22).

6. When asked by the Special Services Department Staff of Mohave County ("Mohave County") to apply for a building permit, the Chantels stated that the building was "art work" and refused to submit a building permit application. (RC Depo pp. 21-23: 6-23).

7. On or about August 7, 2008, Darrell Riedel of Mohave County's Special Services Department issued a stop order regarding the Chantel's building (on account of no permit and other issues) under MEC's distribution line for which MEC had either prescriptive or express easement rights. See, **Exhibit 2.**

8. On or about August 15, 2008, Mr. John Williams (employee of MEC), when advised that Plaintiff was continuing with the construction of the Artwork, contacted Mike

Dorman, one of Mohave County's building inspectors. Mr. Dorman acknowledged that the County was aware that Mr. Chantel's building had no permit. Mohave County advised that it was in the process of getting a deputy sheriff to accompany a building inspector to shut down the construction. See, **Exhibit 3**, Williams Affidavit, ¶ 3.

9. On or about August 18, 2008, Mr. Williams and Darrell Riedel (a building inspector for Mohave County) went to the Chantel property, and arrived at approximately 10:30 a.m. Plaintiff did not allow access until informed that as a condition of service, MEC had the right to investigate a possible safety violation. Mr. Williams took measurements and determined that the clearing between the existing electric line and the building was in violation of the National Electric Safety Code ("NESC"). Mr. Williams told Plaintiff that construction on the Artwork must cease. See, **Exhibit 3,** Williams Affidavit, ¶ 4.

10. On or about August 18, 2008, Darrell Riedel of the Mohave County Special Services Department contacted Mr. Williams of MEC and informed him that Plaintiff said he would cooperate and planned to get a building permit. However, Mr. Riedel explained to Mr. Williams that Plaintiffs building could never qualify for a permit because the structure did not comply with County building codes. See, **Exhibit 3,** Williams Affidavit, ¶ 5.

11. On or about September 12, 2008, MEC confirmed that Plaintiff had started construction again. Mr. Dorman of Mohave County faxed a request to MEC that it disconnect electric service to the Chantel property. See, **Exhibit 3,** Williams Affidavit, ¶ 6.

12. On or about September 13, 2008, MEC undertook a second measurement and confirmed the accuracy of the earlier measurement – the Artwork was still in violation of NESC clearance requirements. See, **Exhibit 3,** Williams Affidavit, ¶ 7.

13. The drop line from MEC's overhead distribution lines provided service to the Plaintiffs' residence and also provided power to a nearby railroad train signal on the Burlington Northern Santa Fe railroad tracks. (See, **Exhibit 3,** Williams Affidavit, ¶ 9). Any

electrical incidents around the Artwork that would cause a circuit breaker to open would have curtailed MEC's supply of power to a nearby railroad train signal along the side of the Burlington Northern Santa Fe railroad tracks, creating a dangerous situation. See, Affidavit of Tom Longtin, **Exhibit 4.**

14. On or about September 15, 2008, MEC sent correspondence to Plaintiffs explaining that the building that was under construction violated clearance requirements mandated by NESC and that, as a result, the Mohave County Building Inspection Division had requested MEC to immediately disconnect service and that the cost would include reallocation of existing overhead electric lines. See, **Exhibit 5** and **Exhibit 3,** Williams Affidavit ¶ 9.

15. On or about September 15, 2008, Darrell Riedel of Mohave County confirmed with Mr. Williams of MEC that Plaintiffs had already received a couple of stop work orders and that Plaintiffs were ignoring them. See, **Exhibit 3,** Williams Affidavit ¶ 8.

16. On or about September 15, 2008, Mr. Williams forwarded a letter to Plaintiffs explaining to them actions MEC would take because the Artwork was in violation of industry clearance guidelines for structures under utility lines. MEC contacted the BNSF Railroad signal advisor to determine if the line could be de-energized for an extended length of time. The signal supervisor informed Mr. Williams that there could be no extended de-energized period because the line also provided power to a railroad signal along the railroad tracks adjacent to Route 66. See, **Exhibit 3,** Williams Affidavit ¶ 9.

17. On or about September 16, 2008, Mr. Williams of MEC spoke with Ms. Ragen of the ACC and requested that the ACC send notice in writing if it did not want Mohave to proceed with the de-energization of the line. Mr. Williams also requested that the ACC send notice to proceed with the de-energization if that was its wish. Mr. Williams and Paula Griffes had a conference call with Ms. Ragen and Steve Olea concerning the de-energization of the Plaintiffs' distribution line. See, **Exhibit 3,** Williams Affidavit ¶ 11.

18. On or about September 16, 2008, Darlene Chantel was contacted by MEC personnel at approximately 3:20 p.m. and was informed that the power line would be de-energized due to safety issues. See, **Exhibit 3,** Williams Affidavit ¶ 12.

19. On or about September 16, 2008, the Chantel electric meter was read at approximately 3:33 p.m. and the distribution line on the Property and the power line to the Residence were immediately thereafter de-energized, and a new route for the distribution line was made. See, **Exhibit 3,** Williams Affidavit ¶ 10 & 13.

20. On or about September 17, 2008, MEC confirmed the County's request to disconnect the power line. See, **Exhibit 6** and **Exhibit 3**, Williams Affidavit ¶ 14.

21. On or about September 30, 2008, Plaintiff filed an informal complaint with the ACC. The "2008 Informal Complaint" was attached to MEC's Motion to Dismiss.

22. On or about October 8, 2008, MEC filed a response to Chantel's complaint. See, **Exhibit 7.**

23. On or about October 20, 2008, MEC forwarded an email to ACC Staff regarding responses to specific inquires made by Staff. See, **Exhibit 8.**

24. In response to Plaintiffs' informal complaint, Steven Olea (of the ACC Utilities Division) prepared a report which completely absolved MEC of any wrong-doing. A copy of Mr. Olea's November 5, 2008 report (the "Olea Report") was attached to Mohave's Motion to Dismiss and is incorporated herein by reference. A copy of the Olea Report is attached as a convenience for the Court at the end of this Statement of Facts. The Olea Report exhaustively addressed all of the Plaintiffs' allegations in the 2008 Informal Complaint (which allegations continue in the 2009 Formal Complaint and the Supplement).

25. The Olea Report further indicates the real issue resulting in the de-energizing of the power line to the Plaintiffs' property was an issue of construction permitting between the Plaintiffs and the County Planning and Zoning Department. The Olea Report also notes that

County personnel advised the Plaintiffs that if they did not dismantle the structure on their property, their electric service might require termination for reasons the County articulated.

26. Plaintiff contends that the purpose of the Artwork is to "protect my property, and my children, or grandchildren running from the dangerous situation of Mohave's power lines." (RC Depo p. 30: 21-25).

27. When asked if his grandchildren play in the Artwork, Plaintiff replied: "[n]ot if I have anything to say about it." (RC Depo p. 31: 9-10).

28. Plaintiff acknowledges the existence of the MEC poles on his premises at the time he purchased his residence. (RC Depo pp. 36-37: 23-3 and p. 65: 16-24).

29. MEC believes the distribution lines and poles were set at least 40 years ago. See **Exhibit 4,** Longtin Affidavit.

30. When Plaintiff was asked in the Deposition if "you've been dispossessed of your property in any way?" he replied: "[t]hey tried to force me off by taking my electricity. They figured that if I didn't have electricity then I would not – either have to get it from them because they are the only provider, or I'd have to leave my property." (RC Depo pp. 37-38: 16-1).

31. Relative to Plaintiffs' claim for negligence against MEC, Mr. Chantel stated that his physical injuries from the purported "negligence" were caused by his having an accident on his premises while riding an all-terrain vehicle ("ATV"), causing a "broken clavicle and badly bruised ribs." (RC Depo pp. 38-39: 13-10).

32. Regarding Plaintiffs' claim for "exemplary damages" under A.R.S. § 40-423(a), Plaintiff stated in Deposition testimony that the "forbidden" action was "[MEC] maliciously maneuvered to disconnect my electricity with intent to force me to giving them a right of way." Additionally, Plaintiff contended that MEC engaged in forbidden conduct by "[failing]

to reconnect my electricity whenever they became aware of my physical disorders." (RC Depo p. 44: 3 -12).

33. Plaintiffs have not alleged any reasonable manifestations of the emotional distress they claim. (RC Depo pp. 56-57:14-23). *See* also Plaintiffs' Disclosure Statements, **Exhibits 10, 11, 12 and 13**.

34. Plaintiff advised that he has started "treatment" with the Veterans Administration that relates to "post-stress disorder" which had its origins in Plaintiff's involvement in the Vietnam War as a soldier. (RC Depo pp. 57-58: 11-18).

35. Plaintiff has not commenced any mental stress or psychological treatment. (RC Depo p. 59: 4-13).

36. The Artwork has a north side entrance wide enough for a truck to drive in. (RC Depo p. 69: 21-23).

37. The Artwork has a subterranean room which is used for storage purposes. (RC Depo p. 70: 10-16).

38. The Artwork also has storage rooms intended to be used for various items. (RC Depo p. 73:11-16).

39. The Artwork is functional for material storage and gardening. (RC Depo pp. 73 – 74: 11-7).

40. The construction process of the Artwork is not a conventional method recognized in the construction industry. (RC Depo pp. 76-77: 23-4).

41. Plaintiff acknowledged that he did not engage in any research to determine whether his proposed construction process was sound. Rather, he claims that his methodology was based on "divine faith." (RC Depo p. 79: 1-10).

42. Plaintiff, contending that the Artwork was built for his and his grandchildren's protection, had no answer when asked in deposition why he didn't simply build arches to catch

the MEC electric lines if they ever came down. Plaintiff responded: "I wasn't inspired to [just] build any arches." (RC Depo p. 92: 3-13).

43. Plaintiff admitted there were no architectural plans for the Artwork (RC Depo p. 31: 15-18) and further admitted he was not aware of any other building like his in the whole country. (RC Depo p. 61).

44. When asked in deposition about the structural integrity of the building and whether he had conducted any research on the structural integrity of the process he created, Plaintiff replied:

> A: "In a sense. Like Noah's Ark, he built that thing and never had any idea if it was going to hold water. It was just divine faith that he went on. I took the same approach."

(RC Depo p. 79: 1-10).

45. The Chantels never obtained a building permit for the 6,200 square foot Artwork. (RC Depo pp. 21-22: 19-13; pp. 74-75: 20-3).

46. The Plaintiffs have continued to file hostile letters with the ACC since removing the proceeding from the ACC to this Court (**Exhibit 9**), tacitly acknowledging the ACC's jurisdiction over this matter.

47. The Plaintiffs have not articulated any injuries proximately caused by any actions of MEC. See, **Exhibits 10, 11, 12 and 13** and (RC Depo pp. 38-39: 13-15).

48. The Plaintiffs' Disclosure Statement and Supplemental Disclosure Statements do not identify and documents supporting the alleged existence of a contractual relationship of the nature Plaintiffs allege. See, **Exhibits 10, 11, 12 and 13**.

49. The Plaintiffs' Disclosure Statement and Supplemental Disclosure Statements do not identify any documents necessary for a statutory quiet title action under A.R.S. § 12-12-1101, *et seq*. See, **Exhibits 10, 11, 12 and 13**.

50. The Plaintiffs' Disclosure Statement and Supplemental Disclosure Statements do not identify any evidence for Plaintiffs' Count Four for ejectment. See, **Exhibits 10, 11, 12 and 13.**

51. The Plaintiffs' Disclosure Statement and Supplemental Disclosure Statements fail to identify any evidence supporting sufficiently supportive of Plaintiffs' Count Five. See, **Exhibits 10, 11, 12 and 13.**

52. The Plaintiffs' Disclosure Statement and Supplemental Disclosure Statements fail to identify evidence sufficiently supportive of Plaintiffs' Count Six. When asked about ejectment, Plaintiff stated – "They tried to force me off by taking my electricity." See, **Exhibits 10, 11, 12 and 13.**

53. The Plaintiffs' Disclosure Statement and Supplemental Disclosure Statements fail to identify evidence sufficiently supportive of Plaintiffs' Count Seven. See, **Exhibits 10, 11, 12 and 13.**

54. Mohave County is not named as a defendant in this lawsuit (it is a "non-party at fault", at least for Plaintiffs' claim of negligence against MEC).

55. Plaintiffs failed to advise MEC of the construction of the Artwork under the MEC distribution lines (a violation of A.R.S. §40-360.41).

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DATED this 2nd day of June, 2011.

CURTIS, GOODWIN, SULLIVAN,
UDALL & SCHWAB, P.L.C.

By: _____
Michael A. Curtis
Larry K. Udall
501 East Thomas Road
Phoenix, Arizona 85012-3205
Attorneys for Mohave Electric
Cooperative, Inc.

Original of the foregoing mailed
this 2nd day of June, 2011, to:

Clerk of Court
Mohave County Superior Court
401 E. Spring Street
P.O. Box 7000
Kingman, Arizona 86402

Copy of the foregoing mailed
this 2nd day of June, 2011 to:

The Honorable Lee F. Jantzen
Mohave County Superior Court
P.O. Box 7000
Kingman, Arizona 86402-7000

Mr. and Mrs. Chantel
10001 East Highway 66
Kingman, Arizona 86401

_____
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APPENDIX F

Counterclaimant's Statement Of Facts In Support Of Its Motion For Summary Judgment On Its Claim (without Exhibits)

ROA 59

The Law Offices of
CURTIS, GOODWIN, SULLIVAN,
UDALL & SCHWAB, P.L.C.
501 East Thomas Road
Phoenix, Arizona 85012-3205
Telephone (602) 393-1700
firm@cgsuslaw.com
Michael A. Curtis (#001876)
Mcurtis401@aol.com
Larry K. Udall (#009873)
ludall@cgsuslaw.com
Attorneys for Mohave Electric Cooperative, Inc.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MOHAVE

DUSTIN R. CHANTEL and ELIZABETH D. CHANTEL, husband and wife, Plaintiffs, v. MOHAVE ELECTRIC COOPERATIVE, INC., an Arizona non-profit corporation; JOHN and JANE DOES, I-X; BLACK and WHITE CORPORATIONS I–X, Defendants.	CASE NO. CV 2009-2574 COUNTERCLAIMANT'S STATEMENT OF FACTS IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT ON ITS CLAIM (Assigned to The Honorable Lee F. Jantzen)
MOHAVE ELECTRIC COOPERATIVE, INC., an Arizona non-profit corporation; Counterclaimant, v. DUSTIN R. CHANTEL and ELIZABETH D. CHANTEL, husband and wife, Counterdefendants.	

Pursuant to Rule 56, *Arizona Rules of Civil Procedure*, Counterclaimant Mohave Electric Cooperative, Inc. ("MEC") presents its allegations of facts in support of its Motion for Summary Judgment against Dustin R. Chantel (known as "Roger" and referred herein as "Counterdefendant") and Elizabeth Chantel (collectively, the "Counterdefendants") on its claim for costs it incurred from being instructed by Mohave County to de-energize the distribution line to the Chantels' residence. References to the Roger Chantel deposition (the "Deposition") dated August 17, 2010 will be made by "RC Depo p. __:__". Only cited references in the deposition transcript are attached hereto as **Exhibit 1**. All exhibits cited hereafter are incorporated by reference.

FACTS

1. Counterdefendant has been retired for a few years (RC Depo p. 9: 9-10) and owns acreage in Shadow Mountain Estates and Shadow Mountain Estates II (east of Kingman), which he sells in various sized lots. (RC Depo p. 28).

2. When Counterdefendants applied for membership with MEC (consisting of an information card and application form) they agreed to pay for all power used, to give easements of right-of-way across their property, to comply with the Bylaws, and all adopted rules and regulations. See, **Exhibit 2** (consisting of information card, application form, Bylaws applicable to Member duties, Service Rules and Regulations for Termination of Service and Conditions of Service under MEC's Tariff on file with the Arizona Corporation Commission ("ACC") for residential service).

3. Termination of a cooperative member's electric service <u>with notice</u> is authorized under Section 111-C (under 1.g) of MEC's Service Rules and Regulations when: 1) MEC is obligated to "comply with an order of any governmental agency having such jurisdiction"; and 2) a customer violates any of MEC's tariffs. MEC's actual contact with the Chantels to advise them of the imminent contact satisfies the notice requirements. Additionally, termination of a

cooperative member's electric service without notice is authorized under Subsection 111-B of MEC's Service Rules and Regulations when there is an imminent hazard or safety issue and restoration of service does not have to occur until the conditions which resulted in the termination have been corrected to the satisfaction of the Cooperative. Furthermore, the MEC Bylaws provide [Article 1,(d)] that the cooperative member agrees to grant, ... "at the time of filing said application, easements of right-of-way across his property for construction, use and operation of power lines necessary for the servicing of members in his area." See, **Exhibit 3**.

4. In the summer of 2008, Counterdefendant commenced the construction of a survivalist structure of approximately 6,200 square feet on his property (only a short distance from his residence) in MEC's utility easement. Counterdefendant claimed the structure is artwork (the "Artwork") apparently to avoid a permit requirement and inspection of his unconventional construction. (RC Depo p. 23: 10).

5. Counterdefendant did not use any architectural blueprints or industry-recognized construction practices for the construction of the Artwork. Counterdefendant claims the construction plans were "divinely inspired." (RC Depo pp. 23-24: 24-3).

6. The Artwork is made of sprayed-on cement over a canvas-type material draped on arched supports. (RC Depo p. 77: 16-20). Plaintiff mixed the cement and did not acquire commercially prepared cement for the Artwork. (RC Depo p. 25: 15-18).

7. Those who assisted the Counterdefendant in the construction of the Artwork were residents at a Kingman men's mission shelter. They did not possess any particular skills. (RC Depo p. 24: 16-22).

8. When asked by the Special Services Department Staff of Mohave County ("Mohave County") to apply for a building permit, the Chantels stated that the building was "art work" and refused to submit a building permit application. (RC Depo pp. 21-23: 6-23).

9. On or about August 7, 2008, Darrell Riedel of Mohave County's Special Services Department issued a stop order regarding the Chantel's building (on account of the Plaintiffs/Counterdefendants not having acquired a county building permit and other issues) under MEC's distribution line for which MEC had either prescriptive or express easement rights. See, **Exhibit 4.**

10. On or about August 15, 2008, Mr. John Williams (employee of MEC), when advised that Counterdefendant was continuing with the construction of the Artwork, contacted Mike Dorman, one of Mohave County's building inspectors. Mr. Dorman acknowledged that the County was aware that Mr. Chantel's building had no permit. Mohave County advised that it was in the process of getting a deputy sheriff to accompany a building inspector to shut down the construction. See, **Exhibit 5**, Williams Affidavit, ¶ 3.

11. On or about August 18, 2008, Mr. Williams and Darrell Riedel (a building inspector for Mohave County) went to the Chantel property, and arrived at approximately 10:30 a.m. Counterdefendant did not allow access until informed that as a condition of service, MEC had the right to investigate a possible safety violation. Mr. Williams took measurements and determined that the clearing between the existing electric line and the building was in violation of the National Electric Safety Code ("NESC"). Mr. Williams told Counterdefendant that construction on the Artwork must cease. See, **Exhibit 5,** Williams Affidavit, ¶ 4.

12. On or about August 18, 2008, Darrell Riedel of Mohave County contacted Mr. Williams of MEC and informed him that Mr. Chantel said he would cooperate and planned to get a building permit. However, Mr. Riedel explained to Mr. Williams that Counterdefendants building could never qualify for a permit because the structure did not comply with County building codes. See, **Exhibit 5,** Williams Affidavit, ¶ 5.

13. On or about September 12, 2008, MEC confirmed that Counterdefendant had started construction again. Mr. Dorman of Mohave County faxed a request to MEC that it disconnect electric service to the Chantel property. See, **Exhibit 5,** Williams Affidavit, ¶ 6.

14. On or about September 13, 2008, MEC undertook a second measurement and confirmed the accuracy of the earlier measurement – the Artwork was still in violation of NESC clearance requirements. See, **Exhibit 5,** Williams Affidavit, ¶ 7.

15. A drop line from MEC's overhead distribution line provided service to a nearby railroad train signal on the Burlington Northern Santa Fe railroad tracks. (See, **Exhibit 5,** Williams Affidavit, ¶ 9). Any electrical incidents around the Artwork that would cause a circuit breaker to open would have curtailed MEC's supply of power to a nearby railroad train signal along the side of the Burlington Northern Santa Fe railroad tracks, creating a dangerous situation. See, Affidavit of Tom Longtin, **Exhibit 6**.

16. On or about September 15, 2008, MEC sent correspondence to Counter-defendants explaining that the building that was under construction violated clearance requirements mandated by NESC and that, as a result, the Mohave County Building Inspection Division had requested MEC to immediately disconnect service and that the cost would include reallocation of existing overhead electric lines. See, **Exhibit 6,** Tom Longtin Affidavit and **Exhibit 5,** Williams Affidavit ¶ 9.

17. On or about September 15, 2008, Darrell Riedel of Mohave County confirmed with Mr. Williams of MEC that Counterdefendants had already received a couple of stop work orders and that Counterdefendants were ignoring them. See, **Exhibit 5,** Williams Affidavit ¶ 8.

18. On or about September 15, 2008, Mr. Williams forwarded a letter to Counterdefendants explaining to them actions MEC would take because the Artwork was in violation of industry clearance guidelines for structures under utility lines. MEC contacted the

BNSF Railroad signal advisor to determine if the line could be de-energized for an extended length of time. The signal supervisor informed Mr. Williams that there could be no extended de-energized period because the line also provided power to a railroad signal along the railroad tracks adjacent to Route 66. See, **Exhibit 5,** Williams Affidavit ¶ 9.

19. On or about September 16, 2008, Mr. Williams of MEC spoke with Ms. Ragen of the ACC and requested that the ACC send notice in writing if it did not want Mohave to proceed with the de-energization of the line. Mr. Williams also requested that the ACC send notice to proceed with the de-energization if that was its wish. Mr. Williams and Paula Griffes had a conference call with Ms. Ragen and Steve Olea concerning the de-energization of the Counterdefendants' distribution line. See, **Exhibit 5,** Williams Affidavit ¶ 11.

20. On or about September 16, 2008, Darlene Chantel was contacted by MEC personnel at approximately 3:20 p.m. and was informed that the power line would be de-energized due to safety issues. See, **Exhibit 5,** Williams Affidavit ¶ 12.

21. The actions of the Counterdefendants were grounds for termination of service with notice in that: 1) MEC had been instructed by a governmental agency to disconnect power over the Counterdefendants' premises; and 2) the Counterdefendants violated the Cooperative's tariffs, which tariffs required, as a condition of service, abiding by the rules and regulations, which include the Bylaws. Additionally, the actions of the Counterdefendants were grounds for termination of service without notice in that the Artwork created an "obvious and imminent hazard to the safety" of the general public. Additionally, the hazards created by the Artwork created an "emergency" requiring immediate discontinuance of service. See Subsection 111-B of MEC Service Rules and Regulations, **Exhibit 3**.

22. On or about September 16, 2008, the Chantel electric meter was read at approximately 3:33 p.m. and the distribution line on the Property and the power line to the

Residence were immediately thereafter de-energized, and a new route for the distribution line was made. See, **Exhibit 5,** Williams Affidavit ¶ 10 & 13.

23. On or about September 17, 2008, MEC confirmed the County's request to disconnect the power line. See, **Exhibit 5**, Williams Affidavit ¶ 14 and **Exhibit 6.**

24. It is normal for MEC (or for any utility company for that matter) to pass on to a customer/cooperative member the costs the utility company has borne as a result of such individual's unjustified conduct. See, Lauxman Affidavit, **Exhibit 7**, ¶ 3. Otherwise, the expense is borne by the well-behaved cooperative member.

25. The Counterdefendants' construction of the Artwork caused Mohave County to instruct MEC to de-energize the power lines over the Chantel premises for safety and public interest purposes. See, **Exhibit 6**, Longtin Affidavit, ¶ 3.

26. MEC's conduct was appropriate in dealing with the Chantels' construction of the Artwork because the Counterdefendants created unacceptable risks for the general public and for themselves. See, Expert Report of Dennis Hughes, **Exhibit 8.**

27. The Counterdefendants filed an informal complaint with the ACC, to which Steven Olea (of the ACC Utilities Division) prepared a report which completely absolved MEC of any wrong-doing. See, the November 5, 2008 report (the "Olea Report") attached to MEC's Motion to Dismiss and incorporated herein by reference. The Olea Report exhaustively addressed all of the Plaintiffs' allegations in the 2008 Informal Complaint (which allegations continue in the 2009 Formal Complaint and the Supplement).

28. The Olea Report further indicates the real issue resulting in the de-energizing of the power line to the Plaintiffs' property was an issue of construction permitting between the Counterdefendants and the County Planning and Zoning Department (now known as the Mohave County Special Services Department). The Olea Report also notes that County

personnel advised the Counterdefendants that if they did not dismantle the structure on their property, their electric service might require termination for reasons the County articulated.

29. The costs for MEC to comply with Mohave County's instruction to disconnect/de-energize the utility line to the Chantel residence and to reroute the three phase distribution line are based on the following breakdown:

a. Costs to disconnect service to the Chantel residence and relocate service to the railroad meter across the street from the residence - $12,135.09;

b. Costs to install a new three phase overhead distribution line around the Chantel residence - $23,145.47; and

c. Service charges - $12,601.48 (subject to continuing monthly adjustments – permitted under MEC's ACC-approved tariffs)

See Affidavit of Arden Lauxman, **Exhibit 7.**

DATED this 18th day of July, 2011.

CURTIS, GOODWIN, SULLIVAN,
UDALL & SCHWAB, P.L.C.

By: _____
Michael A. Curtis
Larry K. Udall
501 East Thomas Road
Phoenix, Arizona 85012-3205
Attorneys for Mohave Electric Cooperative, Inc.

Original of the foregoing mailed this 18th day of July, 2011, to:

Clerk of Court
Mohave County Superior Court
401 E. Spring Street
P.O. Box 7000
Kingman, Arizona 86402

Copy of the foregoing mailed
this 18th day of July, 2011 to:

The Honorable Lee F. Jantzen
Mohave County Superior Court
P.O. Box 7000
Kingman, Arizona 86402-7000

Mr. and Mrs. Chantel
10001 East Highway 66
Kingman, Arizona 86401

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APPENDIX G

Report of Dennis Hughes

Exhibit 8 to ROA 59

REPORT OF DENNIS HUGHES

1. I am a retired employee of Navopache Electric Cooperative, Inc. ("NEC") where I worked for 30 years. NEC is domiciled in Lakeside, Arizona. I also reside in Lakeside, Arizona.

2. At the conclusion of my employment with NEC, my title was Chief Operating Officer and I had numerous assignments and positions, including following assignments:

> To Assist the Chief Executive Officer in the planning and direction of all aspects of the Cooperative's operational policies, objectives and initiatives. The C.O.O. is responsible for the attainment of short and long-term financial and operational goals.
>
> My previous titles while employed by NEC include Manager of Energy Services, Senior SCADA, ("Supervisory Control And Data Acquisition"), Operator, and Power System Analyst. These positions included direct responsibility for the operation and maintenance of the NEC transmission and distribution system, metering systems, communications systems, and member service programs.

3. For my preparation of this Report, I have reviewed the following documents:

> Plaintiff's complaint;
> MEC's answer;
> MEC's Motion to Dismiss;
> Chantel response;
> MEC's reply;
> MEC's Motion for Summary Judgment;
> MEC's disclosure statements;
> Plaintiff's disclosure statements;
> Steven Olea report; and
> John Williams' chronology (attached to MEC's initial disclosure statement).

Because I am unable to personally verify some of the information I have received, I rely on the accuracy of information provided to me. Importantly, I rely heavily on the Steven Olea report, which was prepared by an impartial, highly respected employee of the Utilities Division of the Arizona Corporation Commission, whom I know and have had a business relationship with throughout my career.

I expect to review more material in the ensuing weeks.

4. Area of Opinion –

The two areas in which I have formulated an opinion relate to:

1) the standard of care and the due diligence undertaken by MEC in its efforts to deal with: a) the dangerous circumstances created by Plaintiffs' construction of a 6,200 square foot structure believed to be non-compliant with Mohave County building code and located in the prescriptive easement held by MEC; and b) MEC's compliance with Mohave County's instruction to de-energize the distribution lines over the Chantel 6,200 square foot structure; and

2) the inherent risks Plaintiffs created for MEC by constructing a structure non-conforming to building code without adequate clearance.

STANDARD OF CARE/DUE DILIGENCE

a) The standard of care and due diligence provided by MEC in dealing with the dangerous condition created by the Plaintiff clearly met the high standard of member relations which is the foundation of a member-owned Rural Electric Cooperative. During my career at NEC, if we had discovered a similar situation, it would have been handled in the same manner as it was by MEC. The fact that MEC expressed its concerns through both written communication and on-site visits to the MEC member demonstrate their patience and willingness to afford the member adequate time to correct a serious safety violation. It was only after being directed by Mohave County to de-energize the MEC line serving the Plaintiff's residence did MEC discontinue service. Even then, MEC took the extra step of taking a second measurement of the clearance between their line and the Plaintiff's structure to confirm the safety violation prior to disconnecting service.

b) In my experience if a similar safety violation had been identified on the NEC power system, after a thorough investigation of the circumstances, NEC would have exercised its right to disconnect service to the member creating the safety violation without any outside influence or direction. MEC only disconnected service to the Plaintiff when ordered to do so by a higher authority, that being Mohave County. MEC, as a corporation doing business in Mohave County, had no options other than to comply with the Mohave County order to disconnect service.

RISKS PLAINTIFFS HAVE CREATED

The risks created for MEC by the Plaintiffs fall into two categories: a) the risks associated with a right-of-way violation; and b) the risks associated with a violation of industry clearance requirements as set forth by the National Electric Safety Code, ("NESC"), which MEC must comply with.

a) MEC, as a condition of providing electric service to its members, requires that a right-of-way or easement be granted, by the member requesting electric service, within which to locate its infrastructure. MEC has adopted policies and procedures regarding the maintenance of its easements which include the prohibition of impediments which may prohibit their perpetual access to infrastructure located within its rights-of-way. These impediments could be

fences, locked gates, trees and shrubbery, and most certainly buildings or other permanent structures. In this particular case regarding the Plaintiff in this litigation, the "artwork" which they have constructed within the MEC right-of-way is a direct violation of MEC's published policies and procedures regarding easements. The "artwork" constructed by the Plaintiff prohibits MEC's perpetual access to its easement for maintenance and operation of its electric distribution system. Any object or structure which prohibits the direct access to its infrastructure elevates the safety risks to MEC employees maintaining or repairing its distribution lines by having to "work around" an easement violation. It cannot be argued that the Plaintiff was unaware of MEC's easement requirements as at the time the Plaintiff signed an application to receive electric service from MEC, they agreed to abide by published MEC policies and procedures as a condition of receiving electric service from MEC.

b) The NESC establishes standards by which all electric utilities must comply with. Among those standards are the mandatory clearance distances between electric conductors and any other objects. The most profound consideration which impacts those clearance distances is the possibility for loss of life by inadvertent contact with an energized conductor. In this particular case, because the minimum clearance distance from MEC's conductors was compromised, the possibility of contact with an energized conductor by the Plaintiff or others was present and constituted an extreme liability issue for MEC which could not be ignored. To ignore NESC clearance standards in any location or circumstance would place MEC in jeopardy of a violation of NESC standards which would lead to financial and or other disciplinary measures against MEC. MEC took the only path open to it in dealing with the NESC violation created by the Plaintiff.

It is my opinion that:

1) MEC's conduct through its employees was entirely professional and appropriate over the course of numerous communications with the Plaintiff and the subsequent actions that were taken by MEC employees in responding to the circumstances created by the Plaintiff. MEC employees were faced with a serious safety violation that required unavoidable measures to be taken for the actions necessitated by the Chantels' construction of a 6,200 square foot structure in the MEC prescriptive utility easement. As a (then) member of MEC, the Chantels owed duties to the Cooperative.

2) The Chantels created a serious risk for themselves, the public and anyone who might be in or near the 6,200 square foot structure on account of the violation of NESC distance clearance standards which MEC is required to adhere to under all circumstances. There are no waivers or other options available to MEC under these circumstances. It is my opinion that Mohave County owed a duty to the public to issue the stop work orders and further acted reasonably when it instructed MEC to de-energize the power in the distribution lines over the Chantel premises and service to the Chantel residence. In turn, MEC acted reasonably in obeying Mohave County's instructions to de-energize. If any electrical accident had occurred with the distribution

power lines over the 6,200 square foot structure, MEC, by virtue of its knowledge of the insufficient distance between the structure and the MEC distribution lines and the encroachment in its utility easement, would have been held strictly liable for any and all losses to personal property, injuries or loss of life by an accidental contact with MEC distribution lines.

Dennis W. Hughes

Dennis W. Hughes

APPENDIX H

Affidavit of John Williams

Exhibit 3 to ROA 50
Exhibit 5 to ROA 59

AFFIDAVIT OF JOHN WILLIAMS

STATE OF ARIZONA)
) ss.
County of Mohave)

I, John Williams, being first duly sworn, depose and state:

1. I have been an employee of Mohave Electric Cooperative ("MEC") for 28 years. My present position is Line Extension Supervisor.

2. On or about August 7, 2008, MEC conducted a measurement of the clearance between its electric distribution line and the Artwork and determined that the building was in violation with the National Electric Safety Code ("NESC") clearance requirements. At that time I sent a FAX to Darrell Riedel, Chief Building Inspector for Mohave County, requesting that, in the interest of public safety, a stop-work order be placed on construction activities at that location.

3. On or about August 15, 2008, I was advised that Plaintiff was continuing with the construction of the Artwork and I contacted Mike Dorman, one of Mohave County's building inspectors. Mr. Dorman acknowledged that the County was aware that Mr. Chantel's building had no permit. Mohave County advised that it was in the process of getting a deputy sheriff to accompany a building inspector to shut down the construction.

4. On or about August 18, 2008, Mr. Riedel (of Mohave County) and I went to the Chantel property, and arrived at approximately 10:30 a.m. Plaintiff did not allow me access until I informed him that, as a condition of service, MEC had the right to investigate a possible safety violation. Plaintiff did not allow Mr. Riedel onto his property, and waited with him at the gate. I took measurements and determined that the clearance between the existing

electric line and the building was in violation of NESC. I informed Plaintiff that construction on the Artwork must cease.

5. On or about August 18, 2008, Mr. Riedel of the Mohave County Special Services Department contacted me and informed me Plaintiff said that he would cooperate and planned to get a building permit. However, Mr. Riedel also informed me it was his belief that Plaintiff's building could never qualify for a permit because the structure did not comply with County building codes.

6. On or about September 12, 2008, we confirmed that Plaintiff had resumed construction. Mr. Dorman of Mohave County faxed to us (MEC) a request to disconnect electric service to the Chantel property.

7. On or about September 13, 2008, MEC undertook a second measurement and determined that the building was still in violation of NESC clearance requirements and once again, it was apparent that the clearance between the Plaintiff's building and our lines was inadequate.

8. On or about September 15, 2008, Mr. Riedel of Mohave County informed me that Plaintiffs had already received a couple of stop work orders and that Plaintiffs were ignoring them.

9. On or about September 15, 2008, I forwarded a letter to Plaintiffs explaining to them actions MEC would take because their structure was in violation of industry clearance guidelines for structures under utility lines. MEC also contacted the BNSF Railroad signal advisor to determine if the line could be de-energized for an extended length of time. I was informed that there could be no extended de-energized period because the line provided power to a railroad signal. That made it critical that the deenergizing occur quickly. If anything

happened at the Chantel residence to create a power outage, there would be great risk to the safety of the trains coming along the tracks near the Plaintiffs' residence.

10. On or about September 16, 2008, MEC crews commenced the de-energizing of the line to the Chantel property and the construction of an alternate route.

11. On or about September 16, 2008, I spoke with Ms. Ragen of the ACC and requested that the ACC send notice in writing if it did not want MEC to proceed with the de-energization of the line. I also requested that the ACC send notice to MEC to proceed with the de-energization if the Commission concluded that de-energizing was necessary. Ms. Paula Griffes and I had a conference call with Ms. Ragen and Steve Olea concerning the de-energization of the Plaintiffs' utility line and we discussed all of the facts. We (MEC) were given permission to de-energize the line over the Plaintiffs' premises and to reroute the lines.

12. On or about September 16, 2008, Darlene Chantel was contacted by MEC personnel at approximately 3:20 p.m. and informed that the power line would be de-energized due to safety issues. The Chantel electric meter was read at approximately 3:33 p.m. and the power line on the Chantel property was immediately thereafter de-energized.

13. On or about September 17, 2008, MEC confirmed the County's request to disconnect the power line.

DATED 5/18/11

John Williams

SUBSCRIBED TO BEFORE ME this 18th day of May, 2011 by John Williams.

Notary Public

My Commission expires:

OFFICIAL SEAL
PAULA R. GRIFFES
Notary Public - State of Arizona
MOHAVE COUNTY
My Comm. Expires Aug. 1, 2014

APPENDIX I

Affidavit of Tom Longtin

Exhibit 5 to ROA 50
Exhibit 6 to ROA 59

AFFIDAVIT OF THOMAS LONGTIN

STATE OF ARIZONA)
) ss.
County of Mohave)

I, Thomas Longtin, being first duly sworn, depose and state:

1. I have been an employee of Mohave Electric Cooperative ("MEC") for 20 years. My present position is Manager of Operations and Engineering.

2. For the entire time I have been employed at MEC, the utility poles and distribution lines that run along Route 66 east of Kingman have been there. Furthermore, it is my belief and understanding that those poles and distribution lines were placed there in the 1960's. I have personal knowledge that MEC's poles and transmission lines were in place when I commenced my employment over two decades ago.

3. The drop line from the distribution lines that crisscrossed the Chantels' property also provided power to a nearby railroad train signal. Given that the Chantels had built a huge structure under our distribution lines without our (MEC's) approval or permission and further given that the drop line going to the Chantel residence violated industry standards for clearance purposes where it crossed over the Chantel's concrete structure, any incident around the Chantel structure (on which MEC had knowledge) that caused a circuit breaker to trip would have created a serious liability situation for MEC if the train signal did not have power. This was unacceptable for us.

DATED 5-24-2011

Thomas Longtin

SUBSCRIBED TO BEFORE ME this 24th day of May, 2011 by Thomas Longtin.

OFFICIAL SEAL
PAULA R. GRIFFES
Notary Public - State of Arizona
MOHAVE COUNTY
My Comm. Expires Aug. 1, 2014

Paula R. Griffes
Notary Public

My Commission expires:

APPENDIX J

Affidavit of Arden Lauxman

Exhibit 7 to ROA 59

AFFIDAVIT OF ARDEN G. LAUXMAN

STATE OF ARIZONA)
) ss.
County of Maricopa)

I, Arden G. Lauxman, being first duly sworn, on oath state:

1. I am the Chief Financial Officer for Mohave Electric Cooperative ("MEC") and I am authorized to execute this Affidavit.

2. Mohave Electric Cooperative is a membership cooperative that is non-profit, without "equity." In other words, every member shares *pro rata* in the costs of MEC if those costs are extrinsic to the day-to-day costs of MEC and are not borne by those who have caused them.

3. When members are responsible for costs incurred by MEC for the protection of its members and the public at large, MEC passes those costs on to its members. This is a well-established practice in the utility industry.

4. I am familiar with the accounting practices utilized by the Cooperative and its practices conform to those of the utility industry for the determination of expenses caused by customers/cooperative members who have caused events that are in breach of rules, policies and Bylaws, and the Rural Utilities Services *Bulletin 1767B-2(7).*

5. Whenever MEC personnel are involved in extraordinary activities for de-energizing of power lines to residences, MEC passes on the direct and indirect costs to the member owning the residence. The direct costs will include the actual time of the MEC personnel involved, at an established rate per hour. Additionally, the overhead expenses are also allocated to the costs passed on to the MEC member. This is in conformance with the utility industry practices and *Bulletin 1767B-2.*

6. On or about September 15, 2008, Mohave County instructed MEC to de-energize the utility line to the Chantel residence and to re-route a three-phase distribution line that was over the approximately 6,200 square foot structure the Chantels had constructed because, as I understand it, the Chantels had not obtained a building permit and Mohave County was very concerned about some safety issues.

7. The costs MEC has assessed to the Chantels involves the time of the following employees: Robert Radcliff, Victor Holeman, Shelby Sinclair, Rob Frederick, Donald Driver, John Williams, and Michael Delance, who spent the better part of a day using MEC equipment in the de-energization process. Time Sheets for their work are attached.

8. The costs for MEC to comply with Mohave County's instruction to disconnect/de-energize the utility line to the Chantel residence and to reroute the three phase distribution line are based on the following breakdown:

a. Costs to disconnect service to Chantel residence and relocate service to the railroad meter across street of residence - $12,135.09

b. Costs to install a new three phase overhead distribution line around the Chantel residence - $23,145.47

c. Service charges - $12,601.48

TOTAL AMOUNT DUE AND OWING - $47,882.04 (subject to still accruing service charges and legal fees).

These costs exclude what Mr. and Mrs. Chantel will have to pay should they decide to pay the costs for reconnecting to MEC electrical system.

9. Worksheets reflecting all of the costs are attached hereto. These records are maintained in the ordinary course of business, as are all records on repairs, etc. that relate to the protection of MEC's assets. These records are accurate, to the best of my knowledge.

DATED this 6th day of July, 2011.

Arden Lauxman

SUBSCRIBED AND SWORN TO BEFORE ME this 6th day of July, 2011, by Arden Lauxman.

Mary Walker
Notary Public

My Commission Expires:

OFFICIAL SEAL
MARY WALKER
NOTARY PUBLIC - State of Arizona
MARICOPA COUNTY
My Comm. Expires June 29, 2012

APPENDIX K

Chantel Application for Membership and Electric Service

Exhibit 2 to ROA 59

MOHAVE ELECTRIC COOPERATIVE, INC.
Application For Membership and Electric Service

The undersigned (hereinafter called the "Applicant") hereby applies for electric service, and agrees to purchase electric energy from Mohave Electric Cooperative, Inc. (hereinafter called the "Cooperative") upon the following terms and conditions.

1. The Applicant will pay to the Cooperative the sum of $5.00, which if this application is accepted by the Cooperative, will constitute the Applicant's membership fee.

2. The Applicant will, when electric energy becomes available, purchase from the Cooperative all electric energy used on the premises and will pay therefor monthly at rates to be determined from time to time in accordance with the by-laws of the Cooperative; provided, however, that the Cooperative may limit the amount of electric energy which it shall be required to furnish to the Applicant.

3. The Applicant will cause his premises to be wired in accordance with wiring specifications approved by the Cooperative, or in accordance with good wiring practices.

4. The Applicant will comply with and be bound by the provisions of the articles of incorporation, the articles of conversion, and the by-laws of the Cooperative, and such rules and regulations as may from time to time be adopted by the Cooperative.

5. The Applicant, by paying a membership fee and becoming a member, assumes no liability or responsibility for any debts or liabilities of the Cooperative, and it is expressly understood that under the law his private property is exempt from execution for any such debts or liabilities.

6. The Applicant agrees to grant at the time of filing of said application, easements of right of way across his property, for construction, use and operation of power lines necessary for the servicing of members in this area. Also, applicant shall give safe and unobstructed access at reasonable times to the premises for the purpose of reading meters, testing, repairing, relocating, removing or exchanging any or all equipment or facilities necessary to provide electric service.

7. The Applicant is hereby notified and is aware of Article VII of the Corporate by-laws regarding the disposition of revenue and receipts and non-profit operation.

ROGER CHANTEL

ACCOUNT NAME (Print)

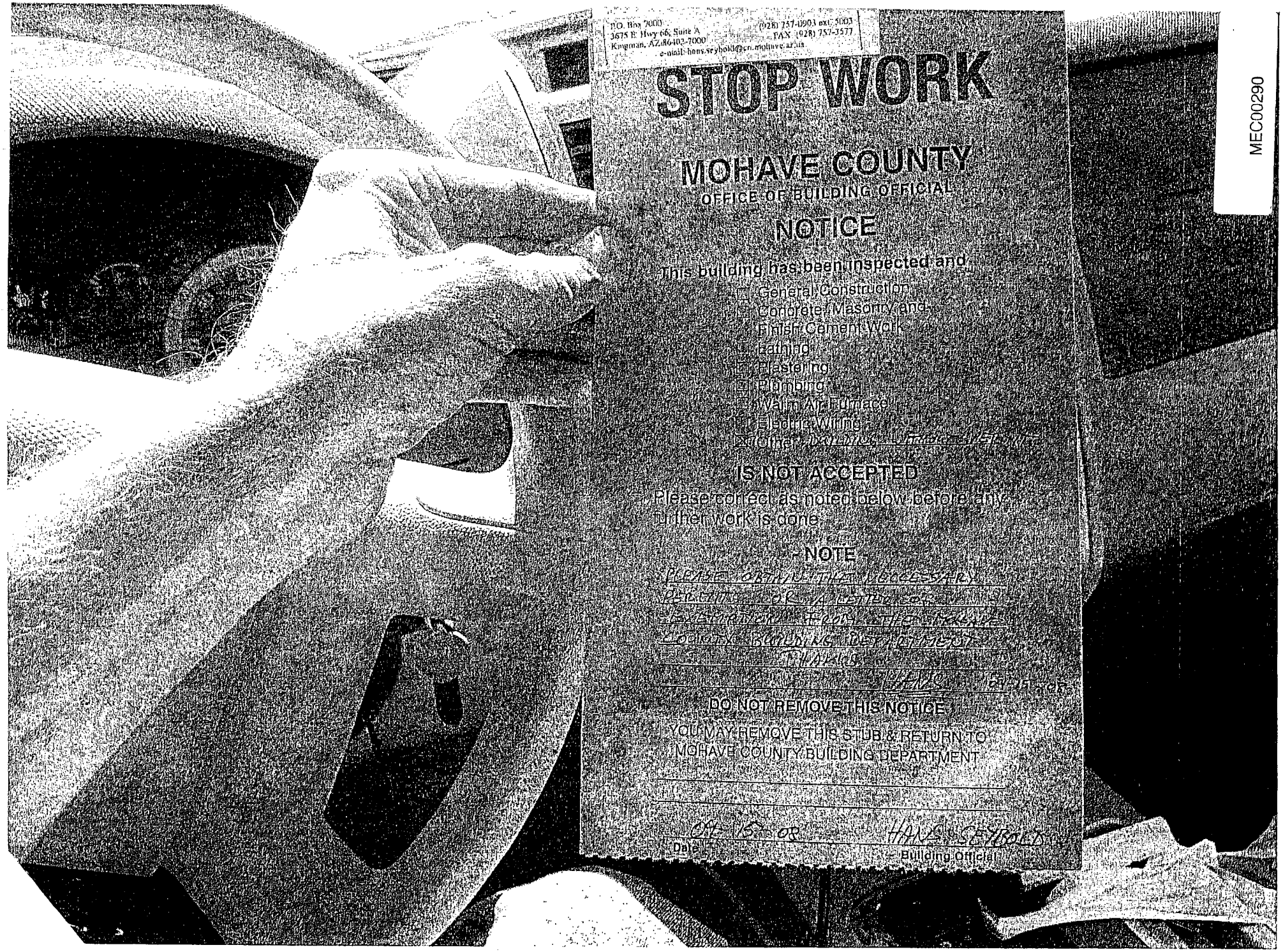
Roger Chantel

SIGNATURE

APPENDIX L

September 15, 2008 Mohave County Stop Work Order

Exhibit 2 to ROA 50



P.O. Box 7000
3675 E. Hwy 66, Suite A
Kingman, AZ 86402-7000
(928) 757-0903 ext. 5003
FAX (928) 757-3577
e-mail: hans.seybold@co.mohave.az.us

STOP WORK

MOHAVE COUNTY

OFFICE OF BUILDING OFFICIAL

NOTICE

This building has been inspected and

- ☐ General Construction
- ☐ Concrete, Masonry and Finish Cement Work
- ☐ Painting
- ☐ Plastering
- ☐ Plumbing
- ☐ Warm Air Furnace
- ☐ Electric Wiring
- ☒ Other [illegible]

IS NOT ACCEPTED

Please correct as noted below before any further work is done.

- NOTE -

PLEASE OBTAIN THE NECESSARY PERMITS OR A CERTIFICATE EXEMPTION FROM THE MOHAVE COUNTY BUILDING DEPARTMENT

THANKS

HANS 08-15-08

DO NOT REMOVE THIS NOTICE

YOU MAY REMOVE THIS STUB & RETURN TO MOHAVE COUNTY BUILDING DEPARTMENT

Date: OCT 15 08

HANS SEYBOLD
Building Official

MEC00290

APPENDIX M

September 15, 2008 Notice Letter

Exhibit 5 to ROA 50

to MC 1/9/09

MOHAVE
electric cooperative
A Touchstone Energy® Cooperative

P.O. Box 1045, Bullhead City, AZ 86430

September 15, 2008

Roger Chantel
10001 E. Highway 66
Kingman, AZ 86411-2028

Via Certified Letter

Re: Disconnection of Electric Service
9455 E. Highway 66 (APN 313-11-006)

Dear Mr. Chantel:

As you are aware, Mohave Electric Cooperative, Inc. was informed that you were constructing a building directly beneath an existing overhead electric line. A field review of the property revealed that the building you are constructing is in violation of clearance requirements mandated by the National Electric Safety Code.

Mohave County and Mohave Electric Cooperative, Inc. have previously requested that you cease construction on this building. You have refused. As a result, the Mohave County Division of Building Inspection has requested that Mohave Electric Cooperative immediately disconnect electric service to your property.

Please be advised that you will be held responsible for all costs incurred by Mohave Electric Cooperative as a result of this action. These costs shall include the construction costs associated with the de-energization of this line segment (made necessary by your construction of this structure too close to the electric line), as well as the construction costs associated with re-establishing electric service to a neighboring customer who would be also affected by the de-energization of this line segement. In addition, you will be responsible for the costs of relocating the existing overhead electric line to permanently meet the electric code clearances.

Electric service will not be restored to your premises until these costs are paid in full.

Mohave Electric's Service Rules and Regulations, on file with the Arizona Corporation Commission, cite that unsafe conditions are grounds for the disconnection of electric service.

If you have any questions or need more information please contact me at (928) 758-0580.

Sincerely,

Mohave Electric Cooperative, Inc.

John H. Williams
Line Extension Supervisor

cc: Thomas Longtin
Neil Garney
Dispatch
File

APPENDIX N

September 17, 2008 Facsimile from Mohave County to MEC

Exhibit 6 to ROA 50

MOHAVE
electric cooperative
A Touchstone Energy® Cooperative

Facsimile Transmission Sheet

Date: September 17, 2008 Number of pages (including this page): 1

From: John H. Williams, Line Extension Supervisor, (928) 758-0580

For problems in transmission contact Belinda Sierra at 763-4115 (Main Office). Our fax number is (928) 763-6094 (Main Office).

Attention: Daryl Riedel

Company: Mohave County Chief Building Inspector

Fax No. 928-757-3577 Phone No. 928-757-0903 x5822

Subject: Disconnection of Electric Service
Chantel (9455 E. Highway 66), Parcel 313-11-006

Message: Mohave Electric Cooperative, Inc. received your request to disconnect the electric service to the above-named property on September 12, 2008.

Please be advised that Mohave Electric Cooperative de-energized the power line across the above-named property at 3:33 p.m. on September 16, 2008.

If you have any questions or need more information please call me.

CONFIDENTIALITY NOTICE

This transmission and any accompanying documents contain information belonging to the sender, which may be confidential, legally privileged, or protected by law. This transmission is intended only for the use of the individual or entity to whom it is addressed. If you are not the intended recipient, any disclosure, copying, distribution, or action taken in reliance on the contents of the information contained in this transmission is strictly prohibited.

If you have received this facsimile in error, please call me at the number printed above to let me know – then destroy the documents. Thank you.

APPENDIX O

MEC Bylaw Art. 1, Sec. 1

BYLAWS OF
MOHAVE ELECTRIC COOPERATIVE, INC.

Amended June 25, 2010

ARTICLE I. MEMBERSHIP

Section 1. Requirements for Membership.
Any person, firm, association, corporation, or body politic or subdivision thereof will become a member of Mohave Electric Cooperative, Inc. (hereinafter called the "Cooperative") upon receipt of electric service from the Cooperative, provided that he or it has first:

(a) Made a written application for membership therein;
(b) Agreed to purchase from the Cooperative electric energy as herein after specified;
(c) Agreed to comply with and be bound by the Articles of Incorporation and Bylaws of the Cooperative and any rules and regulations adopted by the Board of Directors;
(d) Agreed to grant, at the time of filing said application, easements of right-of-way across his property for construction, use and operation of power lines necessary for the servicing of members in his area; and
(e) Paid the membership fee hereinafter specified.

No member may hold more than one membership in the Cooperative, and no membership in the Cooperative shall be transferable, except as provided in these Bylaws.

Section 2. Membership Certificates.
Membership in the Cooperative shall be evidenced by a membership certificate which shall be in such form and shall contain such provisions as shall be determined by the Board of Directors. Such certificate shall be signed by the President and by the Secretary of the Cooperative and the corporate seal shall be affixed thereto. No membership certificate shall be issued for less than the membership fee fixed by these Bylaws, nor until such membership fee has been fully paid for. In case a certificate is lost, destroyed or mutilated, a new certificate may be issued therefore upon such uniform terms and indemnity to the Cooperative as the Board of Directors may prescribe.

Section 3. Joint Membership.
A husband and wife may apply for a joint membership and, subject to their compliance with the requirements set forth in Section 1 of this Article, may be accepted for such membership. The term "member" as used in these Bylaws shall be deemed to include a husband and wife holding a joint membership any provisions relating to the rights and liabilities of membership shall apply equally with respect to the holders of a joint membership. Without limiting the generality of the foregoing, the effect of the hereinafter specified actions by or in respect of the holders of a joint membership shall be as follows:

(a) The presence at a meeting of either or both shall be regarded as the presence of one member and shall constitute a joint waiver of notice of the meeting;
(b) The vote of either separately or both jointly shall constitute one joint vote;
(c) A waiver of notice signed by either or both shall constitute a joint waiver;
(d) Notice to either shall constitute notice to both;
(e) Expulsion of either shall terminate the joint membership;
(f) Withdrawal of either shall terminate the joint membership;
(g) Either but not both may be elected or appointed as officer or board member, provided that both meet the qualifications for such office.

APPENDIX P

A.A.C. R14-2-206
A.A.C. R14-2-208

Arizona Administrative Code Currentness
Title 14. Public Service Corporations; Corporations and Associations; Securities Regulation
Chapter 2. Corporation Commission Fixed Utilities
Article 2. Electric Utilities (Refs & Annos)

A.A.C. R14-2-206

R14-2-206. Service Lines and Establishments

A. Priority and timing of service establishments

1. After an applicant has complied with the utility's application and deposit requirements and has been accepted for service by the utility, the utility shall schedule that customer for service establishment.

2. Service establishments shall be scheduled for completion within five working days of the date the customer has been accepted for service, except in those instances when the customer requests service establishment beyond the five working day limitation.

3. When a utility has made arrangements to meet with a customer for service establishment purposes and the utility or the customer cannot make the appointment during the prearranged time, the utility shall reschedule the service establishment to the satisfaction of both parties.

4. A utility shall schedule service establishment appointments within a maximum range of four hours during normal working hours, unless another time-frame is mutually acceptable to the utility and the customer.

5. Service establishments shall be made only by qualified utility service personnel.

6. For the purposes of this rule, service establishments are where the customer's facilities are ready and acceptable to the utility and the utility needs only to install or read a meter or turn the service on.

B. Service lines

1. Customer provided facilities

a. Each applicant for services shall be responsible for all inside wiring including the service entrance and meter socket.

b. Meters and service switches in conjunction with the meter shall be installed in a location where the meters will be readily and safely accessible for reading, testing and inspection and where such activities will cause the least interference and inconvenience to the customer. However, the meter locations shall not be on the front exterior wall of the home; or in the carport or garage, unless mutually agreed to between the home builder or customer and the utility. The customer shall provide, without cost to the utility, at a suitable and easily accessible location, sufficient and proper space for installation of meters.

c. Where the meter or service line location on the customer's premises is changed at the request of the customer or due to alterations on the customer's premises, the customer shall provide and have installed at his expense all wiring and equipment necessary for relocating the meter and service line connection and the utility may make a charge for moving the meter or service line.

2. Company provided facilities

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a. Each utility shall file, in Docket Control, for Commission approval, a service line tariff which defines the maximum footage or equipment allowance to be provided by the utility at no charge. The maximum footage or equipment allowance may be differentiated by customer class.

b. The cost of any service line in excess of that allowed at no charge shall be paid for by the customer as a contribution in aid of construction.

c. A customer requesting an underground service line in an area served by overhead facilities shall pay for the difference between an overhead service connection and the actual cost of the underground connection as a nonrefundable contribution.

C. Easements and rights-of-way

1. Each customer shall grant adequate easement and right-of-way satisfactory to the utility to ensure that customer's proper service connection. Failure on the part of the customer to grant adequate easement and right-of-way shall be grounds for the utility to refuse service.

2. When a utility discovers that a customer or customer's agent is performing work or has constructed facilities adjacent to or within an easement or right-of-way and such work, construction or facility poses a hazard or is in violation of federal, state or local laws, ordinances, statutes, rules or regulations, or significantly interferes with the utility's access to equipment, the utility shall notify the customer or customer's agent and shall take whatever actions are necessary to eliminate the hazard, obstruction, or violation at the customer's expense.

HISTORICAL NOTE

Adopted effective March 2, 1982 (Supp. 82-2). Amended by exempt rulemaking at 5 A.A.R. 3933, effective September 24, 1999 (Supp. 99-3). Amended by exempt rulemaking at 6 A.A.R. 4180, effective October 13, 2000 (Supp. 00-4).

Current through March 31, 2012.

A.A.C. R14-2-206, AZ ADC R14-2-206

End of Document

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Arizona Administrative Code Currentness
Title 14. Public Service Corporations; Corporations and Associations; Securities Regulation
Chapter 2. Corporation Commission Fixed Utilities
Article 2. Electric Utilities (Refs & Annos)

A.A.C. R14-2-208

R14-2-208. Provision of Service

A. Utility responsibility

1. Each utility shall be responsible for the safe transmission and distribution of electricity until it passes the point of delivery to the customer.

2. The entity having control of the meter shall be responsible for maintaining in safe operating condition all meters, equipment, and fixtures installed on the customer's premises by the entity for the purposes of delivering electric service to the customer.

3. The Utility Distribution Company may, at its option, refuse service until the customer has obtained all required permits and inspections indicating that the customer's facilities comply with local construction and safety standards.

B. Customer responsibility

1. Each customer shall be responsible for maintaining all customer facilities on the customer's side of the point of delivery in safe operating condition.

2. Each customer shall be responsible for safeguarding all utility property installed in or on the customer's premises for the purpose of supplying utility service to that customer.

3. Each customer shall exercise all reasonable care to prevent loss or damage to utility property, excluding ordinary wear and tear. The customer shall be responsible for loss of or damage to utility property on the customer's premises arising from neglect, carelessness, or misuse and shall reimburse the utility for the cost of necessary repairs or replacements.

4. Each customer shall be responsible for payment for any equipment damage and estimated unmetered usage resulting from unauthorized breaking of seals, interfering, tampering, or bypassing the utility meter.

5. Each customer shall be responsible for notifying the utility of any equipment failure identified in the utility's equipment.

C. Continuity of service. Each utility shall make reasonable efforts to supply a satisfactory and continuous level of service. However, no utility shall be responsible for any damage or claim of damage attributable to any interruption or discontinuation of service resulting from:

1. Any cause against which the utility could not have reasonably foreseen or made provision for, that is, force majeure.

2. Intentional service interruptions to make repairs or perform routine maintenance.

3. Curtailment.

D. Service interruptions

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1. Each utility shall make reasonable efforts to reestablish service within the shortest possible time when service interruptions occur.

2. Each utility shall make reasonable provisions to meet emergencies resulting from failure of service, and each utility shall issue instructions to its employees covering procedures to be followed in the event of emergency in order to prevent or mitigate interruption or impairment of service.

3. In the event of a national emergency or local disaster resulting in disruption of normal service, the utility may, in the public interest, interrupt service to other customers to provide necessary service to civil defense or other emergency service agencies on a temporary basis until normal service to these agencies can be restored.

4. When a utility plans to interrupt service for more than four hours to perform necessary repairs or maintenance, the utility shall attempt to inform affected customers at least 24 hours in advance of the scheduled date and estimated duration of the service interruption. Such repairs shall be completed in the shortest possible time to minimize the inconvenience to the customers of the utility.

5. The Commission, Consumer Services Section, shall be notified of interruption in service affecting the entire system or any significant portion thereof. The interruption of service and cause shall be reported by telephone to the Commission within two hours after the responsible representative of the utility becomes aware of said interruption and followed by a written report to the Commission.

E. Curtailment. Each utility shall file with the Commission, through Docket Control, as a part of its general tariffs a procedural plan for handling severe supply shortages or service curtailments. The plan shall provide for equitable treatment of individual customer classes in the most reasonable and effective manner given the existing circumstances. When the availability of service is so restricted that the reduction of service on a proportionate basis to all customer classes will not maintain the integrity of the total system, the utility shall develop procedures to curtail service giving service priority to those customers and customer classes where health, safety and welfare would be adversely affected.

F. Construction standard and safety

1. Each utility shall construct all facilities in accordance with the provisions of Institute of Electrical and Electronic Engineers, Inc., Pub. No. C2-2007, The National Electrical Safety Code (2007), which is incorporated by reference in R14-2-207(E)(3)(c), and American Society of Mechanical Engineers, Pub. No. ANSI/ASME B31.1-2007, Power Piping (2007), including no future editions or amendments, which is incorporated by reference, on file with the Commission, and published by and available from the American Society of Mechanical Engineers, 3 Park Avenue, New York, New York 10016, and through http://catalog.asme.org.

2. Each utility shall adopt a standard alternating nominal voltage or standard alternating nominal voltages (as may be required by its distribution system) for its entire service area or for each of the several districts into which the system may be divided, which standard voltage or voltages shall be stated in the rules and regulations of each utility and shall be measured at the customer's service entrance. Each utility shall, under normal operating conditions, maintain its standard voltage or voltages within the limits of National Electrical Manufacturers Association, Pub. No. ANSI C84.1-2006, American National Standard for Electric Power Systems and Equipment-Voltage Ratings (60 Hertz) (2006), including no future editions or amendments, which is incorporated by reference, on file with the Commission, and published by and available from the National Electrical Manufacturers Association, 1300 North 17th Street, Suite 1752, Rosslyn, Virginia 22209, and through http://www.nema.org.

HISTORICAL NOTE

Adopted effective March 2, 1982 (Supp. 82-2). Amended subsections (D)(5) and (F)(1) and (2) effective April 1, 1986 (Supp. 86-2). Amended effective February 8, 1991 (Supp. 91-1). Amended effective August 16, 1996 (Supp. 96-3). Amended by an

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emergency action effective August 10, 1998, pursuant to A.R.S. § 41-1026, in effect for a maximum of 180 days (Supp. 98-3). Emergency amendment replaced by exempt permanent amendment effective December 31, 1998 (Supp. 98-4). Amended by exempt rulemaking at 5 A.A.R. 2054, effective June 4, 1999 (Supp. 99-2). Amended by exempt rulemaking at 5 A.A.R. 3933, effective September 24, 1999 (Supp. 99-3). Amended to correct subsection numbering (Supp. 99-4). Amended by exempt rulemaking at 6 A.A.R. 4180, effective October 13, 2000 (Supp. 00-4). Amended by final rulemaking at 15 A.A.R. 1933, effective December 27, 2009 (Supp. 09-4).

Current through March 31, 2012.

A.A.C. R14-2-208, AZ ADC R14-2-208

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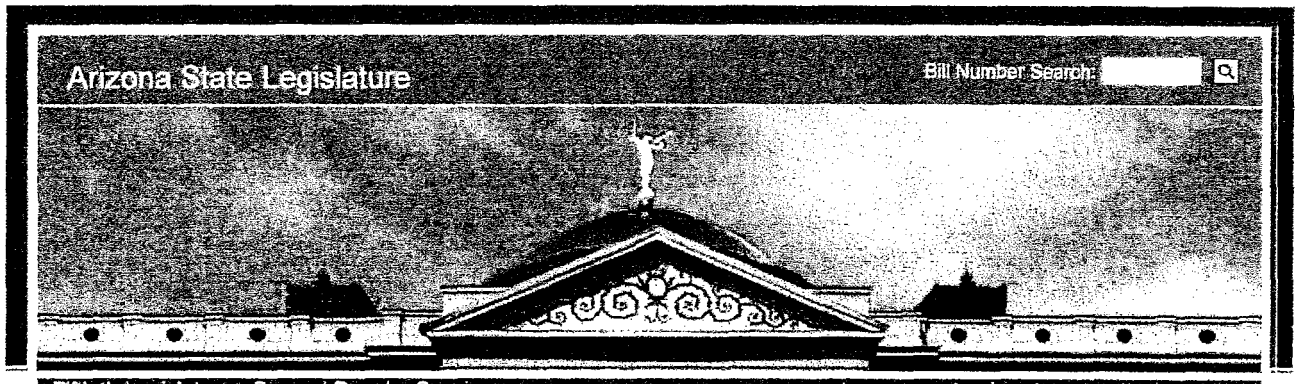
APPENDIX Q

Art. 15, § 3, Arizona Constitution



3. Power of commission as to classifications, rates and charges, rules, contracts, and accounts; local regulation

Section 3. The corporation commission shall have full power to, and shall, prescribe just and reasonable classifications to be used and just and reasonable rates and charges to be made and collected, by public service corporations within the state for service rendered therein, and make reasonable rules, regulations, and orders, by which such corporations shall be governed in the transaction of business within the state, and may prescribe the forms of contracts and the systems of keeping accounts to be used by such corporations in transacting such business, and make and enforce reasonable rules, regulations, and orders for the convenience, comfort, and safety, and the preservation of the health, of the employees and patrons of such corporations; Provided, that incorporated cities and towns may be authorized by law to exercise supervision over public service corporations doing business therein, including the regulation of rates and charges to be made and collected by such corporations; Provided further, that classifications, rates, charges, rules, regulations, orders, and forms or systems prescribed or made by said corporation commission may from time to time be amended or repealed by such commission.

APPENDIX R

A.A.C. R14-2-211
MEC Rule Subsection 111-B

Arizona Administrative Code Currentness
Title 14. Public Service Corporations; Corporations and Associations; Securities Regulation
Chapter 2. Corporation Commission Fixed Utilities
Article 2. Electric Utilities (Refs & Annos)

A.A.C. R14-2-211

R14-2-211. Termination of Service

A. Nonpermissible reasons to disconnect service. A utility may not disconnect service for any of the reasons stated below:

1. Delinquency in payment for services rendered to a prior customer at the premises where service is being provided, except in the instance where the prior customer continues to reside on the premises.

2. Failure of the customer to pay for services or equipment which are not regulated by the Commission.

3. Nonpayment of a bill related to another class of service.

4. Failure to pay for a bill to correct a previous underbilling due to an inaccurate meter or meter failure if the customer agrees to pay over a reasonable period of time.

5. A utility shall not terminate residential service where the customer has an inability to pay and:

a. The customer can establish through medical documentation that, in the opinion of a licensed medical physician, termination would be especially dangerous to the health of a customer or a permanent resident residing on the customer's premises, or

b. Life supporting equipment used in the home that is dependent on utility service for operation of such apparatus, or

c. Where weather will be especially dangerous to health as defined or as determined by the Commission.

6. Residential service to ill, elderly, or handicapped persons who have an inability to pay will not be terminated until all of the following have been attempted:

a. The customer has been informed of the availability of funds from various government and social assistance agencies of which the utility is aware.

b. A third party previously designated by the customer has been notified and has not made arrangements to pay the outstanding utility bill.

7. A customer utilizing the provisions of subsection (A)(4) or (A)(5) above may be required to enter into a deferred payment agreement with the utility within 10 days after the scheduled termination date.

8. Disputed bills where the customer has complied with the Commission's rules on customer bill disputes.

B. Termination of service without notice

1. In a competitive marketplace, the Electric Service Provider cannot order a disconnect for nonpayment but can only send a notice of contract cancellation to the customer and the Utility Distribution Company. Utility service may be disconnected without advance written notice under the following conditions:

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a. The existence of an obvious hazard to the safety or health of the consumer or the general population or the utility's personnel or facilities.

b. The utility has evidence of meter tampering or fraud.

c. Failure of a customer to comply with the curtailment procedures imposed by a utility during supply shortages.

2. The utility shall not be required to restore service until the conditions which resulted in the termination have been corrected to the satisfaction of the utility.

3. Each utility shall maintain a record of all terminations of service without notice. This record shall be maintained for a minimum of one year and shall be available for inspection by the Commission.

C. Termination of service with notice

1. In a competitive marketplace, the Electric Service Provider cannot order a disconnect for nonpayment but can only send a notice of contract cancellation to the customer and the Utility Distribution Company. A utility may disconnect service to any customer for any reason stated below provided the utility has met the notice requirements established by the Commission:

a. Customer violation of any of the utility's tariffs,

b. Failure of the customer to pay a delinquent bill for utility service,

c. Failure to meet or maintain the utility's deposit requirements,

d. Failure of the customer to provide the utility reasonable access to its equipment and property,

e. Customer breach of a written contract for service between the utility and customer,

f. When necessary for the utility to comply with an order of any governmental agency having such jurisdiction.

2. Each utility shall maintain a record of all terminations of service with notice. This record shall be maintained for one year and be available for Commission inspection.

D. Termination notice requirements

1. No utility shall terminate service to any of its customers without providing advance written notice to the customer of the utility's intent to disconnect service, except under those conditions specified where advance written notice is not required.

2. Such advance written notice shall contain, at a minimum, the following information:

a. The name of the person whose service is to be terminated and the address where service is being rendered.

b. The utility tariff that was violated and explanation thereof or the amount of the bill which the customer has failed to pay in accordance with the payment policy of the utility, if applicable.

c. The date on or after which service may be terminated.

d. A statement advising the customer to contact the utility at a specific address or phone number for information regarding any deferred payment or other procedures which the utility may offer or to work out some other mutually agreeable solution to avoid termination of the customer's service.

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e. A statement advising the customer that the utility's stated reason for the termination of services may be disputed by contacting the utility at a specific address or phone number, advising the utility of the dispute and making arrangements to discuss the cause for termination with a responsible employee of the utility in advance of the scheduled date of termination. The responsible employee shall be empowered to resolve the dispute and the utility shall retain the option to terminate service after affording this opportunity for a meeting and concluding that the reason for termination is just and advising the customer of his right to file a complaint with the Commission.

3. Where applicable, a copy of the termination notice will be simultaneously forwarded to designated third parties.

E. Timing of terminations with notice

1. Each utility shall be required to give at least five days' advance written notice prior to the termination date.

2. Such notice shall be considered to be given to the customer when a copy thereof is left with the customer or posted first class in the United States mail, addressed to the customer's last known address.

3. If after the period of time allowed by the notice has elapsed and the delinquent account has not been paid nor arrangements made with the utility for the payment thereof or in the case of a violation of the utility's rules the customer has not satisfied the utility that such violation has ceased, the utility may then terminate service on or after the day specified in the notice without giving further notice.

4. Service may only be disconnected in conjunction with a personal visit to the premises by an authorized representative of the utility.

5. The utility shall have the right (but not the obligation) to remove any or all of its property installed on the customer's premises upon the termination of service.

F. Landlord/tenant rule. In situations where service is rendered at an address different from the mailing address of the bill or where the utility knows that a landlord/tenant relationship exists and that the landlord is the customer of the utility, and where the landlord as a customer would otherwise be subject to disconnection of service, the utility may not disconnect service until the following actions have been taken:

1. Where it is feasible to so provide service, the utility, after providing notice as required in these rules, shall offer the occupant the opportunity to subscribe for service in his or her own name. If the occupant then declines to so subscribe, the utility may disconnect service pursuant to the rules.

2. A utility shall not attempt to recover from a tenant or condition service to a tenant with the payment of any outstanding bills or other charges due upon the outstanding account of the landlord.

HISTORICAL NOTE

Adopted effective March 2, 1982 (Supp. 82-2). Amended by an emergency action effective August 10, 1998, pursuant to A.R.S. § 41-1026, in effect for a maximum of 180 days (Supp. 98-3). Emergency amendment replaced by exempt permanent amendment effective December 31, 1998 (Supp. 98-4). Amended to correct subsection numbering (Supp. 99-4). Amended by exempt rulemaking at 6 A.A.R. 4180, effective October 13, 2000 (Supp. 00-4).

Current through March 31, 2012.

A.A.C. R14-2-211, AZ ADC R14-2-211

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(2) A third party previously designated by the customer has been notified and has not made arrangements to pay the outstanding Utility bill.

g) A customer utilizing the provisions of (e.) or (f.) above may be required to enter into a deferred payment agreement with the Cooperative within ten (10) days after the scheduled termination date.

h) Disputed bills where the customer has complied with the ACC's rules on customer bill disputes.

SUBSECTION 111-B

TERMINATION OF SERVICE WITHOUT NOTICE

1. Electric service may be disconnected without advance written notice under the following conditions:

   a) The existence of an obvious and imminent hazard to the safety or health of the Customer or the general population or the Cooperative's personnel or facilities.

   b) The Cooperative had evidence of meter tampering, theft of service, or damage and loss to the Cooperative's property pertaining to the service to the Customer.

   c) Failure of a Customer to comply with the curtailment procedures.

   d) An emergency requiring immediate discontinuance of service.

   e) Unauthorized resale or use of electric services.

2. The Cooperative shall not be required to restore service until the conditions which resulted in the termination have been corrected to the satisfaction of the Cooperative.

Exhibit 10

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DUSTIN R. CHANTEL and ELIZABETH D. CHANTEL, husband and wife, Plaintiffs/Appellants, v. MOHAVE ELECTRIC COOPERATIVE, INC., an Arizona non-profit corporation, Defendant/Appellee.	No. 1 CA-CV 12-0411 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Mohave County

Cause No. S8015CV200902574

The Honorable Lee Frank Jantzen, Judge

AFFIRMED

Dustin R. Chantel and Elizabeth D. Chantel — Kingman
Plaintiffs/Appellants *In Propria Persona*

Curtis, Goodwin, Sullivan, Udall & Schwab, P.L.C. — Phoenix
By Michael A. Curtis
Larry K. Udall
Attorneys for Defendant/Appellee

J O H N S E N, Judge

¶1 Dustin R. and Elizabeth D. Chantel appeal the superior court's entry of summary judgment in favor of Mohave Electric

Cooperative, Inc. ("MEC"). For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 MEC is a member-owned and -operated electrical cooperative. The Chantels, who live in Kingman, are members of MEC. The membership application the Chantels signed provided that they would be bound by MEC's articles of incorporation, by-laws and rules and regulations. MEC's rules and regulations provide, *inter alia*: "The Customer will be held responsible for . . . interfering with the Cooperative's meter(s) or other utility property." The rules and regulations also allow MEC to disconnect service without advance notice if there is "an obvious and imminent hazard to the safety or health of the Customer or the general population."

¶3 MEC provided the Chantels with electricity via overhead lines installed on the Chantels' property decades before they purchased it. The lines also served a nearby train signal. In the summer of 2008, without a building permit, the Chantels began building what they called a "divinely inspired" structure directly beneath the lines.

¶4 A county building inspector and an MEC employee visited the property in August 2008 and determined that the clearance between the electric lines and the structure violated the National Electric Safety Code. The county issued stop-work

orders, but the Chantels continued construction. On September 12, 2008, the county instructed MEC to de-energize the overhead lines because the structure created an unsafe condition.

¶5 On September 15, 2008, MEC mailed the Chantels notice of the county's directive that MEC de-energize the lines. The following afternoon, MEC contacted Ms. Chantel to inform her that the lines would be de-energized that day. After de-energizing the lines above the Chantels' structure on September 16, MEC installed a new system to provide service to the nearby train signal. When the Chantels asked MEC to reinstate their service, MEC said it would do so only if the Chantels reimbursed MEC for the costs it incurred in de-energizing the lines and installing the new system.

¶6 The Chantels filed a complaint against MEC alleging that the electrical lines were sagging and the power poles were breaking and asserting that the Chantels built the structure to catch any lines or poles that might break because MEC refused to repair them. They alleged eight claims for relief: Breach of contract, breach of the covenant of good faith and fair dealing, quiet title, ejectment, "recovery of rents," negligence, intentional infliction of emotional distress and punitive damages. MEC filed a counterclaim seeking to recover more than $41,000 in expenses it incurred in de-energizing the lines and installing the new system.

¶7 MEC moved for summary judgment on the complaint and counterclaim. The Chantels then withdrew their quiet title and ejectment claims, and the court granted MEC's motion for summary judgment as to the Chantels' claims for recovery of rent, intentional infliction of emotional distress and punitive damages, but denied MEC's motion on the other claims.

¶8 At the summary judgment hearing, the Chantels avowed they would produce additional discovery to support their remaining claims. When they produced no such discovery, MEC moved for reconsideration of the denial of its summary judgment motion on its counterclaim and on the Chantels' claims for breach of contract, breach of the covenant of good faith and fair dealing and negligence. The court granted the motion and entered summary judgment in favor of MEC on all of the remaining counts in the complaint and on the counterclaim, stating "[i]n retrospect, the Court's denial of MEC's entire motion was incorrect." The court also awarded MEC more than $47,000 in damages on its counterclaim and awarded MEC attorney's fees pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-341.01(A) (West 2013) and -349 (West 2013).[1]

¶9 We have jurisdiction of the Chantels' timely appeal pursuant to Article 6, Section 9, of the Arizona Constitution,

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

and A.R.S. §§ 12-120.21(A)(1) (West 2013) and -2101(A)(1) (West 2013).

DISCUSSION

A. Legal Principles.

¶10 Summary judgment is appropriate "if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a); *Orme Sch. v. Reeves*, 166 Ariz. 301, 305, 802 P.2d 1000, 1004 (1990). "Summary judgment is also appropriate when a plaintiff fails to establish a *prima facie* case." *Gorney v. Meaney*, 214 Ariz. 226, 232, ¶ 17, 150 P.3d 799, 805 (App. 2007). We review *de novo* the grant of a motion for summary judgment. *Wolfinger v. Cheche*, 206 Ariz. 504, 506, ¶ 4, 80 P.3d 783, 785 (App. 2003). We review the facts in the light most favorable to the party opposing summary judgment. *Id.* Additionally, an award of attorney's fees is left to the discretion of the superior court and will not be reversed on appeal absent an abuse of discretion. *Orfaly v. Tucson Symphony Soc'y*, 209 Ariz. 260, 265, ¶ 18, 99 P.3d 1030, 1035 (App. 2004).

¶11 In their opening brief, the Chantels challenge only the superior court's entry of summary judgment on their negligence claim and on their claim for recovery of rent and the court's award of attorney's fees in favor of MEC. The Chantels therefore have waived any arguments concerning the court's entry

of summary judgment in favor of MEC on the remaining claims in the complaint and on MEC's counterclaim. *See Phoenix Newspapers, Inc. v. Molera*, 200 Ariz. 457, 462, ¶ 26, 27 P.2d 814, 819 (App. 2001).[2]

B. Wrongful Termination of Electrical Service.

¶12 The Chantels argue they are entitled to injunctive relief and money damages for MEC's alleged wrongful termination of their electrical service, claiming it constitutes "actionable tortious conduct." Although MEC argues the Chantels failed to raise this argument in the superior court, we construe the Chantels' argument as a challenge to the summary judgment on their negligence claim, which alleged in part that MEC "wrongfully disconnect[ed] the electricity" to their home.

¶13 A plaintiff must prove four elements to establish a claim for negligence: "(1) a duty requiring the defendant to conform to a certain standard of care; (2) a breach by the defendant of that standard; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) actual damages." *Gipson v. Kasey*, 214 Ariz. 141, 143, ¶ 9, 150 P.3d 228, 230 (2007).

---

[2] We also decline to address the various issues the Chantels raise for the first time in their reply brief, including their request that we issue an injunction requiring MEC to reinstate the Chantels' power service. *See Dawson v. Withycombe*, 216 Ariz. 84, 111, ¶ 91, 163 P.3d 1034, 1061 (App. 2007).

¶14 The Chantels do not identify any legal duty owed by MEC to provide them electrical service. "Whether the defendant owes the plaintiff a duty of care is a threshold issue; absent some duty, an action for negligence cannot be maintained." *Id.* at ¶ 11. The only authority the Chantels cite as imposing a duty upon MEC is Arizona Administrative Code ("A.A.C.") R14-2-208(A)(1), which provides that a "utility shall be responsible for the safe transmission and distribution of electricity until it passes the point of delivery to the customer." That regulation does not impose a duty on MEC to provide service that might give rise to a breach for disconnecting service. Rather, A.A.C. R14-2-208(A)(1) simply requires a utility to safely deliver electricity if it is providing such a service.

¶15 The Chantels cite *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1 (1978), and *Walton Electric Membership Corp. v. Snyder*, 508 S.E.2d 167 (Ga. 1998), for the proposition that a utility may not terminate service for nonpayment without affording a customer due process. We do not consider this argument because the Chantels did not raise it in the superior court. *See Best v. Edwards*, 217 Ariz. 497, 504, ¶ 28, 176 P.3d 695, 702 (App. 2008).

¶16 Moreover, MEC did not disconnect the Chantels' electrical service because of an unpaid bill. MEC offered undisputed evidence in support of its motion for summary

judgment that it disconnected the Chantels' service because the county directed MEC to do so because of safety concerns caused by the structure the Chantels had built directly beneath the electrical lines. *See Tucker v. Hinds County*, 558 So. 2d 869, 875-76 (Miss. 1990) (utility company properly may shut off customer's power when acting pursuant to directive from county official). Additionally, MEC provided the Chantels with more than adequate notice of the pending shut-off. Pursuant to A.A.C. R14-2-211(B)(1)(a), a utility may disconnect service without notice when there is "an obvious hazard to the safety or health of the consumer or the general population," and MEC provided the Chantels both written and personal notice prior to de-energizing the lines.

¶17 We therefore affirm the grant of summary judgment on the Chantels' negligence claim.

C. Recovery of Rent for MEC's Use and Occupancy of the Chantels' Property.

¶18 The Chantels also contend they are entitled to rent from MEC pursuant to A.R.S. § 12-1271(A)(2) (West 2013) because they did not grant MEC an easement allowing MEC's electrical lines over their property.

¶19 MEC argues the Chantels' withdrawal of their claims for quiet title and ejectment deprives this court of jurisdiction to address the claim for rent. *See Osuna v. Wal-*

Mart Stores, Inc., 214 Ariz. 286, 289, ¶ 9, 151 P.3d 1267, 1270 (App. 2007) ("Generally, an order granting a voluntary dismissal without prejudice to its being refiled is not an appealable, final judgment." (quotation omitted)). In the "recovery of rents" count of their complaint, however, the Chantels alleged they were entitled under A.R.S. § 12-1271 to the "rents or the fair and reasonable satisfaction for MEC's unauthorized use and possession of the Property."

¶20 In their application for membership to MEC, the Chantels agreed to grant MEC "easements of right of way across [their] property, for construction, use and operation of power lines necessary for the servicing of members in this area." On appeal, the Chantels point to no evidence that would show why this easement grant was not effective. Moreover, the superior court did not abuse its discretion in declining to consider additional arguments the Chantels made for the first time in their motion for reconsideration of the entry of summary judgment against them on this claim.

¶21 Accordingly, we affirm the grant of summary judgment on the Chantels' claim for rent.

D. Attorney's Fees.

¶22 Finally, the Chantels contend the superior court erred in awarding MEC its attorney's fees pursuant to A.R.S. § 12-341.01(A) because their claims did not arise out of contract.

In the superior court, however, the Chantels took the contrary position, and in fact described their claims concerning the placement of power lines and their entitlement to service as arising out of their contract with MEC. The Chantels also failed to argue in the superior court that § 12-341.01(A) did not apply to fees incurred in defending any claims in the litigation that did not arise out of contract. Neither did the Chantels object to the reasonableness of the fees MEC sought; they merely argued they "should not be punished for exercising their right to pursue a claim." The failure to challenge the reasonableness of a fee establishes its reasonableness. *See Boltz & Odegaard v. Hohn*, 148 Ariz. 361, 366, 714 P.2d 854, 859 (App. 1985); *see also United States v. Globe Corp.*, 113 Ariz. 44, 51, 546 P.2d 11, 18 (1976) (because the appellant "did not object to the award of costs and attorneys' fees in the court below, the asserted error will not be considered in this Court").[3]

CONCLUSION

¶23 We affirm the superior court's grant of summary judgment in favor of MEC on all counts in the Chantels' complaint and on MEC's counterclaim. We grant MEC's request for

[3] Because we conclude the superior court did not err in awarding fees to MEC as the successful party pursuant to A.R.S. § 12-341.01(A), we need not address the court's alternate ruling imposing fees pursuant to A.R.S. § 12-349.

costs and reasonable attorney's fees on appeal pursuant to A.R.S. § 12-341.01(A), upon its compliance with Arizona Rule of Civil Appellate Procedure 21.

/s/
DIANE M. JOHNSEN, Judge

CONCURRING:

/s/
SAMUEL A. THUMMA, Presiding Judge

/s/
MICHAEL J. BROWN, Judge

Exhibit 11

Court of Appeals of Virginia,
Lexington.
ADVANCE AUTO AND INDEMNITY INSURANCE COMPANY OF NORTH AMERICA
v.
Brenda Lee CRAFT.

Record No. 2049–13–3.
June 24, 2014.

Background: Claimant sought workers' compensation benefits for a work-related injury to her cervical and thoracic spine. The Workers' Compensation Commission found claimant's injury to be work-related and that medical treatment of her spinal injuries was necessary. Employer appealed.

Holdings: The Court of Appeals, Lexington Chafin, J., held that:
(1) claimant's claim concerning work-related injuries to her cervical and thoracic spine was not barred by the principles of res judicata;
(2) the two-year period for claimant to file her claim for workers' compensation benefits began to run on the date of her work-related accident in which she sustained injuries to her cervical and thoracic spine;
(3) sufficient credible medical evidence existed to support the Commission's finding that claimant sustained an injury to her cervical and thoracic spine in a work accident;
(4) claimant was not required to prove a change in her condition since the entry of an award order entered pursuant to an award agreement she had entered into with employer; and
(5) sufficient evidence existed to support the Commission's finding that claimant's spinal injuries required further medical treatment.

Affirmed.

West Headnotes

[1] Workers' Compensation 413 ⚷1935

413 Workers' Compensation
413XVI Proceedings to Secure Compensation
413XVI(T) Review by Court
413XVI(T)12 Scope and Extent of Review in General
413k1935 k. Presumptions and burden of showing error. Most Cited Cases

On appeal of a decision of the Workers' Compensation Commission, the appellate court views the evidence in the light most favorable to the prevailing party below.

[2] Workers' Compensation 413 ⚷1135

413 Workers' Compensation
413XV Agreements as to Compensation; Compromise, Settlement, and Release
413XV(B) Construction, Operation, and Enforcement
413k1134 Operation and Effect as to Particular Subject-Matters
413k1135 k. In general. Most Cited Cases

Workers' compensation claimant's claim concerning work-related injuries to her cervical and thoracic spine was not barred by the principles of res judicata, even though she had previously entered into an award agreement that did not include her spinal injuries which was approved by the Workers' Compensation Commission; claimant had not yet filed a claim with the Commission when she entered into the award agreement with the employer, and thus, there

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was no contested matter before the Commission when the parties entered into the award agreement, and claimant had not presented her case to the Commission for adjudication before it entered the final order. West's V.C.A. § 65.2–701(C).

[3] Appeal and Error 30 ⚷893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In general. Most Cited Cases

The determination of res judicata is a question of law and is reviewed de novo.

[4] Workers' Compensation 413 ⚷52

413 Workers' Compensation
413I Nature and Grounds of Employer's Liability
413k44 Construction and Operation of Statutes in General
413k52 k. Construction in favor of employee or beneficiary. Most Cited Cases

Workers' Compensation 413 ⚷1939.1

413 Workers' Compensation
413XVI Proceedings to Secure Compensation
413XVI(T) Review by Court
413XVI(T)12A Questions of Law or Fact, Findings, and Verdict
413k1939 Review of Decision of Department, Commission, Board, Officer, or Arbitrator
413k1939.1 k. In general; questions of law or fact. Most Cited Cases

While the Court of Appeals reviews questions of law de novo, it construes the Workers' Compensation Act liberally for the benefit of employees to effectuate its remedial purpose of making injured workers whole. West's V.C.A. § 65.2–100 et seq.

[5] Administrative Law and Procedure 15A ⚷438(15)

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules, Regulations, and Other Policymaking
15Ak428 Administrative Construction of Statutes
15Ak438 Particular Statutes and Contexts
15Ak438(15) k. Labor, employment, and public officials. Most Cited Cases

Workers' Compensation 413 ⚷1910

413 Workers' Compensation
413XVI Proceedings to Secure Compensation
413XVI(T) Review by Court
413XVI(T)12 Scope and Extent of Review in General
413k1910 k. In general. Most Cited Cases

The Court of Appeals gives great weight to the Workers' Compensation Commission's construction of the Workers Compensation Act. West's V.C.A. § 65.2–100 et seq.

[6] Judgment 228 ⚷540

228 Judgment
228XIII Merger and Bar of Causes of Action and Defenses
228XIII(A) Judgments Operative as Bar

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228k540 k. Nature and requisites of former recovery as bar in general. Most Cited Cases

Judgment 228 ⚷634

228 Judgment
228XIV Conclusiveness of Adjudication
228XIV(A) Judgments Conclusive in General
228k634 k. Nature and requisites of former adjudication as ground of estoppel in general. Most Cited Cases

The principles of res judicata can be comprised of two distinct concepts: issue preclusion and claim preclusion.

[7] Judgment 228 ⚷584

228 Judgment
228XIII Merger and Bar of Causes of Action and Defenses
228XIII(B) Causes of Action and Defenses Merged, Barred, or Concluded
228k584 k. Nature and elements of bar or estoppel by former adjudication. Most Cited Cases

Judgment 228 ⚷713(1)

228 Judgment
228XIV Conclusiveness of Adjudication
228XIV(C) Matters Concluded
228k713 Scope and Extent of Estoppel in General
228k713(1) k. In general. Most Cited Cases

Judgment 228 ⚷713(2)

228 Judgment
228XIV Conclusiveness of Adjudication
228XIV(C) Matters Concluded
228k713 Scope and Extent of Estoppel in General
228k713(2) k. Matters which might have been litigated. Most Cited Cases

"Issue preclusion" bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim; in contrast, "claim preclusion" forecloses litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit.

[8] Judgment 228 ⚷584

228 Judgment
228XIII Merger and Bar of Causes of Action and Defenses
228XIII(B) Causes of Action and Defenses Merged, Barred, or Concluded
228k584 k. Nature and elements of bar or estoppel by former adjudication. Most Cited Cases

Claim preclusion treats unasserted claims as being subsumed into the disposition of related, previously adjudicated, claims arising out of the same cause of action; thus, the effect of a final decree is not only to conclude the parties as to every question actually raised and decided, but as to every claim which properly belonged to the subject of litigation and which the parties, by exercise of reasonable diligence, might have raised at the time.

[9] Workers' Compensation 413 ⚷1789

413 Workers' Compensation
413XVI Proceedings to Secure Compensation
413XVI(Q) Award or Judgment
413k1788 Conclusiveness and Effect
413k1789 k. In general. Most Cited Cases

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The principles of res judicata apply to workers' compensation cases.

[10] Workers' Compensation 413 ⚷1130

413 Workers' Compensation
413XV Agreements as to Compensation; Compromise, Settlement, and Release
413XV(B) Construction, Operation, and Enforcement
413k1129 Operation and Effect in General
413k1130 k. In general. Most Cited Cases

Workers' Compensation 413 ⚷1789

413 Workers' Compensation
413XVI Proceedings to Secure Compensation
413XVI(Q) Award or Judgment
413k1788 Conclusiveness and Effect
413k1789 k. In general. Most Cited Cases

The relationship of the Workers' Compensation Commission to an award is that of a court to a judgment, and thus, a final award from the Commission bars relitigation of the same cause of action, or any part thereof which could have been litigated between the same parties and their privies; likewise, an order by the Commission awarding benefits to a claimant by agreement of the parties is a final determination of the matters which were actually, or might have been, litigated in that suit.

[11] Workers' Compensation 413 ⚷1115

413 Workers' Compensation
413XV Agreements as to Compensation; Compromise, Settlement, and Release
413XV(A) Requisites and Validity
413k1115 k. In general. Most Cited Cases

Blanket releases are not favored by the Workers' Compensation Commission and are reviewed with a high degree of scrutiny.

[12] Workers' Compensation 413 ⚷1199.8

413 Workers' Compensation
413XVI Proceedings to Secure Compensation
413XVI(D) Time for Institution of Proceedings, and Limitations
413XVI(D)2 Computation, Tolling, and Accrual
413k1199.8 k. Date of accident. Most Cited Cases

The two-year period for claimant to file her claim for workers' compensation benefits began to run on the date of her work-related accident in which she sustained injuries to her cervical and thoracic spine. West's V.C.A. § 65.2–601.

[13] Workers' Compensation 413 ⚷1531.4

413 Workers' Compensation
413XVI Proceedings to Secure Compensation
413XVI(N) Weight and Sufficiency of Evidence
413XVI(N)7 Accident or Injury and Consequences Thereof
413k1531.1 Particular Injuries and Consequences
413k1531.4 k. Back injuries. Most Cited Cases

Workers' Compensation 413 ⚷1531.5

413 Workers' Compensation
413XVI Proceedings to Secure Compensation
413XVI(N) Weight and Sufficiency of Evi-

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dence
413XVI(N)7 Accident or Injury and Consequences Thereof
413k1531.1 Particular Injuries and Consequences
413k1531.5 k. Head, neck, and shoulder injuries. Most Cited Cases

Sufficient credible medical evidence existed to support the Workers' Compensation Commission's finding that claimant sustained an injury to her cervical and thoracic spine in a work accident; claimant was injured at work when she removed a set of rotors from a shelf above her head, she visited her family practitioner the next day complaining of neck and shoulder pain, she underwent an MRI of her cervical spine that revealed a disc extrusion and nerve root compression, and although she had a history of problems with her cervical spine, those issues had completely resolved according to her medical records.

[14] Workers' Compensation 413 ⚷1990

413 Workers' Compensation
413XVII Increase, Diminution, Termination, Reinstatement, or Additional Award of Disability Compensation
413XVII(A) Awards Generally
413XVII(A)1 Adjustment or Termination of Compensation
413k1990 k. In general. Most Cited Cases

Workers' compensation claimant who sought benefits for cervical and thoracic spinal injuries resulting from an accident at work was not required to prove a change in her condition since the entry of an award order entered pursuant to an award agreement she had entered into with employer that did not mention her spinal injuries, where claimant's claim regarding her spinal injuries was filed as an initial claim. West's V.C.A. § 65.2–601.

[15] Workers' Compensation 413 ⚷1939.4(1)

413 Workers' Compensation
413XVI Proceedings to Secure Compensation
413XVI(T) Review by Court
413XVI(T)12A Questions of Law or Fact, Findings, and Verdict
413k1939 Review of Decision of Department, Commission, Board, Officer, or Arbitrator
413k1939.4 Sufficiency of Evidence in Support
413k1939.4(1) k. In general. Most Cited Cases

Decisions of the Workers' Compensation Commission as to questions of fact, if supported by credible evidence, are conclusive and binding on the Court of Appeals.

[16] Workers' Compensation 413 ⚷1939.4(1)

413 Workers' Compensation
413XVI Proceedings to Secure Compensation
413XVI(T) Review by Court
413XVI(T)12A Questions of Law or Fact, Findings, and Verdict
413k1939 Review of Decision of Department, Commission, Board, Officer, or Arbitrator
413k1939.4 Sufficiency of Evidence in Support
413k1939.4(1) k. In general. Most Cited Cases

Workers' Compensation 413 ⚷1939.7

413 Workers' Compensation
413XVI Proceedings to Secure Compensation
413XVI(T) Review by Court
413XVI(T)12A Questions of Law or Fact, Findings, and Verdict
413k1939 Review of Decision of De-

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partment, Commission, Board, Officer, or Arbitrator
413k1939.7 k. Inferences or conclusions from facts proved. Most Cited Cases

If there is evidence, or reasonable inferences can be drawn from the evidence, to support the Workers' Compensation Commission's findings, they will not be disturbed on review, even though there is evidence in the record to support a contrary finding.

[17] Workers' Compensation 413 ⚷1939.11(7)

413 Workers' Compensation
413XVI Proceedings to Secure Compensation
413XVI(T) Review by Court
413XVI(T)12A Questions of Law or Fact, Findings, and Verdict
413k1939 Review of Decision of Department, Commission, Board, Officer, or Arbitrator
413k1939.11 Particular Findings
413k1939.11(7) k. Injuries arising out of and in course of employment. Most Cited Cases

The determination of causation in a workers' compensation proceeding is a factual finding that will be upheld on appeal if credible evidence supports the finding.

[18] Workers' Compensation 413 ⚷1939.8

413 Workers' Compensation
413XVI Proceedings to Secure Compensation
413XVI(T) Review by Court
413XVI(T)12A Questions of Law or Fact, Findings, and Verdict
413k1939 Review of Decision of Department, Commission, Board, Officer, or Arbitrator
413k1939.8 k. Expert testimony. Most Cited Cases

A question raised by conflicting expert medical opinions in a workers' compensation case is one of fact binding upon the Court of Appeals on appeal.

[19] Workers' Compensation 413 ⚷1418

413 Workers' Compensation
413XVI Proceedings to Secure Compensation
413XVI(N) Weight and Sufficiency of Evidence
413XVI(N)1 In General
413k1415 Opinion Evidence
413k1418 k. Credibility and conflict with other evidence. Most Cited Cases

When medical expert opinions conflict, the Workers' Compensation Commission must determine the probative weight to be accorded such evidence.

[20] Workers' Compensation 413 ⚷1939.8

413 Workers' Compensation
413XVI Proceedings to Secure Compensation
413XVI(T) Review by Court
413XVI(T)12A Questions of Law or Fact, Findings, and Verdict
413k1939 Review of Decision of Department, Commission, Board, Officer, or Arbitrator
413k1939.8 k. Expert testimony. Most Cited Cases

If the Workers' Compensation Commission's resolution of conflicting expert opinions is based on credible evidence, then its decision is binding on the Court of Appeals.

[21] Workers' Compensation 413 ⚷998.6(3)

413 Workers' Compensation
413IX Amount and Period of Compensation
413IX(H) Medical or Other Expenses
413IX(H)2 Proceedings for Allowance or Recovery

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413k998.1 Evidence
413k998.6 Weight and Sufficiency
413k998.6(3) k. Extent of right; amount. Most Cited Cases

Sufficient evidence existed to support the Workers' Compensation Commission's finding that claimant's spinal injuries required further medical treatment; while one physician opined that claimant did not require further medical treatment, his opinion only addressed medical treatment within his specialty of osteopathy, at the time of that physician's report, claimant still experienced pain in her cervical region and had discussed the possibility of surgery with other physicians, and other physicians diagnosed claimant with work-related radiculopathy and somatic dysfunction which implied claimant would require further medical treatment in the future.

[22] Workers' Compensation 413 ⚷999

413 Workers' Compensation
413IX Amount and Period of Compensation
413IX(H) Medical or Other Expenses
413IX(H)2 Proceedings for Allowance or Recovery
413k999 k. Hearing, findings, and original and supplemental awards. Most Cited Cases

Workers' Compensation 413 ⚷1001

413 Workers' Compensation
413IX Amount and Period of Compensation
413IX(H) Medical or Other Expenses
413IX(H)2 Proceedings for Allowance or Recovery
413k1001 k. Review. Most Cited Cases

Whether disputed medical treatment in a workers' compensation case is compensable presents a mixed question of law and fact, which the Court of Appeals reviews de novo.

[23] Workers' Compensation 413 ⚷966

413 Workers' Compensation
413IX Amount and Period of Compensation
413IX(H) Medical or Other Expenses
413IX(H)1 In General
413k965 Extent of Right
413k966 k. In general. Most Cited Cases

The services which an employer has to furnish under the Workers' Compensation Act are necessary services incident to the treatment of an injury sustained in a compensable accident. West's V.C.A. § 65.2–100 et seq.

[24] Workers' Compensation 413 ⚷966

413 Workers' Compensation
413IX Amount and Period of Compensation
413IX(H) Medical or Other Expenses
413IX(H)1 In General
413k965 Extent of Right
413k966 k. In general. Most Cited Cases

Workers' Compensation 413 ⚷998.6(1)

413 Workers' Compensation
413IX Amount and Period of Compensation
413IX(H) Medical or Other Expenses
413IX(H)2 Proceedings for Allowance or Recovery
413k998.1 Evidence
413k998.6 Weight and Sufficiency
413k998.6(1) k. In general. Most Cited Cases

Subject to the Workers' Compensation Commission's review, the employer is responsible for medical

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attention if (1) a causal relationship exists between the workplace accident and the treatment, and (2) the attending physician deems it necessary; the claimant, however, bears the burden of proving by a preponderance of the evidence that disputed treatment was medically necessary.

***20** J. Derek Turrietta (W. Russell Himes; Stackhouse, Nexsen & Turrietta, Norfolk, on briefs), for appellant.

Kerry S. Hay, Clintwood, for appellee.

Present: Judges HUMPHREYS, PETTY and CHAFIN.

CHAFIN, Judge.

***507** Advance Auto and Indemnity Insurance Company of North America (referred to collectively as "the employer") appeal a decision of the Virginia Workers' Compensation Commission ("the commission") awarding Brenda Lee Craft ("Craft") benefits for cervical and thoracic spinal injuries resulting from an accident at work. On appeal, the employer argues that the commission erred by concluding that Craft's claim for benefits was not barred by the principles of res judicata outlined in ***508** *Starbucks Coffee Co. v. Shy,* 61 Va.App. 229, 734 S.E.2d 683 (2012). The employer also contends that the commission erred in finding that Craft injured her spine through her work-related accident and that medical treatment of Craft's spinal injuries was necessary. For the reasons that follow, we disagree with the employer's arguments and affirm the commission's decision.

I. BACKGROUND

[1] On appeal, this Court views the evidence in the light most favorable to Craft, the prevailing party below. *See R.G. Moore Bldg. Corp. v. Mullins,* 10 Va.App. 211, 212, 390 S.E.2d 788, 788 (1990). So viewed, the evidence established that Craft sustained an injury at work on September 13, 2009, while removing a set of rotors from a shelf above her head. When she lifted the rotors from the shelf, Craft felt a "pull" in her left shoulder and left scapular region. Craft notified the employer of her injury and sought medical treatment.

A. CRAFT'S MEDICAL TREATMENT AND DIAGNOSIS

Craft visited her family practitioner, Dr. Mario Hernandez, on the day after the accident for treatment concerning pain in her neck. She returned to Dr. Hernandez's office two days later complaining of neck pain radiating into her left shoulder and numbness and tingling in her left hand. Dr. Hernandez noted that Craft had previously undergone a cervical fusion of the C5–7 vertebrae, and referred her for an MRI of her cervical spine and a neurosurgery evaluation. On September 18, 2009, Craft underwent an MRI of her cervical spine. Dr. Kelly Cassedy compared the results of this MRI to a previous CT scan post myelogram from February 25, 2005. The MRI showed a new left lateral recess disc extrusion at C7–T1 and left C8 nerve root compression.

On September 21, 2009, Craft was treated by April Stidham, family nurse practitioner ***21** for Dr. Souhail Shamiyeh. During this visit, Craft was diagnosed with a work-related neck ***509** injury. The notes from this visit discussed Craft's September 13, 2009 work accident and her subsequent MRI revealing a new disc extrusion at C7–T1. Additionally, Craft was treated at Stone Mountain Health Services on October 9, 2009. The chart notes from that visit discussed her work accident and the new left lateral recess disc extrusion from C6–T1 depicted by the most recent MRI of her cervical spine.

Craft was treated by Dr. Ken Smith, neurosurgeon, on October 19, 2009. Dr. Smith examined Craft and noted her history of cervical difficulties and her prior cervical fusion. He noted that after the prior fusion surgery Craft had "progressed quite well with complete resolution of the neck and upper extremity

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pain and resumed her usual activities without difficulty." Dr. Smith linked the September 13, 2009 work accident with the development of neck and left trapezial and scapular pain, and noted Craft's difficulty with the range of motion in her cervical spine and her hand numbness. Dr. Smith's examination revealed moderate cervical paraspinous muscle contractions and tenderness of the cervical spine. He diagnosed Craft with cervical herniated nucleus pulposus without myelopathy, cervical spondylosis without myelopathy, cervical degenerative disc disease, cervical radiculopathy, and neck pain. Dr. Smith recommended structured physical therapy and medication management.

Craft returned to Dr. Smith on November 30, 2009, complaining of persistent cervical and left upper extremity pain. Dr. Smith reviewed the cervical MRI from September 18, 2009, and noted the disc extrusion at C7–T1. Dr. Smith recommended continuing physical therapy and referred Craft to Dr. William M. Platt, physiatrist, for a pain clinic evaluation for cervical epidural steroid injections and treatment of cervical pain.

Dr. Platt first examined Craft on December 14, 2009. He recorded the history of her work accident and the C7–T1 disc protrusion. Dr. Platt assessed an acute work-related neck injury with left upper extremity cervical brachial radiculitis with C7–T1 disc protrusion. He also diagnosed fibromyalgia, ***510** cervical degenerative disc disease, cervical brachial radiculitis, and cervical post-laminectomy syndrome.

On February 1, 2010, Craft was evaluated by Dr. Joshua H. Dalton, osteopath. Craft reported left shoulder pain following the September 13, 2009 work accident that radiated into her upper arm and neck, and weakness and numbness in those areas. On examination, Craft's strength in her upper extremities was 5/5. Dr. Dalton reviewed Craft's medical records and composed a letter documenting his opinions. Although Dr. Dalton diagnosed shoulder pain, he concluded that Craft's normal range of motion, reflexes, strength, and lack of muscle atrophy did not correlate with a nerve root compression at C8. Dr. Dalton opined that the only information in the record supporting a causal relationship between the accident and the alleged injuries was the September 18, 2009 MRI showing a new left lateral recess disc extrusion at C7–T1 with C8 nerve root compression. While Dr. Dalton admitted the MRI indicated "that some change had occurred" between the September 18, 2009 MRI and the February 25, 2005 CT scan, he stated that the MRI failed to indicate what caused this change. Dr. Dalton further noted that Craft's medical history contained pre-existing conditions, including a motor vehicle accident, a cervical fusion, and fibromyalgia, which could have impacted her current condition.

Craft underwent another CT scan post myelogram on July 27, 2010. This scan revealed that the left lateral foraminal herniation at C7–T1 had diminished in size and that the herniation abutted but did not definitively compress the left C8 nerve root. On October 11, 2010, Dr. Platt noted that Craft had undergone a series of cervical epidural injections and was using a TENS unit to control her pain and that she wanted to avoid another cervical fusion. Dr. Platt opined that Craft was nearing maximum medical improvement.

Craft was treated by Dr. David A. Wiles, neurosurgeon, on May 20, 2010, on referral from Dr. Shamiyeh. Dr. Wiles diagnosed C8 radiculopathy on the left and a C7–T1 ***22**herniated disc on the left. He opined that "[w]ith respect to causality, if ***511** [Craft's] history is reasonably correct, one would have to assume that the work-related injury from 9–13–09 was a direct cause of the herniated disc since [she] was asymptomatic prior to this injury."

Dr. Dalton examined Craft again on May 5, 2011. He reported that her condition had worsened due to objective texture changes, marked inflammatory changes, and a restricted range of motion in the cervicothoracic region, with specific somatic dysfunction at C3 and T1. He opined that Craft had work-related

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radiculopathy and somatic dysfunction and agreed with Dr. Platt's work-related restrictions. Dr. Dalton did not recommend further medical treatment in his specialty and opined that Craft had reached maximum medical improvement with the exception of surgical intervention.

By letter dated December 6, 2011, Dr. Shamiyeh indicated that he had reviewed the September 18, 2009 MRI and Dr. Smith's records through August 9, 2010. Dr. Shamiyeh agreed that Craft's work accident "resulted in a mechanical change" to her neck "causing the disc herniation at C7–T1." Further, he opined that her disability was, at least in part, caused by this disc herniation.

B. PROCEDURAL HISTORY OF THE CASE

On November 9, 2009, Craft entered into an award agreement with the employer before she filed a formal claim for benefits with the commission.[FN1] This agreement listed her ***512** injuries as "left shoulder possible C8 nerve root compression," and provided for the payment of temporary total disability benefits. The agreement was filed with the commission for its approval on November 13, 2009, and the commission issued an award order on December 4, 2009 accepting the agreement and awarding lifetime medical benefits to Craft. Like the award agreement, the award order listed Craft's "left shoulder possible C8 nerve root compression" as the "body parts injured during [her] workplace injury of September 13, 2009." Although the award order informed Craft of her right to appeal the commission's decision within twenty days, neither she nor the employer appealed the decision.

FN1. Craft filed her initial claim for benefits with the commission shortly after reaching this agreement. Although Craft endorsed this claim on November 2, 2009 (the same day that she endorsed the award agreement with the employer), the claim was not filed with the commission until January 5, 2010. Thus, Craft's initial claim for benefits was filed after she entered into the award agreement with the employer and after the terms of that agreement were incorporated into the commission's December 4, 2009 award order. Furthermore, this claim did not address Craft's spinal injuries at issue in the present case. While the claim referred to an "attach[ed] copy" to list the body parts that Craft injured in her work accident, the only document attached to this claim displayed copies of Craft's pay stubs from Advance Stores Co. and Lee County Schools, for whom Craft was employed as a contract bus driver.

On September 12, 2011, Craft filed a claim for benefits concerning her cervical and thoracic spinal injuries. Specifically, Craft requested to amend the "nature of [her] injury to include [the] cervical and thoracic spine" and requested temporary total disability benefits and lifetime medical benefits. Commissioner Dudley, who sat by designation under Code § 65.2–704(A), accepted the parties' request to have the matter decided on the record. Both parties submitted written statements concerning the matter. The employer defended the claim by arguing that the commission lacked jurisdiction to hear Craft's claim. The employer argued that the December 4, 2009 award order was a final order in the case and that Craft waived her right to file a claim based on additional injuries not included in that order when she failed to timely appeal the commission's decision or otherwise except those injuries from the order. The employer also argued that Craft failed to prove a change in her condition or that her spinal injuries were caused by her work accident. Additionally, the employer argued that further medical treatment of Craft's spinal injuries was unnecessary.

On September 19, 2012, Commissioner Dudley determined that (1) the commission possessed the jurisdictional authority to hear Craft's claim regarding the injuries to her cervical and thoracic spine; (2) Craft

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suffered injuries to her cervical and thoracic ***23** spine in the September 13, 2009 work accident; and (3) medical treatment was necessary for Craft's cervical and ***513** thoracic spinal injuries. In addressing the employer's argument that the commission lacked jurisdiction to hear Craft's claim, Commissioner Dudley placed emphasis on the fact that Craft entered into the initial agreement with the employer before she actually filed a claim with the commission. Commissioner Dudley held that as Craft's claim was initiated by agreement of the parties before she filed a claim with the commission, "there was nothing for her to waive, abandon, or merge with the November 9, 2009 agreement" or the December 4, 2009 award order.

The employer requested a review of Commissioner Dudley's decision by the full commission. On September 23, 2013, the commission unanimously affirmed the decision.[FN2] Like Commissioner Dudley, the full commission placed emphasis on the fact that Craft had not filed a claim before she entered into the agreement. The commission reasoned that "[t]he parties did not fail to mention or address a previously filed claim ... [because] there was no claim." The commission held that Craft "did not waive her rights by signing the agreement and the doctrine of res judicata does not preclude a claim to add additional injuries sustained as a result of a compensable accident." The commission addressed several policy considerations supporting this conclusion, including the efficient administration of the Virginia Workers' Compensation Act, the encouragement of the voluntary settlement of claims, and the protection of injured employees that may lack bargaining power at the time of the initial agreement due to their incapacity to work and strained economic circumstances. The commission also held that Craft's spinal injuries resulted from her September 13, 2009 work accident and noted that the mechanism of her injury was consistent with a cervical injury. The commission further held that the employer's argument concerning the necessity of additional medical treatment of Craft's spinal injuries was without merit. The employer appealed the commission's decision to this Court.

FN2. Commissioner Dudley retired before the full commission reviewed this matter.

***514** II. ANALYSIS

Upon reviewing the record and the authority addressing the issues presented on appeal, we find that the employer's assignments of error are without merit. Craft's claim for benefits resulting from her cervical and thoracic spinal injuries was not barred by the principles of res judicata or the statute of limitations. Further, the commission's decision that Craft's spinal injuries were caused by her September 13, 2009 work accident was supported by credible medical evidence. Additionally, credible evidence supported the commission's decision that Craft's spinal injuries required further medical treatment.

A. CRAFT'S CLAIM CONCERNING HER SPINAL INJURIES WAS NOT BARRED BY THE PRINCIPLES OF RES JUDICATA

[2] On appeal, the employer contends that the December 4, 2009 award order was a final order barring Craft's claim for further benefits. The employer argues that Craft waived her right to file other claims based on injuries not included in the award order when she failed to timely appeal the commission's decision or otherwise except any additional injuries from the order. The employer claims that the principles of res judicata prohibit the commission from considering Craft's claim for her spinal injuries.

[3][4][5] "The determination of res judicata is a question of law and is reviewed *de novo.*" *Pruden v. Plasser Am. Corp.,* 45 Va.App. 566, 573, 612 S.E.2d 738, 742 (2005). While we review questions of law *de novo,* we construe the Workers' Compensation Act liberally for the benefit of employees to effectuate its remedial purpose of making injured workers whole. *See Fairfax Cnty. Sch. Bd. v. Humphrey,* 41 Va.App. 147, 154–55, 583 S.E.2d 65, 68 (2003). We also "give

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great weight to the commission's construction of the Act." *Id.* at 155, 583 S.E.2d at 68–69 (citation omitted).

***24** [6][7][8] "[R]es judicata is a judicially created doctrine resting upon public policy considerations which favor certainty in ***515** the establishment of legal relations, demand an end to litigation, and seek to prevent harassment of parties." *K & L Trucking Co. v. Thurber,* 1 Va.App. 213, 219, 337 S.E.2d 299, 302 (1985).

> [T]he principles of res judicata can be comprised of two distinct concepts: "issue preclusion" and "claim preclusion." *See Brock v. Voith Siemens Hydro Power Generation,* 59 Va.App. 39, 45, 716 S.E.2d 485, 487 (2011). "Issue preclusion bars 'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim." *Id.* (quoting *New Hampshire v. Maine,* 532 U.S. 742, 748–49 [121 S.Ct. 1808, 1814, 149 L.Ed.2d 968] (2001)). In contrast, claim preclusion " 'foreclos[es] litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit.' " *Nottingham v. Weld,* 237 Va. 416, 419 n. 2, 377 S.E.2d 621, 622 n. 2 (1989) (quoting *Migra v. Warren City School Dist. Bd. of Ed.,* 465 U.S. 75, 77 n. 1 [104 S.Ct. 892, 894 n.1, 79 L.Ed.2d 56] (1984)).

Shy, 61 Va.App. at 241, 734 S.E.2d at 689. "[C]laim preclusion treats unasserted claims as being subsumed into the disposition of related, previously adjudicated, claims arising out of the same cause of action." *Brock,* 59 Va.App. at 45, 716 S.E.2d at 488 (citing *Restatement (Second) of Judgments* §§ 18, 19 (1982)). Thus, the " 'effect of a final decree is not only to conclude the parties as to every question actually raised and decided, but as to every claim which properly belonged to the subject of litigation and which the parties, by exercise of reasonable diligence, might have raised at the time.' " *Id.* at 46, 716 S.E.2d at 488 (quoting *Smith v. Holland,* 124 Va. 663, 666, 98 S.E. 676, 677 (1919)).[FN3]

> FN3. Claim preclusion has been referenced by this Court as a "could-have-litigated-should-have-litigated principle." *See Brock,* 59 Va.App. at 46, 716 S.E.2d at 488.

[9][10] The principles of res judicata apply to workers' compensation cases. *Id.* at 47, 716 S.E.2d at 488. " '[T]he ***516** relationship of the [c]omission to an award is that of a court to a judgment....' " *Id.* (quoting *Thurber,* 1 Va.App. at 219, 337 S.E.2d at 302). Thus, "a final award [from the commission] 'bars relitigation of the same cause of action, *or any part thereof which could have been litigated* between the same parties and their privies.' " *Id.* (emphasis in original). Likewise, "[a]n order by the commission awarding benefits to a claimant by agreement of the parties is a final determination of the matters which were actually, *or might have been,* litigated in that suit." *Shy,* 61 Va.App. at 240, 734 S.E.2d at 689 (emphasis added).

This Court addressed the doctrine of res judicata in the context of workers' compensation cases in *Brock* and *Shy.* In *Brock,* an employee alleged several injuries in his initial claim but failed to raise all of those injuries at his evidentiary hearing before the commission. *See Brock,* 59 Va.App. at 42, 716 S.E.2d at 486. The commission awarded the employee benefits for the injuries he actually raised at the hearing and dismissed his claim. *See id.* Four months later, the employee filed a new claim requesting benefits for the injuries he failed to previously address before the commission. *See id.* at 43, 716 S.E.2d at 486. The commission applied the doctrine of res judicata to bar the employee's new claim. *See id.* at 44, 716 S.E.2d at 487. This Court affirmed the commission's decision on appeal, and noted that the deputy commissioner presiding over the initial evidentiary hearing specifi-

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cally warned the employee of the necessity of addressing all of the issues raised by his claim. *See id.* at 49, 716 S.E.2d at 489–90. This Court held that "settled principles of res judicata ... [barred the employee] from litigating matters he neglected to raise at his earlier evidentiary hearing." *Id.* at 49, 716 S.E.2d at 490. *See also Thurber,* 1 Va.App. at 218, 337 S.E.2d at 301 (res judicata prevented employee from presenting evidence that he procured selective employment from which he was discharged when he had "ample opportunity" to present this evidence at an earlier hearing).

In *Shy,* an employee filed a claim for benefits after an unsuccessful attempt to return ***25** to work following a work-related***517** upper back injury. *See Shy,* 61 Va.App. at 234, 734 S.E.2d at 685–86. The parties entered into an award agreement concerning the employee's injury prior to her hearing before the commission. *See id.* at 234, 734 S.E.2d at 686. The commission approved the agreement and entered an award order reflecting its terms. *See id.* Several months later, the employer filed an application for a hearing before the commission requesting a termination of the employee's award on the ground that her attempted return to work constituted a change in her condition. *See id.* The commission held that the employer's request for review was barred by the award order under the principles of res judicata. *See id.* at 237–38, 734 S.E.2d at 687. The commission found that the employer had abandoned its claim to challenge the award based on the employee's attempted return to work because it was aware of this unsuccessful work attempt prior to the execution of the award agreement. *See id.* This Court affirmed the commission's decision, finding that the award order was a final judgment that barred further review of the employee's award under the claim preclusion component of res judicata. *See id.* at 242–43, 734 S.E.2d at 689 (citing *Brock,* 59 Va.App. at 46, 716 S.E.2d at 488).

The present case is distinguishable from *Brock* and *Shy* due to its procedural history. In contrast to the employee in *Shy,* Craft had not yet filed a claim with the commission when she entered into the award agreement with the employer. Thus, there was no "contested matter before the commission" when the parties entered into the award agreement. *See id.* at 239, 734 S.E.2d at 688. Moreover, Craft had not presented her case to the commission for adjudication before it entered the award order. Unlike the employee in *Brock,* Craft had not yet put all of her injuries at issue before the commission or had the opportunity to advance her claims by presenting evidence of her injuries at an evidentiary hearing. *See Brock,* 59 Va.App. at 42–43, 716 S.E.2d at 486. As Craft had not filed a claim with the commission at the time of the award agreement and the subsequent entry of the award order, there were no claims pending with the commission that could later be ***518** barred by the principles of res judicata. Craft had not yet put her spinal injuries at issue before the commission, and therefore she cannot be deemed to have abandoned or otherwise waived those claims.

[11] As noted by the commission, applying the principles of res judicata to bar Craft's claim would thwart several important public policy considerations relating to the Virginia Workers' Compensation Act. First, the Act "encourages the voluntary settlement of claims arising from compensable injuries." *Watts v. P & J Hauling, Inc.,* 41 Va.App. 278, 283, 584 S.E.2d 457, 460 (2003); *see also* Code § 65.2–701(C) (the Act encourages settlements between the parties). Interpreting the principles of res judicata in the manner encouraged by the employer would undermine this goal. If res judicata applied to voluntary agreements entered before employees actually filed claims, then employees would have to ensure that those agreements covered *all* of the potential injuries resulting from their work-related accidents. Voluntary agreements would essentially act as blanket releases concerning claims for unlisted injuries.[FN4] Employees would be barred by their pre-claim agreements from filing additional claims if other injuries were discov-

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ered at a later date. The increased diligence required by such an application of res judicata coupled with uncertain medical diagnoses and potentially latent injuries would discourage the voluntary settlement of claims in many cases. In turn, the efficient administration of the Act would be jeopardized as more claims would be fully litigated, even when the parties of the case were in agreement concerning some injuries involved in the claim.

FN4. Blanket releases are not favored by the commission and are reviewed with a high degree of scrutiny. *See Chism v. Norfolk (City of) Utilities,* No. 217–46–42 (Va. Workers' Comp. Comm'n March 3, 2005).

Furthermore, the employer's suggested application of the principles of res judicata could lead to inequitable settlements that only partially compensate injured workers for their injuries. Injured employees lacking ***26** economic bargaining power due to their inability to work and earn wages could be forced ***519** by their circumstances to agree to awards that only provide compensation for some of their work-related injuries. Without agreeing to an award, these employees would have to fully litigate their claims, and they could be denied medical care and lost wages throughout the course of this litigation. Under such circumstances, employees would be more likely to abandon compensation for some injuries in favor of partial awards yielding immediate benefits that may not be in their long-term best interest.[FN5] These employees would be barred from bringing claims for additional benefits based on their uncompensated injuries under the application of res judicata advocated by the employer. The principles of res judicata should not be applied in a way that facilitates such inequitable results.

FN5. The Supreme Court of Virginia has expressly addressed such a scenario in *John Driggs Co. v. Somers,* 228 Va. 729, 734–35, 324 S.E.2d 694, 697 (1985). Although we describe this hypothetical scenario to illustrate a potential inequitable outcome resulting from the employer's interpretation of the principles of res judicata, we note that the record does not contain any evidence of similar wrong-doing by the employer in this case.

We also note that Code § 65.2–701 requires the commission to approve award agreements only when they are in the best interests of the employee. *See* Code § 65.2–701(A). If res judicata bars employees from bringing claims for additional injuries not included in initial award agreements, the commission will have to review awards in cases where multiple injuries are likely with increased scrutiny to ensure that injured employees have not waived future claims and that the award is actually in their best interests. This need for increased scrutiny will place further administrative demands on the commission.

[12] We hold that the principles of res judicata do not bar Craft's claim for benefits based on her spinal injuries under the circumstances of this case. Code § 65.2–601 requires a claim for benefits to be filed with the commission within two years of an employee's work-related accident. *See* Code § 65.2–601. Since Craft filed her claim for benefits concerning her spinal injuries within two years of her accident, she timely filed her claim within the period mandated by the relevant statute of limitations. Accordingly, the claim was properly before the commission and it had jurisdiction to award Craft the requested benefits.

***520** B. CRAFT'S INJURIES WERE CAUSED BY HER SEPTEMBER 13, 2009 WORK ACCIDENT

[13][14] The employer argues that "the commission erred in finding that [Craft] sustained an injury to her thoracic and cervical spine in a work accident."

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The employer contends that Craft did not establish that the September 13, 2009 accident caused her spinal injuries.[FN6] We disagree. Credible medical evidence in the record supports the commission's decision that Craft's spinal injuries were caused by her work accident.

FN6. Initially, the employer frames its argument in the context of a review of an award based on a change in condition pursuant to Code § 65.2–708. The employer argues that Craft failed to establish a change in her physical condition that would justify a review of her award because her spinal injuries existed when the commission entered the initial award order. Craft's claim regarding her spinal injuries, however, was filed as an initial claim pursuant to Code § 65.2–601 rather than as a change in condition. Thus, Craft was not required to prove a change in her condition since the entry of the award order and the employer's reference to review based on a change in condition outlined in Code § 65.2–708 is misdirected.

[15][16][17] "Decisions of the commission as to questions of fact, if supported by credible evidence, are conclusive and binding on this Court." *Shy,* 61 Va.App. at 238, 734 S.E.2d at 688 (quoting *Manassas Ice & Fuel Co. v. Farrar,* 13 Va.App. 227, 229, 409 S.E.2d 824, 826 (1991)). Further, as previously stated, this Court views the evidence in the light most favorable to Craft as the prevailing party before the commission. *See R.G. Moore Bldg. Corp.,* 10 Va.App. at 212, 390 S.E.2d at 788. " 'If there is evidence, or reasonable inferences can be drawn from the evidence, to support the commission's findings, they will not be disturbed on review, even though there is evidence in the record to support a contrary finding.' " *Amelia Sand Co. v. Ellyson,* 43 Va.App. 406, 408, 598 S.E.2d 750, 751 (2004) (quoting *Morris v. Badger Powhatan/Figgie Int'l, Inc.,* 3 Va.App. 276, 279, 348 S.E.2d 876, 877 (1986)). "The determination of causation is a factual ***27** finding that will be upheld on appeal if credible evidence supports the finding." ***521** *Imperial Trash Serv. v. Dotson,* 18 Va.App. 600, 603, 445 S.E.2d 716, 718 (1994).

In the present case, the evidence established that Craft was injured at work on September 13, 2009 when she removed a set of rotors from a shelf above her head.[FN7] Craft visited her family practitioner the next day complaining of neck and shoulder pain. On September 18, 2009, Craft underwent an MRI of her cervical spine that revealed a new left lateral recess disc extrusion at C7–T1 and left C8 nerve root compression. Although Craft had a history of problems with her cervical spine that included a prior cervical fusion, these issues had completely resolved according to the medical records. Craft was asymptomatic in relation to her prior cervical problems prior to her injury on September 13, 2009.

FN7. The commission noted that this "mechanism of injury is consistent with a cervical injury."

Four of Craft's physicians linked her neck pain and injuries to her September 13, 2009 work accident. Dr. Smith reported Craft's development of neck, left trapezial, and scapular pain and hand numbness following the accident. He also noted a decreased range of motion in Craft's cervical spine and diagnosed her with cervical herniated nucleus pulposus without myelopathy, cervical spondylosis without myelopathy, cervical degenerative disc disease, cervical radiculopathy, and neck pain. Dr. Platt diagnosed an acute work-related neck injury and linked Craft's C7–T1 disc extrusion to the September 13, 2009 work accident. Dr. Wiles diagnosed a C7–T1 herniated disc on the left and opined that "[w]ith respect to causality, if [Craft's] history is reasonably correct, one would have to assume that *the work-related injury from 9–13–09 was a direct cause of the herniated disc* since [she] was asymptomatic prior to this injury." (Emphasis added). Likewise, Dr. Shamiyeh opined that

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Craft's work accident "resulted in a mechanical change" to her neck "causing the disc herniation at C7–T1" and that her disability was, at least in part, caused by this disc herniation.

***522** On appeal, the employer places emphasis on Dr. Dalton's opinions. Dr. Dalton opined that the only correlation between the work accident and the cervical injuries was the MRI revealing the new disc extrusion. He stated that the MRI did not establish that the new disc extrusion was caused by the accident and that Craft's prior medical history could be impacting her cervical problems.

[18][19][20] "[A] question raised by 'conflicting expert medical opinions' is 'one of fact' binding upon this Court on appeal." *Southwest Va. Tire, Inc. v. Bryant,* 31 Va.App. 655, 661–62, 525 S.E.2d 563, 566 (2000) (citation omitted). When medical expert opinions conflict, the commission must determine the probative weight to be accorded such evidence. *See Pilot Freight Carriers, Inc. v. Reeves,* 1 Va.App. 435, 439, 339 S.E.2d 570, 572 (1986). If the commission's resolution of conflicting expert opinions is based on credible evidence, then its decision is binding on this Court. *See id.* Here, the commission discounted Dr. Dalton's opinions and assigned greater weight to the opinions of the other four physicians linking Craft's spinal injuries to her work accident. The mechanism of Craft's accident, the timing of her symptoms and the nature of her injuries, the MRI revealing the new disc extrusion, and the fact that Craft's prior cervical problems were asymptomatic prior to her injury support the commission's conclusion.

The commission's decision that Craft's spinal injuries were caused by her September 13, 2009 work accident is supported by credible evidence in the record. Four physicians linked Craft's cervical and thoracic spinal injuries to the accident, and radiographic evidence and the circumstances of the case support their conclusions. Thus, the commission did not err in reaching this decision.

C. CRAFT'S SPINAL INJURIES REQUIRE FURTHER MEDICAL TREATMENT

[21][22][23][24] The employer also argues that the commission erred by finding that the medical treatment of Craft's spinal ***523** injuries was necessary. The employer contends that Craft failed to establish the necessity of any further treatment pertaining ***28** to her spinal injuries. The employer does not focus this claim to any specific medical treatment, but rather argues that Craft has reached maximum medical improvement and requires no further treatment in general.

> Whether disputed medical treatment is compensable ... presents a mixed question of law and fact, which this Court reviews *de novo.* "The services which an employer has to furnish under the Work[ers'] Compensation Act are necessary services incident to the treatment of an injury sustained in a compensable accident." *Ins. Mgmt. Corp. of Tidewater/Baldwin Bros. & Taylor v. Daniels,* 222 Va. 434, 439, 281 S.E.2d 847, 849 (1981). Subject to the commission's review, the employer is responsible for medical attention if 1) a causal relationship exists between the workplace accident and the treatment, and 2) the attending physician deems it necessary. The claimant, however, bears the burden of proving by a preponderance of the evidence that disputed treatment was medically necessary.

Haftsavar v. All Am. Carpet and Rugs, Inc., 59 Va.App. 593, 599, 721 S.E.2d 804, 807 (2012) (citations omitted).

As previously discussed, a causal relationship exists between Craft's September 13, 2009 work accident and her cervical and thoracic spinal injuries. Therefore, the employer is responsible for necessary medical treatment pertaining to those injuries. The employer, however, essentially argues that Craft's

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injuries will require no further treatment. The employer bases this position on a report from Dr. Dalton. In that report, Dr. Dalton did not recommend further medical treatment in his specialty and opined that Craft had reached maximum medical improvement with the exception of surgical intervention.

The employer's reliance on Dr. Dalton's report is flawed for several reasons. While Dr. Dalton opined that Craft did not require further medical treatment, his opinion only addressed medical treatment *within his specialty,* osteopathy. While ***524** Craft may not require further osteopathic manipulative treatment, other medical treatment could be necessary in the future. Additionally, Dr. Dalton opined that Craft had reached maximum medical improvement *with the exception of surgical intervention.* At the time of Dr. Dalton's report, Craft still experienced pain in her cervical region and she had discussed the possibility of surgery with her other physicians. Thus, surgical intervention could become necessary in the future. Further, Dr. Dalton diagnosed Craft with work-related radiculopathy and somatic dysfunction and agreed with Dr. Platt's work-related restrictions. These diagnoses and recommendations imply that Craft could require further medical treatment in the future.

Although Craft's need for future medical treatment requires speculation, it was reasonable for the commission to conclude that she could require additional medical treatment for her spinal injuries. Craft still experienced pain in her cervical region and had discussed surgery with her physicians. Further, Dr. Dalton's report is limited in its scope to treatment within his specialty. Accordingly, we conclude that the commission did not err in reaching its decision concerning the necessity of further medical treatment.

III. CONCLUSION

In summary, we hold that the principles of res judicata do not bar Craft's claim for benefits concerning her cervical and thoracic spinal injuries. As that claim was timely filed with the commission, it had jurisdiction to award her benefits based on that claim. Additionally, we hold that credible evidence supported the commission's decision that Craft's September 13, 2009 work accident caused her spinal injuries. Further, we conclude that the commission did not err by finding that Craft's spinal injuries require additional treatment. For these reasons, we affirm the commission's decision.

Affirmed.

Va.App.,2014.
Advance Auto and Indem. Ins. Co. of North America v. Craft
63 Va.App. 502, 759 S.E.2d 17

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Exhibit 12

144 Ariz. 227
Court of Appeals of Arizona,
Division 2, Department A.

CONTEMPO–TEMPE MOBILE HOME OWNERS ASSOCIATION, a non-profit association and Central Arizona Mobile Home Owners Association, an Arizona non-profit corporation, Plaintiffs-Appellants,
v.
Marvin E. STEINERT and Jane Doe Steinert, husband and wife; Marvin E. Steinert, individually and dba Contempo/Tempe Adult Mobile Home Community; Ann McAnelly and John Doe McAnelly, husband and wife; and John Does I–X, and Black Corporations I–X, Defendants-Appellees.

1 CA–CIV 6961. | Jan. 17, 1985. | Reconsideration Denied March 5, 1985.

Tenant associations sought injunction to prevent operators of mobile home park from using particular rental agreement which increased monthly rent and damages for failure to negotiate rental agreement in good faith. The Superior Court, Maricopa County, Cause No. C–456636, David L. Roberts, J., granted motion to dismiss for lack of standing but granted leave to amend complaint to name individual tenants, and after amended complaint was filed, entered order pursuant to stipulation dismissing the case with prejudice, and tenant associations appealed. The Court of Appeals, Grant, J., held that the case was moot since substantive questions raised were resolved by the stipulation.

Appeal dismissed.

West Headnotes (8)

[1] **Appeal and Error**
Effect of settlement in general

Case on appeal was moot where substantive questions raised were resolved by stipulation dismissing suit with prejudice.

1 Cases that cite this headnote

[2] **Appeal and Error**
Existence of actual controversy

Court of Appeals is not empowered to decide moot questions or abstract propositions.

7 Cases that cite this headnote

[3] **Federal Courts**
Mootness

Moot cases do not fit within constitutional definition of "cases" or "controversies." U.S.C.A. Const. Art. 3, § 1 et seq.

Cases that cite this headnote

[4] **Action**
Moot, hypothetical or abstract questions

A case is "moot" when it seeks to determine an abstract question which does not arise upon existing facts or rights.

4 Cases that cite this headnote

[5] **Action**
Moot, hypothetical or abstract questions

A court will not decide question which is unrelated to actual controversy or which by change in condition of affairs has become moot.

1 Cases that cite this headnote

[6] **Appeal and Error**
Matters Not Necessary to Decision on Review

Appellate courts do not give opinions on moot questions, nor do they act as fountain of legal advice.

2 Cases that cite this headnote

[7] **Appeal and Error**
Want of Actual Controversy

Suit in which tenant associations sought injunction to prevent operators of mobile home park from using particular rental agreement which increased monthly rent and damages for

their failure to negotiate rental agreement in good faith, which was rendered moot upon entry of stipulation dismissing the suit with prejudice, did not fit within exception to mootness rule for an issue capable of repetition yet evading review, nor within exception for case which poses question of public importance.

4 Cases that cite this headnote

[8] Appeal and Error

Dismissal by court on its own motion

Court of Appeals had authority to dismiss moot case sua sponte.

1 Cases that cite this headnote

Attorneys and Law Firms

***228 **1377** Creasy & Skivington by Frederick C. Creasy, Jr., Scottsdale, for plaintiffs-appellants.

Law Offices of Ronald W. Meyer by Ronald W. Meyer, Phoenix, for defendants-appellees.

Opinion

OPINION

GRANT, Judge.

The only issue on appeal is whether the appellant associations have standing to sue for themselves and/or for the benefit of their individual members. However, since we conclude that the case is moot, there is no case or controversy before this court and therefore we dismiss the appeal.

The facts of this case are as follows: A complaint was filed against the operators of a mobile home park (appellees) by the tenants association and another association made up of numerous tenant associations (appellants). The appellants' complaint sought an injunction to prevent the appellees from using a particular rental agreement which increased the monthly rent and damages for their failure to negotiate a rental agreement in good faith. The trial court found that the appellants lacked standing to bring the suit. The trial court granted a motion to dismiss for lack of standing but granted leave to amend the complaint to name the individual tenants. An amended complaint brought in the name of the individual tenants was filed. Thereafter the individual tenants and the appellees entered into a stipulation that the matter be dismissed with prejudice. The trial court entered an order pursuant to the stipulation dismissing the case with prejudice.

[1] Thereafter the appellants filed an appeal from the court's original ruling which had dismissed the complaint for lack of standing. However since the substantive questions raised have already been resolved by the stipulation dismissing the suit with prejudice, the appellants would not be entitled to any substantive relief on appeal. Therefore the case is moot, there is no case or controversy before this court, ***229 **1378** and the appellants are merely seeking an advisory opinion concerning their capacity to sue for violations of the Arizona Mobile Home Parks Residential Landlord and Tenant Act. A.R.S. § 33–1401 *et seq.*

[2] [3] [4] The court is not empowered to decide moot questions or abstract propositions. Article III of the United States Constitution limits the exercise of judicial power by federal courts to circumstances involving a "case" or "controversy." *North Carolina v. Rice,* 404 U.S. 244, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971). Moot cases do not fit within the constitutional definition of "cases" or "controversies." *Central Soya Co., Inc. v. Consolidated Rail Corp.,* 614 F.2d 684 (7th Cir.1980). A case is moot when it seeks to determine an abstract question which does not arise upon existing facts or rights. *Freeman v. Wintroath Pumps-Division of Worthington Corporation,* 13 Ariz.App. 182, 475 P.2d 274 (1970); *J.R. Francis Construction Company v. Pima County,* 1 Ariz.App. 429, 403 P.2d 934 (1965). *See* 6(A) J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice ¶ 57. 13 (2d ed. 1981).

The Arizona Supreme Court summarized the law in Arizona concerning mootness in *Fraternal Order of Police v. Phoenix Employee Relations Board,* 133 Ariz. 126, 650 P.2d 428 (1982) as follows:

> Unlike the federal court system, the powers of which are limited by U.S. Const. Art. III, § 2, cl. 1, our state court system has no constitutional provision constraining it to consider only "cases" or "controversies." Nevertheless, since the first time we considered the issue, our court has consistently held that it will refrain from considering moot or abstract questions. *See Mesa*

> *Mail Publishing Co. v. Board of Supervisors,* 26 Ariz. 521, 227 P. 572 (1924); *Camerena v. Department of Public Welfare,* 106 Ariz. 30, 470 P.2d 111 (1970). We will make an exception, however, to consider a question of great public importance or one which is likely to recur even though the question is presented in a moot case. *Camerena, supra; State v. Superior Court,* 104 Ariz. 440, 454 P.2d 982 (1969); *see Wise v. First National Bank of Nogales,* 49 Ariz. 146, 65 P.2d 1154 (1937).

Id. at 127, 650 P.2d at 429.

The appellants here ask the court to resolve the abstract question of whether associations of mobile home tenants have standing to sue for themselves and/or for the benefit of their individual members for violations of the Arizona Mobile Home Parks Residential Landlord and Tenant Act. This question does not arise upon existing facts or rights because the substantive questions raised have already been resolved by the stipulation dismissing the suit with prejudice. The case is moot.

In *Webber v. Smith,* 129 Ariz. 495, 632 P.2d 998 (App.1981) the court held that a counterclaim for the value of a motorcycle and truck held by the plaintiff was moot when the defendant had recovered possession of these items from the plaintiff and did not seek damages for loss of use during the period of the time that the items were held. In *State Farm Automobile Insurance Company v. Civil Service Employees Insurance Company,* 19 Ariz.App. 594, 509 P.2d 725 (1973) the court concluded that the insurer was not liable for the alleged breach of a settlement obligation. The court held that the question concerning denial of the insurer's third party indemnity claim against another insurance company based on allegedly fraudulent conduct of his counsel was rendered moot. Similarly the case at bar was rendered moot by the stipulation between the parties and the trial court's order pursuant to the stipulation dismissing the case with prejudice.

[5] **[6]** A court will not decide a question which is unrelated to an actual controversy or which by a change in a condition of affairs has become moot. *Velasco v. Mallory,* 5 Ariz.App. 406, 427 P.2d 540 (1967); *Magraw v. Donovan,* 177 F.Supp. 803 (D.C.Minn.1959). Appellate courts do not give opinions on moot questions. *Lloyd v. Board of Supervisors of Elections,* 206 Md. 36, 111 A.2d 379 (1954). Nor do they act as a fountain of legal advice. *Allen v.* ***230 **1379** *Graham,* 8 Ariz.App. 336, 446 P.2d 240 (1968).

[7] The present case does not fit within the exception to the mootness rule for an issue "capable of repetition yet evading review." *Board of Examiners v. Marchese,* 49 Ariz. 350, 66 P.2d 1035 (1937); *Odle v. Imperial Ice Cream Co.,* 11 Ariz.App. 203, 463 P.2d 98 (1970). Although the issue involved in the case at bar is capable of repetition it does not evade review. Were it not for the stipulation entered into by the parties the issue raised by the appellants properly could be on review. The stipulation mooted the issue.

Nor does this case fall within another exception to the mootness doctrine for a case which poses a question of "public importance." *Camerena v. Department of Public Welfare,* 106 Ariz. 30, 470 P.2d 111 (1970). We find that the question involved here does not rise to a sufficient level of "public importance" to become an exception to the mootness doctrine.

[8] Although the appellees in the current case filed a motion to dismiss the appeal on other grounds which was denied they have not filed a motion to dismiss the appeal on the ground of mootness. However the court has the authority and often the duty to dismiss a moot case on its own initiative. *Magraw v. Donovan; Sannon v. United States,* 631 F.2d 1247 (5th Cir.1980). Therefore we raise the mootness issue in this case *sua sponte* and dismiss the appeal.

HAIRE, P.J., and BROOKS, J., concur.

Parallel Citations

696 P.2d 1376

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Exhibit 13

155 Ariz. 252
Supreme Court of Arizona,
In Banc.

ELECTRICAL DISTRICT NO. 2, PINAL COUNTY, ARIZONA, a political subdivision of the State of Arizona, Petitioner,
v.
ARIZONA CORPORATION COMMISSION; Marcia Weeks, Renz Jennings and Dale Morgan, as members thereof; and Arizona Public Service Co., an Arizona corporation, as the Real Party in Interest, Respondents,
and
Richard Ungar and Joan Ungar, husband and wife, Intervenors.
ARIZONA PUBLIC SERVICE COMPANY, Plaintiff–Defendant, Appellant, Cross–Appellee,
v.
ELECTRICAL DISTRICT NO. 2, PINAL COUNTY, ARIZONA, a political subdivision of the State of Arizona, Defendant–Plaintiff, Appellee, Cross–Appellant.

Nos. CV 87–0071–SA, CV 86–0532–PR. | Oct. 27, 1987. | Reconsideration Denied Dec. 15, 1987.

Electrical utility filed postjudgment proceeding, in the Superior Court, Pinal County, No. C–26393, seeking to enjoin an electrical district from providing service to a restaurant after the restaurant had moved locations. The district, at approximately the same time, filed separate suit seeking to enjoin the utility from constructing facilities to service subdivision. After consolidation, the Superior Court, Maricopa County, No. C–523486, Linda K. Scott, J., entered injunctions, pendente lite, against both parties. Appeal was taken. The Court of Appeals affirmed in part and reversed in part, in a memorandum decision. Petition for review was filed. In addition, the district filed a special action seeking review of a decision of the Corporation Commission, determining the scope of the utility's certificates and deciding whether the certificates could be extended or a new certificate granted. The Supreme Court, Cameron, J., held that: (1) although the restaurant was not in an area contiguous with city limits, the restaurant was in the vicinity of the city and, thus, was within the utility's certificate; (2) a subdivision located between a city and town was not covered by the utility's certificate and, therefore, prior approval was required before the utility could provide service; and (3) the Commission was bound by a final decision of the Court of Appeals on the parties' dispute.

Affirmed in part and vacated in part.

West Headnotes (7)

[1] **Electricity**
Service Areas; Competition

Electrical utility was entitled to expand anywhere within city limits for which it was certificated, including further expansion of city limits, without prior permission from Corporation Commission and was allowed to extend service to area contiguous to its certificated area if contiguous area was not already served by public service corporation. A.R.S. § 40–281, subd. B.

Cases that cite this headnote

[2] **Electricity**
Service Areas; Competition

Electrical utility had right of first refusal in areas covered by its certificate, which extended to city limits of towns served by utility and to areas contiguous to city limits. A.R.S. § 40–281, subd. B.

1 Cases that cite this headnote

[3] **Electricity**
Service Areas; Competition

Restaurant was not in area contiguous to electrical utility's certificated area where restaurant was located 50 feet outside city limits and thus was not in actual contact with or touching city limits. A.R.S. § 40–281, subd. B.

Cases that cite this headnote

[4] **Electricity**
Service Areas; Competition

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Restaurant located 50 feet outside city limits was within "vicinity" of city and, therefore, electrical utility was entitled to serve restaurant pursuant to its certificate which covered city and vicinity. A.R.S. § 40–281, subd. B.

Cases that cite this headnote

[5] **Electricity**

Service Areas; Competition

Electrical utility's certificate which allowed it to serve both town and city was not broad enough to include subdivision located between city and town, but not within city limits of either, and, therefore, utility was required to seek Corporation Commission's approval before it could provide service to subdivision. A.R.S. § 40–281, subd. B.

Cases that cite this headnote

[6] **Courts**

Operation and effect in general

Memorandum decision which is unpublished and uncitable is just as binding on parties as published opinion and can be law of case.

Cases that cite this headnote

[7] **Electricity**

Proceedings and review; injunction

Corporation Commission was bound by final decision of Court of Appeals and of trial court as between electrical district and electrical utility, but decision was not binding as to future determination of areas encompassed by utility's certificate. A.R.S. § 40–281, subd. B.

1 Cases that cite this headnote

Attorneys and Law Firms

**1384 *253 Martinez & Curtis, P.C. by Michael A. Curtis, Jay M. Martinez, William P. Sullivan, Steven B. Bennett, Phoenix, for Elec. Dist. No. 2.

Arizona Corp. Com'n by Christopher C. Kempley, Timothy M. Hogan, Janice M. Urbanic, Phoenix, for Arizona Corp. Com'n.

Snell & Wilmer by Steven M. Wheeler, George H. Lyons, George J. Coleman, Phoenix, Stanfield & McCarville by Thomas A. McCarville, Casa Grande, for Arizona Public Service.

Mariscal, Weeks, McIntyre & Friedlander, P.A. by Michael S. Rubin, Phoenix, for Richard and Joan Ungar.

Opinion

CAMERON, Justice.

I. JURISDICTION

Pinal County Electrical District No. 2 (The District) petitioned this court for review of a court of appeals' memorandum decision [1 CA–CIV 8334]. The District also filed a special action, seeking review of Decision No. 55298 of the Arizona Corporation Commission (Commission) (Nov. 19, 1986). We granted the petition for review of the court of appeals' memorandum decision and accepted jurisdiction of the petition for special action from the Commission's decision. We consolidated the two matters for argument and decision. We have jurisdiction pursuant to Ariz. Const. Art 6, §§ 5(3), 5(1), and A.R.S. § 40–254(F).

II. ISSUES

A. As to the court of appeals' opinion:

1. Are the rights given under A.R.S. § 40–281(B) within APS' certificate?
2. Was the B'N'B Restaurant within the APS certificated area?
3. Was the Tierra Grande subdivision and trailer park within the APS certificated area?

B. As to the Arizona Corporation Commission's decision:

1. Was the Arizona Corporation Commission bound by the decision of the trial court as modified by the court of appeals?

III. FACTS

This matter is preceded by years of litigation over the right of Arizona Public Service (APS) and the District to provide electrical service in Pinal County. This case focuses on service to two properties. One property is a restaurant, B'N'B, located fifty feet outside the city limits of Casa Grande. The other is a subdivision, Tierra Grande, located approximately three miles from the town limits of Eloy and eight miles from the city limits of Casa Grande.

Both properties lie within the geographic boundaries of the District. The District was created in 1923 for the primary purpose of providing electricity for the irrigation of arid lands in Pinal County. A.R.S. § 48–1701 *et. seq.* The District is a political subdivision of the state pursuant to Ariz. Const. Art. 13 § 7 and not a public service corporation under Ariz. Const. Art. 15, § 2. As such it is not subject to regulation by the Commission.

****1385 *254** APS is a public service corporation, Ariz. Const. Art. 15, § 2, regulated by the Commission, Ariz. Const. Art. 15, § 3; A.R.S. § 40–202. Before a public service corporation shall construct a line, plant, service or system, it must first obtain from the Commission a certificate of public convenience and necessity (certificate), A.R.S. §§ 40–281(A), –282, and is otherwise obligated to comply with the orders, decisions, rules and regulations of the Commission. A.R.S. § 40–202(B).

Dating back to the 1920s, the Commission granted numerous certificates to APS and its predecessors in interest to provide electrical service in Pinal County. The scope of the certificates was described in decisions issued by the Commission. Some of the decisions employed vague descriptions of the certificated territories, describing the areas to be served with such terms as "in the vicinity thereof" and "territory adjacent thereto."

Such vague and ambiguous terms were used to describe the certificated areas now at issue. In 1928, the Commission issued a certificate to APS' predecessor in interest authorizing the operation of electric light and power utilities in the "City of Casa Grande, Pinal County, Arizona, and vicinity." Decision No. 4440 (May 23, 1928). In 1929, the Commission granted a certificate to a predecessor in interest for the operation of an electric plant "serving Eloy and territory adjacent thereto." Decision No. 4850 (June 12, 1929). A later certificate authorized service to "the unincorporated Town of Eloy and territory adjacent thereto." Decision No. 18694 (Feb. 10, 1949).

Operating pursuant to these certificates, APS and its predecessor in interest provided electrical service to customers in Casa Grande and Eloy. As these municipalities grew and their boundaries expanded, the area served by APS expanded even though APS did not seek specific authority from the Commission to expand its certificated territories. This was allowed by A.R.S. § 40–281(B) which reads:

> B. This section shall not require such corporation to secure a certificate for an extension within a city, county or town within which it has lawfully commenced operations, or for an extension into territory either within or without a city, county or town, contiguous to its street railroad or line, plant or system, and not served by a public service corporation of like character, or for an extension within or to territory already served by it, necessary in the ordinary course of its business. If a public service corporation, in constructing or extending its line, plant or system, interferes or is about to interfere with the operation of the line, plant or system of any other public service corporation already constructed, the commission, on complaint of the corporation claiming to be injuriously affected, may, after hearing, make an order and prescribe terms and conditions for the location of lines, plants or systems affected as it deems just and reasonable.

In the 1970s, APS and the District began to encroach upon each others territory; litigation in the courts and the Commission followed.

A. The Court Suit

In 1972, APS filed an action in the Superior Court of Pinal County for declaratory relief. APS claimed that the District

was acting in excess of its statutory authority by providing electrical services to customers other than those pumping water for irrigation of arid farms within the district and domestic uses incidental to farming, thereby violating the certificate which authorized APS to serve Casa Grande and vicinity.

On 1 December 1981, Judge McBryde of the Pinal County Superior Court held that the District's primary purpose was to provide electrical service to irrigate farm lands and to supply incidental electricity to the farms. However, the District could also provide electrical service to other classes of customers (residential, industrial, commercial and municipal), when such service would not interfere with its primary purpose and when it would not directly compete with a public service corporation, such as APS, capable of and properly certificated to serve such customers. Judge ****1386 *255** McBryde held that there should be no duplication of service in the future and that APS, within the area of its certification, should be given the first right to serve new customers, other than irrigation pumping and farm and domestic services incidental thereto, which it was ready, willing and able to serve. Neither party appealed this judgment.

In 1983, APS filed a post-judgment proceeding seeking to enjoin the District from providing electrical service to B'N'B after B'N'B had moved from a location where it had been served by the District. The District, at approximately the same time, filed a suit in Maricopa County Superior Court seeking to enjoin APS from constructing facilities to serve a second phase of development of the Tierra Grande subdivision. The cases were consolidated in Maricopa County and decided by Judge Linda K. Scott in one proceeding.

Concluding that each party would be more likely to succeed in these respective claims, Judge Scott enjoined the District from providing electrical service to B'N'B, *pendente lite* and enjoined APS from providing electrical service or undertaking construction to provide electrical service to the Tierra Grande development and trailer park, *pendente lite.* Noting that the Commission has concurrent jurisdiction to interpret the scope and extent of issued certificates of convenience and necessity, Judge Scott directed APS to pursue a final resolution of the matter with the Commission so as to identify those portions of Pinal County which are within the APS certificates. Judge Scott arrived at the following conclusions of law:

"1. For purposes of interpreting and enforcing Judge McBryde's December 1, 1981 Judgment, A.P.S. has a right of first refusal to serve all new (subsequent to December 1, 1981) electrical customers, other than irrigation pumping and farm and domestic services incidental thereto, within those areas encompassed by its Certificates of Convenience and Necessity issued pursuant to Arizona Corporation Decision Nos. 4440 and 18694.

2. Outside the areas encompassed by A.P.S.' Certificates of Convenience and Necessity, A.P.S. may provide electricity as set forth in A.R.S. § 40–281(B).

3. In areas not within A.P.S.' Certificates of Convenience and Necessity E.D. No. 2 [The District] can provide electrical service to residential, industrial, commercial and municipal customers for which electrical service is not otherwise available.

4. A.P.S. does not have a right of first refusal in areas it can serve under A.R.S. § 40–281(B).

5. The rights embodied in A.R.S. § 40–281(B) are not within a Certificate of Convenience and Necessity." Appendix 3 to the Petition, Findings of Fact, Conclusions of Law and Order, February 13, 1985, pages 4–5; slip opinion, page 5.

---

10. The Arizona Corporation Commission has authority and jurisdiction to issue Certificates of Convenience and Necessity for public service corporations and concurrent jurisdiction with this Court to interpret the scope and extent of issued Certificates of Convenience and Necessity.

The court of appeals issued a memorandum decision, affirming in part and reversing in part the decision rendered by Judge Scott. The court of appeals affirmed the trial court's decision enjoining the District from providing service to B'N'B and reversed the decision to enjoin APS from providing service to Tierra Grande. The court of appeals found the word "contiguous" in A.R.S. § 40–281(B) to mean "near one another, rather than in actual contact." The court went on to find that B'N'B, 50 feet from the then city limits of Casa Grande and Tierra Grande, eight miles from the city limits of Casa Grande and three miles from the town limits of Eloy, were "contiguous" within the scope of APS' Certificates by operation of A.R.S. § 40–281(B). The court also found that Judge Scott had incorrectly interpreted that portion of Judge McBryde's 1981 decision involving APS and the District dealing with APS' rights of first refusal and "run- ****1387 *256** along rights" arising under A.R.S. § 40–281(B), in

which she found that these rights were not part of APS' Certificates. We granted the petition for review to correct what we believe to be misstatements of the law regarding the extent of the authority of the parties to serve areas in Pinal County.

1. Scope of Certificate

[1] We first consider the scope of the APS certificates. A.R.S. § 40–281(B) provides for exceptions to the general rule prohibiting expansion without first securing a certificate from the Commission. Reading the statute as follows, we find three methods by which APS could lawfully extend its certificate without seeking permission of the Commission.

> This section shall not require such corporation to secure a certificate:
>
> 1. For an 'extension' within a city, county or town within which it has lawfully commenced operations, or
>
> 2. For an extension into territory either within or without a city, county or town, 'contiguous' to its ... line, plant or system, and not served by a public service corporation of like character, or
>
> 3. For an extension within or to territory already served by it, necessary in the ordinary course of its business.

This statute allows APS to expand anywhere within the city limits for which it is certificated, including future expansion of the city limits, without seeking permission from the Commission. The statute also allows APS to extend service to areas contiguous to its certificated area if such area is not already serviced by a public service corporation.

[2] The trial court held that these additional areas allowed by § 40–281(B) were not part of APS' certificate. In so holding, the trial court held APS did not have the right of first refusal in these areas or so called "run-along rights."[1] The court of appeals differed in holding that when the statute allows APS to extend its service area the new areas are part of the certificate. As the court of appeals noted:

> The purpose of A.R.S. § 40–281(B) is to allow for the orderly growth of a certificated area without unnecessary and repetitious administrative proceedings. A certificate and the § 40–281(B) rights attached to it are inseparable. If this were not so the rights granted by the statute would be illusory since a public service corporation could only guarantee its right to build an extension by repeatedly going back to the Corporation Commission to secure amended or new certificates. This undermines the precise purpose of § 40–281(B) by making it necessary for a public service corporation to return to the Corporation Commission every time it wishes to make minor extensions and every time the city it serves annexes new territory.
>
> In the instant case, pursuant to statute, the certificates of APS extended to the city limits of the towns it served and to areas contiguous to such city limits. These areas were part of the APS certificates and, as such, APS had the right of first refusal in areas extended by the statute. The trial court erred in concluding that APS did not have the right of first refusal in those areas.

2. Was B'N'B Within the Certificated Area of APS?

[3] The B'N'B Restaurant is located 50 feet outside the city limits of Casa Grande. Before it moved, it was serviced by the District. After moving to a point 50 feet outside the Town of Casa Grande, it continued to receive service from the District but then decided to receive service from APS. APS claimed the right to extend service to it under the rule that the utility's certificated area expanded with the expansion of the city limits and that B'N'B was only 50 feet from the city limits of Casa Grande and, therefore, contiguous to the APS certificated ****1388 *257** area. We agree with APS that the scope of its certificates expanded with the expansion of city limits and areas contiguous thereto. We disagree, however, that the B'N'B was contiguous to APS' certificated area.

We believe the two locations must be "in actual contact or touching." *Ehle v. Tenney Trading Co.,* 56 Ariz. 241, 245, 107 P.2d 210, 212 (1940).

The Supreme Court of North Dakota in construing a statute almost identical to that of Arizona noted:

> Applying these various definitions of 'contiguous' and 'contiguous territory' to the wording of our statute ..., it refers to an area composed of one or more tracts of land owned by one or more persons, joined together by a common boundary on all or a part of one or more sides, common with the territory in which the utility was authorized to serve or in which it had lawfully commenced operation, and which area or territory of proposed service was not separated from the authorized territory by tracts 'receiving similar service from another utility ...'

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Williams Electric Co-op. v. Montana–Dakota Utilities Co., 79 N.W.2d 508, 520 (N.D.1956). We agree with the analysis made by that court.

The court of appeals, however, relied upon the case of *Brewer v. Heine,* 56 Ariz. 160, 169, 106 P.2d 495, 499 (1940), in defining the term "contiguous" as used in the statute. *Brewer,* however, involved a mining claim dispute and the placement of a "discovery monument" about 100 feet from where the discovery work was done. We do not believe *Brewer* is applicable.

We believe the court of appeals has incorrectly construed A.R.S. § 40–281(B) resulting in an overbroad interpretation of the word "contiguous." The area of service was limited by the city limits of Casa Grande and areas contiguous thereto, and B'N'B was not contiguous to the area encompassed by APS' certificate. Even though only 50 feet apart, the two areas were nevertheless apart and not contiguous.

[4] This does not, however, exclude APS from serving B'N'B. The certificate of APS covers the "city of Casa Grande, Pinal County, Arizona and vicinity." Decision No. 4440 (May 23, 1928). Although we need not define the outer limits of the term "and vicinity," we can state that 50 feet is certainly within the "vicinity" and the decision of the trial court and the court of appeals allowing APS to serve B'N'B is affirmed based upon the certificate of APS to service Casa Grande "and vicinity."

3. Was Tierra Grande Within the Certificated Area of APS?

[5] The court of appeals held that the certificate which allowed APS to serve both Eloy and Casa Grande was broad enough under A.R.S. § 40–281(B) to include Tierra Grande. Since Tierra Grande is not within the city limits of either Eloy or Casa Grande and is clearly not contiguous either to Eloy or "territories thereto" or to Casa Grande and "vicinity," we must look to the third provision of the statute which allows a public service corporation to extend the scope of its certificate "within or to territory already served by it, necessary in the ordinary course of its business." A.R.S. § 40–281(B). We do not believe the statute is broad enough to allow APS to provide service to Tierra Grande. As the Alabama Supreme Court has noted:

> Consonant with the purpose of the statute requiring a certificate of convenience and necessity, the interpretation of the phrase 'ordinary extension of an existing system in the usual course of business' ... [does not include] the extension by the utility of the system into a community or territory not then served by said utility and where its purpose is not simply to enable the said utility to maintain good service or to provide better service for its existing system and customers ...

See Alabama Power Co. v. Southern Pine Electric Cooperative, 270 Ala. 453, 455, 118 So.2d 907, 909–10 (1960) (Simpson, J., dissenting).

The issue was not whether APS may serve the area, but whether it must first seek commission approval through the ****1389 *258** grant of a certificate. This the trial court recognized when it directed APS to pursue a final decision from the Commission. The statutory exception has no application to the facts of this case.

The decision of the trial court enjoining the District from providing service to B'N'B is affirmed. The decision of the trial court enjoining APS from serving Tierra Grande is affirmed. The decision of the trial court that the areas of expansion allowed by A.R.S. § 40–281(B) are not within the certificate of APS is set aside. The decision of the trial court that APS does not have right of first refusal or run-along rights within these areas of expansion is also set aside.

B. The Commission's Decision

On 11 March 1985, as directed by the trial court, APS filed an application with the Commission seeking an order declaring APS' certificates to include certain areas within Pinal County, or if the certificates did not include these areas that the Commission grant such an extension. The District and Richard and Joan Ungar filed motions to intervene which were granted. The Ungars, developers of Tierra Grande, supported the action of APS, and the District opposed the application by APS. On 11 June 1985, APS filed a second petition seeking recognition of its certificates or an extension of its areas of service.

Hearings were conducted in two phases. Phase I was to determine the scope of APS' existing certificates, and Phase II was to determine whether the certificates should be extended or a new certificate granted.

The Commission made the following findings in its Decision No. 55298:

1. APS's vague, general Certificates should include areas within one mile of the city limits of the present specified certificated areas granted by the Commission.

2. Pursuant to Decision No. 4440, APS has the right to serve B'N'B located within Casa Grande, Pinal County, Arizona.

3. APS does not have a right to serve Tierra Grande under any of its existing Certificates, but more specifically those rights arising under Decision No. 18694.

4. Under A.R.S. § 40–281(B), APS does not have any rights to extend its service to Tierra Grande.

5. A.R.S. § 40–281(B) does not grant public service corporations authority to extend the confines of their Certificates without procuring an additional grant of authority from the Commission.

6. A.R.S. § 40–281(B) grants public service corporations the right to serve *contiguous* areas *outside their authorized Certificate.*

7. Pursuant to the Commission's authority granted to it by Article XV of the Arizona Constitution and A.R.S. § 40–204(B), the Commission shall require APS to work with its staff in order that the Commission's maps of APS's certificated areas shall correctly reflect the boundaries of its Certificates.

The Commission also stated:

> We do not agree with the court of appeals conclusion that APS or any public utility can unilaterally expand its territory if it is not touching upon the territory into which it plans to expand.

Decision No. 55298.

1. Was the Commission Bound by the Decision of the Court of Appeals?

The Commission in an exhaustive and well-written decision stated in part:

> A utility company is unique in nature in that it is a regulated monopoly that we are charged by the Constitution with regulating. We are also charged with the plenary authority to interpret the boundaries of Certificates issued by the Commission. We do not agree with the Court of Appeals conclusions that APS or any public utility can unilaterally expand its territory if it is not touching upon the territory into which it plans to expand. The utility must seek Commission approval prior to extending its service. Otherwise, development could take place ****1390 *259** in a hop scotch pattern with no uniformity, and force uneconomical development upon the rate payers and in some instances, the utility. As regulators, we must consider the ultimate costs, and also the wishes of the public. Duplication of service by a utility is a costly affair when another alternative to the utility's expansion is available as is the case with ED–2 [The District] in its provision of electrical service to Tierra Grande.
>
> However, we are limited in this particular case to the result ordered by the Court of Appeals decision at least insofar as it applies to the parties before us. We believe we are constrained in this case from reaching a result at variance with that of the Court of Appeals. While the Court of Appeals decision may govern the current dispute between APS and ED–2 [The District], it is nonetheless a memorandum decision and entitled to no precedential value in future cases. Therefore, the Commission will abide by the result reached by the Court of Appeals while noting its disagreement with that decision. Furthermore, the Commission will set forth what it believes to be the appropriate requirements and standards for the parties to follow with regard to their future conduct relative to extensions of service.

[6] [7] We agree with the Commission that it is bound by a final decision of the court of appeals and the decision of the trial court as between the District and APS. [2] It is, however, not binding as to future determinations of areas encompassed by a certificate. The Commission may, in the future, consider a petition from APS to extend the scope of its certificate. This is clearly within the jurisdiction of the Commission, as the trial court noted. So long as the adjudicated rights of the District are not violated by such certificate, the Commission may allow an extension and expansion of the area to be serviced by APS. [3]

The courts have jurisdiction to review a decision of the Commission. However, under A.R.S. § 40–254, the courts may only affirm, modify, or set aside the decision of the Commission. *Arizona Corporation Commission v. Fred*

Harvey Transp. Co., 95 Ariz. 185, 388 P.2d 236 (1964). The decision of the Commission in Decision No. 55298 is affirmed.

GORDON, C.J., FELDMAN, V.C.J., and HOLOHAN, J., concur.

NOTE: Justice JAMES MOELLER did not participate in the determination of this matter.

Parallel Citations

745 P.2d 1383

Footnotes

1 "Run-along rights" are not specifically defined by the statute; nor do we find the rights defined in other jurisdictions. This Court requested the parties herein to define the term. The parties entered into a stipulation which has been of no help. We therefore construe the term "run-along rights" as rights that are contiguous to or part of certificates held by APS.

2 The question was raised as to whether a memorandum decision which is unpublished and uncitable could be the law of the case. It can. A memorandum decision is just as binding on the parties as a published opinion.

3 We note that here the statutes have provided for areas of conflicting jurisdiction that oftentimes result in intense "turf" battles. The attitude of the Arizona Corporation Commission in seeking to work rationally within the system is commendable. This was true even when there was reason to believe that an erroneous decision had been made in the Commission's area of expertise.

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Exhibit 14

194 Ariz. 54
Supreme Court of Arizona,
En Banc.

In Re Joan K. HALL and Stanley E. Lalli,
a minor child, Petitioners/Appellants,
v.
Joseph A. LALLI, Respondent/Appellee.

No. CV–97–0476–PR. | April 13, 1999.

Child brought paternity action against putative father. The Superior Court, Pima County, Cause No. SP-7469, Edgar B. Acuña, J., dismissed action as barred by res judicata, and child appealed. The Court of Appeals, 191 Ariz. 104, 952 P.2d 748, vacated and remanded. The Supreme Court, Feldman, J., granted review and held that child was not in privity with either state or his mother in prior paternity proceeding.

Court of Appeals affirmed, trial court judgment reversed.

West Headnotes (18)

[1] **Appeal and Error**
Cases Triable in Appellate Court
The Supreme Court reviews pure questions of law de novo.

15 Cases that cite this headnote

[2] **Judgment**
Nature and requisites of former recovery as bar in general
"Res judicata" protects litigants from the burden of relitigating an identical issue and promotes judicial economy by preventing needless litigation.

4 Cases that cite this headnote

[3] **Judgment**
Nature and requisites of former recovery as bar in general
The doctrine of res judicata provides finality and deters harassment of former litigants.

5 Cases that cite this headnote

[4] **Constitutional Law**
Notice and Hearing
Due process dictates that a party has the right to be heard.

3 Cases that cite this headnote

[5] **Judgment**
Matters which might have been litigated
Judgment
Matters actually litigated and determined
The doctrine of res judicata will preclude a claim when a former judgment on the merits was rendered by a court of competent jurisdiction and the matter now in issue between the same parties or their privities was, or might have been, determined in the former action.

37 Cases that cite this headnote

[6] **Judgment**
What constitutes privity in general
Finding privity between a party and a non-party requires both a substantial identity of interests and a working or functional relationship in which the interests of the non-party are presented and protected by the party in the litigation.

9 Cases that cite this headnote

[7] **Judgment**
What constitutes privity in general
"Privity" is not a result of parties having similar objectives in an action but of the relationship of the parties to the action and the commonality of their interests.

5 Cases that cite this headnote

[8] **Child Custody**
Constitutional and Statutory Provisions
The establishment of the parent-child relationship is the most fundamental right a child

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possesses to be equated in importance with the most basic constitutional rights.

Cases that cite this headnote

[9] **Children Out–Of–Wedlock**
Nature and form of remedy

While the child has an interest in support during minority, there are other important rights to be considered in an action to establish paternity.

Cases that cite this headnote

[10] **Children Out–Of–Wedlock**
Nature and form of remedy

In an action to establish paternity, the child's interests are broader than all others and include claims to inheritance, medical support, and other matters.

2 Cases that cite this headnote

[11] **Children Out–Of–Wedlock**
Nature and form of remedy

An accurate determination of paternity results in intangible psychological and emotional benefits for the child, including establishing familial bonds and learning of cultural heritage.

4 Cases that cite this headnote

[12] **Children Out–Of–Wedlock**
Nature and form of remedy

A child's interest in determining his or her father is fundamental, unique, and broader than the interests of all others.

1 Cases that cite this headnote

[13] **Children Out–Of–Wedlock**
Nature and form of remedy

Generally, the state pursues a child's paternity not only because it desires to see that justice is done, but also to reduce the number of individuals forced to enter the welfare rolls.

Cases that cite this headnote

[14] **Children Out–Of–Wedlock**
Bar or abatement of proceedings

Children Out–Of–Wedlock
Operation and effect

Child was not in privity with state in prior paternity proceeding brought by state against putative father to recover past and future child support, and thus child was not barred by doctrine of res judicata from pursuing paternity action against putative father following dismissal with prejudice of state's action, where child was not party to state's action and his interests were not represented by guardian ad litem or independent counsel in that action.

2 Cases that cite this headnote

[15] **Children Out–Of–Wedlock**
Nature and form of remedy

A mother's and a child's interests in a paternity determination not only differ, but may potentially conflict.

Cases that cite this headnote

[16] **Children Out–Of–Wedlock**
Bar or abatement of proceedings

Children Out–Of–Wedlock
Operation and effect

Child was not in privity with his mother in prior paternity proceeding brought on behalf of mother by state against putative father to recover past and future child support, and thus child was not barred by doctrine of res judicata from pursuing paternity action against putative father following dismissal with prejudice of state's action, where child was not party to state's action and his interests were not represented by guardian ad litem or independent counsel in that action.

2 Cases that cite this headnote

[17] **Children Out–Of–Wedlock**
Nature and form of remedy

Infants
Domestic relations and parentage

In proceeding to establish paternity, better practice is to join child as party to action, and to seek appointment of guardian ad litem and independent counsel to protect child's interests, which may potentially conflict with those of state or mother.

1 Cases that cite this headnote

[18] Children Out–Of–Wedlock
Sufficiency

Blood tests carry great weight in paternity determinations because the results do not depend upon a party's testimony and because the tests are verifiable.

Cases that cite this headnote

Attorneys and Law Firms

****778 *56** Southern Arizona Legal Aid, Inc. By: Paul D. Julien Eric D. Marsteller and Arizona Justice Institute By: William E. Morris, Tucson, Attorneys for Petitioners/ Appellants.

Lawrence Edwin Condit, Tucson, Attorney for Respondent/ Appellee.

Opinion

OPINION

FELDMAN, Justice.

¶ 1 In 1979, the state brought a paternity action against Joseph Lalli (Lalli) to determine if he was the father of Stanley Lalli (Stanley). Stanley was not named as a party, but the complaint did mention his mother, Joan Hall (Joan). The trial court dismissed the claim with prejudice. In 1995, Joan and Stanley brought a new paternity action against Lalli. The trial court dismissed both claims as barred by res judicata due to the 1979 dismissal. Stanley appealed, and the court of appeals reversed. We granted review to determine whether a child's paternity claim is barred by an earlier contrary judgment to which the child was not a party.

FACTS

¶ 2 Joan and Lalli were married in 1971. In 1978, Lalli filed a petition for dissolution of marriage in which he stated that he and Joan were the parents of three minor children and that Joan was not then pregnant. A default decree was entered against Joan, granting custody of the three children to Lalli. Four months later, Joan gave birth to Stanley.

¶ 3 In 1979, Joan was receiving Aid to Families with Dependant Children (AFDC). In November of that year, the State of Arizona brought a paternity action on Joan's behalf, seeking reimbursement from Lalli for the AFDC benefits paid Joan as Stanley's mother. A few months later, the state moved to dismiss the complaint, attaching Joan's handwritten letter that stated Lalli was "not the natural father of Stanley." The court dismissed the state's complaint with prejudice, in effect determining that Lalli was not Stanley's father.

¶ 4 In 1995, Joan brought a paternity action against Lalli, alleging he was and is Stanley's father. Because Stanley was still a minor, the trial court granted Joan's motion to intervene as Stanley's "best friend," thus joining him as a party. Lalli filed a motion to dismiss both Joan's and Stanley's claims, arguing they were barred by the doctrine of res judicata because the 1979 paternity action and the present case had been brought by the same "parties or their privies." In ruling on the motion, the trial judge relied on a case from Division One of our Court of Appeals as the dispositive law. *See Bill v. Gossett,* 132 Ariz. 518, 647 P.2d 649 (App.1982) (concluding that minor child and her mother had been in privity at time of mother's earlier paternity action and child was therefore barred from bringing subsequent action against same man). Following *Bill,* the trial judge dismissed both claims. Only Stanley appealed the dismissal, arguing that he was neither a party to the 1979 proceeding nor in privity with the state or his mother. Disagreeing with *Bill,* Division Two of our Court of Appeals held that Stanley had *not* been in privity with any party to the 1979 action and thus res judicata did not bar his claim. ****779 *57** *Hall v. Lalli,* 191 Ariz. 104, 109, 952 P.2d 748, 753 (App.1997). We granted review to resolve the conflict between our appellate divisions and to determine whether the doctrine of res judicata should be applied under these circumstances. Ariz.R.Civ.App.P. 23(c)(3). We have jurisdiction pursuant to Ariz. Const. art. VI, § 5(3).

DISCUSSION

[1] ¶ 5 Because the court of appeals' opinion addressed only pure questions of law, we review de novo. *See, e.g., Scottsdale Unified Sch. Dist. v. KPNX Broadcasting Co.,* 191 Ariz. 297, 300, 955 P.2d 534, 537 (1998).

A. Res judicata

[2] [3] [4] ¶ 6 Res judicata protects "litigants from the burden of relitigating an identical issue" and promotes "judicial economy by preventing needless litigation." *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 326, 99 S.Ct. 645, 649, 58 L.Ed.2d 552 (1979). This principle provides finality and deters harassment of former litigants. *See Circle K v. Industrial Comm'n,* 179 Ariz. 422, 426, 880 P.2d 642, 646 (App.1993). Due process, on the other hand, dictates that a party has the right to be heard. "It is a rule as old as the law that no one shall be personally bound until he has had his day in court...." *Phoenix Metals Corp. v. Roth,* 79 Ariz. 106, 109, 284 P.2d 645, 647 (1955) (quoting 12 AM.JUR. *Constitutional Law* § 573).

[5] ¶ 7 The doctrine of res judicata will preclude a claim when a former judgment on the merits was rendered by a court of competent jurisdiction and the matter now in issue between the same parties or their privities was, or might have been, determined in the former action. *Hall,* 191 Ariz. at 106, 952 P.2d at 750; *Aldrich & Steinberger v. Martin,* 172 Ariz. 445, 448, 837 P.2d 1180, 1183 (App.1992). The 1979 dismissal satisfies all factors except whether Stanley, who was not a named party to the first paternity action, was in privity with either the state or his mother. [1] If so, res judicata bars his present claim.

B. Privity

[6] ¶ 8 Finding "[p]rivity between a party and a non-party requires both a 'substantial identity of interests' and a 'working or functional relationship' ... in which the interests of the non-party are presented and protected by the party in the litigation." *Phinisee v. Rogers,* 229 Mich.App. 547, 582 N.W.2d 852, 854 (1998) (quoting *S.O.V. v. Colorado,* 914 P.2d 355, 360 (1996)). *Bill* was the first Arizona case that dealt with mother-child privity in a paternity action. Its essential facts are quite similar to those in the present case. The state and Bill's mother, as a complaining witness, sued Bill's putative father to establish paternity. The parties stipulated that the mother would take a polygraph test. If the examiners determined her answers were untruthful, the case would be dismissed with prejudice. On the other hand, if they determined her answers were truthful, the father would concede paternity and a support hearing would be held. 132 Ariz. at 519, 647 P.2d at 650. During the polygraph test, the only question posed to the mother was whether she had sexual intercourse with any man other than the putative father during the possible conception dates. The two examiners believed her negative response was untruthful. Thus, the state moved to dismiss the claim with prejudice, in accordance with the stipulation, and the trial judge granted the motion. When Bill subsequently brought her own paternity action, the putative father moved to dismiss, arguing res judicata and that the prior dismissal with prejudice barred the complaint. The trial judge agreed and dismissed. *Id.*

¶ 9 The *Bill* court acknowledged that the determinative question was whether mother and child had been in privity at the time of the previous paternity claim. Because the Arizona paternity statutes are derived from Minnesota's, the court found Minnesota's construction of its paternity statutes "particularly persuasive." *Id.* at 522, 647 P.2d at 653. The court relied on a Minnesota case, ****780 *58** stating "the proceedings are for the benefit of the mother as well as the child and the public." *Id.* at 523, 647 P.2d at 654 (quoting *Minnesota v. Sax,* 231 Minn. 1, 42 N.W.2d 680, 684 (1950)). The *Bill* court reasoned that the Arizona paternity statute [2] also served these combined and presumably identical interests by pursuing a single mutual objective—establishing paternity. *Id.* Thus, a child's interests are always represented whenever a paternity action is brought, regardless of who brings it. *Id.* The court therefore concluded that Bill had been in privity with her mother and the state so that Bill's subsequent paternity claim was barred by res judicata. *Id.* at 524, 647 P.2d at 655.

¶ 10 In the present case, Division Two reached the opposite conclusion, focusing on the issue of mother-child privity in a paternity suit. The *Hall* court noted that in *Johnson v. Hunter,* the Minnesota Supreme Court disagreed with *Bill* 's interpretation of *Sax.* 191 Ariz. at 107, 952 P.2d at 751. In *Sax,* the Minnesota court held merely that the mother was a party to a paternity proceeding and therefore entitled to appeal a support order. In *Johnson,* the court went on to discuss privity:

> An Arizona court cited our decision in *Sax* due to the similarity between Arizona's and Minnesota's (1969)

> paternity statutes and held that a prior dismissal of a state's paternity action was res judicata as to the child. [*Bill*], however, stressed the common economic interest of the state, mother and child, particularly the right to child support, rather than the other interests a child may have that are jeopardized in such a dismissal.... We cannot, however, so easily dismiss the significant interests at stake for a child in a paternity determination.... Depriving [a child] of the basic right to establish parental relations arguably would not comport with the constitutional protection granted illegitimate children.

447 N.W.2d 871, 875–76 (Minn.1989) (citations omitted). Thus, *Johnson* held that res judicata did *not* preclude the child's action when she was not a party to the previous action. 447 N.W.2d at 876–77.

¶ 11 We agree that *Johnson* weakened *Bill* 's authority by expressly disavowing *Bill* 's interpretation of *Sax*. Also, as Division Two noted, "[o]ther jurisdictions have held that as a general rule, privity does not arise from the parent-child relationship." *Hall,* 191 Ariz. at 106, 952 P.2d at 750, citing *Ex parte Snow,* 508 So.2d 266 (Ala.1987); *Simcox v. Simcox,* 175 Ill.App.3d 473, 124 Ill.Dec. 915, 529 N.E.2d 1032 (1988); *Payne v. Cartee,* 111 Ohio App.3d 580, 676 N.E.2d 946 (1996); *Virginia ex rel. Gray v. Johnson,* 7 Va.App. 614, 376 S.E.2d 787 (1989). Since the decision in *Hall,* more jurisdictions have expressly adopted this principle. *See Phinisee,* 582 N.W.2d at 854; *S.O.V.,* 914 P.2d at 361–62 & n. 10 (citing eleven cases from various jurisdictions in which it is "well recognized" that child's interests in paternity action differ from those of child's mother); *see also B.M.L. v. Cooper,* 919 S.W.2d 855 (Tex.App.1996) (holding that burden of proof was on father to show that child had been in privity with mother in prior proceeding).

[7] ¶ 12 In *Bill,* Division One concluded that mother and child were in privity because they both sought to establish paternity, a singular "mutual objective." 132 Ariz. at 523, 647 P.2d at 654. Privity, however, is not a result of parties having similar objectives in an action but of the *relationship* of the parties to the action and the *commonality* of their interests. *See Johnson,* 447 N.W.2d at 874. Even though a desired *objective* of all paternity suits is the same—to establish the defendant's paternity—each party's *interests* for doing so differ significantly. Parties with common objectives but disparate interests might pursue an action with varying degrees of diligence. Even when the interests of the parties apparently overlap, a court should determine if there are additional, separate interests that would prevent a finding of privity. *See, e.g., S.O.V.,* 914 P.2d at 361–62. Thus, we turn now to examine the commonality of the parties' interests to determine whether Stanley was in privity with the state or his mother.

1. State-child privity

[8] [9] [10] [11] [12] ¶ 13 We start by examining the interests of the child. The "[e]stablishment ****781** ***59** of the parent-child relationship is the most fundamental right a child possesses to be equated in importance with ... the most basic constitutional rights." *Johnson,* 447 N.W.2d at 876 (quoting *Ruddock v. Ohls,* 91 Cal.App.3d 271, 154 Cal.Rptr. 87, 91 (1979)). While the child has an interest in support during minority, there are other important rights to be considered. *See Phinisee,* 582 N.W.2d at 854 n. 6. The child's interests are broader than all others and include claims to inheritance, medical support, and other matters. *Johnson,* 447 N.W.2d at 875 (also listing personal cause of action, workers' compensation dependent's allowance, and veteran's educational benefits); *see Marsh v. Rodgers,* 659 N.E.2d 171, 173 (Ind.App.1995) (interest in accurate family medical history). Additionally, an accurate determination of paternity results in intangible psychological and emotional benefits for the child, including establishing familial bonds and learning of cultural heritage. *See, e.g., Hall,* 191 Ariz. at 107–08, 952 P.2d at 751–52; *Minnesota ex rel. Kremin v. Graham,* 318 N.W.2d 853, 855 n. 4 (Minn. 1982). We agree with Division Two and these well-reasoned decisions that a child's interest in determining his or her father is fundamental, unique, and broader than the interests of all others.

[13] [14] ¶ 14 Of the many parties wanting to establish Stanley's paternity, the interests of the state are the most simple to define. In general, the state pursues a child's paternity not only because it desires to see that " 'justice is done,' ... [but] also ... to reduce the number of individuals forced to enter the welfare rolls." *Mills v. Habluetzel,* 456 U.S. 91, 103, 102 S.Ct. 1549, 1557, 71 L.Ed.2d 770 (1982) (O'Connor, J. concurring, four justices joining). The state initiated the 1979 action against Lalli for "purely economic" reasons—to establish his fiscal responsibility and terminate Joan's reliance on AFDC. *Hall,* 191 Ariz. at 107, 952 P.2d at 751. Thus, Stanley and the state shared that one important,

overlapping interest. Sixteen years later, however, Stanley brought this action to establish his familial status, apparently for reasons other than support. *Id.* Regardless of any common financial interest, Stanley has other significant interests that prevent finding a commonality of interests between him and the state. Thus, a finding of privity is precluded.

2. Mother-child privity

¶ 15 A mother's interests in bringing a paternity action include securing financial assistance to raise her child and gaining the ability to legally enforce the father's support obligation. Of course, a mother also has emotional and psychological interests in establishing her child's paternity. These may include, for example, a lessened burden from sharing the responsibility of physical custody and tending to the child's emotional and developmental needs.

¶ 16 It is important to remember, however, that parental relationships are triangular; not only does each parent have a relationship with the child, but the parents also have a relationship with each other. *See* Carl W. Gilmore, *Independent Evidence: A New Tool for Paternity Cases,* 86 ILL. B.JJ. 476, 480 (1998). As a result, even if the mother's interests appear to be aligned with the child's, she is often subject to pressures from her relationship with the father. These pressures may affect her decision to proceed with a paternity suit. A mother may decide to dismiss a pending paternity suit because she may hope for a continuing relationship with the father, or because her relationship with the father has deteriorated to the point that she wants to avoid contact with him. There may be pressure from community or family disapproval of the father, the relationship, or the paternity action. The mother may be deterred by the trouble, difficulty, and expense of maintaining the lawsuit and decide that she wants and has the means to raise the child independently. Moreover, the putative father may offer the mother an amount sufficient to induce her to settle the claim without an adjudication. *See, e.g., Johnson,* 447 N.W.2d at 875.

[15] ¶ 17 As illustrated by the list above, "a mother's and a child's interests in a paternity determination not only differ, but may potentially conflict." *Hall,* 191 Ariz. at 108, 952 P.2d at 752. While assuming that most mothers are dedicated to pursuing the best interests of their children, we must also acknowledge that a mother's perception of ****782 *60** what is best for her child will often be affected by factors unique to her. Recognizing that many mothers face significant personal obstacles when pursuing paternity claims, we cannot expect them to always protect only their child's interests and ignore their own. *See G.E.B. v. S.R.W.,* 422 Mass. 158, 661 N.E.2d 646, 651 (1996) (a mother's independent interests "may prevent her from fully protecting the child's sometimes competing concerns"); *R.A.J. v. L.B.V.,* 169 Ariz. 92, 96, 817 P.2d 37, 41 (App.1991) (because conflicts of interest are inherent in paternity case, leaving parent to represent her child may leave child's rights unprotected).

[16] ¶ 18 Thus, although a mother's concerns are more substantial than those of the state, we conclude that the fundamental and unique nature of the child's interests cannot always be adequately represented by the mother, who may have differing, even conflicting interests. We agree with *Hall* that a mother and child lack the necessary commonality of interests to find them in privity.

C. Preventing multiple paternity determinations

¶ 19 Res judicata promotes finality and consistency. *See Circle K,* 179 Ariz. at 426, 880 P.2d at 646. Lalli argues that Division Two's opinion subverts that policy because it allows two separate paternity actions to be brought at different times against one man. But even considering the burden and possible harassment resulting, other courts have concluded that "these concerns are outweighed ... by the paramount interests of a child in an adjudication on the merits of paternity." *Johnson,* 447 N.W.2d at 876. In considering the equities, we note that new procedures and developments in law and science significantly mitigate the potential burden of multiple litigation.

1. Joinder of child at initial paternity proceeding

[17] ¶ 20 Modern procedural rules require joinder of a party who "claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may ... as a practical matter impair or impede [his] ability to protect that interest." Ariz.R.Civ.P. 19(a). In the specific context of a paternity suit, many dangers of multiple litigation can be avoided by joining the child to the first action. *See Hall,* 191 Ariz. at 109, 952 P.2d at 753; *R.A.J.,* 169 Ariz. at 96, 817 P.2d at 41; *see also Kieler v. C.A.T.,* 616 N.E.2d 34 (Ind.App.1993) (observing that paternity defendant could have avoided problems had children been joined as necessary parties to first action). Moreover, because the child's interests potentially conflict with those of other parties involved, a guardian ad litem and independent counsel may be appointed to protect the child's interests. *See* Ariz.R.Civ.P. 17(g); *R.A.J.,* 169 Ariz. at

96–97, 817 P.2d at 41–42. This, of course, depends on the identity of the other parties to the litigation and whether the child's interests can be fully, objectively, and disinterestedly represented. Given that we have identified the child's interests as distinct from those of the state and mother, we are reluctant to adopt a rule that such parties are always privies and representatives of the child, at least while they are also pursuing their own interests.

2. Equitable considerations

¶ 21 The *Hall* court cited two equitable considerations to support its holding. The first cite was to an important section of the RESTATEMENT (SECOND) OF JUDGMENTS (RESTATEMENT)))))):

> *[C]onclusive effect should not be given to a status determination in resolving another person's rights or obligations in which the status is an operative element,* if doing so would impair an interest arising from a just reliance interest or otherwise result in substantial injustice. Some earlier authorities insisted that a judgment determining status must necessarily be conclusive on "all the world" if it was to be conclusive beyond the parties in any way. More carefully considered authorities, however, recognize that a status judgment can be treated as effective at large without enforcing all its legal ramifications, and that *treating it as operative when the interests of others are involved should depend on considerations of equity and good conscience.*

****783 *61** RESTATEMENT § 31 cmt. f (emphasis added); *see also State ex rel. Dep't of Econ. Sec. v. Powers,* 184 Ariz. 235, 237, 908 P.2d 49, 51 (App.1995) (discussing RESTATEMENT § 31 cmt. a and stating that absence of child from former proceeding weighs against application of issue preclusion). [3]

¶ 22 The second cite was to the Uniform Parentage Act (UPA). Although the UPA has not been legislatively adopted in Arizona, our courts have found its policies persuasive. *See Stephenson v. Nastro,* 192 Ariz. 475, 480, 967 P.2d 616, 621 (App.1998); *Ban v.Quigley,* 168 Ariz. 196, 199, 812 P.2d 1014, 1017 (App.1990). Keeping the child's interests at the forefront, the UPA provides that the child is an indispensable party to a paternity action. *See S.O.V.,* 914 P.2d at 360–61 (referring to Colorado's adopted version of the UPA). The UPA also requires that a guardian ad litem be appointed to represent the child's interests. *Id.*

3. Blood testing in paternity cases

¶ 23 We believe the burdens of consecutive or multiple litigation have been considerably lessened by scientific developments since *Bill* was decided. Arizona has adopted the following presumption:

> If the results of the blood tests indicate that the likelihood of the alleged father's paternity is ninety-five per cent or greater, the alleged father is presumed to be the parent of the child and the party opposing the establishment of the alleged father's paternity shall establish by clear and convincing evidence that the alleged father is not the father of the child.

A.R.S. § 25–807(D).

[18] ¶ 24 Blood tests carry great weight in paternity determinations because "the results do not depend upon a party's testimony and because the tests are verifiable." Gilmore, *supra,* 86 ILL. B.JJ. at 477. Before the use of blood tests, juries were often left to determine paternity by resolving the conflicting testimony of adverse witnesses, considering marital status of the parents, and examining the physical likeness of the defendant and the child. *See* Ronald J. Richards, Comment, *DNA Fingerprinting and Paternity Testing,* 22 U.C. DAVIS L.REV. 609, 611 n. 6 (1989). When blood tests were first used, the results placed the child and the father into certain categories based on blood characteristics. While the result could exclude the possibility that a particular man was the child's father, it could not affirmatively establish a single man as a father but could only narrow the class of potential fathers to those who shared the same blood characteristics. *Id.* at 612. A newer blood test, human leukocyte antigen tissue typing (HLA testing), identifies more specific blood characteristics and can establish parentage to ninety-eight percent probability. *Id.* at 612–13 n. 11. Modern DNA fingerprinting boasts even greater accuracy; by mapping the DNA of the mother and the child, the test comes closer than any other in positively identifying a child's father. *Id.* at 613, 620–24, & 627–28 n. 56.

¶ 25 The availability and accuracy of today's blood testing and the statutory presumption created by § 25–807(D) will forestall the filing of many paternity cases and dispose of many others by summary judgment. Thus, even if a man's

paternity is relitigated for the benefit of the child, chances are the claim will often be quickly resolved by testing rather than by long, harassing litigation.

¶ 26 Balancing the factors discussed, we conclude that the rule adopted in *Hall* is best. We disapprove of *Bill* 's analysis and ****784 *62** reject the view that a child is in privity with either the state or its mother in the context of a paternity action. In the future, a child not joined to a paternity action will not be precluded by its disposition. Thus, like Stanley, such a child may bring his or her own subsequent action to establish paternity. We believe this rule will vindicate the rights and interests of children without unduly burdening putative fathers with harassing, repetitive actions.

CONCLUSION

¶ 27 The danger of multiple actions feared by the older cases, such as *Bill,* are now largely obviated by modern procedure and pleading. Any party to a paternity proceeding can move for appointment of a guardian ad litem for the minor child whose status is at issue and have the child joined in the action.[4] Finally, new DNA blood analysis makes the disposition of such actions much less onerous than it was when *Bill* was decided.

¶ 28 Thus, the court of appeals' opinion is approved. The trial court's judgment dismissing Stanley's claim as barred by res judicata is reversed, and the case is remanded to the trial court for proceedings consistent with this opinion.

THOMAS A. ZLAKET, Chief Justice, CHARLES E. JONES, Vice Chief Justice, FREDERICK J. MARTONE, Justice, and RUTH V. McGREGOR, Justice, concur.

Parallel Citations

977 P.2d 776, 299 Ariz. Adv. Rep. 9

Footnotes

1 We make two assumptions. First, we assume, as did the parties and the court of appeals, that Joan was a party to the 1979 case. Second, neither the parties, the trial judge, nor the court of appeals questioned whether a voluntary dismissal with prejudice acts as a judgment or adjudication on the merits for purposes of res judicata or issue preclusion. We do not, therefore, address the matter. *But see Circle K,* 179 Ariz. at 425–27, 880 P.2d at 645–47; WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2367 (1995).

2 A.R.S. § 12–849, now renumbered as § 25–809.

3 A paternity action is, of course, a status determination. When the 1979 action was brought, Stanley was a thirteen-month-old infant *without independent counsel or guardian ad litem.* We, like the *Hall* court, find this significant. 191 Ariz. at 109, 952 P.2d at 753; *see County of Shasta v. Caruthers,* 31 Cal.App.4th 1838, 38 Cal.Rptr.2d 18, 21 (1995) (child could bring paternity action despite fact that mother previously settled her own action against father); *In re M.C.,* 895 P.2d 1098 (Colo.App.1994); *Marsh,* 659 N.E.2d at 173; *G.E.B.,* 661 N.E.2d at 651; *Johnson,* 447 N.W.2d at 874 (finding it too "troublesome" to hold that unrepresented infant was party or in privity to prior paternity action); *Elacqua v. James EE,* 203 A.D.2d 688, 610 N.Y.S.2d 354 (N.Y.App.1994); *Payne v. Cartee,* 111 Ohio App.3d 580, 676 N.E.2d 946 (1996); *West Virginia Dep't of Health & Human Resources ex rel. Cline v. Pentasuglia,* 193 W.Va. 621, 457 S.E.2d 644 (1995); *In re SDM,* 882 P.2d 1217 (Wyo.1994); *but see Bradley v. Division of Child Support Enforcement ex rel. Patterson,* 582 A.2d 478 (Del.1990).

4 Ariz.R.Civ.P. 19(a)(2)(i) and (ii) permits any party to move for joinder when as a practical matter a person's absence may

> impede the person's ability to protect [his or her] interest [or] (ii) leave any of the persons already subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in the proper case, an involuntary plaintiff.

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Exhibit 15

235 Ariz. 12
Court of Appeals of Arizona,
Division 2.

JOHN MUNIC ENTERPRISES, INC., an Arizona corporation, Plaintiff/Appellee,
v.
Beth Anne LAOS and Enrico B. Laos, Wife and Husband, Defendant/Appellant.

No. 2 CA–CV 2013–0108. | May 6, 2014.

Synopsis

Background: Lender brought action against borrowers for breach of contract and fraud, alleging that borrowers failed to repay loan and that borrower misrepresented the value of assets that secured loan. Lender was granted summary judgment on both claims and was awarded damages in the amount of $1,362,305.70. Borrowers moved for relief from judgment and requested fair market valuation hearing for the value of their foreclosed home. The Superior Court, Pima County, No. C20099937, Charles V. Harrington, J., denied borrowers' motion for relief from judgment and request for fair market valuation hearing.

Holdings: The Court of Appeals, Howard, C.J., held that:

[1] Uniform Contribution Among Tortfeasors Act (UCATA) did not apply to damages award;

[2] collateral source rule applied to prevent amount of confidential settlement between lender and its attorney from serving as a credit against damages award; and

[3] trial court did not err in denying borrowers' untimely request for fair market valuation hearing.

Affirmed.

West Headnotes (20)

[1] Mortgages
Presentation and reservation in lower court of grounds of review

Borrowers waived on appeal of trial court's denial of relief from judgment, which judgment was entered against borrowers on lender's claims for breach of contract and fraud, any argument that trial judge was biased or prejudiced against borrowers for looking into other pending cases involving borrowers, where borrowers did not make argument below in their motion for reconsideration or through an affidavit requesting judge's disqualification pursuant to statute, and borrowers stipulated to the same judge entering an amended judgment to confirm appellate court's jurisdiction over appeal. A.R.S. § 12–409.

Cases that cite this headnote

[2] Judges
Time of making objection

The right to apply for a change of judge for cause is waived if not timely filed.

Cases that cite this headnote

[3] Appeal and Error
Refusal to vacate

Appellate courts review for an abuse of discretion the denial of a motion for relief from judgment on grounds that the judgment has been satisfied, released, or discharged. 16 A.R.S. Rules Civ.Proc., Rule 60(c)(5).

Cases that cite this headnote

[4] Courts
Abuse of discretion in general

A court abuses its discretion if it commits an error of law.

Cases that cite this headnote

[5] Appeal and Error
Cases Triable in Appellate Court

Appellate court reviews de novo issues of statutory interpretation.

Cases that cite this headnote

[6] **Statutes**
Clarity and ambiguity; multiple meanings

When statutory language is clear and unambiguous, courts look no further and assume that the legislature has said what it means.

Cases that cite this headnote

[7] **Contribution**
Joint Wrongdoers

Contribution
Measure of contribution

Purpose of the Uniform Contribution Among Tortfeasors Act (UCATA) is to abolish joint and several liability in most circumstances so that each tortfeasor is responsible for paying his or her percentage of fault and no more. A.R.S. §§ 12–2501 to 12–2509.

Cases that cite this headnote

[8] **Action**
Nature of Action

Torts
Contracts in Relation to Torts

To determine whether contract or tort law applies in a specific case, a court must consider the facts of the case, bearing in mind the purposes of tort law recovery as contrasted with contract law.

Cases that cite this headnote

[9] **Contracts**
Nature and Form of Remedy

Torts
Purpose or function of tort law

Contract remedies are designed to redress loss of the benefit of the bargain while tort remedies are designed to protect the public.

Cases that cite this headnote

[10] **Contracts**
Effect of invalidity

When a party is induced to enter a contract by fraudulent misrepresentations and justifiably relies on the misrepresentations, the contract is voidable by that party, but is not automatically void.

Cases that cite this headnote

[11] **Fraud**
Effect of existence of remedy by action on contract

When a party is induced to enter a contract by fraudulent misrepresentations and justifiably relies on the misrepresentations, whether the party chooses to void the contract or not, it also has an independent tort action for fraud.

Cases that cite this headnote

[12] **Action**
Nature of Action

Contribution
Joint debtors

Damages awarded on judgment entered against borrowers, on lender's claims for breach of contract and fraud arising from borrowers' failure to repay loan and from borrower's misrepresentation of the value of assets that secured loan, sounded primarily in contract, and thus Uniform Contribution Among Tortfeasors Act (UCATA) did not apply to damages award; although lender could have sought to void loan agreement as induced by fraud, lender instead sought to enforce agreement by its terms and receive the benefit of its bargain, and judgment awarded damages and attorney fees based on terms of agreement but did not award "additional damages" based on lender's fraud claim. A.R.S. §§ 12–2501 to 12–2509.

Cases that cite this headnote

[13] **Appeal and Error**
Review of correct decision based on erroneous reasoning in general

If a trial court has reached the correct result for the wrong reasons, an appellate court is bound to affirm its ruling.

Cases that cite this headnote

[14] **Damages**
Matter of mitigation; collateral source rule in general

The collateral source rule prevents a tortfeasor from avoiding liability for damages when the injured party has been compensated by a third party.

Cases that cite this headnote

[15] **Contracts**
Nature and Form of Remedy

Enforcing the expectation interests of the parties is one of the principal goals of remedying a breach of contract.

Cases that cite this headnote

[16] **Damages**
Reparation by wrongdoer

Borrowers' breach of loan agreement with lender had willful or tortious character, and thus collateral source rule applied to prevent amount of confidential settlement between lender and its attorney, for legal malpractice in connection with attorney's work on loan, from serving as a credit against damages awarded on judgment entered against borrowers on lender's claims for breach of contract and fraud arising from borrowers' failure to repay loan and from borrower's misrepresentation of the value of assets that secured loan; although damages award sounded primarily in contract and trial court declined to award "additional damages" on lender's fraud claim, trial court found that borrower "intentionally misrepresented the amount and status of her assets offered as collateral to [lender] for the purpose of obtaining a loan."

Cases that cite this headnote

[17] **Appeal and Error**
Matters not included or shown in general

If a fact is not in the record, an appellate court may not consider it.

Cases that cite this headnote

[18] **Appeal and Error**
Cases Triable in Appellate Court

An issue involving statutory interpretation and application is a question of law that an appellate court reviews de novo.

Cases that cite this headnote

[19] **Mortgages**
Right to deficiency judgment and grounds therefor in general

Trial court did not err in denying judgment debtors' untimely request for fair market valuation hearing, pursuant to statute, to determine the value of their foreclosed home, which request was made contemporaneously with debtors' motion for relief from judgment entered against them, where debtors did not provide any authority for their position that trial court should have extended 30-day deadline to request hearing in fairness and that it had the authority to do so, and debtors conceded that failure to timely request hearing "may have been the fault of their then[-]existing counsel." A.R.S. § 12–1566(C).

Cases that cite this headnote

[20] **Appeal and Error**
Form and requisites in general

Arguments unsupported by any authority will not be considered on appeal.

Cases that cite this headnote

Attorneys and Law Firms

***281** Altfeld & Battaile P.C., By Robert A. Kerry, Tucson, Counsel for Plaintiff/Appellee.

Waterfall, Economidis, Caldwell, Hanshaw & Villamana, P.C., By Corey B. Larson, Tucson, Counsel for Defendant/Appellant.

Chief Judge HOWARD authored the opinion of the Court, in which Judge BRAMMER and Judge OLSON concurred. [1]

Opinion

OPINION

HOWARD, Chief Judge.

¶ 1 Beth and Enrico Laos ("the Laoses") appeal from the trial court's denial of their Rule 60(c)(5), Ariz. R. Civ. P., motion for relief from judgment entered in favor of John Munic Enterprises, Inc. ("Munic"), and its denial of their request for a fair market valuation hearing pursuant to A.R.S. § 12–1566. On appeal, they argue that the court was biased against them, that it erred in applying the Uniform Contribution Among Tortfeasors Act ("UCATA") to prevent a settlement amount between Munic and its attorney from serving as a credit against the judgment entered against them, and that fundamental fairness and equity entitled them to a fair market valuation hearing. For the following reasons, we affirm.

Factual and Procedural Background

¶ 2 The underlying facts are undisputed. In March 2009, the Laoses sought a loan from Munic in order to avoid the non-judicial foreclosure of a ranch they had purchased. Munic loaned them $900,000 for this purpose. When the Laoses failed to repay any amount of the loan, Munic discovered that Beth Laos ***282** had misrepresented the value of assets that secured the loan. Munic sued the Laoses for breach of contract and fraud and was granted summary judgment on both claims and awarded contract damages in the amount of $1,362,305.70, which covered the loan principal, unpaid interest, and attorney fees. The trial court declined to enter any additional compensatory or punitive damages on the fraud claim.

¶ 3 Over a year after the judgment was entered, the Laoses discovered Munic had sued its attorney for legal malpractice in connection with his work on the loan and had obtained a confidential settlement amount from him. The Laoses moved for relief from judgment pursuant to Rule 60(c)(5), arguing that Munic should reveal the amount of the settlement so that it could be credited against the judgment entered against them or, in the alternative, that Munic should be required to enter a satisfaction of judgment. They also requested a fair market valuation hearing for the value of the ranch. The trial court denied the motion and the request for a valuation hearing. We have jurisdiction over the Laoses' appeal pursuant to A.R.S. § 12–2101(A)(2).

Trial Court Prejudice

[1] **[2]** ¶ 4 The Laoses first argue the trial court was biased or prejudiced against them because it looked into other cases involving the Laoses pending on the superior court's docket. However, they did not make this argument below in their motion for reconsideration or through an affidavit requesting the judge's disqualification pursuant to A.R.S. § 12–409. Additionally, they stipulated to the same trial judge entering an amended judgment to confirm this court's jurisdiction. "The right to apply for a change of judge for cause is waived if not timely filed." *Fendler v. Phx. Newspapers Inc.,* 130 Ariz. 475, 481, 636 P.2d 1257, 1263 (App.1981). Therefore, they have waived any error. *See Trantor v. Fredrikson,* 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994) (errors not raised in trial court cannot be asserted on appeal); *Marsin v. Udall,* 78 Ariz. 309, 313, 279 P.2d 721, 724 (1955) (untimely to move to disqualify judge when judgment already rendered on pleadings).

Settlement Credit

[3] **[4]** **[5]** **[6]** ¶ 5 The Laoses next argue the trial court erred by concluding that UCATA prevented crediting the settlement Munic obtained from its attorney against the judgment entered against them and therefore denying their Rule 60(c)(5) motion. We review the denial of a Rule 60(c)(5) motion for an abuse of discretion. *Ezell v. Quon,* 224 Ariz. 532, ¶ 15, 233 P.3d 645, 649 (App.2010). A court abuses its discretion if it commits an error of law. *City of Tucson v. Clear Channel Outdoor, Inc.,* 218 Ariz. 172, ¶ 58, 181 P.3d 219, 236 (App.2008). We review de novo issues of statutory interpretation. *First Credit Union v. Courtney,* 233 Ariz. 105, ¶ 9, 309 P.3d 929, 931 (App.2013). "When the statutory language 'is clear and unambiguous,' we look no further and 'assum[e] the legislature has said what it means.' " *Id., quoting Clear Channel Outdoor,* 218 Ariz. 172, ¶ 6, 181 P.3d at 225.

¶ 6 Rule 60(c)(5) allows a trial court to relieve a party from a judgment if "the judgment has been satisfied, released or discharged." The Laoses claim Munic's settlement with its

attorney satisfied, or at least partially satisfied, the judgment against them. But the trial court concluded that "UCATA does apply to this case" because § 12–2501(G) "defines 'property damage' to include 'economic loss[.]' " The court then found that because the liability of Munic's attorney and the Laoses was several, and not joint, the settlement could not be used to offset their judgment under UCATA. *See* § 12–2506(A); *Gemstar Ltd. v. Ernst & Young,* 185 Ariz. 493, 507–08, 917 P.2d 222, 236–37 (1996).

¶ 7 Sections 12–2501 through 12–2509, A.R.S., establish Arizona's version of UCATA. By its plain language, the act applies to persons who become "liable in tort." § 12–2501(A). "The right to contribution under §§ 12–2501 through 12–2504 applies to all tortfeasors whose liability is based on negligence, strict liability in tort or any product liability action, as defined in § 12–681, including warranty." A.R.S. § 12–2509(A). ***283** Section 12–2506(A) sets a default rule that in "personal injury, property damage or wrongful death" actions liability is several and "in direct proportion to that defendant's percentage of fault."

[7] ¶ 8 UCATA's purpose is to "abolish joint and several liability in most circumstances" so that " 'each *tortfeasor* [is] responsible for paying his or her percentage of fault *and no more.*' " *State Farm Ins. Cos. v. Premier Manufactured Sys., Inc.,* 217 Ariz. 222, ¶ 12, 172 P.3d 410, 413 (2007), *quoting Dietz v. Gen. Elec. Co.,* 169 Ariz. 505, 510, 821 P.2d 166, 171 (1991) (first emphasis added; second emphasis in *Dietz*). Although § 12–2506(F) defines "[f]ault" as including the "breach of a legal duty," we recently concluded that "[i]n the context of the UCATA ... breach of a contractual undertaking is [not] included within the meaning of 'breach of a legal duty.' "[2] *Fidelity & Deposit Co. of Md. v. Bondwriter Sw., Inc.,* 228 Ariz. 84, ¶ 24, 263 P.3d 633, 638 (App.2011). We also determined that "[t]he fact that economic losses are included within the definition of 'property damage' does not compel the conclusion that the comparative fault provisions of UCATA apply to breach of contract claims." *Id.* ¶ 25.

¶ 9 Munic received a judgment in its favor on both its contract and tort claims against the Laoses. The judgment did not include compensatory or punitive damages for the fraud claim. In granting judgment in Munic's favor on the contract claim, however, the trial court awarded damages and attorney fees pursuant to the terms of the contract. Because the Laoses are liable in tort and contract, we must review the substance of the damages at issue to determine whether UCATA was intended to apply to this situation. *See Thomas v. Goudreault,* 163 Ariz. 159, 163–64, 165, 786 P.2d 1010, 1014–15, 1016 (App.1989) (courts look to substance not labels; analyzing damages involved to determine relevant law).

[8] [9] [10] [11] ¶ 10 "To determine whether contract or tort law applies in a specific case, the court must consider the facts of the case, 'bearing in mind the purposes of tort law recovery as contrasted with contract law.' " *Salt River Project Agric. Improvement & Power Dist. v. Westinghouse Elec. Corp.,* 143 Ariz. 368, 376, 694 P.2d 198, 206 (1984), *quoting Arrow Leasing Corp. v. Cummins Ariz. Diesel, Inc.,* 136 Ariz. 444, 448, 666 P.2d 544, 548 (App.1983), *abrogated on other grounds by Phelps v. Firebird Raceway, Inc.,* 210 Ariz. 403, 111 P.3d 1003 (2005). "[C]ontract remedies are designed to redress loss of the benefit of the bargain while tort remedies are designed to protect the public...." *Arrow Leasing Corp.,* 136 Ariz. at 447, 666 P.2d at 547. When a party is induced to enter a contract by fraudulent misrepresentations and justifiably relies on the misrepresentation, the contract is voidable by that party, but is not automatically void. *See* Restatement (Second) of Contracts § 164(1) (1981) (hereinafter "Restatement (Contracts)"). But whether the party chooses to void the contract or not, it also has an independent tort action for fraud. *Morris v. Achen Constr. Co.,* 155 Ariz. 512, 514, 747 P.2d 1211, 1213 (1987).

[12] ¶ 11 The summary judgment in Munic's favor awarded damages and attorney fees based on the terms of the contract, but did not award additional damages as requested by Munic's fraud claim. Thus, although Munic could have sought to void the contract, Restatement (Contracts) § 164(1), it instead sought to enforce the contract by its terms and receive the benefit of its bargain. The only recovery Munic received in this case thus fits squarely within the type of remedy that contract law is designed to provide. *See Arrow Leasing Corp.,* 136 Ariz. at 447, 666 P.2d at 547; *Thomas,* 163 Ariz. at 165, 786 P.2d at 1016.

¶ 12 Under these circumstances, we conclude the damages in this case sound primarily in contract. Therefore UCATA was not intended to apply to this situation in which the Laoses were not primarily "liable in tort" pursuant to § 12–2501(A) or liable for a breach of a legal duty causing personal injury, ***284** property damage or wrongful death within the meaning of § 12–2506(A), (F). *See Fidelity & Deposit Co. of Md.,* 228 Ariz. 84, ¶ 25, 263 P.3d at 638. Accordingly, the trial court erred in applying UCATA to this case.

[13] ¶ 13 Munic argues we nonetheless may apply the collateral source rule in this contract case and uphold the trial court because our prior case law on this subject was ill-reasoned and is against the weight of authority in other jurisdictions. The Laoses counter that the collateral source rule is strictly a tort doctrine and should not apply to contractual damages. If the court has reached the correct result for the wrong reasons, however, we are bound to affirm its ruling. *Phelps Dodge Corp. v. El Paso Corp.,* 213 Ariz. 400, n. 7, 142 P.3d 708, 712 n. 7 (App.2006).

[14] ¶ 14 The collateral source rule is a doctrine, usually applied in personal injury cases, which provides "that benefits received by the plaintiff from a source collateral to the defendant may not be used to reduce that defendant's liability for damages." Dan B. Dobbs, *Dobbs Law of Remedies* § 3.8(1) (2d ed.1993) (hereinafter *Remedies*). The Restatement (Second) of Torts § 920A, states the rule as follows:

> (1) A payment made by a tortfeasor or by a person acting for him to a person whom he has injured is credited against his tort liability, as are payments made by another who is, or believes he is, subject to the same tort liability.
>
> (2) Payments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable. [3]

Thus, the rule prevents a tortfeasor from avoiding liability for damages when the injured party has been compensated by a third party. *Sw. Fiduciary Inc. v. Ariz. Health Care Cost Containment Sys. Admin.,* 226 Ariz. 404, ¶ 20, 249 P.3d 1104, 1109 (App.2011).

¶ 15 This court, however, rejected the rule's application to "ordinary contract cases" in *Grover v. Ratliff,* 120 Ariz. 368, 370, 586 P.2d 213, 215 (App.1978). In *Grover,* we stated that the "collateral source rule is a concept of damages in tort cases and does not apply to an ordinary breach of contract case" because the rule " 'is punitive; contractual damages are compensatory.... [I]f applied to an action based on breach of contract, [it] would violate the contractual damage rule that no one shall profit more from the breach of an obligation than from its full performance.' " *Id., quoting Patent Scaffolding Co. v. William Simpson Constr. Co.,* 256 Cal.App.2d 506, 64 Cal.Rptr. 187, 191 (Ct.App.1967). Our more recent opinion in *Norwest Bank (Minn.), N.A. v. Symington* simply quoted *Grover* for the proposition that the rule did not apply in ordinary contract cases, again relying on the reasoning of *Patent Scaffolding.* 197 Ariz. 181, ¶ 36, 3 P.3d 1101, 1109 (App.2000). But that case left open the possibility that the trial court could refuse to offset a settlement from the deficiency judgment if it concluded the damages were not similar enough, and declined to consider such refusal an application of the collateral source rule. *Id.* ¶ 37.

¶ 16 In a case decided just three years after *Patent Scaffolding,* however, the California Supreme Court explicitly overruled the statement that the collateral source rule is "punitive." *Helfend v. S. Cal. Rapid Transit Dist.,* 2 Cal.3d 1, 84 Cal.Rptr. 173, 181, 465 P.2d 61 (1970). It concluded the rule was not punitive and, at least in the tort context, has "several legitimate and fully justified compensatory functions" including encouraging the purchase of insurance, aiding the jury in the computation of damages, better approximating full compensation to victims by allowing victims a larger pool of funds from which to pay their attorneys, and in preventing the tortfeasor from benefiting from a victim's thrift. *Id.* at 178–81. Moreover, even in *Patent Scaffolding,* the court had left open the possibility that the rule ***285** could be applied in cases of tortious or willful breaches of contract. 64 Cal.Rptr. at 191.

¶ 17 Additionally, in *Fleming v. Pima County,* 141 Ariz. 149, 155, 685 P.2d 1301, 1307 (1984), our supreme court refused to offset unemployment compensation against an award of damages for wrongful discharge, characterizing those forms of compensation as a collateral source. The court was unable to deduce whether the damages were awarded under a tort or breach of contract theory. *Id.* at 154, 685 P.2d at 1306. But it reasoned that applying the collateral source doctrine " 'encourag[ed] employers to provide more stable employment' and provid[ed] for 'persons unemployed through no fault of their own.' " *Id.* at 155, 685 P.2d at 1307, *quoting* A.R.S. § 23–601. Thus, at least in the wrongful discharge context, our supreme court concluded applying the collateral source rule supported state public policy and did "not give plaintiff a 'windfall.' " *Id.*

[15] ¶ 18 Although the cases from other jurisdictions are divided, those applying the collateral source rule in contract or similar cases illustrate that in many contexts application of the rule would serve valid and valuable purposes that also are consistent with contract law principles. Enforcing the expectation interests of the parties is one of the principal goals of remedying a breach of contract. *See* Restatement (Contracts) §§ 344(a); 347 cmt. a. Applying the collateral source rule has been held to advance that goal. *See State Farm*

Mut. Auto. Ins. Co. v. Nalbone, 569 A.2d 71, 75 (Del.1989) ("[T]he extent to which the collateral source rule should be applied to permit double recovery should depend upon the contractual expectations that underlie the collateral source payment."); *Sunnyland Farms v. Cent. N.M. Elec. Coop., Inc.,* 301 P.3d 387, ¶ 50 (N.M.2013) (court should honor expectation of parties to collateral source over breaching party); *McConal Aviation, Inc. v. Comm. Aviation Ins. Co.,* 110 N.M. 697, 799 P.2d 133, ¶ 21 (1990) (breaching party should not reap benefit of negotiations to which it is not a party).

¶ 19 Thus, when a party has paid valuable consideration before the breach to a collateral source to insure against a loss or otherwise to protect its interest, there is no logical reason to deny that party a benefit it has paid for and grant it to another party who neither negotiated for it, paid for it, nor absorbed the opportunity costs of securing it, but who has precipitated the loss. To do so would subsume the expectations of the third-party contract into the breached contract, devaluing or eliminating the separate benefit of the third-party contract which was supported by separate consideration, and place the breaching party in a better position than if it had performed the contract. Such a result is illogical and inconsistent with the Restatement, which "implements the policy in favor of allowing individuals to order their own affairs by making legally enforceable promises." Restatement (Contracts) § 344 cmt. a. That the breaching party in these cases is forced to pay damages in line with the expectations of the parties actually serves the maxim that a party should not profit more from breach of a contract than its full performance. *See* Restatement (Contracts) § 347 cmt. e.

¶ 20 And collateral payments resulting from a third-party contract ordinarily are not meant to cover the "judgment debtor's obligation" but, instead, to settle or satisfy the obligations of the third party, whether those arose contractually or otherwise. *See* Restatement (Second) of Judgments § 50(2). Thus, it makes little sense, in the name of fulfilling the expectations of the contract, to give the breaching party the benefit of a separate contract negotiated before the breach by the non-breaching party with a third party. [4]

***286** ¶ 21 Furthermore, in the case of breaches of contract having a willful or tortious character, as when the breaching party secures the benefit of a contract by fraud, the collateral source rule prevents any further unjust enrichment of the breaching party. *See GNP Commodities, Inc. v. Walsh Heffernan Co.,* 95 Ill.App.3d 966, 51 Ill.Dec. 245, 420 N.E.2d 659, 668 (Ill.App.Ct.1981) (where contract secured by misrepresentations of breaching party, "no reason [exists] why the collateral source rule should not apply to bar defendants from reducing damages by proof that plaintiff has been compensated from a source to which they have not contributed"). Even courts that generally will not apply the rule in contract cases concede the rule ought to apply in these situations. *See, e.g., Patent Scaffolding,* 64 Cal.Rptr. at 191; *see also Midland Mut. Life Ins. Co. v. Mercy Clinics, Inc.,* 579 N.W.2d 823, 830 (Iowa 1998) (leaving open application of rule in cases of tortious or willful breach). Though the breaching party "may not be a wrongdoer in the same sense as is a tortfeasor" it seems particularly unobjectionable that in these cases "the injured plaintiff [should] recover twice [rather] than that the breaching defendant escape liability altogether." *Hall v. Miller,* 143 Vt. 135, 465 A.2d 222, 226 (Vt.1983); *see also El Escorial Owners' Ass'n v. DLC Plastering, Inc.,* 154 Cal.App.4th 1337, 65 Cal.Rptr.3d 524, 542 (Ct.App.2007) (where conduct underlying breach of contract involves tort, collateral source rule applies); *McConal Aviation,* 799 P.2d 133, ¶ 35 (" 'If there must be a windfall certainly it is more just that the injured person shall profit therefrom, rather than the wrongdoer shall be relieved of his full responsibility for his wrongdoing.' ") (Montgomery, J., specially concurring), *quoting Grayson v. Williams,* 256 F.2d 61, 65 (10th Cir.1958). Moreover, this approach brings symmetry with the bankruptcy code, which has long refused to discharge contractual debts incurred by fraud. *See* 11 U.S.C. § 523(a)(2)(A).

¶ 22 Additionally, the supposed "double recovery" often will prove to be more hypothetical than actual. In many contract cases the plaintiff has assigned its claims to the collateral source or a subrogation has occurred. No double recovery occurs then because the breaching party bears the full burden of its breach; the collateral source can pursue the claim against the breaching party or the breaching party can fully repay the collateral source. *Sunnyland Farms,* 301 P.3d 387, ¶ 49.

¶ 23 Persuasive scholarship also supports application of the collateral source rule to at least some contract cases. Professor Dobbs concludes that the division of the courts on this issue "at all is probably best seen as a reflection of the fact that different contract cases may demand different answers." *Remedies* § 12.6(4). Thus, he reasons, courts ought to consider the rule's application using "a case by case analysis," taking into account the "performance called for by the contract, the nature of the breach, the nature of the parties'

non-contractual relationship, ... the nature of the benefits in issue, and the subrogation rights of the collateral source" in determining whether to apply the rule. *Id.* Other scholars have agreed the rule should apply in contract cases, noting that, particularly where the non-breaching party has paid separate consideration to receive the benefit or the plaintiff has subrogated its rights to the collateral source, the rule ought to apply, and that the type of breach involved is an important consideration. *See* Joseph M. Perillo, *The Collateral Source Rule in Contract Cases,* 46 San Diego L.Rev. 705, 708–12, 719–21 (2009); John G. Fleming, *The Collateral Source Rule and Contract Damages,* 71 Calif. L.Rev. 56, 63–73, 77–86 (1983).

[16] ¶ 24 Conducting a case by case analysis, we conclude this is not an "ordinary contract case" as in *Grover* and *Symington.* Rather, it is more like *Fleming* in which the analysis of the policies behind the collateral source rule dictates it should apply. Beth Laos was able to secure the contract through her misrepresentations. Munic recovered judgment on both contract and tort theories, but the trial court declined to award "additional damages" for the fraud claim. It did find, however, that the underlying conduct was based on a tort, stating "Beth Anne Laos ***287** intentionally misrepresented the amount and status of her assets offered as collateral to [Munic] for the purpose of obtaining a loan from [Munic]." Thus, the eventual breach had a "willful or tortious" character that justifies applying the collateral source rule in this case.

[17] ¶ 25 Moreover, fulfilling the expectations of the parties also dictates that we apply the rule. Munic had paid specific consideration to its attorney before the breach with the anticipation that its attorney would protect its interests. Nothing in the record suggests that the Laoses were parties to Munic's agreement with its attorney. When Munic's attorney failed to protect its interests, Munic was able to resort to the law of professional negligence in order to seek a recovery for its losses—a right it had purchased by choosing to hire an attorney in the first place. And, as the Laoses conceded at oral argument, Munic's action against its attorney was not brought to mitigate its contract damages. Allowing the Laoses to benefit from the extra protection Munic had purchased for itself would give them the benefit of a bargain to which they were not a party and for which they had paid no consideration. And it would, at the same time, deprive Munic of a benefit for which it had paid. [5]

¶ 26 Additionally, Munic's attorney waived any right it had to an assignment or subrogation of Munic's rights against the Laoses. So, although Munic may have some level of double recovery, that result may be associated with its attorney's determination not to pursue the Laoses rather than any double payment from the Laoses. If that decision turns out to be favorable for Munic, that is a benefit it should reap for advancing Arizona policy by settling its claim; the Laoses should not "reap the benefit of a settlement to which [they were] not a party." *McConal Aviation,* 799 P.2d 133, ¶ 21; *Yollin v. City of Glendale,* 219 Ariz. 24, ¶ 15, 191 P.3d 1040, 1046 (App.2008) (" 'It has always been the policy of [Arizona] law to favor compromise and settlement; and it is especially important to sustain that principle in this age of voluminous litigation.' "), *quoting Dansby v. Buck,* 92 Ariz. 1, 11, 373 P.2d 1, 8 (1962).

¶ 27 Furthermore, the settlement resolved potential professional negligence liability, which was a separate legal wrong susceptible to damages beyond the scope of the contract. *See McConal Aviation,* 799 P.2d 133, ¶ 13 (settled negligence claim "would not have represented double recovery" on separate breach of contract claim). This is consistent with the trial court's conclusion that the liability of the Laoses and Munic's attorney was several, not joint.

¶ 28 Thus, to the extent the Laoses rely on *Pasco Industries, Inc. v. Talco Recycling, Inc.,* 195 Ariz. 50, ¶¶ 72–74, 985 P.2d 535, 550 (App.1998), and *American Home Assurance Co. v. Vaughn,* 21 Ariz.App. 190, 192, 517 P.2d 1083, 1085 (1974), for the proposition that a plaintiff cannot recover twice for the same wrong, those cases are inapposite because Munic has recovered for different wrongs. The Laoses also rely on *Hyatt Regency Phoenix Hotel Co. v. Winston & Strawn,* 184 Ariz. 120, 907 P.2d 506 (App.1995). But in that case this court allowed a settlement with a joint tortfeasor to reduce a judgment against another joint tortfeasor. *Id.* at 138–40, 907 P.2d at 524–26. Munic's attorney was not a joint tortfeasor with the Laoses and thus *Hyatt Regency* is inapposite. Accordingly, the trial court did not err in refusing to offset Munic's settlement with its attorney against the judgment entered against the Laoses.

Fair Market Valuation Hearing

[18] **[19]** ¶ 29 The Laoses finally argue that the trial court erred in denying their request for a fair market valuation hearing pursuant to A.R.S. § 12–1566 to determine ***288**

the value of their foreclosed home. They maintain "fairness dictates they be informed if the Judgment had been satisfied or extinguished before such obligation to request a valuation hearing should arise." "Because this issue involves statutory interpretation and application, it is a question of law that we review *de novo*." *Wells Fargo Credit Corp. v. Tolliver,* 183 Ariz. 343, 345, 903 P.2d 1101, 1103 (App.1995).

[20] ¶ 30 Section 12–1566(C) requires that a judgment debtor request a fair market valuation hearing within thirty days of the sale of real property and does not authorize the court to extend the time. The Laoses did not make a timely request. And they have not provided any authority for their position that the trial court should have extended this deadline in fairness, or had the authority to do so. "Arguments unsupported by any authority will not be considered on appeal." *Ness v. W. Sec. Life Ins. Co.,* 174 Ariz. 497, 503, 851 P.2d 122, 128 (App.1992). Moreover, they concede that failing to request the hearing timely "may have been the fault of their then existing counsel." Their request, therefore, has no connection to their discovery of Munic's settlement with its attorney. Accordingly, we reject this argument.

Attorney Fees

¶ 31 The Laoses request their attorney fees on appeal pursuant to A.R.S. § 12–341.01 and Rule 21, Ariz. R. Civ.App. P. Because the Laoses were not successful in this appeal, we deny their request. Munic also requests its fees and costs pursuant to § 12–341.01, Rule 21, and the contract. We award Munic its fees and costs pursuant to the terms of the contract upon its compliance with Rule 21.

Disposition

¶ 32 For the foregoing reasons, we affirm the judgment of the trial court.

Parallel Citations

326 P.3d 279, 686 Ariz. Adv. Rep. 28

Footnotes

1 The Hon. J. William Brammer, Jr., a retired judge of this court, and the Hon. Robert Carter Olson, a retired judge of the Arizona Superior Court, are called back to active duty to serve on this case pursuant to orders of this court and the supreme court.

2 Fault also can include a breach of warranty action, but we are not presented with that issue here.

3 The Laoses noted at oral argument that the comment to this rule discusses four types of collateral sources not used to offset the liability of the tortfeasor. But the rules as stated are not so limited. *See* Restatement (Second) of Torts § 920A & cmt. c.

4 But in "ordinary contract cases," refusing to apply the collateral source rule makes sense where a benefit to the non-breaching party accrues as a direct result of the breaching party's action or where the non-breaching party is able to mitigate its damages after the breach by finding a substitute transaction, as these are all acts within the ordinary contemplation of the contract. *See Remedies* § 12.6(2); *see also All Am. Sch. Supply Co. v. Slavens,* 125 Ariz. 231, 233, 609 P.2d 46, 48 (1980) ("Arizona has long held that damages for breach of contract are those damages which arise naturally from the breach itself or which may reasonably be supposed to have been within the contemplation of the parties at the time they entered the contract."). The Laoses conceded at oral argument that under the facts presented here, this is not a mitigation case.

5 At oral argument, the Laoses argued they had paid Munic's attorney fees related to this transaction. But they were unable to direct the court to any evidence in the record of that fact. If a fact is not in the record, we may not consider it. *See Schaefer v. Murphey,* 131 Ariz. 295, 299, 640 P.2d 857, 861 (1982). The Laoses also failed to cite any authority that payment of Munic's attorney fees as closing costs would make them parties to or beneficiaries of the contract. *See Ness v. W. Sec. Life Ins. Co.,* 174 Ariz. 497, 503, 851 P.2d 122, 128 (App.1992) (argument waived if made without supporting authority).

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Exhibit 16

144 Ariz. 199
Court of Appeals of Arizona,
Division 1, Department C.

RED BLUFF MINES, INC., Petitioner,
v.
The INDUSTRIAL COMMISSION
OF ARIZONA, Respondent,
Daniel Lott, Deceased, Hetta W. Roberts, Mother and Personal Representative of the Estate of Daniel Lott, Deceased and E.L. Lott, Personal Representative of the Estate of Daniel L. Lott Deceased, Respondent Personal Representatives of the Estate of Daniel Lott, Deceased, NONE, Respondent Carrier.

No. 1 CA–IC 3150. | Oct. 18, 1984. | Reconsideration Denied Dec. 18, 1984. | Review Denied March 19, 1985.

The Industrial Commission, ICA Claim No. XXX–XX–XXXX, issued award for death benefits arising from death of employee who was injured in mine accident, and alleged employer brought special action review. The Court of Appeals, Jacobson, C.J., held that: (1) award for burial expenses to deceased employee's mother did not preclude further claims for medical expenses or death compensation benefits by substituted personal representatives and Special Fund, even though previous award was denominated "death benefits," and (2) issue preclusion did not bar alleged employer from having full evidentiary hearing on compensability of employee's injury and death.

Award set aside.

West Headnotes (9)

[1] **Judgment**
Necessity in general

Judgment
Matters which might have been litigated

Judgment
Matters actually litigated and determined

Claim preclusion prohibits relitigation of same claim; if same claim is involved, relitigation of matters that were actually litigated or could have been litigated is precluded.

8 Cases that cite this headnote

[2] **Workers' Compensation**
Dependency of claimant as condition of claimant's right

To receive death compensation benefits, qualified party must have been dependent upon deceased employee when he died. A.R.S. § 23–1046.

Cases that cite this headnote

[3] **Workers' Compensation**
Persons entitled to institute proceedings and parties

Injured employee is entitled in his own right to reimbursement of medical expenses, independent of benefits which may accrue if death ensues; medical expenses accrue while deceased employee was alive and survive his death, and they are payable to personal representative of deceased employee's estate. A.R.S. §§ 23–1062, 23–1068, subd. B.

Cases that cite this headnote

[4] **Workers' Compensation**
Persons entitled to institute proceedings and parties

Award for burial expenses to deceased employee's mother did not preclude further claims for medical expenses or death compensation benefits by substituted personal representatives and Special Fund, even though previous award was denominated "death benefits," where mother lacked either factual or legal relationship with deceased to make claim for death benefits. A.R.S. §§ 23–1046, 23–1065, subd. A.

Cases that cite this headnote

[5] **Appeal and Error**
Errors existing, but not presented or considered, on former review

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Question that could have been raised on former appeal, but was not, could not be considered by Court of Appeals.

1 Cases that cite this headnote

[6] **Workers' Compensation**
Persons entitled to institute proceedings and parties

Mother of deceased employee was legally entitled to claim funeral expenses, having paid them, but was not entitled to claim medical expenses since she was not dependent upon deceased employee when he died and mother was not personal representative. A.R.S. §§ 23–1046, 23–1068, subd. B.

Cases that cite this headnote

[7] **Workers' Compensation**
Survivorship and persons entitled to balance of disability payments

Personal representatives of deceased employee were interested parties to claim of employee's estate for medical benefits and death compensation benefits, and they therefore were properly joined as parties to claim for death benefits.

Cases that cite this headnote

[8] **Judgment**
Scope and Extent of Estoppel in General

Exception to application of issue preclusion is that if parties sought to be precluded did not have incentive to obtain full and fair adjudication in initial action, preclusion will not be applied.

7 Cases that cite this headnote

[9] **Workers' Compensation**
Hearing, findings, and original and supplemental awards

Issue preclusion did not bar alleged employer of deceased employee from having full evidentiary hearing on compensability of employee's injury and death, in action for medical expenses and death compensation benefits, even though prior award had made alleged employer liable for burial expenses, where prior Industrial Commission award was limited to $1,000 whereas amount in controversy in second action could exceed $24,000 and prior award stated that question of whether deceased was in fact employee at time of death was to be subject of further administrative proceeding.

2 Cases that cite this headnote

Attorneys and Law Firms

***200 **1349** Law Offices of Richard E. Taylor by Don F. Schaar, Phoenix, for petitioner.

Sandra Day, Chief Counsel, The Industrial Com'n of Arizona, Jennings, Strouss & Salmon by Steven C. Lester, Phoenix, for respondents.

Opinion

OPINION

JACOBSON, Chief Judge.

This is a special action review of a November 29, 1983 Industrial Commission (Commission) award for what are denominated "death benefits." The issue on review concerns the preclusive effect, if any, of a previous award entered on November 2, 1981. The petitioner, Red Bluff Mines, ***201 **1350** Inc., asserts that this award determined its sole liability for all claims and therefore precludes the present award. The respondents, personal representatives of the Estate of David Lott, defend the administrative law judge's conclusion that this award determined compensability of the claim but not the extent of petitioner's liability. [1] We reject both positions, but for independent reasons set aside the award.

The history of this case begins on November 27, 1980 at the Red Bluff Mine near Wickenburg, Arizona when Daniel Lott's head was crushed by heavy equipment. He was airlifted to St. Joseph's hospital in Phoenix, where he remained comatose until he died on December 10, 1980. The deceased's mother, Hetta Roberts, was at that time living in Wickenburg, but after her son's death went to Mississippi. Hetta buried her son there at her own expense.

Hospital personnel reported the injury to the Commission which, in turn, sent a December 11, 1980 letter to the Estate of Daniel Lott. This letter in relevant part stated:

> If it is your intention to file for benefits in connection with Daniel Lott's fatal accident of November 24, 1980, a claim for *death benefits* is required from you by the Industrial Commission within one year from November 24, 1980.
>
> We attach hereto the appropriate claim in compliance with Section 23–1061 of the Arizona Workmen's Laws.

(Emphasis added.) The "appropriate" claim attached was a *widow's* claim for benefits.

Hetta completed this claim form and returned it with a May 2, 1981 letter, which in relevant part stated:

> The deceased, Danny Webb Lott ... was my Son, therefore many of the questions on the form are not applicable.
>
> I am not filing this complaint for personal gain. There is no amount of money which will bring back my son or compensate for my loss. My sole purpose is to get his *funeral, medical and death related expenses paid.*

(Emphasis added.)

Red Bluff Mines, Inc. (Red Bluff), Daniel Lott's alleged employer, was apparently uninsured. In May, 1981, the Commission filed an affidavit of no insurance and proceeded to process the case as a "no insurance" case. *See generally* A.R.S. § 23–907; *Holding v. Industrial Commission,* 139 Ariz. 548, 679 P.2d 571 (App.1984). The Commission investigated the injury and also collected information about Lott's medical bills and wages. Contemporaneously, Hetta hired Mississippi counsel "to represent me in the recovery of damages I sustained as a result of the death of my son ..." and filed a written authorization of representation with the Commission. *See generally* A.C.R.R. R4–13–105(1).

On November 2, 1981, the Commission issued two awards. [2] The first denied compensation for a widow's and dependent's benefits claim under A.R.S. § 23–1064. The second granted "death benefits". It found that the injury was compensable and that Red Bluff was Lott's uninsured employer. It also imposed liability on Red Bluff for reasonable burial expenses up to $1,000.00. The award included notice that it would become final after ninety days.

On November 30, 1981, Hetta wrote the Commission requesting payment of the death benefit. On December 7, 1981, an internal Commission memorandum noted that the November 2, 1981 award failed to impose liability on the employer for its ***202 **1351** A.R.S. § 23–1065(A) payment and also failed to include the compensation and medical benefits due Lott's estate. On February 2, 1982, the Commission issued an amended award which reiterated the previous burial expense award, but also imposed liability on Red Bluff for a $1,150.00 payment to the Special Fund under A.R.S. § 23–1065(A) and required Red Bluff to pay Lott's estate compensation and medical benefits. The medical benefits exceeded $22,000.00.

Red Bluff timely protested this award. This protest denied that the injury was compensable and also asserted that Hetta "is not the legally appointed representative of the Estate of Daniel Lott and no claim has been filed within one year by the legally appointed personal representative of the Estate of Daniel Lott." The petitioner subsequently moved to dismiss Hetta's claim for burial allowance and medical expenses and compensation on the grounds that she was required to make this claim in the capacity of personal representative.

Neither Hetta nor her Mississippi counsel appeared at the scheduled hearing. The Commission appeared but conceded the motion to dismiss.

On September 13, 1982, the administrative law judge issued an award vacating the February 2, 1982 amended award and dismissing "the claim for death benefits filed by the decedent's mother under the date of December 2, 1981." [3] The dispositive finding stated:

> 3. That the applicant, having expired and no personal representative having been appointed, the Commission is without jurisdiction to direct payment of benefits to the mother of the deceased herein, accordingly, the AMENDED FINDINGS AND AWARD FOR DEATH BENEFITS heretofore entered on February 2, 1982 should be vacated; furthermore the 'claim' filed by decedent's mother under date of December 2, 1981, for payment of benefits, should be dismissed.... (That the question raised by the defendant employer as to whether the deceased was in fact an employee at the time of his death shall be the subject of further administrative action and/or formal hearing.)

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The award was affirmed on administrative review.[4] It became final without special action review.

Both parties agree that this award did not affect the efficacy of the November 2, 1981 award which originally set liability for burial expenses. This matter lay dormant until January, 1983, when St. Joseph's hospital requested payment of its medical bills. The Commission responded that it lacked jurisdiction because of the final September 13, 1982 award. In March, 1983 certified copies of Hetta's and her husband's appointment as personal representatives of Lott's estate were submitted to the Commission. In June, 1983, a workman's report of injury was filed on behalf of the personal representatives. In relevant part, it stated:

> A claim was presented on behalf of Daniel Lott by St. Joseph's hospital on a Form 102, prior to Daniel Lott's death. The claim contained the necessary and relevant information, but was unsigned by Mr. Lott, since he remained in a comatose state from the time he was brought to the hospital until his death. I have reviewed the Industrial Commission's file and am unable to find a copy of this Form 102, although the summary of records reflects that the 102 was received by the Industrial Commission. A valid claim for funeral and medical expenses, as well as other benefits, was filed by the deceased's mother, Hetta Roberts, on May 2, 1981, and remains a viable claim.

On August 25, 1983, the Commission issued an order denying its jurisdiction. Lott's personal representatives timely protested. ***203** ****1352** No hearing was conducted, but both parties submitted legal memoranda.

On November 29, 1983, the administrative law judge issued an award for "death benefits." It found that:

(1) the September 13, 1982 award vacated the February 2, 1982 award and dismissed Hetta's December 2, 1981 "claim" only because Hetta was not personally entitled to receive the "death benefits" provided in the February 2, 1982 award;

(2) Hetta's May 2, 1981 letter requesting benefits was a claim for benefits within A.R.S. § 23–1061;

(3) the personal representatives could be substituted as the parties entitled to receive the benefits under the May 2, 1981 claim; and

(4) the final November 2, 1981 award precluded litigation of the compensability of Lott's injury.

Red Bluff was accordingly required to pay Lott's estate for medical expenses, compensation, and reasonable burial expenses up to $1,000.00, and also to pay $1,150.00 to the Special Fund. The award was affirmed on administrative review, and this special action followed.

As previously indicated both parties agree that the November 2, 1981 award became final and that the September 13, 1981 award had no effect upon it. They, however, draw differing conclusions from this common assumption. Red Bluff contends that the November 2, 1981 award determined its liability for all claims and thus precludes the present award for medical benefits, compensation, and payment to the Special Fund. The respondents contend that the November 2, 1981 award precludes litigation of compensability issues only, but does not preclude the present award imposing liability for medical benefits, compensation, and payment to the Special Fund.

Both of these contentions require an analysis of the two aspects of res judicata, that is, claim preclusion and issue preclusion.

[1] We start with the proposition that claim preclusion prohibits relitigation of the same *claim. Matusik v. Arizona Public Service Co.,* 141 Ariz. 1, 684 P.2d 882 (App.1984); *accord Restatement (Second) of Judgments* § 17 (1982)(hereinafter *Restatement*). If the same *claim* is involved, relitigation of matters that were actually litigated or could have been litigated is precluded. *Matusik v. Arizona Public Service Co., supra; Magma Copper Co. v. Industrial Commission,* 115 Ariz. 551, 566 P.2d 699 (App.1977). Accordingly, if medical benefits, compensation, and payment to the Special Fund are part of the claim for "death benefits", the November 2, 1981 award which dealt with a claim for "death benefits" would preclude any increase of Red Bluff's liability on this "claim".

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[2] [3] Red Bluff, consistent with this analysis, asserts that medical benefits, compensation, and payment to the Special Fund are "death benefits". It provides no authority for this assertion, but rather refers to what it calls Commission custom to treat these as death benefits. The record lacks any evidence concerning this custom. Moreover, regardless of custom, the assertion lacks legal support.

A.R.S. § 23–1046 defines "death benefits":

> A. In case of an injury causing death, the compensation therefor shall be known as a death benefit and shall be payable in the amount, for the period, and to and for the benefit of the persons following:
>
> 1. Burial expenses, not to exceed one thousand dollars, in addition to the compensation. [2 through 4 relate to dependants' rights to receive compensation]
>
> ---
>
> 5. To a parent if there is no surviving husband, wife or child under the age of eighteen years....

Thus, as treated in the November 2, 1981 award, "death benefits" were limited to burial expenses. These burial expenses are payable directly to the person who paid for burial. *See* A.C.R.R. R4–13–117(B). ***204 **1353** On the other hand, to receive death compensation benefits, the qualified party must have been dependent upon the deceased employee when he died. *E.g. Thomas v. Industrial Commission,* 87 Ariz. 238, 350 P.2d 392 (1960). If there is no dependent, the employer "shall pay the burial expenses of the deceased, as provided in this chapter, and shall pay into the state treasury one thousand one hundred fifty dollars." A.R.S. § 23–1065(A). In the same vein, medical expenses are not paid under A.R.S. § 23–1046, but rather under A.R.S. § 23–1062. The injured claimant is entitled in his own right to the reimbursement of these expenses, independent of the benefits which may accrue if death ensues. The medical expenses accrue while the deceased employee was alive and survive his death. *See Reed v. Industrial Commission,* 104 Ariz. 412, 454 P.2d 157 (1969). They are payable to the personal representative of the deceased employee's estate. *See* A.R.S. § 23–1068(B).

As can be seen, for the purposes of claim preclusion analysis, the generic term "death benefits" is of little analytical help. Rather, the "claim" depends upon who is the claimant. A claim for burial expenses is properly made by the person who paid those expenses. A claim for death compensation benefits depends upon the dependency relationship that exists between the claimant and the deceased. A claim for medical expenses depends upon the legal relationship existing between the claimant and the deceased, i.e., personal representative.

[4] From this analysis, it is clear that the final November 2, 1981 award for burial expenses does not preclude a subsequent award for medical benefits and death benefit compensation, as Hetta lacked either the factual or the legal relationship with the deceased to make such a "claim". Since the payment to the Special Fund under A.R.S. § 23–1065(A) is in lieu of death compensation benefits, this claim is likewise not precluded.

[5] Although Red Bluff challenged the sufficiency of the claim for benefits before the Commission, on review it has not challenged the administrative law judge's finding that the May 2, 1981 letter was a claim for benefits within A.R.S. § 23–1061. A question that could have been raised on appeal but has not, cannot be considered by this court. *See Hurst v. Hurst,* 1 Ariz.App. 227, 401 P.2d 232 (1965), rehearing 1 Ariz.App. 603, 405 P.2d 913 (1965). For purposes of this review, we therefore assume that Hetta's May 2, 1981 letter satisfies A.R.S. § 23–1061.

[6] [7] This letter was a claim for both burial expenses and for compensation due Lott's estate (medical expenses). Hetta, at that time, was legally entitled to claim funeral expenses, having paid them, but was not entitled to claim medical expenses since she lacked the necessary legal relationship (personal representative). Red Bluff has challenged the finding that substituted the personal representatives as the parties entitled to receive the medical benefits under the May 2, 1981 claim. The personal representatives are interested parties to the claim of Lott's estate for medical benefits and compensation. *Reed v. Industrial Commission,* 104 Ariz. at 414, 454 P.2d at 159. They therefore were properly joined as parties to this claim. *Id.* (Red Bluff Makes no contention on review that the substitution was untimely.)

We, therefore, hold that Hetta's claim for burial expenses, properly awarded under the November 2, 1981 award, does not preclude further claims for medical expenses or death compensation benefits, by the substituted personal representatives and the Special Fund who have the legal capacity to pursue these claims.

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We turn then to the personal representatives' argument that the November 2, 1981 award does preclude Red Bluff from relitigating the issue of compensability, that is, that Lott's death arose out of and in the course of his employment by Red Bluff. This, under Restatement terminology, is referred to as issue preclusion. The general rule, as stated in Restatement is that:

> ***205 **1354** When an issue of fact is actually litigated and determined by a valid final judgment, and the determination is essential to the judgment, the determination is conclusive between the parties, whether on the same or a different claim.
>
> Restatement, *supra* § 27.

It is the personal representatives' position that the November 2, 1981 award, which became a final judgment awarding burial expenses, had to have as an essential element, the underlying determination that Lott's injuries and subsequent death arose out of and in the course of his employment by Red Bluff. Since Red Bluff could have, but did not, protest that determination, it is now, under principles of issue preclusion, prohibited from relitigating this issue.

[8] Since Red Bluff has not directly attacked the validity of this analysis, we agree that, as an initial matter, issue preclusion is present in this case. However, an exception to the application of issue preclusion is that if the party sought to be precluded did not have an incentive to obtain a full and fair adjudication in the initial action, preclusion will not be applied. Restatement § 28.

[9] As Comment j to Restatement § 28 points out, "the amount in controversy in the first action may have been so small in relation to the amount in controversy in the second that preclusion would be plainly unfair." *See Ferris v. Hawkins,* 135 Ariz. 329, 660 P.2d 1256 (App.1983). We believe that observation to be applicable here. By the terms of the November 2, 1981 award, Red Bluff's total liability appeared to be limited to $1,000.00. However, the amount in controversy in the second action may exceed $24,000.00. At the time of the November 2, 1981 award, Red Bluff apparently was under the impression that it carried Workers Compensation insurance and was actively pursuing this possibility. We also note that the September 13, 1982 award stated that the question of whether "the deceased was in fact an employee at the time of death shall be the subject of further administrative [proceeding]."

Given all these circumstances, we conclude that issue preclusion should not bar Red Bluff from now having a full evidentiary hearing on the compensability of Lott's injury and death. Attorneys' fees and costs as requested by the respondents are denied.

For the foregoing reasons, the award is set aside.

EUBANK, P.J., and OGG, J., concur.

Parallel Citations

696 P.2d 1348

Footnotes

1 The Commission is an interested party. *See Evertsen v. Industrial Commission,* 117 Ariz. 378, 573 P.2d 69 (App.1977), *adopted* 117 Ariz. 342, 572 P.2d 804 (1977). Although the Commission noticed its appearance, it did not file an answering brief.

2 These awards were the product of the Commission's investigation of the claim. They are not section 23–942 awards, which are decisions by administrative law judges made after an adversary hearing on the merits, but were in the nature of a notice of claim status. *See* A.R.S. § 23–942(A); *Holding v. Industrial Commission, supra.*

3 This date refers to the filing date of Hetta's November 30, 1981 letter requesting payment of the death benefit.

4 Hetta filed a *pro se* request for administrative review. The record does not disclose what became of her Mississippi counsel.

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Exhibit 17

106 Ariz. 119
Supreme Court of Arizona, In Banc.

STATE of Arizona ex rel. E. Leigh LARSON, County Attorney for Santa Cruz County, Petitioner,
v.
Gordon FARLEY, Judge of the Superior Court of Santa Cruz County, Arizona; Lorin Gail SHELLEY, Real Party in Interest, Respondents.

No. 10077. | July 10, 1970.

State brought original proceeding request for special action following order by Superior Court that justice court lacked jurisdiction to enter judgment that defendant was guilty of driving while under influence of intoxicating liquor. The Supreme Court, McFarland, J., held that enactment of statute providing for imposition of additional 10% Of amount of fine for violation of statute prohibiting driving while under influence of alcoholic beverages or drugs was not intended to change maximum fine of $300 or thereby deprive justice court of jurisdiction, but was only intended to provide means of raising money, and maximum fine under each of the statutes, including additional 10% Of fine, could not exceed $300 limit.

Order of Superior Court vacated.

West Headnotes (6)

[1] **Statutes**
Earlier and later statutes

A court may look to prior and contemporaneous statutes in construing a statute which is uncertain and on its face susceptible to more than one interpretation.

3 Cases that cite this headnote

[2] **Statutes**
Construing together; harmony

Statutes
In pari materia

If reasonably practical, a statute should be explained in conjunction with other statutes to the end that they may be harmonious and consistent; and if statutes relate to same subject or have same general purpose, and thus are in pari materia, they should be construed together with other related statutes, as though they constituted one law.

61 Cases that cite this headnote

[3] **Statutes**
Similar or Related Statutes

Legislative intent must be ascertained not alone from literal meaning of wording of statutes but also from the view of whole system of related statutes, even where statutes were enacted at different times and contain no reference one to the other, and it is immaterial that they are found in different chapters of revised statutes.

17 Cases that cite this headnote

[4] **Statutes**
Legislative History

In construing a statute, endeavors should be made to trace history and legislation on subject in order to ascertain consistent purpose of the legislation.

2 Cases that cite this headnote

[5] **Automobiles**
Driving While Intoxicated

Statute providing for imposition of additional 10% of amount of fine for violation of statute prohibiting driving while under influence of alcoholic beverages or drugs was not intended to change maximum fine of $300 and thereby deprive justice court of jurisdiction, but was only intended to provide means of raising money and maximum fine under each of the statutes, including additional 10% of fine, could not exceed $300. A.R.S. §§ 13–379, 22–301, 28–692, 36–141, 36–142.

1 Cases that cite this headnote

[6] **Statutes**
General and specific statutes

General statute remains applicable to all matters not dealt with in specific statute.

Cases that cite this headnote

Attorneys and Law Firms

***120 **732** Gary K. Nelson, Atty. Gen., by E. Dennis Siler, Asst. Atty. Gen., for petitioner.

Jestila & Holroyd, by Donald D. Holroyd, Phoenix, for respondents.

Opinion

McFARLAND, Justice.

This case is before us on a petition for special action, in which the petitioner alleges that Respondent Lorin Gail Shelley—hereinafter referred to as Shelley—the Real Party in Interest, was on November 26, 1969, judged guilty by the Justice of the Peace of Precinct No. 1, Santa Cruz County, of the offense of driving an automobile while under the influence of intoxicating liquor in violation of A.R.S. s 28—692, and was fined $220. This Court accepted jurisdiction in certiorari.

On May 22, 1970, Shelley filed a motion in the justice court to vacate the judgment on the grounds that the recent enactment s 36—142, A.R.S., enlarged the possible fine to more than $300. This would exceed the jurisdiction of the justice court under s 22—301, A.R.S., as amended, which reads in part:

'ARTICLE 1. JURISDICTION AND VENUE

's 22—301. Jurisdiction of criminal actions
'4. Misdemeanors and criminal offenses punishable by a fine not exceeding three hundred dollars, or imprisonment in the county jail not to exceed six months, or by both such fine and imprisonment.'
Section 36—142, A.R.S., as amended, provides for an additional ten per cent of the amount of a fine imposed in cases in violation of s 28—692.01 prohibiting the driving of an automobile while under the influence of alcoholic beverages, or drugs, and s 13—379 relating to drunk and disorderly conduct.

Shelley appealed to the Superior Court from the order denying his motion to vacate the judgment, and the Superior Court entered an order as follows:

> 'The Court having taken the Motion to Vacate Judgment under advisement and the Court now being satisfied that the Motion to Vacate Judgment is well taken under authority of the case of Frazier-vs-Terrill, 65 Arizona 131, (175 P.2d 438) and the Court being further of the opinion that the result of its determination of the question as aforesaid raises serious jurisdictional grounds in numerous similar actions, which will result in great congestion in the Superior Courts of the State of Arizona by reason of the Court's disposition in this case; and no speedy remedy by appeal appearing available to the State except by application to the Supreme Court for a Special Writ; and good reason appearing therefore, It Is Ordered that a stay in the Court's order vacating the judgment is necessary and proper, It is Ordered that unless this Court is otherwise enjoined or prohibited, it will enter judgment on July 1st, 1970, vacating the judgment of the Justice of the Peace Court, No. 1 precinct, adjudicating the defendant guilty of the offense of driving while under the influence of an intoxicating liquor on the ground that said Justice Court lacked jurisdiction to enter such judgment.'

The question involved is whether s 36—142 increases the maximum penalty for driving a car while under the influence of intoxicating liquor to more than three hundred dollars, thereby exceeding the jurisdiction ***121 **733** of the justice court. s 36—142 reads as follows:

'36—142. Imposing additional percentage of certain fines as part of fine; disbursement of proceeds
'A. In addition to every fine imposed against a person for driving or being in actual physical control of a vehicle while he is under the influence of intoxicating liquor or drugs, in violation of section 28—692, or for being drunk and

disorderly, in violation of section 13—379, an additional ten per cent of the amount of the fine imposed shall be imposed by the court as a part of the fine.

'B. Notwithstanding any other provision of law to the contrary, the ten per cent added part of each such fine shall be transmitted by appropriate authorities to the state treasurer on or before the tenth day of each month, for deposit in the same account in which is deposited funds appropriated to the state department of health for use in administering the provisions of section 36—141. All monies deposited in such account under the provisions of this section are appropriated as a continuing appropriation to the State Department of health, to be exempt from the provisions of section 35—173, relating to quarterly allotments, and shall be used by the department in administering the provisions of section 36—141.'

In Frazier v. Terrill, 65 Ariz. 131, 175 P.2d 438, the question of the jurisdiction of the justice court was involved under s 57—126, A.C.A., 1939, as amended by Chapter 52, Laws of 1945, which provided that:

> 'Any person who takes, Possesses, transports, buys, sells, or offers for sale, any deer, * * * shall be guilty of a misdemeanor, and shall be punished by a fine of not less than one hundred dollars nor more than three hundred dollars, * * *; And in addition thereto, is liable to an additional penalty of fifty dollars for each Animal or part thereof, or fish, or bird, taken, destroyed, Possessed, transported, * * *'

The maximum fine was provided as $300, and the penalty was in addition thereto. In determining that the justice court had jurisdiction, this Court held the additional sum was a penalty collected under civil procedure and no part of the fine.

We cannot agree with the 'penalty' theory advanced by the state in its memorandum in the instant case:

> 'It is Petitioner's position herein, however, that the additional 10% Sum imposed upon persons convicted of violating A.R.S. s 28—692 is not a fine in the nature of a criminal punishment, but rather constitutes an assessment of a 'penalty', and hence does not enlarge the criminal punishment which may be imposed under A.R.S. s 28—692.01.'

The statute specifically provides under 'A' that 'an additional ten per cent of the amount of the fine imposed shall be imposed by the court as a part of the fine,' and under 'B' that 'the ten per cent added part of each such fine shall be * * *.' In both 'A' and 'B' the additional ten per cent of the amount is specifically made a part of the fine, while in Frazier v. Terrill, supra, it was held to be a penalty. We agree with the attorney general that the act is ambiguous, but the ambiguity lies in whether the legislature intended for the ten per cent to increase the fine beyond the $300.

Sec. 28—692.01 provides for punishment on a first conviction for driving a car while under the influence of alcoholic liquor by 'not less than ten days, nor more than six months, by a fine of not less than one hundred dollars nor more than three hundred dollars, or both.' In a second or subsequent offense, the maximum fine is also $300.

[1] [2] [3] [4] The question then is whether s 28—692.01 providing for a maximum of a $300 fine was amended by implication in the enactment of s 36—142. The same principle ***122 **734** would be applicable to a violation of s 13—379. Sec. 36—142 made no reference to the minimum or maximum of the fine that could be imposed. This involves a very basic rule of statutory construction. The general rule is that the court may look to prior and contemporaneous statutes in construing the meaning of a statute which is uncertain and on its face susceptible to more than one interpretation. If reasonably practical, a statute should be explained in conjunction with other statutes to the end that they may be harmonious and consistent. If the statutes relate to the same subject or have the same general purpose—that is, statutes which are in pari materia—they should be read in connection with, or should be construed together with other related statutes, as though they constituted one law. As they must be construed as one system governed by one spirit and policy, the legislative intent therefor must be ascertained not alone from the literal meaning of the wording of the statutes but also from the view of the whole system of related statutes. This rule of construction applies even where the statutes were enacted at different times, and contain no reference one to the other, and it is immaterial that they are found in different chapters of the revised statutes. In construing the statute, endeavors should be made to trace the history and legislation on the subject in order to ascertain the consistent purpose of the legislation.

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In Estate of Stark, 52 Ariz. 416, 82 P.2d 894, this Court has clearly set forth this rule:

> 'We have repeatedly held that the cardinal rule of statutory construction is that we must, if possible, ascertain the intent of the legislature. There are many things which we are permitted and, indeed, required to take into consideration in ascertaining this, such as the language used, its grammatical construction, other statutes In pari materia, the general policy of the state, and many other well known rules of construction. * * *'

In Peterson v. Flood, 84 Ariz. 256, 326 P.2d 845, in holding that the justice court had authority to suspend sentence, we said:

> 'There is further reason for construing the procedure outlined in section 13—1657, supra, as being applicable to justice courts. Under the rule that statutes dealing with the same subject should read together and harmonized (sic) if at all possible, * * * (cases cited.)'

In the later case of Desert Waters, Inc. v. Superior Court, 91 Ariz. 163, 370 P.2d 652, we re-affirmed this rule when we said:

> 'Statutes that are in pari materia should be read together and harmonized if at all possible, Peterson v. Flood, 84 Ariz. 256, 326 P.2d 845 (1958). When statutes relate to the same subject matter, the later enactment, in the absence of any express repeal or amendment therein, is held to have been enacted in accord with the legislative policy embodied in the earlier statute, Frazier v. Terrill, 65 Ariz. 131, 175 P.2d 438 (1947); United States v. State of Arizona, 295 U.S. 174, 55 S.Ct. 666, 79 L.Ed. 1371 (1935). In so far as the provisions of a special statute are inconsistent with those of a general statute on the same subject, the special statute will control, Knape v. Brown, 86 Ariz. 158, 342 P.2d 195 (1959); Whitfield Trans., Inc. v. Brooks, 81 Ariz. 136, 302 P.2d 526 (1956). The general statute remains applicable, however, to all matters not dealt with in the specific statute, * * *'

In the case of City of Mesa v. Salt River Project Agr. Imp. & P. Dist., 92 Ariz. 91, 373 P.2d 722, we said:

> '* * * While a statute may be repealed by implication as well as by direct language, such repeals are not favored and will not be indulged if there is any other reasonable construction. Southern Pac. Co. v. Gila County, 56 Ariz. 499, 109 P.2d 610. It is only when by no reasonable construction can two statutes be operative that the latter act repeals the former by implication. ***123 **735** Burnside v. Douglas School Dist. No. 27, 33 Ariz. 1, 261 P. 629.'

See also United States v. Stewart, 311 U.S. 60, 61 S.Ct. 102, 85 L.Ed. 40; Ard v. State, 102 Ariz. 221, 427 P.2d 913; Frazier v. Terrill, supra; Ariz. Corp. Comm. v. Gem State Mut. Life Assn., 72 Ariz. 403, 236 P.2d 730; Isley v. School Dist. No. 2 Maricopa Co., 81 Ariz. 280, 305 P.2d 432; State v. McGriff, 7 Ariz.App. 498, 441 P.2d 264; cases cited in 82 C.J.S. Statutes s 366, at page 803 et seq.

[5] **[6]** The 1927 act provided for a fine of not less than $200 nor more than $500, Laws 1927, Chap. 6. This section was carried forward in the Revised Statutes of 1928, Sec. 1688. In 1935, the legislature amended the punishment provisions by making imprisonment in jail the sole punishment. Laws of 1935, Chap. 33. In the Laws of 1950, 1st Session, Chap. 3, which were carried in Ariz.Rev. Statutes s 28—692 (1956), the punishment was changed to a fine of not less than $100 nor more than $300 on the first conviction, and on a second conviction not more than $1,000. This was amended in 1959 by decreasing the maximum fine from $1,000 to $300 upon a second conviction. In contrast, the provisions of the Revised Statutes of 1913, Sec. 1308, limiting the jurisdiction of the justice courts to fines not exceeding $300, have remained substantially the same. Section 22—301, A.R.S., Revised (1956). It is therefore evident that the legislature found that the public interest was better served by reducing the maximum fine so as to

give the justice courts jurisdiction of such offenses. This reduced the congestion in the superior courts, and provided an expeditious method of handling these cases. This past history makes it clear that had the legislature intended to increase the maximum fine provided for in s 28—692, it would have done so directly, as was done in the reductions of the fines in the past.

Section 36—141 grants authority to contract and pay for alcohol and drug-abuse services, and s 36—142 relates only to the means of financing the program. No reference is made to the maximum fine. There is nothing in the act to indicate in any way that the legislature gave any consideration to raising the maximum penalty. It is therefore evident that the legislature did not have any intention to change the maximum fine or thereby deprive the justice court of jurisdiction, but only intended to provide a means of raising money to carry out the program.

This is made apparent by subsection B of s 36—142, where the legislature refers to this as 'a continuing appropriation.' This is the only reasonable construction whereby all the statutes can be harmonized, and is in accord with the rule set forth in Desert Waters, Inv. v. Superior Court, supra, that the general statute remains applicable to all matters not dealt with in the specific statute. It is also consistent with the rule set forth in Frazier v. Terrill, supra:

> 'The intent of the legislature when a statute is found to be ambiguous may be gathered from statutes relating to the same subject matter—statutes in pari materia. On the presumption that whenever the legislature enacts a provision it has in mind the previous statutes relating to the same subject matter, it is held that in the absence of any express repeal or amendment therein, the new provision was enacted in accord with the legislative policy embodied in those prior statutes, and they all should be construed together. * * *'

We accordingly hold the maximum fine under each of the statutes, Including the additional ten per cent of the fine, may not exceed $300.

The order of the Superior Court is vacated.

LOCKWOOD, C.J., STRUCKMEYER, V.C.J., and UDALL and HAYS, JJ., concur.

Parallel Citations

471 P.2d 731

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Exhibit 18

558 So.2d 869
Supreme Court of Mississippi.

C.E. TUCKER
v.
HINDS COUNTY, Mississippi, and
Mississippi Power & Light Company.

No. 07-CA-59298. | March 21, 1990.

Homeowner brought action against county and electric utility, alleging that his due process rights had been violated when county and utility disconnected his electrical power. The Circuit Court, Hinds County, Second Judicial District, L. Breland Hilburn, J., granted county's motion to dismiss and utility's motion for summary judgment. Homeowner appealed. The Supreme Court, Pittman, J., held that: (1) homeowner had "property interest" in continued electrical service which was protected by due process clauses of State and Federal Constitutions; (2) homeowner's allegation that his electrical service was terminated by county without due process of law stated claim sufficient to pierce county's sovereign immunity defense; and (3) electrical utility had right as matter of law to shut off homeowner's electrical service.

Affirmed in part, and reversed and remanded in part.

West Headnotes (9)

[1] **Appeal and Error**
Cases Triable in Appellate Court

Motion for dismissal for failure to state claim upon which relief may be granted raises issue of law which Supreme Court reviews de novo. Rules Civ.Proc., Rule 12(b)(6).

41 Cases that cite this headnote

[2] **Appeal and Error**
Cases Triable in Appellate Court

Supreme Court conducts de novo review of lower court's grant of summary judgment.

49 Cases that cite this headnote

[3] **Pretrial Procedure**
Availability of Relief Under Any State of Facts Provable

Motion to dismiss for failure to state claim upon which relief may be granted is not favored, and should not be granted unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Rules Civ.Proc., Rule 12(b)(6).

17 Cases that cite this headnote

[4] **Pretrial Procedure**
Construction of Pleadings

When considering motion to dismiss for failure to state claim upon which relief may be granted, court's inquiry essentially is limited to content of complaint; court may assume factual allegations in complaint are true, construe them in manner most favorable to nonmovant, and decide if facts alleged could give rise to actionable claim, but does not have to accept legal conclusions or allegations as to legal effect of events which may be included in complaint. Rules Civ.Proc., Rule 12(b)(6).

36 Cases that cite this headnote

[5] **Municipal Corporations**
Nature and Grounds of Liability

Sovereign immunity will not protect political subdivision when there has been violation by subdivision of individual's constitutional rights.

5 Cases that cite this headnote

[6] **Electricity**
Discontinuance of Supply

Power company may discontinue electrical service when customer has failed or refused to pay undisputed bill, but power company may not discontinue power when there is bona fide dispute as to what is owed.

Cases that cite this headnote

[7] **Constitutional Law**

Gas and Electricity

Subscriber has "property interest" in continued electrical service protected by due process clauses of State and Federal Constitutions. U.S.C.A. Const.Amend. 14; Const. § 14.

17 Cases that cite this headnote

[8] **Counties**

Nature and Grounds of Liability

Subscriber's allegation that his electrical service was terminated by county without due process of law stated claim sufficient to pierce county's sovereign immunity defense, as subscriber had property interest in continuance of his service. U.S.C.A. Const.Amend. 14; Const. § 14.

2 Cases that cite this headnote

[9] **Constitutional Law**

Gas and Electricity

Electricity

Discontinuance of Supply

Electric utility had right as matter of law, and may even have had a duty, to shut off subscriber's utility service, and thus utility could not be held liable to subscriber under theory that his property and property rights were taken without due process of law, where utility was acting pursuant to Public Service Commission rules and its own service policy when it shut off subscriber's power, utility relied on directive from county official with ostensible power to direct enforcement of zoning ordinances and its own serviceman who reported hazardous and dangerous condition at residence, and if subscriber was treated unfairly or was denied due process it was at hands of county. U.S.C.A. Const.Amends. 5, 14; Const. § 14.

2 Cases that cite this headnote

Attorneys and Law Firms

***870** William W. Ferguson, Raymond, for appellant.

Ben J. Piazza, Jr., Montgomery Smith-Vaniz & McGraw, Natie P. Caraway, and Edward C. Cohen, Wise Carter Child & Caraway, Jackson, for appellee.

Before ROY NOBLE LEE, C.J., PRATHER, P.J., and PITTMAN, J.

Opinion

PITTMAN, Justice for the Court:

C.E. Tucker filed suit in Hinds County Circuit Court against Hinds County and Mississippi Power & Light, alleging that he had been damaged when Hinds County and MP & L discontinued his electrical power. Hinds County included in its answer a defense of failure to state a claim, and both Hinds County and MP & L moved for summary judgment. The trial court granted Hinds County's motion to dismiss, and granted MP & L's motion for summary judgment. Tucker appeals, assigning as error:

I. THE CIRCUIT COURT WAS IN ERROR IN GRANTING HINDS COUNTY'S MOTION TO DISMISS ON THE BASIS OF THE DOCTRINE OF SOVEREIGN IMMUNITY.

II. THE CIRCUIT COURT WAS IN ERROR IN GRANTING MOTION FOR SUMMARY JUDGMENT OF MISSISSIPPI POWER & LIGHT COMPANY.

STATEMENT OF THE FACTS

C.E. Tucker was in 1983 a resident of Terry, Mississippi. He was employed by the Jackson Fire Department. Sometime in early 1983, there was a fire in a house owned by Tucker. The local fire department disconnected Tucker's electricity in the process of fighting the fire. Tucker was not living in the house at the time of the fire, but had been renting it, and the tenants had moved out two days before the fire. The major damage resulting from the fire was to a 20 x 20 area of the basement which had been used as a master bedroom, although there was some heat and smoke damage to the rest of the house.

In an effort to get his power restored, Tucker went to the MP & L office in Clinton. They told him that he would have to see someone at the Hinds County Permit Department. Tucker went there and consulted with W.W. Golson, Director of the Department. According to Tucker, he didn't want to repair

his house, and told Golson this, but Golson refused to have the power turned back on unless Tucker got a permit. As a result Tucker applied for on May 4, 1983, and received two days later, a Hinds County Building Permit. He also received with the permit a copy of the County's inspection procedures. Tucker had his power restored very shortly after this. Tucker said that he had no idea that this was temporary service. Tucker never repaired the fire damage in his basement, preferring to block it off. He did paint over some of the smoke damage. Hinds County personnel inspected Tucker's house on January 19, 1984, with the observation that the site "[had] a construction pole and meter" and someone was "still doing work on [the] building." Hinds County personnel again inspected Tucker's house on August 28, 1986. The request for inspection contained the following notation: "T/S-House power box on house-no cover over breakers-Meter # 274-725-Also check to see if he has a shop he is operating." We assume that T/S stands for "temporary service." Another inspection was made on September 2, 1986, and the notation was once again concerned with whether Tucker was operating a shop. A third inspection ***871** was made on September 4, 1986, and though much of the writing on the inspection form is illegible, it does contain the notation: "Leave note to call office concerning meter on house & expired permit ... talk to Sullivan ... Electric panel has wires outside of conduit going into side of it." The Hinds County inspector left a notice at the Tucker house on this September 4 visit, with the notice mentioning an "expired permit" and an "open electric panel outside," and directing that Tucker should "ask for Mr. Sullivan." The notice was signed by Leonard James.

Because of this notice Tucker called Sullivan at the Hinds County Permit Department. According to Tucker he was immediately transferred to W.W. Golson. Golson told him that his building permit had expired. Tucker replied that he didn't need a permit as he was through working on the house. Golson told him that he had to have a permit anyway, and for him to come in. Tucker went by the Department on September 8. According to Tucker, he met with Golson and two other men in Golson's office. Tucker refused to ask for another permit, and invited Golson to inspect his house or to do whatever else was necessary. According to Tucker, Golson then turned to one of the other men there and said, "Call MP & L. Have them disconnect Tucker's service. I'll think of a reason later." Tucker then left the office. According to Tucker his service was disconnected within a day or two.

Joe McClendon, a serviceman for MP & L, inspected Tucker's property on September 9, 1986. According to McClendon, the manner in which the meter base was connected to the house was improper and hazardous, and some of the wiring inside was also done incorrectly. McClendon stated that "[t]he overall situation was hazardous and did not meet electrical code specifications. Therefore, I was under orders to disconnect and did disconnect service on the property in question, the property of C.E. Tucker, due to the hazardous and dangerous situation." (Entered into record by Joint Stipulation) On September 11, Golson wrote to Eddie Toole, service manager for MP & L in Clinton. Golson mentioned the moving of a meter from a pole to the house without the house being approved for a meter, alleged that this was a violation of Article III, Section 300, Paragraph 1 of the Hinds County Zoning Ordinance, and requested "that no meter be placed on this dwelling until and only until the dwelling has been inspected and approved for electric service." Tucker wrote to Golson on September 19, reiterating his refusal to obtain a permit, and demanding that his power be restored within seventy-two hours. The power was not restored.

Tucker filed suit against Hinds County and MP & L in Hinds County Circuit Court on November 12, 1986. He alleged that Hinds County's actions had amounted to a taking of his property and property rights without due process, and were intentional, willful and wanton. He further alleged that MP & L had terminated his electrical service at a time when his account was current, and that it had done so wrongfully in violation of his due process rights. He asked for actual and punitive damages. Hinds County answered and asserted as defenses that Tucker failed to state a claim, and that it was protected from liability by the doctrine of sovereign immunity. Hinds County also counterclaimed against Tucker, alleging that he was in violation of the Hinds County Zoning Ordinance, and asking that he be enjoined from further occupancy or construction of his property until he obtained and complied with a building permit. MP & L answered and denied the allegations against it.

On July 9, 1987, MP & L moved for summary judgment. Hinds County likewise moved for summary judgment on August 21, 1987. MP & L's Motion for Summary Judgment was granted on March 8, 1988. Hinds County's Motion for Summary Judgment was not ruled on, as the Circuit Court, relying on *Grantham v. Mississippi Dept. of Corrections,* 522 So.2d 219 (Miss.1988), found that Hinds County was immune from liability and dismissed Tucker's suit against it. C.E. Tucker, presumably still without power, has appealed both decisions.

*872 STANDARD OF REVIEW

[1] A motion for dismissal under Miss.R.Civ.P. 12(b)(6) raises an issue of law. *Lester Engineering Co. v. Richland Water and Sewer District,* 504 So.2d 1185, 1187 (Miss.1987); 5 C. Wright & A. Miller, Federal Practice and Procedure § 1357, at 593 (1969). This Court conducts *de novo* review on questions of law. *UHS-Qualicare, Inc. v. Gulf Coast Community Hospital, Inc.,* 525 So.2d 746, 754 (Miss.1987).

[2] This Court also conducts *de novo* review of a lower court's grant of summary judgment. *Short v. Columbus Rubber and Gasket Co.,* 535 So.2d 61, 63 (Miss.1988). The applicable standard is as follows:

The trial court must review carefully all of the evidentiary matters before it-admissions in pleadings, answers to interrogatories, depositions, affidavits, etc. The evidence must be viewed in the light most favorable to the party against whom the motion has been made. If in this view the moving party is entitled to judgment as a matter of law, summary judgment should forthwith be entered in his favor. Otherwise the motion should be denied.

Issues of fact sufficient to require denial of a motion for summary judgment obviously are present where one party swears to one version of the matter in issue and another says the opposite.

Dennis v. Searle, 457 So.2d 941, 944 (Miss.1984).

The burden of demonstrating that no genuine issue of fact exists is on the moving party. The non-movant should be given the benefit of every reasonable doubt. *Short,* 535 So.2d at 63-64.

DISCUSSION OF ISSUES

I. THE CIRCUIT COURT WAS IN ERROR IN GRANTING HINDS COUNTY'S MOTION TO DISMISS ON THE BASIS OF THE DOCTRINE OF SOVEREIGN IMMUNITY.

Tucker argues in his brief that Hinds County's actions were violative of the United States and Mississippi Constitutions in two ways: (1) Hinds County ordered his electric power shut off without affording him due process; and (2) Hinds County, acting in conjunction with MP & L, caused him to lose his deposit with MP & L. Tucker cites two cases which have nothing to do with due process, only with taking private property without compensation.

[3] [4] The trial court found that Hinds County's sovereign immunity defense was valid as a matter of law, and dismissed Tucker's suit based on the 12(b)(6) defense raised in Hinds County's answer. A motion to dismiss made under Rule 12(b)(6) is not favored, and should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Martin v. Phillips,* 514 So.2d 338, 340 (Miss.1987). When considering a 12(b)(6) motion, the court's inquiry essentially is limited to the content of the complaint. *Jackson v. Procunier,* 789 F.2d 307, 309 (5th Cir.1986). The court must assume the factual allegations in the complaint are true, construe them in a manner most favorable to the non-movant, and decide if the facts alleged could give rise to an actionable claim. *Rathborne v. Rathborne,* 683 F.2d 914, 918 (5th Cir.1982). The court does not have to accept legal conclusions or allegations as to the legal effect of events which may be included in a complaint. *Davidson v. State of Georgia,* 622 F.2d 895, 897 (5th Cir.1980).

[5] Both parties agree that sovereign immunity will not protect the political subdivision when there has been a violation by the subdivision of an individual's constitutional rights. Tucker relies on *Williams v. Walley,* 295 So.2d 286, 288 (Miss.1974), where this Court stated that "when private property is taken without payment therefor, the courts are open to provide a remedy against the sovereign or any of its subdivisions. Otherwise section 17 of the Mississippi Constitution would be meaningless." Though *Williams* does not explicitly deal with a due process violation, it follows that to allow the sovereign immunity defense to block suits based on other provisions of the Mississippi Constitution ***873** would render them just as meaningless. The question then appears to be, does Tucker allege a constitutional violation sufficient to withstand Hinds County's 12(b)(6) defense? In his complaint Tucker only alleges a due process violation and does not mention, at least with reference to Hinds County, that his property was taken without due compensation.

C.E. Tucker relies on both the due process clause of Fourteenth Amendment to the United States Constitution and Article III, § 14 of the Mississippi Constitution. Though the two are worded differently, they have been found to contain the same guarantee. *See NCAA v. Gillard,* 352 So.2d 1072

(Miss.1977); *Mississippi Power Co. v. Goudy,* 459 So.2d 257 (Miss.1984).

The first question to be considered is whether C.E. Tucker had a "property" interest, protected by the Fourteenth Amendment, in the continuance of his utility service. To claim a property interest in a service, a person must "have a legitimate claim of entitlement" to it, surpassing a mere "abstract need" or "unilateral expectation" of it. *Board of Regents v. Roth,* 408 U.S. 564, 574, 92 S.Ct. 2701, 2707-08, 33 L.Ed.2d 548 (1972). If Tucker possessed such an interest, and alleged that it was terminated by Hinds County without due process, then he has stated a claim sufficient to pierce the sovereign immunity defense of Hinds County. The seminal case involving property interests in one's utilities is *Memphis Light Gas and Water Div. v. Craft,* 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978). The Crafts had their utility service terminated several times because of a billing dispute. Looking to state law, the Supreme Court found that the Crafts had a property interest in the continuance of their utility service, citing Tennessee case law which found a distinction between the power company's right to cut off a customer's service for non-payment of a just service bill, and the non-existent right to do so when there was a bona fide dispute concerning the correctness of the bill, such as with the Crafts. *Craft,* 436 U.S. at 6, 98 S.Ct. at 1559. The Court also mentioned that MLG & W attempted to rely instead on "the general rule that a utility may terminate service for nonpayment of undisputed charges or noncompliance with reasonable rules and regulations." *Craft,* 436 U.S. at 6 n. 10, 98 S.Ct. at 1561 n. 10. Tennessee law further stated that a utility could not coerce a customer to pay a disputed claim, and could not terminate service without "good and sufficient cause." *Craft,* 436 U.S. at 6-7, 98 S.Ct. at 1559.

[6] **[7]** **[8]** This Court has not considered or determined whether or not a subscriber has a "property" interest in continued service under Mississippi law. This Court has found in *Mississippi Power Co. v. Goudy,* 459 So.2d 257, 263 (Miss.1984), that Mrs. Goudy as a consumer "had no specific vested property right in a fair and reasonable utility rate." Mississippi case law dealing with discontinuance of a consumer's utilities is in accord with that from Tennessee mentioned in *Craft.* When a consumer has failed or refused to pay an undisputed bill, the power company may discontinue service. *See Central Louisiana Power Co. v. Thomas,* 145 Miss. 352, 111 So. 142 (1927); *Mississippi Power Co. v. Byrd,* 160 Miss. 71, 133 So. 193 (1931). However, when there is a bona fide dispute as to what is owed, the power company may not discontinue power. *See Mississippi Power Co. v. Cochran,* 167 Miss. 705, 147 So. 473 (1933); *Doherty v. Mississippi Power Co.,* 178 Miss. 204, 173 So. 287 (1937). State law creating a property interest could also be statutory law; however, we find no Mississippi statute dealing with this matter. After a survey of other states, it is clear that the overwhelming majority of courts which have considered this question have found that continuance of electrical power is a property interest worthy of protection under the due process clause of the Fourteenth Amendment. *See Denver Welfare Rights Organization v. Public Utilities Commission,* 190 Colo. 329, 547 P.2d 239 (1976); *I. Erlichman Co. v. Illinois Commerce Commission,* 92 Ill.App.3d 1091, 48 Ill.Dec. 448, 416 N.E.2d 721 (1981); *Perez v. City of San Bruno,* 27 Cal.3d 875, 168 Cal.Rptr. 114, 616 P.2d 1287 (1980); *Dedeke v. Rural Water Dist. No. 5,* 229 Kan. 242, 623 P.2d 1324 (1981); *see also Freeman* ***874** *v. Hayek,* 635 F.Supp. 178 (D.Minn.1986) (applying Minnesota law). Almost all courts considering this question also take into account the fact that utility service has become almost a necessity for safety and comfort in modern-day life. It is time that Mississippi law recognizes such a property interest.

The trial court dismissed Tucker's suit based on Hinds County's sovereign immunity. Both parties agree that sovereign immunity is no defense where a violation of one's constitutional rights are concerned. Finding that C.E. Tucker has a property interest in the continuance of his utility service, then he appears to have alleged a constitutionally viable claim, at least sufficient to survive a 12(b)(6) defense. There may be facts capable of proof under which Tucker could recover. Therefore, the dismissal as to Hinds County is reversed and remanded for further hearing on the claim of Tucker.

II. THE CIRCUIT COURT WAS IN ERROR IN GRANTING MOTION FOR SUMMARY JUDGMENT OF MISSISSIPPI POWER & LIGHT COMPANY.

[9] Because MP & L's motion for summary judgment was granted, the Court's analysis of this claim is not restricted to the pleadings, as was the claim against Hinds County. All materials submitted in support and in opposition to the motion may be considered. One of the first questions to be considered comes from C.E. Tucker's complaint. It alleges that MP & L's actions were "done by cooperation with or direction of governmental authorities and were therefore done under color

of state law and violated the constitutional right of [Tucker] to due process" and MP & L "took his property and property rights without due process of law, all to his damage." Tucker does not mention due process again, either in later pleadings or in his brief, at least with respect to MP & L.

Tucker in his brief lists eight alleged genuine issues of material fact which he claims preclude summary judgment in favor of MP & L. MP & L responds that issues 1-6 have only to do with actions or regulations of Hinds County. We agree. The alleged material issues of fact having to do with MP & L are whether MP & L had the right to disconnect Tucker's utility service, at a time when Tucker claims his account was current, and whether a hazardous condition actually existed at Tucker's residence which necessitated the termination of his utility service. Also, Tucker belately claims that MP & L never refunded his deposit. This is not developed in the record and is not considered here.

Authority is vested in the Mississippi Public Service Commission to regulate public utilities such as MP & L. Miss.Code Ann. § 77-3-2 (Supp.1989). The PSC shall also "have power to prescribe, issue, amend and rescind such reasonable rules and regulations as may be reasonably necessary or appropriate to carry out the provisions of this article." Miss.Code Ann. § 77-3-45 (1972). Pursuant to this authority the PSC has promulgated *Rules and Regulations Governing Public Utility Service.* MP & L relies on the following rules as legal authority for its actions in shutting off C.E. Tucker's utility service:

Rule 7. Refusal to Serve Customers

A. Compliance by Customer. Any utility may decline to serve a customer or prospective customer until he has complied with all state and/or municipal regulations governing the service applied for and has also complied with the reasonable rules and regulations of the utility.

C. Hazardous Equipment. *The utility may refuse to serve a customer if, in its best judgment, the customer's installation or equipment is regarded as hazardous or of such character that satisfactory service cannot be given.* This rule shall not be construed as imposing any duty upon a utility to determine the safety or suitability of a customer's installation or equipment for the use intended.

F. Insufficient Grounds for Refusal to Serve. The following shall not constitute sufficient cause for refusal of service to a present or prospective customer:

....

***875** (4) Violation of the utility's rules pertaining to operation of nonstandard equipment which interferes with service to others, or other services such as communication services, unless the customer has first been notified and been afforded reasonable opportunity to comply with said rules; *provided, however, that where a dangerous condition exists on a customer's premises, service may be refused or discontinued without notice.*

Rule 8. Discontinuance of Service

A. For Violation of Rules and Regulations. No utility shall discontinue service to any customer for violation of its rules and regulations nor for non-payment of bills without first having used due diligence to give the customer notice of such violation or delinquency and reasonable opportunity to comply with its rules and regulations or to pay his bills. In no case shall service be actually discontinued until after at least five (5) days' written notice shall have been given to the customer by the utility; provided, however, for fraudulent, careless, negligent, or unlawful use of the commodity or service, *or where a dangerous condition is found to exist on the customer's premises, service may be discontinued without advance notice.* Such notice may be given by the utility by mailing by U.S. Mail, postage prepaid, to the last known address of the customer.
(emphasis added). MP & L also relies on its service policy.

Tucker argues first that these rules cannot be followed blindly and that MP & L cannot shut off power just because it feels, in its best judgment, that a dangerous or hazardous condition existed. Tucker argues that whether such a condition existed at all is a genuine issue of material fact. (Affidavit of Thomas Long-Joint Stipulation) MP & L claims that the question is not whether such a condition actually existed, but whether MP & L, in its best judgment, determined such a condition existed. Also in controversy is the actual effect of the PSC rules under which MP & L acted. MP & L argues that these rules have the effect of law and there is authority that certain administrative rules have the force of law. *Standard Oil Co. of California v. Johnson,* 316 U.S. 481, 484, 62 S.Ct. 1168, 1169-70, 86

L.Ed. 1611 (1942) (War Department regulations); *see also United States v. Mississippi Power & Light Co.,* 638 F.2d 899 (5th Cir.1981); *Green v. United States,* 460 F.2d 412 (5th Cir.1972).

Several jurisdictions have dealt with the liability of a power company in a fact situation such as this. In *Carroway v. Carolina Power & Light Co.,* 226 S.C. 237, 84 S.E.2d 728 (1954), Carolina Power shut off a consumer's utility service without notice. It was acting pursuant to its own Service Regulations, approved by the South Carolina Public Service Commission, which authorized suspension of electricity without notice "in case of a condition on Customer's side of the point of delivery actually known by Company to be, or which Company reasonably anticipates may be dangerous to life or property." The South Carolina Supreme Court found that these rules and regulations had "the force and effect of law and were binding on the plaintiff, regardless of whether or not he agreed to them." The Court further noted that if there had been a fire, after Carolina Power had been made aware of the dangerous condition, then it surely would have been liable for not having shut off the utility service according to its own rules. *Carroway,* 226 S.C. at 246, 84 S.E.2d at 732.

A similar situation occurred in *Windsor Hotel Co. v. Central Maine Power Co.,* 250 A.2d 194 (Me.1969), where Central Maine Power shut off the electrical service of the Windsor Hotel pursuant to an order issued by the Belfast city electrician, after the electrician found electrical code violations at the Hotel. Summary judgment was granted in favor of Central Maine. Relying on the rules of the Maine Public Utilities Commission, and on the notice from the Belfast city electrician, the Supreme Judicial Court of Maine found that Central Maine was not negligent as a matter of law for following the directive of the electrician, saying that Central Maine "would have continued to energize plaintiff's electrical ***876** system at its peril." Summary judgment was affirmed. *Windsor Hotel,* 250 A.2d at 198; *see also Shaffer v. Georgia Power Co.,* 128 Ga.App. 84, 195 S.E.2d 758 (1973) (summary judgment affirmed in favor of power company which shut off electrical service based on its own rules and regulations, city ordinances, and potential liability for continuing service when dangerous condition was known).

MP & L has the discretion to act as it did in this case. MP & L was acting pursuant to PSC rules and its own service policy when it shut off C.E. Tucker's power. It relied on a directive from W.W. Golson, a county official with ostensible power to direct enforcement of zoning ordinances, and its own serviceman, Joe McClendon, who reported a hazardous and dangerous condition at the Tucker residence. If Tucker was treated unfairly, or was denied due process, it was at the hands of Hinds County. MP & L had the right, as a matter of law (indeed it may have had the duty), to shut off Tucker's utility service. Accordingly, the circuit court is affirmed.

CONCLUSION

Finding that the circuit court erred when it dismissed C.E. Tucker's claim against Hinds County, the judgment of the circuit court is reversed and remanded for further proceedings. Finding no reversible error in the circuit court's disposition of the claim against MP & L, the judgment of the circuit court in this part is affirmed.

AFFIRMED AS TO MP & L, REVERSED AND REMANDED AS TO HINDS COUNTY.

ROY NOBLE LEE, C.J., HAWKINS and DAN M. LEE, P.JJ., and PRATHER, ROBERTSON, SULLIVAN, ANDERSON and BLASS, JJ., concur.

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Exhibit 19

Arizona Revised Statutes Annotated
Constitution of the State of Arizona (Refs & Annos)
Article VI. Judicial Department (Refs & Annos)

A.R.S. Const. Art. 6 § 17

§ 17. Superior court; conduct of business; trial juries; jury trial; grand juries

Currentness

Section 17. The superior court shall be open at all times, except on nonjudicial days, for the determination of non-jury civil cases and the transaction of business. For the determination of civil causes and matters in which a jury demand has been entered, and for the trial of criminal causes, a trial jury shall be drawn and summoned from the body of the county, as provided by law. The right of jury trial as provided by this constitution shall remain inviolate, but trial by jury may be waived by the parties in any civil cause or by the parties with the consent of the court in any criminal cause. Grand juries shall be drawn and summoned only by order of the superior court.

Credits
Addition approved election Nov. 8, 1960, eff. Dec. 9, 1960.

Notes of Decisions (29)

A. R. S. Const Art. 6 § 17, AZ CONST Art. 6 § 17
Current through the Second Regular and Second Special Sessions of the Fifty-first Legislature

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Exhibit 20

Arizona Revised Statutes Annotated
Title 1. General Provisions
Chapter 2. Law and Statutes
Article 1. Common Law

A.R.S. § 1-201

§ 1-201. Adoption of common law; exceptions

Currentness

The common law only so far as it is consistent with and adapted to the natural and physical conditions of this state and the necessities of the people thereof, and not repugnant to or inconsistent with the Constitution of the United States or the constitution or laws of this state, or established customs of the people of this state, is adopted and shall be the rule of decision in all courts of this state.

Notes of Decisions (51)

A. R. S. § 1-201, AZ ST § 1-201
Current through the Second Regular and Second Special Sessions of the Fifty-first Legislature

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Exhibit 21

Arizona Revised Statutes Annotated
Title 40. Public Utilities and Carriers
Chapter 2. Public Service Corporations Generally (Refs & Annos)
Article 4. Certificates of Convenience and Necessity and Franchises

A.R.S. § 40-285

§ 40-285. Disposition of plant by public service corporations; acquisition of capital stock of public service corporation by other public service corporations; exemption

Effective: September 13, 2013
Currentness

A. A public service corporation shall not sell, lease, assign, mortgage or otherwise dispose of or encumber the whole or any part of its railroad, line, plant or system necessary or useful in the performance of its duties to the public, or any franchise or permit or any right thereunder, nor shall such corporation merge such system or any part thereof with any other public service corporation without first having secured from the commission an order authorizing it so to do. Every such disposition, encumbrance or merger made other than in accordance with the order of the commission authorizing it is void.

B. The approval or permit of the commission under this section shall not revive or validate any lapsed or invalid franchise or permit, or enlarge or add to the powers or privileges contained in the grant of any franchise or permit, or waive any forfeiture.

C. This section does not prevent the sale, lease or other disposition by any such corporation of property that is not necessary or useful in the performance of its duties to the public, and any sale of its property by such corporation shall be conclusively presumed to have been of property that is not useful or necessary in the performance of its duties to the public as to any purchaser of the property in good faith for value.

D. A public service corporation shall not purchase, acquire, take or hold any part of the capital stock of any other public service corporation organized or existing under the laws of this state without a permit from the commission.

E. Every assignment, transfer, contract or agreement for assignment or transfer of any stock in violation of the provisions of this section is void, and the transfer shall not be made on the books of any public service corporation.

F. This section does not apply to a telecommunications corporation whose retail telecommunications services are all classified as competitive by the commission, except as may otherwise be determined by a commission order after the effective date of this amendment to this section.

Credits
Amended by Laws 1984, Ch. 40, § 1; Laws 2013, Ch. 176, § 1.

Notes of Decisions (22)

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Exhibit 22

Arizona Revised Statutes Annotated
Rules of Civil Procedure for the Superior Courts of Arizona
VI. Trials
Rule 38. Jury Trial of Right

16 A.R.S. Rules of Civil Procedure, R. 38, Refs & Annos
Currentness

Editors' Notes

GENERAL NOTES

<The heading of Rule 38 is changed to "Right to a jury trial; demand; waiver", by order dated August 28, 2013, revised September 6, 2013, effective April 15, 2014.>

16 A. R. S. Rules Civ. Proc., R. 38, Refs & Annos, AZ ST RCP R. 38, Refs & Annos
Current with amendments received through 1/1/14

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Arizona Revised Statutes Annotated
Rules of Civil Procedure for the Superior Courts of Arizona (Refs & Annos)
VI. Trials (Refs & Annos)
Rule 38. Jury Trial of Right (Refs & Annos)

16 A.R.S. Rules of Civil Procedure, Rule 38(a)

Rule 38(a). Right preserved

Currentness

The right of trial by jury shall be preserved inviolate to the parties.

Notes of Decisions (22)

16 A. R. S. Rules Civ. Proc., Rule 38(a), AZ ST RCP Rule 38(a)
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Arizona Revised Statutes Annotated
Rules of Civil Procedure for the Superior Courts of Arizona (Refs & Annos)
VI. Trials (Refs & Annos)
Rule 38. Jury Trial of Right (Refs & Annos)

16 A.R.S. Rules of Civil Procedure, Rule 38(b)

Rule 38(b). Demand

Currentness

<Text of rule effective until April 15, 2014. See, also, rule effective April 15, 2014.>

Any person may demand a trial by jury of any issue triable of right by jury. The demand may be made by any party by serving upon the other party a demand therefor in writing at any time after the commencement of the action, but not later than the date of setting the case for trial or ten days after a motion to set the case for trial is served, whichever first occurs. The demand for trial by jury may be endorsed on or be combined with the motion to set, but shall not be endorsed on or be combined with any other motion or pleading filed with the court.

Credits
Amended July 14, 1961, effective Nov. 1, 1961.

Editors' Notes

STATE BAR COMMITTEE NOTE
1961 Amendment

Present Rule 38(b) is identical with the present Federal Rule 38(b), but does not conform with the present superior court practice in demanding trial by jury. For example Rule V of Supplemental Rules of the Superior Court of Maricopa County provides that after a case is at issue, either counsel may file a motion to set which will set forth whether a jury is requested.

Confusion sometimes arises when a demand for trial by jury, buried in the complaint or answer, is not brought to the attention of the court until the day set for trial and a jury is not then available. The amended rule eliminates this source of confusion by providing that the demand may not be endorsed on or be combined with any pleading or any motion except a motion to set.

Notes of Decisions (11)

16 A. R. S. Rules Civ. Proc., Rule 38(b), AZ ST RCP Rule 38(b)
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Arizona Revised Statutes Annotated
Rules of Civil Procedure for the Superior Courts of Arizona (Refs & Annos)
VI. Trials (Refs & Annos)
Rule 38. Jury Trial of Right (Refs & Annos)

16 A.R.S. Rules of Civil Procedure, Rule 38(b)

Rule 38(b). Demand

Currentness

<Text of rule effective April 15, 2014. See, also, rule effective until April 15, 2014.>

Any person may demand a trial by jury of any issue triable of right by jury. The demand may be made by any party by filing and serving a demand therefor in writing at any time after the commencement of the action, but not later than the date on which the court sets a trial date or ten days after the date a Joint Report and Proposed Scheduling Order under Rule 16(b) or Rule 16.3 are filed, whichever first occurs. The demand for trial by jury shall not be endorsed on or be combined with any other motion or pleading filed with the court.

Credits
Amended July 14, 1961, effective Nov. 1, 1961; August 28, 2013, revised Sept. 6, 2013, effective April 15, 2014, subject to the conditions of Order No. R-13-0017.

Editors' Notes

STATE BAR COMMITTEE NOTE
1961 Amendment

Present Rule 38(b) is identical with the present Federal Rule 38(b), but does not conform with the present superior court practice in demanding trial by jury. For example Rule V of Supplemental Rules of the Superior Court of Maricopa County provides that after a case is at issue, either counsel may file a motion to set which will set forth whether a jury is requested.

Confusion sometimes arises when a demand for trial by jury, buried in the complaint or answer, is not brought to the attention of the court until the day set for trial and a jury is not then available. The amended rule eliminates this source of confusion by providing that the demand may not be endorsed on or be combined with any pleading or any motion except a motion to set.

Notes of Decisions (11)

16 A. R. S. Rules Civ. Proc., Rule 38(b), AZ ST RCP Rule 38(b)
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Arizona Revised Statutes Annotated
Rules of Civil Procedure for the Superior Courts of Arizona (Refs & Annos)
VI. Trials (Refs & Annos)
Rule 38. Jury Trial of Right (Refs & Annos)

16 A.R.S. Rules of Civil Procedure, Rule 38(c)

Rule 38(c). Demand; specification of issues

Currentness

<Text of rule effective until April 15, 2014. See, also, rule effective April 15, 2014.>

In the demand a party may specify the issues which the party wishes so tried, otherwise the party shall be deemed to have demanded trial by jury for all the issues so triable. If the party has demanded trial by jury for only some of the issues, any other party within ten days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all the issues of fact in the action.

Credits
Amended Sept. 15, 1987, effective Nov. 15, 1987.

Notes of Decisions (3)

16 A. R. S. Rules Civ. Proc., Rule 38(c), AZ ST RCP Rule 38(c)
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Arizona Revised Statutes Annotated
Rules of Civil Procedure for the Superior Courts of Arizona (Refs & Annos)
VI. Trials (Refs & Annos)
Rule 38. Jury Trial of Right (Refs & Annos)

16 A.R.S. Rules of Civil Procedure, Rule 38(c)

Rule 38(c). Demand; specification of issues

Currentness

<Text of rule effective April 15, 2014. See, also, rule effective until April 15, 2014.>

In the demand, a party may specify the issues which the party wishes to have tried by a jury; otherwise the party shall be deemed to have demanded trial by jury for all the issues so triable. If the party has demanded trial by jury for only some of the issues, any other party may, within ten days after service of the demand or such lesser time as the court may order, serve a demand for trial by jury of any other or all issues of fact in the action triable by jury.

Credits

Amended Sept. 15, 1987, effective Nov. 15, 1987; August 28, 2013, revised Sept. 6, 2013, effective April 15, 2014, subject to the conditions of Order No. R-13-0017.

Notes of Decisions (3)

16 A. R. S. Rules Civ. Proc., Rule 38(c), AZ ST RCP Rule 38(c)
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Arizona Revised Statutes Annotated
Rules of Civil Procedure for the Superior Courts of Arizona (Refs & Annos)
VI. Trials (Refs & Annos)
Rule 38. Jury Trial of Right (Refs & Annos)

16 A.R.S. Rules of Civil Procedure, Rule 38(d)

Rule 38(d). Waiver

Currentness

<Text of rule effective until April 15, 2014. See, also, rule effective April 15, 2014.>

The failure of a party to serve a demand as required by this Rule and to file it as required by Rule 5(b) constitutes a waiver by the party of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

Credits
Amended Sept. 15, 1987, effective Nov. 15, 1987.

Notes of Decisions (18)

16 A. R. S. Rules Civ. Proc., Rule 38(d), AZ ST RCP Rule 38(d)
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Arizona Revised Statutes Annotated
Rules of Civil Procedure for the Superior Courts of Arizona (Refs & Annos)
VI. Trials (Refs & Annos)
Rule 38. Jury Trial of Right (Refs & Annos)

16 A.R.S. Rules of Civil Procedure, Rule 38(d)

Rule 38(d). Waiver

Currentness

<Text of rule effective April 15, 2014. See, also, rule effective until April 15, 2014.>

A party waives a jury trial unless its demand is properly served and filed. A proper demand may be withdrawn only if the parties consent.

Credits
Amended Sept. 15, 1987, effective Nov. 15, 1987; August 28, 2013, revised Sept. 6, 2013, effective April 15, 2014, subject to the conditions of Order No. R-13-0017.

Notes of Decisions (18)

16 A. R. S. Rules Civ. Proc., Rule 38(d), AZ ST RCP Rule 38(d)
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Exhibit 23

Arizona Administrative Code Currentness
Title 14. Public Service Corporations; Corporations and Associations; Securities Regulation
Chapter 2. Corporation Commission Fixed Utilities
Article 2. Electric Utilities (Refs & Annos)

A.A.C. R14-2-202

R14-2-202. Certificate of Convenience and Necessity for Electric Utilities

A. Application for new Certificate of Convenience and Necessity. Six copies of each application for a new Certificate of Convenience and Necessity shall be submitted to the Commission, through Docket Control, in a form prescribed by the Commission and shall include, at a minimum, the following information:

1. The proper name and correct address of the proposed utility company and its owner, if a sole proprietorship, each partner, if a partnership, or the President and Secretary if a corporation.

2. The rates proposed to be charged for the service that will be rendered.

3. A financial statement setting forth the financial condition of the applicant.

4. Maps of the proposed service area or a description of the area proposed to be served.

5. Appropriate city, county and/or state agency approvals, where appropriate.

6. The actual number of customers within the service area as of the time of filing and the estimated number of customers to be served for each of the first five years of operation.

7. Such other information as the Commission by order or the staff of the Utilities Division by written directive may request.

B. Application for discontinuance or abandonment of utility service

1. Any utility proposing to discontinue or abandon utility service currently in use by the public shall prior to such action obtain authority therefor from the Commission.

2. The utility shall include in the application, studies of past, present and prospective customer use of the subject service, plant, or facility as is necessary to support the application.

3. An application shall not be required to remove individual facilities where a customer has requested service discontinuance.

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HISTORICAL NOTE

Adopted effective March 2, 1982 (Supp. 82-2). Amended by exempt rulemaking at 5 A.A.R. 3933, effective September 24, 1999 (Supp. 99-3). Amended by exempt rulemaking at 6 A.A.R. 4180, effective October 13, 2000 (Supp. 00-4).

Editor's Note: This Section was amended under an exemption from the Attorney General approval provisions of the Arizona Administrative Procedure Act (State ex. rel. Corbin v. Arizona Corporation Commission, 174 Ariz. 216 848 P.2d 301 (App. 1992)), as determined by the Corporation Commission. This exemption means that the rules as amended were not approved by the Attorney General.

Current through March 31, 2013.

A.A.C. R14-2-202, AZ ADC R14-2-202

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Exhibit 24

Arizona Administrative Code Currentness
Title 14. Public Service Corporations; Corporations and Associations; Securities Regulation
Chapter 2. Corporation Commission Fixed Utilities
Article 2. Electric Utilities (Refs & Annos)

A.A.C. R14-2-203

R14-2-203. Establishment of Service

A. Information from new applicants

1. A utility may obtain the following minimum information from each new applicant for service:

a. Name or names of applicant or applicants.

b. Service address or location and telephone number.

c. Billing address/telephone number, if different than service address.

d. Address where service was provided previously.

e. Date applicant will be ready for service.

f. Indication of whether premises have been supplied with utility service previously.

g. Purpose for which service is to be used.

h. Indication of whether applicant is owner or tenant of or agent for the premises.

i. Information concerning the energy and demand requirements of the customer,

j. Type and kind of life-support equipment, if any, used by the customer.

2. Customer-specific information shall not be released without specific prior written customer authorization unless the information is requested by a law enforcement or other public agency, or is requested by the Commission or its staff, or is reasonably required for legitimate account collection activities, or is necessary to provide safe and reliable service to the customer.

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3. A utility may require a new applicant for service to appear at the utility's designated place of business to produce proof of identity and sign the utility's application form.

4. Where service is requested by two or more individuals the utility shall have the right to collect the full amount owed to the utility from any one of the applicants.

B. Deposits

1. A utility shall not require a deposit from a new applicant for residential service if the applicant is able to meet any of the following requirements:

a. The applicant has had service of a comparable nature with the utility within the past two years and was not delinquent in payment more than twice during the last 12 consecutive months or disconnected for nonpayment.

b. The applicant can produce a letter regarding creditor verification from an electric utility where service of a comparable nature was last received which states applicant had a timely payment history at time of service discontinuance.

c. In lieu of a deposit, a new applicant may provide a Letter of Guarantee from a governmental or non-profit entity or a surety bond as security for the utility.

2. The utility may issue a nonnegotiable receipt to the applicant for the deposit. The inability of the customer to produce such a receipt shall in no way impair his or her right to receive a refund of the deposit which is reflected on the utility's records.

3. Deposits shall be interest bearing; the interest rate and method of calculation shall be filed with and approved by the Commission in a tariff proceeding.

4. Each utility shall file a deposit refund procedure with the Commission, through Docket Control, subject to Commission review and approval during a tariff proceeding. However, each utility's refund policy shall include provisions for residential deposits and accrued interest to be refunded or letters of guarantee or surety bonds to expire after 12 months of service if the customer has not been delinquent more than twice in the payment of utility bills.

5. A utility may require a residential customer to establish or reestablish a deposit if the customer becomes delinquent in the payment of two bills within a 12-consecutive- month period or has been disconnected for service during the last 12 months.

6. The amount of a deposit required by the utility shall be determined according to the following terms:

a. Residential customer deposits shall not exceed two times that customer's estimated average monthly bill.

b. Nonresidential customer deposits shall not exceed 2 1/2 times that customer's estimated maximum monthly bill.

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7. The utility may review the customer's usage after service has been connected and adjust the deposit amount based upon the customer's actual usage.

8. A separate deposit may be required for each meter installed.

9. If a utility Distribution Company' customer with an established deposit elects to take competitive services from an Electric Service Provider, and is not currently delinquent in payments to the Utility Distribution Company, the Utility Distribution Company will refund a portion of the customer's deposit in proportion to the expected decrease in monthly billing. A customer returning to Standard Offer Service may be required to increase an established deposit in proportion to the expected increase in monthly billing.

C. Grounds for refusal of service. A utility may refuse to establish service if any of the following conditions exist:

1. The applicant has an outstanding amount due for the same class of utility service with the utility, and the applicant is unwilling to make arrangements with the utility for payment.

2. A condition exists which in the utility's judgment is unsafe or hazardous to the applicant, the general population, or the utility's personnel or facilities.

3. Refusal by the applicant to provide the utility with a deposit when the customer has failed to meet the credit criteria for waiver of deposit requirements.

4. Customer is known to be in violation of the utility's tariffs filed with the Commission.

5. Failure of the customer to furnish such funds, service, equipment, or rights-of-way necessary to serve the customer and which have been specified by the utility as a condition for providing service.

6. Applicant falsifies his or her identity for the purpose of obtaining service.

D. Service establishments, re-establishments or reconnection charge

1. Each utility may make a charge as approved by the Commission for the establishment, reestablishment, or reconnection of utility services, including transfers between Electric Service Providers.

2. Should service be established during a period other than regular working hours at the customer's request, the customer may be required to pay an after-hour charge for the service connection. Where the utility scheduling will not permit service establishment on the same day requested, the customer can elect to pay the after-hour charge for establishment that day or the customer's service will be established on the next available normal working day.

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3. For the purpose of this rule, the definition of service establishments are where the customer's facilities are ready and acceptable to the utility and the utility needs only to install a meter, read a meter, or turn the service on.

4. Service establishments with an Electric Service Provider will be scheduled for the next regular meter read date if the direct access service request is provided 15 calendar days prior to that date and appropriate metering equipment is in place. If a direct access service request is made in less than 15 days prior to the next regular read date, service will be established at the next regular meter read date thereafter. The utility may offer after-hours or earlier service for a fee. This Section shall not apply to the establishment of new service but is limited to a change of providers of existing electric service.

E. Temporary service

1. Applicants for temporary service may be required to pay the utility, in advance of service establishment, the estimated cost of installing and removing the facilities necessary for furnishing the desired service.

2. Where the duration of service is to be less than one month, the applicant may also be required to advance a sum of money equal to the estimated bill for service.

3. Where the duration of service is to exceed one month, the applicant may also be required to meet the deposit requirements of the utility.

4. If at any time during the term of the agreement for services the character of a temporary customer's operations changes so that in the opinion of the utility the customer is classified as permanent, the terms of the utility' line extension rules shall apply.

HISTORICAL NOTE

Adopted effective March 2, 1982 (Supp. 82-2). Amended by an emergency action effective August 10, 1998, pursuant to A.R.S. § 41-1026, in effect for a maximum of 180 days (Supp. 98-3). Emergency amendment replaced by exempt permanent amendment effective December 31, 1998 (Supp. 98-4). Amended by exempt rulemaking at 5 A.A.R. 3933, effective September 24, 1999 (Supp. 99-3). Amended by exempt rulemaking at 6 A.A.R. 4180, effective October 13, 2000 (Supp. 00-4).

Editor's Note: This Section was amended under an exemption from the Attorney General approval provisions of the Arizona Administrative Procedure Act (State ex. rel. Corbin v. Arizona Corporation Commission, 174 Ariz. 216 848 P.2d 301 (App. 1992)), as determined by the Corporation Commission. This exemption means that the rules as amended were not approved by the Attorney General.

Current through March 31, 2013.

A.A.C. R14-2-203, AZ ADC R14-2-203

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Exhibit 25

Ariz. Admin. Code R14-2-211

C

Arizona Administrative Code Currentness
Title 14. Public Service Corporations; Corporations and Associations; Securities Regulation
Chapter 2. Corporation Commission Fixed Utilities
Article 2. Electric Utilities (Refs & Annos)
R14-2-211. Termination of Service

A. Nonpermissible reasons to disconnect service. A utility may not disconnect service for any of the reasons stated below:

1. Delinquency in payment for services rendered to a prior customer at the premises where service is being provided, except in the instance where the prior customer continues to reside on the premises.

2. Failure of the customer to pay for services or equipment which are not regulated by the Commission.

3. Nonpayment of a bill related to another class of service.

4. Failure to pay for a bill to correct a previous underbilling due to an inaccurate meter or meter failure if the customer agrees to pay over a reasonable period of time.

5. A utility shall not terminate residential service where the customer has an inability to pay and:

a. The customer can establish through medical documentation that, in the opinion of a licensed medical physician, termination would be especially dangerous to the health of a customer or a permanent resident residing on the customer's premises, or

b. Life supporting equipment used in the home that is dependent on utility service for operation of such apparatus, or

c. Where weather will be especially dangerous to health as defined or as determined by the Commission.

6. Residential service to ill, elderly, or handicapped persons who have an inability to pay will not be terminated until all of the following have been attempted:

a. The customer has been informed of the availability of funds from various government and social assistance agencies of which the utility is aware.

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b. A third party previously designated by the customer has been notified and has not made arrangements to pay the outstanding utility bill.

7. A customer utilizing the provisions of subsection (A)(4) or (A)(5) above may be required to enter into a deferred payment agreement with the utility within 10 days after the scheduled termination date.

8. Disputed bills where the customer has complied with the Commission's rules on customer bill disputes.

B. Termination of service without notice

1. In a competitive marketpace, the Electric Service Provider cannot order a disconnect for nonpayment but can only send a notice of contract cancellation to the customer and the Utility Distribution Company. Utility service may be disconnected without advance written notice under the following conditions:

a. The existence of an obvious hazard to the safety or health of the consumer or the general population or the utility's personnel or facilities.

b. The utility has evidence of meter tampering or fraud.

c. Failure of a customer to comply with the curtailment procedures imposed by a utility during supply shortages.

2. The utility shall not be required to restore service until the conditions which resulted in the termination have been corrected to the satisfaction of the utility.

3. Each utility shall maintain a record of all terminations of service without notice. This record shall be maintained for a minimum of one year and shall be available for inspection by the Commission.

C. Termination of service with notice

1. In a competitive marketplace, the Electric Service Provider cannot order a disconnect for nonpayment but can only send a notice of contract cancellation to the customer and the Utility Distribution Company. A utility may disconnect service to any customer for any reason stated below provided the utility has met the notice requirements established by the Commission:

a. Customer violation of any of the utility's tariffs,

b. Failure of the customer to pay a delinquent bill for utility service,

c. Failure to meet or maintain the utility's deposit requirements,

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d. Failure of the customer to provide the utility reasonable access to its equipment and property,

e. Customer breach of a written contract for service between the utility and customer,

f. When necessary for the utility to comply with an order of any governmental agency having such jurisdiction.

2. Each utility shall maintain a record of all terminations of service with notice. This record shall be maintained for one year and be available for Commission inspection.

D. Termination notice requirements

1. No utility shall terminate service to any of its customers without providing advance written notice to the customer of the utility's intent to disconnect service, except under those conditions specified where advance written notice is not required.

2. Such advance written notice shall contain, at a minimum, the following information:

a. The name of the person whose service is to be terminated and the address where service is being rendered

b. The utility tariff that was violated and explanation thereof or the amount of the bill which the customer has failed to pay in accordance with the payment policy of the utility, if applicable.

c. The date on or after which service may be terminated.

d. A statement advising the customer to contact the utility at a specific address or phone number for information regarding any deferred payment or other procedures which the utility may offer or to work out some other mutually agreeable solution to avoid termination of the customer's service.

e. A statement advising the customer that the utility's stated reason for the termination of services may be disputed by contacting the utility at a specific address or phone number, advising the utility of the dispute and making arrangements to discuss the cause for termination with a responsible employee of the utility in advance of the scheduled date of termination. The responsible employee shall be empowered to resolve the dispute and the utility shall retain the option to terminate service after affording this opportunity for a meeting and concluding that the reason for termination is just and advising the customer of his right to file a complaint with the Commission.

3. Where applicable, a copy of the termination notice will be simultaneously forwarded to designated third parties.

E. Timing of terminations with notice

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Ariz. Admin. Code R14-2-211

1. Each utility shall be required to give at least five days' advance written notice prior to the termination date.

2. Such notice shall be considered to be given to the customer when a copy thereof is left with the customer or posted first class in the United States mail, addressed to the customer's last known address.

3. If after the period of time allowed by the notice has elapsed and the delinquent account has not been paid nor arrangements made with the utility for the payment thereof or in the case of a violation of the utility's rules the customer has not satisfied the utility that such violation has ceased, the utility may then terminate service on or after the day specified in the notice without giving further notice.

4. Service may only be disconnected in conjunction with a personal visit to the premises by an authorized representative of the utility.

5. The utility shall have the right (but not the obligation) to remove any or all of its property installed on the customer's premises upon the termination of service.

F. Landlord/tenant rule. In situations where service is rendered at an address different from the mailing address of the bill or where the utility knows that a landlord/tenant relationship exists and that the landlord is the customer of the utility, and where the landlord as a customer would otherwise be subject to disconnection of service, the utility may not disconnect service until the following actions have been taken:

1. Where it is feasible to so provide service, the utility, after providing notice as required in these rules, shall offer the occupant the opportunity to subscribe for service in his or her own name. If the occupant then declines to so subscribe, the utility may disconnect service pursuant to the rules.

2. A utility shall not attempt to recover from a tenant or condition service to a tenant with the payment of any outstanding bills or other charges due upon the outstanding account of the landlord.

HISTORICAL NOTE

Adopted effective March 2, 1982 (Supp. 82-2). Amended by an emergency action effective August 10, 1998, pursuant to A.R.S. § 41-1026, in effect for a maximum of 180 days (Supp. 98-3). Emergency amendment replaced by exempt permanent amendment effective December 31, 1998 (Supp. 98-4). Amended to correct subsection numbering (Supp. 99-4). Amended by exempt rulemaking at 6 A.A.R. 4180, effective October 13, 2000 (Supp. 00-4).

Editor's Note: This Section was amended under an exemption from the Attorney General approval provisions of the Arizona Administrative Procedure Act (State ex. rel. Corbin v. Arizona Corporation Commission, 174 Ariz. 216 848 P.2d 301 (App. 1992)), as determined by the Corporation Commission. This exemption means that the rules as amended were not approved by the Attorney General.

A.A.C. R14-2-211, AZ ADC R14-2-211

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