DIVISION ONE
FILED: 09/27/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

T.R. WORLD GYM, LLC, a business entity; and BROWN & RECKER, LLC, an Arizona corporation,	1 CA-CV 11-0742
	DEPARTMENT B
Appellants,	**MEMORANDUM DECISION**
v.	(Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)
BRUNSWICK CORPORATION, an Arizona corporation dba LIFE FITNESS,	
Appellee.	

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-001045

The Honorable Edward O. Burke, Judge (Retired)

The Honorable Arthur T. Anderson, Judge

AFFIRMED

The Sorenson Law Firm, LLC — Tempe
By Wade R. Causey

And

The Doyle Firm, PC — Phoenix
By Nathaniel James Odle
Attorneys for Appellants

Jennings Strouss & Salmon, PLC Peoria
By Garrett Olexa
John J. Egbert
And

K&L Gates, LLP Chicago, IL
By M. David Short, *Pro Hac Vice*
Attorneys for Appellee

O R O Z C O, Judge

¶1 T.R. World Gym, LLC, and Brown & Recker, LLC, (collectively, Appellants) appeal from the trial court's denial of their motion for leave to amend their answer. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 This appeal arises out of an accident in which David Valenzuela was injured while using an exercise machine at a health club facility owned and operated by Appellants. In January 2009, Valenzuela and his wife (Plaintiffs) brought suit against Appellants and the manufacturer of the exercise machine, Brunswick Corporation (Brunswick), alleging strict liability, negligence, and breach of warranty.

¶3 Approximately four months after answering the complaint, Appellants moved for partial summary judgment on the strict liability and breach of warranty claims. Appellants claimed that because they "d[id] not sell or lease the product but rather offer[ed] use of the product as part of a contract for services," they were merely "end user[s] of the product," and

therefore, were not strictly liable for the exercise machine's defects under Arizona's product liability statute. *See* Arizona Revised Statutes (A.R.S.) section 12-681.5 (Supp. 2011) (providing that a product liability action resulting in bodily injury, death, or property damage can be brought against a manufacturer or a seller of a product).

¶4 While Appellants' motion for partial summary judgment was pending, they filed a motion for leave to amend their answer to assert a cross-claim against Brunswick. Despite disputing that they were sellers, Appellants asserted that they were entitled to statutory indemnification[1] because the allegation in Plaintiffs' complaint that Appellants were sellers triggered Brunswick's obligation to defend and indemnify Appellants. Appellants attached a proposed amended answer as an exhibit to the motion, which contained a claim for implied indemnity (common law indemnification) in addition to the statutory indemnity claim discussed in the motion. Appellants, however, did not argue in their motion to amend that they were entitled to common law indemnification.

¶5 In a minute entry filed June 25, 2010, the trial court, focusing solely on the statutory indemnification claim that Appellants asserted in their motion, denied Appellants' motion for leave to amend. The court's rationale for the denial was

[1] *See* A.R.S. § 12-684.A (2003).

that an amendment would be futile because A.R.S. § 12-684 allows a seller to seek indemnification from a manufacturer and Appellants "are not sellers of the product."[2] Appellants then filed a motion for reconsideration (first motion to reconsider), but once again, they did not address the common law indemnification cause of action. The trial court subsequently denied the first motion to reconsider. Based on its determination that Appellants were not sellers, the trial court did, however, grant Appellants' motion for partial summary judgment on both the strict liability and breach of warranty claims.

¶6 In January 2011, Plaintiffs and Brunswick reached a settlement and Plaintiffs moved to dismiss their claims against Brunswick. Upon learning of the settlement, Appellants filed "[Appellants'] Opposition to Plaintiffs' Motion to Voluntarily Dismiss Certain Claims and Motion to Reconsider Motion to Amend Answer" (Opposition and Motion to Reconsider), which focused on Appellants' belief that they had a claim for common law indemnification against Brunswick. Brunswick filed a response to the Opposition and Motion to Reconsider and addressed Appellants' claim for common law indemnification. The trial court reviewed Appellants' Opposition and Motion to Reconsider and Brunswick's

[2] To be a seller, a person or entity must be "engaged in the business of leasing any product or selling any product for resale, use or consumption." A.R.S. § 12-681.9.

response; however, it dismissed Brunswick from the matter without addressing Appellants' claim for common law indemnification. Appellants subsequently reached a settlement with Plaintiffs, and the case against Appellants was dismissed in September 2011.

¶7 Appellants timely appealed. We have jurisdiction pursuant to A.R.S §§ 12-120.21.A.1 (2003) and -2101.A.1 (Supp. 2011).

DISCUSSION

¶8 We review the denial of leave to amend a pleading for an abuse of discretion. *In re Estate of Torstenson*, 125 Ariz. 373, 376, 609 P.2d 1073, 1076 (App. 1980). Because amendments to pleadings should be "freely given when justice requires," Ariz. R. Civ. P. 15(a)1.B, a trial court abuses its discretion if it denies without reason a motion for leave to amend. *Dewey v. Arnold*, 159 Ariz. 65, 68, 764 P.2d 1124, 1127 (App. 1988). However, there is no abuse of discretion if the trial court denies the motion for leave to amend because the amendment would be futile. *Bishop v. State, Dep't of Corr.*, 172 Ariz. 472, 474-75, 837 P.2d 1207, 1209-10 (App. 1992).

Statutory Indemnification Claim

¶9 Appellants claim that the trial court abused its discretion by denying their motion for leave to amend their answer to assert a cross-claim for statutory indemnification under A.R.S. § 12-684. Under that statute, a manufacturer must

indemnify a seller for any judgment rendered against the seller, as well as reimburse the seller for reasonable attorney fees and costs incurred by the seller in defending itself during a product liability action.[3] A.R.S. § 12-684.A. The trial court determined that allowing Appellants to amend their answer to assert a cross-claim for statutory indemnification would be futile because Appellants are not sellers as required under the statute. We agree.

¶10 Appellants' main contention is that they are entitled to indemnification under the statute merely because Plaintiffs alleged in the complaint that "one or more or all Defendants designed, manufactured . . . sold, supplied, maintained and/or placed [the product] into the stream of commerce." They argue that even though the Plaintiffs' allegation in the complaint that Appellants were sellers of the product was found to be meritless, that finding should not foreclose Appellants' right to statutory indemnification or reimbursement of their attorney fees. Additionally, they assert that a determination that a party is entitled to reimbursement of its fees and costs based on the ultimate outcome of the case, and not the allegations in the complaint, would require a complete reversal of well-established indemnification law in Arizona, including *Hellebrandt v. Kelley*

[3] A seller's right to indemnification and reimbursement is limited by two exceptions, neither of which applies in this case. *See* A.R.S. § 12-684.A.1-2.

Co., 153 Ariz. 429, 737 P.2d 405 (App. 1987) and *McIntyre Refrigeration, Inc. v. Mepco Electra*, 165 Ariz. 560, 799 P.2d 901 (App. 1990). Appellants' argument misapplies the holdings of those two cases.

¶11 In both *Hellebrandt* and *McIntyre,* this court determined that there is a difference between the seller's right to reimbursement and its right to indemnification and that the statutory right to reimbursement should not be contingent upon a judgment against the seller. *See Hellebrandt*, 153 Ariz. at 430, 737 P.2d at 406 (finding that the seller is entitled to reimbursement of its fees and costs pursuant to § 12-684.A regardless of the outcome of the action); *McIntyre*, 165 Ariz. at 564, 799 P.2d at 905 (holding that a plaintiff's product liability claim against the seller triggers the seller's right to reimbursement for defense costs, even if the product has not been proven defective). While Appellants are correct that in *Hellebrandt* and *McIntyre* the court determined that the allegations in the complaint control the right to reimbursement, those cases stand for the proposition that a manufacturer must still reimburse a *seller*, even if the plaintiff's product liability action is ultimately unsuccessful. It does not follow from the holdings of those cases that a party who is not a seller is entitled to indemnification or reimbursement under § 12-684

merely because there are erroneous allegations in the complaint that the party is a seller.

¶12 Moreover, nothing in the statute's language implies that a party who is not a seller is entitled to indemnification based solely on the allegations made in the complaint. Section 12-684 states that in any product liability action, if a "manufacturer refuses to accept a tender of defense from the *seller*, the manufacturer shall indemnify the *seller* for any judgment rendered against the *seller* and shall also reimburse the *seller* for reasonable attorneys' fees and costs." (Emphasis added).

¶13 A statute's language "is the best and most reliable index of its meaning, and where language is clear and unequivocal it is determinative of its construction." *Ariz. Sec. Ctr., Inc. v. State*, 142 Ariz. 242, 244, 689 P.2d 185, 187 (App. 1984); *see also Deatherage v. Deatherage*, 140 Ariz. 317, 320, 681 P.2d 469, 472 (App. 1984) (noting that because the legislature is presumed to express itself as clearly as possible, words in a statute are given "their obvious and natural meaning"). We may not "inflate, expand, stretch or extend a statute to matters not falling within its expressed provisions," *City of Phoenix v. Donofrio*, 99 Ariz. 130, 133-34, 407 P.2d 91, 93 (1965), and we "cannot read into a statute something which is not within the manifest intention of the legislature as gathered from the statute itself," *State ex*

rel. Morrison v. Anway, 87 Ariz. 206, 209, 349 P.2d 774, 776 (1960).

¶14 In a case, such as this, in which the statute's language is clear and unambiguous, we must apply the language as written. *Jackson v. Phoenixflight Prods., Inc.*, 145 Ariz. 242, 245, 700 P.2d 1342, 1345 (1985). The effect of Appellants' argument that they are entitled to indemnification or reimbursement under the statute merely because Plaintiffs called them sellers in the complaint would be to read into the statute "alleged seller," rather than the word "seller" as chosen by the legislature. Because we cannot expand the statute to include Appellants' interpretation, we cannot accept Appellants' argument.

¶15 Further, Appellants clearly are not entitled to indemnification under the statute as written. Appellants are admittedly neither sellers nor lessors of any product. In fact, they moved for and received partial summary judgment on the strict liability and breach of warranty claims specifically because they "do[] not sell or lease the product but rather offer[] use of the product as part of a contract for services." Because Appellants are not sellers, they are not entitled to statutory indemnification under § 12-684. Allowing Appellants to amend their answer to include a claim for statutory

indemnification would have been futile; therefore, the trial court did not abuse its discretion in denying Appellants' motion.

Common Law Indemnification Claim

¶16 Appellants also assert that the trial court abused its discretion by failing to address their common law claim for indemnification from Brunswick when the court denied their motion for leave to amend. We disagree because we find that Appellants failed to properly raise the claim.

¶17 Appellants contend that the trial court failed to address the portion of their motion to amend that asserted an entitlement to common law indemnity; however, Appellants' motion for leave to amend focused exclusively on Appellants' claim that they are entitled to statutory indemnification under § 12-684. The only reference to a claim for common law indemnification came in Appellants' proposed amended answer, which merely stated that Appellants' acts were "secondary, derivative, or passive in nature" and "[p]ursuant to the principles of implied indemnity, [Appellants] are entitled to indemnification from [Brunswick]."

¶18 By neglecting to mention a common law indemnity claim in the memorandum of points and authorities submitted with their motion for leave to amend, Appellants failed to comply with the requirements of Arizona Rule of Civil Procedure 7.1(a). That rule states that motions must be accompanied by a memorandum that, at a minimum, states "the precise legal points, statutes

and authorities relied on." Ariz. R. Civ. P. 7.1(a). Although Appellants later claimed that their motion for leave to amend was premised on "Arizona precedent outlining the entitlement to common law indemnity," the motion's memorandum of points and authorities contained no mention of the common law indemnity claim, much less Arizona precedent or any other authorities on which Appellants relied.

¶19 Even if the common law indemnity claim was briefly mentioned in the attached proposed amended answer, that alone was insufficient to bring the issue before the trial court. The purpose of a motion is to direct the attention of the court to the moving party's particular matter or request and to give the court "an opportunity to rule as to the matter." *McClinton v. Rice*, 76 Ariz. 358, 362, 265 P.2d 425, 428 (1953); *see, e.g.*, *State v. Lucas*, 123 Ariz. 39, 40-41, 597 P.2d 192, 193-94 (App. 1979) (finding that appellant's motion gave no indication that appellant sought to disqualify the trial court and thus the trial court could not have been expected to rule on the issue). A party's counsel must file "properly styled motions which clearly indicate the nature of the relief sought and the appropriate legal references to support the motion." *Hegel v. O'Malley Ins. Co.*, 117 Ariz. 411, 412, 573 P.2d 485, 486 (1977).

¶20 Nothing in Appellants' motion for leave to amend or in their first motion to reconsider would have directed the trial

court's attention to Appellant's belief that they were entitled to common law indemnification. The trial court cannot be expected to rule on the issue of common law indemnification when both Appellants' memorandum accompanying their motion to amend and their first motion to reconsider only included a request to add a claim for statutory indemnification. Because Appellants failed to properly raise the issue of common law indemnification, the trial court did not abuse its discretion by failing to address Appellants' common law indemnification claim.

¶21 However, Appellants did raise the common law indemnification claim in their Opposition and Motion to Reconsider. Generally, this court will not consider an argument that was raised for the first time in a motion to reconsider. *Evans Withycombe, Inc. v. W. Innovations, Inc.*, 215 Ariz. 237, 240, ¶ 15, 159 P.3d 547, 550 (App. 2006). While we may exercise our discretion and consider new issues raised in a motion to reconsider, we normally only do so when new facts or arguments have come to light after the trial court's initial ruling, when the trial court has addressed the merits of the motion to reconsider, or when the trial court has requested a response to the motion to reconsider. *See, e.g.*, *Ramsey v. Yavapai Family Advocacy Ctr.*, 225 Ariz. 132, 137-38, ¶¶ 18-19, 235 P.3d 285, 290-91 (App. 2010) (declining to consider an issue raised for the first time in a motion to reconsider because the trial court did

not request a response to the motion); *Evans Withycombe*, 215 Ariz. at 241 n.5, ¶ 16, 159 P.3d at 551 n.5 (stating that courts may consider a matter raised for the first time in a motion to reconsider when the new "facts or arguments presented were not available" when the original ruling was entered); *Crown Life Ins. Co. v. Howard*, 170 Ariz. 130, 132, 822 P.2d 483, 485 (App. 1991) (declining to find an argument waived, even though it was raised for the first time in a motion to reconsider, when the trial court actually considered the merits of that argument).

¶22 In this case, although the common law indemnification claim was fully briefed in the Opposition and Motion to Reconsider and Brunswick's response, the trial court implicitly denied the claim by granting Plaintiffs' motion to dismiss their claims against Brunswick. *See State v. Hill*, 174 Ariz. 313, 323, 848 P.2d 1375, 1385 (1993) (stating that when a court fails to rule on a motion, it is deemed denied).

¶23 We find that the trial court's denial of the Opposition and Motion to Reconsider containing the common law indemnification claim was not an abuse of discretion because Appellants had already waived the claim by failing to include it in their motion to amend or their first motion to reconsider. *See Payne v. Payne*, 12 Ariz. App. 434, 435, 471 P.2d 319, 320 (1970) ("[A] party must timely present his legal theories to the trial court so as to give the trial court an opportunity to rule

properly."); *see also Schoolhouse Educ. Aids, Inc. v. Haag*, 145 Ariz. 87, 91-92, 699 P.2d 1318, 1322-23 (App. 1985) (finding undue delay and substantial prejudice when appellant waited months after the initial pleadings were filed before filing its motions to amend adding counterclaims, cross-claims, and third party claims shortly before trial).

¶24 Because Appellants failed to properly raise the common law indemnification claim in their motion to amend, the trial court only addressed the statutory claim for indemnification in its denial of their motion. The trial court's failure to address the common law indemnification claim gave Appellants notice of the defects in their motion to amend, yet they again failed to raise the common law indemnification claim in their first motion to reconsider and did not properly bring the claim to the court's attention until almost nine months after filing their motion to amend. Given the undue delay in the raising of the common law indemnification claim and the close proximity of the dismissal of Brunswick from the case after two years of litigation, we cannot say the trial court abused its discretion by denying Appellants' common law indemnification.

CONCLUSION

¶25 For the foregoing reasons, we affirm.

/S/

PATRICIA A. OROZCO, Judge

CONCURRING:

/S/

MAURICE PORTLEY, Presiding Judge

/S/

RANDALL M. HOWE, Judge