

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



DIVISION ONE  
FILED: 03/06/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: DLL

ERIC RUSSELL and DONNA RUSSELL, ) No. 1 CA-CV 11-0165  
husband and wife, )  
)  
) DEPARTMENT D  
Plaintiffs/Appellants, )  
)  
) **MEMORANDUM DECISION**  
v. ) (Not for Publication -  
) Rule 28, Arizona Rules of  
DANIEL W. TALLEY and ANN M. ) Civil Appellate Procedure)  
TALLEY, husband and wife; DANIEL )  
W. TALLEY, D.C. dba AMERICAN )  
CHIROPRACTIC, an Arizona )  
corporation, )  
)  
)  
Defendants/Appellees. )  
\_\_\_\_\_ )

Appeal from the Superior Court in Mohave County

Cause No. CV 2008-0762

The Honorable Lee F. Jantzen, Judge

**AFFIRMED**

Law Offices of Don C. Wilkinson  
By Don C. Wilkinson  
Attorney for Plaintiffs/Appellants

Phoenix

Sanders & Parks, PC  
By Winn L. Sammons, Robin E. Burgess and Mandi J. Karvis  
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Phoenix

**B R O W N**, Judge

¶1 Donna Russell appeals the trial court's judgment following a defense verdict in favor of Dr. Daniel Talley. Russell's principal argument is that the court committed reversible error in the way it handled the jury's request for the use of a dictionary. For the following reasons, We affirm.

#### **BACKGROUND**

¶2 In 2008, Russell sued Talley for medical malpractice, alleging Talley failed to diagnose a fracture in her hip and subjected her to unnecessary chiropractic treatments. At trial, in its preliminary and final instructions, the court directed the jurors that they not "do any research or make any investigation about the case on [their] own. . . ." The court explained that "'[r]esearch' includes doing things such as looking up words in a dictionary[.]" During deliberations, the jury sent a written note to the court stating: "We need [a] dictionary." The court summarily denied the request and reminded the jury that it was to rely on the jury instructions. The court subsequently notified one attorney from each side regarding the jury's request and the court's response. Shortly thereafter, counsel were notified that the jury had reached a verdict.<sup>1</sup>

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<sup>1</sup> The record does not reflect the precise language the court used in responding to the jury's request nor does it reflect the exact manner used to communicate with counsel. The only transcript provided to us on appeal is the oral argument on the

¶13 Russell filed a motion for judgment as a matter of law under Arizona Rule of Civil Procedure 50(b) or, alternatively, for a new trial under Rule 59(a). Russell asserted she was entitled to judgment as a matter of law because she had "presented irrefutable evidence" of each element required under her malpractice claim and "there was no legally sufficient evidentiary basis for the jury's verdict in favor of [Talley]." As for the new trial request, Russell asserted that after the jury's verdict, her counsel spoke with jurors who "indicated the jury was confused over the . . . instruction regarding causation, and felt causation did not exist because Dr. Talley did not actually break Donna Russell's hip." Russell thus argued the trial court erred in failing to clarify its jury instruction on causation after the jury impliedly indicated it "was confused about the instruction" by asking for a dictionary. Russell also alleged that the jury committed misconduct when it "relied on [its] own erroneous interpretation of the [causation] instruction" in reaching a verdict. Following oral argument, the court denied the motions and this timely appeal followed.

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motion for new trial. The parties do not appear to dispute, however, the events that transpired relating to the jury's request for a dictionary.

## DISCUSSION

¶4 Russell argues that the trial court erred in denying her motion for a new trial.<sup>2</sup> We review the denial of a motion for new trial for an abuse of discretion. *Warne Invs., Ltd. v. Higgins*, 219 Ariz. 186, 194, ¶ 33, 195 P.3d 645, 653 (App. 2008).

¶5 Russell argues that the trial court erred in denying the jury's request for a dictionary before notifying counsel. She does not dispute that the court properly refused the request for a dictionary, but she contends the jury's request was a "clear indication of confusion" that required advance notice to the parties prior to the court refusing the jury's request. She therefore asserts that the court had a duty to address the confusion. Russell contends that the court's failure to take either of these actions was prejudicial to her and "resulted in the jury reaching a verdict which went against the weight of the evidence presented."

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<sup>2</sup> Russell also asks us to consider whether, "[g]iven the facts of this case," this court should remand the case with an order to enter judgment as a matter of law in favor of Russell. We decline to address this argument because Russell has failed to develop it, does not point to any particular evidence, and cites no supporting authority. See ARCAP 13(a)(6) (stating a brief shall contain arguments with citations to authorities and parts of the record relied upon); *Polanco v. Indus. Comm'n*, 214 Ariz. 489, 491 n.2, ¶ 6, 154 P.3d 391, 393 n.2 (App. 2007) (finding an issue waived on appeal because the party mentioned it in passing, cited no supporting legal authority, and failed to develop it further).

¶16 We recognize that "trial judges should not communicate with the jury regarding substantive legal issues or matters of substantial procedural importance without first notifying and giving counsel an opportunity to state their positions and make whatever record is appropriate." *Perkins v. Komarnyckyj*, 172 Ariz. 115, 118, 834 P.2d 1260, 1263 (1992). However, trial judges are not required to communicate with counsel regarding administrative details such as the viewing of an exhibit or the use of a book or documents not admitted into evidence. *Id.* (citing *Sanders v. Buchanan*, 407 F.2d 161, 164-65 (10th Cir. 1969) (finding no error when judge did not consult parties before telling jury it could not examine police duty manual not admitted into evidence)).

¶17 Russell relies on *Ott v. Samaritan Health Servs.*, 127 Ariz. 485, 622 P.2d 44 (App. 1980) and *Harrington v. Beauchamp Enters.*, 158 Ariz. 118, 761 P.2d 1022 (1988) for the proposition that the court is required to give the jury additional instruction when it requests clarification on a point of law. In *Ott*, we found the court erred when the trial judge refused to answer two jury questions specifically seeking clarification of the court's instructions regarding liability and negligence. 127 Ariz. at 490, 492, 622 P.2d at 49, 51. In *Harrington*, our supreme court held that the trial court erred in failing to address a jury question indicating the jury erroneously believed

a contract provision had bearing on the law of the case. 158 Ariz. at 1024-25, 761 P.2d at 120-21. In contrast to both of these cases, the jury here simply requested a dictionary and expressed no confusion over any substantive issue of law. The court had already instructed the jurors that they were not to refer to a dictionary, and in denying their request the court was merely confirming its previous instructions regarding an administrative matter—that the jurors were not to consult any outside sources. The court was not required to instruct the jury or explore the matter any further. See *Ott*, 121 Ariz. at 491, 622 P.2d at 50 (“As a general rule the decision to further instruct a jury on a matter is within the trial court’s discretion.” (internal quotations and citation omitted)). We therefore conclude that the trial court did not abuse its discretion in denying the motion for new trial.

¶18 Even assuming the trial court erred in failing to notify the parties prior to denying the jury’s request, any such error was harmless. See Ariz. Const. art. 6, § 27 (“No cause shall be reversed for technical error in pleadings or proceedings when upon the whole case it shall appear that substantial justice has been done.”). As the court explained during oral argument on the motion, speaking with the parties’ counsel first would not have changed the court’s decision to deny the jury’s request nor would the court have allowed the

parties to inquire as to why the jury wanted a dictionary. And Russell acknowledged in her motion that the court "properly refused the request for a dictionary." Moreover, Russell does not cite, and our research has not revealed, any relevant authority suggesting (1) the judge was required to *sua sponte* inquire into the reason for the jury's request for a dictionary, or (2) that counsel would have been permitted to do so.

¶19 Russell also argues the jury committed misconduct by failing to request clarification of whatever issue prompted it to request the dictionary. A party requesting a new trial on grounds of juror misconduct must establish that the misconduct occurred and that it resulted in prejudice. *Brooks v. Zahn*, 170 Ariz. 545, 549, 826 P.2d 1171, 1175 (App. 1991). Although Russell suggests that the jury's request for a dictionary indicated its "confusion about some aspect of the case," she points to no evidence in the record that the jury was in fact confused about any particular instruction or point of law.<sup>3</sup> Further, the trial court stated three times in its final instructions to the jurors that if they had any questions during

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<sup>3</sup> Russell alleged in her motion that members of the jury told her counsel they had been confused about the jury instruction on causation and that this confusion led them to request a dictionary and subsequently find in favor of the defendant. But Russell's counsel acknowledged at oral argument that the trial court and parties had "no idea" what the jury wanted to look up. Also, in her brief on appeal, Russell states that "[e]xactly what the jury was confused about is open to speculation."

deliberations they could write them down and send them in a note to the court. Absent evidence to the contrary, we presume the jury would have followed this instruction and sought clarification if it had in fact been confused about any substantive matters in the case. See *Hudgins v. Sw. Airlines, Co.*, 221 Ariz. 472, 482, ¶ 16, 212 P.3d 810, 820 (App. 2009).

¶10 Asserting that Russell's appeal is frivolous, Talley requests an award of attorneys' fees and damages. We do not find the appeal frivolous and thus we deny Talley's request. However, as the prevailing party, Talley is entitled to an award of costs upon his compliance with Arizona Rule of Civil Appellate Procedure 21.

#### CONCLUSION

¶11 For the foregoing reasons, we affirm the trial court's judgment in favor of Talley and the court's denial of Russell's post-trial motions.

/s/

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MICHAEL J. BROWN, Judge

CONCURRING:

/s/

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PETER B. SWANN, Presiding Judge

/s/

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JON W. THOMPSON, Judge