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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA, a Pennsylvania corporation,<br><br>Intervenor/Appellee,<br><br>v.<br><br>UNITED NATIONAL INSURANCE COMPANY,<br><br>Proposed Intervenor/Appellant. | 2 CA-CV 2011-0157<br>DEPARTMENT B<br><br>MEMORANDUM DECISION<br>Not for Publication<br>Rule 28, Rules of Civil Appellate Procedure |

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CV200400331

Honorable Stephen F. McCarville, Judge

AFFIRMED

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E S P I N O S A, Judge.

**¶1** This case arises from a fatal automobile accident involving Jose Castillo and Ramon Pargas, a delivery driver for Distribution Management Corporation ("DMC"). United National Insurance Company ("United"), DMC's excess liability insurance carrier, appeals from the trial court's orders (1) dismissing all claims and motions against DMC and Pargas and vacating all judgments, rulings, findings, and decisions, pursuant to a settlement agreement between Castillo's survivors and DMC, Pargas, and American Casualty Company of Reading, Pennsylvania ("American Casualty"), DMC's primary insurer; (2) denying United's motion to intervene; and (3) denying its subsequent motion for reconsideration. United contends the court erred in denying its motion to intervene on grounds its motion was untimely filed and would prejudice the parties. For the reasons stated below, we affirm.

## Factual Background and Procedural History

**¶2** The relevant facts of this nearly eight-year-old case are undisputed, but the lengthy procedural history is somewhat complex. In January 2004, while returning to Phoenix after making a delivery for DMC in Tucson, Pargas ran a stop sign while intoxicated and collided with Castillo's vehicle, killing him. Pargas pled guilty to manslaughter and was sentenced to 10.5 years in prison. DMC and Pargas were insured under a primary insurance policy with American Casualty that provided one million dollars of liability coverage per occurrence and a United policy providing five million dollars of excess coverage. In March 2004, Castillo's mother and three children ("the Castillos") filed this wrongful death action against Pargas and DMC, alleging Pargas's negligence and DMC's vicarious liability, negligent hire, and negligent supervision.

**¶3** The Castillos made multiple demands upon DMC and Pargas to settle the wrongful death litigation, which American Casualty ignored. In May 2005, the trial court granted summary judgment on the issue of Pargas's fault and ruled that the issue of punitive damages could be presented to a jury. At that point, American Casualty tendered its one million dollar policy limits to United. United accepted American Casualty's offer the following month but preserved potential bad-faith claims on behalf of itself and the Castillos. In July, the Castillos, DMC, Pargas, and United conducted a private mediation separate from the pending wrongful death lawsuit, which culminated in a *Morris* agreement[1] between the parties. Pursuant to that agreement, a stipulated judgment was entered against Pargas and DMC for $8.3 million and United paid $2.9 million to the Castillos, who agreed not to execute the judgment against United, DMC, or Pargas. The Castillos were granted an assignment of the other parties' rights, claims, and causes of action against American Casualty. The parties agreed the Castillos would seek the $5.4 million balance only against American Casualty, which was not a party to the stipulated judgment.

**¶4** Two other lawsuits were filed as a result of the collision. In the first, filed in September 2005 after the *Morris* agreement had been executed, American Casualty sought a declaratory judgment against Pargas, the Castillos, DMC, and United that the

[1]Pursuant to *United Services Automobile Ass'n v. Morris*, 154 Ariz. 113, 741 P.2d 246 (1987) (*Morris*), Pargas "admit[ted] to liability and assign[ed] to [the Castillos] his . . . rights against [American Casualty], including any cause of action for bad faith, in exchange for a promise by [the Castillos] not to execute the judgment against [him]." *Safeway Ins. Co. v. Guerrero*, 210 Ariz. 5, n.1, 106 P.3d 1020, 1022 n.1 (2005).

*Morris* agreement was not binding on American Casualty, and alleging interference with contract and breach of contract against United. In the second lawsuit, the Castillos alleged bad-faith against American Casualty on the basis of the claims assigned by DMC, Pargas, and United.

**¶5** American Casualty thereafter moved to intervene in the wrongful death action, seeking a determination of whether the *Morris* agreement was "binding upon American Casualty because [it was] unreasonable and/or the product of fraud or collusion." The trial court granted the motion to intervene but found the settlement was not fraudulent, collusive, or unreasonable. On appeal, this court affirmed the trial court's finding that the settlement was not fraudulent or collusive, but determined it had erred with respect to factual findings regarding the amount of punitive damages and remanded the case for a determination of whether, excluding the erroneous findings, the court still would have found the settlement reasonable. *DeSantiago v. Pargas*, No. 2 CA-CV 2008-0079, ¶¶ 29-30 (memorandum decision filed Mar. 26, 2009). On remand, the trial court clarified its prior ruling on punitive damages, and American Casualty filed a notice of appeal. We stayed the appeal so that an appealable order might be signed, and the stay was continued to permit the trial court to hear various post-judgment motions filed by American Casualty.

**¶6** Following private mediation in which all parties participated, in February 2011 the Castillos, DMC, Pargas, and American Casualty stipulated to dismiss the wrongful death action and agreed "any minute entries, . . . judgments, appellate court opinions, or other rulings, findings, or decisions of any nature whatsoever in or arising

from the Wrongful Death Lawsuit shall have no continuing or preclusive force or effect whatsoever in any legal proceeding." Pursuant to the stipulation, the Castillos, DMC, and Pargas released their bad-faith and wrongful death claims against American Casualty, "whether such claims, counterclaims or causes of action [we]re asserted in the name of the Castillo Parties or in the names of DMC, Pargas and/or United," the Castillos released DMC and Pargas from the wrongful death claim, and American Casualty accordingly agreed to dismiss its claims against those parties. American Casualty specifically preserved any claims against United. Four days later, before the trial court was notified of the settlement, United moved to intervene in the wrongful death action to "address any attempts by the parties to vacate the judgment in this case or to take other actions to limit United National's ability to utilize [the trial court's] rulings, through issue/claim preclusion or otherwise, in the [pending interference-with-contract] action."

**¶7** We revested jurisdiction in the trial court, and it denied United's motion to intervene on the grounds the motion had been untimely filed, the interests of United were represented by the Castillos throughout the litigation, United had otherwise waived its right to participate through the *Morris* agreement, and intervention at that stage would be prejudicial to the remaining parties. The court cited *City of Tucson v. Koerber*, 82 Ariz. 347, 313 P.2d 411 (1957), in support of its determination that United had waived the right to participate in the wrongful death litigation when it assigned its rights to the Castillos. The court initially declined to address United's motion for reconsideration, believing jurisdiction remained with this court, and then dismissed all claims, causes of action, and pending motions pursuant to the parties' stipulation. We have jurisdiction to consider

United's appeal pursuant to A.R.S. § 12-2101(A)(3). *See McGough v. Ins. Co. of N. Am.*, 143 Ariz. 26, 30 & n.3, 691 P.2d 738, 742 & n.3 (App. 1984) (appeal permissible under former § 12-2101(D) (1974), now § 12-2101(A)(3)).

**Discussion**

**¶8** United moved to intervene as a matter of right pursuant to Rule 24(a)(2), Ariz. R. Civ. P., and also sought permissive intervention under Rule 24(b)(2).[2] The denial of a motion to intervene as a matter of right is reviewed *de novo*. *Dowling v. Stapley*, 221 Ariz. 251, ¶ 57, 211 P.3d 1235, 1253-54 (App. 2009); *Purvis v. Hartford Accident & Indem. Co.*, 179 Ariz. 254, 257, 877 P.2d 827, 830 (App. 1994). "[W]e review orders denying permissive intervention under Rule 24(b) for an abuse of discretion." *Dowling*, 221 Ariz. 251, ¶ 57, 211 P.3d at 1254.

[2]We note that United's complaint in intervention failed to comply with Rule 24(c), containing no claims or defenses for which intervention was sought, but merely reciting its version of the facts and requesting a judgment that it be "determined to be a real party in interest" and "have the right to contest any efforts by the parties to vacate the judgment in this case or . . . limit United National's ability to utilize [the trial court's] rulings and factual and legal conclusions" in other actions. *See Cruz v. Lusk Collection Agency*, 119 Ariz. 356, 358, 580 P.2d 1210, 1212 (App. 1978) (real party in interest rule enables defendant to avail itself of evidence and defenses against real party in interest and assure finality of results in application of res judicata); *cf. Colo. Cas. Ins. Co. v. Safety Control Co.*, 228 Ariz. 517, ¶¶ 11-12, 269 P.3d 693, 698 (App. 2012) (entry of judgment may not be opposed on ground that intervening real party in interest not included as party to judgment when judgment would not allow double recovery or prevent any defense). The complaint's procedural shortfalls were fatal to United's motion, but were not mentioned in the court's denial. *See Lebrecht v. O'Hagan*, 96 Ariz. 288, 289, 394 P.2d 216, 217 (1964) (provisions of Rule 24(c) are mandatory). That United did not articulate any claim or defense supports our conclusion that it had no legal interest to justify intervention of right, as discussed *infra*. *See Weaver v. Synthes, Ltd. (U.S.A.)*, 162 Ariz. 442, 447-48, 784 P.2d 268, 273-74 (App. 1989) (interest must be based on right belonging to proposed intervenor rather than existing party).

**Timeliness**

**¶9** United asserts the trial court erred when it denied its motion to intervene as untimely, arguing the motion was "the very definition of 'timely'" because it was filed four days after United "knew of sufficient facts upon which to bring its motion." United relies on several practice guides, a Ninth Circuit case, and the dissent in *State ex rel. Napolitano v. Brown & Willamson Tobacco Corp.*, 196 Ariz. 382, ¶ 35, 998 P.2d 1055, 1062-63 (2000) (Jones, V.C.J., dissenting); additionally, it attempts to distinguish *Winner Enterprises, Ltd. v. Superior Court*, 159 Ariz. 106, 109, 765 P.2d 116, 119 (App. 1988). United does not, however, offer any controlling authority.

**¶10** A nonparty seeking either permissive or of-right intervention must file a timely application to intervene. Ariz. R. Civ. P. 24(a), (b); *Weaver v. Synthes, Ltd. (U.S.A.)*, 162 Ariz. 442, 448, 784 P.2d 268, 274 (App. 1989). The timeliness determination is "to be left to the sound discretion of the trial court." *Winner Enters., Ltd.*, 159 Ariz. at 109, 765 P.2d at 119. "'[T]he most important consideration in deciding whether a motion is untimely is whether the delay in moving for intervention will prejudice the existing parties to the case.'" *Id.*, *quoting* 7C Charles A. Wright et al., *Federal Practice and Procedure* § 1916, at 435 (2d ed. 1986). Additionally, the court must consider the stage of the proceedings and whether the intervenor had an opportunity to seek intervention earlier. *See Brown*, 196 Ariz. 382, ¶ 5, 998 P.2d at 1057; *Winner Enters., Ltd.*, 159 Ariz. at 109, 765 P.2d at 119. The burden is on the intervenor to demonstrate the court abused its discretion by reaching a conclusion unsupported by any evidence, or by relying on reasons "'clearly untenable, legally incorrect, or [that] amount

to a denial of justice.'" *In re Estate of Long*, 634 Ariz. Adv. Rep. 26, ¶ 22 (Ct. App. May 3, 2012), *quoting Charles I. Friedman, P.C. v. Microsoft Corp.*, 213 Ariz. 344, ¶ 17, 141 P.3d 824, 830 (App. 2006). When reviewing a denial of a motion to intervene on the basis of untimeliness, we accept as true the allegations of the motion. *Saunders v. Superior Court*, 109 Ariz. 424, 425, 510 P.2d 740, 741 (1973).

**¶11** United first argues its motion was timely filed because, before the February 2011 settlement agreement, it believed its interests were being adequately represented by the Castillos, and the need for intervention arose only as their interests began to diverge. United maintains it filed its motion to intervene a mere four days after the Castillos settled their wrongful death claims, when it became aware its interests were no longer being represented.

**¶12** This argument, however, has been rejected by our supreme court, holding that delay in filing a motion to intervene is not justified when, after reviewing the parties' settlement agreement, the potential intervenors no longer believe their interests are adequately represented by the plaintiffs. *Brown*, 196 Ariz. 382, ¶¶ 6, 9, 998 P.2d at 1057 (motion to intervene filed two and one-half years into litigation). The *Brown* court noted that the intervenors' argument amounted to the "'realiz[ation] that the end result of the protracted litigation would not be entirely to [their] liking.'" *Id.*, *quoting Cnty. of Orange v. Air Cal.*, 799 F.2d 535, 538 (9th Cir. 1986) (first alteration added, second alteration in *Brown*). And the court reasoned the prospective intervenors should have known the plaintiffs were not representing them because there was no representation agreement or indication that the intervenors' interests were being represented. *Id.* ¶¶ 10-12.

**¶13** United seeks to distinguish *Brown* by claiming "there is no dispute that the [Castillos] were adequately representing United National's interests prior to settlement." But it does not identify any other agreement with the Castillos to represent it in the wrongful death litigation, and further argues the *Morris* agreement did not apply thereto or result in an assignment of United's rights to protect its interests therein. Although the trial court cited the Castillos' adequate representation of United's interests as a reason to deny United's motion to intervene, and found "[i]t is undisputed that [United] assigned its rights to the plaintiffs in this case," presumably pursuant to the *Morris* agreement assignment of claims, we are not convinced United had any legal interest in the outcome of this action that would warrant representation, as discussed below. While United may have been tangentially affected by the outcome of the wrongful death litigation, it had no legal interest therein that could have been represented by the Castillos. *See* A.R.S. § 12-612(A), (B) (designating persons with standing to bring wrongful death action); *Lingel v. Olbin*, 198 Ariz. 249, ¶ 11, 8 P.3d 1163, 1168 (App. 2000) (cause of action for wrongful death litigation not assignable). As with the prospective intervenors in *Brown*, United has not established that the Castillos agreed to represent it in this action; therefore, any reliance upon the Castillos' representation of its interests was unfounded.

**¶14** United also attempts to distinguish *Brown* by asserting an earlier intervention would have served no purpose because intervention was sought only for the limited purpose of challenging the legality of the trial court's order vacating all "judgments, rulings, findings and other decisions." But it provides no legal authority, merely citing practice manuals and the dissent in *Brown* for its proposition that because it

intervened for a "limited purpose," its application was timely under Rule 24(a) and (b). We find its arguments unpersuasive.

**¶15** In ruling on United's petition to intervene, the trial court properly considered the stage of the lawsuit, noting that the litigation had "been ongoing for several years," the case was "finally at its conclusion," and "any further delay [wa]s unwarranted." It also determined that United "ha[d] been well aware of the ongoing litigation and the issues being addressed" and could have sought intervention earlier. Finally, the court concluded United's delay in submitting its request was prejudicial to the parties.[3]

**¶16** The trial court could reasonably find that allowing intervention in this case would further prolong this nearly eight-year litigation, which had already come to a close pursuant to an agreement of the parties, and consequently would prejudice the parties to the lawsuit. *Compare Brown*, 196 Ariz. 382, ¶ 6, 998 P.2d at 1057 (prejudice where case ongoing for two and one-half years and parties already had settled), *with Winner Enters., Ltd.*, 159 Ariz. at 109, 765 P.2d at 119 (no prejudice where pretrial intervention would not delay trial). The trial court's determination that United's motion to intervene was

[3]United challenges the trial court's finding of prejudice to the existing parties based on delay in filing its motion to intervene. It asserts because intervention was sought on the limited issue of vacatur, which was not before the court until the parties settled, intervention within several days of the challenged issue could not cause prejudice. Also, it claims the parties cannot be prejudiced by a challenge to the settlement provision that was contrary to law in the first instance. United cites no authority for this narrow reading of prejudice, which would result in a piecemeal approach to determinations of prejudice on an issue-by-issue basis. We subscribe to the broader view, evaluating the burden to parties based on the entirety of the litigation. *See Brown*, 196 Ariz. 382, ¶ 8, 998 P.2d at 1057.

untimely is supported by the evidence and law; we therefore find no abuse of discretion. *See Estate of Long*, 634 Ariz. Adv. Rep. 26, ¶ 22 (trial court abuses discretion when conclusions unsupported by evidence or reasons clearly untenable, legally incorrect, or deny justice). Accordingly, we could uphold the decision of the trial court on the basis of untimeliness alone. *See Brown*, 196 Ariz. 382, ¶ 8, 998 P.2d at 1057; *Weaver*, 162 Ariz. at 447, 784 P.2d at 273.

**Intervention as a Matter of Right**

**¶17** Even had the motion to intervene been timely filed, however, it would have properly been denied on its merits. Intervention as a matter of right permits anyone, upon timely application, to intervene

> when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Ariz. R. Civ. P. 24(a)(2).

**¶18** United argued below that the only interest it was seeking to protect was its "ability to utilize [rulings in the wrongful death litigation], through issue/claim preclusion or otherwise, in the action that American Casualty filed against it for 'interference with contract' and 'breach of contract.'" Specifically, United intended to introduce findings from the wrongful death litigation, including the quantified reasonable settlement value and the lack of fraud or collusion in obtaining the *Morris* agreement, in the other

lawsuits.[4] United argues, as it did below, that if these rulings were vacated, American Casualty might assert that they had no preclusive effect on its positions in other actions.

**¶19** Although Rule 24 is construed liberally in the interests of providing justice for nonparties seeking to protect their rights, "a prospective intervenor must have such an interest in the case that the judgment would have a direct legal effect upon his or her rights and not merely a possible or contingent effect." *Dowling*, 221 Ariz. 251, ¶ 58, 211 P.3d at 1254; *see also Morris v. Sw. Sav. & Loan Ass'n*, 9 Ariz. App. 65, 67-68, 449 P.2d 301, 303-04 (1969) (*Sw. Sav.*) (intervention properly denied where alleged mortgage trustee claimed privilege to appear and raise issues on behalf of indispensible party but failed to demonstrate right to intervene). Such an interest exists where an insurer seeks to intervene in the determination of its insured's liability and damages, if the insurer would be bound to those rulings in a future bad-faith action through collateral estoppel. *Anderson v. Martinez*, 158 Ariz. 358, 360-61, 762 P.2d 645, 647-48 (App. 1988); *McGough*, 143 Ariz. at 30-31, 691 P.2d at 742-43. But a bare assertion that one's interest may become impaired is not, without more, sufficient to confer a right to intervene. *Weaver*, 162 Ariz. at 447, 784 P.2d at 273. And the burden is on the nonparty to prove a "'direct and immediate interest in the case'" sufficient to warrant intervention. *Sw. Sav.*,

[4]Below, United cited only *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 29 (1994), in support of its motion for intervention as a matter of right. As American Casualty pointed out in its opposition to the motion to intervene, *U.S. Bancorp Mortgage Co.* is a bankruptcy case that does not involve intervention; we thus find it inapposite.

9 Ariz. App. at 68, 449 P.2d at 304, *quoting Miller v. City of Phoenix*, 51 Ariz. 254, 263, 75 P.2d 1033, 1037 (1938).

**¶20** United has not articulated, much less demonstrated, an interest in the wrongful death litigation sufficient to warrant intervention. It has not cited any authority, nor are we aware of any, establishing that issue or claim preclusion is an "interest" sufficient to satisfy Rule 24(a).[5] And, because United was not bound by either the wrongful death rulings or the settlement, it has not shown itself to be a proper Rule 24(a) party. *See Brown*, 196 Ariz. 382, ¶ 18, 998 P.2d at 1059-60 (Martone, J., concurring). The *Morris* agreement with the Castillos, DMC, and Pargas expressly immunized United from liability for the judgment, and the parties' stipulation vacated all determinations. Finally, United has not established that, had it been permitted to intervene, it would have had legal standing to challenge the trial court's order vacating all "judgments, rulings, findings and other decisions" or otherwise control the outcome in the litigation, *see Dowling*, 221 Ariz. 251, ¶ 69, 211 P.3d at 1256 (interest in litigation insufficient to support intervention when proposed intervenor lacked authority to control or resolve litigation), or that its interest in the other pending lawsuits would be impeded by the dismissal of the wrongful death lawsuit, *cf. Weaver*, 162 Ariz. at 448, 784 P.2d at 274

[5]Although the parties dispute whether United could rely on the wrongful death judgments to support a claim- or issue-preclusion argument, because this debate was not adequately developed below, we decline to resolve the dispute on appeal. *See Lemons v. Showcase Motors, Inc.*, 207 Ariz. 537, n.1, 88 P.3d 1149, 1153 n.1 (App. 2004). We recognize there could be instances in which the inability to preclude issues or claims would rise to the level of an affected legal interest permitting intervention, but United has made no such showing here. *See Campbell v. SZL Props., Ltd.*, 204 Ariz 221, ¶ 14, 62 P.3d 966, 969 (App. 2003) (vacated judgment has no collateral estoppel effect).

(former counsel's interest in setting aside default judgment to avoid liability in potential legal malpractice claim not "'direct and immediate interest'" sufficient to justify intervention), *quoting Miller*, 51 Ariz. at 263, 75 P.2d at 1037. Based upon our *de novo* review, United had no right under Rule 24(a)(2) to intervene in the wrongful death lawsuit because it did not establish that it had a legal interest affected by the outcome of the litigation.[6]

**¶21** Having determined *de novo* that United failed to demonstrate a right to intervene under Rule 24(a)(2) and having found the trial court did not abuse its discretion in denying the untimely application for intervention under both Rule 24(a)(2) and (b)(2), we need not address United's additional argument that the court erred in concluding it waived its right to intervene, either based upon its conduct or the assignment of claims in the *Morris* agreement. *See Glaze v. Marcus*, 151 Ariz. 538, 540, 729 P.2d 342, 344 (App. 1986) (trial court ruling affirmed if legally correct for any reason).

[6]We would likewise uphold the trial court's denial of permissive intervention under Rule 24(b)(2), which is entrusted to the court's sound discretion. *See Allen v. Chon-Lopez*, 214 Ariz. 361, ¶ 9, 153 P.3d 382, 385 (App. 2007). Permissive intervention allows anyone, upon timely application, to intervene "[w]hen an applicant's claim or defense and the main action have a question of law or fact in common." Ariz. R. Civ. P. 24(b)(2). In reviewing the application, the court "shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Id*. If a common question of law or fact exists, the court may consider other relevant factors, including, *inter alia*, the nature and extent of the intervenor's interest, its standing, its legal position, whether its interests are adequately represented by other parties, and the possibility of undue delay. *Bechtel v. Rose ex rel. Maricopa Cnty.*, 150 Ariz. 68, 72, 722 P.2d 236, 240 (1986), *citing Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977).

**Motion for Reconsideration**

**¶22** Finally, United claims the trial court abused its discretion by denying United's motion for reconsideration of its motion to intervene. United provides no legal support for this argument as required by Rule 13(a)(6), Ariz. R. Civ. App. P. Therefore, we decline to consider it. *Ness v. W. Sec. Life Ins. Co.*, 174 Ariz. 497, 503, 851 P.2d 122, 128 (App. 1992) (arguments unsupported by citation to authority not considered on appeal).

**Disposition**

**¶23** The trial court did not abuse its discretion when it determined United's motion to intervene pursuant to Rule 24(a)(2) and (b)(2) was not timely filed, and the motion was, in any event, without merit. Accordingly, the trial court's order denying United's motion to intervene and subsequent denial of United's motion for reconsideration are affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge