DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DR. PATRICIA CRELLIN, M.D. and MATTHEW WAYNE MUSTAIN, husband and wife; and SUSAN LIVENGOOD, R.N., a single woman, Plaintiffs/Appellants, v. SNELL & WILMER, L.L.P., a limited liability partnership organized pursuant to the laws of the State of Arizona; PAUL J. GIANCOLA, Defendants/Appellees.	1 CA-CV 12-0222 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2011-011669

The Honorable J. Richard Gama, Judge

AFFIRMED

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O R O Z C O, Judge

¶1 Patricia Crellin, M.D. and Susan Livengood, R.N. (collectively, Appellants)[1] and Matthew Wayne Mustain appeal from a judgment dismissing their complaint against Snell & Wilmer, L.L.P. and Paul J. Giancola (collectively, Appellees) with prejudice. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY[2]

¶2 On November 1, 2007, Ashley B. was admitted to Scottsdale Healthcare Osborn Hospital after suffering a debilitating stroke. Dr. Crellin was Ashley B.'s treating psychiatrist and Livengood was a registered nurse and the Associate Vice-President of Patient Services at the time of the incident. In a criminal proceeding against Appellants, the State alleged that on December 12, 2007, Ashley B. communicated to her speech therapist, by using drawings and gestures, that she had been sexually assaulted approximately one month before by a certified nursing assistant. The therapist informed Appellants of the alleged abuse.

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[1] "Appellants" refers only to Dr. Patricia Crellin and Susan Livengood. Matthew Wayne Mustain is Dr. Patricia Crellin's husband, and although he is named as a party on appeal, he played no role in the underlying facts.

[2] We take the alleged facts as true when reviewing the trial court's grant of a motion to dismiss a complaint for failure to state a claim. *Riddle v. Ariz. Oncology Servs., Inc.*, 186 Ariz. 464, 465, 924 P.2d 468, 469 (App. 1996).

¶3 Appellants investigated the abuse allegations made by Ashley B. and found (1) no physical evidence substantiating a sexual assault; (2) no eyewitness testimony supporting sexual assault; and (3) no corroborating evidence of any kind. They determined that those facts, coupled with (1) the excessive length of time between the occurrence of the alleged assault and Ashley B.'s report of it one month later; (2) Ashley B.'s heavily medicated state involving potent hypnotic drugs; and (3) the therapist's personal interpretation and opinion of Ashley B.'s non-verbal communication, objectively indicated that no reasonable basis existed to believe a sexual assault had occurred.

¶4 On April 29, 2008, Appellants were charged with Failing to Report Abuse of an Incapacitated Adult, a violation of Arizona Revised Statutes (A.R.S.) section 46-454.A (Supp. 2012)[3], a class one misdemeanor. Appellants retained Appellees to represent them in the criminal matter filed in Scottsdale City Court (Criminal Matter).

¶5 The Criminal Matter was tried as a bench trial. During trial, Ashley B.'s speech therapist testified about the communications made to her by Ashley B. concerning the alleged

[3] Absent material revisions, we cite to the current version of applicable statutes.

abuse. Ashley B. did not testify. At the conclusion of the trial, the court found Appellants guilty of the crime as charged.

¶6 On appeal, the superior court reversed Appellants' convictions and held that admission of the speech therapist's testimony relating to Ashley B.'s statements was fundamental error because the statements were hearsay. On remand, Scottsdale City Court held that although it did not believe the statements were hearsay, it could not find that a hearsay exception existed, and therefore, dismissed the case against Appellants.

¶7 Appellants subsequently filed a complaint against Appellees alleging legal malpractice. They attached the minute entry from the superior court judgment to the complaint. They argued that Appellees' "failure to object to the admission of the hearsay statements was negligent, below the standard of care and caused [Appellants] to be wrongfully convicted, sentenced and publicly ridiculed." Appellants also alleged that Appellees' representation fell below the standard of care in defending Appellants.

¶8 Appellees filed a motion to dismiss Appellants' complaint for failure to state a claim under Arizona Rule of Civil Procedure 12(b)6. They alleged that the complaint should be dismissed because it did not establish the breach and causation elements necessary in a malpractice claim. Appellees further argued that the speech therapist's testimony regarding

Ashley B.'s abuse allegations was not hearsay; therefore, Appellees were under no legal duty to object to such statements. Appellees attached excerpts from the transcripts in the Criminal Matter to their motion to dismiss.

¶9 After reviewing Appellees' motion to dismiss, Appellants' responsive pleading and the subsequent reply filed by Appellees, the trial court[4] granted the motion to dismiss with prejudice stating that Appellants'

> theory of liability turns on a question of law, i.e. whether the therapist's testimony was admissible. . . . As a consequence, this Court finds that [Appellees] were under no legal duty to object, because the solicited testimony was not objectionable. Further, and importantly the lower court's convictions were also supported by [Appellants'] own testimony . . . .

¶10 Appellants timely appealed. We have jurisdiction under A.R.S. §§ 12-120.21.A.1 (2003) and -2101.A.1 (Supp. 2012).

DISCUSSION

¶11 Appellants argue that the trial court erred by (1) dismissing their complaint with prejudice; (2) reconsidering evidentiary issues already litigated in the appeal of the Criminal Matter, which is prohibited by the doctrine of res judicata; (3) failing to convert the Rule 12(b)6 motion to dismiss to a motion for summary judgment pursuant to Arizona Rule

[4] Throughout this decision, in order to prevent confusion, "trial court" refers to the superior court that dismissed Appellants' legal malpractice claim.

of Civil Procedure 56; and (4) failing to grant them leave to amend the complaint before dismissing the case with prejudice.

Dismissal of All Claims

¶12 Dismissal of a complaint for failure to state a claim is appropriate if as a matter of law, the plaintiff would not be entitled to relief under any interpretation of the facts. *Bunker's Glass Co. v. Pilkington PLC*, 202 Ariz. 481, 484, ¶ 9, 47 P.3d 1119, 1122 (App. 2002). We review a trial court's decision to dismiss a complaint de novo. *Coleman v. City of Mesa*, 230 Ariz. 352, 355-56, ¶¶ 7-8, 284 P.3d 863, 866-67 (2012). "We will affirm the trial court's decision if it is correct for any reason . . . ." *Glaze v. Marcus*, 151 Ariz. 538, 540, 729 P.2d 342, 344 (App. 1986).

¶13 Appellants argue that it was error for the trial court to dismiss the entire malpractice action. Specifically, Appellants allege that the trial court "did not accept all material facts as true . . . [and] did not accept the fact that [Appellees'] failure to object to [Ashley B.'s] out-of-court statements resulted in [Appellants'] criminal convictions." They also contend that the trial court did not accept as true other allegations set forth in the complaint pertaining to Appellees' representation falling below the standard of care in their defense of Appellants.

¶14 A pleading must comply with Arizona Rule of Civil Procedure 8 and provide the defendants with "fair notice of the nature and basis of the claim and indicate generally the type of litigation involved." *Mackey v. Spangler*, 81 Ariz. 113, 115, 301 P.2d 1026, 1027-28 (1956). If the pleading does not comply with Rule 8, the opposing party may move to dismiss the action under Rule 12(b)6 for failure to state a claim. *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, ¶ 7, 189 P.3d 344, 346 (2008). We assume the truth of all well-pled factual allegations and construe all reasonable factual inferences in favor of the plaintiff. *Id.* However, "a complaint that states only legal conclusions, without any supporting factual allegations, does not satisfy Arizona's notice pleading standard under Rule 8." *Id.*

¶15 To be successful on a legal malpractice claim, a plaintiff must prove the existence of a duty, breach of that duty, that the defendant's negligence was the actual and proximate cause of the injury, and the nature and extent of the damages. *Phillips v. Clancy*, 152 Ariz. 415, 418, 733 P.2d 300, 303 (App. 1986).[5] To prove that an attorney breached a duty, a plaintiff must show that the attorney did not "exercise that degree of skill, care, and knowledge commonly exercised by

[5] The Appellees did not challenge the existence of a duty and damages. Therefore, the only issues before the trial court were the elements concerning breach of that duty and causation of the damages.

members of the profession." *Id.* In establishing causation, "the plaintiff must prove that but for the attorney's negligence, he would have been successful in the prosecution or defense of the original suit." *Id.*

¶16 Because the allegations depend on whether the admitted testimony was hearsay, the complaint involves questions of law that are to be decided by the trial court. "[W]hen the consequences of an attorney's alleged negligence bear upon a legal ruling by the court, the causation question is in all circumstances one of law." *Molever v. Roush*, 152 Ariz. 367, 374, 732 P.2d 1105, 1112 (App. 1986).

Hearsay

¶17 In the complaint, Appellants allege that Appellees were negligent in failing to object to the admission of testimony of the speech therapist as a violation of the hearsay rule.

¶18 Hearsay is an out-of-court statement that is offered to prove the truth of the matter asserted in the statement. Ariz. R. Evid. 801(c). However, statements that are offered for reasons other than to prove the truth of the matter asserted are not hearsay. *See State v. Chavez*, 225 Ariz. 442, 443, ¶ 6, 239 P.3d 761, 762 (App. 2010).

¶19 The trial court reviewed the evidence from an objective standard and ruled that Appellees "were under no legal duty to object [to the therapist's testimony]." It reasoned that the

solicited testimony was not objectionable given that the statements were offered to establish Appellants' knowledge that allegations of abuse were raised, not for the purpose of establishing that the statements were true. *See Phillips*, 152 Ariz. at 418, 733 P.2d at 303 (noting that when using an objective standard, "the trier in the malpractice suit views the first suit from the standpoint of what a reasonable judge or jury would have decided, but for the attorney's negligence"). The trial court further found that the convictions in the Criminal Matter "were also supported by [Appellants'] own testimony that allegations of abuse were raised approximately a month prior to it being reported."

¶20 To determine whether Appellants were guilty for failing to report the alleged abuse, the court in the Criminal Matter had to find that Appellants had a reasonable basis to believe the abuse allegations and did not report them. *See* A.R.S. § 46-454 ("A physician . . . or other person who has responsibility for the care of a vulnerable adult and who has a reasonable basis to believe that abuse or neglect of the adult has occurred . . . shall immediately report . . . to a peace officer or to a protective services worker.").

¶21 When a statement is "offered to evidence the *state of mind* which ensued *in another person* in consequence of the [statement], it is obvious that no assertive or testimonial use

is sought to be made of it, and the [statement] is therefore admissible." *Pub. Serv. Co. of Okla. v. Bleak*, 134 Ariz. 311, 320, 656 P.2d 600, 609 (1982) (citation and internal quotation marks omitted). "The value of the evidence in such cases does not depend on the truth of the words, but is relevant to prove the motive or the reasonableness of conduct of the person receiving the communication." *Id.* at 321, 656 P.2d at 610.

¶22 We agree with the trial court's ruling that the statements made by Ashley B. to her therapist that were admitted into evidence in the Criminal Matter, were not hearsay and, for that reason, not objectionable. The testimony of the therapist was admitted to show that Appellants were on notice of the alleged abuse, not to show that the abuse had actually occurred.

¶23 Because we conclude as a matter of law that the admitted testimony was not a violation of the hearsay rule, we also conclude that Appellees were under no legal duty to object.

Confrontation Clause

¶24 Appellants also argue that the therapist's admitted testimony violated the Confrontation Clause of the Sixth Amendment of the United States Constitution.

¶25 The Confrontation Clause bars the admission of testimonial statements of a witness who did not testify at trial unless the witness was unavailable and the defendant had a prior opportunity to cross-examine the witness. *Crawford v.*

Washington, 541 U.S. 36, 53-54 (2004). However, testimonial statements that are used for purposes other than establishing the truth of the matter asserted are not barred. *State v. Womble*, 225 Ariz. 91, 97, ¶ 12, 235 P.3d 244, 250 (2010).

¶26 The therapist testified regarding what Ashley B. told her of the alleged abuse and the fact that she told Appellants of the allegations. As discussed above, the testimony was not offered to prove that Ashley B. had actually been sexually abused, but rather to show that Appellants were on notice of the abuse allegations. Therefore, the therapist's testimony was non-testimonial and did not violate the Confrontation Clause. Also, we find that Appellees were under no legal duty to object to such testimony.

Other Claims Relating to Legal Malpractice Raised by Appellants

¶27 Appellants argue that it was error for the trial court to dismiss the entire legal malpractice action because it based the dismissal solely on the hearsay issue and did not address Appellants' remaining claims. Appellants contend that they should have an opportunity to fully litigate the remainder of the claims made in the complaint.

¶28 "The dismissal of a complaint is only appropriate when the plaintiffs would not be entitled to relief under any interpretation of the facts susceptible of proof." *Turley v.*

Ethington, 213 Ariz. 640, 643, ¶ 6, 146 P.3d 1282, 1285 (App. 2006) (internal quotation marks omitted). "When testing a motion to dismiss for failure to state a claim, well-pleaded material allegations of the complaint are taken as admitted, but conclusions of law or unwarranted deductions of fact are not." *Aldabbagh v. Ariz. Dep't of Liquor Licenses & Control*, 162 Ariz. 415, 417, 783 P.2d 1207, 1209 (App. 1989).

¶29 In the complaint, Appellants contend that Appellees' representation fell below the standard of care and they were negligent in defending Appellants

> by failing to use reasonable care to assert [Appellants'] rights under the VI Amendment; to investigate and shape [Appellants'] legal defenses; to offer and argue credible exculpatory evidence; to prepare [Appellants'] witnesses; to advance [Appellants'] defenses while attacking the State's witnesses and prosecution's case, and negligently basing a substantial part [of] the criminal defense on the standard of care and testimony of several "expert" opinion witnesses, whose opinions on standard of care were not relevant in the Criminal Matter, and who were not permitted to testify by the trial judge, thereby causing [Appellants] to be wrongfully convicted, sentenced and publicly ridiculed and scorned.

¶30 "[A] complaint that states only legal conclusions, without any supporting factual allegations, does not satisfy Arizona's notice pleading standard under Rule 8." *Cullen*, 218 Ariz. at 419, ¶ 7, 189 P.3d at 346. We find that Appellants

failed to include any factual allegations in the complaint that would allow them to recover under the remaining claims. Appellants make generalized claims that do not provide sufficient facts to support their claims, such as what credible exculpatory evidence should have been offered, how the witnesses should have been prepared, and in what way Appellees should have shaped Appellants' legal defenses. Also, they do not allege how the outcome would have been different.

¶31 Merely stating that Appellees did not partake in certain trial strategies and preparation is insufficient to show that Appellees fell below the standard of care in the defense of Appellants. Therefore, we find that the trial court did not err in dismissing the complaint with prejudice.

Res Judicata Does Not Apply

¶32 Appellants argue that the trial court is barred under the doctrine of res judicata[6] from ruling that witness testimony

[6] In their opening brief, Appellants argue that res judicata applies. In their reply brief, they argue that issue preclusion applies. Because Appellants did not raise issue preclusion in their opening brief, it is waived. *See Trantor v. Fredrikson*, 179 Ariz. 299, 300-01, 878 P.2d 657, 658-59 (1994) (noting that a party waives any argument not properly presented in the trial court). However, even assuming they had raised this argument, we find that issue preclusion does not apply because it cannot be used in an "offensive" manner when there is no mutuality of the parties, which means a party who is not bound by the judgment of an earlier suit cannot invoke the judgment of the first suit or use it to establish a necessary element of his case in a later suit against one of the parties involved in the first litigation. *See Standage Ventures, Inc. v. State*, 114

was non-hearsay after previously being declared as improper hearsay in the Criminal Matter. We note that "claim preclusion" is considered synonymous with "res judicata." *See Howell v. Hodap*, 221 Ariz. 543, 546 n.7, ¶ 17, 212 P.3d 881, 884 n.7 (App. 2009) (using "claim preclusion" and "res judicata" interchangeably).

¶33 "Claim preclusion, or res judicata bars a claim when the earlier suit (1) involved the same 'claim' or cause of action as the later suit, (2) reached a final judgment on the merits, and (3) involved identical parties or privies." *Id.* at 546, ¶ 17, 212 P.3d at 884 (quoting *Mpoyo v. Litton Electro–Optical Sys.*, 430 F.3d 985, 987 (9th Cir. 2005); *Stratosphere Litig. L.L.C. v. Grand Casinos, Inc.*, 298 F.3d 1137, 1142 n.3 (9th Cir. 2002)) (internal quotation marks omitted).

¶34 For res judicata to apply, Appellees had to have been a party in the Criminal Matter or in privity with Appellants. "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

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Ariz. 480, 484, 562 P.2d 360, 364 (1977) (holding that when there is not a common identity of the parties in the subsequent litigation, Arizona permits defensive use of issue preclusion); *see also Campbell v. SZL Props., Ltd.*, 204 Ariz. 221, 223, ¶ 10, 62 P.3d 966, 968 (App. 2003) (Arizona permits defensive use of issue preclusion, which occurs when a defendant seeks to prevent a plaintiff from asserting a claim the plaintiff previously litigated unsuccessfully against another party).

presented and protected by the party in the litigation." *Hall v. Lalli*, 194 Ariz. 54, 57, ¶ 8, 977 P.2d 776, 779 (1999) (citation and internal quotation marks omitted). Here, Appellees did not share the same identity, interests or objectives as Appellants in the Criminal Matter. In the Criminal Matter, Appellants were defendants, and Appellees were their attorneys. As Appellants' attorneys, Appellees could not be parties in the Criminal Matter. To hold that Appellees are bound by a judgment in which they were not parties and did not have the chance to participate in the proceedings would violate due process. *See id.* at ¶ 6 (noting that due process dictates that a party has the right to be heard).

¶35 Appellants rely on *Fraternal Order of Police, Lodge 2 v. Superior Court*, 122 Ariz. 563, 596 P.2d 701 (1979), to argue that "res judicata bars two judges with the same jurisdiction from granting conflicting judgments in separate cases involving the same subject matter." *Fraternal Order* is distinguishable because it involved a judge that acted as a reviewing court of a judge on the same court. *Id.* at 565, 596 P.2d at 703. In that case, the two judges shared identical jurisdiction; therefore, one could not review or change the judgment of the other. *Id.*

¶36 In this case, the trial court is not acting as a reviewing court in the Criminal Matter. The outcome of the civil litigation has no effect in the Criminal Matter. Therefore, res

judicata would not bar the trial court from re-evaluating evidentiary issues in the Criminal Matter and making findings inconsistent with that ruling. In addition, because Appellees were not a party in the Criminal Matter, we find that res judicata does not apply.

Conversion to a Motion for Summary Judgment

¶37 Appellants argue that the trial court was required to treat the Rule 12(b)6 motion as a motion for summary judgment because it considered and relied on extraneous material. In their responsive pleading in opposition to the motion to dismiss, Appellants did not request for the Rule 12(b)6 motion to be converted to a Rule 56 motion for summary judgment. Therefore, we could find that this issue was waived. Even if it was not waived, we find that the trial court was not required to treat the Rule 12(b) motion as a motion for summary judgment.

¶38 Rule 12(b) states that if, in a motion to dismiss for failure to state a claim

> matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Ariz. R. Civ. P. 12(b). The rationale behind the rule is "a plaintiff must be given an opportunity to respond when a motion to dismiss for failure to state a claim includes material

extraneous to the complaint." *Strategic Dev. & Constr., Inc. v. 7th & Roosevelt Partners, LLC*, 224 Ariz. 60, 64, ¶ 14, 226 P.3d 1046, 1050 (App. 2010). However, if extraneous matters neither add to nor subtract from the deficiency of the pleading, the motion will not be converted to a motion for summary judgment. *Id.* at 63, ¶ 8, 226 P.3d at 1049. Moreover, a narrow exception to the conversion rule exists "that applies to matters that, although not appended to the complaint, are central to the complaint." *Id.* at 64, ¶ 14, 226 P.3d at 1050; *see Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196-97 (3d Cir. 1993) (Rule 56 treatment not required when Rule 12(b)6 motion attached authentic copy of contract that was the subject of the complaint).

¶39 In this case, Appellants attached the minute entry from the appeal in the Criminal Matter to the complaint to show that the admitted testimony had been ruled as hearsay. Appellees subsequently attached portions of the trial transcripts to the Rule 12(b)6 motion to dismiss to demonstrate why the admitted testimony referenced by Appellants in the complaint was not hearsay. The trial court also referred to both the minute entry and the trial transcript excerpts in its ruling granting the motion.

¶40 In this case, the trial transcript excerpts were not extraneous to the complaint because they were intrinsic to the

claim. *See Strategic Dev. & Constr., Inc., 224 Ariz.* at 63-64, ¶¶ 10, 13-14, 226 P.3d at 1049-50 (document central to complaint may be considered intrinsic to claim if attached to complaint, sufficiently referenced in complaint, or an official public record); *see also Cullen v. Koty-Leavitt Ins. Agency, Inc.*, 216 Ariz. 509, 513, ¶ 8, 168 P.3d 917, 921 (App. 2007) (stating that a contract central to the plaintiff's claim is not a matter outside the pleadings for purposes of Rule 12(b)6), *vacated in part by Cullen*, 218 Ariz. at 421, ¶¶ 15-17, 189 P.3d at 348.

¶41 We find that the contents of the transcripts were central to Appellants' claim of legal malpractice because the dispute arises out of Appellees' failure to object to witness testimony at trial. Therefore, because Appellees' Rule 12(b)6 motion did not present material extraneous to the complaint, the trial court was not required to automatically treat the motion to dismiss as a motion for summary judgment pursuant to Rule 56.

Failure to Amend the Complaint

¶42 Finally, Appellants argue that the trial court erred when it dismissed their complaint with prejudice without first giving them an opportunity to amend it to cure any deficiencies. A party may amend its pleadings once as a matter of course any time before a responsive pleading is served. Ariz. R. Civ. P.

15(a)1.[7] After that, a party may amend its pleading only by leave of the court. *Id.* Leave to amend is discretionary but is liberally granted. *Owen v. Superior Court*, 133 Ariz. 75, 79, 649 P.2d 278, 282 (1982).

¶43 Appellants raise this argument for the first time on appeal, and consequently, have waived it. *See Englert v. Carondelet Health Network*, 199 Ariz. 21, 26, ¶ 13, 13 P.3d 763, 768 (App. 2000) (court of appeals generally does not address issues raised for the first time on appeal). "[A] party must timely present his legal theories to the trial court so as to give the trial court an opportunity to rule properly." *Payne v. Payne*, 12 Ariz. App. 434, 435, 471 P.2d 319, 320 (1970).

¶44 The trial court never had an opportunity to deny Appellants' motion to amend their complaint because Appellants did not file that motion. Because Appellants did not request to amend their complaint to the trial court, we decline to fully address this argument.

¶45 However, even if Appellants had requested that the trial court allow them to amend their complaint, it would not have abused its discretion in denying the request. As stated above, the complaint did not allege sufficient facts in support of the allegations that would have allowed Appellants to recover.

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[7] Because material revisions have been made to this rule, we cite to the prior version effective until January 1, 2012.

Attorney Fees

¶46 Appellees request their costs incurred in this appeal pursuant to A.R.S. § 12-341 (2003). As the successful party on appeal, we award Appellees their costs upon compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶47 For the foregoing reasons, we affirm the trial court's order dismissing the complaint with prejudice.

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PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/
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PETER B. SWANN, Judge

/S/
_____
MARK R. MORAN, Judge Pro Tempore*

*The Honorable Mark R. Moran, Presiding Judge of the Coconino County Superior Court, is authorized by the Chief Justice of the Arizona Supreme Court to participate in the disposition of this appeal pursuant to Article 6, Section 3, of the Arizona Constitution and A.R.S. §§ 12-145 to -147 (2003).