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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT  
PRECEDENTIAL AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

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

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DREAM GAMES OF ARIZONA INC., et al.,  
*Plaintiffs/Appellants/Cross-Appellees,*

*v.*

TARP HOLDINGS LLC, et al., *Defendants/Appellees.*

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FRED AUZENNE, et al., *Defendants/Appellees/  
Cross-Appellants,*

No. 1 CA-CV 19-0789

FILED 05-13-2021

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Appeal from the Superior Court in Maricopa County  
No. CV2015-007438  
The Honorable Sherry K. Stephens, Judge

**AFFIRMED**

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COUNSEL

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**MEMORANDUM DECISION**

Judge Brian Y. Furuya delivered the decision of the Court, in which Presiding Judge Kent E. Cattani and Judge Samuel A. Thumma joined.

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**F U R U Y A**, Judge:

¶1 Plaintiffs Dream Games of Arizona, Inc. and American Software Development Company, Inc. (collectively, “Dream Games”) appeal the superior court’s order granting a new trial to defendants Fred Auzenne, Renee Cermak, George Bruner, Christopher Hamer, Michelle Hamer, Linda Rouse, and Estevan Sandoval (collectively, the “Individual Defendants”) on civil conspiracy claims related to their alleged involvement in fraudulent transfers made by Tarp Holdings, LLC (“Tarp”) and 24 Circle Group, LLC (“24 Circle”), (collectively, the “Corporate Defendants”). The Individual Defendants cross-appeal the denial of their motion for a new trial on alternative grounds and the court’s award of attorneys’ fees to Dream Games. For the following reasons, we affirm the order granting a new trial and dismiss the Individual Defendants’ cross-appeal.

**FACTS AND PROCEDURAL HISTORY**

¶2 Dream Games developed and copyrighted software called Fast Action Bingo. Dream Games’ business model included providing bingo halls with its software and equipment in exchange for a portion of the revenues earned. In 2006, Dream Games hired Jeffrey Boltz to manage its business. That same year, Dream Games entered into a series of agreements with Boltz to license its software and transfer its property and accounts to Boltz’ company, Lightning Games, LLC (“Lightning Games”). In return, Lightning Games agreed to pay Dream Games the first \$75,000 in net revenue each month it generated from the software and accounts it received. In 2010, Lightning Games stopped making payments and Dream Games filed a breach of contract lawsuit.

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¶3 In September 2011, Dream Games, Boltz, Lightning Games, and others entered into a settlement agreement to resolve the 2010 lawsuit. The agreement obligated the defendants to the 2010 lawsuit, including Lightning Games and Jeffrey Boltz, to pay Dream Games \$2,700,000 in exchange for ownership rights, property, accounts, and software. Under a security provision of this settlement, Boltz and Lightning Games agreed to pay any money owed if the agreement was breached—enforceable by a stipulated judgment (the “pocket judgment”) that could be submitted to the superior court without further notice or litigation and summarily entered. Unbeknownst to Dream Games, before this settlement agreement had been reached, Boltz had transferred Lightning Games’ property and operations into a new entity called Next Generations Technology (“NGT”). NGT assumed Lightning Games’ settlement obligations and made monthly payments thereunder for the following three years. In November 2014, NGT stopped making monthly settlement payments, causing Dream Games to file and record the pocket judgment in the amount of \$1,862,500 on December 2, 2014. Boltz filed for Chapter 7 bankruptcy protection on December 4, 2014. In June 2015, Dream Games filed the lawsuit from which this appeal follows.

¶4 In this most recent lawsuit, Dream Games alleged that Lightning Games fraudulently transferred its assets and accounts to NGT, which then further transferred the assets and accounts to the Corporate Defendants (Tarp, owned by Fred Auzenne, and 24 Circle, owned by George Bruner). Dream Games further alleged that the remaining Individual Defendants, who had previously worked for Boltz and were hired by Tarp as independent contractors in 2014, conspired to fraudulently transfer Dream Games’ property.

¶5 During trial, the superior court circulated proposed jury instructions, which described the burden of proof for Dream Games’ civil conspiracy claims as being under the “more probably true” standard. The Corporate and Individual Defendants filed a timely written objection, arguing that the burden of proof for civil conspiracy is by clear and convincing evidence. However, all defendants failed to correct the burden of proof language in their redline version of the jury instructions subsequently submitted to the court. The Individual Defendants also failed to object when the court reviewed the final instructions, which still included the more-probably-true standard. After a 20-day trial, the jury returned all verdicts relevant on appeal in favor of plaintiff Dream Games. The superior court awarded Dream Games its attorneys’ fees pursuant to Arizona Revised Statutes (“A.R.S.”) § 12-341.01. Final judgment was signed on June 15, 2019 and filed on June 17, 2019.

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¶6 The Corporate and Individual Defendants filed six post-judgment motions, including a motion for a new trial on the civil conspiracy claim. During the hearing for these motions, the superior court informed the parties of its concern that it had instructed the jury to deliberate on the civil conspiracy claim under the erroneous more-probably-true standard, rather than under the correct clear-and-convincing standard. The court requested supplemental briefing regarding this issue.

¶7 In its supplemental brief, Dream Games argued that because the Defendants failed to object when the superior court read the final instructions to the jury, Defendants were only entitled to fundamental error review. Dream Games additionally argued the Defendants invited the error by submitting a redline version of the proposed jury instructions that included the incorrect burden. The court later rejected Dream Games' arguments and granted the Individual Defendants' request for a new trial on the civil conspiracy claim. Dream Games and the Individual Defendants filed timely notices of appeal and cross-appeal, respectively, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), -2101(A)(2), and -2101(A)(5)(a). However, as explained below, although we have jurisdiction pursuant to A.R.S. § 12-2101(A)(2) and -2101(A)(5)(a) as to that portion of the cross-appeal dealing with alternative bases supporting the order granting new trial, we dismiss this portion of the cross-appeal, and we further dismiss the cross-appeal's challenge of award of attorneys' fees.

## DISCUSSION

¶8 "We review an order granting a new trial under a more liberal standard than an order denying one, and we will not overturn the order absent a clear abuse of discretion." *State Farm Fire & Cas. Co. v. Brown*, 183 Ariz. 518, 521 (App. 1995). The superior court abuses its discretion when it commits an error of law, or when the record lacks substantial evidence to support the court's findings. *Romer-Pollis v. Ada*, 223 Ariz. 300, 302-03, ¶ 12 (App. 2009). To the extent a court's order granting a new trial addresses questions of law, we review those questions of law *de novo*. See *Sandretto v. Payson Healthcare Mgmt., Inc.*, 234 Ariz. 351, 355, ¶ 8 (App. 2014) (citing *Twin City Fire Ins. Co. v. Burke*, 204 Ariz. 251, 253-54, ¶ 10 (2003)). "Whenever a new trial order is justified by any of the grounds cited in the order, an appellate court will not disturb the [superior] court's exercise of its discretion." *Reeves v. Markle*, 119 Ariz. 159, 163 (1978) (citations omitted); see generally *State v. Fischer*, 242 Ariz. 44 (2017) (discussing standard for superior court to use in addressing a motion for new trial in criminal and civil cases and appellate review of such decisions).

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**I. Invited Error and Waiver**

¶9 The parties agree that the correct burden of proof for civil conspiracy under *Dawson v. Withycombe* is by clear and convincing evidence. 216 Ariz. 84, 103, ¶ 53 (App. 2007) (“To establish liability on the basis of conspiracy, a plaintiff must show by clear and convincing evidence that the defendant and at least one other person agreed to accomplish an unlawful purpose or a lawful purpose by unlawful means, and accomplish the underlying tort, which in turn caused damages.”). Nevertheless, Dream Games argues the superior court erred in granting a new trial either because the Individual Defendants invited the erroneous jury instruction or waived their objection to it. But the court’s ruling is supported by the record.

**A. Invited Error**

¶10 Dream Games cites *State v. Logan* for the proposition that when a “party requests an erroneous instruction, any resulting error is invited and the party waives his right to challenge the instruction on appeal.” 200 Ariz. 564, 565, ¶ 8 (2001).

¶11 Here, unlike in *Logan*, the Individual Defendants did not request the erroneous civil conspiracy instruction. To the contrary, they submitted a timely written objection to the improper standard. Dream Games argues that despite this written objection, the Individual Defendants invited the error by failing to provide corrected language in the redline version of the instructions they submitted to the superior court, and for further failing to object at trial.

¶12 Our supreme court recently reemphasized its caution against application of the invited error doctrine “unless it is clear from the facts that the party asserting the error on appeal is responsible for introducing the error into the record.” *State v. Robertson*, 249 Ariz. 256, 260, ¶ 15 (2020) (citing *State v. Escalante*, 245 Ariz. 135, 145, ¶ 38 (2018)). The *Robertson* Court rejected the argument that invited error could apply to a criminal defendant who had entered into a stipulated plea agreement with a potentially illegal sentence. *Id.* at 258, 262, ¶¶ 7, 28. It clarified that “the invited error doctrine only applies when the facts show the party urging the error initiated, or at least actively defended, the error rather than passively acquiescing in it.” *Id.* at 260, ¶ 16. The record before us demonstrates that the error was originally introduced by the superior court. Appellants point to no facts that the Individual Defendants either initiated or actively defended the lower burden of proof for civil conspiracy. Our review of the record also

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did not reveal any such facts. Instead, the Individual Defendants (as well as Appellants) mistakenly failed to correct the superior court's error.

¶13 Dream Games cites *Caruthers v. Underhill* for the proposition that the invited error doctrine is applicable even when "there is no evidence that the error was invited for the improper purpose of profiting on appeal." 235 Ariz. 1, 6-7, ¶ 23 (App. 2014). However, in *Caruthers*, plaintiffs had "affirmatively set the error in motion by arguing" in favor of the error. *Id.* Unlike the plaintiffs in *Caruthers*, the Individual Defendants did not deliberately lead the court to take the erroneous action. *See id.* Thus, the superior court properly declined to find that the Individual Defendants invited the error.

**B. Waiver**

¶14 Dream Games asserts that the Individual Defendants waived their objection to the jury instruction and are limited to fundamental error review, relying upon *Gonzales v. City of Phx.*, 203 Ariz. 152 (2002), and *Bradshaw v. State Farm Mut. Auto. Ins. Co.*, 157 Ariz. 411 (1988). However, in both *Gonzales* and *Bradshaw* the parties that were allegedly aggrieved by jury instructions had failed to preserve any objection. *Gonzales*, 203 Ariz. at 155, ¶ 14 n. 3; *Bradshaw*, 157 Ariz. at 419, 420, 423. "In order to properly preserve an objection to jury instructions on appeal, counsel must state distinctly what is being objected to and the grounds for the objection." *S Dev. Co. v. Pima Cap. Mgmt. Co.*, 201 Ariz. 10, 19, ¶ 20 (App. 2001); *see also* Ariz. R. Civ. P. 51(c).

¶15 Here, the superior court rejected Dream Games' waiver argument. While acknowledging the Individual Defendants' failure to correct the erroneous burden of proof in their redline copy of the instructions and at trial, the court also observed that "[the Individual] Defendants filed written objections that included an objection to the burden of proof language in the proposed instruction." Thus, the Individual Defendants preserved their objection in writing and the superior court recognized that objection in post-trial motions. With a timely, distinct, written objection on the record, we review for an abuse of discretion. *See State Farm Fire & Cas. Co.*, 183 Ariz. at 521.

¶16 The basis for the court's grant of a new trial was Arizona Rule of Civil Procedure ("Rule") 59(a)(1)(F), which states, in part: "The court may, on motion, grant a new trial . . . on . . . grounds materially affecting that party's rights," including "error in giving or refusing jury instructions." While the court, and not the defense, raised the issue of the

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erroneous jury instruction, Rule 59(c) allows the court to order a new trial “on its own” motion “for a reason not stated in the motion” so long as the court “specif[ies] the reasons in its order.” *See* Ariz. R. Civ. P. 59(c).

¶17 The superior court’s order explained with specificity that it was granting a new trial under Rule 59(a)(1)(F) because the erroneous instruction was contrary to the Individual Defendants’ “right to have the jury instructed on the proper burden” and that the “jury did not evaluate the evidence using that heightened standard.” The Individual Defendants were entitled to have the jury properly instructed on the heightened burden of proof for civil conspiracy and use of the erroneous lower standard materially affected the Individual Defendants’ rights at trial. *See Reeves*, 119 Ariz. at 162.

¶18 Dream Games argues that even if it was error that the jury was instructed using the wrong burden of proof for the civil conspiracy claim, there was no prejudice because “Dream Games extensively detailed the existence of the fraud and the conspiracy” both at trial and on appeal. Even assuming the truth of this contention, that circumstance alone is insufficient to establish that the superior court abused its discretion in granting a new trial because “it is not enough to show that reasonable evidence supported the jury’s verdict.” *See Soto v. Sacco*, 242 Ariz. 474, 480, ¶ 15 (2017) (citations omitted).

¶19 Dream Games also argues that the jury could not have found the Corporate Defendants liable for fraudulent transfer and punitive damages by clear and convincing evidence without also finding the Individual Defendants liable for civil conspiracy by clear and convincing evidence. But the parties involved in the two claims differ. Moreover, although aspects of these claims may bear similarities to those of civil conspiracy, the elements of civil conspiracy are not coextensive with those of claims for fraudulent transfer or punitive damages.

¶20 The jury was instructed that NGT was liable for fraudulent transfer if there was clear and convincing evidence a transfer occurred “with actual intent to hinder, delay or defraud” Dream Games, or if NGT made a transfer “without receiving a reasonably equivalent value in exchange for the transfer and was insolvent.” The punitive damages instruction explained that such damages are recoverable only if “a defendant acted with an evil mind” –listing “intent to cause injury,” “wrongful conduct motivated by spite or ill will,” or knowingly and consciously disregarding a substantial risk that “might significantly injure the rights of others” as grounds for punitive damages.

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¶21 By contrast, the instruction given by the court on the civil conspiracy claim listed the following five elements to be proven by a more-probably-true standard:

(1) there was an unlawful agreement; (2) it was the specific intent of a defendant as a member of the conspiracy to hinder, delay and defraud a judgment creditor; (3) acts were committed pursuant to the unlawful agreement; (4) something the individual defendant did had a negative effect on Plaintiff's ability to collect; and (5) damages were caused by the acts committed pursuant to the unlawful agreement.

¶22 Beyond differences between their elements, the civil conspiracy instruction asked the jury to consider the Individual Defendants' actions, while the fraudulent transfer instruction called upon jurors to consider the conduct of the Corporate Defendants. Thus, the jury's consideration of valid instructions for fraudulent transfer and punitive damages claims cannot cure the erroneous instruction for civil conspiracy.

¶23 Dream Games further argues the superior court abused its discretion by explicitly vacating the judgment against the Individual Defendants upon an oral motion, arguing that such an order was unnecessary, and they were denied an opportunity to raise arguments in briefing, citing *Nielson v. Patterson*, 204 Ariz. 530, 531-33, ¶¶ 6-11 (2003). While the *Nielson* case clarifies that it is unnecessary to separately order a vacatur of an original judgment upon entry of an order granting a new trial, it does not prohibit a trial court from doing so. *See id.* at 530, ¶ 1. Dream Games also had an opportunity to (and, in fact, did) argue against the oral motion during the hearing, which afforded them sufficient due process. And in any event, explicitly taking an action that would be implicitly proper cannot constitute an abuse of discretion. *See id.* Thus, the court did not abuse its discretion in ordering vacatur of the original judgment after granting a new trial on the civil conspiracy claim.

¶24 Accordingly, we affirm the new trial order.

## II. Cross-Appeal and Attorneys' Fees

¶25 The Individual Defendants' cross-appeal offers alternative grounds to support the superior court's order for a new trial on the civil conspiracy claim. But the court granted their motion for new trial, meaning they were not aggrieved parties and had nothing to cross-appeal from on that point. *See* ARCAP 1(d) (providing that only those "aggrieved by a judgment may appeal"); *Chambers v. United Farm Workers Org. Comm., AFL-*



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*CIO*, 25 Ariz. App. 104, 107 (1975) (“In Arizona, a party to the action may not appeal from a judgment or order unless he is ‘aggrieved’ by the judgment or order.”) (citations omitted). Therefore, we dismiss this portion of the cross-appeal for lack of appellate jurisdiction.

¶26 The Individual Defendants’ cross-appeal further argues that the superior court erred in awarding Dream Games its reasonable attorney’s fees as the successful party under A.R.S. § 12-341.01(A). After finding that a new trial for civil conspiracy was necessary, the superior court addressed the fee award, stating, “the Court will reconsider the award of attorney’s fees as to the [I]ndividual [D]efendants after the new trial concludes.” Further, by expressly vacating the judgment, the court also vacated with it the original award of fees. Accordingly, given that the issue will be reconsidered after the new trial concludes, the Individual Defendants have failed to show error in the court’s denial of its motion for new trial on the now-vacated award of fees to Dream Games. We, therefore, have no award, order, or judgment to review, and have no jurisdiction over the cross-appeal as to the attorneys’ fees challenge. The Individual Defendants’ cross-appeal as to this issue is dismissed for lack of jurisdiction.

¶27 Both parties request an award of their attorneys’ fees on appeal pursuant to ARCAP 21 and A.R.S. § 12-341.01(A). Given the procedural position in which our decision leaves this case, and in our discretion, we decline to award fees to either party.

¶28 As to the matter of costs on appeal, normally “awarding of costs to the successful party under A.R.S. [§] 12-341 is mandatory.” *Watson Constr. Co. v. Amfac Mortg. Corp.*, 124 Ariz. 570, 584 (App. 1979) (citing *Trollope v. Koerner*, 21 Ariz. App. 43, 47 (1973)). However, considering that Appellants were unsuccessful in prosecution of their appeal and Cross-Appellants were unsuccessful in prosecution of their cross-appeal, and further considering the current state of the litigation, neither side can properly be regarded as the successful party. Moreover, none of the parties in this case have requested, or argued for, apportionment of their costs. In this limited situation, we decline to award costs to any party on appeal. *See Watson Constr. Co.*, 124 Ariz. at 584-85 (finding no error in a superior court’s failure to award costs to either party when the resolution of multiple issues resulted in no clear prevailing party).

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**CONCLUSION**

¶29 For the foregoing reasons, we affirm the superior court's order granting a new trial and dismiss the cross-appeal in its entirety.



AMY M. WOOD • Clerk of the Court  
FILED: HB