DIVISION ONE
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RUTH WILLINGHAM, ACTING CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JOANN KNIGHT KENNEDY, a married woman, Plaintiff/Appellee, v. BRADLEY WILLIAM KENNEDY, a married man, Defendant/Appellant.	1 CA-CV 07-0305 1 CA-CV 07-0666 (Consolidated) DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)
In re the Marriage of: JOANN KNIGHT KENNEDY, Petitioner/Appellee, v. BRADLEY WILLIAM KENNEDY, Respondent/Appellant.	

Appeal from the Superior Court in Maricopa County

Cause Nos. CV 2003-010254 and FC 2003-001980

The Honorable Gilberto V. Figueroa, Judge

1 CA-CV 07-0305 REVERSED AND REMANDED
1 CA-CV 07-0666 AFFIRMED IN PART, VACATED IN PART AND REMANDED

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N O R R I S, Judge

¶1 Bradley Kennedy ("Bradley") appeals the judgment in a civil case against him, alleging various procedural and substantive errors. Most importantly, he challenges the superior court's grant of partial summary judgment, which found as a matter of law his signature on the quitclaim deed at issue in this case was forged. Although we disagree with or need not address some of Bradley's arguments, we nonetheless agree the superior court should not have granted partial summary judgment. Bradley also appeals from certain aspects of a decree of dissolution that dissolved his marriage to JoAnn Knight Kennedy ("JoAnn"). Again, we either disagree with or need not address some of Bradley's arguments on appeal, but because the superior court divided the value of the home in the decree by relying on the partial summary judgment ruling, we vacate that portion of the decree and a setoff related to it. Because these cases involve the same facts and were tried jointly, we consolidated

them on appeal and resolve both appeals in this memorandum decision.

FACTS AND PROCEDURAL BACKGROUND

¶2 In 1991, Bradley, then single, purchased a home in Chandler, Arizona. He married JoAnn in 1994, and the couple occupied the home. In January 2003, police arrested Bradley and jailed him on criminal charges. A month later, JoAnn petitioned the superior court to dissolve their marriage. In March 2003, Bradley's sister, Kate Stone ("Kate"), used a power of attorney purportedly signed by Bradley to have a locksmith change the locks to the home. The next month, Kate recorded a quitclaim deed purportedly executed by Bradley and delivered to her by him before he married JoAnn. With the quitclaim deed, Bradley purportedly conveyed his ownership interest in the home to Kate.

¶3 In May 2003, JoAnn filed a civil complaint against Bradley and Kate, alleging claims of fraud and fraudulent transfer and a violation of the injunction -- enjoining Bradley from transferring community property assets -- issued as a consequence of the dissolution filing. All of JoAnn's claims were based on an assertion the quitclaim deed was forged. Relying on the quitclaim deed, Kate then filed a forcible entry and detainer action against Bradley and JoAnn, and in July 2003, the superior court entered judgment in Kate's favor, finding

Bradley and JoAnn guilty of forcible entry and detainer. Kate also used the quitclaim deed as security to obtain an appearance bond for Bradley, and Bradley was released from jail on June 12, 2003.

¶4 As we discuss, the superior court granted JoAnn's motion for partial summary judgment in the civil case ("quitclaim ruling"), finding Bradley's signature on the quitclaim deed was a forgery but leaving JoAnn's claims for trial. In June 2006, the superior court scheduled the civil case and dissolution case for back-to-back trials in July 2006 with the dissolution case to go first. Although Bradley's counsel, retained by Bradley only days before trial, requested more time to respond to JoAnn's motion to consolidate the two cases, the superior court "joined" the two trials and tried both simultaneously. After conducting a three-day bench trial and considering memoranda by the parties, the superior court entered judgment for JoAnn in the civil case and a decree of dissolution of marriage in the dissolution case. Relying on the quitclaim ruling, the superior court treated Bradley as the owner of the home, but, because mortgage payments and home improvements had been made during the marriage, also ruled JoAnn was "entitled to an equitable share of the proceeds of the sale of that property." The superior court used the formula from *Drahos v.*

Rens, 149 Ariz. 248, 717 P.2d 927 (App. 1986), to equitably divide the proceeds of the sale of the home ("*Drahos* ruling").

DISCUSSION

Civil Case

¶5 Bradley argues the superior court should not have made the quitclaim ruling because a triable issue of fact existed as to the authenticity of his signature on the quitclaim deed. We agree. Summary judgment should be granted "if the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). And, when ruling on a summary judgment motion, the court should not assess the credibility of witnesses. *Braillard v. Maricopa Cnty.*, 224 Ariz. 481, 489, ¶ 19, 232 P.3d 1263, 1271 (App. 2010).

¶6 In a sworn affidavit filed on June 9, 2005, Bradley stated that on or about November 24, 1994, he "executed a quit claim Deed to his sister (subject deed) in contemplation of his marriage . . . and Kate Stone retained subject deed." Although acknowledging she had not seen Bradley sign the quitclaim deed,

Kate filed a signed declaration stating[1] that in November 1994 Bradley wanted her to assume ownership of the home; he provided her with the legal description of the property and a quitclaim deed form; she filled in the blanks on several different forms; and he later returned one quitclaim deed that was signed and notarized. Kate stated she intended to record the deed at that time but failed to do so.

¶7 JoAnn, on the other hand, disputed Bradley's affidavit testimony that he had quitclaimed the home's title to Kate. In an affidavit, JoAnn stated that when she moved into the home, Bradley owned it. JoAnn also presented two forensic document examination reports comparing the signature on the quitclaim deed with other examples of Bradley's signature. One report, by an Arizona Department of Public Safety criminalist, found the signature on the quitclaim deed "was probably NOT written" by Bradley. The other report, by a handwriting expert, found the signer of the provided examples "did not execute the 'B.W. Kennedy' signature appearing on the questioned Quit Claim Deed."

[1]Under Arizona Rule of Civil Procedure 80(i), whenever a sworn statement is required, "such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn written declaration . . . subscribed by such person as true under penalty of perjury, and dated." Kate's declaration, captioned "Unsworn Statement Made Under Penalty of Perjury," complied with Rule 80(i) and thus could be considered by the superior court in ruling on the summary judgment motion.

¶8 Apparently unaware of Bradley's affidavit and discounting the supportive nature of Kate's declaration,[2] the superior court made the quitclaim ruling, explaining the "evidence in the file and pleadings convince this court that the deed that is purportedly signed by Mr. Kennedy" was not signed by him.

¶9 Although we acknowledge Bradley, after he filed his affidavit, filed several motions and responses that were "ramblings," as JoAnn's counsel put it, Bradley presented the court with testimony under oath that he had signed and delivered the deed to Kate in 1994. Bradley's and Kate's statements created a genuine issue of material fact that required the court to assess credibility. *See supra* ¶ 5. Thus, the forgery issue could not be decided on summary judgment.

¶10 The quitclaim ruling had a significant effect on the civil case because the alleged fraudulent nature of the quitclaim deed formed the factual basis for all of JoAnn's civil claims. As a result, we have no choice but to reverse the quitclaim ruling and the civil case judgment and remand for a new trial. Although reversing the entire judgment cleans the

[2]In making the quitclaim ruling, the superior court said it was making no finding as to the intent of the parties and was treating Kate's statement as a "demurrer and finding that she is not able to and has not taken the position as to the validity of that deed."

slate, we also briefly consider a few issues raised on appeal that may arise on remand.

¶11 First, Bradley argues JoAnn failed to timely allege a cause of action under Arizona Revised Statutes ("A.R.S.") section 33-420(A) (2007) and thus the superior court improperly assessed damages against him under this statute.[3] While JoAnn may have been tardy in disclosing her reliance on the statute and while Bradley may have waived any objection by failing to bring JoAnn's delay to the attention of the superior court, the issue has now been raised and, assuming JoAnn can seek relief under A.R.S. § 33-420(A), Bradley can defend against the statute on remand. *See infra* ¶ 13.

¶12 Second, Bradley argues the actual damages awarded by the superior court to JoAnn should not have been trebled under

[3]The text of A.R.S. § 33-420(A) is as follows:

> A person purporting to claim an interest in, or a lien or encumbrance against, real property, who causes a document asserting such claim to be recorded in the office of the county recorder, knowing or having reason to know that the document is forged, groundless, contains a material misstatement or false claim or is otherwise invalid is liable to the owner or beneficial title holder of the real property for the sum of not less than five thousand dollars, or for treble the actual damages caused by the recording, whichever is greater, and reasonable attorney fees and costs of the action.

A.R.S. § 33-420(A). We agree. The court awarded damages in the amount of $678,983. That sum consisted of $44,000 in "[a]ctual damages suffered as a result of the eviction"; $75,000 in loss-of-income damages due to Bradley's "stalking"; $150,000 in punitive damages; $50,000 in attorneys' fees; $2983 in costs; and $357,000 in treble damages ($44,000 actual damages plus $75,000 loss-of-income damages multiplied by three) pursuant to A.R.S. § 33-420(A).[4]

¶13 Under the statute, "the owner or beneficial title holder of the real property" can receive relief in "the sum of not less than five thousand dollars, or for treble the actual damages *caused by the recording*." *Id.* (emphasis added). The judgment here shows that none of the actual damages awarded were "caused by the recording" and thus treble damages should not have been awarded. *See id.* On remand, JoAnn may prove she is entitled to various damages, but, assuming JoAnn demonstrates she is an owner or beneficial title holder of the home, the only award she can receive under A.R.S. § 33-420(A) is the greater of $5000 or triple the actual damages caused by the recording of a fraudulent or groundless instrument. *See Lebaron Props., LLC v.*

[4]Bradley contends and JoAnn concedes the superior court incorrectly assessed treble damages by taking the combined actual and loss-of-income damages of $119,000, tripling it to arrive at $357,000, and then adding those amounts together to reach $476,000.

Jeffrey S. Kaufman, Ltd., 223 Ariz. 227, 230, ¶ 9, 221 P.3d 1041, 1044 (App. 2009).[5]

Dissolution Case

¶14 Because the superior court should not have made the quitclaim ruling, we must also vacate the *Drahos* ruling as it rested on the quitclaim ruling. Additionally, we must also vacate the portion of the decree of dissolution awarding JoAnn a $25,000 setoff that reduced Bradley's share of the value of the home to compensate JoAnn for the division of a different community asset. We affirm all other aspects of the decree of dissolution.

¶15 Because we vacate the *Drahos* ruling and the setoff, we do not need to consider Bradley's argument on appeal that the superior court, in making the *Drahos* ruling, should have considered the down payment he asserts he made on the home and the appreciation in value he asserts occurred before marriage. Although we agree with the superior court that Bradley did not present admissible evidence to prove he paid a down payment or

[5]In his reply brief, Bradley argues the superior court should not have granted damages to JoAnn under A.R.S. § 33-420(A) because JoAnn was never an "owner or beneficial title holder of the real property." Because this argument was not raised in Bradley's opening brief, we deem it waived and do not address it. *Dawson v. Withycombe*, 216 Ariz. 84, 111, ¶ 91, 163 P.3d 1034, 1061 (App. 2007) ("We will not consider arguments made for the first time in a reply brief."). Thus, we express no opinion on whether JoAnn is entitled to relief under A.R.S. § 33-420(A).

to prove the home had appreciated, on remand he will have an opportunity to present such evidence.

¶16 Bradley does present three arguments that, despite our partial remand, are properly before us.[6] First, he argues the superior court improperly consolidated the cases for trial,[7] violating Bradley's due process rights and the "law of the case" doctrine. We disagree. Bradley failed to raise these arguments in the superior court, thus waiving them on appeal.[8] *Dillon-Malik, Inc. v. Wactor*, 151 Ariz. 452, 454, 728 P.2d 671, 673 (App. 1986).

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[6]In his brief in the dissolution case, Bradley also argues the superior court should not have granted treble damages under A.R.S. § 33-420(A) because JoAnn was never an "owner or beneficial title holder of the real property." This argument is only relevant to the civil case, and thus we do not consider it as a basis for setting aside or reversing the decree of dissolution.

[7]The cases were not actually consolidated under one case number but rather were "joined for purposes of trial." All evidence in one case was treated as evidence in the other case; so, for all practical purposes, it was as if the cases were consolidated.

[8]Even if Bradley had preserved his "law of the case" argument, the outcome would not change. A court "unquestionably has the power to vacate or modify a previous order of consolidation where good cause appears." *Yavapai Cnty. v. Superior Court*, 13 Ariz. App. 368, 369-70, 476 P.2d 889, 890-91 (1970). Here, the dismissal of Kate from the case represented changed circumstances that gave the superior court good cause to consider a motion to consolidate even though a previous motion had been denied.

¶17 Second, Bradley argues the superior court should have stayed the trial until his criminal case was completed.[9] We disagree. We review the denial of a stay for an abuse of discretion. *State v. Ott*, 167 Ariz. 420, 428, 808 P.2d 305, 313 (App. 1990).

¶18 If simultaneous civil and criminal proceedings would "substantially prejudice" a defendant's rights, the civil case should be stayed. *Id.* at 428-29, 808 P.2d at 313-14. In *Ott*, we explained the factors a trial court should consider in deciding whether to stay a civil case: whether the parallel proceedings "involve the same matter"; whether resolving the criminal case would "moot, clarify, or otherwise affect various contentions in the civil case"; whether a party could "exploit civil discovery" to advance the criminal case; and whether various bad-faith tactics or other special circumstances pointed toward a stay. *Id.* at 429, 808 P.2d at 314 (citations omitted). We also encouraged trial courts to state the reasons for denying a stay to aid appellate review. *Id.*

¶19 Here, Bradley argues the superior court failed to state specific reasons for denying a stay and, further, the court's refusal to enter a stay prejudiced him by forcing him to

[9]Bradley filed his motion to stay on July 19, 2006, only five days before trial was scheduled to begin on July 24, 2006.

choose between possible self-incrimination and the loss of his property in the dissolution case. We disagree with both arguments. First, in denying the stay the superior court indicated on the record (1) several prior continuances had been granted and the criminal trial was still pending and (2) Bradley had chosen to retain new counsel on the eve of trial. *See State v. Hein*, 138 Ariz. 360, 369, 674 P.2d 1358, 1367 (1983) ("[T]he right to choice of counsel is not absolute, but is subject to the requirements of sound judicial administration.").

¶20 Also, the record shows the court's ruling did not "substantially prejudice" Bradley. His alleged inability to testify fully due to fear of criminal prosecution does not create a compelling reason for a stay under *Ott*. Further, the factors in *Ott* are absent here. Because of the quitclaim ruling, the criminal and dissolution cases involved wholly separate issues. Also, Bradley failed to show how resolution of the criminal case would affect any of the issues or contentions in the dissolution case and how any discovery in the dissolution case -- which had been completed by the time he requested the stay -- would be used in the criminal case. And, finally, Bradley presented no evidence of bad-faith tactics by any party. Thus, Bradley presented no proof he would be substantially

prejudiced if the dissolution trial preceded resolution of the criminal proceedings.

¶21 Third, Bradley contends the superior court improperly admitted three exhibits (Exhibit 17 in the civil case and Exhibits 19 and 23 in the dissolution case) under the Arizona Rules of Family Law Procedure when the admissibility of the exhibits was governed by the Arizona Rules of Evidence. We agree.

¶22 Rule 2(B) of the Arizona Rules of Family Law Procedure provides a more relaxed evidentiary standard in family law cases.[10] Arizona Supreme Court Order R-05-0008, which

[10]Arizona Rule of Family Law Procedure 2(B) states in full:

> 1. Upon notice to the court filed by any party at least forty-five (45) days prior to hearing or trial, or such other date as may be established by the court, any party may require strict compliance with the *Arizona Rules of Evidence*, except as provided in subdivision 2(B)(3). If a hearing or trial is set upon less than sixty (60) days prior notice, the notice provided for in this paragraph will be deemed timely if filed within a reasonable time after the party receives notice of the hearing or trial date.

promulgated the Arizona Rules of Family Law Procedure, stated the new family law rules would apply to any family law case filed on or after January 1, 2006, and all of the new rules, except for Rule 2(B), would apply to any family law case pending as of January 1, 2006. JoAnn petitioned for dissolution in

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> 2. If no such notice is filed, all relevant evidence is admissible, provided, however, that the court shall exclude evidence if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay, waste of time, needless presentation of cumulative evidence, lack of reliability or failure to adequately and timely disclose same. This admissibility standard shall replace Rules 403, 602, 801-806, 901-903 and 1002-1005, *Arizona Rules of Evidence*. Except as provided in subdivision 2(B)(3). All remaining provisions of the *Arizona Rules of Evidence* apply.
>
> 3. Regardless of whether a notice is filed under subdivision 2(B)(1):
>
> a. Records of regularly conducted activity as defined in Rule 803(6), *Arizona Rules of Evidence*, may be admitted into evidence without testimony of a custodian or other qualified witness as to its authenticity if such document (i) appears complete and accurate on its face, (ii) appears to be relevant and reliable, and (iii) is seasonably disclosed and copies are provided at time of disclosure to all other parties and
>
> b. Any report, document, or standardized form required to be submitted to the court for the current hearing or trial may be considered as evidence if either filed with the court or admitted into evidence by the court.

February 2003; thus, Rule 2(B) was inapplicable, contrary to the superior court's belief. Nevertheless, admission of the exhibits was harmless error and does not require reversal of the decree of dissolution. *See State v. Torres*, 127 Ariz. 309, 311, 620 P.2d 224, 226 (App. 1980) (error harmless when improperly admitted evidence merely cumulative). As we explain, the exhibits the court admitted pursuant to Rule 2(B) constituted either cumulative evidence or evidence admissible under the Arizona Rules of Evidence.

I. Exhibit 17

¶23 JoAnn testified that a rental residence where she had been living refused to extend her lease, and she believed the refusal was due to Bradley's actions, which she characterized as "stalking." JoAnn offered as Exhibit 17 a letter her counsel had written to the rental company in an effort to ensure her safety if the rental company chose to show the residence to prospective tenants. Bradley objected on the basis of relevance and hearsay, but because JoAnn testified regarding her concerns about Bradley's actions, the letter was cumulative.

II. Exhibit 19

¶24 JoAnn also testified at length about the addition built on the home in 1997 and how she and Bradley purchased the materials but bartered dental work for the labor. Bradley

objected to the foundation of Exhibit 19, which consisted of a number of receipts representing the purchase of materials from Home Depot, because "there's nothing that directly links these to the particular property or these parties." JoAnn testified that the receipts were for items purchased for the addition, and her testimony regarding the project showed she had firsthand knowledge. JoAnn's testimony provided sufficient foundation to make the receipts admissible under the stricter standard of the Arizona Rules of Evidence.

III. Exhibit 23

¶25 Finally, JoAnn testified Bradley regularly paid the mortgage payments on the home. In support, she offered Exhibit 23, a number of Bank of America real estate loan statements, all listing Bradley's name, and a letter from Bank of America addressed to Bradley, responding to a request for information. Although not objecting to the statements, Bradley objected to the letter on the basis of foundation and hearsay, stating "there is no way to prove [Bradley] actually made inquiry just because it's addressed to him." Although the letter should not have been admitted, the real estate loan statements -- all of which were admitted without objection -- evidenced Bradley's mortgage payments, making the letter cumulative.

CONCLUSION

¶26 For the foregoing reasons, we reverse the judgment in the civil case, and we vacate the provisions in the decree of dissolution dividing the home and awarding JoAnn a $25,000 setoff against Bradley's share of the value of the home. We remand both cases to the superior court for further proceedings consistent with this decision.

/s/
_____
PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/
_____
JOHN C. GEMMILL, Judge

/s/
_____
PATRICIA A. OROZCO, Judge