IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

ROBERT KRAMBER,
Plaintiff/Appellee,

v.

ZIAD FAKHRI ABU HMEIDAN AND LINDA KAMAL BARAKAT,
HUSBAND AND WIFE,
Defendants/Appellants.

No. 2 CA-CV 2020-0150
Filed July 7, 2021

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. C20182221
The Honorable Richard E. Gordon, Judge

AFFIRMED

COUNSEL

Thomae Law, Tucson
By Eric J. Thomae
Counsel for Plaintiff/Appellee

Ziad Fakhri Abu Hmeidan and Linda Kamal Barakat, Glendale
In Propria Personae

MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Presiding Judge Eppich and Judge Brearcliffe concurred.

V Á S Q U E Z, Chief Judge:

¶1 In this civil action involving a breach of contract claim, Ziad Fakhri Abu Hmeidan and his wife Linda Kamal Barakat appeal from the trial court's judgment in favor of appellee Robert Kramber, arguing that the court improperly deprived them of a jury trial. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the record in the light most favorable to affirming the trial court's judgment. *See Lewis v. Pleasant Country, Ltd.*, 173 Ariz. 186, 188 (App. 1992). In May 2018, Kramber sued Hmeidan and Barakat for breach of contract, alleging that they had failed to pay him on a promissory note relating to their purchase of a liquor license. Hmeidan and Barakat filed an answer, but thereafter participated sparingly in pretrial litigation. After Kramber's attempts to confer with Hmeidan and Barakat on pretrial matters did not yield any response, Kramber submitted a proposed scheduling order, which included a request for a jury trial.

¶3 However, at a trial-setting conference in January 2020, Kramber instead requested a bench trial.[1] In discussing with counsel and the parties whether there should have been a jury or bench trial, the court stated that there was no indication a jury trial had been requested. Kramber, who was not aware of his own previous jury trial request, argued that the deadline for Hmeidan and Barakat to request a jury trial was "long

[1]Hmeidan and Barakat have not provided us with a transcript of this hearing. In the absence of a transcript, we presume the discussion during the hearing supported the court's ruling. *Cf. Boltz & Odegaard v. Hohn*, 148 Ariz. 361, 366 (App. 1985) ("Where no transcript of evidence is made part of the record on appeal, a reviewing court will not question the sufficiency of evidence to sustain the ruling.").

gone," but agreed that they could still request a jury trial if he had previously requested one. The court set the matter for a bench trial in March, with the caveat that the parties could file within the next week "any objection to [Kramber]'s request for a court trial based on a prior request or any other basis."

¶4 Hmeidan and Barakat did not file an objection within that week, nor at any other time before trial. After a continuance, a bench trial was held in June 2020. At the trial's conclusion, the court ruled in Kramber's favor in the amount of $47,000 plus interest, costs, and attorney fees.

¶5 Three weeks after the trial, but before entering a judgment, the court alerted the parties that it was concerned that it had violated Hmeidan and Barakat's right to a jury trial. The court revealed that it had discovered Kramber's request for a jury trial. It also explained it had learned that Rules 38 and 39, Ariz. R. Civ. P.—the rules governing the right to a jury trial and the setting of civil actions for jury or bench trial—were amended during the pendency of the case, and that under the new rules, "no request for a jury trial was needed and any waiver had to be by written stipulation." The court noted that the new rules "would have applied notwithstanding the fact that this case was pending before their effective date, unless application would have been infeasible, or some injustice would occur." It invited the parties to brief the issue and set the matter for a hearing.

¶6 Hmeidan and Barakat instead filed a motion for new trial, contending that the facts "demonstrate[d] without question that there was no legitimate or knowing waiver of [the] 'inviolate' right . . . to a trial by jury" under Rule 38. After a hearing, the trial court denied the motion. The court questioned whether the new rules applied given its belief that "the trigger date for requesting a jury trial, had come and gone . . . before the rule change." And it concluded that even if the new rules generally applied, it would decline to apply them under Rule 81, Ariz. R. Civ. P., because it would be an injustice under the circumstances. Finally, it concluded that Hmeidan and Barakat had, in any event, waived the right to a jury trial through their failure to object to the bench trial despite being permitted to "object to a bench trial for any reason whatsoever."

¶7 The trial court entered final judgment in favor of Kramber. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).[2]

Jury Trial

¶8 Hmeidan and Barakat argue that because the trial court failed to apply the current version of Rule 38, it violated their right to a jury trial. Thus, they contend the court erred in denying their motion for a new trial. We review the denial of a motion for new trial for an abuse of discretion. *Jaynes v. McConnell*, 238 Ariz. 211, ¶ 13 (App. 2015). "Whether a defendant is entitled to a jury trial, however, is a question of law we review de novo." *Kaniowsky v. Pima Cnty. Consol. Just. Ct.*, 239 Ariz. 326, ¶ 3 (App. 2016).

¶9 Under the current version of Rule 38, which became effective January 1, 2019, "a party need not file a written demand or take any other action in order to preserve its right to trial by jury" on any issue where a jury trial is a right. Ariz. R. Civ. P. 38(a). "The parties may be deemed to have waived, under these rules, a right to trial by jury only if they affirmatively waive that right by filing a written stipulation" at least thirty days before the scheduled trial date, or by written or oral stipulation within thirty days before the scheduled trial date if the court approves. Ariz. R. Civ. P. 38(b). "If there is no waiver of the right to trial by jury under Rule 38(b), the trial must be by jury unless the court, on motion or on its own, finds that there is no right to a jury trial on some or all issues." Ariz. R. Civ. P. 39(a). The right to a jury trial "is preserved to the parties inviolate." Ariz. R. Civ. P. 38(a); *see also* Ariz. Const. art. II, § 23 ("The right of trial by jury shall remain inviolate.").

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[2]Although final judgment was entered on September 2 and the notice of appeal was not entered by the superior court until October 6—after the thirty-day deadline to file a notice of appeal, *see* Ariz. R. Civ. App. P. 9(a)—Hmeidan and Barakat had delivered the notice of appeal to the superior court clerk before the deadline but the clerk rejected it because the accompanying check for the filing fee was too large: $140 instead of the required $100. The notice of appeal was entered by the clerk only after Hmeidan and Barakat submitted another check for the exact amount. In this circumstance, Hmeidan and Barakat's notice of appeal is deemed filed when it was received by the clerk. *See In re Marriage of Gray*, 144 Ariz. 89, 91-92 (1985) (notice of appeal considered filed by party when submitted to clerk if party pays filing fee within reasonable time after submitting notice to clerk).

¶10 When a new or amended rule becomes effective during the pendency of a case, the new rule generally applies unless "the court determines that applying the rule or amendment in a particular action would be infeasible or work an injustice, in which event the former rule or procedure applies." Ariz. R. Civ. P. 81(b)(2)(B). "[T]he decision whether to apply an amended rule retroactively to a pending case is within the discretion of the trial judge." *Drozda v. McComas*, 181 Ariz. 82, 86 (App. 1994).

¶11 The previous version of Rule 38, in place when Kramber filed his complaint in 2018, required a party to request a jury trial through a "written demand . . . [which] may not be combined with any other motion or pleading filed with the court." *See* Ariz. Sup. Ct. Order R-18-0018, at 3 (Aug. 28, 2018). The rule provided that "a party waives a jury trial unless its demand is properly filed and served." *Id.* In this case, neither party filed a compliant request for a jury trial and, therefore, a jury trial would have been waived under former Rule 38. Hmeidan and Barakat do not meaningfully explain why the trial court lacked discretion under Rule 81 to conclude "there in fact would be injustice in applying the new rule given the absence of any objection to going forward with a bench trial, . . . the age of the case itself, and the absence of any significant defense to the case until the trial itself." They merely maintain, without support, that the court had "no choice" but to grant a new trial because of the inviolate right to a jury trial under the rule as amended. Hmeidan and Barakat have thus waived review of whether the court abused its discretion in applying the former rule based on its determination that applying the amended rule would work an injustice. *See MacMillan v. Schwartz*, 226 Ariz. 584, ¶ 33 (App. 2011) ("[m]erely mentioning an argument in an appellate opening brief is insufficient"; appellant "must present significant arguments, supported by authority" in opening brief to avoid waiver of issue).

¶12 Even applying the amended rule, however, Hmeidan and Barakat waived appellate review because they failed to alert the trial court of their right to a jury trial before the bench trial occurred. To preserve issues for appellate review, "legal theories must be presented timely to the trial court so that the court may have an opportunity to address all issues on their merits." *Cont'l Lighting & Contracting, Inc. v. Premier Grading & Utils., LLC*, 227 Ariz. 382, ¶ 12 (App. 2011). Parties generally cannot stay silent through trial regarding an error that could be corrected and instead "l[ie] in the weeds to see how the trial . . . come[s] out," even when the error is "of fundamental or constitutional importance." *Love v. Double "AA" Constructors, Inc.*, 117 Ariz. 41, 46 (App. 1977); *cf. State v. Henderson*, 210 Ariz. 561, ¶ 19 (2005) (disapproving of criminal defendant "tak[ing] his chances

on a favorable verdict, reserving the 'hole card' of a later appeal on [a] matter that was curable at trial, and then seek[ing] appellate reversal" (alterations in *Henderson*) (quoting *State v. Valdez*, 160 Ariz. 9, 13-14 (1989))). This is particularly so here, in view of the fact that the new rule was in place when nearly all of the litigation took place. Indeed, early in the case the trial court entered an order dismissing the case without prejudice because nothing had been filed by the parties after the pleadings and the deadline for filing the joint scheduling order had passed. Active litigation began only after the court granted Kramber's motion to set aside the dismissal order in February 2019, when the new rule was already in place.[3]

¶13 In criminal cases, defendants may generally seek fundamental error review when they do not object at trial to a claimed error. *See Henderson*, 210 Ariz. 561, ¶¶ 19, 20. But in civil cases our supreme court has "recognize[d] that the 'fundamental error' doctrine should be used sparingly, if at all." *Clark v. Muñoz*, 235 Ariz. 201, ¶ 12 (2014) (alteration in *Clark*) (quoting *Williams v. Thude*, 188 Ariz. 257, 260 (1997)). Thus, in a civil case, an error raised for the first time in a motion for new trial is generally not reviewable on appeal. *See Medlin v. Medlin*, 194 Ariz. 306, ¶ 6 (App. 1999) ("An issue raised for the first time after trial is deemed to have been waived."); *Conant v. Whitney*, 190 Ariz. 290, 293 (App. 1997).

¶14 Hmeidan and Barakat do not explain why they are entitled to appellate review despite their lack of timely objection. Instead, they simply claim that nothing they did constituted a waiver under the provisions of Rule 38(b). They conclude that "any finding of waiver below would had to have been made by court order determining that there was a [qualifying] waiver," and suggest that they could not have waived their right to a jury trial because that right is "inviolate." But Rule 38(b) only establishes the circumstances in which "parties may be deemed to have waived [a jury trial] . . . *under these rules*." (Emphasis added.) The requirement that a party must timely raise claims to avoid waiving appellate review is not established in the Rules of Civil Procedure; it is an equitable rule. *See Zajac v. City of Casa Grande*, 209 Ariz. 357, ¶ 19 (2004). Interpreting Rule 38(b) to bar application of such well-established equitable waiver doctrines would render the words "under these rules" superfluous; we therefore do not

[3]The parties do not address whether the dismissal and subsequent reinstatement of the case impacts whether the case was "pending" when the rule was adopted and the applicability of the new rule. Because we determine Hmeidan and Barakat's claim fails even if the new rule were to apply, we need not resolve this issue.

interpret it to do so. *See Brenda D. v. Dep't of Child Safety*, 243 Ariz. 437, ¶ 20 (2018) ("We will not interpret statutes or rules in a manner that renders portions of their text superfluous."). And while "the doctrine of waiver is discretionary," *see Noriega v. Town of Miami*, 243 Ariz. 320, ¶ 27 (App. 2017), applying it here is particularly appropriate, where Hmeidan and Barakat failed to object despite the trial court's explicit pretrial invitation to raise objections, *see State v. Kidwell*, 106 Ariz. 257, 261 (1970) (citing party's specific opportunities to raise objections in finding issue waived).

Disposition

¶15 For the foregoing reasons, we affirm the trial court's denial of Hmeidan and Barakat's motion for new trial and its judgment in favor of Kramber.