IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

IN RE THE CONSERVATORSHIP OF WILLIAM CHALMERS, AN ADULT

S. ALAN COOK,
Plaintiff/Appellant,

v.

BRIAN THEUT AND RYAN SCHARBER,
Respondents/Appellees.

No. 2 CA-CV 2022-0101
Filed October 26, 2022

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NOT FOR PUBLICATION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 Maricopa County
No. PB2017001373
The Honorable Thomas L. Marquoit, Judge

AFFIRMED

COUNSEL

S. Alan Cook P.C., Phoenix
By S. Alan Cook
Counsel for Plaintiff/Appellant

Theut, Theut, & Theut P.C., Phoenix
By Brian J. Theut
Counsel for Respondent/Appellee Theut

MEMORANDUM DECISION

Judge Brearcliffe authored the decision of the Court, in which Vice Chief Judge Staring and Judge Eckerstrom concurred.

B R E A R C L I F F E, Judge:

¶1 Appellant S. Alan Cook appeals the trial court's order awarding appellees Brian Theut and Ryan Scharber sanctions against him and the court's order denying his motion to alter or amend the imposition of sanctions.[1] For the following reasons, we affirm.

Factual and Procedural Background

¶2 "We view the evidence in the light most favorable to sustaining the award." *Rogone v. Correia*, 236 Ariz. 43, ¶ 23 (App. 2014). In 2017, in dissolution proceedings between Chalmers and his (now) ex-wife, Chalmers' then-counsel filed a Motion to Appoint a Guardian ad Litem for Chalmers. Brian Theut was appointed guardian ad litem for Chalmers in the dissolution proceedings. Theut then initiated this probate proceeding by filing a Petition for Appointment of Permanent Conservator for an Adult and an Emergency Petition for Appointment of Temporary Conservator for an Adult. The trial court appointed East Valley Fiduciary Services, Inc. ("EVFS") as Chalmers' temporary conservator. At the time, EVFS was

[1]Ryan Scharber is also identified as an appellee, but he has not filed an answering brief on appeal. Cook filed a notice and motion on appeal, requesting that this court vacate the award of sanctions to Scharber because he did not file an answering brief. Pursuant to an order by this court, we rule on that motion now. "[W]hen an appellant raises a debatable issue, the court, in its discretion, *may* find that an appellee's failure to file an answering brief constitutes a confession of error." *State ex rel. McDougall v. Superior Court*, 174 Ariz. 450, 452 (App. 1993) (emphasis added); *see also McDowell Mountain Ranch Comm'n Ass'n v. Simons*, 216 Ariz. 266, ¶ 13 (App. 2007). However, this doctrine is discretionary, "and we are reluctant to reverse based on an implied confession of error when . . . the trial court has correctly applied the law." *Nydam v. Crawford*, 181 Ariz. 101, 101 (App. 1994). Because the record supports the court's award of sanctions against Cook, we do not, in our discretion, deem Scharber's failure to respond as a confession of error.

represented by Sharber in the probate matter and John McKindles in the dissolution proceeding. The temporary conservatorship remained in effect and was extended several times throughout 2018. In September 2018, the court terminated EVFS as Chalmers' temporary conservator and appointed it as Chalmers' temporary limited conservator,[2] to terminate on September 18, 2018.

¶3 In February 2019, Michael Doyle and his firm—Chalmers' court-appointed counsel—moved to withdraw, stating that, because Chalmers was no longer "under the constraints of the temporary conservatorship," he was "legally able to retain counsel of his own choosing." Following Doyle's withdrawal, Cook first appeared as Chalmers' probate counsel on March 14, 2019. That same day, Cook also filed an objection to Theut's Rule 33 application for his fees and costs covering his work as Chalmers' guardian ad litem from May 2018 through September 2018, and requested an independent accountant be appointed. In this motion, Cook alleged that Theut had threatened Chalmers with a permanent conservatorship if he did not agree to the settlement in the dissolution proceedings. Cook also claimed that the case was "rife with malfeasance" by EVFS, Scharber, Theut, Doyle, and others. A few weeks later, Cook filed another motion, requesting an extension to file a more detailed objection to the Rule 33 application. In that motion, Cook referenced a decision in other litigation involving Theut's firm, claiming that, because of that case, Theut "had every incentive to act in his own best interest rather than the best interest of his ward," and that he had "spent little or no time protecting" Chalmers' interest. The trial court granted Theut's request to strike that portion of the motion.

¶4 In April 2019, Cook filed a Notice of Change of Judge for Cause, supported by an affidavit from Chalmers, in which Chalmers alleged that the assigned judge was "biased and prejudiced against [him]" and could not give him "a fair hearing with respect to the multitude of pending requests for approval of fees, costs and other expenditures" from his estate. Chalmers specifically alleged that: the assigned judge communicated ex parte with a then-retired judge regarding Chalmers'

[2]As temporary limited conservator, EVFS's authority was limited to (1) arranging for the sale of Chalmers' firearms under the Rule 69 agreement; (2) resolving any issues regarding the Qualified Domestic Relations Order for the IRA to be divided between Chalmers and his ex-wife; (3) taking any actions to address and improve Chalmers' credit history; (4) providing any information requested by the Internal Revenue Service; and (5) releasing necessary funds to Chalmers.

divorce; the judge had "false, negative thoughts" about him that had "no factual basis"; and the judge "may have entered rulings in this cause based upon its disrespect for Mr. Doyle, rather than because of the merits of the case, all to the detriment of [Chalmers]." No other support for the allegations was provided. While the trial court did "not find there to be a factual or legal basis for the allegations in the affidavit," it did not believe it could remain fair and impartial and therefore recused itself from the case. The matter was re-assigned.

¶5 Cook filed a motion in May to release Chalmers' firearms and his remaining funds held by EVFS and to award fees and costs. Cook alleged in this motion that the psychiatrist who had assessed Chalmers—Dr. Gwen Levitt—had "a symbiotic relationship" with Theut and his law firm, which "call[ed] into question the independence of Levitt in making her findings and recommendations to the Court." Cook seemed to question the legitimacy of Dr. Levitt's license as well, saying she was "allegedly a psychiatrist." The trial court set a hearing for July 2019.

¶6 Then, in June 2019, Cook filed his more detailed objection to the Rule 33 applications of EVFS, Scharber, McKindles, and Theut. The addendum to the objection contained most of the factual and legal support for the objection, in which Cook argued that the fees were "largely unnecessary and were not reasonable," that the fees were not usual or customary, and, generally, that "the conservator, for all intents and purposes, used his appointment to raid Chalmers' estate" and "all the professionals, including all the lawyers, joined in."

¶7 The trial court set an evidentiary hearing on all the matters for October 2019. Days before the evidentiary hearing, Cook filed a preliminary notice of Chalmers' intent to file bankruptcy, and the next day, he filed an actual notice of bankruptcy. The evidentiary hearing was vacated, and Chalmers was ordered to notify the court when the bankruptcy proceedings were completed. In June 2020, EVFS—not Chalmers or Cook—notified the court that the bankruptcy matter had been remanded to the trial court on May 22.

¶8 Following remand, the trial court reset the evidentiary hearing for September 18, 2020, and required that all motions be submitted no later than August 18. On August 18 at approximately 8:00 p.m., Cook filed three: a motion for an extension of time; a motion to compel production of files; and a motion to continue the evidentiary hearing. In the motion to compel production of files, Cook stated:

> Chalmers believes that if . . . Theut were to actually produce all of his emails . . . they would

> reflect that he worked in concert with Dr. Levitt and EVFS . . . for the purpose of maximizing their income from Chalmers' estate rather than acting for the benefit of Chalmers.

He also cited to another case involving Theut and his law firm, stating that "there appears to be a history of acting in self interest rather than in the best interest of the protected person." The trial court ultimately denied all three motions and also denied Cook's later motion for reconsideration.

¶9 Cook then withdrew as Chalmers' counsel in September 2020. The following month, Scharber and Theut each filed requests for fees incurred for their work, citing among other authority, A.R.S. § 12-349 and A.R.S. § 14-1105. Scharber requested that the fees and legal costs incurred during this period be "assessed against S. Alan Cook because his consistently unethical interventions forced all parties involved to waste significant time and money." Similarly, Theut asserted that "due to the severity of the unsupported conclusions in S. Alan Cook's pleadings, all parties had to engage in time-intensive and resource draining responses." Cook responded to both applications.

¶10 In January 2021, the trial court awarded Theut and Scharber the full amount of fees requested in their applications. The court made detailed findings and concluded that Cook had violated Rule 11, Ariz. R. Civ. P., by "disregard[ing] whether or not his claims were well-ground[ed] or warranted by law in his filings with the Court." The court also found that Cook had violated § 12-349 because he "brought . . . groundless claims without substantial justification . . . primarily for the purpose of delay and harassment, and . . . he unreasonably expanded and delayed the proceeding."

¶11 Cook filed a motion to alter or amend the order granting sanctions—or, alternatively, for a new trial—pursuant to Rule 4, Ariz. R. Prob. P., and Rule 59, Ariz. R. Civ. P. The trial court denied the motion, and this appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-2101(A)(9) and 12-120.21(A)(1).

Analysis

¶12 Cook argues that the trial court lacked a legal and factual basis to grant sanctions against him under Rule 11, Ariz. R. Civ. P., and A.R.S.

§ 12-349[3] and improperly denied his Rule 59 motion. "We review all aspects of a court's Rule 11 order for an abuse of discretion." *In re $15,379 U.S. Currency*, 241 Ariz. 462, ¶ 15 (App. 2016). We similarly review the denial of a motion to alter or amend a judgment under Rule 59 for an abuse of discretion. *See Mullin v. Brown*, 210 Ariz. 545, ¶ 2 (App. 2005); *see also Zimmerman v. City of Oakland*, 255 F.3d 734, 737 (9th Cir. 2001) (applying abuse of discretion standard to review of denial of motion to alter or amend under federal counterpart to Rule 59); *Haroutunian v. Valueoptions, Inc.*, 218 Ariz. 541, n.8 (App. 2008) ("It is appropriate to look to federal courts' interpretations of federal rules that mirror Arizona rules."). A court abuses its discretion when its discretion is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Tilley v. Delci*, 220 Ariz. 233, ¶ 16 (App. 2009). When reviewing an award of sanctions, "we view the evidence in a manner most favorable to sustaining the award, affirming unless the trial court's findings are clearly erroneous." *Heuisler v. Phoenix Newspapers, Inc.*, 168 Ariz. 278, 284 (App. 1991).

Sanctions

¶13 Rule 11 provides that, by signing a document filed with the court, the attorney certifies, among other things, that the claim "is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation" and that "the factual contentions have evidentiary support or . . . will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." Ariz. R. Civ. P. 11(b)(1), (3). If an attorney violates Rule 11, sanctions may be imposed on motion by the other party, or by the court on its own. Ariz. R. Civ. P. 11(c)(1). When a party files a motion for sanctions, he must first "attempt to resolve the matter by good faith consultation," and, if the matter is not resolved, then he must "serve the opposing party with written notice of the specific conduct that allegedly violates Rule 11(b)." Ariz. R. Civ. P. 11(c)(2).

¶14 Cook first argues that neither Theut nor Scharber consulted with him before seeking fees. Assuming that to be true, Theut sought fees under A.R.S. §§ 12-349 and 14-1105, and Scharber under §§ 12-349 and 25-324. Neither sought fees under Rule 11. It was the trial court, on its own, which expressly awarded fees as a sanction under Rule 11, in addition to relying on § 12-349. Notwithstanding the obligations placed on counsel by Rule 11, the court has discretion to impose such sanctions, without motion

[3]Cook argues against awarding attorney fees under several other statutes. However, because the trial court awarded fees as a sanction under Rule 11 and § 12-349, we need only address his arguments as to those bases.

from either party, and the court has no obligation to consult with counsel. *See* Ariz. R. Civ. P. 11(c)(1). Indeed, the court here noted its authority to impose sanctions sua sponte in its decision.

¶15 Cook next argues that there was no "factual basis" for an award of sanctions against him under Rule 11. We disagree.

¶16 First, in its order, the trial court found that the three motions Cook had filed on August 18 were attempts to delay the case.[4] It also found that Cook had made several "outlandish and wholly unsupportable claims," alleging them solely because "Chalmers believe[d]" them. Specifically, the court found Cook's claims that "Theut was practicing medicine without a license" and that an EVFS employee was a convicted felon to be baseless and unsupported. The court also determined that Cook had filed Chalmers' affidavit when seeking a change of judge without "reasonable inquiry" into the allegations made.

¶17 Cook argues that his allegation that Theut practiced medicine without a license was "well founded," claiming that "Theut, in August 2017, asked a doctor at Desert Vista Hospital to keep Chalmers in the hospital . . . instead of releasing him as the doctor had planned to do." Cook claims in his opening brief that there is a doctor's note confirming this and that he provided this note to the trial court, but he does not reference where in the record that evidence is or when he submitted it. And, in the motion below, where he first raises this allegation, he also did not cite to or include any supporting evidence. Given the absence of any evidence in the record, we cannot say the court abused its discretion in finding the allegation "wholly unsupportable."

¶18 As to Cook's allegation that an EVFS employee was a convicted felon, this charge was similarly unsupported below. Cook first raised this allegation in his reply as to his motion for release of funds and firearms, but he, again, attached no exhibits or evidence in support. Although Cook has ultimately included supporting evidence for the claim with his opening brief, we will not consider such evidence for the first time on appeal. *See GM Dev. Corp. v. Cmty. Am. Mortg. Corp.*, 165 Ariz. 1, 4 (App.

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[4]On appeal, Cook does not address the trial court's factual finding that his three motions on August 18 were made with the intent to delay the case. Therefore, we do not address whether the court abused its discretion in making such a finding and relying on it when awarding sanctions. *See Robert Schalkenbach Found. v. Lincoln Found., Inc.*, 208 Ariz. 176, ¶ 17 (App. 2004) ("Generally, we will consider an issue not raised in an appellant's opening brief as abandoned or conceded.").

1990) ("An appellate court's review is limited to the record before the trial court."). Relatedly, the court addressed Cook's statement that EVFS's president had vouched for the employee in question when her rights were later restored. Cook provided no evidence for that claim either, and, even if he had, we agree with the court that the claim was nonetheless irrelevant.

¶19 Finally, Cook makes several arguments as to why the allegations of bias and prejudice in his Notice of Change of Judge were not in violation of Rule 11. Cook alleges that "the entire record, viewed dispassionately, suggests that the [judge] did not do her best work in this case." He then cites trial court rulings against Chalmers and in favor of the other parties. Unfavorable rulings are insufficient support, however, for a claim that a judge is biased or prejudiced against a party. *See Mervyn's v. Superior Court*, 179 Ariz. 359, 362 (App. 1994) ("A judge's legitimate exercise of judicial discretion cannot be the basis of the bias and prejudice required for a change of judge for cause."); *see also Conkling v. Crosby*, 29 Ariz. 60, 77 (1925) (When bias or prejudice of judge is raised, "the one interposing the challenge must go further than to prove facts which in his opinion merely . . . show bias and prejudice, and must prove the actual fact of bias, hostility, or ill will . . . as would prevent impartial justice being done."). Even so, as the court noted, neither Cook's filing nor Chalmers' affidavit offered evidence in support of the claims. As the court explained, Cook merely signed off on the notice, stating it was "based upon the attached . . . affidavit of the Ward." It is clear from the record, and it is also seemingly undisputed, that Cook did not conduct any "reasonable inquiry" into Chalmers' allegations prior to filing the notice. *See* Ariz. R. Civ. P. 11(b). Therefore, we cannot conclude the court erred in awarding sanctions for these allegations. And, because an award of fees as a sanction under § 12-349 is redundant of an award under Rule 11 here, we need not address the court's alternative basis for sanctions.

Rule 59 Motion

¶20 Cook also challenges the trial court's denial of his Rule 59, Ariz. R. Civ. P., motion to alter or amend the order awarding sanctions to

Theut and Scharber.[5] [6] Similar to his motion below, most of Cook's argument contests the existence of facts that the court relied on. He also argued below, and now on appeal, that the court should alter or amend the judgment because the amount it awarded was unreasonable.[7] Cook further asserts that the court should not have awarded Scharber and Theut fees for the time Scharber spent responding to the court's accountant regarding EVFS's final accounting. Cook also argues on appeal, as he did below, that "it is manifestly unreasonable to order Cook to pay Appellees more than $48,000 in legal fees that were incurred almost entirely unrelated to anything that Cook did." He claims that EVFS's failure to file an appropriate accounting is what caused delays and extra work for Theut and Scharber, not his actions.

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[5]In his answering brief, Theut argues that Cook's motion to alter or amend the judgment under Rule 59 , was untimely. Under Rule 59(b)(1), a party has fifteen days from the entry of judgment to file a motion to alter or amend. The judgment here was entered by the clerk on January 22, 2021, and Cook filed his motion on February 8, 2021. Following the rules for computing time under Rule 6(a), Ariz. R. Civ. P., Cook's motion was timely because it was filed exactly fifteen days after the judgment was entered.

[6]Cook raised many arguments and disputed many facts from the trial court's judgment in his Rule 59 motion below. On appeal, Cook states that he "incorporates . . . by reference" his Rule 59 motion. His opening brief, however, only specifically repeats some of the arguments made below. Although incorporating arguments by reference is not forbidden in civil cases, the failure to develop an argument on appeal or cite legal authority in support of an argument constitutes waiver. Ariz. R. Civ. App. P. 13(a)(7); *Bennett v. Baxter Grp., Inc.*, 223 Ariz. 414, ¶ 11 (App. 2010). Accordingly, we conclude that Cook has waived those arguments from his Rule 59 motion, which he did not develop on appeal in his opening brief.

[7]In the section of Cook's opening brief addressing his Rule 59 motion, he also incorporates by reference his prior arguments in the opening brief. The only preceding arguments made that we have not already addressed are his arguments that he gave notice of Chalmers' intent to file bankruptcy as soon as he was aware of it and that he did not withdraw as Chalmers' counsel for improper reasons. Although Cook also raised these arguments in his Rule 59 motion, the trial court does not appear to have considered those two facts significant, if at all, when awarding sanctions against Cook. Therefore, we need not address those two arguments on appeal.

¶21 The trial court was in a better position than we are, however, to determine what caused delays during litigation and what fees were related to those causes. *See Solimeno v. Yonan*, 224 Ariz. 74, ¶ 41 (App. 2010); *see also Schweiger v. China Doll Rest., Inc.*, 138 Ariz. 183, 189 (App. 1983) ("It should be recognized that an appellate court is somewhat unsuited for the fact-finding inquiry which is frequently necessary to properly determine reasonable fees for legal services rendered."). Both Theut and Scharber submitted applications for fees and costs in compliance with *China Doll*, 138 Ariz. at 187-89, and the court considered the applications when determining the amount of sanctions to be awarded. Considering the actions taken by Cook as described above, we cannot say the amount awarded by the court was unreasonable. The record supports the conclusion that Cook's actions were the primary cause of litigation delay and required efforts of opposing counsel.

¶22 Cook's motion was also, in the alternative, a motion for a new trial pursuant to Rule 59(a)(1)(A), (E), (G), and (H). The denial of a motion for a new trial "will be reversed only if it reflects a manifest abuse of discretion given the record and circumstances of the case." *Styles v. Ceranski*, 185 Ariz. 448, 450 (App. 1996). Rule 59(a)(1) provides for certain circumstances under which a court may grant a new trial, including, in relevant part: "any irregularity in the proceedings or abuse of discretion depriving the party of a fair trial;" "excessive or insufficient damages;" "the verdict is the result of passion or prejudice;" or "the verdict, decision, findings of fact, or judgment is not supported by the evidence or is contrary to law."

¶23 We cannot say the trial court abused its discretion in denying Cook a new trial. In Cook's motion below and in his opening brief, he provides no showing of "any irregularity in the proceedings or abuse of discretion" depriving him of a fair trial.[8] Cook makes several arguments regarding the facts the court relied on in awarding sanctions against him, claiming that the court "abused its discretion in making grand assumptions about things that just did not happen, and by choosing to believe the unfounded allegations of opposing counsel over the sworn testimony of

[8]Cook also claims that he "was denied due process by the way the requests for sanctions [were] handled." He argues that it was a violation of his due process rights when the trial court decided that it "knew what Cook was thinking" without a hearing and awarded sanctions against him. Generally, we "do not consider issues, even constitutional issues, raised for the first time on appeal." *Englert v. Carondelet Health Network*, 199 Ariz. 21, ¶ 13 (App. 2000). We therefore decline to address this issue. *See id*.

Chalmers." "[W]hen this court reviews the grant or denial of a motion for a new trial, it does not weigh the evidence. That is the function of the trial court." *Adroit Supply Co. v. Electric Mut. Liab. Ins. Co.*, 112 Ariz. 385, 390 (1975). Because Chalmers' argument would require us to reweigh the evidence, we will not disturb the trial court's denial.

¶24 Rule 59(a)(1)(E) provides for a new trial if there are excessive or insufficient damages. It appears Cook requested a new trial under this subsection because he claims the amount of sanctions awarded was unreasonable. First, to the extent that Cook is arguing that the sanctions awarded against him should be considered damages under Rule 59(a)(1)(E), we disagree. *Compare City Ctr. Exec. Plaza, LLC v. Jantzen*, 237 Ariz. 37, ¶ 14 (App. 2015) ("Damages . . . are compensation for actual injury."), *with Wells Fargo Credit Corp. v. Smith*, 166 Ariz. 489, 497 (App. 1990) ("The purpose of Rule 11 is to discourage wasteful, costly litigation battles by mandatory sanctions where the position of the lawyer will not support a sound basis in law or fact justifying the position asserted."). Regardless, as discussed above, we do not find the amount awarded to be unreasonable, and, therefore, the trial court did not abuse its discretion in denying a new trial due to "excessive or insufficient damages."

¶25 Finally, Cook has made no showing that the denial of his motion was the "result of passion or prejudice." *See* Ariz. R. Civ. P. 59(a)(1)(G). And we find no evidence in the record to support such an assertion. Other than merely disagreeing with many of the factual findings made by the trial court, Cook has not presented any evidence that the judgment was "not supported by the evidence or is contrary to law." *See* Ariz. R. Civ. P. 59(a)(1)(H). Therefore, the court did not abuse its discretion in denying Cook's motion for a new trial under Rule 59(a)(1)(A), (E), (G), or (H).

Fees and Costs on Appeal

¶26 Cook requests his attorney fees and costs on appeal pursuant to A.R.S. §§ 14-1105(B), 12-341.01(B), and 12-341 and Rule 21, Ariz. R. Civ. App. P. Theut also requests his fees and costs under Rule 21 and A.R.S. §§ 14-1105(A) and (C),[9] 14-5414(B), and 12-349(A). Because Cook was not successful on appeal, we decline to award his fees and costs.

[9]Section 14-1105(A), the subsection cited in Theut's answering brief, allows the award of fees incurred by "a decedent's estate or trust" as a result of "unreasonable conduct." We presume Theut meant to cite § 14-1105(B),

¶27 Section 12-349 requires fees to be awarded when a party or attorney: "[b]rings or defends a claim without substantial justification"; "[b]rings or defends a claim solely or primarily for delay or harassment"; or "[u]nreasonably expands or delays the proceeding." A claim is without substantial justification if it "is groundless and is not made in good faith." § 12-349(F). Although Theut prevailed on appeal, we cannot say that Cook's claims were brought without substantial justification, and, therefore, we do not award fees under § 12-349. And, as to §§ 14-1105 and 14-5414, in our discretion, we deny Theut's request. However, as the prevailing party on appeal, we award Theut his costs on appeal upon his compliance with Rule 21. *See Reynolds v. Reynolds*, 231 Ariz. 313, ¶ 16 (App. 2013).

Disposition

¶28 For the foregoing reasons, we affirm.

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which permits fees to be awarded under the same circumstances but in a guardianship or conservatorship case.