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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| VICTOR DEMENT, an unmarried person; BARBARA EDWARDS, a married person; and KAREN EVANS, a minor, by and through her mother and next of friend, CHERYL NORTON,<br><br>Plaintiffs/Appellants,<br><br>v.<br><br>STATE OF ARIZONA, a body politic,<br><br>Defendant/Appellee. | 2 CA-CV 2008-0063<br>DEPARTMENT B<br><br>MEMORANDUM DECISION<br>Not for Publication<br>Rule 28, Rules of Civil Appellate Procedure |

APPEAL FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. CV20040206

Honorable Robert Duber II, Judge

AFFIRMED

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V Á S Q U E Z, Judge.

**¶1** Appellants Victor Dement and Karen Evans[1] appeal from a jury verdict in favor of the State of Arizona on their claims for personal injury arising out of a single vehicle accident in August 2003. On appeal, Dement and Evans argue the trial court abused its discretion by permitting one of the state's witnesses to testify despite late and incomplete disclosure, excluding their demonstrative exhibit, improperly instructing the jury, and denying their motion for new trial. They contend the individual and cumulative weight of the errors as well as public policy considerations require reversal. For the reasons stated below, we affirm.

**Facts and Procedural Background**

**¶2** We view the evidence, and all reasonable inferences derived therefrom, in the light most favorable to upholding the jury's verdict. *Kaman Aerospace v. Ariz. Bd. of Regents*, 217 Ariz. 148, ¶ 2, 171 P.3d 599, 601 (App. 2007); *Inch v. McPherson*, 176 Ariz. 132, 136, 859 P.2d 755, 759 (App. 1992). On August 9, 2003, Dement, Evans, and two of their friends drove from Globe to Show Low to attend a monster truck rally. After they were unable to find lodging for the night, they decided to drive back to Globe. The driver, Joseph Armstrong, fell asleep at the wheel, and drove off the road into a drainage culvert near the highway. Dement and Evans, who had been sleeping in the back seat, were injured.

[1]Karen Evans has married since the filing of the complaint. For consistency, we refer to her by her maiden name.

**¶3** Dement and Evans filed a lawsuit naming Armstrong, his parents, Gila County, and the State of Arizona as defendants. In the complaint they alleged Armstrong had negligently operated the vehicle and his parents had negligently entrusted the vehicle to him. They alleged the state and Gila County were negligent because they had failed "to maintain, and to safeguard the foreseeable and unreasonably dangerous conditions created by the negligently designed and maintained roadway and adjacent area" and they had additionally failed "to provide, install, monitor, and maintain effective and meaningful traffic control devices, . . . to provide adequate safety railings and/or guard rails, . . . to warn, . . . to eliminate visual obstructions, and otherwise . . . to safeguard, remedy, and/or eliminate foreseeable and unreasonably dangerous conditions." Dement, who was rendered paraplegic as a result of the accident, and Evans sought damages for past and future medical expenses, economic loss, pain and suffering, and property damage. Before trial, the court dismissed the claim against Gila County with prejudice, and Dement and Evans settled with Armstrong and his parents. The state was the only remaining defendant.

**¶4** The main issue at trial was whether the state was liable for failing to make specific improvements to the area of Highway 60 where the accident occurred when the state undertook a pavement preservation project in 1989. The project included work on six of thirty-seven culvert ends that were within the "clear zone" of a car accidentally leaving the pavement. But the project did not include work on the culvert ends in the area where Armstrong's vehicle had left the road. The plaintiffs' main contention was that the American

Association of State Highway and Transportation 1989 Roadside Design Guidelines (AASHTO Green Book) provided mandatory standards that required "the drainage culvert and headwall in which the Plaintiffs' vehicle impacted . . . to be extended out at least 30 feet off of the shoulder of the road when the . . . project was conducted," and that the state had been negligent in failing to do so. The jury found in favor of the state. Dement and Evans filed a motion for new trial, which the trial court denied. This timely appeal followed. We have jurisdiction pursuant to A.R.S. § 12-2101(B), (F)(1).

## Discussion

### Permitting Undisclosed Witness to Testify

**¶5** Dement and Evans argue the trial court abused its discretion by permitting Terry Otterness, an Arizona Department of Transportation (ADOT) employee, to testify over their objection that he "was improperly . . . disclosed, untimely disclosed, and gave expert opinions which were cumulative to [the] state's retained expert." They also contend Otterness testified during trial about matters that had not been disclosed before trial. The trial court's admission of evidence is highly discretionary, and we will not reverse absent a clear abuse of that discretion. *Lohmeier v. Hammer*, 214 Ariz. 57, ¶ 7, 148 P.3d 101, 104-05 (App. 2006).

Disclosure of witness

**¶6** Dement and Evans first contend the disclosure of Otterness as a witness was untimely and insufficient under Rule 26.1, Ariz. R. Civ. P., as a matter of law. However,

other than to state the disclosure was improper and untimely, they have wholly failed to support this content with proper argument, including citation to relevant authority.[2] We therefore find this argument waived. *See* Ariz. R. Civ. App. P. 13(a)(6) (briefs must contain argument "with citation to the authorities . . . relied on"); *see also Brown v. U.S. Fid. & Guar. Co.*, 194 Ariz. 85, ¶ 50, 977 P.2d 807, 815 (App. 1998) (summarily rejecting "assertion . . . wholly without supporting argument or citation of authority").

Cumulative testimony

**¶7** Next, Dement and Evans contend the trial court should have precluded Otterness's testimony because it was cumulative to that of the state's expert witness, Don Ivey. However they have waived this argument as well. In their opening brief, they state that they "addressed the cumulative nature of Otterness['s] and Ivey's testimony in their Motion *in limine* No. 1, as both engineers opined that the road work met the standard of care." However, they have failed to direct this court to the actual testimony they contend was cumulative, and they do not provide any authority to support their claim that Otterness's entire testimony would be inadmissible under these circumstances. Consequently, we will

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[2]Dement and Evans cite only to *Gibson v. Gunsch*, 148 Ariz. 416, 417, 714 P.2d 1311, 1312 (App. 1985), and they seem to suggest that preserving an argument in a motion in limine below obviates the need to support the argument on appeal. However, the preservation of an argument in a motion in limine merely means that the party need not object to the same issue during trial, *see id.*, it does not mean the party need not make and support the argument on appeal. However, they do argue extensively that the disclosure statement concerning Otterness's testimony was deficient because it did not reflect the full scope of Otterness's testimony at trial. But this argument, which we later address, is separate from a contention that the original disclosure did not, as a matter of law, comply with Rule 26.1.

not consider this issue further. *See Brown*, 194 Ariz. 85, ¶ 50, 977 P.2d at 815. However, to the extent they argue Otterness provided specific expert opinion testimony that the trial court should have precluded, we address that argument below.

Evidence first disclosed at trial

**¶8** Dement and Evans argue the trial court erred by permitting Otterness to testify "regarding the standard of 'engineering judgment,'" despite the fact that this standard was first disclosed during Otterness's trial testimony. They contend his testimony went beyond the limited topics the court had expressly approved prior to trial and that before Otterness could testify to the standard of "engineering judgment," the state should have filed a motion under Rule 37(c), Ariz. R. Civ. P., for leave to introduce evidence that had not been previously disclosed.

**¶9** Rule 37(c) precludes evidence not disclosed in accordance with Rule 26.1 from being introduced at trial without good cause, unless the failure to disclose is harmless. And, in the context of information first disclosed during trial, for such information to be admissible, the court must first find it could not have been discovered earlier and that the proponent disclosed the information immediately upon discovering it. Ariz. R. Civ. P. 37(c)(3).

**¶10** Well before trial, the state disclosed that it would be calling a witness from ADOT, without naming that witness, and it generally described the substance of the witness's testimony. Then in September 2006, Otterness was disclosed as the ADOT witness, and the

disclosure statement further stated, "Mr. Otterness is employed by the Arizona Department of Transportation Roadway Engineering Group and is expected to testify as to his knowledge and experience regarding ADOT's standards and procedures concerning culvert extensions." Dement and Evans requested supplemental disclosure "regarding the 'knowledge and experience' to which Mr. Otterness will testify[,] . . . including a disclosure of all facts and written documents that Mr. Otterness intends to reference in his trial testimony, or form the foundation for his testimony."

**¶11** The state filed a supplemental disclosure statement, which provided more detail about Otterness's work background and knowledge of ADOT policies and procedures. It also specifically stated that Otterness could be expected to testify, inter alia: (1) about the "standards ADOT used at the time" the pavement preservation project was drafted, (2) that Dement and Evans's expert Voyles's opinion "that the [AASHTO Green Book] is 'mandatory' or even applies to a [pavement preservation] project" was "not accurate," (3) that "ADOT ha[d] not seen or interpreted any standard or guide which applie[d]" to the circumstances of this case, and (4) about any factual information contained in any documents or materials that had been produced or exchanged by the parties. Two days later, Dement and Evans requested further information about Otterness's proposed testimony that was never produced. Approximately eight weeks later, they filed a motion in limine to preclude Otterness's testimony.

**¶12** The trial court denied the motion but apparently recognized there had been some confusion in setting up Otterness's deposition. The court therefore gave Dement and Evans the choice of either deposing Otterness during trial at the state's expense or restricting his testimony as follows:

> That he has been an employee of ADOT for over 30 years; he has an engineering degree; he has experience in roadway design, construction maintenance and other road management; he has testified in the past regarding ADOT procedures; that ADOT . . . relies upon various guides and standards; he may identify what those guides and standards are and whether they are viewed as guides or standards; he may identify the standards ADOT used at the time the project in issue here was drafted, if they have been disclosed to the Plaintiff; and he may identify the consideration that ADOT took into account in these projects, if they have been disclosed to the Plaintiff; he may testify as to his view as it is contrary to Mr. Voyles's; that the [AASHTO Green Book] is mandatory or that it even applies in a [pavement preservation] project; he may testify whether he is or is not aware of any ADOT guide or standard that applies a 30 foot clear zone requirement in consideration of drivers who are asleep . . . .

Dement and Evens opted to allow Otterness to testify within these limits, without obtaining a deposition. At trial, Otterness testified there were no mandatory standards with which the pavement preservation project had to comply, and the Federal Highway Administration (FHWA) was "satisfied with the engineering judgment that was used on each particular project to determine what level of safety would be incorporated." He also stated that "obviously engineering judgment is not a standard" and agreed with Dement and Evans's counsel that, taking into account all phases of engineering and weighing the various

construction options, "a good definition of . . . a standard of engineering judgment is . . . [to m]ake the highway reasonably safe for travelers."

**¶13** We do not agree that this testimony constituted previously undisclosed evidence. It is true that the term "engineering judgment" had not been used by either party before Otterness's testimony; however, this is of no meaningful consequence. Contrary to Dement and Evans's argument, from the beginning of these proceedings, the parties were aware the standard of care and applicable safety precautions would be contested, material issues at trial. And defense expert Ivey's deposition put Dement and Evans on notice well before trial of the state's position that there were no mandatory safety standards that required extending the culvert where the accident had occurred. Otterness's testimony was in conformity with this position, and it was both consistent with the state's disclosure and well within the limits set by the trial court. Thus, we cannot see how Otterness's testimony that there were no standards, but that engineers were required to use their judgment to create reasonably safe roads, went beyond what he was permitted to testify to or introduced new evidence.

**¶14** Furthermore, to the extent Dement and Evans argue Otterness improperly testified as an expert rather than a fact witness, we disagree. As used in Rule 26(b), Ariz. R. Civ. P., an independent expert is a "'person who will offer opinion evidence who is retained for testimonial purposes and who is not a witness to the facts giving rise to the action.'" *In re Commitment of Frankovitch*, 211 Ariz. 370, ¶ 9, 121 P.3d 1240, 1243 (App. 2005),

*quoting* Ariz. R. Civ. P. 26(b), committee cmt. This definition does not include employees of a party who are testifying about issues that are within the scope of their employment, including testimony concerning the application of the employee's professional judgment and opinions that relate to the material issues in dispute. *See Ariz. Dep't of Revenue v. Superior Court*, 189 Ariz. 49, 54, 938 P.2d 98, 103 (App. 1997) (Arizona Department of Revenue employee not an "independent expert" when testifying to professional judgment and underlying opinions giving rise to valuation of copper mine).

**¶15** Here, Otterness, an ADOT employee, provided the factual background concerning ADOT's procedures for determining how and when to upgrade road conditions, its considerations in making these decisions, and what, if any, standards or guidelines ADOT considered to be mandatory in this type of project. He specifically testified that he was not an "accident reconstructionist," he had not viewed the accident site, and he gave no opinion as to the relative safety of this particular section of the highway or whether the improvements made were reasonable under the circumstances. He thus was not testifying as an expert but merely as a fact witness who provided the facts underlying ADOT's decision-making during the 1989 pavement preservation project. The trial court, therefore, did not abuse its discretion in permitting Otterness to testify.

**Demonstrative Exhibit**

**¶16** Next Dement and Evans argue the trial court abused its discretion in precluding their three-dimensional demonstrative model of the accident scene on the ground that it had

not been disclosed substantively until the day of trial. They argue that because they listed the exhibit and provided a general description of it in a disclosure statement sent to defense counsel on the same day the state had disclosed the substance of Otterness's testimony, the trial court should have admitted it.

**¶17** Preliminarily, we remind counsel there is no "tit-for-tat" in a court's evidentiary rulings; decisions concerning admissibility are based on the independent merits of each issue raised. It is therefore irrelevant that the exhibit and Otterness's testimony may have been disclosed in some fashion on the same day. More importantly, however, Dement and Evans provide absolutely no citation to authority supporting the admissibility of the exhibit itself, which they admitted had not been shown to opposing counsel until the first day of trial. We therefore find the issue waived.[3] *Brown*, 194 Ariz. 85, ¶ 50, 977 P.2d at 815.

**Jury Instruction**

**¶18** Dement and Evans next assert the trial court improperly commented on the evidence by instructing the jury that a statute cited by their expert, Voyles, did not exist.

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[3]In any event, Dement and Evans did not provide the state with any information about the exhibit, other than its "essence," until the first day of trial. And, we agree with the trial court that the exhibit "may [have] be[en] the single most demonstrative item of what actually happened that the jury might ever [have] see[n]" and was "effectively a surprise," given the scant disclosure that had been provided. Dement and Evans additionally provided no explanation for the late disclosure except that the exhibit was not finished at the time of the joint pretrial statement. Under these circumstances, we cannot say the trial court abused its discretion in finding the probative value of the demonstrative exhibit substantially outweighed by the danger of prejudice under Rule 403, Ariz. R. Evid., and excluding the exhibit from trial. *See also* Ariz. R. Civ. P. 37(c)(3), cmt. to 1996 and 1997 Amendments (prejudice inevitable for information first disclosed at trial).

They contend that although the citation was technically incorrect, the court went too far in informing the jury the statute did not exist because the content Voyles attributed to the statute was contained in a different, but existing, statute. We will not reverse on the basis of a jury instruction absent both error and prejudice to the substantial rights of the aggrieved party. *Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 504, 917 P.2d 222, 233 (1996).

**¶19** During cross-examination, Voyles testified that in any pavement preservation project, the state is "required to bring the road up to code." Defense counsel then asked which code controlled in this case; Voyles responded it was "the U.S. Code." When counsel asked for the citation to the relevant statute, Voyles testified that it was "CFR . . . 23109." The state later moved to strike Voyles's testimony on multiple grounds, including that the citation he mentioned did not exist. It requested a curative instruction telling the jury to disregard his testimony.

**¶20** The court apparently denied the motion to strike Voyles's entire testimony, but it instructed the jury as follows: "There is an item of judicial notice that I need to tell you about that you would consider as if it were evidence and that is that there is no 23CFR109. It does not exist." Dement and Evans contend the instruction was improper because the error was invited by the state's questioning of Voyles and prejudicial because it cast doubt on Voyles's credibility, "although the substance of his testimony was accurate."

**¶21** First, we fail to see how eliciting Voyles's testimony qualifies as invited error. "By the rule of invited error, one who deliberately leads the court to take certain action may

not upon appeal assign that action as error." *Schlecht v. Schiel*, 76 Ariz. 214, 220, 262 P.2d 252, 256 (1953). The state has not filed a cross-appeal or argued that the trial court ruled erroneously on any issue. Thus the state did not lead the trial court to take any action it is assigning as error on appeal. *See id.* And, in any event, the state committed no error by asking Voyles a question, which elicited an incorrect answer.

**¶22** Furthermore, the court's instruction was a true and accurate statement; that the substance of the statute Voyles cited actually exists in a different statute does not render erroneous the court's instruction that there is no statute numbered 23 CFR 109. And to the extent Dement and Evans complain the instruction was unduly prejudicial because it called Voyles's "overall credibility" into consideration, it was Voyles's own incorrect response that placed his credibility at issue. Jury instructions are designed to "adequately set forth the law applicable to the case." *State v. Rodriguez*, 192 Ariz. 58, ¶ 16, 961 P.2d 1006, 1009 (1998). Here, the jury had been directed to a statute that was not "applicable to the case," and the court was entitled to correct that mistake. Dement and Evans have not established any error, let alone prejudicial error in the jury instruction warranting reversal.

**Motion for New Trial**

**¶23** Last, Dement and Evans contend the trial court abused its discretion by denying their motion for new trial. They argue newly discovered evidence demonstrated that Otterness's testimony was "inaccurate, misleading, and unsupported." In particular, they assert the information they obtained after trial demonstrated the AASHTO Green Book

standards did apply to the 1989 pavement preservation project, contrary to Otterness's trial testimony. The trial court has broad discretion in ruling on a motion for new trial, and we will not reverse that ruling absent a clear abuse of its discretion. *Matos v. City of Phoenix*, 176 Ariz. 125, 130, 859 P.2d 748, 753 (App. 1993).

**¶24** After trial, Voyles submitted a Freedom of Information Act request (FOIA request) to the United States Department of Transportation (USDOT) concerning the safety standards applicable to the pavement preservation project. In response, USDOT informed Voyles it had no records in its official files, but a senior employee independently recalled there had been a letter indicating "that ADOT chose to use the current edition of the AASHTO [Green Book] . . . as their standard for" pavement preservation projects and new highway construction. Based in part on this information, Dement and Evans filed their motion for new trial, and the trial court authorized the parties to conduct additional discovery on this issue to determine whether there would be admissible evidence in the event the court granted a new trial. After the discovery, in which the parties deposed USDOT employee Kenneth Davis, and a hearing on the motion, the court considered the new evidence and determined that it conformed with the evidence produced at trial and therefore did not establish there were "error(s) in the admission or rejection of evidence or other errors of law which materially affected [Dement and Evans's] right to a fair trial."

**¶25** "In order to warrant a new trial based on newly discovered evidence, it must appear to the trial court that the evidence would probably change the result . . . and that it

could not have been discovered before trial by the exercise of due diligence." *Id.* During his deposition, Davis testified that Arizona had adopted the AASHTO Green Book as its standard for pavement preservation projects. However, he later clarified:

> The [AASHTO] Green Book and the way the FHWA construes the [AASHTO] Green Book is that there's certain aspects that are actually standards that we actually apply and say if you deviate from that, you're deviating.
>
> When the [AASHTO] Green Book makes reference to other guides and so forth, and actually that same document is listed in the rule making as a guide for use on federal-aid highways, the guide is a compendium of recommended practice but it falls short of what FHWA would consider to be an absolute standard.
>
> . . . .
>
> There are 13 controlling criteria that FHWA identified. There are many criteria in the [AASHTO] Green Book. You know, and there's only 13 that FHWA considers to be standards under which if they deviate[,] . . . there needs to be a design exception.

**¶26** This testimony is consistent with Otterness's testimony that he was "not aware of any specific safety standard that the Federal Highway Administration says we have to bring [a pavement preservation project] unto. They're satisfied with the engineering judgment that was used on each particular project to determine what level of safety would be incorporated." Ivey similarly testified that "neither [codes nor standards] are applicable [to pavement preservation projects]. They are guidelines; they are policies; they are research reports, they are not codes. They are not standards with one exception," which is not relevant in this case. Thus, the "newly discovered evidence" would merely have been cumulative to

the testimony of Otterness and Ivey and, as the trial court pointed out, it did not establish that any of the mandatory standards contained in the AASHTO Green Book applied to the pavement preservation project at issue in this case. *See Ruesga v. Kindred Nursing Centers, L.L.C.*, 215 Ariz. 589, ¶ 17, 161 P.3d 1253, 1259 (App. 2007) (newly discovered evidence will not warrant new trial if merely cumulative to evidence produced at trial). We therefore cannot say this evidence would have changed the result at trial. *See Matos*, 176 Ariz. at 130, 859 P.2d at 753.

**¶27** We are also not convinced Dement and Evans exercised due diligence in attempting to obtain this information before trial. They contend ADOT's adoption of the AASHTO Green Book was "newly discovered after Otterness's undisclosed trial testimony," and "[t]he need to research USDOT's standards never arose until trial, when Otterness offered his standard of 'engineering judgment' when utilizing federal money." But, as they stated in their opening brief, the "crux" of their case was that when making improvements to this stretch of road, ADOT "w[as] required to make safety improvements, and bring the stretch of highway up to the current standard, . . . set forth in [the AASHTO Green Book]."

**¶28** Furthermore, in his pretrial deposition, Ivey testified, "[T]here's no such thing as highway standards, unless . . . A[]DOT calls some of their things standards." He further stated, "[T]here is a hierarchy of documents that highway engineers go by. And the highest class of those documents are standards. . . . The only standard that we are faced with nationally is the MUTCD," which provides uniformity for highway signs and markings

throughout the country. Otterness's disclosure also stated that he would testify about "ADOT's use and reliance o[n] various guides and standards" and that Voyles was "not accurate that the [AASHTO Green Book] is 'mandatory' or even applies to a []pavement [preservation] project."

**¶29** Thus, Dement and Evans had been put on notice that the standard of care was a material issue long before Otterness testified. Knowing the application of the AASHTO Green Book was the "crux" of their case, they could have submitted their FOIA request to USDOT at any point before trial.[4] Therefore, they failed to properly exercise due diligence in discovering this evidence before trial. *Chambers v. Taber*, 21 Ariz. App. 291, 293-94, 518 P.2d 1008, 1010-11 (1974) (party lacks due diligence where it does not make reasonable effort to discover evidence before trial because it believed evidence unnecessary); *Tamsen v. Weber*, 166 Ariz. 364, 369, 802 P.2d 1063, 1068 (App. 1990) (lack of due diligence where

[4]For this reason, Dement and Evans's argument that they satisfied their due diligence obligation because the information would have been disclosed to them before trial had the state complied with their requests for the production of documents also fails. And, in any event, they could have filed a motion to compel under Rule 37, Ariz. R. Civ. P., to bring any issue concerning the state's compliance with disclosure to the court's attention well in advance of trial. However, they failed to do so and instead chose to file a motion in limine three days before trial to exclude Otterness's testimony, based in part on the alleged lack of disclosure. At no time did they file a separate motion seeking the production of the missing documents. *See Allstate Ins. Co. v. O'Toole*, 182 Ariz. 284, 288, 896 P.2d 254, 258 (1995) ("[A]n opposing party's action or inaction in attempting to resolve a discovery dispute short of calling for the exclusion of evidence can be an important factor. Lying in wait is not an acceptable strategy.") (citation omitted).

"degree of activity or diligence which led to the discovery of the evidence after trial[,] would have produced it had diligence been exercised before trial").

**¶30** Finally, even assuming Davis's testimony was contrary to Otterness's and not discoverable before trial, evidence that merely contradicts or impeaches the testimony of a trial witness is not "newly discovered evidence" warranting a new trial. *Ghyselinck v. Buchanan*, 13 Ariz. App. 125, 128, 474 P.2d 844, 847 (1970). Based on the foregoing, we cannot say the trial court abused its discretion in denying the motion for new trial on the basis of newly discovered evidence.

**Disposition**

**¶31** For the reasons stated above, we affirm.[5] As the prevailing party on appeal, the state is entitled to costs upon compliance with Rule 21, Ariz. R. Civ. App. P.

_____
GARYE L. VÁSQUEZ, Judge

CONCURRING:

_____
PETER J. ECKERSTROM, Presiding Judge

_____
J. WILLIAM BRAMMER, JR., Judge

[5]Because we have found no error, we need not address the issues of cumulative error or public policy.