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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

CHARLES HAROUTUNIAN, a single man, Plaintiff/Appellee/Cross-Appellant, v. VALUEOPTIONS, INC., a Virginia corporation, Defendant/Appellant/Cross-Appellee.	2 CA-CV 2008-0190 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20045138

Honorable John F. Kelly, Judge

AFFIRMED

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and

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H O W A R D, Chief Judge.

¶1 This matter arises from appellee/plaintiff Charles Haroutunian's lawsuit against appellant/defendant ValueOptions, Inc. for common law negligence and statutory elder abuse. After a trial, the jury found in favor of Haroutunian and awarded him over $300,000. ValueOptions appeals from the trial court's denial of its motion for judgment as a matter of law or alternative motion for new trial. Haroutunian cross-appeals from the trial court's denial of its various requests for attorney fees incurred during different phases of the litigation. Because the court did not err in denying judgment as a matter of law or a new trial or in denying Haroutunian's requests for attorney fees, we affirm.

Facts

¶2 "In reviewing a judgment based on a jury verdict, we view the evidence and all reasonable inferences therefrom in the light most favorable to sustaining the judgment." *Aegis of Ariz., L.L.C. v. Town of Marana*, 206 Ariz. 557, ¶ 2, 81 P.3d 1016, 1019 (App. 2003). In 2002, Haroutunian attempted suicide by overdosing on Valium. He was hospitalized and underwent a psychological evaluation at the Maricopa County Medical Center. His daughter subsequently petitioned for his court-ordered evaluation and treatment.

At a hearing on October 10, 2002, the superior court ordered involuntary treatment through a combination of inpatient and outpatient treatment. The inpatient treatment was to be in a "Local Mental Health Treatment Agency for at least 25 days then if appropriate at the Arizona State Hospital." The court appointed the Maricopa County Public Fiduciary as Haroutunian's temporary guardian. The court also ordered ValueOptions to supervise and administer Haroutunian's outpatient care. ValueOptions is the Regional Behavioral Health Authority that contracts with the Arizona Department of Health Services to provide behavioral health services to Maricopa County residents pursuant to A.R.S. § 36-3410. *See Bailey-Null v. ValueOptions*, 221 Ariz. 63, ¶ 2, 209 P.3d 1059, 1062 (Ct. App. 2009).

¶3 On or about October 16, Haroutunian was transferred from Maricopa County Medical Center in Phoenix to the Santa Rosa Care Center in Tucson. The transfer to Santa Rosa was arranged by a social worker at the Maricopa County Medical Center. The social worker arranged the transfer with the Veterans Administration because it was paying for Haroutunian's care. ValueOptions was informed that Haroutunian had been transferred, but neither the Public Fiduciary nor ValueOptions informed the Maricopa County Superior Court of the transfer. ValueOptions began the process of arranging a formal transfer of Haroutunian's case to the Regional Behavioral Health Authority in Pima County, but the process was never completed. Apparently due to a clerical error, ValueOptions then concluded that the court order for involuntary treatment had been terminated and subsequently closed its file on Haroutunian.

¶4 Haroutunian was confined at Santa Rosa for approximately six months. He was housed in a "locked-down unit" with patients suffering from severe physical and mental impairments. The atmosphere in the unit was "volatile" and "chaotic." Haroutunian shared a room and a bathroom with other men and had no privacy. The residents were supervised at all times, even in the bathroom, and were permitted outside only for short cigarette breaks in a confined area. The residents with whom Haroutunian was housed had various problems controlling bodily functions, resulting in constant "accidents": one resident regularly vomited all over the bathroom; others would cough and spit at the communal dining table; some residents screamed, and one shook his metal bed frame and screamed or yelled throughout the night. Other than treatment for the flu and medication for depression, Haroutunian received no medical care or psychiatric treatment at Santa Rosa.

¶5 A social worker at Santa Rosa, Wendy White, did not believe Haroutunian belonged there. She testified that "[h]e didn't seem to fit in. He took complete care of himself. He was cognitive. He could carry on conversations without any trouble. He knew what date it was, what year it was, what the situation was, that kind of thing[;] . . . he was oriented." White eventually helped Haroutunian get an attorney. Through the attorney's efforts, the Maricopa County Superior Court learned of Haroutunian's situation and set a hearing to determine his status and determine whether ValueOptions and the public fiduciary should be sanctioned for failing to carry out the court's orders. At the hearing, a ValueOptions case management supervisor testified that ValueOptions was responsible for

maintaining contact with Haroutunian to ensure he received proper treatment and that ValueOptions should have completed the formal transfer process. The public fiduciary also acknowledged errors in handling Haroutunian's case.

¶6 After the hearing, ValueOptions sent psychiatrists to Santa Rosa to evaluate Haroutunian. Based on their evaluation, ValueOptions determined he still met the criteria for court-ordered treatment. Haroutunian's attorney then arranged for him to be evaluated by an independent psychiatrist and a neuropsychologist. After ValueOptions received the reports from these two doctors, it submitted a "notification of release from court-ordered treatment." The court subsequently ordered that Haroutunian's treatment be terminated, and he was then released from Santa Rosa. The probate court ordered sanctions against ValueOptions and the public fiduciary for failing to abide by its original order. ValueOptions paid the sanction amount in full.

¶7 Haroutunian sued ValueOptions alleging common law negligence and elder abuse under A.R.S. § 46-455. After a trial, the jury returned a verdict in favor of Haroutunian, awarding him damages of $365,000. The jury further found ValueOptions to be eighty-five percent at fault and found nonparty Maricopa County to be fifteen percent at fault. The trial court entered judgment against ValueOptions for $310,250. The court denied ValueOptions' subsequent request to extend the time to file post-trial motions. After ValueOptions appealed, this court reversed the trial court's decision and remanded to permit the filing of those motions. *See Haroutunian v. ValueOptions, Inc.*, 218 Ariz. 541, ¶ 29, 189

P.3d 1114, 1124 (App. 2008). ValueOptions then filed a motion for judgment as a matter of law or a new trial. The trial court denied the motion, as well as Haroutunian's various requests for attorney fees.

Issues on Appeal

¶8 ValueOptions presents essentially two arguments in support of its claim that the trial court erred in denying judgment as a matter of law and two arguments in support of its claim the trial court erred in refusing to grant a new trial.

ValueOptions' Duty to Haroutunian

¶9 ValueOptions first argues the trial court erred in denying judgment as a matter of law because, it claims, it owed no duty to Haroutunian. We review de novo the court's decision on a motion for judgment as a matter of law. *Warne Invs., Ltd. v. Higgins*, 219 Ariz. 186, ¶ 33, 195 P.3d 645, 653 (App. 2008). Whether a defendant owes the plaintiff a duty of care is a question of law decided by the court. *See Gipson v. Kasey*, 214 Ariz. 141, ¶ 9, 150 P.3d 228, 230 (2007).

¶10 ValueOptions offers various arguments in support of its contention that it did not owe a duty to Haroutunian. But ValueOptions does not dispute that the superior court ordered it to supervise and administer Haroutunian's outpatient treatment. Thus, as a matter of law, ValueOptions owed a duty of care to Haroutunian. *See Sorichetti v. City of New York*, 408 N.Y.S.2d 219, 226, 230 (N.Y. Sup. Ct. 1978) (court order establishes relationship creating duty); *see also Semler v. Psyc. Inst. of Washington, D.C.*, 538 F.2d 121, 125 (4th Cir.

1976) (same); *Gipson*, 214 Ariz. 141, n.3, 150 P.3d at 232 n.3 (relationships may create basis for duty under common law).

¶11 ValueOptions first characterizes Haroutunian's claim as being that it had a "duty to rescue" him from Santa Rosa. ValueOptions argues that, because it never had actual physical custody of Haroutunian or any common law duty, it had no obligation to rescue him. But ValueOptions had a court-ordered duty to supervise and manage Haroutunian's outpatient treatment. And none of the authorities on which ValueOptions relies concerning duty to rescue would negate that duty. Therefore, ValueOptions' argument about a "duty to rescue" is inapposite.

¶12 ValueOptions claims its duty under § 46-455(B) is similarly limited because it did not have actual custody of Haroutunian. But that section imposes liability on an enterprise "appointed by a court to provide care." § 46-455(B). It does not require actual custody.

¶13 Likewise, ValueOptions' argument regarding the effectiveness of a minute entry is unavailing. It contends Haroutunian improperly relied on an unsigned minute entry to show ValueOptions had a duty of care and contends this minute entry had no legal effect. But we need not address this theory because, as we conclude above, the formal order signed by the judge did create a legal duty of care.

¶14 ValueOptions also contends that its duty did not arise while Haroutunian was being treated as an inpatient and that he was still in inpatient care at Santa Rosa. But

ValueOptions' duty arose no later than when the superior court's order became legally effective; that is, when it was signed by the judge and filed with the clerk of the court. *See* Ariz. R. Civ. P. 58(a). Whether ValueOptions' subsequent actions or inactions constituted a breach of that duty is a distinct and separate factual issue. *See Gipson*, 214 Ariz. 141, ¶ 10, 150 P.3d at 230 (delineating difference between existence of duty and breach of duty). Because ValueOptions has not provided relevant argument or authority on the issue of whether it breached the duty imposed on it by the court order, it has waived such argument on appeal. *See FIA Card Servs., N.A. v. Levy*, 219 Ariz. 523, n.1, 200 P.3d 1020, 1021 n.1 (App. 2008) (argument undeveloped on appeal deemed abandoned).

¶15 Moreover, even if ValueOptions had not waived this argument, Haroutunian presented sufficient evidence from which a jury could reasonably determine that ValueOptions had breached its duty. *See Gipson*, 214 Ariz. 141, ¶ 10, 150 P.3d at 230. A trial court should grant a motion for judgment as a matter of law only "'if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense.'" *Acuna v. Kroack*, 212 Ariz. 104, ¶ 24, 128 P.3d 221, 227-28 (App. 2006), *quoting Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990); *see also* Ariz. R. Civ. P. 50(a). On appeal, we view the evidence and any reasonable inferences therefrom in the light most favorable to Haroutunian. *See Warne Invs.*, 219 Ariz. 186, ¶ 15, 195 P.3d at 650.

¶16 Haroutunian presented evidence that he was a "consumer" receiving services from ValueOptions before he was moved to Santa Rosa. According to ValueOptions' policy, a consumer is to receive "never less than one face-to-face contact per month by both [a] Case Manager and [an] attending Psychiatrist." When a ValueOptions client is moved to a different county, ValueOptions has a formal transfer procedure to ensure the Regional Behavioral Health Authority in the new county takes over supervision and monitoring of the patient. Part of this formal procedure also involves notifying the superior court of the transfer. Haroutunian presented evidence that ValueOptions initiated the formal transfer procedure but never completed it after Haroutunian was physically moved from Maricopa County to the facility in Pima County. Additionally, ValueOptions never informed the court of the transfer. Haroutunian further presented evidence that, as a result of a clerical error, ValueOptions concluded the court order for Haroutunian's treatment had been terminated. ValueOptions therefore mistakenly closed Haroutunian's file and took no further action regarding his care.

¶17 At trial, Haroutunian presented a transcript of the probate hearing at which a ValueOptions case management supervisor had admitted the case management team had made errors. The supervisor testified that ValueOptions believed it was "responsible for maintaining contact with him" and was "responsible for assuring that [Haroutunian] was receiving the services that were appropriate for him and, [for] following up on the request for [the] transfer." The supervisor further testified that ValueOptions should have contacted

Santa Rosa to relay the information that the court order had been terminated. He noted that ValueOptions had failed to do so. The supervisor further stated that, when he learned—months later and approximately one week before the probate hearing—that the court's order for treatment had not been terminated, ValueOptions re-opened Haroutunian's file and took steps to "reinitiate care."

¶18 The jury was also presented with the evidence that ValueOptions had been sanctioned for its conduct and had paid for legal expenses Haroutunian had incurred in securing his release from Santa Rosa. Haroutunian also presented to the jury a copy of a pleading ValueOptions had submitted to the superior court after the probate hearing in which it stated:

> ValueOptions acknowledged [its] responsibility in this matter and informed the court of the reasons for this anom[a]lous occurrence and described the corrective actions immediately implemented to insure that such events do not happen again. As the court may recall, Vetera[ns] Administration involvement as the primary payer resulted in Mr. Haroutunian[']s placement out of county in Tucson. No change of venue to Pima County, thereby transferring responsibility for outpatient services, was ever coordinated through ValueOptions primarily because of an erroneous entry in the ValueOptions case management system reflecting that Mr. Haroutunian's matter had been closed. As a result, Mr. Haroutunian did not receive subsequent outpatient services.

In light of this evidence, the jury could reasonably find ValueOptions had breached its duty of care to Haroutunian. Therefore, judgment as a matter of law with respect to this issue

would have been error.[1] *See* Ariz. R. Civ. P. 50(a); *Warne Invs.*, 219 Ariz. 186, ¶ 33, 195 P.3d at 653; *see also Gipson*, 214 Ariz. 141, n.1, 150 P.3d at 230 n.1.

¶19 ValueOptions also asserts, primarily in its reply brief, that an action under § 46-455(B) may not be brought against it because the statute only applies to individuals or entities that *provide* care. ValueOptions argues that, because it is a Regional Behavioral Health Authority, it only *manages* care and does not deliver direct services. *See* § 36-3410(C). It contends that therefore it is not a permissible defendant under § 46-455(B).

¶20 This court does not generally address claims raised for the first time in a reply brief. *See Dawson v. Withycombe*, 216 Ariz. 84, ¶ 91, 163 P.3d 1034, 1061 (App. 2007). In any event, ValueOptions ascribes too narrow a meaning to the word "provide." *See The American Heritage Dictionary* 997 (2d college ed. 1982) ("provide" means to "supply" or "make available"). And this court has already held that § 46-455(B) is not limited to only "those who have a direct caregiver-patient relationship with an incapacitated or vulnerable adult." *Corbett v. ManorCare of Am., Inc.*, 213 Ariz. 618, ¶ 36, 146 P.3d 1027, 1038 (App. 2006). It includes an entity that "'has assumed a legal duty to provide care.'" *Id.* ¶ 35, *quoting* § 46-455(B). As we have stated above, ValueOptions had such a legal duty.

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[1]The parties disagree over whether Haroutunian's time at Santa Rosa was inpatient time or outpatient time. In light of our analysis above, we conclude it is unnecessary to resolve this issue. ValueOptions clearly owed a duty of care to Haroutunian and, regardless of how Haroutunian's time at Santa Rosa is characterized, sufficient evidence existed to show ValueOptions breached that duty.

Prima Facie Case of Negligence

¶21 ValueOptions next contends the court erred in denying its motion for judgment as a matter of law on the grounds that Haroutunian failed to show causation and damages. Both causation and damages are required elements of a negligence claim, and both are generally issues of fact to be determined by a jury. *See Gipson*, 214 Ariz. 141, ¶ 9, 150 P.3d at 230. To show causation, a plaintiff must prove "cause-in-fact," that is, that the injury would not have occurred but for the defendant's act. *Ontiveros v. Borak*, 136 Ariz. 500, 505, 667 P.2d 200, 205 (1983). The plaintiff must also prove "proximate cause," which is defined as "'that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces an injury, and without which the injury would not have occurred.'" *Saucedo ex rel. Sinaloa v. Salvation Army*, 200 Ariz. 179, ¶ 15, 24 P.3d 1274, 1278 (App. 2001), *quoting Robertson v. Sixpence Inns of Am., Inc*., 163 Ariz. 539, 546, 789 P.2d 1040, 1047 (1990). ValueOptions appears to argue only that Haroutunian failed to show cause-in-fact.

¶22 "The defendant's act or omission need not be a 'large' or 'abundant' cause of the injury; even if defendant's conduct contributes 'only a little' to plaintiff's damages, liability exists if the damages would not have occurred but for that conduct." *Robertson*, 163 Ariz. at 546, 789 P.2d at 1047, *quoting Ontiveros*, 136 Ariz. at 505, 667 P.2d at 205. The "[p]laintiff need only present probable facts from which the causal relationship reasonably may be inferred." *Id.* A court may enter a judgment as a matter of law on the question of causation "[o]nly when plaintiff's evidence does not establish a causal connection, leaving

causation to the jury's speculation, or where reasonable persons could not differ on the inference derived from the evidence." *Id.*

¶23 In light of the evidence previously summarized regarding ValueOptions' breach of its duty, a jury could reasonably infer that ValueOptions' erroneous handling of Haroutunian's case contributed at least "a little" to his damages. *See id.* If ValueOptions had properly continued to supervise Haroutunian's case to ensure he received appropriate services, had properly completed the formal transfer procedure and informed the court of the transfer, and had not improperly closed Haroutunian's case file, Haroutunian would not have been inappropriately confined.

¶24 Further, contrary to ValueOptions' argument, the jury could reasonably conclude that, by contributing to his confinement, ValueOptions damaged Haroutunian. Haroutunian testified about having panic attacks as a result of his confinement at Santa Rosa. And ValueOptions presented expert testimony from a psychiatrist who had evaluated Haroutunian and had diagnosed him as possibly having an "adjustment disorder" as the result of his experience at Santa Rosa. The psychiatrist further testified Haroutunian reported having nightmares about Santa Rosa.

¶25 ValueOptions also asserts Haroutunian failed to prove he had incurred legally cognizable damages. As noted above, damages are generally a factual issue to be decided by the jury. *Gipson*, 214 Ariz. 141, ¶ 9, 150 P.3d at 230. Citing a treatise and out-of-state cases, ValueOptions asserts Haroutunian sought compensation for the loss of his physical

freedom and that "this interest is not protected by the law of negligence." But ValueOptions elicited testimony from Haroutunian that he was seeking damages for his panic attacks, a psychological condition. And, as explained above, it was ValueOptions' own expert who offered evidence from which the jury could find Haroutunian suffered from nightmares and an "adjustment disorder." Thus, even if ValueOptions is correct that mere loss of freedom is not compensable in a negligence action, the jury had sufficient evidence to find Haroutunian had incurred other "actual" damages that were compensable. *See In re Guardianship/Conservatorship of Denton*, 190 Ariz. 152, 155, 945 P.2d 1283, 1286 (1997) (actual damages include pain and suffering).

¶26 In sum, a "legally sufficient evidentiary basis" existed for the jury to find in Haroutunian's favor. Ariz. R. Civ. P. 50(a)(1). Therefore, the court did not err in denying ValueOptions' motion for judgment as a matter of law. *See Warne Invs.*, 219 Ariz. 186, ¶ 33, 195 P.3d at 653.

Expert Testimony of Former Superior Court Judge

¶27 In support of its claim that the trial court should have ordered a new trial, ValueOptions argues the court erred in permitting certain testimony by Haroutunian's expert witness, former superior court judge Margaret Houghton. We review the denial of a motion for new trial for an abuse of discretion. *Warne Invs.*, 219 Ariz. 186, ¶ 33, 195 P.3d at 653. The permissible grounds for granting a new trial are provided in Rule 59(a), Ariz. R. Civ. P. Although failing to cite Rule 59(a), ValueOptions appears to argue it was entitled to a new

trial under subsection six of that rule. Rule 59(a)(6) provides that a new trial may be granted if a party's rights were materially affected by an "[e]rror in the admission or rejection of evidence, error in the charge to the jury, or in refusing instructions requested, or other errors of law occurring at the trial or during the progress of the action."

¶28 ValueOptions argues portions of Houghton's testimony were not appropriate expert testimony because they were "directed at a legal question (i.e., duty and effect of Court Order), not a question of fact." *See Webb v. Omni Block, Inc.*, 216 Ariz. 349, ¶¶ 17, 20, 166 P.3d 140, 145, 146 (App. 2007) (expert may not testify to legal conclusion). ValueOptions challenges Houghton's opinion testimony that the superior court "had ordered ValueOptions to administer and supervise both the inpatient and the outpatient treatment, that ValueOptions was responsible for Mr. Haroutunian's care, and that he could not be transferred to Pima County." ValueOptions also complains that Houghton conveyed an erroneous legal standard when she testified that "there was no practical difference between a minute entry and a formal written order." In addition, ValueOptions suggests the fact that Houghton was a former judge had a prejudicial effect on the jury.

¶29 Before trial, ValueOptions filed a motion in limine to preclude Houghton's testimony entirely, which the trial court denied. But ValueOptions did not raise in that motion the arguments it now raises on appeal. Additionally, although ValueOptions raised certain objections at trial to some of the testimony about which it now complains, it did not object on the grounds that Houghton was improperly testifying as an expert to a conclusion

of law about ValueOptions' duty to Haroutunian. Nor did ValueOptions object that Houghton's status as a former superior court judge would have an improper prejudicial effect on the jury. An objection on one ground does not preserve another for appeal. *See Romero v. Sw. Ambulance*, 211 Ariz. 200, ¶ 6, 119 P.3d 467, 470-71 (App. 2005); *Sulpher Springs Valley Elec. Coop., Inc. v. Verdugo*, 14 Ariz. App. 141, 146, 481 P.2d 511, 516 (1971). Accordingly, we will not address these arguments. *Id.*

¶30 ValueOptions further challenges Houghton's testimony that her "'ultimate opinion' was that 'due to the conduct of ValueOptions, Mr. Haroutunian was wrongly imprisoned' and denied mental health treatment." But ValueOptions cites a portion of the record in which it elicited this testimony, not Haroutunian. Therefore, ValueOptions invited any purported error with respect to this testimony and may not complain about it on appeal. *See Martinez v. Schneider Enters., Inc.*, 178 Ariz. 346, 348, 873 P.2d 684, 686 (App. 1994); *see also Acheson v. Shafter*, 107 Ariz. 576, 579, 490 P.2d 832, 835 (1971).

Jury Instruction on "Incapacitated" or "Vulnerable" Adult

¶31 ValueOptions also argues the court erred in denying the motion for new trial by "omitting from the jury instructions the requirement that the jury find Mr. Haroutunian incapacitated or vulnerable." Again, we presume ValueOptions intended to assert that it is entitled to a new trial under Rule 59(a)(6).

¶32 ValueOptions did not request the specific instruction it now complains was missing. Accordingly, it has not preserved this issue for appeal. *See* Ariz. R. Civ. P. 51(a)

("No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection."); *The S Dev. Co. v. Pima Capital Mgmt. Co.*, 201 Ariz. 10, ¶ 20, 31 P.3d 123, 132 (App. 2001); *see also AMERCO v. Shoen*, 184 Ariz. 150, 161, 907 P.2d 536, 547 (App. 1995) (failure to offer acceptable alternative instruction may waive objection).

¶33 In its reply brief, ValueOptions asserts in a single sentence that the purported error in the instructions is fundamental. But it provides no analysis or citation to authority to support this assertion, and the argument is therefore waived. *See FIA Card Servs.*, 219 Ariz. 523, n.1, 200 P.3d at 1021 n.1 (undeveloped argument deemed abandoned). Moreover, we do not address arguments raised for the first time in the reply brief. *See Dawson*, 216 Ariz. 84, ¶ 91, 163 P.3d at 1061. Consequently, the trial court did not abuse its discretion in denying ValueOptions' motion for a new trial.

Issues on Cross-Appeal

¶34 Haroutunian raises several arguments in his cross-appeal concerning the trial court's denial of his requests for attorney fees at various stages of the case. We review a trial court's denial of attorney fees for an abuse of discretion. *Orfaly v. Tucson Symphony Soc'y*, 209 Ariz. 260, ¶ 18, 99 P.3d 1030, 1035 (App. 2004); *see also* A.R.S. § 46-455(H)(4) ("such orders *may* include" and "[t]he court *may* order the payment of reasonable attorney fees") (emphasis added). But, to the extent that any of Haroutunian's arguments raise questions of

law, we review them de novo. *See Fremont Indem. Co. v. Indus. Comm'n of Ariz.*, 182 Ariz. 405, 408, 897 P.2d 707, 710 (App. 1995).

Motion for Attorney Fees Incurred During Trial

¶35 Haroutunian first challenges the trial court's denial of his motion for attorney fees incurred at trial. Eight days after trial and six days after the clerk's mailing of the decision, Haroutunian filed a notice of his intent to seek such attorney fees incurred. Approximately one month later, he filed a formal motion seeking the same, accompanied by supporting affidavits. The trial court denied Haroutunian's motion as untimely under Rule 54(g)(2), Ariz. R. Civ. P., which requires that a party seeking attorney fees file a motion requesting the fees "within 20 days from the clerk's mailing of a decision on the merits of the cause, unless extended by the trial court."

¶36 Relying on Rule 54(g)(4), Haroutunian first claims the time limit imposed by Rule 54(g)(2) does not apply to his claim for attorney fees because the attorney fees were an element of his damages recoverable under § 46-455.[2] Rule 54(g)(4) exempts motions for

[2]ValueOptions contends Haroutunian did not raise this argument in his motion for attorney fees or in his reply in support of that motion and therefore claims that the argument is waived. *See Evans Withycombe, Inc. v. W. Innovations, Inc.*, 215 Ariz. 237, ¶ 15, 159 P.3d 547, 550 (App. 2006) (this court generally does not consider on appeal arguments raised for the first time in a motion for reconsideration). But Haroutunian's reply in support of his motion for attorney fees does imply, albeit briefly, that the time limit of Rule 54(g) does not apply to "causes in which the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial." Although Haroutunian's argument could have been more explicit, we nevertheless consider its merits.

attorney fees from the time limits prescribed in Rule 54(g)(2) when the fees are "an element of damages to be proved at trial."

¶37 Section 46-455(H)(4) permits the superior court after a determination of liability to order the "payment of actual and consequential damages, *as well as* costs of suit and reasonable attorney fees." *Id*. (emphasis added). When evaluating whether attorney fees are an element of damages under the statute, we must "determine and give effect to legislative intent." *See City of Phoenix v. Phoenix Employment Relations Bd.*, 207 Ariz. 337, ¶ 11, 86 P.3d 917, 920 (App. 2004). We look first to the plain language of the statute as the best indicator of legislative intent. *Mejak v. Granville*, 212 Ariz. 555, ¶ 8, 136 P.3d 874, 876 (2006). By allowing an order awarding damages "as well as" costs and fees, the plain language of § 46-455(H)(4) demonstrates that costs of suit and reasonable attorney fees are separate from and in addition to damages that may be awarded by the superior court. *Cf. Spanier v. U.S. Fid. and Guar. Co.*, 127 Ariz. 589, 599, 623 P.2d 19, 29 (App. 1980) (award of attorney fees against defendant for litigating with that defendant not element of damages).

¶38 Moreover, Haroutunian presented no evidence of his attorney fees during trial—which is required if they are an element of damages and if a motion for those fees is to be exempted from the time constraints of Rule 54(g)(2). Haroutunian also did not claim attorney fees as part of his damages during closing argument, and attorney fees were not included in the jury instructions on damages. Finally, Haroutunian's argument is seriously undercut by his own "Notice of Intent to File Attorney Fees," which states: "Affidavits and

other supporting information and documents shall be filed *within the time required, pursuant to Rule 54(g)*." (Emphasis added.) Haroutunian's attorney fees were not an element of damages to be proved at trial for purposes of Rule 54(g)(4) and are therefore subject to the time constraints of Rule 54(g)(2).

¶39 Haroutunian also contends his § 46-455(H)(4) attorney fee claim is not subject to Rule 54(g)(2)'s time limit because he followed the statute's requirement that attorney fees be determined after the determination of liability. But Rule 54(g)(2) provides for the attorney fee determination to be made after the decision on the merits, which is after a determination of liability. And nothing in the statute's language indicates that the legislature did not intend the normal rules of civil procedure to apply. *See* § 46-455(H)(4).

¶40 Haroutunian next argues the trial court erred in denying his motion as untimely because his initial notice of intent to seek attorney fees, which was filed within the twenty-day time frame required by Rule 54(g)(2), constituted a motion for attorney fees under Rule 54(g). He contends that the motion for attorney fees filed after the expiration of the twenty-day period was not a motion in and of itself but an amendment to the original "motion."

¶41 A motion must "state with particularity the grounds therefor, . . . set forth the relief or order sought" and, at a minimum, "the precise legal points, statutes and authorities relied on." Ariz. R. Civ. P. 7.1(a); *see also Black's Law Dictionary* 1036 (8th ed. 1999) (motion is request for ruling or order); *cf. Kline v. Kline*, No. 1 CA-CV 08-0050, ¶ 16, 2009 WL 1423354 (Ariz. Ct. App. May 21, 2009) (defining motion as written request); *State v.*

Bejarano, 219 Ariz. 518, ¶ 12, 200 P.3d 1015, 1019 (App. 2008) (motion to suppress is request that court prohibit introduction of illegally obtained evidence). Unlike his later, untimely motion, Haroutunian's initial notice of intent does not request an award of a specific amount of attorney fees or costs or meaningfully support his request for fees and nontaxable costs with "precise legal points, statutes and authorities." *See* Rule 7.1(a). It merely states that Haroutunian *intends* to seek or request attorney fees in the future. An intent to request something is not the same as an actual request for relief. Hypothetically if the trial court had granted Haroutunian the $100,000 estimated in the notice after he had later filed a timely and proper motion requesting $134,175 plus $15,175 in costs, Haroutunian no doubt would have complained. His notice of intent to file attorney fees is thus not a motion for attorney fees.[3] We cannot say the trial court abused its discretion in determining Haroutunian's actual motion for attorney fees was therefore not timely under Rule 54(g)(2). *See Allstate Ins. Co. v. Universal Underwriters, Inc.*, 199 Ariz. 261, ¶ 16, 17 P.3d 106, 111 (App. 2000) (referring to untimeliness of motion as ground for upholding denial).

¶42 Haroutunian suggests, however, that this result would elevate form over substance. But we have explained above that Haroutunian's notice of intent was lacking in

[3]As ValueOptions stated in its answering brief to Haroutunian's cross-appeal, Haroutunian's notice of intent to request attorney fees was likely instead a misguided attempt to comply with the previous version of Rule 54, which required a party claiming attorney fees to file a notice of intent within fifteen days after entry of judgment. *See* 195 Ariz. XXXVIII.

substance as well as form. And compliance with the rules is also a matter of substance and importance.

¶43 Citing Rule 54(g)(3), Haroutunian nevertheless claims that his notice of intent qualified as a motion for attorney fees because he was not required to file the supporting documentation with the notice. First, as we have explained, Haroutunian's notice is not a motion, with or without the supporting documentation. Furthermore, Rule 54(g)(3) states that "[a] motion for attorneys' fees may be supported by affidavit, and exhibits or, at the discretion of the court, by testimony." Haroutunian reasons this means the supporting documents may be provided later or not at all. But the plain language of Rule 54(g)(3) demonstrates that the rule provides a choice between two methods of supporting the motion; it does not eliminate the requirement for factual support or the time limit imposed elsewhere in the rule. *See* Ariz. R. Civ. P. 7.1(a) (affidavits supporting motions "shall be filed and served *together* with the motion") (emphasis added); *cf. Nolan v. Starlight Pines Homeowners Ass'n*, 216 Ariz. 482, ¶ 37, 167 P.3d 1277, 1285 (App. 2007), *quoting Schweiger v. China Doll Rest., Inc*., 138 Ariz. 183, 188, 673 P.2d 927, 932 (App. 1983) (Affidavit supporting fee request should include "'the type of legal services provided, the date the service was provided, the attorney providing the service . . . and the time spent in providing the service.'"). Haroutunian's notice of intent was not a motion for attorney fees.

¶44 Relying on § 46-455(O), Haroutunian also argues that his noncompliance with Rule 54(g)(2) should not be "deemed fatal" because applying Rule 54(g)(2) to his case would

violate the provisions of § 46-455 protecting remedies such as attorney fees. Section 46-455(O) provides that claims under the statute shall not be "limited by any other civil remedy . . . or any other provision of law." "Limitations imposed by [the] rules of civil procedure," including Rule 54(g)(2), "are not, however, the kinds of limitations the legislature had in mind when drafting [§ 46-455(O)]." *In re Estate of Winn*, 214 Ariz. 149, ¶ 18, 150 P.3d 236, 240 (2007). Haroutunian is not exempted from compliance with the rules of civil procedure merely because he filed his claim under § 46-455.

¶45 Haroutunian finally claims that the trial court erred when it denied his request, made for the first time in his motion for reconsideration of the trial court's decision, to extend the twenty-day time limit imposed by Rule 54(g)(2). But Haroutunian cites no authority for the proposition that a trial court must grant a request for an extension made in a motion for reconsideration, or for any other part of this argument. We therefore need not and do not consider it. *See* Ariz. R. Civ. App. P. 13 (a)(6) (brief shall contain argument with citations to authorities and statutes relied on); *Ness v. W. Sec. Life Ins. Co.*, 174 Ariz. 497, 503, 851 P.2d 122, 128 (App. 1992) ("Arguments unsupported by any authority will not be considered on appeal.").

¶46 The trial court could have considered Haroutunian's motion for attorney fees on the merits under these circumstances. But we cannot say it abused its discretion by refusing to do so. We affirm the court's denial of Haroutunian's motion for attorney fees incurred from trial.

Motion for Supplemental Attorney Fees

¶47 Haroutunian also challenges the trial court's denial of his motion for supplemental attorney fees incurred while responding to a post-trial motion filed by ValueOptions. After the jury had returned its verdict in favor of Haroutunian, ValueOptions moved to enlarge the time for filing post-trial motions and appealing the jury's verdict. The trial court denied ValueOptions' motion. Haroutunian subsequently requested supplemental attorney fees "for the time expended in responding" to ValueOptions' motion.

¶48 While Haroutunian's motion for supplemental fees was still pending, ValueOptions appealed the trial court's denial of its motion to extend the time to appeal and to enlarge the time for filing post-judgment motions. This court reversed the trial court's denial of ValueOptions' motion and remanded the case for further proceedings. *Haroutunian v. ValueOptions, Inc.*, 218 Ariz. 541, ¶ 29, 189 P.3d 1114, 1124 (App. 2008). The trial court then denied Haroutunian's motion for supplemental fees, stating that it "decline[d] to award attorney's fees incurred on an issue on which [Haroutunian] did not prevail."

¶49 Haroutunian claims the trial court erred in denying his motion for supplemental attorney fees because the affidavits supporting the motion were sufficient and because the fees requested were reasonable and recoverable under § 46-455(H). But the court did not

deny Haroutunian's motion for any of these reasons;[4] it denied the motion because Haroutunian did not prevail. We therefore need not consider Haroutunian's arguments.

¶50 Haroutunian next claims the trial court erred in denying him supplemental fees because the fees were necessary to protect his judgment and verdict. But Haroutunian cites no authority for this argument, and we therefore need not consider it. *See* Ariz. R. Civ. App. P. 13(a)(6) (brief shall contain argument with citations to supporting authorities and statutes); *Ness*, 174 Ariz. at 503, 851 P.2d at 128 ("Arguments unsupported by any authority will not be considered on appeal."). Moreover, we cannot find the trial court abused its discretion in refusing to award fees on issues on which Haroutunian did not prevail. *See Santa Fe Ridge Homeowners' Ass'n v. Bartschi*, 219 Ariz. 391, ¶ 27, 199 P.3d 646, 654 (App. 2008) (attorney fees denied for separate unsuccessful claims).

¶51 Haroutunian also suggests the trial court committed an error of law in denying his request for supplemental fees. But denying his request for supplemental attorney fees because he did not prevail on the underlying issue is not a misapplication of the law, as Haroutunian claims. Rather, it is a decision within the discretion of the trial court. *See* 46-455(H)(4); *Santa Fe Ridge Homeowners' Ass'n*, 219 Ariz. 391, ¶ 27, 199 P.3d at 654; *Orfaly*, 209 Ariz. 260, ¶ 18, 99 P.3d at 1035. We affirm the trial court's denial of Haroutunian's

[4]In fact, the court agreed with Haroutunian that he would be entitled to attorney fees under § 46-455.

request for supplemental attorney fees incurred in responding to ValueOptions' post-trial motion.

Attorney Fees Incurred in First Appeal and Cross-Appeal

¶52 Finally, Haroutunian argues the trial court erred in denying his request on remand for attorney fees incurred during the first appeal and cross-appeal. After ruling on the merits of ValueOptions' first appeal, this court allowed Haroutunian to request attorney fees on remand. *Haroutunian*, 218 Ariz. 541, ¶ 29, 189 P.3d at 1124. Haroutunian filed a motion for attorney fees and costs incurred during that appeal and cross-appeal. The trial court denied the motion, noting that Haroutunian was not entitled to attorney fees because he did not prevail on the only issue decided in that appeal.

¶53 Haroutunian claims he was entitled to attorney fees from the first appeal because he incurred the fees "defend[ing the] judgment." But the trial court denied Haroutunian's request for fees because he did not prevail on the merits in the first appeal. Haroutunian does not explain why the court's determination was an error or abuse of discretion. *See* Ariz. R. Civ. App. P. 13(a)(6) (brief shall contain contentions of appellant with respect to issues presented); *see also FIA Card Servs., N.A. v. Levy*, 219 Ariz. 523, n.1, 200 P.3d 1020, 1021 n.1 (App. 2008) (argument undeveloped on appeal deemed abandoned). We therefore affirm the trial court's denial of Haroutunian's attorney fees incurred during the first appeal.

¶54 We also deny both parties' requests for attorney fees incurred in this appeal. Each party failed to obtain any affirmative relief on appeal and made arguments of questionable merit, imposing an unnecessary burden on the opposing party.

Conclusion

¶55 In light of the foregoing, we affirm the trial court's denial of ValueOptions' motion for judgment as a matter of law or for a new trial. We likewise affirm the court's denial of Haroutunian's various requests for attorney fees.

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JOSEPH W. HOWARD, Chief Judge

CONCURRING:

_____
PHILIP G. ESPINOSA, Presiding Judge

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JOHN PELANDER, Judge