NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. *See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

AXEL HOLM, Plaintiff/Appellant, v. LINCOLN & CONTINENTAL OWNERS CLUB, a corporation; DOUGLAS W. MATTIX and CAROL MATTIX, husband and wife; TIM HOWLEY and JANE DOE HOWLEY, husband and wife; LELAND DALE SHAEFFER and JANE DOE SHAEFFER, husband and wife; CHRISTOPHER MICHAEL BLACK and JANE DOE BLACK, husband and wife, Defendants/Appellees.	2 CA-CV 2010-0035 DEPARTMENT B <u>MEMORANDUM DECISION</u> Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF SANTA CRUZ COUNTY

Cause No. CV04033

Honorable James A. Soto, Judge

AFFIRMED

Gregory L. Droeger — Nogales
Attorney for Plaintiff/Appellant

Dwight M. Whitley, Jr., PLLC
By Dwight M. Whitley, Jr. — Tucson
Attorney for Defendants/Appellees

K E L L Y, Judge.

¶1 In this defamation action, appellant Axel Holm appeals from the trial court's denial of his motion for new trial. He maintains the court erred in instructing the jury in several respects. Finding no error, we affirm.

Background

¶2 On review from the denial of a motion for new trial, "we consider all conflicting evidence in the light most favorable to the appellee, and all competent evidence supporting the judgment will be taken as true." *Hibbitts v. Walter Jacoby & Sons*, 9 Ariz. App. 486, 487, 453 P.2d 997, 998 (1969). In 2003, the Lincoln and Continental Owners Club ("LCOC") published an article in its magazine about the history of the LCOC. The article, authored by Leland Dale Shaeffer, who is now deceased, included statements about an unnamed past president of LCOC. The article stated the past president had lost $10,000 in club funds as part of a foreign bond investment scheme and had run a vehicle restoration business that improperly "trade[d] parts from one [customer's] car to another." Regarding the lost funds, the article additionally asserted that the individual had "chose[n] not to go to trial and [face] a possible jail sentence." The past president subsequently had resigned "to avoid any personal financial responsibility" but had ultimately repaid the lost funds "without interest." Holm, although not mentioned by name, had been the president of LCOC during the period discussed in the article.

¶3 Holm brought the instant action against Shaeffer; Tim Howley, the editor of the magazine; Douglas Mattix, president of LCOC; Michael Black, publisher of the magazine; and LCOC. He alleged defamation, intentional infliction of emotional

distress, and invasion of privacy. During the first trial on the matter, the trial court granted a motion for judgment as a matter of law in favor of Mattix and Black. The jury returned a verdict in Holm's favor against LCOC and Shaeffer, but the court granted LCOC's motion for new trial.

¶4 Before the second trial began, defendants moved for partial summary judgment. The trial court granted the motion in part, in favor of Mattix and Black. Holm appealed to this court, which reversed the judgment. *Holm v. Lincoln & Continental Owners Club*, No. 2 CA-CV 2008-0111 (memorandum decision filed Feb. 20, 2009).

¶5 After remand, Holm moved for partial summary judgment, arguing that the magazine article "did not constitute [a] matter of public concern." The trial court denied the motion, and the case proceeded to a second trial, at which the jury found in favor of the defendants on the remaining claims. Holm moved for a new trial, arguing the court had improperly instructed the jury. This appeal followed the court's denial of that motion.

Discussion

¶6 Holm appeals solely from the trial court's denial of his motion for new trial, so we address only the issues raised in that motion. *Rourk v. State*, 170 Ariz. 6, 12, 821 P.2d 273, 279 (App. 1991). On review, we are mindful that "[t]he trial court has broad discretion in deciding whether to grant or deny a motion for a new trial." *Pullen v. Pullen*, 223 Ariz. 293, ¶ 10, 222 P.3d 909, 912 (App. 2009). Therefore, "'we will not overturn that decision absent a clear abuse of discretion.'" *Id.*, *quoting Delbridge v. Salt*

River Project Agric. Improvement & Power Dist., 182 Ariz. 46, 53, 893 P.2d 46, 53 (App. 1994).

¶7 Holm contends the trial court improperly instructed the jury in several respects. Although he fails on appeal to cite Rule 59(a), Ariz. R. Civ. P., which states the permissible grounds for granting a new trial, Holm appears to argue he 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."

¶8 At the outset, we address LCOC's contention that Holm has waived these arguments by failing to properly object to the instructions below. Citing Rule 51(a), Ariz. R. Civ. P., LCOC argues that, although Holm filed a pretrial memorandum raising objections to most of the instructions at issue, he may not challenge the instructions on appeal because he did not object at the in-chambers conference during which the instructions were settled. During the conference, however, Holm referred to his memorandum and made objections to some instructions. The court noted Holm's ongoing objection to certain aspects of the instructions and also noted both parties' "objections that are already part of the record" when it asked counsel if they approved of the final instructions as read to the jury. Based on Holm's objections below, we address his arguments concerning the instruction on defamation and the instructions on the application of a qualified privilege.

I. Instruction on Defamation

¶9 Holm first maintains the trial court erred in instructing the jury as follows about the elements of his defamation claim:

> Plaintiff seeks to recover damages from defendants based upon a claim of defamation. Plaintiff must prove the following elements:
>
> 1. Defendants published a false and defamatory statement:
>
> a. Knowing the statement was false and defamatory;
>
> b. In reckless disregard of the statement's character; or
>
> c. Negligently failing to ascertain the statement's character.

Holm argues, as he did in his motion for new trial, that the instruction was "premised upon the publication being of public interest" and therefore improperly "impose[d] a burden of proving falsity on [him]." Holm argues at length that the publication at issue here was not of "public concern." Relying on *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), he contends that, because the matter here was not of public concern, "the free speech protections of the First Amendment do not apply" and the defendant therefore must bear "[t]he burden of proving [the] truth of a defamatory statement."

¶10 In *Dun & Bradstreet*, a plurality of the United States Supreme Court concluded "that permitting recovery of presumed and punitive damages in defamation cases absent a showing of 'actual malice' does not violate the First Amendment when the

defamatory statements do not involve matters of public concern." *Id.* at 763. Thus, to the extent Holm argues Supreme Court First Amendment jurisprudence does not require him to prove actual malice because he is a private figure and the speech was of private concern, he is correct. *See Dombey v. Phoenix Newspapers, Inc.*, 150 Ariz. 476, 481, 724 P.2d 562, 567 (1986) ("[W]hen a plaintiff is a private figure and the speech is of private concern, the states are free to retain common law principles."). But, *Dun & Bradstreet* did not foreclose the states from requiring a heightened showing of fault before imposing liability in defamation cases involving private figures and nonpublic content.

¶11 Our supreme court has adopted the standard for the requirement of fault in the defamation of a private person set forth in the Restatement (Second) of Torts § 580B (1977), which states:

> One who publishes a false and defamatory communication concerning a private person, or concerning a public official or public figure in relation to a purely private matter not affecting his conduct, fitness or role in his public capacity, is subject to liability, if, but only if, he
>
> (a) knows that the statement is false and that it defames the other,
>
> (b) acts in reckless disregard of these matters, or
>
> (c) acts negligently in failing to ascertain them.

Peagler v. Phoenix Newspapers, Inc., 114 Ariz. 309, 315, 560 P.2d 1216, 1222 (1977).

¶12 We repeated this language in our previous memorandum decision as well, explaining:

> To recover in a defamation action where the plaintiff is a private person, the plaintiff must prove the defendant

> published a false and defamatory statement either (1) knowing the statement was false and defamatory, (2) in reckless disregard of the statement's character, or (3) negligently failing to ascertain the statement's character.

See Holm, No. 2 CA-CV 2008-0111, ¶ 7. The trial court's instruction mirrored these statements of the law.

¶13 Holm does not directly address the legal complexities involved in the interplay between the plaintiff's burden to prove fault and the burden of proof relating to the falsity of an alleged defamatory statement. But, he does maintain in the context of his public concern argument that the trial court's instruction was erroneous because he should not have had to "prove falsity, [but rather] the burden of proof of truth must fall upon [LCOC]." Indeed, at common law a defendant who raised the defense of the truth of the defamatory matter had the burden of proving it. Restatement (Second) of Torts § 613 cmt. j. (1977). The First Amendment protections accorded to speech "regarding matters of public concern," however, require that a plaintiff prove the statement was made with actual malice—that is the statement must be "provable as false before a defamation action can lie." *Turner v. Devlin*, 174 Ariz. 201, 205, 848 P.2d 286, 290 (1993). Thus, our supreme court pointed out in *Turner*, that "[b]ecause truth is an affirmative defense, the burden of proving falsity lies only on those plaintiffs who are defamed by speech that is a matter of public concern." *Id.*

¶14 We note, however, as does the Restatement, that even the requirement to prove negligence or greater fault in relation to the defendant's knowledge of the falsity of the statement, "has, as a practical matter, made it necessary for the plaintiff to allege and

prove the falsity of the communication, and from a realistic standpoint, has placed the burden of proving falsity on the plaintiff." Restatement § 613 cmt. j. Thus, although the burden of proving truth as an affirmative defense may remain on the defendant, a plaintiff may also bear some burden to prove the falsity of a defamatory statement in the course of proving negligence.

¶15 In any event, based on the limited transcripts before us, it does not appear that the truth or falsity of these statements was central at trial. Other than jury instructions, the only additional trial transcript provided to us includes excerpts of defense counsel's closing argument. These excerpts focused on proving actual malice in relation to the qualified privilege discussed below. And, even though Holm argues at length on appeal about which party bears the burden of proof, he does not develop any argument that the statements in the article were in fact false.

¶16 Additionally, we consider the propriety of jury instructions in view of the facts presented at trial, the other instructions given, and the arguments of counsel. *See Thompson v. Better-Bilt Aluminum Prods. Co.*, 187 Ariz. 121, 127, 927 P.2d 781, 787 (App. 1996); *cf. State v. Bruggeman*, 161 Ariz. 508, 510, 779 P.2d 823, 825 (App. 1989) ("Closing arguments of counsel may be taken into account when assessing the adequacy of jury instructions."); *see also Smith v. Chesapeake & Ohio Ry. Co.*, 778 F.2d 384, 387-88 (7th Cir. 1985) (in assessing jury instructions, closing arguments considered in determining if jury "adequately informed of the applicable law"). As the appellant, Holm was obligated to "mak[e] certain the record on appeal contains all transcripts or other documents necessary for us to consider the issues raised." *Baker v. Baker*, 183 Ariz. 70,

73, 900 P.2d 764, 767 (App. 1995); *see also* Ariz. R. Civ. App. P. 11(b). In the absence of the remainder of the trial transcripts, we must presume they support the trial court's rulings. *See Kohler v. Kohler*, 211 Ariz. 106, n.1, 118 P.3d 621, 623 n.1 (App. 2005).

II. Qualified privilege

¶17 Holm next alleges the trial court's instructions about applying a qualified privilege were erroneous. The court instructed the jury that it had "determined as a matter of law that a qualified privilege exists in this case." It then defined excessive publication, gave instructions on the privilege's application, and instructed the jurors that the privilege could be overcome if the plaintiff proved "the defendant acted with actual malice" or that there had been "excessive publication" of the defamatory material. It further explained that "[t]he burden of proving actual malice is on the plaintiff" and that "[p]laintiff must prove actual malice by clear and convincing evidence." It then instructed the jurors on the definition of actual malice.

¶18 According to Holm, "[t]he grant of conditional privilege was without basis in fact or law" and "the distribution of the publication was patently in excess of that allowed by any privilege." "In general, Arizona law establishes a two-part analysis for determining whether a qualified privilege exists. The court must first determine whether a privileged occasion arose, and, if so, whether the occasion for the privilege was abused." *Green Acres Trust v. London*, 141 Ariz. 609, 616, 688 P.2d 617, 624 (1984). The trial court's conclusion that a privileged occasion had arisen is a legal conclusion that we review de novo. *See id.* But, "whether the occasion for the privilege was abused is a question of fact for the jury," whose finding we review deferentially. *Id.*

¶19 In this case, the trial court concluded that the common-interest qualified privilege applied. This privilege applies "where an occasion arises in which 'one is entitled to learn from his associates what is being done in a matter in which he has an interest in common with them.'" *Green Acres Trust*, 141 Ariz. at 617, 688 P.2d at 625, *quoting* Restatement (Second) of Torts § 596 cmt. c (1977). In other words, "[a]n occasion makes a publication conditionally privileged if the circumstances lead any one of several persons having a common interest in a particular subject matter correctly or reasonably to believe that there is information that another sharing the common interest is entitled to know." Restatement § 596.

¶20 Holm sets forth four grounds on which he maintains the privilege should not apply in this case: (1) LCOC did not establish "that the magazine was circulated only to club members"; (2) LCOC "owed no duty to club members to report the matters [in the article]"; (3) "the matter was published for a purpose not reasonably believed to be necessary to accomplish the purpose for which the occasion is privileged"; and (4) the matters in the article "have nothing to do with the conduct of officers or members." The first ground cited does not go to the application of the privilege but, rather, to whether LCOC abused the privilege through excessive publication. The communication was made to members of the organization through its magazine for members.[1] Whether LCOC abused the privilege by distributing the magazine to nonmembers was a

[1]Holm has not provided us with the transcripts of the trial in this matter. We therefore presume the evidence presented at trial, including evidence relating to whether the magazine was intended for members, supported the trial court's rulings. *See Kohler*, 211 Ariz. 106, n.1, 118 P.3d at 623 n.1.

determination for the jury. *Green Acres Trust*, 141 Ariz. at 616, 688 P.2d at 624; *cf. Hibbitts*, 9 Ariz. App. at 487, 453 P.2d at 998 (on review from order denying new trial, appellate court views evidence in favor of appellee). Because Holm's arguments on the remaining three grounds overlap and are not clearly argued separately in his brief, we address them as a whole.

¶21 According to Holm, "neither Shaeffer nor the LCOC owed a duty to the club members to notify them of [Holm's] history in the club." He contends the article was not "published for a proper purpose"[2] and "there was surely no obligation to speak." Indeed, "[t]he qualified or conditional privilege is . . . based on the social utility of protecting statements required to be made in response to a legal, moral or social duty." *Green Acres Trust*, 141 Ariz. at 616, 688 P.2d at 624. Here, the article in question apparently appeared in an anniversary edition of LCOC's member magazine and recounted the club's history.[3] Although Holm may be correct that LCOC had no legal duty to recount its history for its members, we cannot say it was without a social duty to do so.

¶22 As indicated in the comments to the Restatement (Second) of Torts, § 596, "one is entitled to learn from his associates what is being done in a matter in which he has

[2]The question of a proper purpose goes to whether a defendant demonstrates actual malice and whether the privilege is abused. As this court stated in *Rowland v. Union Hills Country Club*, 157 Ariz. 301, 306, 757 P.2d 105, 110 (App. 1988), *quoting* Prosser & Keeton on Torts, § 115 at 832 (5th ed. 1984), "Malice may be proved by showing that 'the publication is not made primarily for the purpose of furthering the interest which is entitled to protection.'"

[3]Again, in the absence of transcripts, we presume the evidence presented at trial supported the trial court's rulings. *See Kohler*, 211 Ariz. 106, n.1, 118 P.3d at 623 n.1.

an interest in common with them," even if he "is not personally concerned with the information." Restatement § 596 cmt. c. And, "[t]he common interest of members of . . . non-profit associations . . . is recognized as sufficient to support a privilege for communications among themselves concerning the qualifications of the officers and members and their participation in the activities of the society" or the "alleged misconduct of some . . . member that makes him undesirable for continued membership." Restatement § 596 cmt. e, *see also Aspell v. Am. Contract Bridge League of Memphis, Tenn.*, 122 Ariz. 399, 400-01, 595 P.2d 191, 192-93 (App. 1979).

¶23 Holm argues that, because he had not been a member or officer of LCOC for many years by the time the article was written, it could not "seriously be contended that [he] was involved in 'conduct of officers and members and their participation in the activities of the association.'" He does not dispute, however, that the events discussed in the purportedly defamatory statements in the article took place while he was an officer of the organization.[4] Thus, the communication was about the participation of an officer in the activities of the organization, a topic on which LCOC had some duty to speak.

III. Actual Malice

¶24 Holm further contends the trial court's instructions on the meaning of actual malice "g[a]ve two incompatible definitions" of the term. The court defined actual malice as

[4]And, as previously noted, because Holm has not provided this court with transcripts of the trial, we presume the evidence presented there supported the trial court's ruling. *Kohler*, 211 Ariz. 106, n.1, 118 P.3d at 623 n.1.

> that state of mind arising from personal spite, hatred or ill will toward the plaintiff, but such a state of mind occasioned by a good-faith belief on the part of the defendant in the truth of the libelous publication or broadcast at the time it is published or broadcast shall not constitute actual malice.
>
> Actual malice means that the statements were [made] with knowledge that they were false or that they were made with reckless disregard of whether or not they were false.

¶25 Holm did not object to these instructions during the in-chambers conference on instructions, nor did he object when they were given. In his memorandum addressing the proposed jury instructions, Holm addressed possible instructions defining actual malice, stating: "There are two apparently inharmonious definitions of the term 'actual malice' as it may be applied to defamation tort." The memorandum ultimately suggested to the trial court that one definition should be used if "no public concern is found" and another used "if the matter is held to have been of public concern."

¶26 Holm did not, however, argue directly that the two definitions could not be given together, and he did not discuss their alleged incompatibility. In view of his failure to object to the instructions when given, we cannot say he adequately advised the trial court of his position as required by the rule. *See Edward Greenband Enters. of Ariz. v. Pepper*, 112 Ariz. 115, 118, 538 P.2d 389, 392 (1975) ("The purpose of this rule is to fully advise the trial court of the basis of a litigant's position so that it may not be led into involuntary error."). The argument is therefore waived. And, in any event, although "ill will, 'standing alone' is not sufficient of itself to prove malice," we cannot say "that ill will is not evidence of actual malice." *Starkins v. Bateman*, 150 Ariz. 537, 548, 724 P.2d

1206, 1217 (App. 1986). Thus, even if not waived, Holm's argument is without merit because the two instructions are not necessarily contradictory.

IV. General Damages

¶27 Holm also argues the trial court's instruction on the "definition of general damages for defamation [wa]s grounded on a statute" that Holm contends is unconstitutional. He maintains the instruction, and A.R.S. § 12-653.01, from which it was taken, "omit three important elements of general damages for defamation."

¶28 The trial court instructed the jury that "'[g]eneral damages' means damages for loss of reputation." Holm asserts that, under *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974), the types of actual harm sustained as a result of "defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." And, he now further contends, by eliminating these other types of harm from the definition of general damages, the statute and the instruction violated article II, § 31 and article XVIII, § 6 of the Arizona Constitution.[5]

¶29 Holm briefly raised the general-damages instruction in his memorandum on proposed jury instructions. He proposed an instruction and argued that the instruction on general damages given at the first trial "[had] not cover[ed] all of the defamation injuries for which general damages are recoverable." He did not raise the constitutional

[5]Article II, § 31 provides: "No law shall be enacted in this state limiting the amount of damages to be recovered for causing the death or injury of any person." Article XVIII, § 6 provides: "The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation."

argument he now makes, however, until his supplemental memorandum in support of his motion for new trial. Because the argument was raised for the first time in Holm's motion for new trial, it is waived. *See Conant v. Whitney*, 190 Ariz. 290, 293, 947 P.2d 864, 867 (App. 1997) (arguments first raised in motion for new trial deemed waived).

V. Burden of proof

¶30 Finally, Holm asserts now for the first time that "[t]he requirement for 'clear and convincing' evidence for overcoming qualified privilege, is improper as to defamations that are not entitled to constitutional protection."[6] He therefore apparently maintains the trial court erred in instructing the jury that it should apply a clear and convincing standard in this case. Generally, arguments raised for the first time on appeal are untimely and deemed waived. *Englert v. Carondelet Health Network*, 199 Ariz. 21, ¶ 13, 13 P.3d 763, 768 (App. 2000) ("[W]e generally do not consider issues, even constitutional issues, raised for the first time on appeal."). Holm nonetheless urges us to address this argument "under the third principle recited" in *Mitchell v. Gamble*, 207 Ariz. 364, ¶ 17, 86 P.3d 944, 950 (App. 2004), namely, that the issue is a purely legal one and is of general statewide interest.

¶31 As we pointed out in *Mitchell*, the rules of waiver are procedural and employed at our discretion. *Id.* ¶ 16. In that case, we suspended the rule of waiver based not only on the fact that the issue raised was an important legal question, but on several

[6]Holm states in his opening brief that he did not raise this issue below, but it is possible to read a portion of his argument on the motion for new trial as urging this position. However, as noted above, arguments raised for the first time in a motion for new trial are also waived. *Conant*, 190 Ariz. at 293, 947 P.2d at 867.

other factors not present here. Likewise, *Mitchell* did not involve a waiver specifically set forth by rule, as is the case here. *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 . . . ."). We therefore decline to address Holm's waived argument on this issue.

Disposition

¶32 The judgment of the trial court is affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge