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

JESUS A. ROMERO, Plaintiff/Appellant, v. DAVID RICARDO TORRES, Defendant/Appellee.	2 CA-CV 2010-0040 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20083964

Honorable John F. Kelly, Judge
Honorable Kenneth Lee, Judge

AFFIRMED

Risner & Graham
By William J. Risner
Tucson
Attorneys for
Plaintiff/Appellant

David Ricardo Torres
Tucson
In Propria Persona

B R A M M E R, Presiding Judge.

¶1 Jesus Romero appeals from the judgment awarding him $1,000 in damages and from the order denying his motion for a new trial on his intentional tort claim for

assault against appellee David Torres. Romero argues on appeal that the trial court erred in denying his motions in limine and in concluding Torres's criminal conviction for that assault did not establish Torres and Gustavo Zunega, another individual involved in that assault, had acted in concert. We affirm.

Factual and Procedural Background

¶2 "'We view the facts in the light most favorable to sustaining the trial court's judgment.'" *Flying Diamond Airpark, LLC v. Meienberg*, 215 Ariz 44, ¶ 2, 156 P.3d 1149, 1151 (App. 2007), *quoting Cimarron Foothills Cmty. Ass'n v. Kippen*, 206 Ariz. 455, ¶ 2, 79 P.3d 1214, 1216 (App. 2003). Romero has not provided this court with transcripts of the proceedings below and we therefore assume they would "support the [trial] court's findings and conclusions." *See Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995).

¶3 In November 2007, Torres and Zunega assaulted Romero, causing him to sustain a broken leg and bumps and bruises. Torres was indicted on the criminal charge of aggravated assault, serious physical injury. At the trial on those charges, the jury was instructed, inter alia, on self-defense and accomplice liability. On August 28, 2008, the jury found Torres guilty of the charge, and we affirmed his conviction and sentence on appeal. *State v. Torres*, No. 2 CA-CR 2008-0337 (memorandum decision filed Nov. 20, 2009).

¶4 In June 2010, Romero sued Torres and Zunega for the injuries he had sustained in the assault. After Zunega failed to answer, the trial court entered a default judgment against him for $250,000 in compensatory damages and $200,000 in punitive

damages. The court also granted Romero's motion for partial summary judgment against Torres, finding that, pursuant to A.R.S. § 13-807, Torres's conviction for aggravated assault established his liability for assaulting Romero.

¶5 After a two-day bench trial on the issue of Romero's damages, the court found Torres at fault for causing Romero "only some facial and/or bodily bumps and bruises." The court noted that, although the parties' descriptions of the November 7 assault varied widely, both Romero and his wife had testified consistently in the criminal trial, the default hearing, and at trial that Zunega, not Torres, had broken Romero's leg during the assault. The court found Romero's medical expenses and lost income claims were the result of his broken leg, and "[Romero] presented no evidence to support any theory where . . . Torres could be held vicariously or jointly liable for [Zunega's] actions." The court awarded judgment against Torres for $1,000. After the court denied Romero's motion for a new trial, this appeal followed.

Discussion

¶6 Romero first argues the trial court erred by permitting Torres to use the "same defense" he unsuccessfully had argued in the criminal trial, asserting the issue of self-defense should not have been "re-litigat[ed]" in the civil trial because it was precluded by both § 13-807 and the principle of collateral estoppel. Romero filed two motions in limine below. His first motion requested "a pre-trial order clearly prohibiting . . . Torres from denying his culpability or testifying in any manner that he was not the responsible aggressor," and his second requested "an order prohibiting [Torres] from testifying concerning the justification of self-defense." The court denied both motions.

We review a trial court's ruling on a motion in limine for an abuse of discretion. *Warner v. Sw. Desert Images, LLC*, 218 Ariz. 121, ¶ 33, 180 P.3d 986, 998 (App. 2008).

¶7 To the extent Romero argues the trial court should not have admitted any evidence regarding culpability for purposes of alleging comparative negligence, we disagree. Section 13-807 precludes a defendant who has been convicted of offenses in a criminal proceeding from "subsequently denying in any civil proceeding brought by the victim . . . the essential allegations of the criminal offense of which he was adjudged guilty." The defense of contributory negligence, unlike self-defense, "generally is not recognized as a defense to criminal conduct." *Williams v. Baugh*, 214 Ariz. 471, ¶ 20, 154 P.3d 373, 377 (App. 2007). Section 13-807 did not preclude Torres from raising the defense of contributory negligence or from arguing comparative fault principles because neither were denials of the "essential allegations" of his criminal assault conviction. *See Williams*, 214 Ariz. 471, ¶ 20, 154 P.3d at 377. For these reasons, this court concluded in *Williams* that "§ 13-807 does not bar a civil defendant from alleging contributory negligence or seeking a reduction of his percentage of comparative fault."[1] *Williams*, 214 Ariz. 471, ¶ 20, 154 P.3d at 377.

¶8 Insofar as Romero suggests Torres was allowed to present a self-defense argument beyond what was appropriate to determine contributory negligence, Romero

[1]Romero also asserts "[t]his is a classic *res judicata* situation," but does not explain how the analysis under that doctrine would differ meaningfully from that under § 13-807, nor does he cite any relevant authority. Because he does not develop this argument adequately, we do not address it. *See* Ariz. R. Civ. App. P. 13(a)(6) (argument shall contain "citations to the authorities, statutes and parts of the record relied on"); *Polanco v. Indus. Comm'n*, 214 Ariz. 489, n.2, 154 P.3d 391, 393 n.2 (App. 2007) (appellant's failure to develop and support argument waives issue on appeal).

has cited nothing in the record in support. *See* Ariz. R. Civ. App. P. 13(a)(6). As we noted above, Romero did not provide this court with transcripts of hearings on the motions or trial and did not identify any evidence that had been admitted as a result of the trial court's denial of his motions in limine. We assume any missing portions of the record "would support the court's findings and conclusions." *See Baker*, 183 Ariz. at 73, 900 P.2d at 767. Mere denial of Romero's motion to prohibit Torres from testifying concerning self-defense does not establish the defense was "re-litigated." Moreover, because the court found Torres civilly liable for the assault, any self-defense argument Torres might have made plainly was unsuccessful, and we therefore need not address this issue further. *See Warner*, 218 Ariz. 121, ¶ 10, 180 P.3d at 992 ("'In order to justify reversal, . . . the trial error must be prejudicial to the substantial rights of the appealing party.'"), *quoting Walters v. First Fed. Sav. & Loan Ass'n of Phoenix*, 131 Ariz. 321, 326, 641 P.2d 235, 240 (1982) (alteration in *Warner*); *see also Contempo-Tempe Mobile Home Owners Ass'n v. Steinert*, 144 Ariz. 227, 229, 696 P.2d 1376, 1378 (App. 1985) ("The court is not empowered to decide moot questions or abstract propositions.").

¶9 Romero next asserts that, by awarding him only those damages unrelated to his broken leg, the trial court improperly required him "to prove which of two assaulters caused which injury," reasoning that "joint assaulters are responsible for all injuries resulting from the assault." We review the court's discretionary rulings for an abuse of discretion, but review any legal issues de novo. *See Home Builders Ass'n of Cent. Ariz. v. City of Maricopa*, 215 Ariz. 146, ¶ 6, 158 P.3d 869, 872 (App. 2007). Arizona has abolished joint and several liability for tortfeasors, adopting comparative fault instead,

requiring that there be an apportionment of fault and liability. A.R.S. § 12-2506; *State Farm Ins. Cos. v. Premier Manufactured Sys., Inc.*, 217 Ariz. 222, ¶ 12, 172 P.3d 410, 413 (2007). If two intentional tortfeasors "act in concert," however, they are excepted from the application of comparative fault principles and are liable jointly and severally for any injuries. § 12-2506(D)(1). Parties act in concert if they "enter[] into a conscious agreement to pursue a common plan or design to commit an intentional tort and actively tak[e] part in that intentional tort." § 12-2506(F)(1).

¶10 Romero asserted in his complaint that Torres and Zunega had "unlawfully assaulted" him. The trial court, however, did not determine that Torres's conviction established his liability for an intentional tort, instead concluding pursuant to § 13-807 only that Torres could not deny he had recklessly assaulted Romero.[2] We find no error in the court's conclusion. As noted above, § 13-807 precludes a convicted defendant from denying in a later civil proceeding involving the same conduct "the essential allegations of the criminal offense of which he was adjudged guilty." "'[T]he essential mental state alleged is the minimum mental state necessary for conviction of that offense as defined by statute.'" *Williams*, 214 Ariz. 471, ¶ 6, 154 P.3d at 374, *quoting Republic Ins. Co. v. Feidler*, 178 Ariz. 528, 533, 875 P.2d 187, 192 (App. 1993). The "minimum mental

[2]In his reply brief on appeal, Romero describes his claim as one based on intentional tort. But it is not entirely clear from his complaint whether Romero sought to bring a claim for battery, which requires proof that "the defendant intentionally caused a harmful or offensive contact with the plaintiff to occur," *Johnson v. Pankratz*, 196 Ariz. 621, ¶ 6, 2 P.3d 1266, 1268 (App. 2000), or assault, which does not require the plaintiff to prove the harmful or offensive contact actually occurred, only that the defendant intended it to occur. *See* Restatement (Second) of Torts § 21 (1965). The distinction is not meaningful in this context, as either claim requires proof of intentional conduct.

state" for Torres's aggravated assault conviction is not intentional or knowing, but reckless. *See* A.R.S. §§ 13-1203(A)(1), 13-1204(A)(1);[3] *see also* A.R.S. § 13-105(10) (defining culpable mental states). Thus, Torres's assault conviction does not establish that he committed an intentional tort—it instead establishes he acted recklessly in causing Romero serious physical injury.[4]

¶11 The trial court noted Romero and his wife both had acknowledged it was Zunega, not Torres, who had broken Romero's leg. And the court found there was no evidence Torres and Zunega had acted in concert. Correctly observing that the jury in Torres's criminal case had been given an instruction on accomplice liability, *see Torres*, No. 2 CA-CR 2008-0337, ¶ 6, Romero argues that acting in concert is indistinguishable from accomplice liability. Thus, he reasons, if Torres was convicted based on his liability as an accomplice, then that conviction conclusively established Torres and Zunega had acted in concert.

¶12 Romero's argument presupposes that accomplice liability is an "essential allegation[]" of an offense pursuant to § 13-807 and that Torres therefore cannot deny he was Zunega's accomplice. But we need not decide that question because, even if Torres was precluded from denying he was Zunega's accomplice, that does not establish he and

[3]Section 13-1204 has been amended since the assault at issue here. *See* 2010 Ariz. Sess. Laws, ch. 241 § 1, ch. 276 § 2, ch. 97 § 1; 2008 Ariz. Sess. Laws, ch. 179, § 1, ch. 301, § 52. We refer to the version in effect at the time of the assault. *See* 2007 Ariz. Sess. Laws, ch. 47, § 1.

[4]Torres has not cross-appealed from the trial court's summary judgment ruling in Romero's favor on the issue of liability and we therefore do not address whether it was correct in light of Romero's position that his claim is one for an intentional tort.

Zunega had acted in concert for purposes of § 12-2506(F)(1). First, the "acting in concert" exception in § 12-2506 "does not apply to any person whose conduct was negligent in any of its degrees rather than intentional." § 12-2506(F)(1). As we have explained, Torres's criminal conviction for aggravated assault does not establish he had committed an intentional act, only that he had engaged either in reckless conduct or had acted as an accomplice to another's reckless conduct. In order to prove Zunega and Torres acted in concert, Romero would have to prove both that they had committed an intentional tort and that they had agreed to do so. § 12-2506(F)(1).

¶13 Second, a person may be liable as an accomplice without his or her conduct necessarily meeting the definition of "acting in concert" in § 12-2506(F)(1). Pursuant to § 13-301, a person acting "with the intent to promote or facilitate the commission of an offense" is an accomplice if that person:

> 1. Solicits or commands another person to commit the offense; or
>
> 2. Aids, counsels, agrees to aid or attempts to aid another person in planning or committing an offense.
>
> 3. Provides a means or opportunity to another person to commit the offense.

¶14 Section 12-2506(F)(1) excludes from the definition of "acting in concert" a person who "provides substantial assistance to one committing an intentional tort . . . if the person has not consciously agreed with the other to commit the intentional tort." Accomplice liability under subsections (2) and (3) of § 13-301 does not require a "conscious agreement" between the two actors to commit the offense. The primary actor

need not have agreed to have an accomplice. Insofar as "acting in concert" requires an agreement and not merely intent by one party to aid the primary actor, it is closer to the definition of a criminal conspiracy under A.R.S. § 13-1003(A) than it is to accomplice liability under § 13-301(2) or (3).

¶15 Nor is accomplice liability under § 13-301(1) the equivalent of "acting in concert" under § 12-2506(F)(1). If a person has solicited or commanded another to commit an offense, and the other person does so, that readily could be construed as a conscious agreement between those parties to commit the offense. But, unlike § 12-2506(F)(1), § 13-301(1) does not require the person soliciting or commanding the other to "actively tak[e] part" in committing the offense to be found responsible under an accomplice theory. Thus, as a matter of law, Torres's assault conviction did not establish he had acted in concert with Zunega, and the trial court therefore did not err in requiring Romero to demonstrate Zunega and Torres had "enter[ed] into a conscious agreement to pursue a common plan or design to commit an intentional tort."[5] § 12-2506(F)(1).

¶16 Romero does not assert on appeal that the trial court erred in accepting his and his wife's testimony that Zunega had broken his leg. And, in any event, we must assume the missing transcripts support the court's factual findings. *See Baker*, 183 Ariz. at 73, 900 P.2d at 767. Nor does he argue that, if Torres's criminal conviction was not based on accomplice liability, that conviction conclusively establishes Torres is liable in

[5]To the extent Romero argues the doctrine of collateral estoppel precluded Torres from arguing he and Zunega did not act in concert, Romero does not develop this argument adequately and we do not address it. *See* Ariz. R. Civ. App. P. 13(a)(6); *Polanco*, 214 Ariz. 489, n.2, 154 P.3d at 393 n.2.

a civil action for Romero's broken leg. Accordingly, we do not address these questions. Similarly, we need not address Romero's argument that his complaint adequately stated a claim that Torres and Zunega acted in concert. The court found Romero had not presented evidence they had done so. Romero does not argue that conclusion was incorrect and, in any event, has not provided this court with trial transcripts. In light of the court's finding, whether Romero properly pled a claim of joint liability is immaterial.

Disposition

¶17 For the reasons stated, we affirm the judgment.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge