

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2011-000423-001 DT

09/08/2011

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT  
H. Beal  
Deputy

LISA GARDNER

MATTHEW SCOTT FANKHAUSER

v.

TINA THEISS CUBBON (001)

HOPE N KIRSCH

AGUA FRIA JUSTICE COURT  
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

**Lower Court Case Number CC2011045184**

The Agua Fria Justice Court continued an injunction against harassment in place against Defendant-Appellant Tina Theiss Cubbon (Defendant). Defendant contends the trial court erred. For the reasons stated below, this Court affirms the judgment.

I. FACTUAL BACKGROUND.

On March 7, 2011, Plaintiff-Appellee Lisa Gardner (Plaintiff) filed a petition for an injunction against harassment against Defendant. The trial court granted the petition on an *ex parte* basis. Subsequently, at Defendant's request, an evidentiary hearing was held on March 16, 2011. Based on the evidence presented, the trial court continued the order in place. Defendant filed a timely notice of appeal on March 18, 2011. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12-124(A).

II. ISSUE: DID PLAINTIFF PROPERLY PRESERVE HER ISSUES FOR APPEAL.

Defendant raises issues that she failed to raise below. Failure to raise an issue at trial waives the right to raise the issue on appeal. *State v. Gatliff*, 209 Ariz. 362, 102 P.3d 981, ¶ 9 (Ct. App. 2004). It is particularly inappropriate to consider an issue for the first time on appeal when the issue is a fact-intensive one. *State v. West*, 176 Ariz. 432, 440-41, 862 P.2d 192, 200-01 (1993); *State v. Rogers*, 186 Ariz. 508, 511, 924 P.2d 1027, 1030 (1996); *State v. Brita*, 158 Ariz. 121, 124, 761 P.2d 1025, 1028 (1988). The Arizona courts have held that, if a defendant does not object at trial, the appellate court will review only for fundamental error, and will grant relief only if the defendant proves both that the trial court erred and that any error prejudiced the defendant. *State v. Kiles*, 222 Ariz. 25, 213 P.3d 174, ¶ 16 (2009); *State v. Valverde*, 220 Ariz. 582, 208 P.3d 233, ¶ 12 (2009); *State v. Forte*, 222 Ariz. 389, 214 P.3d 1030, ¶¶ 14, 22 (Ct. App.

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2009); *State v. Fimbres*, 222 Ariz. 293, 213 P.3d 1020, ¶¶ 41–42 (Ct. App. 2009). Fundamental error rarely exists in civil cases. See *Monica C. v. Arizona D.E.S.*, 211 Ariz. 89, 94, 118 P.3d 37, 42 (Ct. App. 2005) (explaining that courts apply the doctrine sparingly and that fundamental error is error going to the case’s very foundation that prevents a party from receiving a fair trial). See also *Bradshaw v. State Farm Mutual Automobile Ins. Co.*, 157 Ariz. 411, 758 P.2d 1313 (1988) (doctrine of fundamental error in civil cases may be limited to situations when a party was deprived of a constitutional right). This Court finds no fundamental error in the record.

Notably, Defendant alleged that the trial court admitted evidence that had been altered or falsified. During the evidentiary hearing, Defendant denied writing certain portions of an e-mail about Plaintiff. Plaintiff maintains she did not alter or falsify any evidence. In addressing the role of an appellate court in reviewing conflicting evidence and testimony, the Arizona Supreme Court has said the following:

Something is discretionary because it is based on an assessment of conflicting procedural, factual or equitable considerations which vary from case to case and which can be better determined or resolved by the trial judge, who has a more immediate grasp of all the facts of the case, an opportunity to see the parties, lawyers and witnesses, and who can better assess the impact of what occurs before him. Where a decision is made on that basis, it is truly discretionary and we will not substitute our judgment for that of the trial judge; we will not second-guess. Where, however, the facts or inferences from them are not in dispute and where there are few or no conflicting procedural, factual or equitable considerations, the resolution of the question is one of law or logic. Then it is our final responsibility to determine law and policy and it becomes our duty to “look over the shoulder” of the trial judge and, if appropriate, substitute our judgment for his or hers.

*State v. Chapple*, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n.18 (1983) (citation omitted). Because the issue in the present case requires an “assessment of conflicting procedural, factual or equitable considerations which vary from case” rather than a “question . . . of law or logic,” it is not appropriate for this Court to “substitute [its] judgment for that of the trial judge.” This Court therefore concludes the trial court correctly resolved this case.

Finally, Rule 5(A)(1), Rules Prot. Ord. P., provides as follows:

1. All relevant evidence is admissible, except the court may exclude evidence if:
  - a. the probative value is outweighed by the danger of unfair prejudice;
  - b. the evidence results in confusion of the issues;
  - c. admitting the evidence may result in undue delay;
  - d. a needless presentation of cumulative evidence would result, or
  - e. the evidence lacks reliability.

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(Emphasis added.) Absent a clear abuse of discretion, an appellate court will not second-guess the trial court's ruling on the admissibility or relevance of evidence. *State v. Spreitz*, 190 Ariz. 129, 146, 945 P.2d 1260, 1277 (1997). This Court find no clear abuse of discretion by the trial court in the record. Further, Defendant neither moved to preclude, nor object to the admission of, the e-mails she deemed altered. Challenges to the admissibility of evidence can be preserved only by a motion to preclude that evidence or by a specific, contemporaneous objection to its admission. *State v. Moody*, 208 Ariz. 424, 94 P.3d 1119, ¶ 39 (2004).

III. CONCLUSION.

Based on the foregoing, this Court concludes that the Agua Fria Justice Court's order continuing the injunction against harassment was correct and was supported by substantial evidence.

**IT IS THEREFORE ORDERED** affirming the judgment of the Agua Fria Justice Court.

**IT IS FURTHER ORDERED** remanding this matter to the Agua Fria Justice Court for all further appropriate proceedings.

**IT IS FURTHER ORDERED** signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen  
THE HON. CRANE MCCLENNEN  
JUDGE OF THE SUPERIOR COURT

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