

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000268-001 DT

09/04/2012

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT
K. Waldner
Deputy

VICTOR L CIUMMO

VICTOR L CIUMMO
14808 E CHOLULA DR
FOUNTAIN HILLS AZ 85268

v.

HYMSON GOLDSTEIN & PANTILIAT PLLC
(001)

EDDIE A PANTILIAT

MCDOWELL MOUNTAIN JUSTICE
COURT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case No. CC2008299005.

Plaintiff Appellant Victor L. Ciummo (Plaintiff) appeals the McDowell Mountain Justice Court's decision to dismiss Plaintiff's malpractice case with prejudice. Plaintiff contends the trial court erred. For the reasons stated below, the court affirms the trial court's judgment.

I. FACTUAL BACKGROUND.

Introduction—The “Driveway” Lawsuit

On June 18, 2008, Plaintiff retained Defendant's services. Defendant is a professional corporation providing legal services and Plaintiff sought its help in prosecuting a lawsuit because of damage to his driveway. Defendant prepared and filed an initial complaint against Cascade Homes for wrongfully excavating portions of Defendant's driveway (the “driveway” lawsuit)¹. The parties later disagreed about the underlying reasons for (1) selecting Cascade Homes as the defendant and (2) excluding the adjacent homeowner as a co-defendant in this “driveway” lawsuit. Plaintiff gave Defendant a \$2,500.00 retainer for the “driveway” lawsuit.

¹ Because there is an underlying lawsuit (a case within a case), this Court shall refer to Plaintiff's claim against Cascade Homes as the “driveway” lawsuit.

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Defendant prepared and filed a multi-count complaint—the “driveway” complaint—against Cascade Homes alleging breach of contract, negligence, trespass, conversion, and breach of implied covenant of good faith and fair dealing.² In that complaint, Plaintiff requested compensatory damages of \$9,280.00, and reasonable attorneys’ fees. The “driveway” complaint included—as Exhibit 2— a copy of a letter Plaintiff sent to Mr. Keith Gordon at Cascade Homes which included the language, “[b]ecause you insisted that the driveway was done per plans, I had Mr. Dave Montgomery re-survey it.”³

On December, 15, 2008, Plaintiff sent Defendant a letter informing Defendant that Plaintiff was not satisfied with Defendant’s services. The letter stated Plaintiff originally approached Defendant and asked “if I could sue my neighbor’s builder (Cascade Homes) for badly digging up the driveway which I share with this neighbor.” The letter continued and said: (1) Plaintiff did not want to sue his neighbor but (2) Plaintiff was surprised to learn—in October—that he had no case against Cascade Homes because there was no contract with them. In the letter, Plaintiff added he never told Defendant that Cascade Homes was the developer and Plaintiff did not understand why Defendant did not first seek to determine if there was a contract between Plaintiff and Cascade Homes before suing them on a breach of contract claim. Plaintiff also asserted—in his letter—that he asked about claiming for a trespass when he first met with Defendant in June, but Defendant told him the trespass claim was untimely. Plaintiff challenged the quality of Defendant’s work as well as the law firm’s bill and demanded a full refund of Plaintiff’s money plus interest.

On December 19, 2008, Defendant responded to Plaintiff’s letter, disagreeing with Plaintiff’s characterization of the legal representation but informing Plaintiff that Defendant had received a telephone call from opposing counsel in the “driveway” lawsuit offering to settle the matter for \$4,640.00. The letter also informed Plaintiff that—pursuant to Plaintiff’s instructions—the Defendant would (1) not do anything further regarding the “driveway” lawsuit and (2) Defendant would withdraw from further representation. Defendant’s letter mentioned Defendant (1) included a copy of the Court’s 150-day Order and (2) cautioned Plaintiff the case must be kept active or the Court would dismiss the case (from the Inactive Calendar). Defendant suggested Plaintiff consult with another lawyer. Defendant’s letter also included a request that Plaintiff sign a consent for withdrawal of representation. In addition, Defendant informed Plaintiff that if he failed to sign the consent for withdrawal, Defendant intended to move the Court to allow the withdrawal of representation. Defendant concluded by telling Plaintiff that Defendant would be informing opposing counsel—Ms. Kushner—that he would no longer be representing Plaintiff.

² Complaint in CV2008–052376, filed in the Superior Court of the State of Arizona, In and For the County of Maricopa on July 7, 2008.

³ This letter would become important in Plaintiff’s lawsuit against Defendant.

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The “driveway” lawsuit was set for arbitration to be held March 19, 2009.⁴ Plaintiff failed to appear at the arbitration and the defendant—Cascade Homes—succeeded in having the “driveway” lawsuit dismissed. The arbitration award included an award of attorneys’ fees to Cascade Homes of \$1,500.00 plus costs of \$191.00.

The Malpractice Lawsuit

Thereafter, Plaintiff sued his former attorney—Eddie Pantiliat—in his personal capacity, in Justice Court—Small Claims Complaint—alleging he (1) mishandled Plaintiff’s case by suing the wrong party; and (2) charged Plaintiff for work he “was not supposed to do.”⁵ Plaintiff requested a refund of his \$2,500 retainer. On January 9, 2009, Mr. Pantiliat filed a Motion To Dismiss alleging he never contracted with Plaintiff in his individual capacity and any work was done by Defendant—Hymson, Goldstein, & Pantiliat, PLLC.⁶ The trial court—on February 24, 2009, added Defendant as the sole Defendant and set the matter for a settlement conference hearing. This Ruling on Motion—dated February 24, 2009—indicated a copy was mailed to each party on March 23, 2009. On July 13, 2009, Defendant answered the Plaintiff’s complaint and asserted (1) Defendant did not breach its contract; (2) Plaintiff’s claim lacked evidence; (3) Plaintiff failed to mitigate his damages; and (4) Plaintiff provided false information to Defendant about the underlying case.

According to the trial court docket, no action occurred on the malpractice case between July 13, 2009, and March 4, 2011. However, on February 6, 2010, Plaintiff sent Mr. Pantiliat another demand letter where he again requested (1) reimbursement of his retainer; (2) interest on his money; and (3) added a demand for reimbursement for a “no-show penalty” that the trial court imposed in the “driveway” lawsuit because he failed to show for his scheduled arbitration date.⁷ In this letter, Plaintiff also alleged counsel failed to inform him a trial date had been set.

On March 4, 2011, Defendant filed (1) an answer denying each allegation in Plaintiff’s complaint and (2) a counterclaim alleging Plaintiff owed \$1,263.86 in unpaid attorneys’ fees. The trial court transferred the case to the civil division of the Justice Court. Plaintiff filed a Reply to the Counterclaim on March 29, 2011,

The trial court then set the matter for mediation. A mediation conference was held on September 28, 2011. That day, Plaintiff filed a disclosure statement alleging damages in excess of \$10,000.00. Plaintiff claimed his damages included an initial retainer fee of \$2,500.00; a “non-disclosed statement of \$4,640.00; the \$1,500.00 in attorneys’ fees he was ordered to pay Cascade Homes in the “driveway” lawsuit; the \$191.00 he was ordered to pay Cascade Homes for the

⁴ Neither party included a copy of the trial court’s order setting the arbitration hearing. This Court does not know if the arbitration was set (1) during the time Defendant represented Plaintiff or (2) after Defendant notified Plaintiff he would no longer represent Plaintiff.

⁵ Small Claims Complaint filed on December 22, 2008, in CC2008299005.

⁶ The law firm, Hymson, Goldstein & Pantiliat, PLLC shall be referred to as Defendant—in the singular form—throughout this opinion.

⁷ The trial court later determined this “penalty” was an award of attorneys’ fees and costs. See *infra*.

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“driveway” lawsuit; interest of \$2,673.00; and his current court fees. Mediation was not successful and the matter was set for trial to be held on February 6, 2012.

The Trial

The court held a trial on February 6, 2012. At the beginning of trial, Defendant objected to Plaintiff having a witness because Plaintiff failed to disclose his potential witness.⁸ The trial court asked what the witness would testify about and Plaintiff responded the witness would talk about the construction next door as opposed to a development of the lot.⁹ Defendant responded the Plaintiff was assuming a defense that Defendant was not raising.¹⁰ The trial court discussed (1) the need to disclose witnesses prior to trial; (2) the potential sanction for failing to disclose a witness; and (3) if the proposed witness’ testimony would be relevant and excluded the witness on the basis of relevance.¹¹

Plaintiff testified about the underlying “driveway” lawsuit and said the people building on Lot 10—the lot adjoining his—“excavated wrongly” while he was in Chicago.¹² In response to the trial court’s question as to who was the excavator, Plaintiff replied that the excavator was (1) the people next door and (2) the builder—Cascade Homes.¹³ Plaintiff reiterated his next door neighbor contracted with Cascade Homes to build a house.¹⁴ Plaintiff clarified there was one builder doing all of the work to excavate the driveway and build the house—Cascade Homes.¹⁵

Plaintiff added (1) Cascade Homes refused to correct the problem and (2) he therefore hired an independent contractor to correct his driveway because the excavation did not comport with the engineering drawings and city ordinance.¹⁶ Defendant stipulated that Cascade improperly excavated the driveway and said that was why Plaintiff hired the firm.¹⁷ In response to the trial court’s question, Plaintiff said he spent approximately \$5,600.00 to fix the driveway.¹⁸

Plaintiff testified Defendant called him about 3 months later and said (1) Plaintiff could not sue Cascade Homes because Plaintiff did not have a contract with them¹⁹ and (2) should have sued the homeowner. Plaintiff repeated the homeowner who hired Cascade Homes was responsible for the problem and Defendant should have sued the homeowner.²⁰ The trial court asked Plaintiff about the outcome of the lawsuit against Cascade Homes and Plaintiff responded that

⁸ Audio recording, bench trial, February 6, 2012, at 10:30:58–10:31:02.

⁹ *Id.* at 10:31:20–50.

¹⁰ *Id.* at 10:31:56–10:32:43.

¹¹ *Id.* at 10:33:16–10:38:30.

¹² *Id.* at 10:42:48–55.

¹³ *Id.* at 10:43:51–10:44:05.

¹⁴ *Id.* at 10:44:00–10:45:11.

¹⁵ *Id.* at 10:45:11–10:46:42.

¹⁶ *Id.* at 10:46:49–10:48:04.

¹⁷ *Id.* at 10:48:52–10:49:00.

¹⁸ *Id.* at 10:49:29–38.

¹⁹ *Id.* at 10:50:07–33.

²⁰ *Id.* at 10:51:16–42.

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because he was not familiar with court proceedings, he did not present his disclosure and the case was “thrown out.”²¹

Plaintiff stated he sued Defendant because Defendant (1) sued the builder instead of the owner; (2) refused to refund Plaintiff’s retainer; (3) although Plaintiff fired Defendant, Defendant failed to inform Plaintiff about the status of the case or the trial setting; and (4) Plaintiff was assessed \$1,700.00 when he failed to appear at the trial for the underlying “driveway” lawsuit.²² Plaintiff provided the court with a copy of the Arbitration award assessing him the attorneys’ fees and costs for the “driveway” lawsuit.²³ Plaintiff also alleged Defendant sued for an improper claim—breach of contract—and stated there was no contract.²⁴ Plaintiff reiterated (1) Defendant “failed to reveal to me that there was an outstanding trial coming out” [sic] and (2) inferred this was the reason why he did not show up.²⁵

On cross-examination Defendant asked Plaintiff about his June 3, 2008, letter to Cascade—written before he retained Defendant—demanding reimbursement for their wrongful excavation and demanding \$9,280.00.²⁶ Plaintiff admitted he hired Defendant to sue Cascade pursuant to the information in his demand letter.²⁷ Defendant asked Plaintiff if it was correct that Plaintiff did not want to sue the homeowner to which Plaintiff responded that it was not Plaintiff’s job to tell Defendant who to sue, and that Defendant was supposed to tell him.²⁸ Plaintiff alleged he asked Defendant if he could sue for trespass and Defendant told him too much time had passed.²⁹ Plaintiff then stated he did not want to sue the homeowner because the homeowner would be his neighbor so they decided to sue the builder.³⁰

Defendant reviewed the claims in the “driveway” complaint with Plaintiff. Plaintiff agreed the complaint established Defendant included five counts—alleged against Cascade Homes—because Cascade Homes injured Plaintiff’s property by negligently going onto Plaintiff’s property and taking some of it.³¹

Defendant also reviewed the contents of a letter Plaintiff wrote to Defendant on December 15, 2008. In that letter, Plaintiff noted (1) Defendant informed him he could sue his neighbor and Cascade; but (2) he—Plaintiff—was not in favor of suing his neighbor.³² Defendant

²¹ *Id.* at 10:52:02–16.

²² *Id.* at 10:53:24–57.

²³ *Id.* at 10:54:58–10:55:30.

²⁴ *Id.* at 10:56:03–17.

²⁵ *Id.* at 10:56:57–10:57:04.

²⁶ *Id.* at 10:58:02–35.

²⁷ *Id.* at 10:58:35–42.

²⁸ *Id.* at 10:58:42–10:59:00.

²⁹ *Id.* at 10:59:07–20. The allegations in the “driveway” complaint demonstrate Defendant included a trespass claim in that complaint.

³⁰ Audio recording, *id.* at 10:59:21–32.

³¹ *Id.* at 11:00:45–11:01:43.

³² *Id.* at 11:01:50–11:02:37.

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examined page 2 of Plaintiff's letter and read the portion where Plaintiff wrote Defendant should have sued for trespass at the time of the occurrence.³³ Plaintiff denied knowing about a claim for trespass—a denial that Defendant refuted using the language of the complaint in the "driveway" lawsuit.³⁴

Plaintiff objected to Defendant's use of his letters and said (1) Defendant failed to timely present a disclosure statement and (2) should be precluded from using any documents at trial because Defendant's disclosure statement was presented 16 days after the trial setting.³⁵ Defendant responded Plaintiff authored the letter. The trial court ruled Plaintiff disclosed Exhibits A–H on September 28, 2011, and listed the exhibits as (1) copy of retainer fee deposit; (2) copy of intent to settlement [sic]; (3) letter to defendant; (4) letter from defendant admitting settlement; (5) charges incurred by Plaintiff for not properly being advised by Defendant; (6) charges for services rendered; (7) letter to Defendant advising possible complaint to Bar Association; (8) Answer not signed by Defendant; (9) copy of Arizona Corp.[sic] Commission regarding Cascade Homes, Inc.; and (10) disclosed the identity of Plaintiff's witness.³⁶ Defendant interrupted and stated he was not sent a copy of the disclosure.³⁷ Defendant further claimed he provided a disclosure statement in October and the documents he was using were letters written by Defendant.³⁸ The trial court overruled the Plaintiff's objection because Plaintiff wrote the letters.³⁹

Defendant reviewed his—Defendant's—December 19, 2008, letter. Plaintiff said he did not know about this letter and never received it.⁴⁰ Plaintiff agreed the total amount of fees he paid Defendant's firm was \$2,500.00.⁴¹ Plaintiff said he was entitled to a refund of that money plus all of the money he lost "because of your negligence."⁴² Defendant ended his cross-examination and Plaintiff resumed testifying.

Plaintiff asserted Defendant failed to give him a fee agreement but the trial court found this to not be relevant.⁴³ Plaintiff then re-stated Defendant sued the wrong person because the lot was developed by Community Southwest ten years prior to the driveway incident. Plaintiff again said Defendant should have filed against the owner because the builder worked for the owner.⁴⁴ Plaintiff mentioned Defendant said they could sue the owner three months after the driveway suit

³³ *Id.* at 11:03:09–24.

³⁴ *Id.* at 11:03:24–56.

³⁵ *Id.* at 11:03:58–11:05:25.

³⁶ *Id.* at 11:05:48–11:06:40.

³⁷ *Id.* at 11:06:40–43.

³⁸ *Id.* at 11:07:21–36.

³⁹ *Id.* at 11:07:46–57.

⁴⁰ *Id.* at 11:09:38–54.

⁴¹ *Id.* at 11:10:09–18.

⁴² *Id.* at 11:10:18–38.

⁴³ *Id.* at 11:10:39–56.

⁴⁴ *Id.* at 11:14:30–35; 11:15:44–11:16:01.

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began but said it would be a separate lawsuit and estimated the costs could be \$10,000.00.⁴⁵ Plaintiff asserted he believed it would not be worthwhile to incur legal fees of \$10,000.00 to obtain a \$9,280 judgment so Plaintiff asked Defendant to “vacate.”⁴⁶ Plaintiff added that when Defendant vacated, Defendant needed to tell Plaintiff the status of the lawsuit.⁴⁷

Plaintiff continued to repeat his earlier allegations that Defendant (1) sued the wrong party because he should have sued the owner and (2) sued for the wrong claim because there was no breach of contract.⁴⁸ After the trial court attempted to explain the concept of a contract between Plaintiff and his neighbor, the trial court determined the essence of this case was whether Defendant sued the wrong party.⁴⁹ The trial court decided it would only focus on whether Defendant sued the wrong party.⁵⁰ Defendant waived further cross-examination of Plaintiff.⁵¹

Defendant then testified and said Plaintiff came to his office after Plaintiff had already sent a demand letter to Cascade Homes regarding the wrongful excavation of his portion of the driveway.⁵² Defendant stated he and Plaintiff discussed legal theories as well as who to sue, and Plaintiff specifically informed Defendant not to sue the homeowner because he wanted to preserve his good relationship with the owner.⁵³ Defendant said there was an implied contract between the builder and Plaintiff because (1) the builder performed work on Plaintiff’s driveway and, had the work been correctly performed, it would have benefitted Plaintiff.⁵⁴ Defendant mentioned there were alternative theories of negligence, trespass, conversion, and breach of good faith and fair dealing.⁵⁵ He added Plaintiff paid the law firm \$2,500.00 which was used to pay for (1) the meeting and (2) to prepare and draft the complaint.⁵⁶ Defendant asserted he had the complaint served. Defendant stated he billed Plaintiff and Plaintiff was concerned about the costs.⁵⁷ Defendant maintained he suggested pursuing settlement for 50% of Plaintiff’s claim⁵⁸ and Plaintiff assented.⁵⁹

Defendant testified that—on November 18, 2008,—he sent a letter to Cascade’s attorney—Ms. Kushner—saying Plaintiff was willing to settle the case for \$4,640.00.⁶⁰ Defendant claimed

⁴⁵ *Id.* at 11:16:01–33.

⁴⁶ *Id.* at 11:16:33–52.

⁴⁷ *Id.* at 11:16:52–55.

⁴⁸ *Id.* at 11:16:55–11:20:50.

⁴⁹ *Id.* at 11:20:50–11:23:24.

⁵⁰ *Id.* at 11:23:18–24.

⁵¹ *Id.* at 11:23:36–39.

⁵² *Id.* at 11:24:30–41.

⁵³ *Id.* at 11:24:41–55.

⁵⁴ *Id.* at 11:24:55–11:25:12.

⁵⁵ *Id.* at 11:25:12–42.

⁵⁶ *Id.* at 11:25:42–51.

⁵⁷ *Id.* at 11:25:51–11:26:06.

⁵⁸ *Id.* at 11:26:06–27.

⁵⁹ *Id.* at 11:26:27–29.

⁶⁰ *Id.* at 11:26:33–58.

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he did not hear back from Ms. Kushner, and, on December 15, Plaintiff sent him a letter saying he was not—and had never been—in favor of suing the homeowner.⁶¹ Defendant added that had Plaintiff wished to sue the homeowner, he would have amended the complaint.⁶²

Defendant said he informed Plaintiff that the fees and costs could increase to between \$9,000.00–\$10,000.00, and Plaintiff wrote—pursuant to the December 15, letter—he wanted Defendant to withdraw from the case and refund his money.⁶³

Defendant stated that shortly after he received Plaintiff’s December 15, letter, he received—on December 18,—Ms. Kushner’s agreement to settle the “driveway” case for \$4,640.00.⁶⁴ Defendant stated he sent Plaintiff the December 19, letter, (1) informing him about the settlement offer and (2) warning him about the 150 day order.⁶⁵ Defendant claimed Plaintiff did not object to Defendant’s withdrawal from representation. Defendant maintained that from that point forward, the case was Plaintiff’s.⁶⁶ Defendant alleged he did not mishandle the case as he successfully sued a party from whom he obtained a settlement offer for \$4,640.00.⁶⁷ Thereafter Defendant rested.

Plaintiff cross-examined Defendant who stated (1) he sued the builder because Plaintiff had causes of action against the builder and (2) did not sue the homeowner because Plaintiff said he did not want to sue the homeowner.⁶⁸ Plaintiff interrupted and said he could not tell the lawyer what to do, but Defendant disagreed with this assertion. Defendant added that (1) Plaintiff was the client and (2) an attorney would listen to his client and not sue a party if the client did not wish to do so.⁶⁹

Plaintiff asked why Defendant referred to the “\$4,600.00” if Plaintiff did not accept the settlement. Defendant responded he referred to the settlement amount because Plaintiff alleged he sued the wrong party but,—if that were so—why would that party have offered Plaintiff \$4,640.00 to settle Plaintiff’s claim against them.⁷⁰ Defendant agreed he did tell Plaintiff the case could cost around \$10,000.00 if the case went through full discovery and a full trial.⁷¹

After listening to final argument, the trial court explained (1) the documentation in this case was relatively consistent and (2) attorneys will commonly present multiple legal theories to support a damage claim.⁷² The trial court continued and said that in an attorney-client

⁶¹ *Id.* at 11:26:58–11:27:34.

⁶² *Id.* at 11:27:15–27.

⁶³ *Id.* at 11:27:27–11:28:10.

⁶⁴ *Id.* at 11:28:24–36.

⁶⁵ *Id.* at 11:28:36–11:29:00.

⁶⁶ *Id.* at 11:29:00–09.

⁶⁷ *Id.* at 11:29:09–56.

⁶⁸ *Id.* at 11:31:30–41.

⁶⁹ *Id.* at 11:31:41–11:32:04.

⁷⁰ *Id.* at 11:33:09–19.

⁷¹ *Id.* at 11:34:48–58.

⁷² *Id.* at 11:42:51–11:44:40.

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relationship, (1) the attorney is required to carry out the client's instructions if the client's instructions are legally permissible and (2) a lawyer will not sue a person the client does not want to have sued.⁷³ The trial court then said the adverse party in the "driveway" lawsuit agreed to pay for 50% of the alleged damage.⁷⁴ However, the trial court added the problem between the parties was exacerbated because (1) the settlement offer was received at approximately the same time Plaintiff discharged Defendant and (2) it became Plaintiff's responsibility to respond to the settlement offer, negotiate on his own behalf and comply with any other court orders.⁷⁵ The trial court explained Plaintiff was assessed attorneys' fees (for the adverse party) in the "driveway" lawsuit because Plaintiff's "driveway" case was dismissed.⁷⁶ The trial court then returned to the question about whether Defendant sued the right party and said the party sued—Cascade Homes—was willing to accept partial responsibility for what occurred.⁷⁷ The trial court found this was an appropriate party to be sued.⁷⁸ The trial court further found Defendant was not responsible for malpractice and dismissed both the lawsuit and the counterclaim.

Plaintiff filed a timely appeal. Defendant responded. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12-124(A).

II. ISSUES:

A. *Did Defendant Properly Present His Issues On Appeal.*

Plaintiff submitted a memorandum that neither cites to the record nor cites relevant authority. Accordingly, Plaintiff's appellate memorandum failed to comply with Rule 8(a)(3), Super. Ct. 20App. P.—Civil, which states:

Memoranda shall include a short statement of the facts with reference to the record, a concise argument setting forth the legal issues presented with citation of authority, and a conclusion stating the precise remedy sought on appeal.

When a litigant fails to include citations to the record in an appellate brief, the court may disregard the party's unsupported factual narrative and draw the facts from the opposing party's properly-documented brief and the record on appeal. *Arizona D.E.S. v. Redlon*, 215 Ariz. 13, 156 P.3d 430 ¶ 2 (Ct. App. 2007). Allegations lacking specific references to the record do not warrant consideration on appeal absent fundamental error, *State v. Cookus*, 115 Ariz. 99, 104, 563 P.2d 898, 903 (1977), which is rare in civil cases. *Monica C. v. Arizona D.E.S.*, 211 Ariz. 89, 118 P.3d 37 ¶¶ 23-25 (Ct. App. 2005).⁷⁹ In this case, Plaintiff failed to clearly articulate his issues, relying instead on a listing of perceived errors on the part of Defendant and the trial court. Defendant

⁷³ *Id.* at 11:44:40-11:46:24.

⁷⁴ *Id.* at 11:46:24-11:47:45.

⁷⁵ *Id.* at 11:47:35-11:49:13.

⁷⁶ *Id.* at 11:49:13-56.

⁷⁷ *Id.* at 11:49:59-11:50:10.

⁷⁸ *Id.* at 11:50:10-47.

⁷⁹ Courts apply the fundamental error doctrine sparingly. Fundamental error goes to the case's very foundation that prevents a party from receiving a fair trial. *State v. Henderson*, 210 Ariz. 561, 567, 115 P.3d 601, 607 ¶ 19 (2005).

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also confused the roles of the appellate proceeding and the bar association in his Appellant Memoranda [sic] at p. 11, where he included the following statement:

In my opinion this lawyer is not very competent in his profession and should be investigated by the bar association.

Defendant appeared *pro se* at both the trial and appellate levels. However, a litigant's *pro se* appearance does not excuse the failure to conform to mandated rules. When individuals represent themselves, those persons are held to the same standard as a lawyer. In *In re Marriage of Williams*, 219 Ariz. 546, 200 P.3d 1043 ¶ 13 (Ct. App. 2008) the Arizona Court of Appeals held:

Parties who choose to represent themselves “are entitled to no more consideration than if they had been represented by counsel” and are held to the same standards as attorneys with respect to “familiarity with required procedures and . . . notice of statutes and local rules.” A party's ignorance of the law is not an excuse for failing to comply with it.

[Citations omitted.] Similarly, in *Higgins v. Higgins*, 194 Ariz. 266, 279, 981 P.2d 134, 138 (Ct. App. 1999) the Court ruled:

One who represents herself in civil litigation is given the same consideration on appeal as one who has been represented by counsel. She is held to the same familiarity with court procedures and the same notice of statutes, rules, and legal principles as is expected of a lawyer.

[Citations omitted.] Accord, *Kelly v. NationsBanc. Mortg. Corp.*, 199 Ariz. 284, ¶ 16, 17 P.3d 790 ¶ 16 (Ct. App. 2001). Defendant's memorandum⁸⁰ is merely a repetition of his claims about Defendant's alleged wrongdoing but his memorandum lacks legal authority.

On the other hand, SCRAP—Civ. Rule 8(a)(5) provides the Superior Court may “modify or waive the requirements of this rule to insure a fair and just determination of the appeal.” Although Defendant's brief is inadequate, this Court concludes that—in order to insure a fair and just determination of the appeal—this Court will waive strict compliance with SCRAP—Civ. Rule 8(a)(3) and rule on the issues this Court believes Defendant raised.

B. Did The Trial Court Err In Dismissing Plaintiff's Malpractice Lawsuit.

Standard of Review

Appellate courts review trial court decisions in the light most favorable to sustaining the trial court's action. All reasonable inferences will be made to support the trial court's decision. *Triangle Constr. v. City of Phoenix*, 149 Ariz. 486, 720 P.2d 87 (Ct. App. 1985). The appellate court does not re-weigh the evidence to see if it would reach the same conclusion as the original trier-of-fact. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). Instead, the

⁸⁰ Similarly, Plaintiff's pleadings throughout the underlying litigation show a disregard for procedural mandates.

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appellate court must determine if the trial court could find sufficient evidence to support its decision.

Plaintiff's Claims

Plaintiff raised a plethora of claims—page 9, Appellant Memoranda—about problems he had in the underlying lawsuit. In essence, these claims all point to a general allegation of malpractice. Plaintiff claims Defendant fell below minimal competency standards by failing to sue the homeowner—his neighbor—and by alleging a breach of contract claim. Neither of Defendant's claims is meritorious.

While Defendant—and/or Plaintiff—may have had grounds to name the homeowner as a defendant in the “driveway” lawsuit, Plaintiff instructed Defendant to forego that opportunity. Plaintiff gave as his reason his desire to maintain good relationships with the homeowner. This is a valid reason to refrain from filing suit. It was not the Defendant's job to overrule Plaintiff's desire to maintain friendly relations with Plaintiff's neighbor. According to Plaintiff, Defendant discussed with him the possibility of including the homeowner. Plaintiff elected to forego this potential target. Having made that choice, Plaintiff must live with the consequences that follow such an election. Additionally, despite Plaintiff now claiming he wanted to include the homeowner as early as October, 2008, Plaintiff did not seek to amend his complaint and add the homeowner as a co-defendant in the “driveway” action. Defendant testified that had Plaintiff requested the homeowner be joined, Defendant would have amended the “driveway” complaint to add the homeowner.

Plaintiff's second claim—about the breach of contract claim—is similarly inapposite. Defendant prepared a complaint alleging Cascade Homes was responsible for damage to Plaintiff's driveway in five separate counts and specifically included claims about negligence, trespass, conversion, and breach of an implied covenant of good faith and fair dealing. The breach of contract claim was only one of these five claims. Even assuming the breach of contract claim was not appropriate—an assumption which this Court does not necessarily make—Defendant included four additional causes of action against Cascade Homes. This complaint resulted in Cascade Homes' willingness to (1) settle the action between the parties and (2) accede to Plaintiff's settlement offer of 50% of the damages. This Court is aware the driveway lawsuit did not settle. However, the failure of the settlement negotiations is not attributable to any improper claim or drafting on Defendant's part. As became clear during trial, Cascade Homes—by and through their attorney—accepted Plaintiff's settlement offer first presented in the November 18, 2008, letter Defendant drafted on Plaintiff's behalf. Thereafter, Plaintiff discharged Defendant. Defendant could not continue to represent Plaintiff once Plaintiff discharged him. Defendant made this clear to Plaintiff in Defendant's December 19, letter to Plaintiff. This Court understands Plaintiff alleged he did not receive Defendant's December 19, letter. However, Plaintiff should have realized that once he discharged his lawyer, his lawyer would no longer work for him and Plaintiff would then either need to seek new counsel or represent himself on a *pro se* basis. Apparently Plaintiff did not seek new counsel. No one testified about any other

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counsel becoming involved or representing Plaintiff. Therefore, Plaintiff should have realized he would need to act for himself. That he failed to do so is no one's fault but his.

Plaintiff also asserted Defendant failed to apprise him of the status of the case and stated Plaintiff missed his scheduled "trial" in the "driveway" lawsuit and was penalized because of this failing. Plaintiff provided no proof for this assertion and the submitted documents belie this assertion. First, there was no trial in the "driveway" lawsuit. Instead,—as can be seen from the arbitration award—the matter was set for arbitration. Plaintiff missed his arbitration date. Moreover, the arbitration was set for March, 2009—several months after (1) Plaintiff discharged Defendant and (2) sued Defendant. Second, the arbitrator assessed no penalty. Undoubtedly, Plaintiff was ordered to pay attorneys' fees for Cascade Homes after Cascade Homes had the "driveway" lawsuit dismissed because of Plaintiff's failure to appear. Attorneys' fee awards are not penalties. Instead, courts award attorneys' fees to successful parties in actions arising from contracts in order to mitigate the expense of litigation. *Fousel v. Ted Walker-Mobile Homes Inc.*, 124 Ariz. 126, 602 P.2d 507 (Ct. App. 1979). Had Plaintiff been the successful party in the "driveway" lawsuit, he would have been entitled to request attorneys' fees.⁸¹ Third, Plaintiff failed to sustain his allegation that Defendant was responsible for failing to apprise him of the arbitration date. The evidence indicated Plaintiff discharged Defendant on December 15, 2008. After Defendant received Plaintiff's December 15, letter, Defendant wrote to Plaintiff—on December 19, 2008,—informing Plaintiff he needed to be aware of the dates in his "driveway" lawsuit and that Defendant would be withdrawing from the case. While Plaintiff testified he did not receive this December 19, 2008, letter, Defendant had no way of knowing Plaintiff had not received the letter. Additionally, Plaintiff certainly did know he had discharged Defendant and Plaintiff knew—or should have known—Defendant would not continue to represent Plaintiff after Plaintiff fired Defendant.

In summary, Plaintiff failed to demonstrate Defendant knew of the arbitration date at the time Plaintiff discharged him. Plaintiff provided no evidence about when the arbitration date was set. It was Plaintiff's burden to prove his case. In order to show Defendant had an obligation to inform Plaintiff of the arbitration date, Plaintiff first needed to demonstrate the arbitration date was set while Defendant still represented Plaintiff. Plaintiff did not sustain this burden.

Malpractice

To prevail on a legal malpractice claim, a litigant must actually prove the lawyer's deficient conduct and that—but for the lawyer's errors—the litigant would have won the underlying lawsuit. In *Elliot v. Videan*, 164 Ariz. 113, 115, 791 P.2d 639, 641 (Ct. App. 1989) the Arizona Court of Appeals held that a plaintiff in a legal malpractice action must prove his suit would have been successful if the attorney had not been negligent. The Arizona Court of Appeals also

⁸¹ The attorneys' fees statute, A.R.S. § 12-341.01, and the many decisions discussing attorneys' fees in matters "arising from" contracts answer—in part—Plaintiff's question about why he would choose to incur substantial fees in order to get compensation that might approximate the amount of the fees.

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reviewed the duties imposed by the attorney-client relationship and, after quoting from the Arizona Supreme Court, said:

[A]n attorney-client relationship is an ongoing one that gives rise to a continuing duty by the attorney unless and until the client clearly understands or reasonably should understand that the relationship may no longer be depended upon. . .

Elliot v. Videan, id., 164 Ariz. at 116, 791 P.2d at 642.

In the current case, Plaintiff demonstrated the possibility of success in his “driveway” lawsuit because Cascade Homes had agreed to settle the claim. However, Plaintiff failed to prove that his lack of success was the result of Defendant’s negligence. Furthermore,—as previously stated—Plaintiff should reasonably have understood the attorney relationship ended as of the time he discharged Defendant. Thus, after December 15, 2008, Plaintiff should have known Defendant did not represent him on the “driveway” matter and he would need to either look after his own interest or hire another to assist him. To recap, Plaintiff produced no evidence showing the arbitration matter was set before December 15, 2008, and no evidence indicating (1) Defendant knew the arbitration date or (2) failed to disclose the arbitration date. Defendant lost his “driveway” lawsuit because he failed to appear at the scheduled arbitration. He cannot attribute this loss to Defendant because he did not produce even a scintilla of evidence indicating Defendant owed any duty to him with regard to the date of the arbitration or the scheduling of the arbitration. Furthermore, Defendant produced the December 19, 2008, letter clearly indicating Defendant warned Plaintiff he needed to take charge of his lawsuit and—if Plaintiff so desired—seek alternate counsel.

Plaintiff’s oft reiterated claims of “wrong party” and “improper breach of contract claim” in the “driveway” lawsuit also fail (the malpractice test). First, Plaintiff testified he instructed Defendant to omit his neighbor as a defendant because he wanted to maintain friendly relations. That was a choice Plaintiff was free to make. Having made this choice, Plaintiff must assume responsibility for it. Second, the “improper breach of contract claim” was but one of five possible grounds for imposing liability on Cascade Homes. Even if the claim was improper—which the Court will not address—Defendant included four additional grounds in the “driveway” complaint. Additionally,—and as stated above—at least one of the asserted grounds caused Cascade Homes to be willing to settle. This Court finds Plaintiff failed to meet his burden of proof and did not support his claim for legal malpractice.

III. CONCLUSION.

Based on the foregoing, this Court concludes the McDowell Mountain Justice Court did not err in dismissing (1) Plaintiff’s case-in-chief and (2) Defendant’s counterclaim.

IT IS THEREFORE ORDERED affirming the judgment of the McDowell Mountain Justice Court.

IT IS FURTHER ORDERED remanding this matter to the McDowell Mountain Justice Court for all further appropriate proceedings.

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

/s/ Myra Harris

THE HON. MYRA HARRIS
Judicial Officer of the Superior Court

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