

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2018-014261

03/27/2020

HONORABLE CONNIE CONTES

CLERK OF THE COURT
P. McKinley
Deputy

JASON KOMOROWSKI, et al.

E JEFFREY WALSH

v.

WHISPER MOUNTAIN HOMEOWNERS
ASSOCIATION

BRADLEY R JARDINE

MICHAEL WARZYNSKI
JUDGE CONTES

TRIAL SET

East Court Building – Courtroom 913

9:03 a.m. This is the time set for telephonic Trial Setting Conference for the purpose of setting a trial date and a final trial management conference date. Plaintiffs are represented by counsel E. Jeffrey Walsh. Defendant is represented by counsel Bradley Jardine and Michael Warzynski.

A record of the proceedings is made digitally in lieu of a court reporter.

Discussion is held regarding the status of the case and trial scheduling matters. The court inquires of all counsel whether or not the parties have considered waiver of a jury trial in accordance with Rule 38(b) in favor of a trial to the court.

Based upon the matters presented and for the reasons stated on the record,

IT IS ORDERED setting a **4-Day Jury Trial** for **September 28, 29, 30 and October 1, 2020 at 9:00 a.m.** before:

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**THE HONORABLE CONNIE CONTES
MARICOPA COUNTY SUPERIOR COURT
EAST COURT BUILDING
101 W. JEFFERSON
9TH FLOOR, COURTROOM 913
PHOENIX, AZ 85003
PHONE: (602) 506-7768**

THIS IS A FIRM TRIAL SETTING.

Note: This case has been double booked with another trial. If the first case does not settle, this case may be placed into civil case transfer to be tried by another judicial officer.

Please note that normal trial days in this division are Monday through Thursday from 9:00 a.m. to 4:30 p.m. The lunch break will be taken at Noon, with the afternoon session to begin promptly at 1:30 p.m. A fifteen (15) minute break will be taken both mid-morning and mid-afternoon, with the trial day to end at 4:30 p.m.

One day's jury fees will be assessed against the parties (evenly divided) unless the court is notified of settlement by 2:00 p.m. on the judicial day before trial or 11:00 a.m. on Friday for trials beginning on a Monday. The parties are reminded to promptly notify the court of any settlement pursuant to Rule 5.3(d), Ariz. R. Civ. P.

IT IS ORDERED setting **Final Trial Management Conference** on **August 21, 2020 at 11:00 a.m. (1 hour allotted)**. The Final Trial Management Conference shall be governed by the Pretrial Management Orders issued this date. **Trial counsel/parties who are not represented by counsel** shall attend this conference in person.

IT IS FURTHER ORDERED that the **Joint Pretrial Statement (JPTS)** in accordance with Rule 16(f), Arizona Rules of Civil Procedure (ARCP), is due in this division by **5:00 p.m., August 11, 2020**.

IT IS FURTHER ORDERED setting telephonic **Status Conference** on **July 24, 2020 at 11:00 a.m. (15 minutes allotted)** regarding status of jury trial.

Counsel for **plaintiffs** shall initiate the telephonic conference by first arranging the presence of all other counsel on the conference call and by calling this division at: **(602) 506-7768 promptly** at the scheduled time.

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IT IS FURTHER ORDERED all trial exhibits shall be submitted for marking not later than **August 21, 2020**. Two sets of exhibits shall be submitted, one for marking and one for the bench, following the procedures for preparing the exhibits for marking attached hereto. The bench copy shall be submitted in a binder(s).

NOTE: All court proceedings are recorded digitally and not by a court reporter. Pursuant to Local Rule 2.22, if a party desires a court reporter for any proceeding in which a court reporter is not mandated by Arizona Supreme Court Rule 30, the party must submit a written request to the assigned judicial officer at least ten (10) judicial days in advance of the hearing, and must pay the authorized fee to the Clerk of the Court at least two (2) judicial days before the proceeding. The fee is \$140 for a half-day and \$280 for a full day.

If the parties are not familiar with the courtroom's technology, they are encouraged to set up an appointment with the court's technology liaison at 602.506.3269.

9:30 a.m. Matter concludes.

ATTACHED: PRETRIAL MANAGEMENT ORDERS

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PRETRIAL MANAGEMENT ORDERS

1. IT IS ORDERED the JPST shall contain the following:

(A) Stipulations of material fact and law;

(B) Such contested issues of fact and law as the parties can agree are material or applicable;

(C) A separate statement by each party of other issues of fact and law believed by that party to be material;

[NOTE: Failure to identify a fact or legal issue that is material and either stipulated or disputed may result in a determination that a claim or defense has been abandoned or waived.]

(D) A list of witnesses intended to be used by each party during trial. Each party shall list any objections to a witness and the basis for that objection. No witness shall be used at the trial other than those listed, except for good cause shown. Witnesses whose testimony will be received by deposition testimony only will be so indicated;

(E) Each party's final list of exhibits to be used at trial for any purpose, including impeachment. Plaintiffs shall deliver copies of all of their exhibits to all parties twenty days before the final trial conference. All other parties shall deliver copies of all their exhibits to all parties fifteen days before the final trial conference. Any exhibit that cannot be reproduced must be made available for inspection to all parties on or before the deadlines stated above. Each party shall list any objections to an exhibit and the basis for that objection. Any objection not listed is waived. No exhibit shall be used at the trial other than those listed, except for good cause shown. The parties shall indicate any exhibits which the parties stipulate can be admitted into evidence, such stipulations being subject to court approval;

(F) A statement by each party identifying any proposed deposition summaries or, otherwise, designating portions of any deposition testimony to be offered by that party at trial, other than for impeachment purposes. Deposition testimony shall be designated by transcript page and line numbers. A copy of any proposed deposition summary and written transcript of designated deposition testimony should be filed with the JPST. No deposition summary or testimony (other than testimony used for impeachment) may be offered unless it is designated in the JPST. Each party shall list any objections to the proposed deposition summaries and designated deposition testimony, and any objection not listed is waived;

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(G) A brief statement of the case to be read to the jury during voir dire. If the parties cannot agree on this statement, then each party shall submit a separate statement to the judge who will decide the contents of the statement to be read to the jury;

(H) Technical equipment needed or interpreters requested;

(I) The number of jurors and alternates agreed upon, whether the alternates may deliberate, and the number of jurors required to reach a verdict;

(J) Whether any party will invoke *Rule 615 of the Arizona Rules of Evidence* regarding exclusion of witnesses from the courtroom; and

(K) A brief description of settlement efforts.

2. IT IS FURTHER ORDERED at the time of the filing of the JPST, the parties shall file (A) an agreed-upon set of jury instructions, proposed verdict forms, and voir dire questions, (B) any additional jury instructions, verdict forms, and voir dire questions requested, but not agreed upon, and (C) a statement by each party on how a verbatim record of the trial will be made (i.e., cd/videotape or court reporter).

3. IT IS FURTHER ORDERED **Regarding Motions in Limine and Daubert Motions** – The granting or denial of a motion in limine turns on whether the admission of evidence reaches the level of reversible error or a mistrial.¹ Motions in limine are not granted “except upon a clear showing of non-admissibility.”² And, motions in limine should not be used as substitutes for dispositive motions.³

¹ See e.g., *State v. Ferrari*, 112 Ariz. 324, 327, 541 P.2d 921, 924 (1975) (affirming denials of motions in limine: framing the issue in terms of reversible error); *State v. Pearce*, 22 Ariz. App. 338, 339, 527 P.2d 297, 298 (1975) (affirming grant of motion in limine: same); *State ex rel. Berger v. Superior Court*, 108 Ariz. 396, 397, 499 P.2d 152, 153 (1972) (framing the issue in terms of a mistrial).

² *State ex rel. Berger*, 108 Ariz. at 397, 499 P.2d at 153 (emphasis added); accord e.g., *Indiana Ins. Co. v. General Elec. Co.*, 326 F. Supp. 2d 844, 846 (N.D. Ohio 2004) (“The court has the power to exclude evidence in limine only when evidence is clearly inadmissible on all potential grounds” (emphasis added)).

³ E.g., *Dunn v. State Farm Mut. Auto. Ins. Co.*, 264 F.R.D. 266, 274 (E.D. Mich. 2009) (“[M]otions in limine are meant to deal with discrete evidentiary issues related to trial, and are not another excuse to file dispositive motions disguised as motions in limine” (citation and internal quotation marks omitted)); *Goldman v. Healthcare Mgt. Sys., Inc.*, 559 F. Supp. 2d 853, 871-72 (W. D. Mich. 2008) (same: collecting cases); *Johnson v. Chiu*, 199 Cal. App. 4th 775, 780-81, 131 Cal Rptr. 3d 614, 618 (2011) (“What in limine motions are *not* designed to do is to replace . . . dispositive motions”; “To have the sufficiency of the pleading or the existence of triable issues of material fact decided in the guise of a motion in limine is a perversion of the process” (citations and internal quotation marks omitted)).

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1. Page Limit and Format: Other than *Daubert* motions and responses to those motions, neither the motion in limine nor the response may exceed two pages, including the caption. Showing that the motion has merit should not require more than that.⁴

Any motion in limine or response to such a motion should begin with a simple declarative sentence that identifies the evidence that is the subject of the motion, with the understanding that the broader the scope of the evidence to be excluded, the less likely it is that a motion in limine will be granted.⁵ The remainder of the motion or response should then explain why a mistrial or reversible error would or would not result if the motion is denied, with citations to authority that have reached the same conclusion in the same or similar circumstances (this also applies to motions in limine based on any failure to disclose, keeping in mind that nondisclosure implicates Ariz. R. Civ. P. 37(c)).⁶ If the motion is unable to explain why its denial would result in a mistrial or reversible error, the remainder should then demonstrate persuasively what efficiency, economy, or other benefit is to be gained by granting the motion.

Other than *Daubert* motions, which should be filed separately, if two or more motions in limine are filed, they should be combined as a single omnibus motion. The caption should appear on the first page, and each motion should begin on a new page, following the format and page limit standards above. The same applies to any response opposing such an omnibus motion.

2. Rule 7.2: Before any motion or omnibus motion may be filed, the moving party must comply with Ariz. Rule Civ. P. 7.2(a) (i.e., establishing a meet and confer requirement, which may be satisfied by meeting in person or by way of telephone conversations, but not by written means (e.g., e-mail, letter)).

⁴ Evidence is not to be excluded even when it is inadmissible for one purpose or against one party if it remains admissible for another purpose or against another party. *E.g.*, *Steele v. Vanderslice*, 90 Ariz. 277, 287, 367 P.2d 636, 643 (1961) (“Evidence admissible for one purpose is not to be excluded because inadmissible for another purpose”); *Cavanagh v. Ohio Farmers Ins. Co.*, 20 Ariz. App. 38, 44, 509 P.2d 1075, 1081 (1973) (“[E]vidence properly offered against one of multiple parties must ordinarily be admitted, although it would be inadmissible and prejudicial against another party”).

⁵ *Sperberg v. Good year Tire & Rubber Co.*, 519 F.2d 708, 712 (6th Cir. 1975) (“Orders in limine which exclude broad categories of evidence should rarely be employed”).

⁶ “When a motion in limine is used to enforce the provisions of Rule 26.1, it is effectively a request for sanctions under Rule 37(c), Ariz. R. Civ. P. As such, it must be considered and reviewed using the standards of Rules 26.1 and 37(c) and the cases that have applied them.” *Zimmerman v. Shakman*, 204 Ariz. 231, 235, ¶12, 62 P.3d 976, 980 (App. 2003). Among other things, that requires the Court to consider whether a postponement of the trial is warranted. Thus, a motion that urges the exclusion of evidence based on a failure to comply with Rule 26.1 should explain why any unfair prejudice that may result from allowing the evidence cannot be remedied by a trial continuance.

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3. Deadlines: Unless another order in this case, including any subsequent order, establishes an earlier deadline, the deadline for filing *Daubert* motions is 120 days before the scheduled first day of trial and the deadline for motions in limine is 30 days before the trial management conference. In both instances, timely responses must be filed after service, and no replies should be filed unless requested.

4. Under Advisement: Although motions in limine will be considered as quickly as the court's schedule permits, they will not be taken under advisement any sooner than 15 days before the start of the trial, irrespective of when they are filed. That said, if the parties believe that a ruling on such a motion early in the case will facilitate settlement, they should notify this Division (by telephone or e-mail is sufficient), and every effort will be made to decide the issue as soon as time allows.

NOTE: Any previous order regarding preparation of jury notebooks should be disregarded. Given the resources that are available in this Division's Courtroom, jury notebooks are unnecessary.

Notices of Settlement

In accordance with the provisions of ARCP 41(a), to be effective, any Notice of Settlement or Dismissal providing for resolution of one or more pending claims that is filed after service by the opposing party's answer or dispositive motion, must be signed by each affected party (or appropriate counsel) prosecuting or defending against the claim(s) covered by the Notice. Each filed Notice shall state whether it resolves all pending issues in the case and constitutes a representation to the court that the claims subject to the Notice have been fully resolved with respect to Notice signatories, and that the only further relief to be sought with respect to such claims is entry of an order that each signatory confirms is consistent with the agreement that gave rise to filing of the Notice.

IT IS FURTHER ORDERED that the Time Estimates for Trial attached hereto shall be submitted on the same date as the parties' JPTS as ordered herein.

ATTACHED: SAMPLE FORMAT FOR TIME ESTIMATE FORM AND EXHIBIT PROCEDURES

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CAUSE NUMBER
CASE CAPTION
PLAINTIFF'S COUNSEL/PRO PER
DEFENDANT'S COUNSEL/PRO PER
(NOTE: Add additional lines as needed for additional parties and or witnesses.)

TIME ESTIMATES FOR TRIAL

Opening Statement and Closing Argument

PLAINTIFF'S OPENING STATEMENT	
DEFENDANT'S OPENING	
PLAINTIFF'S CLOSING	
DEFENDANT'S CLOSING	
PLAINTIFF'S REBUTTAL	

Estimate of Time for Witness Examination

PLAINTIFF'S WITNESSES	DIRECT EXAMINATION	CROSS EXAMINATION	REDIRECT EXAMINATION

Estimate of Time for Witness Examination

DEFENDANT'S WITNESSES	DIRECT EXAMINATION	CROSS EXAMINATION	REDIRECT EXAMINATION

The foregoing are based on the best estimates of the parties of the time reasonably needed to complete the necessary examination of the witnesses listed.

Plaintiff's counsel/Pro Per

Defendant's counsel/Pro Per

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GUIDELINES WHEN PREPARING EXHIBITS FOR USE IN COURT

PLEASE READ

1. Exhibits will be marked consecutively. *The clerk cannot reserve numbers for exhibits that will be provided at a later date.* Any missing exhibits will not be considered and the numbers of all following exhibits will be moved up. If Defendant's exhibits are received prior to Plaintiff's exhibits, the clerk may mark them first with Plaintiff's exhibits following.
2. Original Depositions will not be marked as an exhibit. **Original** depositions to be used for impeachment purposes shall be provided to the clerk on the first day of trial to be hand-filed.
3. Do not submit duplicate exhibits, **it is essential that the parties confer to avoid submitting duplicate exhibits.**
4. If large charts or blow-ups are anticipated to be used, please include a small version (or photo) which can be marked as the exhibit. The charts and blow-ups are used for demonstrative purpose only, are not marked as the exhibits, and are returned.
5. Each multiple page exhibit **MUST** be securely fastened together by staple or pronged fasteners. **DO NOT use paper clips, rubber bands, binder clips or submit loose sheets of paper.**
6. Do not put numbers on the exhibits themselves; instead, **use a COLORED sheet with the exhibit number on it.** Place the colored sheet in front of each exhibit, however, **DO NOT staple or paper-clip it to the exhibit itself** (this should be the only loose sheet).
7. The parties are to provide a workable list of exhibits. The list should include a title or description of each exhibit. (See blank sample of the following table as a reference).

Exhibit No.	Identified By	Description <i>Should be verifiable when viewing the first page of the exhibit</i>	Stipulated in Evidence/Objection

PLEASE NOTE: Each party shall provide a binder of exhibits for the court's use. Each exhibit shall be separated by numbered divider tabs.

For additional assistance in preparation of exhibits contact the courtroom clerk at:
(602) 506-3451