

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

---

TERRI BENNETT, A SINGLE WOMAN,  
*Plaintiff/Appellant,*

*v.*

PIMA COUNTY COMMUNITY COLLEGE DISTRICT, A POLITICAL  
SUBDIVISION OF THE STATE OF ARIZONA; BOARD OF GOVERNORS OF  
PIMA COUNTY COMMUNITY COLLEGE DISTRICT,  
*Defendants/Appellees.*

No. 2 CA-CV 2016-0019  
Filed October 28, 2016

---

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
NOT FOR PUBLICATION  
*See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).*

---

Appeal from the Superior Court in Pima County  
No. C20133885  
The Honorable Richard S. Fields, Judge

**AFFIRMED**

---

COUNSEL

Munger Chadwick, P.L.C., Tucson  
By John F. Munger, Andrew H. Barbour, and Adriane J. Hofmeyr  
*Counsel for Plaintiff/Appellant*

BENNETT v. PIMA CTY. CMTY. COLLEGE DIST.  
Decision of the Court

Jones, Skelton & Hochuli, P.L.C., Phoenix  
By Georgia A. Staton, Eileen Dennis GilBride, and  
Elizabeth A. Gilbert  
*Counsel for Defendants/Appellees*

---

**MEMORANDUM DECISION**

Presiding Judge Howard authored the decision of the Court, in which Judge Espinosa and Judge Staring concurred.

---

H O W A R D, Presiding Judge:

¶1 Terri Bennett appeals from the judgment entered against her in this action after the trial court granted partial summary judgment and judgment as a matter of law (JMOL) on some claims and denied declaratory and injunctive relief, and a jury rendered verdicts as to others. She contends the court erred by dismissing or granting judgment on certain claims, making evidentiary rulings, and giving certain jury instructions. She also asserts that one of the jury's verdicts was not supported by the evidence. Because we find no error, we affirm.

**Factual and Procedural Background**

¶2 In reviewing a grant of summary judgment or JMOL, we review the facts in the light most favorable to the non-moving party. *Rice v. Brakel*, 233 Ariz. 140, ¶ 2, 310 P.2d 16, 18 (App. 2013); *see also Warner v. Sw. Desert Images, LLC*, 218 Ariz. 121, ¶ 25, 180 P.3d 986, 996 (App. 2008). But in reviewing a jury's verdict, we view the facts in the light most favorable to upholding the verdict. *S Dev. Co. v. Pima Capital Mgmt. Co.*, 201 Ariz. 10, ¶ 3, 31 P.3d 123, 126 (App. 2001). When this distinction is material to our view of the facts for a particular issue, we will so state.

¶3 Bennett began nursing classes at Pima Community College (PCC) in 2013. Shortly after beginning the program, she began complaining to PCC instructors about "disruptions" in the classroom, specifically the use of Spanish in class by a particular

BENNETT v. PIMA CTY. CMTY. COLLEGE DIST.  
Decision of the Court

student, M.E. Other students would occasionally speak Spanish in class as well, but Bennett testified at trial that they did so only in response to M.E.

¶4 On April 4, Bennett again complained to her instructor, Elizabeth Coleman, and a meeting was arranged with the Director of Nursing at PCC, David Kutzler, about M.E.'s use of Spanish in classes. When Bennett and Kutzler met to discuss the issue, the conversation became confrontational, and the meeting ended.

¶5 In an attempt to address concerns that arose during that meeting, Bennett met with and otherwise communicated with various members of the PCC staff on several different occasions to discuss her complaint that Spanish was being spoken in class and other, more general complaints. Witnesses at trial described Bennett as contentious and argumentative during these meetings.<sup>1</sup>

¶6 PCC suspended Bennett on April 22. She was given written notice of her suspension and escorted off campus by police. In that notice, Ann Parker, the Vice President of Student Development at the Desert Vista Campus of PCC, advised Bennett she had been suspended, pending a meeting with Parker, because Bennett presented "an unreasonable risk of danger to [her]self or others or . . . [her] presence on [PCC] property pose[d] a significant risk of disruption of educational activities."

¶7 On April 24, Bennett met with Parker to discuss the suspension. In a memo titled "Review Decision" sent to Bennett after the meeting, Parker stated that Bennett had "disrupt[ed] class by arguing with the instructor over a test answer," "complain[ed] to several staff members about students speaking Spanish in and out of

---

<sup>1</sup>For example, Ricardo Rivero, who at the time was an assistant to one of PCC's directors, testified that when Bennett came in to schedule a meeting with the director, she began "yelling" about Mr. Kutzler, and "gesturing" with her arms. Rivero testified that because of Bennett's yelling, an instructor came and closed Rivero's door. Rivero continued that Bennett was "irate" and "pissed off," that he felt intimidated, and that he contemplated calling campus security.

the classroom,” and “display[ed] intimidating behavior to students, staff and faculty.” Parker noted that this behavior violated two sections of the Student Code of Conduct, one that prohibited students from disrupting any educational activity, and another that prohibited them from engaging in harassing conduct. Confirming the initial suspension, Parker further suspended Bennett until the end of 2013.

¶8 In July, Bennett sued PCC, alleging claims for violations of article XXVIII of the Arizona Constitution and violations of her state and federal right to free speech, “unlawful suspension,” defamation, false light, “discrimination,” “retaliation,” “harassment,” breach of contract, breach of the duty of good faith and fair dealing, intentional infliction of emotional distress, and declaratory and injunctive relief.<sup>2</sup> Bennett filed two partial motions for summary judgment and PCC filed a motion for summary judgment. In March, the trial court denied PCC’s motion for summary judgment on Bennett’s claim under article XXVIII, as well as those based on the violation of her right to free speech, retaliation, and breach of contract and duty of good faith. The court denied Bennett’s motions for partial summary judgment on her article XXVIII claims and on her unlawful suspension claims related to A.R.S. § 13-2911. The court granted summary judgment in favor of PCC on the discrimination claim, noted the harassment claim had been withdrawn, and limited the claims of defamation and false light to a specific set of statements. This ruling was followed by various motions, including eight motions in limine, and a nine-day jury trial.

¶9 During trial, the court granted JMOL in favor of PCC on Bennett’s claim of unlawful suspension, and what remained of her claims of defamation and false light. The jury found in favor of PCC on Bennett’s contract claims,<sup>3</sup> and rendered an advisory verdict for PCC on the article XXVIII and free speech claims. Bennett filed a

---

<sup>2</sup>Bennett later withdrew her claim for intentional infliction of emotional distress.

<sup>3</sup>The trial court construed the unlawful suspension claim, the retaliation claim, and some aspects of the article XXVIII claim as contract claims. This is discussed in more detail *infra*.

BENNETT v. PIMA CTY. CMTY. COLLEGE DIST.  
Decision of the Court

motion for new trial, which the court denied. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 12-2101(A)(1), and 12-2102.

**Article XXVIII**

¶10 Bennett first argues the trial court erred by granting PCC's motion for summary judgment on her discrimination claim based on article XXVIII, § 3(B) of the Arizona Constitution which she claims "expressly outlaws discrimination against English speakers." She claims PCC discriminated against her "when it refused to instruct Spanish Speakers in her class to discuss substantive matters in English" and when it "evicted her from campus as soon as she complained about Spanish." PCC responds that summary judgment was proper because the record was "devoid of evidence that PCC did anything to [Bennett] 'because she used or attempted to use English.'"

¶11 Rule 56(a), Ariz. R. Civ. P., states that a trial court "shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." "Where no evidence exists to support an essential element of a claim, summary judgment is appropriate." *Rice*, 233 Ariz. 140, ¶ 6, 310 P.2d at 19. "We view the facts and inferences to be drawn from those facts in the light most favorable to the" non-moving party, and our review of summary judgment is de novo. *Id.* ¶¶ 2, 6. "We will affirm the trial court's grant of summary judgment if it is correct for any reason." *Grubb v. Do It Best Corp.*, 230 Ariz. 1, ¶ 3, 279 P.3d 626, 627 (App. 2012).

¶12 "When interpreting the scope and meaning of a constitutional provision, we are guided by fundamental principles of constitutional construction. Our primary purpose is to effectuate the intent of those who framed the provision and, in the case of an amendment, the intent of the electorate that adopted it." *Jett v. City of Tucson*, 180 Ariz. 115, 119, 882 P.2d 426, 430 (1994). The first step in our analysis is to turn to the plain language of the provision. *Id.* When the language of the provision is "clear and unambiguous, we generally must follow the text of the provision as written." *Id.* "No extrinsic matter" may be considered "to support a construction that would vary" from the plain language. *Id.*

BENNETT v. PIMA CTY. CMTY. COLLEGE DIST.  
Decision of the Court

¶13 Section 3(B) states, “A person shall not be discriminated against or penalized in any way because the person uses or attempts to use English in public or private communication.” Arizona appellate courts have not previously construed this version of article XXVIII.<sup>4</sup> Because the electorate did not define “discriminated” or “penalized,” we presume it intended these words to be given their normal, accepted meaning. See *McGuire v. Lee*, 239 Ariz. 384, ¶ 10, 372 P.3d 328, 331 (App. 2016) (plain language is “best indicator of . . . the intent of the electorate in amending the constitution” and should be employed “unless the statute provides a specific definition for its terms”). Black’s Law Dictionary defines “discrimination,” as is pertinent here, both as “[t]he effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class,” and as “[d]ifferential treatment; esp., a failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored.” *Discrimination*, Black’s Law Dictionary (10th ed. 2014). “Penalize” means “[t]o impose a penalty; to punish” or “[t]o treat unfairly.” *Penalize*, Black’s Law Dictionary (10th ed. 2014).

¶14 Bennett did not provide any evidence in response to PCC’s motion for summary judgment that PCC had discriminated against her by treating her differently or penalizing her because she spoke English. We reject Bennett’s unsupported assertion that the constitution requires that PCC must compel all students to speak only English in class. See Ariz. Const. art. XXVIII, §§ 1, 3(B), 4. Moreover, Bennett was not suspended because she spoke English. And she has not, on appeal or below, cited any case law in support of her contention that the use of Spanish by students in conversations with each other during classroom activities,

---

<sup>4</sup>A previous version of article XXVIII was ruled unconstitutional by the Arizona Supreme Court in 1998. *Ruiz v. Hall*, 191 Ariz. 441, 457, 459, 957 P.2d 984, 1000, 1002 (1998). The previous article XXVIII was repealed and replaced with the current version in 2006. 2006 Ariz. Sess. Laws, H.R. Con. Res. 2036. Because we conclude the provision was not violated, we need not address its constitutionality. See *Abbott v. Banner Health Network*, 239 Ariz. 409, ¶ 10, 372 P.3d 933, 937 (2016) (“[C]ourts should not unnecessarily decide constitutional questions.”).

compulsory or otherwise, could constitute discrimination under § 3(B). Therefore, the trial court did not err by granting PCC summary judgment on this claim.

¶15 Bennett next claims that, because she presented sufficient evidence at trial, the trial court erred by granting JMOL on Bennett's claim that PCC had "failed to 'preserve, protect and enhance the role of English' by failing to 'avoid any official actions that ignore, harm or diminish the role of English as the language of government'" as required by article XXVIII, §§ 1(3)(a), 3(A). Bennett argues that sufficient evidence supports her contention that PCC violated this section in two ways: Bennett argues, 1) for the first time on appeal, that PCC failed to investigate whether Spanish was being spoken in class and, 2) as she raised below, that PCC failed to prevent M.E. from speaking Spanish in class, thereby allowing a disturbance to Bennett's learning to continue. PCC responds that Bennett "provided no evidence that any PCC representative took any official action in Spanish."

¶16 Bennett did not raise the failure-to-investigate argument below, and it is thus waived. *See Romero v. Sw. Ambulance*, 211 Ariz. 200, ¶ 7, 119 P.3d 467, 471 (App. 2005) (an objection on one ground does not preserve another for appeal). Bennett, however, has argued that the trial court's grant of JMOL was fundamental error, apparently in an effort to avoid waiver on appeal. "[T]he doctrine of fundamental error 'should be used sparingly, if at all, in civil cases.'" *Id.* at n.3, quoting *Williams v. Thude*, 188 Ariz. 257, 260, 934 P.2d 1349, 1352 (1997). But we need not engage in a fundamental error analysis, because, as shown below, § 3(A) did not require PCC to prohibit the use of Spanish by students in class, and it therefore did not need to investigate such behavior.

¶17 We review de novo the trial court's grant of JMOL on Bennett's claim that PCC violated her rights under § 3(A) by failing to prevent Spanish from being spoken by students in its classes. *Warner*, 218 Ariz. 121, ¶ 25, 180 P.3d at 996. JMOL should be granted when "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Ariz. R. Civ. P. 50(a). "JMOL should only be granted if the evidence in support of a claim would not allow reasonable people to agree with the conclusions of the claim's proponent." *Warner*, 218 Ariz. 121, ¶ 25, 180 P.3d at 996.

“In reviewing a ruling on a motion for JMOL, we view the facts’ and all reasonable inferences therefrom ‘in the light most favorable to the party opposing it.’” *Id.*, quoting *Crackel v. Allstate Ins. Co.*, 208 Ariz. 252, ¶ 20, 92 P.3d 882, 889 (App. 2004).

¶18 We analyze these constitutional provisions first relying on their plain language. *Jett*, 180 Ariz. at 119, 882 P.2d at 430. Section 3(A) states: “Representatives of government in this state shall preserve, protect and enhance the role of English as the official language of the government of Arizona.” Section 1(3)(a) defines “preserve, protect and enhance” to include, “[a]voiding any official actions that ignore, harm or diminish the role of English as the language of government.” “Official action” is defined to include “the performance of any function or action on behalf of this state or a political subdivision of this state or required by state law that appears to present the views, position or imprimatur of the state or political subdivision or that binds or commits the state or political subdivision.” Ariz. Const. art. XXVIII, § 1(2).

¶19 Based on its plain language, § 3(A) applies only to the role of English as the “official language of the government of Arizona.” This interpretation is bolstered by article XXVIII, § 5, which expressly exempts state representatives from the requirement to solely use English, even during official duties. *See Adams v. Comm’n on Appellate Court Appointments*, 227 Ariz. 128, ¶ 20, 254 P.3d 367, 372 (2011) (“[C]onstitutions must be construed as a whole and their various parts must be read together.”), quoting *Kilpatrick v. Superior Court (Miller)*, 105 Ariz. 413, 419, 466 P.2d 18, 24 (1970).

¶20 Section 3(A) does not prohibit students from speaking Spanish to one another in class. All PCC instructors used English exclusively for teaching classes.<sup>5</sup> If it is constitutional for a member of the state’s legislature to speak any language other than English during the performance of official duties under § 3(A), it would be

---

<sup>5</sup>Kutzler did say “[b]ueno” in class, and Bennett responded by “yell[ing] out [‘]I don’t understand that language.[’]” This use of Spanish is clearly excluded from Article XXVIII’s scope. Ariz. Const. art XXVIII, § 1(2)(f) (“‘Official action’ . . . does not include: . . . Using terms of art or phrases from languages other than English.”).

absurd to construe § 3(A) to prevent private citizens from conversing with each other in Spanish, even if such conversation occurred during a state-organized program. *See Arnold Constr. Co. v. Ariz. Bd. of Regents*, 109 Ariz. 495, 498, 512 P.2d 1229, 1232 (1973) (interpretation should “avoid an absurd conclusion or result”); *cf. Tumacacori Mission Land Dev. v. Union Pac. R.R.*, 228 Ariz. 100, ¶ 6, 263 P.3d 649, 651 (App. 2011) (“Only when the . . . plain meaning would lead to an absurd result may we look behind the bare words of the provision to determine” intent). JMOL was proper on this claim. *Warner*, 218 Ariz. 121, ¶ 25, 180 P.3d at 996.

¶21 Finally, even if the definition of “official action” extended to students speaking Spanish during class, the students’ extremely limited use of Spanish, as shown by this record, could not rise to the level of a violation of Bennett’s constitutional rights under § 3(A). Reasonable people could not conclude that PCC had failed to “preserve, protect and enhance the role of English as the official language of the government” by allowing students to speak Spanish amongst themselves in this limited way.<sup>6</sup> Ariz. Const. art. XXVIII, § 3(A); *see also Daniels v. Williams*, 474 U.S. 327, 332 (1986) (Supreme Court refuses to “trivialize” Due Process Clause). The court did not err in granting JMOL. *Warner*, 218 Ariz. 121, ¶ 25, 180 P.3d at 996 (JMOL proper where reasonable people cannot agree with conclusions of non-moving party).

### False Light/Defamation

¶22 Bennett next claims the trial court erred by granting JMOL on her claims for defamation and false light during trial. For both claims, Bennett identifies two statements made by Kutzler, as well as her removal from campus in the presence of police officers as potentially defamatory or actionably casting her in a false-light.

### Defamation

¶23 Bennett claims the trial court erred in granting JMOL because there was sufficient evidence to support her claims for

---

<sup>6</sup>Bennett herself testified that one student, M.E., was primarily responsible for the use of Spanish in class, and that the use of Spanish was solely between M.E. and students.

defamation. She argues PCC defamed her when Kutzler “posted on an internet blog that ‘[Bennett] began to harass and intimidate other students,’ and ‘[Kutzler] had at least two students in [his] office in tears wanting to quit the program because of [Bennett’s] intimidation.’” Bennett also claims Kutzler’s online statement, “[Bennett] began to harass and intimidate other students,” was defamatory. She further asserts PCC defamed her by “evicting her from campus under police escort.” PCC counters that JMOL was proper because the facts Bennett primarily relies on to support her defamation claim were raised during PCC’s case-in-chief, after the court granted JMOL.

¶24 Bennett’s defamation claim required demonstrating that PCC “publishe[d] a false and defamatory communication regarding [Bennett]” and “(a) kn[ew] that the statement [was] false and it defame[d Bennett,] (b) act[ed] in reckless disregard of these matters, or (c) act[ed] negligently in failing to ascertain them.” *Dube v. Likins*, 216 Ariz. 406, ¶ 35, 167 P.3d 93, 104 (App. 2007), quoting *Rowland v. Union Hills Country Club*, 157 Ariz. 301, 306, 757 P.2d 105, 110 (App. 1988). In order to survive JMOL, therefore, Bennett had the burden of showing not only that Kutzler’s statements were false, but that Kutzler knew of or acted negligently in discerning their falsity. *Dube*, 216 Ariz. 406, ¶ 35, 167 P.3d at 104.

¶25 But Bennett does not cite to any testimony showing Kutzler’s state of mind, other than his post-JMOL testimony. Kutzler testified on August 19, after the trial court had entered JMOL on August 14, at the end of Bennett’s case-in-chief. Our review is limited to what was before the court when it granted JMOL. See *GM Dev. Corp. v. Cmty. Am. Mortg. Corp.*, 165 Ariz. 1, 4, 795 P.2d 827, 830 (App. 1990) (limiting court’s review to record that existed when trial court ruled on motion for partial summary judgment, which did not include deposition transcripts filed subsequent to that ruling). Kutzler’s statements, coming as they did after JMOL was granted, were not part of the record before the court when it granted JMOL; we therefore do not consider them.

¶26 Further, Bennett does not contend that she raised the issue of Kutzler’s post-JMOL testimony before the trial court. Therefore, any argument on that ground is also waived. *Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 503, 733 P.2d 1073, 1086 (1987).

¶27 Bennett also claims that the testimony of W.P. and M.E. gave rise to an inference that Kutzler's statements were false. But this evidence was also adduced after JMOL and our review is limited to the record before the trial court when it made that ruling. *GM Dev. Corp.*, 165 Ariz. at 4, 795 P.2d at 830.

¶28 Bennett argues in her reply brief that her testimony at trial was sufficient evidence to support a defamation claim. In particular, she highlights portions of her testimony where she claimed Kutzler's statements that she had threatened and intimidated other students were false and portions of testimony from other PCC nursing students who claimed she had not done so, or had not made racially charged statements. But again, Bennett does not direct any of her arguments to PCC's contention that she failed to present evidence of Kutzler's state of mind regarding the allegedly defamatory statements. *See Dube*, 216 Ariz. 406, ¶ 35, 167 P.3d at 104.

¶29 Bennett failed at trial, and likewise fails on appeal, to produce evidence sufficient for reasonable people to disagree about whether Kutzler knew his statements were false or acted negligently or recklessly in discerning their falsehood. *Dube*, 216 Ariz. 406, ¶ 35, 167 P.3d at 104. Thus, an essential element of her defamation claim lacked sufficient evidence, and JMOL was proper. Ariz. R. Civ. P. 50; *see also Warner*, 218 Ariz. 121, ¶ 25, 180 P.3d at 996.

¶30 Bennett lastly claims that PCC defamed her by removing her from campus using a police presence, thereby making "Bennett appear to be a criminal or a grave threat to others by evicting her from campus under police escort." But Bennett does not explain how her removal from campus under these circumstances constitutes defamation, and the argument is thus waived. Ariz. R. Civ. App. P. 13(a)(7) ("An 'argument' . . . must contain . . . contentions . . . with citations of legal authorities and appropriate references to the portions of the record on which the appellant relies."); *Polanco v. Indus. Comm'n*, 214 Ariz. 489, n.2, 154 P.3d 391, 393 n.2 (App. 2007).

BENNETT v. PIMA CTY. CMTY. COLLEGE DIST.  
Decision of the Court

**False Light**

¶31 Bennett next claims the trial court erred by granting JMOL on her false light claim, arguing the evidence at trial would support a jury finding that PCC cast her in a false light. PCC responds that Bennett failed at trial to “adduce evidence of the prerequisite state of mind,” to show that the complained-of behavior was outrageous, and the statements “simply did not place [Bennett] in a false light.” Therefore, PCC argues, JMOL was proper on Bennett’s claim.

¶32 In her reply brief, Bennett argues that PCC waived the insufficiency of the evidence and outrageousness arguments by failing to raise them below. But, we review a JMOL de novo, affirming the trial court if it is correct for any reason. *Warner*, 218 Ariz. 121, ¶¶ 25-26, 180 P.3d at 995-96. Thus, we need not address the court’s reasoning, and we may consider arguments raised by PCC for the first time on appeal.

¶33 Bennett claims that Kutzler’s online statements that Bennett had harassed and intimidated students were “factually false” and “also created a false impression” about Bennett. Further, she asserts that “evicting her from campus in the presence of uniformed police officers . . . created the false impression that [Bennett] was a criminal and a threat to her community.”

¶34 A party commits the tort of false light invasion of privacy when it “gives publicity to a matter concerning another that places the other before the public in a false light” if the “false light in which the other was placed would be highly offensive to a reasonable person, and . . . the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.” *Reynolds v. Reynolds*, 231 Ariz. 313, ¶ 13, 294 P.3d 151, 156 (App. 2013), quoting *Godbehere v. Phx. Newspapers, Inc.*, 162 Ariz. 335, 338, 783 P.2d 781, 784 (1989). “A false light cause of action may arise . . . when the publication of true information creates a false implication about the individual. In [this] type of case, the false innuendo created by the highly offensive presentation of a true fact constitutes the injury.” *Id.* ¶ 14, quoting *Godbehere*, 162 Ariz. at 341, 783 P.2d at 787.

BENNETT v. PIMA CTY. CMTY. COLLEGE DIST.  
Decision of the Court

¶35 Bennett states, without citation to any authority, that Kutzler's statements "created a false impression that [Bennett] was a harasser and intimidator of many fellow students to the point that she was so intolerable that fellow students wished to give up their studies." Bennett appears to base her argument solely on the claim that "these statements were false." But as Bennett herself points out, a false light claim need not be predicated on factually false statements. *Reynolds*, 231 Ariz. 313, ¶ 14, 294 P.3d at 156. Instead, Bennett had the burden of showing that Kutzler knew his statements were false or recklessly disregarded their falsity. *Id.* ¶ 13. And she had to show his online statements constituted a "major misrepresentation of [Bennett's] character, history, activities or beliefs,' not merely minor or unimportant inaccuracies." *Id.* ¶ 14, quoting *Godbehere*, 162 Ariz. at 341, 783 P.2d at 787. Bennett has not presented sufficient argument explaining how Kutzler's online statements, whether true or not, were knowingly false or created a false impression. Thus, this argument is waived. Ariz. R. Civ. App. P. 13(a)(7); see also *Polanco*, 214 Ariz. 489, n.2, 154 P.3d at 393 n.2.

¶36 Turning finally to Bennett's contention that she was placed in a false light by being escorted from the campus by police officers, as with her defamation claim, we find Bennett has made an insufficient argument on appeal. She does not explain how being "evicted . . . from campus in the presence of uniformed police officers . . . in front of her colleagues" constitutes a claim for false light. Bennett has not cited any authority, explained how such actions would constitute a publication, or identified evidence suggesting PCC acted with reckless disregard for "the false light in which [Bennett] would be placed." *Reynolds*, 231 Ariz. 313, ¶ 13, 294 P.3d at 156, quoting *Godbehere*, 162 Ariz. at 338, 783 P.2d at 784. Thus, this argument is waived. Ariz. R. Civ. App. P. 13(a)(7); see also *Polanco*, 214 Ariz. 489, n.2, 154 P.3d at 393 n.2.

BENNETT v. PIMA CTY. CMTY. COLLEGE DIST.  
Decision of the Court

**A.R.S. § 13-2911**

¶37 Bennett next claims that the trial court erred by failing to instruct the jury in accordance with A.R.S. § 13-2911 as she requested at trial. PCC responds that § 13-2911 does not apply to Bennett's case; it defines a misdemeanor criminal offense that Bennett was not charged with or suspended for violating. Bennett replies that § 13-2911 "imposes obligations on educational institutions [such as PCC] . . . that they can only order a student to leave campus in certain enumerated circumstances."

¶38 "We review a court's jury instructions for an abuse of discretion." *A Tumbling-T Ranches v. Flood Control Dist.*, 222 Ariz. 515, ¶ 50, 217 P.3d 1220, 1238 (App. 2009). We determine whether a jury instruction correctly stated the law de novo, and in so doing, "we review jury instructions in their totality." *Id.* "A party is entitled to an instruction on any theory of the case if reasonably supported by the evidence." *Id.*

¶39 Section 13-2911(A) sets forth the elements for the criminal offense of "interference with or disruption of an educational institution." *See also* § 13-2911(J) (setting forth offense levels). Section 13-2911(D) states, in relevant part:

The appropriate governing board of every educational institution shall adopt rules . . . for the maintenance of public order . . . and shall provide a program for the enforcement of its rules. The rules shall govern the conduct of students, faculty and other staff and all members of the public while on the property of the educational institution. Penalties for violations of the rules shall be clearly set forth and enforced. Penalties shall include provisions for the ejection of a violator from the property and, in the case of a student, faculty member or other staff violator, the violator's suspension or expulsion or any other appropriate disciplinary action.

¶40 Section 13-2911(F) expressly states that this subsection does not “prevent or limit the authority of the governing board of any educational institution to discharge any employee or expel, suspend or otherwise punish any student for any violation of its rules, even though the violation is unlawful under this chapter or is otherwise an offense.” The statute further provides that “[t]he chief administrative officer of an educational institution or an officer or employee designated by the chief administrative officer to maintain order *may* order a person to leave the property of the educational institution” under certain circumstances. § 13-2911(C) (emphasis added).

¶41 Bennett’s interpretation of § 13-2911 directly conflicts with the plain language of the statute. Nothing in subsection (A) suggests it is the only method an institution must use to eject someone, and subsection (F) expressly states otherwise. In defense of her interpretation, Bennett argues that § 13-2911(E) obligates educational institutions to adopt subsection (A) as the applicable policy for removing students from campus. Section 13-2911(E) states, in its entirety: “An educational institution is not eligible to receive any state aid or assistance unless rules are adopted in accordance with this section.” Bennett’s interpretation misreads the statute, which only imposes an obligation to “adopt rules . . . for the maintenance of public order.” § 13-2911(D).

¶42 Bennett also argues that the trial court previously ruled that whether PCC complied with § 13-2911 was a jury question. Bennett has misread the court’s statements. The court, in considering the § 13-2911 issue, stated: “A.R.S. § 13-2911 does not completely supplant the policies of [PCC] in their suspension process, and any question about whether PCC lawfully followed that process is for the jury.” Because the court clearly noted that § 13-2911 “does not completely supplant the policies of [PCC],” the “process” it thought reserved to the jury was PCC’s “suspension process.” This interpretation is bolstered by the court’s eventual refusal to include the statute in the instructions. Bennett’s interpretive arguments are unavailing, therefore an instruction on § 13-2911 was not supported by any theories before the court, and it did not abuse its discretion by rejecting such an instruction. *See A Tumbling-T Ranches*, 222 Ariz. 515, ¶ 50, 217 P.3d at 1238.

### Evidentiary Rulings

¶43 Bennett also challenges a number of the trial court's evidentiary rulings regarding the proposed testimony of three witnesses. We now consider her arguments pertaining to two of them.<sup>7</sup>

#### Testimony of J.N.

¶44 Bennett first challenges the admission of J.N.'s testimony that Bennett used racial slurs to refer to Hispanic and Mexican-American classmates and that she had referred to the Spanish language as "gibberish." Bennet claims the trial court erred by admitting this testimony because it was irrelevant, prejudicial, and unreliable, and she had a right "to hold such opinions without reprisals from [PCC]." "We review the trial court's evidentiary rulings for a clear abuse of discretion; we will not reverse unless unfair prejudice resulted, or the court incorrectly applied the law." *Larsen v. Decker*, 196 Ariz. 239, ¶ 6, 995 P.2d 281, 283 (App. 2000) (citations omitted).

¶45 Just before J.N. began testifying, Bennett made a motion in limine to preclude the challenged testimony on the grounds that it was irrelevant, lacked foundation, and was more prejudicial than probative. The trial court declined to rule at that time on the ground it was unaware of the substance or context of J.N.'s testimony and could not take time to hear the testimony out of the presence of the jury. The court specifically stated "if there's a problem, [it would] try to address it while the testimony is underway." When J.N. testified regarding Bennett's use of racial slurs, Bennett objected, but only on the ground that the evidence lacked foundation. When the testimony that Bennett had called Spanish "gibberish" was elicited, Bennett again only raised a foundation objection.

¶46 Rule 103(a)(1), Ariz. R. Evid., states that "[a] party may claim error in a ruling to admit or exclude evidence only if . . . [the

---

<sup>7</sup>Because witness E.G. proposed to testify regarding Bennett's emotional damages, we address Bennett's contention regarding the admissibility of E.G.'s testimony *infra*, in our discussion of damages-related errors.

party] timely objects . . . [and] states the specific ground, unless it was apparent from the context.” Failure to object on a certain ground at the appropriate time does not constitute a sufficient objection to sustain an argument on appeal, even when a party has objected to the complained-of testimony on that ground previously. *Romero*, 211 Ariz. 200, ¶ 7, 119 P.3d at 471. Bennett’s arguments are thus waived.<sup>8</sup>

### **Incident report of F.L.**

¶47 Bennett next argues the trial court erred by admitting an “incident report” written by F.L. as well as excluding impeachment evidence for F.L. Bennett contends the court erred by admitting the report because 1) the report was impermissible hearsay under Rule 802, Ariz. R. Evid., and 2) the report was more prejudicial than probative under Rule 403, Ariz. R. Evid. As noted above, we review a court’s decision to admit evidence for an abuse of discretion. *Larsen*, 196 Ariz. 239, ¶ 6, 995 P.2d at 283.

¶48 At trial, PCC offered testimony from Kutzler regarding an “incident report” about Bennett that he had received from F.L., a student in the nursing program. The report, which had been received by PCC staff just before Bennett was suspended, detailed a number of allegations including that Bennett had been “hostile” toward a teacher in class, seemed to “spy” on Mexican-American students, and had acted negatively toward “Mexican-American students.” PCC sought to admit this report during Kutzler’s testimony about the process he followed in taking disciplinary

---

<sup>8</sup>Even had the argument not been waived, the trial court noted that the complained-of testimony would go “to the credibility of the witnesses who have testified on [Bennett’s] side that she would never use that kind of language.” Relevant evidence includes that which “has any tendency to make a fact more or less probable” and in this case, J.N.’s testimony regarding Bennett’s use of racially charged language rebuts the claim that she had not engaged in intimidating or harassing behavior toward Spanish-speaking students. Ariz. R. Evid. 401. For similar reasons, the court could have found that the evidence was more probative than prejudicial under Rule 403, Ariz. R. Evid.

BENNETT v. PIMA CTY. CMTY. COLLEGE DIST.  
Decision of the Court

action toward Bennett, which included reviewing a number of other reports.

¶49 Bennett objected on the grounds the report lacked foundation, was hearsay, was speculative, and was more prejudicial than probative under Rule 403. F.L. had been subpoenaed, but it appears the parties could not effectuate service on him, and he appears to have been unavailable to testify. After some redaction and a further objection on the grounds noted above as well as relevance, his report was admitted into evidence during Kutzler's testimony.

¶50 Rule 802, Ariz. R. Evid., prohibits the admission of hearsay unless an exception applies. Hearsay means a statement made out-of-court offered into evidence to "prove the truth of the matter asserted in the statement." Ariz. R. Evid. 801(c). "It is a [well-recognized] principle that [w]henver an utterance is offered to evidence the *state of mind* which ensued in another person in consequence of the utterance, it is obvious that no assertive or testimonial use is sought to be made of it, and the utterance is therefore admissible, so far as the hearsay rule is concerned." *Rutledge v. Ariz. Bd. of Regents*, 147 Ariz. 534, 545, 711 P.2d 1207, 1218 (App. 1985), quoting *Pub. Serv. Co. of Okla. v. Bleak*, 134 Ariz. 311, 320, 656 P.2d 600, 609 (1982); see also Ariz. R. Evid. 803(3). "Thus, words offered as evidence of an utterance which caused a state of mind in the listener are not within the proscription of Ariz. R. Evid. 802, since they are not offered for a hearsay purpose." *Id.*, quoting *Pub. Serv. Co. of Okla.*, 134 Ariz. at 320, 656 P.2d at 609.

¶51 The trial court admitted the report because "it show[ed] the effect on the reader." This report was offered to show the body of information Kutzler was acting on when he formulated the belief that Bennett's behavior "had crossed the line into a possible violation of the student code of conduct." The report was not admitted for the purpose of showing that Bennett had been hostile toward a teacher or that she had behaved in a racist or discriminatory manner toward other students. Thus, the report was not excludable as hearsay, and the court did not abuse its discretion in admitting it on that ground.

¶52 Bennett argues, however, that the trial court nonetheless abused its discretion in admitting the evidence, which she claims was more prejudicial than probative under Rule 403. In particular, Bennett asserts “[s]tatements like ‘spying’ on Mexican-Americans, and refusing to work with them, are highly offensive, and serve no purpose other than to turn the jury against . . . [Bennett].” PCC responds that because the statements in the report coincided with “recurring descriptions of [Bennett’s] conduct, the report, which only confirmed that testimony, was simply not inflammatory or unduly prejudicial.”

¶53 Rule 403 states: “The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice.” We review for an abuse of discretion. *Shotwell v. Donahoe*, 207 Ariz. 287, ¶ 27, 85 P.3d 1045, 1052 (2004).

¶54 A Rule 403 analysis “begins with a proper assessment of the ‘probative value of the evidence on the issue for which it is offered.’” *Id.* ¶ 34, quoting *State v. Gibson*, 202 Ariz. 321, ¶ 17, 44 P.3d 1001, 1004 (2002). And “we accord substantial discretion to the trial court in the Rule 403 weighing process.” *Hudgins v. Sw. Airlines Co.*, 221 Ariz. 472, ¶ 13, 212 P.3d 810, 819 (App. 2009).

¶55 The report was offered to show the state of mind of PCC staff in making their decision to suspend Bennett. The report was one of the main pieces of documentation that Kutzler relied on in forming his opinion that Bennett had violated the student code of conduct. The trial court noted that once PCC received the report, they were required to act on it, thereby suggesting the report was probative with regards to why PCC chose to suspend Bennett. We cannot say the court abused its discretion in finding this evidence sufficiently probative.

¶56 Once probative value has been established, a court should exclude evidence when that evidence “suggests a ‘decision on an improper basis, such as emotion, sympathy, or horror.’” *Shotwell*, 207 Ariz. 287, ¶ 34, 85 P.3d at 296, quoting *State v. Mott*, 187 Ariz. 536, 545, 931 P.2d 1046, 1055 (1997). The trial court expressed concern about a portion of the report and subsequently

redacted that part. The court found the remainder of the report posed no risk of improper prejudice.

¶57 After the redaction, the report contained the following information alleged by F.L.: that Bennett “constantly complain[ed]” about students talking in Spanish; that Bennett “goes out of her way to spy on Mexican-Americans” by listening-in on their conversations; that Bennett refused to work in groups with Mexican-Americans; that Bennett was “intolerant of people of color”; and that Bennett said her “father was a racist and that she takes after her father.” Bennett concedes she complained about the use of Spanish in class. As noted above, J.N. also testified that Bennett had made racially derogatory statements. Given J.N.’s testimony concerning Bennett’s repeated racially derogatory remarks, such as her referring to Mexican-American students as “spics,” “illegals,” and “beaners,” the admission of the report would not have led the jury to base its “decision on an improper basis, such as emotion, sympathy, or horror.” *Id.*, quoting *Mott*, 187 Ariz. at 545, 931 P.2d at 1055. Thus, because the evidence was probative of PCC’s state of mind when it suspended Bennett, and that probative value was not substantially outweighed by any prejudicial effect, the court did not abuse its discretion in admitting this testimony. *Larsen*, 196 Ariz. 239, ¶ 6, 995 P.2d at 283.

¶58 Bennett finally argues the trial court abused its discretion when it excluded evidence proposed to impeach F.L. Again, we review evidentiary issues for an abuse of discretion. *Id.*

¶59 Bennett sought to impeach F.L.’s character for truthfulness by introducing the following evidence: F.L. had been deeded the entire estate of an elderly woman to whom he had been providing care for approximately a month; F.L. believed that Bennett had filed a complaint against him related to his use of the word “masturbation”; and the Arizona Nursing Board had found that F.L. had lied about his previous employment history. The trial court granted a motion in limine with regards to the elder-care issue on the ground the evidence’s probative value was outweighed by a danger of some of the Rule 403 factors, preventing Bennett from raising the issue “[u]nless the door gets open with some kind of financial motive.” The court attempted to “sanitize” the masturbation issue by precluding the use of the word

“masturbation” and limiting cross-examination to the existence of a complaint about F.L., which the court expanded at trial to cover a complaint about “sexual overtones.” Finally, the court ruled that the questions regarding F.L.’s truthfulness about his previous employment would be admitted.

¶60 As a preliminary matter, the trial court did not exclude cross-examination regarding F.L.’s previous employment, it only excluded mention of a “notice of charges” related to potential untruthfulness on employment applications. In any event, the issue of whether F.L. was untruthful about his previous employment was not raised at trial, and we therefore cannot address the argument on appeal that impeachment on this issue was excluded. To the extent Bennett argues that the “notice of charges” specifically should have been admitted, she has made insufficient argument to warrant review. Ariz. R. Civ. App. P. 13(a)(7)(A); *see also Polanco*, 214 Ariz. 489, n.2, 154 P.3d at 393 n.2.

¶61 As to the other two portions of testimony, Bennett first claims the testimony should have been admitted under Rule 806, Ariz. R. Evid. “When a hearsay statement . . . has been admitted in evidence,” a party may admit “any evidence that would be admissible for [the] purposes” of attacking the declarant’s credibility “if the declarant had testified as a witness.” Ariz. R. Evid. 806. But Rule 806 does not apply because, as noted above, F.L.’s statements were not admitted as hearsay.

¶62 Bennett next argues the evidence should have been admitted under Rule 608(b), Ariz. R. Evid. That rule prohibits use of specific instances of conduct to attack a witness’s character for truthfulness; but, the rule further provides that, on cross-examination, a court may allow the admission of evidence of specific instances that call into question the witness’s character for truthfulness or the character of another witness whose character the witness being cross-examined has testified about. F.L. was not, however, a witness at trial. *See Ryan v. S.F. Peaks Trucking Co.*, 228 Ariz. 42, ¶ 29, 262 P.3d 42, 50 (App. 2011) (A “‘witness’ is defined as ‘One who gives testimony under oath or affirmation (1) in person, (2) by oral or written deposition, or (3) by affidavit.’”), *quoting Witness*, Black’s Law Dictionary (8th ed. 1999). And Rule

608(b) expressly applies to witnesses. Thus, Rule 608 does not apply and Bennett has not identified an alternate ground for relief.

¶63 In sum, the trial court did not abuse its discretion in admitting the incident report, or in excluding the proposed impeachment evidence.

### Merged Claims

¶64 Bennett next argues the trial court erred by “eliminat[ing]” her claim for breach of duty of good faith and fair dealing and her claim “for free speech” from the jury instructions. In particular, Bennett contends that these claims should have been presented to the jury as distinct claims, rather than being “merged” with other claims. PCC responds that these instructions were in fact given to the jury, and in a proper manner.

¶65 “We review a court’s jury instructions for an abuse of discretion.” *A Tumbling-T Ranches*, 222 Ariz. 515, ¶ 50, 217 P.3d at 1238. “But we review whether a jury instruction correctly states the law de novo.” *Id.* “[W]e review jury instructions in their totality.” *Id.* “A party is entitled to an instruction on any theory of the case if reasonably supported by the evidence.” *Id.*

¶66 The trial court did not abuse its discretion in refusing to give the requested instructions pertaining to the good faith and fair dealing claim. At trial, the court expressly merged that claim with the breach-of-contract claim, on the ground that the two claims had the same damages. A breach of the covenant of good faith and fair dealing is ultimately a breach of an implied contractual term. *Wells Fargo Bank v. Ariz. Laborers, Teamsters and Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, ¶ 59, 38 P.3d 12, 28 (2002) (“Arizona law implies a covenant of good faith and fair dealing in every contract . . . [s]uch implied terms are as much of a part of a contract as are the express terms.”) (citations omitted). “[T]he remedy for breach of this implied covenant is ordinarily by action on the contract . . . .” *Burkons v. Ticor Title Ins. Co. of Calif.*, 168 Ariz. 345, 355, 813 P.2d 710, 720 (1991).

¶67 Bennett cites *Rawlings v. Apodaca*, 151 Ariz. 149, 153, 726 P.2d 565, 569 (1986), for the following definition of the covenant of good faith and fair dealing: “The essence of [the duty imposed by

a covenant of good faith and fair dealing] is that neither party will act to impair the right of the other to receive the benefits which flow from their agreement or contractual relationship.” The trial court instructed the jury that “[t]he duty [of good faith and fair dealing] requires that neither party do anything to prevent the other party from receiving the benefits of their agreement.” This instruction correctly states the law and did not constitute an abuse of discretion. *A Tumbling-T Ranches*, 222 Ariz. 515, ¶ 50, 217 P.3d at 1238.

¶68 But the main thrust of Bennett’s argument on appeal is that a breach of the covenant of good faith and fair dealing can support tort damages, and therefore merging it with the contract claim was improper. She cites *Taylor v. State Farm Mut. Auto. Ins. Co.*, 185 Ariz. 174, 176, 913 P.2d 1092, 1094 (1996), for the proposition that “breach of the duty of good faith and fair dealing may even be considered a tort claim, entitling a plaintiff to damages for pain and suffering.” But as Bennett acknowledges, that case involved an insurance contract, which the Arizona Supreme Court specifically designated as “unique from . . . other contracts.” *Id.* “A party may bring an action in tort claiming damages for breach of the implied covenant of good faith, but only where there is a ‘special relationship between the parties arising from elements of public interest, adhesion, and fiduciary responsibility.’” *Wells Fargo Bank*, 201 Ariz. 474, ¶ 60, 38 P.3d at 29, quoting *Burkons*, 168 Ariz. at 355, 813 P.2d at 720.

¶69 Bennett attempts to establish that such a special relationship existed in a footnote of her brief on appeal, explaining, again without citation, that although insurance contracts are unique, her case is similar because, “It is plausible that the same can be said of the relationship between a government educational institution and its students.” Because Bennett has failed to provide the court with any “citations of legal authorities” pertinent to the question at hand, this argument is waived. Ariz. R. Civ. App. P. 13(a)(7)(A); see also *Polanco*, 214 Ariz. 489, n.2, 154 P.3d at 393 n.2.

¶70 Turning to the free speech claim, the trial court merged this claim with the claim for breach of contract on the ground that no distinct tort remedies were available for free speech retaliation. Bennett failed at trial and similarly fails on appeal to cite any authority supporting tort damages for free speech retaliation, and

we are not aware of any legal basis under Arizona law to support such a claim. Consequently, this argument is waived. Ariz. R. Civ. App. P. 13(a)(7)(A); *see also Polanco*, 214 Ariz. 489, n.2, 154 P.3d at 393 n.2. The court did not abuse its discretion in refusing to give an instruction on a separate retaliation claim.

### Jury Verdict

¶71 Bennett additionally argues that the jury verdict in favor of PCC on her breach-of-contract claim was not supported by the evidence. PCC counters that Bennett is arguing that the jury should have believed her argument over its own, which amounts to a “blustery jury argument.”

¶72 On appeal, Bennett fails to identify any authority stating that PCC’s policies are part of a contract and that violation of those policies are violations of the contract. She further fails to identify the elements of a breach-of-contract claim and show how that law would apply to this case. Because we are unable to discern from her brief whether there is any legal basis for granting relief, we find her argument waived for failure to develop it. Ariz. R. Civ. App. P. 13(a)(7); *see also Polanco*, 214 Ariz. 489, n.2, 154 P.3d at 393 n.2.

¶73 Moreover, the verdict was based on substantial evidence. On review of a jury verdict, “we view the evidence in the light most favorable to upholding [it].” *S Dev. Co.*, 201 Ariz. 10, ¶ 3, 31 P.3d at 126. “We will affirm the verdict if there is substantial evidence to support it.” *Id.* ¶ 42, *quoting Warrington v. Tempe Elementary Sch. Dist. No. 3*, 197 Ariz. 68, ¶ 4, 3 P.3d 988, 989 (App. 1999). “In considering whether sufficient evidence supports the jury verdict, we look to the broad scope of the trial and do not attempt to reweigh the facts or comb the record for evidence supporting a conclusion or inference different from that reached by the jury.” *Flanders v. Maricopa County*, 203 Ariz. 368, ¶ 49, 54 P.3d 837, 845 (App. 2002).

¶74 At trial, PCC presented significant evidence regarding its suspension process. In particular, it presented ample testimony at trial suggesting that Bennett had violated the student code of conduct, including the following: Bennett had argued with a teacher

in class; she had made potentially harassing comments to students; and, she had argued with and made potentially offensive, intimidating comments and gestures to administrative staff. PCC and Bennett both presented evidence detailing the process PCC followed in suspending her. This evidence was sufficient to allow a reasonable jury to conclude PCC had not breached its implied contract with Bennett when it suspended her. *See Wells Fargo Bank*, 201 Ariz. 474, ¶ 59, 38 P.3d at 28.

¶75 Nevertheless, in roughly six pages of her opening brief, Bennett raises arguments related to evidence and the inferences she would have us draw from that evidence. But an appellate court is not entitled to reweigh the evidence, and therefore her arguments are unavailing in light of the substantial evidence upon which the jury could have based its decision. *Flanders*, 203 Ariz. 368, ¶ 49, 54 P.3d at 845.

### Damages

¶76 Finally, Bennett has made numerous arguments pertaining to alleged errors that the trial court made in excluding or limiting damages: precluding Bennett from claiming damages under article XXVIII and damages for future lost wages, and precluding the testimony of E.G. pertaining to Bennett's emotional damages. PCC asserts, relying on *Medlyn v. Kimble*, 106 Ariz. 66, 470 P.2d 679 (1970), that any error was harmless because "the jury found against [Bennett] on liability." *Medlyn* stands for the proposition that when a factfinder does not find any liability, any errors related to damages are "immaterial." *Id.* at 68, 470 P.2d at 681, quoting *Snethen v. Gomez*, 6 Ariz. App. 366, 370, 432 P.2d 914, 918 (1968). Bennett appears to concede that this court should consider her damages arguments only if we reverse "any of the Trial Court's rulings" or the jury verdict. As noted above, the court did not err, and the jury's verdict was based on substantial evidence. Because Bennett lost on liability for each and every claim, we need not address her damages arguments. *See id.*

### Attorney Fees

¶77 PCC has requested attorney fees under A.R.S. § 12-341.01, arguing this action "arises out of contract," and Rule 25, Ariz.

R. Civ. App. P., asserting Bennet’s “arguments on appeal are frivolous.” “An action sounds in contract when the duty breached is ‘created by the contractual relationship, and would not exist but for the contract.’” *Assyia v. State Farm Mut. Auto. Ins. Co.*, 229 Ariz. 216, ¶ 12, 273 P.3d 668, 672 (App. 2012), quoting *Barmat v. John & Jane Doe Partners A-D*, 155 Ariz. 519, 523, 747 P.2d 1218, 1222 (1987). “[A]s used in A.R.S. § 12-341.01, the words ‘arising out of a contract’ describe an action in which a contract was a factor causing the dispute.” *Id.*, quoting *ASH, Inc. v. Mesa Unified Sch. Dist. No. 4*, 138 Ariz. 190, 192, 673 P.2d 934, 936 (App. 1983).

¶78 Here, PCC is the successful party and we award it a portion of its fees under § 12-341.01. Bennett’s claims for defamation and false light, and violations of article XXVIII could have existed without the existence of the implied contract between PCC and Bennett. These claims do not sound in contract but instead have an independent legal basis, and therefore an award of fees under § 12-341.01 would not be appropriate for these claims. See *Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc.*, 198 Ariz. 10, ¶ 27, 6 P.3d 315, 320 (App. 2000) (“The existence of a contract that merely puts the parties within tortious striking range of each other does not convert ensuing torts into contract claims.”).

¶79 PCC may recover its fees related to responding to Bennett’s appeal on the following issues: lost future wages, admitting the testimony of J.N. and F.L., sufficiency of the jury verdict on the breach of contract claim, merging the breach of the covenant of good faith and fair dealing and retaliation claims, and the § 13-2911 jury instruction issue. We decline to award fees under Rule 25, Ariz. R. Civ. App. P.

### Disposition

¶80 Based on the foregoing, the judgment of the trial court is affirmed.