DIVISION ONE
FILED: 10/01/09
PHILIP G. URRY, CLERK
BY: DN

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

BRUCE BRIMACOMBE and CYNTHIA BRIMACOMBE, husband and wife; SEBRIM SYSTEMS, L.L.C., Plaintiffs-Appellees, v. LYLA GAIL CHARLOFF and RONALD L. MATTHEWS, husband and wife; ROWZ PROPERTIES LIMITED PARTNERSHIP, Defendants-Appellants,	1 CA-CV 08-0595 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2005-011385

The Honorable Peter B. Swann, Judge

AFFIRMED

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P O R T L E Y, Judge

¶1 Defendants-Appellants Lyla Gail Charloff, Ronald L. Matthews, and RowZ Properties Limited Partnership (collectively, "the Charloff parties") appeal the jury verdict in favor of Plaintiffs-Appellees Bruce and Cynthia Brimacombe and Sebrim Systems, L.L.C. (collectively, "the Brimacombe parties"). For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND[2]

¶2 Bruce Brimacombe and Christopher Segal formed Sebrim in August 2002, to provide, primarily, wireless broadband internet services. Sebrim subsequently entered into a joint venture with two other companies, Centerlynx Communications, Inc. ("Centerlynx"), and Lages, Inc. ("Lages"), to provide related services under the name of Trynetics L.L.C. ("Trynetics"). Trynetics conducted business in a building in Mesa ("the Building") and used the communications tower to broadcast its internet signal.

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[2] We view the facts in the light most favorable to upholding the jury's verdict. *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 53, ¶ 13, 961 P.2d 449, 451 (1998).

¶3 Bruce Brimacombe and Charloff executed the Member Admission Agreement ("MAA") and the Membership Purchase Agreement ("MPA"), on July 29, 2003, which admitted RowZ as a new member of Sebrim, subject to the terms and conditions of the MPA and, to the extent it had not been superseded, Sebrim's Operating Agreement. RowZ, in exchange for a 50% interest in Sebrim, agreed that Sebrim could possess, control, and use the assets of Centerlynx, Lages, and Trynetics, which RowZ had contemporaneously purchased for $170,000 pursuant to an Asset Purchase Agreement ("APA"). Bruce Brimacombe agreed Sebrim would pay RowZ $800 per month for the use of those assets.[3]

¶4 The Brimacombe parties filed a complaint against the Charloff parties in July 2005. They alleged that RowZ had failed to fully perform its obligations under the APA and the MAA, and that Charloff and Matthews had failed to provide the funding as promised for Sebrim's operation. They also alleged Charloff breached her fiduciary duty to Sebrim when she purchased the Building and conveyed Sebrim's confidential information to its competitors. The Charloff parties filed a counterclaim for conversion and breach of contract because Sebrim failed to make the monthly payment, as promised to RowZ, for the use of the assets RowZ had purchased from Centerlynx,

[3] As part of the transaction, RowZ purchased Segal's interest in Sebrim and Trynetics.

Lages, and Trynetics. The Charloff parties also sought dissolution and accounting of Sebrim.[4]

¶5 Forty days before trial, the Charloff parties successfully moved to substitute counsel. Their subsequent motion to continue the trial for ninety days was denied.

¶6 At trial, in addition to the written agreements, the Brimacombe parties alleged that Charloff orally agreed to secure and personally guarantee a $750,000 line of credit for Sebrim's benefit, but never fulfilled her promise. They also claimed they were entitled to damages because Charloff's purchase of the Building was a breach of her fiduciary duty to Sebrim and a usurpation of its corporate opportunity, and Charloff's disclosure of Sebrim's customer list to competitors was a misappropriation of its trade secrets. Finally, Bruce Brimacombe claimed he had a written employment contract with Sebrim wherein Sebrim agreed to pay him $3000 per month for his work, but that despite his work for the company, he was never paid.

¶7 The Charloff parties moved for judgment as a matter of law on the claim that Charloff orally promised to secure a $750,000 line of credit for Sebrim, and on Bruce Brimacombe's claim that he had an employment agreement with Sebrim. They

[4] Charloff also alleged that Sebrim breached a contract to repay loans made for operating expenses, but did not raise the claim at trial.

argued the agreements violated the statute of frauds, which generally precludes a party from bringing an action to enforce an unwritten promise to lend more than $250,000 or a promise that cannot be performed within one year. Ariz. Rev. Stat. ("A.R.S.") § 44-101(5), (9) (2003). The trial court denied the motions because the statute of frauds had not been pled as an affirmative defense and was not disclosed prior to the discovery deadline.[5] The court also denied their motion for leave to amend their answer to plead the statute of frauds defense or to conform to the evidence.

¶8 The Charloff parties also unsuccessfully moved for judgment as a matter of law on the claim for misappropriation of trade secrets, arguing that it had not been shown that Charloff divulged any trade secrets, or that the alleged misappropriation damaged the Brimacombe parties.[6]

¶9 The jury found for the Brimacombe parties on their claims for misappropriation of corporate opportunity, misappropriation of trade secrets, conversion and unjust enrichment, and awarded them $233,000. The jury also awarded them $167,000 on their breach of contract and breach of

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[5] In addition, the court noted that the Brimacombe parties had alleged and offered evidence that the employment agreement was in writing.

[6] The court granted the motion for judgment as a matter of law on the claim that Sebrim had a right of first refusal to purchase the Building because they presented no evidence to support the existence of a right of first refusal.

fiduciary duty claims. The Charloff parties received an award of $14,400 on their counterclaim.

¶10 The court entered judgment and awarded the Brimacombe parties their attorneys' fees of $199,924. The Charloff parties' motion for a new trial was denied. Subsequently, the Charloff parties appealed, and we have jurisdiction pursuant to A.R.S. § 12-2101(B), (F)(1) (2003).

ISSUES

¶11 The Charloff parties raise the following issues:

1. Whether the trial court erred when it denied the Charloff parties' request to continue the trial.
2. Whether the trial court erred when it denied them leave to amend the answer to assert a statute of frauds defense.
3. Whether the trial court erred when it refused to instruct the jury regarding parol evidence.
4. Whether the trial court erred when it allowed the Brimacombe parties to present the testimony of witness Jerry Joyce telephonically.
5. Whether the trial court erred when it awarded damages for an alleged oral employment agreement between Bruce Brimacombe and Sebrim.
6. Whether there was sufficient evidence of any oral agreement.
7. Whether there was sufficient evidence of damages.
8. Whether any of the other claims were supported by the law and the facts.

DISCUSSION

A. Motion to Continue Trial

¶12 We first consider whether the trial court erred in denying the Charloff parties' motion to continue trial. "A trial court's order on a motion to continue will be affirmed on

appeal absent an abuse of discretion." *Canon Sch. Dist. No. 50 v. W.E.S. Constr. Co.*, 177 Ariz. 431, 438, 868 P.2d 1014, 1021 (App. 1993), *vacated on other grounds*, 180 Ariz. 148, 882 P.2d 1274 (1994).

¶13 Immediately after applying for substitution of counsel, the Charloff parties moved to continue the trial because their prior lawyer had not kept them apprised of important case deadlines and developments, and new counsel needed additional time to prepare for trial. In particular, they argued that the oral agreements failed as a matter of law because they violated the statute of frauds, or otherwise should be excluded as inadmissible parol evidence, and sought to resolve these issues prior to trial. The court denied the motion because the request was made too late to allow the court to effectively use the trial time for another case.

¶14 Maricopa County Local Rule of Practice 3.4 provides that "[w]hen an action has been set for trial, no trial continuance shall be granted except upon a finding of good cause." *Cf. Valley Nat. Bank of Ariz. v. Meneghin*, 130 Ariz. 119, 122, 634 P.2d 570, 573 (1981) (stating principal purpose of prior Arizona Rule of Civil Procedure 42(c), governing postponement of trial, was to "ensure that lawsuits will be tried on the day set so that the trial court can make the most economical use of its time"). The Charloff parties discharged

their lawyer forty days before trial and their new counsel certified, as required by Arizona Rule of Civil Procedure 5.1(a)(2)(C), that they would be ready for trial in November 2007.[7] Accordingly, we find that the trial court did not abuse its discretion when it denied the motion to continue. *See Weston v. Denny*, 14 Ariz. App. 1, 3, 480 P.2d 24, 26 (1971) (finding no abuse of discretion in the trial court's denial of a motion to continue trial when the party seeking the continuance discharged his counsel shortly before trial).

¶15 The Charloff parties argue, however, that good cause existed for an extension because they needed time to develop legal theories that had been overlooked by their prior counsel, and to raise potentially dispositive legal issues. They cite *Camelback Partners v. Weber*, 9 Ariz. App. 452, 454, 453 P.2d 548, 550 (1969), in which we held the court abused its discretion when it refused to grant a motion to continue where counsel for the plaintiff was engaged in trial in another division of the superior court on the day of trial. Unlike in *Weber*, the Charloff parties were not seeking a trial continuance due to an unavoidable scheduling conflict, but sought additional time before trial to allow them to raise new legal issues.

[7] Although the Charloff parties' new counsel stated in the application for substitution that they would "do their best to be prepared for trial as scheduled," they later asserted that statement satisfied Rule 5.1(a)(2)(C), Arizona Rules of Civil Procedure.

Because the Charloff parties did not seek an extension of time for disclosure, to raise these legal theories that they had not pled nor disclosed prior to forty days before trial, they could not use those theories at trial. Ariz. R. Civ. P. 26.1(a)(2) (requiring disclosure of the legal theory upon which each claim or defense is based); Ariz. R. Civ. P. 37(c)(1) & (2) (party seeking to use information disclosed less than sixty days before trial must obtain leave of court to extend the time for disclosure); *Englert v. Carondelet Health Network*, 199 Ariz. 21, 25, ¶ 7, 13 P.3d 763, 767 (App. 2000) (holding undisclosed affirmative defense should have been precluded at trial).

¶16 The Charloff parties also argue that new "fundamental legal issues" arose during trial that they could not properly explore. Specifically, they complain about the exclusion of the information about Bruce Brimacombe's past criminal involvement and business dealings, and his purported misrepresentations regarding Sebrim's business, and the drafting of the MAA and the APA based on their untimely disclosure. Because the information was not raised in the motion to continue it cannot be used to argue that the trial court abused its discretion.[8] Accordingly,

[8] They first raised the information about Bruce Brimacombe in their motion for a new trial and asserted it was newly discovered evidence that justified a new trial.

the trial court did not abuse its authority when it denied the motion to continue trial.[9]

B. Motion for Leave to Amend

¶17 The Charloff parties argue the trial court erred when it denied their motion to amend their answer to plead the statute of frauds defense. We review a motion to amend, where the amendment seeks to add a new legal theory, for abuse of discretion. *Owen v. Superior Court*, 133 Ariz. 75, 80, 649 P.2d 278, 283 (1982).

¶18 The statute of frauds is an affirmative defense that must be pled or it is waived. Ariz. R. Civ. P. 8(c), 12(h); *Hegel v. O'Malley Ins. Co.*, 122 Ariz. 52, 56, 593 P.2d 275, 279 (1979) ("Failure to plead an affirmative defense results in a waiver of that defense and an exclusion of the issue from the case."); *Abner v. Arizona Newspapers, Inc.*, 11 Ariz. App. 237, 240, 463 P.2d 543, 546 (1970) (holding statute of frauds defense was unequivocally waived because it was not pled in the answer).

¶19 The complaint alleged that the Charloff parties had breached certain oral promises. The Charloff parties did not raise the statute of frauds defense in their answer and did not disclose that they intended to invoke that defense until thirty-

[9] The Charloff parties suggest that the Brimacombe parties agreed to a thirty-day extension. The record clearly reveals that the Brimacombe parties opposed the motion to continue, but asked that if the court granted the request any continuance be limited to thirty days.

three days prior to trial. In fact, it was on the second day of trial that they moved for judgment as a matter of law on the alleged oral agreements because they violated the statute of frauds. The motions were denied because the defense had not been timely pled and could not be asserted at trial.

¶20 Consequently, they moved to amend their answer to add the defense or, in the alternative, to permit amendment to conform to the evidence. They argued that there was "no question that the statute of frauds has always been at issue in this case," citing Bruce Brimacombe's deposition testimony more than one year prior to trial. The relevant portion of the deposition read:

> Q: So you're alleging that there is an oral agreement for Sebrim to purchase the Broadway building; is that correct?
>
> A: That is correct.
>
> Q: Have you ever heard of the statute of frauds? Does that phrase mean anything to you?
>
> A: No, sir.
>
> Q: Do you know why this agreement was not reduced to writing?
>
> A: It was an oversight by our attorney that was drafting the documents and crazy closing date.

¶21 The Charloff parties also cited their answer provision, which stated that they had preserved "any other affirmative defense that becomes known . . . through further

discovery and disclosure." In addition, they noted the defense had been raised in their motion to continue trial and other pre-trial pleadings, and argued the defense had "effectively" been tried because the Brimacombe parties presented testimony that certain oral agreements were not reduced to writing. The trial court again denied the motion.

¶22 "Leave to amend shall be freely given when justice requires." Ariz. R. Civ. P. 15(a)(1). To justify denial of a motion there must be "'undue' delay, bad faith, dilatory motive, repeated failure to cure deficiencies by previous amendments or undue prejudice to the opposing party." *Owen*, 133 Ariz. at 79, 649 P.2d at 282 (citation omitted). Denial of a motion to amend is "deemed a proper exercise of the court's discretion when the amendment comes late and raises new issues requiring preparation for factual discovery which would not otherwise have been necessitated nor expected, thus requiring delay in the decision of the case." *Id.* at 80-81, 649 P.2d at 283-84.

¶23 The elements of undue delay and undue prejudice are implicated in this case. Despite the complaint's allegations about oral promises, the Charloff parties litigated this case for two years before asserting the statute of frauds as a defense. They knew, at least a year before trial, the statute of frauds was implicated but did nothing to timely raise the affirmative defense, as required by Arizona Rule of Civil

Procedure 8(c). The defense was never disclosed as a legal theory, upon which they intended to rely, as required by Rule 26.1(a)(2).[10] The allegations of oral promises listed in the complaint and the paragraph in the answer, which attempted to preserve the affirmative defenses not raised, did not relieve the Charloff parties of their obligations under the rules.[11]

¶24 A little more than a month before trial the Charloff parties acknowledged their desire to assert the statute of frauds, but they did not seek to formally amend their answer until after the Brimacombe parties had rested. Under the circumstances, they were not diligent and their tardiness constitutes undue delay. *Haynes v. Syntek Fin. Corp.*, 184 Ariz. 332, 339, 909 P.2d 399, 406 (App. 1995) (affirming denial of defendant's motion to amend answer on eve of trial when it had not diligently discovered basis for amendment); *Matter of Estate of Torstenson*, 125 Ariz. 373, 376-77, 609 P.2d 1073, 1076-77 (App. 1980) (undue delay justified denial of motion to amend filed two years after petition contesting probate).

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[10] The three questions posed to Bruce Brimacombe at his deposition regarding the oral nature of one of the alleged agreements and his knowledge of the statute of frauds did not satisfy the pleading and disclosure obligations.

[11] Similarly, the statute of frauds is an affirmative defense for which the defendant bears the burden of proof, and thus the evidence at trial about the oral agreements did not "effectively" try the statute of frauds defense. *See Double AA Builders, Ltd. v. Grand State Constr. L.L.C.*, 210 Ariz. 503, 510, ¶ 34, 114 P.3d 835, 842 (App. 2005).

Accordingly, the trial court did not abuse its discretion when it denied the motion for leave to amend the answer.

C. Parol Evidence

¶25 The Charloff parties also contend that the alleged oral agreements were barred by the parol evidence rule and the trial court erred when it refused to appropriately instruct the jury.

¶26 A trial court must give a requested instruction if evidence presented supports the instruction, the instruction is proper under the law, and the instruction pertains to an important issue that is not dealt with in any other instruction. *DeMontiney v. Desert Manor Convalescent Ctr. Inc.*, 144 Ariz. 6, 10, 695 P.2d 255, 259 (1985); *Czarnecki v. Volkswagen of Am.*, 172 Ariz. 408, 411, 837 P.2d 1143, 1146 (App. 1991). However, "it is not necessary for the [court] to instruct on every refinement suggested by counsel," *Porterie v. Peters*, 111 Ariz. 452, 458, 532 P.2d 514, 520 (1975), and we consider the instructions as a whole to determine whether the jury was properly guided in its deliberations. *Pima County v. Gonzalez*, 193 Ariz. 18, 20, ¶ 7, 969 P.2d 183, 185 (App. 1998). We will not overturn a jury verdict on the basis of an improper instruction unless there is substantial doubt regarding whether the jury was properly guided in its deliberations. *Barnes v. Outlaw*, 188 Ariz. 401, 405, 937 P.2d 323, 327 (App. 1996), *aff'd*

in part and rev'd in part on other grounds, 192 Ariz. 283, 964 P.2d 484 (1998).

¶27 Arizona law prohibits the admission of parol evidence to contradict the terms of a written agreement:

> Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:
>
> 1. By course of performance, course of dealing or usage of trade []; and
>
> 2. By evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

A.R.S. § 47-2202 (Supp. 2008).

¶28 The rule is substantive contract law and not a rule of evidence. *Rental Dev. Corp. of Am. v. Rubenstein Constr. Co.*, 96 Ariz. 133, 136-37, 393 P.2d 144, 146-47 (1964); Restatement (Second) of Contracts § 213 cmt. a (1981) (stating that parol evidence is a "rule of substantive law"); *see also* Robert L. Gottsfield, *Darner Motor Sales v. Universal Underwriters: Corbin, Williston and the Continued Viability of the Parol Evidence Rule in Arizona*, 25 Ariz. St. L.J. 377, 383 (1993). Moreover, the rule precludes the admission of written or oral evidence of the contracting parties' antecedent understandings

or negotiations to vary or contradict the terms of an integrated, written contract, but allows admission to interpret such a contract. *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 152-53, 854 P.2d 1134, 1138-39 (1993). If the court determines the parol evidence is probative of the parties' intent and the contract language is "reasonably susceptible" to the proponent's interpretation, the court will admit the parol evidence for consideration in determining the parties' actual intent. *Id.* at 153, 854 P.2d at 1139. If, on the other hand, the court decides that the proffered parol evidence is not probative of the parties' intent, the evidence is excluded as an attempt to "vary or contradict the meaning of the written words." *Id.*

¶29 The MAA set forth the contribution RowZ agreed to make to Sebrim in exchange for a membership interest in the company:

> NEW MEMBER'S Contribution: The NEW MEMBER [RowZ] agrees to allow the COMPANY [Sebrim] to take possession, control and use of the assets which the NEW MEMBER has acquired concurrently with the execution of this agreement by operation of that certain ASSET PURCHASE AGREEMENT regarding TRYNETICS L.L.C., which is incorporated herein by this reference.

The MAA also contained an integration clause that stated:

> The parties hereto agree that this Agreement shall constitute their entire agreement superseding all previous discussions, negotiations or oral agreements, and that any addition, alteration or modification, shall be in writing.

Nevertheless, the Brimacombe parties presented evidence at trial that Charloff promised to secure a $750,000 line of credit for the benefit of Sebrim as a condition to RowZ acquiring a membership interest in Sebrim. Bruce and Cynthia Brimacombe testified the line of credit condition was a "non-negotiable" term without which they would not have entered the arrangement with Charloff.

¶30 The Charloff parties did not raise the parol evidence objection during trial, and did not assert the rule in their motion for judgment as a matter of law on the breach of contract claim. Instead, they asked the court to instruct the jury:

> You may not consider evidence of any alleged oral representations by Charloff or Matthews that add to, subtract from, vary, or contradict the terms of the written agreements between the Brimacombes and Sebrim and Charloff, Matthews and RowZ.
>
> In doing so, you may consider that all prior agreements were superseded. If you find that Charloff or Matthews made an oral representation that adds to, subtracts from, varies, or contradicts the terms of the parties' written contract, such oral representation may not be considered by you as a term or condition of the parties' agreement.

The court refused to give the instruction.

¶31 The Charloff parties argue the court erred because the Brimacombe parties were attempting to use evidence of an oral agreement to vary or contradict the terms of the MAA and the APA, which did not require Charloff to secure a line of credit. The Brimacombe parties argue the court properly rejected the

proposed jury instruction because the language instructing the jury not to consider evidence of oral representations that "add to" the written agreement is a misstatement of the law, and it was the court's function to determine whether the Charloff parties' proposed interpretation was reasonable.

¶32 We agree that the proposed instruction misstated the law and was properly rejected. *Pima County*, 193 Ariz. at 20, ¶ 7, 969 P.2d at 185 (stating trial court is required to refuse a jury instruction that does not correctly state the law); *Terry v. Gaslight Square Assocs.*, 182 Ariz. 365, 370, 897 P.2d 667, 672 (App. 1994) ("Where the offered instruction is partly correct and partly incorrect, the court need not revise it, and may reject the entire instruction.") (citation omitted). When a party offers parol evidence, "the judge first considers the offered evidence and, if he or she finds that the contract language is 'reasonably susceptible' to the interpretation asserted by its proponent, the evidence is admissible to determine the meaning intended by the parties." *Taylor*, 175 Ariz. at 154, 854 P.2d at 1140. The jury is not responsible for determining whether the evidence adds to, subtracts from, varies or contradicts the written terms of the contract, as suggested by the Charloff parties' proposed jury instruction. Accordingly, the trial court did not err when it refused to give the requested parol evidence instruction.

D. Telephonic Testimony

¶33 Several days prior to trial, the Brimacombe parties asked the court to allow Jerry Joyce to testify telephonically. They explained they had timely served Joyce with a trial subpoena at his Arizona residence and received an affidavit of service. They later learned, however, that Joyce was in California on the purported date of service[12] and that the description on the affidavit of service did not identify Joyce. They also stated Joyce was willing to voluntarily testify at trial, but he was in California and unable to return to Arizona. They estimated that Joyce's testimony would be brief – approximately twenty minutes – and requiring him to travel to Arizona would be an undue burden. The Charloff parties opposed the motion arguing that Arizona Rule of Civil Procedure 43(f) required live testimony and they had never deposed or interviewed Joyce. The court granted the motion, and ordered counsel to assist the Charloff parties' counsel to interview Joyce before he testified.

¶34 The Charloff parties contend they were denied the right to fully confront the witness, which resulted in

[12] At the time of trial, Joyce had been working in California for ten months.

structural error from which prejudice must be presumed.[13] We review the trial court's interpretation and application of court rules de novo. *Schwab Sales, Inc. v. GN Constr. Co.*, 196 Ariz. 33, 35, ¶ 3, 992 P.2d 1128, 1130 (App. 1998); *Perguson v. Tamis*, 188 Ariz. 425, 427, 937 P.2d 347, 349 (App. 1996).

¶35 "[T]he trial court has great discretion in controlling the conduct of the trial," *Hales v. Pittman*, 118 Ariz. 305, 313, 576 P.2d 493, 501 (1978), and shall exercise reasonable control over the mode of interrogating witnesses so as to make the interrogation effective for the ascertainment of the truth. Ariz. R. Evid. 611(a). Arizona Rule of Civil Procedure 43(f) generally governs the form and admissibility of evidence at trial:

> In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules or the Arizona Rules of Evidence.

Ariz. R. Civ. P. 43(f).

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[13] Structural error involves a deprivation of a basic protection necessary for the trial to serve as a vehicle for determination of guilt or innocence. *State v. Valverde*, 220 Ariz. 582, 584, ¶ 10, 208 P.3d 233, 235 (2009). Structural error requires automatic reversal. *State v. Hickman,* 205 Ariz. 192, 199 n.7, ¶ 29, 68 P.3d 418, 425 n.7 (2003). Structural error was found in a civil case when the trial court improperly instructed the jury after receiving a question during deliberations without consulting with counsel. *See Perkins v. Komarnyckyj*, 172 Ariz. 115, 116-20, 834 P.2d 1260, 1261-65 (1992). The court's ruling in this civil case did not constitute structural error.

¶36 The Charloff parties cite *Murphy v. Tivoli Enters.*, 953 F.2d 354 (8th Cir. 1992), where the Eighth Circuit found the federal rules of evidence favored live testimony to allow the jury to observe the demeanor of the witness and to determine credibility.[14] 953 F.2d at 359. We note, however, that the circuit court found that the ruling which allowed telephonic testimony was harmless error. *Id.*

¶37 Federal Rule of Civil Procedure 43 was amended in 1996, subsequent to *Murphy*, to allow telephonic testimony under appropriate circumstances: "For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location." Fed. R. Civ. P. 43(a); *see also Jerden v. Amstutz*, 430 F.3d 1231, 1238 n.7 (9th Cir. 2006). The comments to the rule state that in evaluating whether good cause exists, a court may consider if a witness is unable to attend trial for unexpected reasons but remains able to testify from a different place. Fed. R. Civ. P. 43(a), 1996 Advisory Committee Notes.

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[14] The Charloff parties also cite *Archem, Inc. v. Simo*, 549 N.E.2d 1054 (Ind. Ct. App. 1990), which is inapposite because the appellate court ruled that the trial court erred when it allowed a videotaped deposition because defendant's counsel had not been present at the deposition and could not effectively cross-examine the witness. *Id.* at 1059-60.

¶38 We have held that Arizona Rule of Civil Procedure 43(f) does not necessarily preclude telephonic testimony. *In re MH 2004-001987*, 211 Ariz. 255, 258-59, ¶¶ 15-19, 120 P.3d 210, 213-14 (App. 2005). Indeed, in a civil case, "appearance by telephone is an appropriate alternative to personal appearance." *Ariz. Dep't of Econ. Sec. v. Valentine*, 190 Ariz. 107, 110, 945 P.2d 828, 831 (App. 1997). While the fact-finder's ability to observe the demeanor of the witness is limited, "the fact-finder can at least consider the pacing of the witness's responses and the tenor of his voice" to determine the credibility of the witness. *Sabori v. Kuhn*, 199 Ariz. 330, 332-33, ¶ 13, 18 P.3d 124, 126-27 (App. 2001); *see T.W.M. Custom Framing v. Indus. Comm'n of Ariz.*, 198 Ariz. 41, 48, ¶ 22, 6 P.3d 745, 752 (App. 2000) ("[T]he telephonic medium preserves the paralinguistic features such as pitch, intonation, and pauses that may assist [the fact-finder] in making determinations of credibility.").

¶39 The Charloff parties argue that the Brimacombe parties' failure to secure Joyce's attendance at trial with an effective trial subpoena did not constitute the type of

circumstance justifying telephonic testimony.[15] We believe, however, that the trial court was in the best position to determine whether there was good cause for allowing Joyce to testify telephonically. It is undisputed that the Brimacombe parties took the proper steps to secure Joyce's appearance at trial, that through no fault of their own he was not properly served, and that they did not learn of the defect in service and Joyce's unavailability until immediately prior to trial. Consequently, the trial court did not abuse its discretion when it allowed Joyce to telephonically testify after it ensured that he could be interviewed before he testified.

E. Employment Agreement

¶40 The Charloff parties argue that Bruce Brimacombe's claim for breach of his employment agreement with Sebrim was legally deficient and should never have gone to the jury. They contend the claim failed as a matter of law because neither Charloff nor Matthews were parties to the contract, which was between Bruce Brimacombe and Sebrim.

[15] The Charloff parties also attempt to distinguish the proceedings in *In re M.H.*, on the grounds that they occurred in the "administrative context" and the court "allowed affidavits to be used." 211 Ariz. 255, 120 P.3d 210. We reject their analysis of the involuntary commitment proceeding. Those proceedings are not administrative, nor are they conducted informally or outside the dictates of due process. *Id.* at 259-60, ¶¶ 20-21, 120 P.3d at 214-15.

¶41 The issue was fairly raised in the motion for judgment as a matter of law when the Charloff parties asserted that the purported written contract was between Bruce Brimacombe and Sebrim and would therefore only support a cause of action against Sebrim, not Charloff. The trial court denied the motion and allowed the issue to go to the jury. The jury subsequently found in favor of Bruce and Cynthia Brimacombe on their "claim for breach of contract and breach of fiduciary duty."

¶42 The Brimacombe parties had asserted claims against the Charloff parties for breach of the alleged line of credit promise, breach of the fiduciary duty they allegedly owed to the Brimacombe parties, and breach of Bruce Brimacombe's employment agreement with Sebrim. Because the jury returned a general verdict on these claims, we cannot discern the specific claims under which the jury found the Charloff parties liable. Because the Charloff parties did not request special interrogatories or object to the verdict form, they are not entitled to have the verdict set aside on the grounds that Bruce Brimacombe's claim for breach of his employment contract was erroneously submitted to the jury. *Kaman Aerospace v. Ariz. Bd. of Regents*, 217 Ariz. 148, 158, ¶ 2, 171 P.3d 599, 609 (App. 2007) (supplemental opinion).

¶43 The Charloff parties also contend the verdict was not supported by the evidence because the Brimacombe parties did not introduce any evidence to corroborate Bruce Brimacombe's testimony that he had an oral employment agreement with Sebrim.[16] They did not, however, challenge the jury verdict on this claim for insufficiency of the evidence. As a result, they have waived the argument. *Acuna v. Kroack*, 212 Ariz. 104, 111, ¶¶ 26-27, 128 P.3d 221, 228 (App. 2006).

F. Sufficiency of the Evidence

¶44 Finally, the Charloff parties argue the verdict was not supported by the evidence and that the trial court erred by refusing to grant their motion for new trial.

¶45 Arizona Rule of Civil Procedure 59(a)(8) provides that a motion for new trial may be granted when "the verdict, decision, findings of fact, or judgment is not justified by the evidence or is contrary to law." Ariz. R. Civ. P. 59(a)(8). Although the Charloff parties cited Rule 59(a)(8) as a basis for their motion for new trial, other than their unsupported statement, they did not advance any argument that the verdict was not supported by the evidence. We may not consider the sufficiency of the evidence supporting the judgment unless the appealing party moved for new trial on that basis. A.R.S. § 12-

[16] The Charloff parties misstate Bruce Brimacombe's claim; he asserted at trial that he had a written employment agreement with Sebrim.

2102(C) (2003); *Acuna*, 212 Ariz. at 111 n.9, ¶ 27, 128 P.3d at 228 n.9; *Gabriel v. Murphy*, 4 Ariz. App. 440, 442, 421 P.2d 336, 338 (1966). The scope of the appeal may not be enlarged beyond matters assigned as error in the motion for new trial because the trial court must be given an opportunity to correct any alleged errors before any appeal. *Gabriel*, 4 Ariz. App. at 442, 421 P.2d at 338.

¶46 Since the Charloff parties did not properly raise the issue of whether the judgment was supported by the evidence in their motion for new trial, we will not consider it for the first time on appeal.

CONCLUSION

¶47 For the foregoing reasons, we affirm the judgment.

¶48 Both parties request an award of costs and attorneys' fees on appeal. The Brimacombe parties request attorneys' fees pursuant to A.R.S. § 12-341.01(A) (2003), which provides for a discretionary award of fees to the successful party in an action arising out of a contract. Because the underlying issues arise out of contract, we award the Brimacombe parties their reasonable attorneys' fees on appeal upon compliance with Rule 21(c) of the Arizona Rules of Civil Appellate Procedure. The Brimacombe parties are also entitled to an award of their

taxable costs, subject to compliance with Arizona Rule of Civil Appellate Procedure 21(a).

_____/s/_____
MAURICE PORTLEY, Judge

CONCURRING:

_____/s/_____
MARGARET H. DOWNIE, Presiding Judge

_____/s/_____
PATRICK IRVINE, Judge