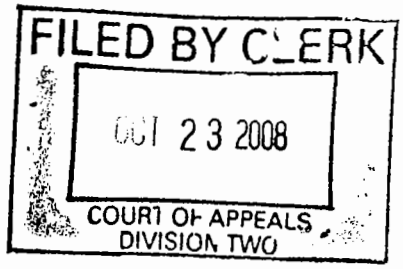

COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

OCT 27 2008

MANDATE

2 CA-CV 2007-0118
Department A
Cochise County
Cause No. CV200400779

RE: RONALD G. MORALES v. ROGER BARNETT

To: The Superior Court of Cochise County and the Hon. James L. Conlogue, Judge Pro Tempore, in relation to Cause No. CV200400779.

This cause was brought before Division Two of the Arizona Court of Appeals in the manner prescribed by law. This Court rendered its Memorandum Decision and it was filed on February 25, 2008.

A Motion for Reconsideration was filed and DENIED by Order of this Court.

A Petition for Review was filed and DENIED by Order of the Arizona Supreme Court.

NOW, THEREFORE, YOU ARE COMMANDED to conduct such proceedings as required to comply with the Memorandum Decision of this Court, a copy of which is attached hereto.

I, Jeffrey P. Handler, Clerk of the Court of Appeals, Division Two, hereby certify the attachment to be a full and accurate copy of the Memorandum Decision filed in this cause on February 25, 2008.

IN WITNESS WHEREOF, I hereunto set my hand and affix the official seal of the Arizona Court of Appeals, Division Two, on October 23, 2008.

Jeffrey P. Handler
Clerk of the Court

2 CA-CV 2007-0118
Cochise County Superior Court Number CV200400779

Superior Court Record returned on October 23, 2008

EXHIBITS - 1 Envelope and 7 Large Charts
TRANSCRIPTS - 7 Volumes

RECEIVED:_____
Clerk, Cochise County Superior Court

BY:_____
Deputy Clerk

2 CA-CV 2007-0118
Cochise County Superior Court Number CV200400779

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[ORIGINAL MANDATE]

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

RONALD G. MORALES and RENEÉ O. MORALES, husband and wife, on their behalf and on behalf of their minor daughters VENESE and ANGELIQUE MORALES; EDWARD A. ENGLISH and ANA M. ENGLISH, on their behalf and on behalf of their minor daughter, EMMA A. ENGLISH; and ARTURO MORALES, Plaintiffs/Appellees, v. ROGER BARNETT, Defendant/Appellant.	2 CA-CV 2007-0118 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CV200400779

Honorable James L. Conlogue, Judge

AFFIRMED

Mexican American Legal Defense and Educational Fund
By Nina Perales, David Herrera, and Marisa Bono
San Antonio, Texas

and

Ronald's two daughters, nine-year-old Angelique Morales, and eleven-year-old Venese Morales, as well as Venese's friend, eleven-year-old Emma English. Barnett claims the Moraleses were hunting on his private cattle ranch property, a claim the Moraleses dispute.[1] Roger Barnett spotted the Moraleses through binoculars and radioed his brother, Donald Barnett. Donald rode his all-terrain vehicle (ATV) to the Moraleses' location. At that point, Ronald and Venese Morales had gone into the desert, following a deer they had seen from the road. Arturo Morales and the two other girls were still with the truck when Donald arrived. Donald told them that they were trespassing on his brother's property and ordered them to leave. Arturo said he could not leave until his son and granddaughter returned. Donald then left on his ATV and informed Roger Barnett by radio of what had occurred.

¶3 Barnett and his wife drove in their pickup truck to where the Moraleses' truck was located. When they arrived, Barnett told Arturo he had to leave. Arturo told Barnett he had to wait for his son and granddaughter and Barnett then became very angry and threatened to start shooting if they did not leave immediately. Arturo started honking his horn and shortly thereafter, Ronald and Venese returned. Ronald had a rifle with him that he took to his truck. While walking towards the truck, Ronald told Barnett that they had permission to be on the land and asked Barnett for his name. Barnett retrieved a rifle from his own truck

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[1]Barnett's ranch includes 22,000 acres and is comprised of private property that he owns, private property that he leases, and state trust land that he leases. The dispute appears to be about whether the Moraleses were on private property or state trust land at the time of the incident.

apportioning seventy-five percent of the fault to Arturo Morales and twenty-five percent to Roger Barnett; (3) in favor of Venese Morales, with damages of $60,000, apportioning twenty-five percent of the fault to Ronald Morales, twenty-five percent to Arturo Morales, and fifty percent to Roger Barnett; (4) in favor of Angelique Morales, with damages of $60,000, apportioning twenty-five percent of the fault to Ronald Morales, twenty-five percent to Arturo Morales, and fifty percent to Roger Barnett; and (5) in favor of Emma English, with damages of $60,000, apportioning twenty-five percent of the fault to Ronald Morales, twenty-five percent to Arturo Morales, and fifty percent to Roger Barnett. On the counterclaim for trespass, the jury found in favor of Roger Barnett but awarded no damages. Barnett then filed another motion for judgment as a matter of law, or in the alternative, a motion for new trial. After the court entered final judgment on the verdicts and denied Barnett's second motion, Barnett appealed.

Sufficiency of the Evidence to Support Claims

¶6 Barnett argues the trial court erred in denying his motion for judgment as a matter of law based on his contention that insufficient evidence supported the jury's verdicts on false imprisonment, intentional infliction of emotional distress, and negligent infliction of emotional distress. We review de novo the denial of a motion for judgment as a matter of law. *Monaco v. HealthPartners of S. Ariz.*, 196 Ariz. 299, ¶ 6, 995 P.2d 735, 738 (App. 1999). Such a motion should be granted "'if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that

> plaintiff] submits to the control of the other party, then the proof will be sufficient to sustain a charge of false arrest.

Swetnam, 83 Ariz. at 192, 318 P.2d at 366. When one has a reasonable and safe means of egress, there is no confinement. *See* Restatement (Second) of Torts § 36 cmt. a (1965).

¶8 Barnett argues that the evidence shows he was, at all times, insisting the Moraleses leave his property and no evidence exists to indicate that he did anything to restrain or confine them. We note first that Barnett conceded in his testimony that the altercation at issue took place on state land and that, as a general matter, hunters have a legal right to be on state land, unless specifically prohibited by the state. From this and other testimony, substantial evidence suggests that the Moraleses had a legal right to be where they were at the time Barnett confronted them.[3]

¶9 With respect to the altercation itself, the testimony at trial shows Barnett pointed a loaded semi-automatic rifle at the Moraleses and that they believed he was going to shoot them. Barnett testified that while he was pointing the rifle, he instructed Ronald Morales to put his rifle down and Morales complied. Ronald and Arturo testified that Barnett told them that they had to leave and if they did not he would shoot them. Barnett continued to point the gun at them as they were preparing to depart. After the girls got into the cab of the truck, they huddled down on the floor because Ronald and Arturo were afraid Barnett would shoot them. Additional testimony suggests that as the Moraleses were driving away,

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[3]The testimony also suggests that the Moraleses did trespass on Barnett's private land earlier that day.

Law of Torts § 36, at 68 (2001). In this case, Barnett was using the threat of deadly force to restrain the Moraleses from doing anything other than what he instructed. And their confinement was complete in that the Moraleses had no reasonable and safe means of egress. Being directed at gunpoint, by someone with no legal justification, is manifestly neither safe nor reasonable.

¶12 Barnett also cites the provision in Restatement § 36 that says, "[t]he actor does not become liable for false imprisonment by intentionally preventing another from going in a particular direction in which he has a right or privilege to go." Restatement § 36(3). But in this case, Barnett was not merely blocking the Moraleses from going in a particular direction. This is not a scenario in which the plaintiffs were free to do as they wished so long as they did not travel down one particular road that was being guarded by the defendant. *See* Dobbs, *supra*, at 68 (obstructing road not confinement). Rather, the Moraleses were not allowed to exercise any choice about their movements. Barnett was actively forcing the Moraleses to do only as he directed.

¶13 Viewed in the light most favorable to upholding the verdict, *see Acuna*, 212 Ariz. 104, ¶ 24, 128 P.3d at 228, the evidence is sufficient to find that Barnett falsely imprisoned the Moraleses. Barnett does not dispute the other elements of the tort and we therefore do not address them.

evidence to support such a claim. But he only challenged with specificity whether there was sufficient evidence of severe emotional distress.[4] This did not preserve an issue for appeal regarding the intent element. Likewise, in his post-verdict motion for judgment as a matter of law, Barnett merely listed the elements of intentional infliction of emotional distress and then focused his argument on whether the element of severe emotional distress had been shown. Barnett has thus waived any claim on appeal that the evidence did not show he possessed the requisite intent.

¶16 Barnett next argues there was insufficient evidence to support the element of severe emotional distress. To support a claim of intentional infliction of emotional distress, the plaintiff's emotional response to the defendant's conduct must be severe but it need not rise to the level of a "disabling response." *Pankratz v. Willis*, 155 Ariz. 8, 17, 744 P.2d 1182, 1191 (App. 1987).[5]

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[4]Barnett also argued, during his Rule 50 motion, that the evidence was insufficient to show his conduct was extreme and outrageous, but he did not raise that issue in his post-verdict motion, nor does he raise it on appeal.

[5]Barnett suggests the case law in Arizona on the element of severe emotional distress is in "disarray." But the cases are actually quite consistent, holding that the emotional distress must be severe but that a physical injury is not necessary. *See Duke v. Cochise County*, 189 Ariz. 35, 38, 938 P.2d 84, 87 (App. 1996) (physical injury not required); *see also Ford*, 153 Ariz. at 43, 734 P.2d at 585 (severe emotional distress must occur). Barnett cites *Venerias v. Johnson*, 127 Ariz. 496, 500, 622 P.2d 55, 59 (App. 1980), for the proposition that "a severely disabling emotional response" is required. But as the Moraleses correctly point out, in *Pankratz* this court specifically overruled that portion of *Venerias*. *See Pankratz*, 155 Ariz. at 17, 744 P.2d at 1191 (with respect to requirement that plaintiff suffer disabling response, court stated "we reject that single aspect of *Venerias*").

presented that would permit a reasonable person to conclude the three girls suffered severe emotional distress.

C. Negligent Infliction of Emotional Distress

¶19 Barnett also argues the evidence did not establish the degree of physical injury required for the tort of negligent infliction of emotional distress. Although the law in Arizona requires a showing of bodily harm, a "long-term physical illness or mental disturbance" is sufficient to meet this requirement.[6] *Monaco v. HealthPartners of S. Ariz.*, 196 Ariz. 299, ¶¶ 7-8, 995 P.2d 735, 738-39 (App. 1999). As we have already observed, all three girls were diagnosed with chronic post-traumatic stress disorder by a psychologist who testified at trial. We conclude that substantial evidence exists that would permit a reasonable person to find that emotional distress resulting in a long-term mental disturbance has occurred.

¶20 Barnett points out that he presented the testimony of another psychologist who disputed theses diagnoses. But this shows only that there was a question of fact to be decided. That question was for the jury to resolve. *See Ball v. Prentice*, 162 Ariz. 150, 152,

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[6]Barnett suggests error occurred because the jury was not instructed that "physical injury or illness" can include "substantial, long-term emotional disturbances." But at trial, Barnett did not request this instruction, nor did he specifically object to the omission of this explanation from the instruction that was given. Barnett has thus waived this argument on appeal. *See* Ariz. R. Civ. P. 51(a) ("No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection."); *see also S Dev. Co. v. Pima Capital Mgmt. Co.*, 201 Ariz. 10, ¶ 20, 31 P.3d 123, 132 (App. 2001).

¶22 Whether an issue not contained in the pleadings was tried by implied consent is determined by review of the record. *See Collison v. Int'l Ins. Co.*, 58 Ariz. 156, 162, 118 P.2d 445, 447 (1941). Consent of the parties is generally implied when there is no objection to the introduction of evidence that gives rise to the new or different theory. *Elec. Adver., Inc. v. Sakato*, 94 Ariz. 68, 71, 381 P.2d 755, 756-57 (1963). The pleadings shall be amended to conform to the proof when an objecting party shows no more than "legal surprise" as opposed to "actual surprise." *Cont'l Nat'l Bank*, 107 Ariz. at 381, 489 P.2d at 18. When the pleadings should have been amended to conform to the evidence presented at trial, we will treat such amendments as made. *Beckwith v. Clevenger Realty Co.*, 89 Ariz. 238, 241, 360 P.2d 596, 597 (1961). "'Failure to formally amend the pleadings will not affect a judgment based upon competent evidence.'" *Barker v. James*, 15 Ariz. App. 83, 86, 486 P.2d 195, 198 (1971), *quoting Elec. Adver.*, 94 Ariz. at 71, 381 P.2d at 756-57.

¶23 A trial court has a duty to instruct the jury on all legal theories that are "framed by the pleadings and supported by substantial evidence." *AMERCO v. Shoen*, 184 Ariz. 150, 156, 907 P.2d 536, 542 (App. 1995). When a party challenges a trial court's instruction on appeal, reversal is only justified if the instruction is erroneous and prejudices the substantial rights of the appealing party. *Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 504, 917 P.2d 222, 233 (1996). Prejudice "'will not be presumed'"; rather it "'must affirmatively appear from the record.'" *Id., quoting Walters v. First Fed. Sav. & Loan Ass'n*, 131 Ariz. 321, 326,

he might have conducted examination and cross-examination differently had the issue been raised before. But he does not identify any other evidence he would have elicited or other questions he would have asked, nor did he request a continuance to obtain additional evidence. Barnett was motivated to dispute the Moraleses' evidence in order to defeat the other alleged torts or to mitigate the damage award. And the record shows Barnett spent a meaningful amount of time challenging the Moraleses' claim of emotional distress and the finding of any resulting mental disorders. Barnett cross-examined the Moraleses' psychological expert and brought in his own expert psychologist to rebut the testimony of the Moraleses' expert.

¶26 Although including the theory of negligent infliction of emotional distress in the instructions may have constituted legal surprise, it did not constitute actual surprise. *See Cont'l Nat'l Bank*, 107 Ariz. at 381, 489 P.2d at 18. We cannot discern from the record, nor from Barnett's argument on appeal, how he would have conducted his defense differently had the pleadings, or other disclosures, been more specific with respect to the negligence claims.

¶27 Barnett further argues that requesting an instruction on negligent infliction of emotional distress on the fourth day of trial constituted a disclosure violation prohibited by Rule 26.1, Ariz. R. Civ. P. He asserts that the failure to disclose this legal theory warranted sanctions pursuant to Rule 37(c), Ariz. R. Civ. P., and that allowing the jury instruction was presumptively prejudicial. We review a court's decision not to impose sanctions for

based on competent evidence, *see Thomas*, 163 Ariz. at 164, 786 P.2d at 1015. The trial court did not err by instructing the jury on negligent infliction of emotional distress.

New Trial because of Error in Instructions

¶33 Barnett claims the trial court erred in denying his motion for a new trial. "'We review the denial of a motion for new trial . . . for an abuse of discretion.'" *White v. Greater Ariz. Bicycling Ass'n*, 216 Ariz. 133, ¶ 6, 163 P.3d 1083, 1085 (App. 2007), *quoting Mullin v. Brown*, 210 Ariz. 545, ¶ 2, 115 P.3d 139, 141 (App. 2005) (alteration in *White*). On appeal, Barnett claims the jury should not have been instructed on false imprisonment, intentional infliction of emotional distress, or negligent infliction of emotional distress. But in his motion for new trial, the only error in jury instructions that Barnett alleged was the instruction on negligent infliction of emotional distress on the grounds that it had not previously been disclosed. Because we have already concluded that the court did not err in allowing this claim to go to the jury, it likewise did not abuse its discretion in denying a new trial on this ground.

¶34 Barnett also included various other grounds to support his motion for new trial, including insufficiency of the evidence to support the intentional torts. To the extent Barnett is arguing on appeal that it was error to instruct on false imprisonment and intentional infliction of emotional distress because of insufficient evidence, we have already concluded sufficient evidence exists to support those claims and therefore the court did not abuse its discretion in denying Barnett's motion for a new trial on these grounds.

to object to some of the evidence of which he now complains but argues a new trial was proper, "based upon cumulative misconduct." He provides no authority or legal analysis to support this assertion. Barnett has failed to present anything that even remotely approaches the standard set forth in *Hawkins*. The trial court therefore did not abuse its discretion in denying his motion for a new trial on these grounds. *See White*, 216 Ariz. 133, ¶ 6, 163 P.3d at 1085.

Conclusion

¶37 Based on the foregoing, we affirm the court's denial of Barnett's motion for a new trial as well as the final judgment entered pursuant to the jury verdicts.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

/s/ John Pelander
JOHN PELANDER, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge