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14 SUPERIOR COURT OF ARIZONA

15 MARICOPA COUNTY

16 AMBER WINTERS, *et al.*, on behalf of
17 themselves and all others similarly situated,

18 Plaintiffs,

19 vs.

20 BANNER HEALTH NETWORK, *et al.*,

21 Defendants.

22 **Case No. CV2012-007665**

23 **PLAINTIFFS' REPLY IN
24 SUPPORT OF MOTION FOR A
25 NEW TRIAL RE BREACH OF
26 CONTRACT**

(The Honorable J. Richard Gama)

27 Defendants argue that Plaintiffs' Motion for a New Trial re Breach of Contract
28 should be denied because (1) the Motion is untimely, (2) the Court cannot extend the
29 deadline to file the Motion, and (3) based upon the factors set forth in *Associated*
30 *Indemnity Corp. v. Warner*, 143 Ariz. 567, 569, 694 P.2d 1181, 1183 (1985). It is fatal to
31 their argument, however, that Defendants have admitted that this Court's earlier ruling on
32 breach of contract was reversed by Division One in *Abbott v. Banner Health Network*,

1 2014 WL 7331031 (Ariz.App.), that came out *after* the time to file motions under Rule
2 59(d), and that the Court of Appeals’ opinion is in fact the “law of the case.” *See*
3 Defendants’ Motion to Stay Trial Court Proceedings at 2:3-7 (stating the *Abbott* opinion
4 held that “Defendants breached their provider agreements with AHCCCS by engaging in
5 lien enforcement.”).

6
7 **I. The Court May Treat This as a Motion under Rule 60.**

8 Plaintiffs respectfully request the Court consider the underlying Motion pursuant
9 to Rule 60(c), Ariz.R.Civ.Proc., which provides numerous bases to correct the judgment
10 herein.

11 In *Welsh v. McClure*, 123 Ariz. 161, 165, 598 P.2d 980, 984 (1979), the Supreme
12 Court held that an untimely filed motion for new trial can be treated as a Rule 60 motion
13 if the motion provides grounds for relief under Rule 60. The Court explained that “[t]he
14 crucial factor to be considered on this issue is whether the . . . motion sets forth grounds
15 for relief recognized by rule 60(c).” *Id.* In this case, the Motion provides that an earlier
16 ruling by this Court is now contrary to an interposing and controlling decision in the very
17 same proceeding.

18 Rule 60(c)(1) (“mistake”), (2) (“newly discovered evidence which by due
19 diligence could not have been discovered in time to move for a new trial under Rule
20 59(d)”), (4) (“the judgment is void” in light of *Abbott*) or (6) (“any other reason justifying
21 relief from the operation of the judgment”) provides grounds that could apply. Moreover,
22 this Motion is not being used as a “substitute for appeal,” *cf. Anderson v. Hawkins*, 129
23 Ariz. 83, 628 P.2d 966 (App. 1981), just the opposite. This Motion is simply asking the
24 Court to conform its final judgment to the new and controlling decision rendered in an
25 appeal on this very case. *State v. Kiles*, 222 Ariz. 25, 213 P.3d 174, 185 (2009); *cf.*
26

1 *Anderson*, 222 Ariz. at 85, 213 P.3d at 968 (“There appears to be no showing of any
2 special circumstances justifying the relief given the defendant, nor is there any indication
3 but that the defendant simply chose not to move for a new trial or to appeal from the
4 summary judgment for plaintiff.”).

5
6 Respectfully, conforming this Court’s earlier decision to the Court of Appeals’
7 subsequent *Abbott* decision in this case is not discretionary. On this issue, the Court of
8 Appeals has stated that a Court of Appeals’ opinion “bec[o]me[s] binding precedent
9 when it [is] published. It remains so until this court, in [another] published opinion,
10 refuses to follow it or it is vacated by our supreme court. Whether [such an opinion] is to
11 be disaffirmed is not a question for the superior court. A lower court cannot refuse to
12 follow the rulings of a higher court.” *Francis v. Ariz. Dept. of Transp.*, 192 Ariz. 269, 963
13 P.2d 1092, 1094 (App. 1998).

14 **II. Plaintiffs Have Established Entitlement to Fees Under A.R.S. § 12-**
15 **341.01.**

16 Defendants’ only substantive argument concerns application of the familiar
17 *Associated Indemnity* factors. But the Court already considered those factors. *See*
18 Minute Entry at pg. 3 (filed 10/15/14) (“Having reviewed and evaluated the affidavits
19 submitted by Plaintiffs’ counsel and considering the factors set forth in *Associated*
20 *Indemn. Corp. v. Warner*, 143 Ariz. 567 [1985], the Court finds given the totality of these
21 circumstances, that the Final Fee Calculations requested by Plaintiffs’ counsel are
22 ‘reasonable.’”). Moreover, the Court of Appeals in *Abbott* awarded attorneys’ fees on
23 appeal against Defendants pursuant to A.R.S. § 12-341.01. *Abbott* at ¶¶ 34-36. For all
24 the same reasons, the Court can and should reaffirm that the fees it awarded under the
25 private attorney general doctrine are supported by A.R.S. § 12-341.01.
26

1 Defendants do not point to any principled reason to deny the relief requested in the
2 Motion and, therefore, under Rule 60 and *Walsh, supra*, the Court should grant the relief
3 requested.
4

5 RESPECTFULLY SUBMITTED this 22nd day of January, 2015.

6 **LEVENBAUM TRACHTENBERG, PLC**

7
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