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Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 10/16/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: sls

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

DAVID W. ZINK, a married man, on ) No. 1 CA-CV 12-0106  
behalf of his sole and separate )  
property, ) DEPARTMENT D  
)  
Plaintiff/Appellee, ) **MEMORANDUM DECISION**  
)  
v. ) (Not for Publication -  
) Rule 28, Arizona Rules of  
JERRY A. and KRISTINE A. CECIL, ) Civil Appellate Procedure)  
husband and wife, )  
)  
Defendants/Appellants. )  
)

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Appeal from the Superior Court in Yavapai County

Cause No. P1300CV20060642

The Honorable David L. Mackey, Judge

**VACATED**

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Sanders & Parks, P.C. Phoenix  
By G. Gregory Eagleburger  
Attorneys for Plaintiff/Appellee

Sandweg & Ager, P.C. Phoenix  
By John P. Ager  
Attorneys for Defendants/Appellants

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**G O U L D**, Judge

¶1 Appellants Jerry and Kristine Cecil appeal from a judgment awarding David Zink punitive damages. The Cecils argue

the award of punitive damages was improper because the trial court did not award Zink rescission. We hold that because the trial court denied Zink's claim for rescission, it erred in awarding Zink punitive damages. Therefore, we vacate the award of punitive damages.

#### **FACTS AND PROCEDURAL BACKGROUND**

¶2 In 2005, Zink entered into a contract with the Cecils to purchase the Cecils' house in Yavapai County for \$435,000. After completing the purchase, Zink asserted that the Cecils failed to disclose and intentionally misrepresented certain property conditions which were material to the transaction.

¶3 Zink filed a multi-count complaint against the Cecils alleging breach of contract, fraud, and negligent misrepresentation among other claims.<sup>1</sup> Zink requested compensatory and consequential damages or, in the alternative, rescission of the purchase contract. Additionally, Zink requested punitive damages.

¶4 Prior to trial, Zink elected to pursue the remedy of rescission, thereby waiving his claims for compensatory and consequential damages. See *Fousel v. Ted Walker Mobile Homes, Inc.*, 124 Ariz. 126, 129, 602 P.2d 507, 510 (App. 1979)

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<sup>1</sup> Zink named several other defendants in the complaint. The judgments pertaining to those defendants are not at issue in this appeal.

(election of rescission precludes an award of compensatory damages); *Phillips v. Adler*, 134 Ariz. 480, 482, 657 P.2d 893, 895 (App. 1982) (plaintiff who elected rescission was barred from seeking compensatory damages). After trial, the jury found in favor of Zink on the claims for fraud, negligent misrepresentation, and breach of contract and awarded Zink \$75,000 in punitive damages. Nevertheless, the jury recommended against awarding rescission.<sup>2</sup> The court adopted the jury's verdicts. In determining rescission was not appropriate, the court explained that all of the problems with the house had been resolved, the evidence established that the total repair costs were less than ten percent of the purchase price, and the house still had value.

¶5 The Cecils filed a motion for judgment as a matter of law pursuant to Arizona Rule of Civil Procedure 50(b), arguing that punitive damages cannot be awarded in absence of actual damages, such as rescission. After oral argument, the court denied the Cecils' motion. The court entered judgment against

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<sup>2</sup> The trial court held that the jury verdicts finding in favor of Zink on his claims for breach of contract, negligent misrepresentation and fraud "were not advisory," but the jury verdict denying Zink rescission was advisory. Although it is not an issue in this case, all of the jury's verdicts were advisory. It is well-established in Arizona that an action for rescission is equitable in nature and, therefore, "the jury in such cases is advisory only." *Kostolansky v. Leshner*, 95 Ariz. 103, 105, 387 P.2d 804, 806 (1963); *Gallegos v. Garcia*, 14 Ariz.App.85, 87, 480 P.2d 1002, 1004 (App. 1971).

the Cecils for \$75,000 in punitive damages based on the Cecils' fraudulent conduct.<sup>3</sup> The Cecils timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1).

#### DISCUSSION

¶6 The Cecils argue that punitive damages cannot be awarded because neither rescission nor any other relief or damages was awarded. This is an issue of law we review de novo. *Hall v. Lalli*, 194 Ariz. 54, 57, ¶ 5, 977 P.2d 776, 779 (1999).

¶7 Punitive damages are available in cases where an equitable remedy is sought. See *Medasys Acquisition Corp. v. SDMS, P.C.*, 203 Ariz. 420, 424-25, ¶¶ 18-19, 55 P.3d 763, 767-68 (2002) (rescission case); *Starkovich v. Noye*, 111 Ariz. 347, 351-52, 529 P.2d 698, 702-03 (1974) (reformation of a joint venture agreement). However, an award of equitable relief or monetary damages is a necessary predicate for an award of punitive damages. *Fousel*, 124 Ariz. at 129, 602 P.2d at 510; see also *Edmond v. Fairfield Sunrise Vill., Inc.*, 132 Ariz. 142, 144, 644 P.2d 296, 298 (App. 1982) (explaining that punitive damages may be awarded only if a party "has recovered actual damages"); and *Hyatt Regency Phoenix Hotel Co. v. Winston & Strawn*, 184 Ariz. 120, 131, 907 P.2d 506, 517 (App. 1995) ("A

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<sup>3</sup> The court awarded Zink \$174,832.00 in attorneys' fees incurred solely to prove the claims for fraud and punitive damages.

plaintiff must be entitled to compensatory damages before being entitled to punitive damages.”). Arizona cases which uphold punitive damages awards all have an underlying relief/damage award. See, e.g., *Medasys*, 203 Ariz. at 424, ¶¶ 19-20, 55 P.3d at 767; *Starkovich*, 111 Ariz. at 352, 529 P.2d at 703; *Hyatt Regency*, 184 Ariz. at 141, 907 P.2d 506, 527; and *Fousel*, 124 Ariz. at 129, 602 P.2d at 510; Cf. *Magma Copper Co. v. Shuster*, 118 Ariz. 151, 153-54, 575 P.2d 350, 352-53 (App. 1977) (punitive damages award of \$30,000 cannot stand when plaintiff was awarded only \$1.00 in damages because either the punitive damages award resulted from passion or prejudice or the damages constituted nominal damages).

¶8 In *Medasys*, the Arizona Supreme Court stated “[t]he traditional rule requires an award of actual damages before punitive damages may be awarded, and we adhere to that rule.” *Medasys*, 203 Ariz. at 423, ¶ 14, 55 P.3d at 766. The court noted that punitive damages serve to punish and deter egregious conduct and courts should be able to provide relief to which parties are entitled. Nevertheless, the court stated “[c]onduct so egregious as to warrant punitive damages if compensatory damages are awarded should similarly support an award of punitive damages if only rescissory damages are awarded.” *Id.* at ¶ 19 (emphasis added).

¶9 Here, the court found that the jury's verdicts on Zink's claims for fraud, negligent misrepresentation and breach of contract were supported by evidence that the Cecils engaged in a course of conduct designed to deceive Zink. Nevertheless, the court did not award rescission, the only relief requested. Although the purpose of awarding punitive damages is to deter egregious conduct, which the jury and court found present in this case, we cannot ignore the rule upheld in *Medasys*; that an award of equitable relief or monetary damages is required before punitive damages may be awarded. *Medasys*, 203 Ariz. at 423, ¶ 14, 55 P.3d at 766.

¶10 We also find instructive *Lisa v. Strom*, 183 Ariz. 415, 904 P.2d 1239 (App. 1995). There, the plaintiffs sued the defendants for failure to return a security deposit. *Lisa*, 183 Ariz. at 416, 904 P.2d at 1240. The plaintiffs asserted an emotional distress claim and requested punitive damages based solely on that claim. *Id.* at 420, 904 P.2d at 1244. The trial court found the defendants' withholding of the deposit "was willful, in bad faith and without substantial justification." *Id.* However, the court did not award damages for emotional distress and consequently, did not award punitive damages. *Id.* On appeal, this court affirmed the denial of punitive damages, stating that "[w]ithout a recovery of actual damages, punitive damages cannot be awarded." *Id.*

¶11 Likewise, although the Cecils committed fraud, the court did not grant Zink rescission nor was Zink awarded any damages based on that fraud. Consequently, the punitive damages award cannot stand.

¶12 Zink argues that punitive damages are appropriate under these circumstances because Arizona law provides a broad interpretation of "actual damages" which includes the alteration of one's position to his detriment. *Starkovich*, 111 Ariz. at 351, 529 P.2d at 702; *Medasys*, 203 Ariz. at 423, ¶¶ 13-14, 55 P.3d at 766. Zink contends that he altered his position about whether to buy the house based on the Cecils' fraud and misrepresentations and that he suffered actual and monetary harm as a result of the Cecils' actions.

¶13 As the Cecils point out, however, the jury made no findings concerning actual damages. And, although the superior court stated that Zink's repair costs were less than ten percent of the purchase price, the court did not award Zink the home repair costs as damages. Even assuming that Zink altered his position and was prejudiced thereby, the cited case law still requires an award of equitable relief or monetary damages before punitive damages can be awarded. See *Starkovich*, 111 Ariz. at 351, 529 P.2d at 702 (noting that punitive damages were not allowed in previous cases because "the plaintiffs were denied

[a]ny remedy, actual damages, on their asserted claims for relief"). There was no award of damages in this case.

¶14 Zink also argues that public policy supports awarding punitive damages in this case. Punitive damages are appropriate to penalize a party for "outrageous, malicious, or fraudulent conduct that is coupled with an evil mind" and should be available "to punish the wrongful act and to remedy the injury caused." *Medasys*, 203 Ariz. at 424, ¶ 18, 55 P.3d at 767 (citation omitted). Zink contends that because he presented evidence of home repair costs, he is entitled to punitive damages to punish the Cecils for their wrongful acts.

¶15 The holding in *Medasys*, however, compels an award of equitable relief or monetary damages, not merely that some evidence of damages was presented at trial. *Medasys*, 203 Ariz. at 423, 424, ¶¶ 14, 19, 55 P.3d at 766, 767; *Cf. Belliard v. Becker*, 216 Ariz. 356, 360, ¶ 24, 166 P.3d 911, 915 (App. 2007) (because a party proved actual damages by being awarded \$3,600 by the jury, punitive damages may be awarded). For this reason, we reject Zink's public policy argument.

¶16 Additionally, we find *State Farm Mutual Ins. Co. v. St. Joseph's Hospital*, 107 Ariz. 498, 489 P.2d 837 (1971) distinguishable. There, the court upheld a punitive damages award even though the trial court determined that the plaintiff waived his claim for actual damages. *State Farm*, 107 Ariz. at



504, 489 P.2d at 843. Despite the plaintiff's waiver, the trial court awarded the plaintiff \$461.30 in compensatory damages. *Id.* at 500, 504, 489 P.2d at 839, 843. Accordingly, even though the compensatory damages claim was waived, the award of actual damages was sufficient to support an award of punitive damages in that case.

¶17 Because case law requires that equitable relief or monetary damages be awarded, not merely proven, before punitive damages can be awarded, we vacate the superior court's judgment awarding Zink punitive damages and remand the matter to the superior court. Because we are vacating the award of punitive damages, we need not address the Cecils' remaining arguments concerning the constitutionality of the punitive damages award and whether they are entitled to a new trial.

¶18 Both parties request attorneys' fees on appeal pursuant to the purchase contract and A.R.S. § 12-341.01. The contract mandates an award of fees and costs to "the prevailing party in any dispute or claim . . . arising out of or relating to" the contract. Although the Cecils have prevailed in vacating the award of \$75,000 in punitive damages, they still owe Zink \$174,832 in attorneys' fees that were awarded by the trial court. Accordingly, there is no net "winner" on appeal,

and we award attorneys' fees to neither party.<sup>4</sup> The Cecils are awarded their costs incurred on appeal.

**CONCLUSION**

¶19 Because the court did not award rescission or other damages, we vacate the punitive damages award and direct the trial court to amend the judgment in accordance with our decision.

/S/

ANDREW W. GOULD, Judge

CONCURRING:

/S/

MICHAEL J. BROWN, Presiding Judge

/S/

DONN KESSLER, Judge

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<sup>4</sup> Our decision does not disturb the award of attorney's fees entered by the trial court in favor of Zink. By failing to challenge the fees awarded below, the Cecils have waived this issue. We do not address whether the attorneys' fees awarded below may serve as a basis for awarding punitive damages because this argument was not raised by the parties on appeal.