NOTICE: NOT FOR PUBLICATION.
UNDER ARIZ. R. SUP. CT. 111(c), THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED.

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

CHAD GAMMAGE, an individual, *Plaintiff/Appellant*,

v.

THOMSON CONANT, PLC, an Arizona professional liability corporation; and PAUL A. CONANT, ESQ., an individual, *Defendants/Appellees*.

No. 1 CA-CV 12-0882
FILED 11-26-2013

Appeal from the Superior Court in Maricopa County
No. CV2010-050103
The Honorable Michael D. Gordon, Judge

AFFIRMED

COUNSEL

Chad Gammage, Scottsdale

Plaintiff/Appellant In Propria Persona

Jones, Skelton & Hochuli, P.L.C., Phoenix
By Eileen Dennis GilBride and Robert R. Berk

Counsel for Defendants/Appellees

MEMORANDUM DECISION

Judge Donn Kessler delivered the decision of the Court, in which Presiding Judge Andrew W. Gould and Judge Michael J. Brown joined.

K E S S L E R, Judge:

¶1 Chad Gammage appeals from a jury's award of damages, contending the trial court erroneously instructed the jury. Finding no error or prejudice, we affirm.

BACKGROUND

¶2 Gammage hired Thomson Conant, PLC (the "Firm") to assist him in his efforts to modify the debt on his Scottsdale residence and lower his monthly payments prior to a scheduled trustee's sale. Gammage's combined debt under a deed of trust and a home equity line of credit exceeded his property's value by more than $100,000.

¶3 In exchange for a flat fee of $3500, the Firm negotiated with the lender's servicing agent, Aurora Loan Services ("Aurora"), obtained a temporary forbearance agreement, and secured a reduction in debt payments while Aurora was considering the loan modification request. When an Aurora representative advised the Firm that the loan modification had been approved, the Firm immediately notified Gammage and advised him that he would receive the final modification documents directly from Aurora.

¶4 A few days later, the Firm received a letter from Aurora stating that it had terminated the loan modification process because the request had been withdrawn. The Firm notified Aurora in writing that the request had not been withdrawn and had already been approved. Nevertheless, the lender sold Gammage's property at a trustee's sale in September 2009.

¶5 At no cost to Gammage, the Firm filed suit against Aurora to set aside the foreclosure, and obtained a temporary restraining order and preliminary injunction. Gammage opted to abandon that litigation, moved out of his residence, and then sued the Firm and its partner, Paul A. Conant, for legal malpractice.

¶6 During the ensuing trial, the trial court instructed the jury that, as a matter of law, there was insufficient evidence to support Gammage's allegations that the defendants negligently failed to follow up or communicate with Aurora and had failed to monitor the status of the foreclosure. The jury could still consider the allegation that defendants negligently failed to communicate with Gammage.

¶7 Gammage requested the following damages instruction:

> In a legal malpractice case, damages must be ascertainable and non-speculative. Once the right to damages has been established, uncertainty as to amount of damages will not preclude recovery. There must be a reasonable basis in the evidence for the trier of fact to fix compensation when a dollar loss is claimed.
>
> There is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount.

The trial court rejected this instruction and, over Gammage's objection, instead instructed the jury as follows: "In legal malpractice claims, damages must be ascertainable and non-speculative. If you determine that Plaintiff has met his burden of proof and is entitled to damages, you may award the damages, if any, in an amount that you determine has a reasonable basis from the evidence."

¶8 The jury found the Firm and Conant liable for malpractice and awarded $770 in damages, assigning 100% liability to the defendants and no liability to Gammage and Aurora. Because the award was less than the Firm's Offer of Judgment, *see* Ariz. R. Civ. P. 68, the court awarded judgment against Gammage in the amount of $15,015.46.

¶9 Gammage timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1) (Supp. 2013).

DISCUSSION

I. The trial court's instruction adequately conveyed the burden of proof on damages.

¶10 Gammage contends that the trial court erred in refusing to give his requested instruction on damages. We review a court's refusal to give an instruction for an abuse of discretion, and consider the evidence in the light most favorable to the party requesting the instruction. *Strawberry Water Co. v. Paulsen*, 220 Ariz. 401, 409, ¶ 21, 207 P.3d 654, 662 (App. 2008).

¶11 A court must give a proposed instruction if: "(1) the evidence presented supports the instruction, (2) the instruction is proper under the law, and (3) the instruction pertains to an important issue, and the gist of the instruction is not given in any other instructions." *DeMontiney v. Desert Manor Convalescent Ctr., Inc.*, 144 Ariz. 6, 10, 695 P.2d 255, 259 (1985). The parties do not dispute that evidence of damages existed, and focus their arguments on whether the proposed instruction was legally proper and whether other instructions incorporated the gist of the proposed instruction.

¶12 Gammage's proposed instruction, like the instruction given, accurately states that malpractice damages must be ascertainable and not speculative or contingent. *See Glaze v. Larsen*, 207 Ariz. 26, 29, ¶ 13, 83 P.3d 26, 29 (2004). The proposed instruction then quotes from *Lewis v. N.J. Riebe Enterprises, Inc.*, 170 Ariz. 384, 397, 825 P.2d 5, 18 (1992) and *Lewin v. Miller Wagner & Co.*, 151 Ariz. 29, 34, 725 P.2d 736, 741 (App. 1986). The *Lewis* and *Lewin* excerpts enunciated rules to be applied by courts, and do not purport to craft jury instructions. For example, Gammage's proposed instruction quotes the *Lewis* statement that "[o]nce the right to damages is established, uncertainty as to the amount of damages does not preclude recovery." 170 Ariz. at 397, 825 P.2d at 18. As the defendants point out, this language appears in the analysis of the appropriateness of a directed verdict, a matter outside the jury's purview.

¶13 Gammage nevertheless contends that his additional instruction was necessary to explain the difference between uncertainty and speculation, and to clarify the burdens of proof for the fact of damage and the amount of damage. The trial court is not required to instruct the jury on every refinement of the law. *See Starkins v. Bateman*, 150 Ariz. 537, 547-48, 724 P.2d 1206, 1216-17 (App. 1986) (stating that the trial court did not abuse its discretion in declining to instruct on the difference between

actual malice and ill will); *see also Haynes v. Syntek Fin. Corp.*, 184 Ariz. 332, 341 & n.5, 909 P.2d 399, 408 & n.5 (App. 1995) (upholding refusal to instruct jurors concerning which specific hazardous condition provided notice to a landowner defendant). Because the given instructions adequately conveyed the legal standards and burdens of proof for awarding damages,[1] and it is not reasonable to suppose that the

[1] The trial court also instructed the jury in relevant part:

> I will now tell you the rules you must follow to decide this case. I will instruct you on the law. It is your duty to follow the law whether you agree with it or not.
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> It is also your duty to determine the facts. You must determine the facts only from the evidence produced in court. *You should not speculate or guess about any fact.* You must not be influenced by sympathy or prejudice. You must not be concerned with any opinion you may feel I have about the facts. You are the sole judges of the facts.
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> * * *
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> Burden of proof means burden of persuasion. On any claim, the party who has the burden of proof must persuade you, by the evidence, that the claim is more probably true than not true. This means that the evidence that favors that party outweighs the opposing evidence. In determining whether a party has met this burden, consider all the evidence that bears on that claim, regardless of which party produced it.
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> * * *

instructions as a whole misled the jury, we decline to reverse. *See Taylor v. DiRico*, 124 Ariz. 513, 516-17, 606 P.2d 3, 6-7 (1980) (stating that reference to "near future" in a proximate causation instruction was not likely to confuse the jury).

II. The appellate record does not substantiate Gammage's claim of prejudice.

¶14 Gammage also argues that the trial court's failure to instruct the jury was "far from harmless" because the $770 verdict was "clearly not supported by the evidence." The prejudice from a jury instruction to an appellant's substantial rights must affirmatively appear in the record. *Walters v. First Fed. Savs. & Loan Ass'n of Phoenix*, 131 Ariz. 321, 326, 641 P.2d 235, 240 (1982) (finding that an erroneous fraud instruction did not require reversal).

¶15 Even if the refusal to give the instruction was erroneous, the lack of a transcript impedes our ability to evaluate the alleged prejudicial effect of refusing the requested instruction. As the appellant, Gammage is responsible for supplying a trial transcript. *See* ARCAP 11(b)(1); *Plattner v. State Farm Mut. Auto. Ins. Co.*, 168 Ariz. 311, 319, 812 P.2d 1129, 1137 (App. 1991) ("It was [appellant's] burden to see that all documents necessary to his arguments on appeal were made part of the record on appeal."). Without the transcript, the refusal of this instruction "cannot be considered as a ground for reversal." *Deisler v. Stevens*, 77 Ariz. 16, 17, 266 P.2d 738, 738 (1954) (quoting *Frost v. Grizzly Bluff Creamery Co.*, 36 P. 929, 929-30 (Cal. 1894)); *see Evans v. Dineen*, 105 Ariz. 44, 45-46, 459 P.2d 304, 305-06 (1969) (declining to find error in refusal of a requested instruction because the record was incomplete). To the extent that Gammage contests the instruction given, we cannot reverse unless it "would have been

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> Damages for emotional distress are not recoverable in a claim for legal malpractice. The proper measure of damages is the difference between the economic position the Plaintiff was/is in as a result of Defendants' negligence, and the economic position he would have been in but for Defendants' negligence.

(Emphasis added.)

erroneous under any conceivable state of facts." *Deisler,* 77 Ariz. at 17, 266 P.2d at 738 (citation ommitted). We cannot say that the given instruction meets this standard. *See id.*; *McCarty v. F. C. Kingston Co.*, 22 Ariz. App. 17, 19, 522 P.2d 778, 780 (1974) (affirming given instruction in the absence of a complete transcript); *see also Zuniga v. City of Tucson*, 5 Ariz. App. 220, 223, 425 P.2d 122, 125 (1967) (holding that court had no alternative but to affirm somewhat repetitious instructions in the absence of a transcript). Our resolution of this issue obviates the need to consider the parties' remaining arguments.

CONCLUSION

¶16 We affirm the trial court's rulings in all respects. In addition, we award the defendants their costs on appeal pursuant to A.R.S. § 12-341 (2003) contingent upon their compliance with Arizona Rule of Civil Appellate Procedure 21(a).[2] We deny Gammage's request for costs.

Ruth A. Willingham · Clerk of the Court
FILED: mjt

[2] *See* Ariz. Sup. Ct. Order No. R-12-0039 (amending ARCAP 21 effective Jan. 1, 2014).