DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ELVIS PEÑA and ELIZABETH PEÑA, husband and wife; and EDWARD SEAGER, an unmarried man, Plaintiffs/Appellees, v. TIMOTHY ANDREW OPIC and JAMIE OPIC, husband and wife; and OPIC FIDELITY, LLC, an Arizona company, Defendants/Appellants.	)	No. 1 CA-CV 09-0401 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)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 2007-003144

The Honorable Douglas L. Rayes, Judge

AFFIRMED

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B R O W N, Judge

¶1 Tim and Jamie Opic appeal the trial court's denial of their motion for judgment as a matter of law ("JMOL"), or, in the alternative, the denial of their motion for new trial. For the following reasons, we affirm.

BACKGROUND

¶2 The Opics owned a parcel of real estate in an unincorporated area of Maricopa County, which they subdivided into four building lots. In April 2005, the Opics hired Scott Stephens ("Stephens")[1] to clear the land, collapse an underground septic tank, and remove various structures and debris from the property, including a large chicken coop, a mobile home, and fences. In November 2005, Elvis and Elizabeth Peña, husband and wife, and Edward Seager (collectively "Plaintiffs") entered into a contract with the Opics to purchase one of the lots (Lot C) for $225,000. The purchase agreement, a standard vacant land contract, provided that: "Seller warrants that Seller has disclosed to Buyer and Broker(s) all material latent defects and any information concerning the Property known to Seller . . . which materially and adversely affect the consideration to be paid by Buyer." Escrow closed on the lot in January 2006.

[1] Other parties previously named in this action, including Stephens, have had their claims dismissed or settled and are not parties to this appeal.

¶3 In the fall of 2006, while the Peñas were moving forward with construction of their home on Lot C, Jamie Opic called Elizabeth Peña, informing her that one of the Opics' employees had buried some trash and debris on the lot. Jamie told Elizabeth "not to worry about it, that [she] and Tim would take care of it if there was anything there." Plaintiffs' plumber dug some small test holes on the south side of the lot, discovering the buried trash. Elizabeth told Jamie about the trash, who then reiterated that "it didn't matter . . . what the cost was, that they were going to take care of it." Plaintiffs later hired Mike Larson ("Larson"), a licensed excavating contractor, to dig larger test holes and provide an estimate of the cost to remove the buried debris. Larson's test holes revealed "thick chunks of concrete," piping, a bathtub, a sink, a Dr. Pepper vending machine, numerous wood fragments, steel frames, and steel barring.

¶4 After subsequent efforts to resolve the matter were unsuccessful, in February 2007, Plaintiffs sued the Opics and Opic Fidelity, LLC,[2] for fraud, consumer fraud, fraudulent concealment, breach of contract, and breach of the implied convenant of good faith and fair dealing. The Opics filed a counterclaim alleging that Plaintiffs committed interference

[2] In December 2008, the trial court granted Opic Fidelity, LLC's motion to dismiss. Thus, Opic Fidelity, LLC is not a party to this appeal.

with business relations, resulting in lost profits because the Opics were unable to complete the sales of the other lots due to Plaintiffs' conduct.

¶5 In July 2008, the Opics moved for summary judgment on Plaintiffs' claims, and, in response, Plaintiffs cross-moved for summary judgment on the Opics' counterclaim. Plaintiffs also moved for sanctions, arguing that the Opics' motion for summary judgment was not grounded in fact, was not warranted by existing law, and needlessly increased the cost of the litigation. In September 2008, the court granted Plaintiffs' cross-motion for summary judgment and denied the Opics' motion. The court also imposed sanctions on the Opics and their counsel.

¶6 A seven-day jury trial was held on Plaintiffs' claims in December 2008. Plaintiffs presented evidence regarding the discovery of the buried debris, the Opics' involvement and knowledge of the burial of the debris, and Larson's estimate of the costs of removal. All three Plaintiffs testified, as did the Opics, three of Tim Opic's former co-workers, Larson, Stephens, and a homeowner who lived near Lot C. The Opics denied they had any knowledge of Stephens' activities in burying the debris.

¶7 Stephens testified that he entered into a verbal agreement with the Opics to clear the mobile home and debris from the property and place it into dumpsters. The Opics were

to be responsible for ordering and paying for the dumpsters, while Stephens would be paid for his labor, which he told them would be $5,500. After completing only a portion of the job, Tim Opic informed Stephens it was becoming too expensive to continue ordering dumpsters, so he instructed Stephens to bury the remaining debris. Tim walked around the property with Stephens and pointed out the exact locations where he wanted Stephens to dig the holes to accomplish the task. After the initial location proved too difficult for digging, Tim told Stephens to dig holes in a different location, either on Lot C or Lot D, because he planned to sell those lots. Both Tim and Jamie Opic "frequently" visited the job site. Stephens buried part of the mobile home, the chicken coop, and all the surrounding debris in Lot C.

¶8 At the close of evidence, the Opics moved for JMOL. *See* Ariz. R. Civ. P. 50. The Opics argued the economic loss rule barred the Plaintiffs' claims and there was insufficient evidence to prove fraud. The court granted their motion as to the breach of the implied covenant of good faith and fair dealing, but denied it as to the remaining four claims. The jury found the Opics liable to the Plaintiffs for breach of contract, fraud, fraudulent concealment, and statutory consumer fraud. The jury awarded the Plaintiffs $76,840 in compensatory damages and it also awarded punitive damages of $33,699 against

each of the Opics. In a separate verdict form, the jury found that the purpose of the Opics' "[activity] was to benefit the [marital] community interests" and therefore the marital community was liable for "intentional torts" committed by the Opics.

¶9 The Opics then renewed their motion for JMOL, and, in the alternative, requested a new trial. They argued that: (1) the trial court erred by admitting evidence regarding settlement and mediation communications between the parties; (2) there was insufficient evidence to prove that Jamie Opic knew about the buried debris at the time of the sales contract; (3) Plaintiffs did not present damage evidence meeting the requisite degree of certainty; (4) the economic loss rule barred all of Plaintiffs' fraud claims; and (5) the court erred by denying their requested jury instruction on the concealment of evidence. The court denied the Opics' post-trial motions, finding there was sufficient evidence to support the amounts of damages awarded and the jury's finding that Jamie Opic was liable on the fraud claims. The court also found there were no errors in the admission of evidence concerning communications between the Opics and Plaintiffs and, even if it was error, "it was not prejudicial and did not affect the outcome of the case." Further, the court concluded that Plaintiffs' fraud claims could be maintained under the economic loss rule and that there was no

error in denying the Opics' requested jury instruction on concealment of evidence. The court entered final judgment against the Opics in the amounts found by the jury. It also awarded Plaintiffs $54,270.98 in attorneys' fees, $688.60 in pre-offer of judgment costs, and $8,549.74 in post-offer of judgment costs. The Opics timely appealed.

DISCUSSION

I. Denial of Motion for JMOL and New Trial

¶10 We review de novo a denial of a motion for JMOL, and we view the facts in a light most favorable to the nonmoving party. *Shoen v. Shoen*, 191 Ariz. 64, 65-66, 952 P.2d 302, 303-04 (App. 1997). A motion for JMOL 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 reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). We review a denial of a motion for a new trial, however, for an abuse of discretion. *Styles v. Ceranski*, 185 Ariz. 448, 450, 916 P.2d 1164, 1166 (App. 1996). Additonally, we view the evidence in a light most favorable to sustaining the jury's verdict, and we will affirm "if any substantial evidence exists permitting reasonable persons to reach such a result." *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 53, ¶ 13, 961 P.2d 449, 451 (1998).

A. "Desert Trash" Defense

¶11 In their July 2008 motion for summary judgment, the Opics requested that the court "take judicial notice that desert trash is a well documented problem in Arizona," based on brief excerpts from two newspaper articles. In October 2008, the Opics filed a motion for leave to allow an expert witness. One topic upon which the expert was to testify was that it was "common to find debris, trash, garbage, etc. . . . under raw land in Arizona, depending on the prior use of the property." The Plaintiffs filed a motion *in limine* to prevent the Opics from presenting the "desert trash" theory to the jury, arguing that the Opics had failed to offer any admissible evidence to support the theory, and that the motion for leave to allow an expert witness was untimely because the court had ordered that all expert witnesses be disclosed before May 15, 2008. The court granted Plaintiffs' motion.

¶12 The Opics argue that the trial court erred in precluding them from presenting evidence regarding their desert trash theory. They argue that the theory was properly disclosed and admissible. Additionally, they assert that Plaintiffs' motion *in limine* did not comply with procedural rules governing disclosure. Plaintiffs counter that the theory was irrelevant because Stephens had already admitted he buried the trash on the lot. We agree with Plaintiffs.

¶13 Although the trial court did extend the deadline for completion of all discovery from June 15, 2008, until August 30, 2008, we find no evidence in the record to show that the court extended the deadline to disclose expert witnesses past the initial deadline of May 15, 2008, and thus the court did not abuse its discretion in precluding the expert.[3] Thus, without an expert witness who could arguably present a theory that the trash was illegally placed on the lot by a third party, the Opics could only rely on excerpts from newspaper articles referenced in their motion for summary judgment as evidence supporting the timely disclosure of their desert trash defense. The problem with the Opics' desert trash theory is that they offered no evidence establishing any connection between a desert trash problem and the property they sold to Plaintiffs. Instead, the only evidence offered were merely quoted excerpts referencing a trash problem in southern Arizona, with one of the excerpts specifically referring to Yuma. In sum, the desert trash defense was based on nothing more than speculation and was therefore irrelevant.[4]

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[3] The court ruled that "disclosure" was extended until August 30, 2008, but the record is unclear if that included "expert witness disclosure." Nonetheless, the court ruled that the Opics disclosure of their "desert trash" expert was untimely.

[4] Furthermore, the Opics have failed to provide us with a transcript of the November 14, 2008, hearing on Plaintiffs' motion *in limine*. *See Rancho Pescado, Inc. v. Nw. Mut. Life*

B. Settlement and Mediation Communications

¶14 The Opics assert that the trial court erred by admitting documents and testimony regarding settlement and mediation communications. Specifically, they argue that the admission of the second and third pages of Exhibit 10 were inadmissible because it addressed settlement negotiations between the parties.[5] Ariz. R. Evid. 408 (statements made in compromise negotiations are not admissible when offered to prove liability). This argument is without merit.

¶15 Although we review the admission of evidence by a trial court for an abuse of discretion, we are not bound by a trial court's conclusions of law. *See Yauch v. S. Pac. Transp. Co.*, 198 Ariz. 394, 399, ¶ 10, 10 P.3d 1181, 1186 (App. 2000) (citations omitted). Here, Exhibit 10 is not part of the record on appeal. "As to matters not in our record, we presume that the record before the trial court supported its decision." *Ashton-Blair v. Merrill*, 187 Ariz. 315, 317, 928 P.2d 1244, 1246 (App. 1996) (citation omitted). Thus, we will not find an abuse

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Ins. Co., 140 Ariz. 174, 189, 680 P.2d 1235, 1250 (App. 1984) ("It is, of course, the duty of the appealing party to insure that all necessary transcripts of evidence finds it way to this court.") We therefore presume that the transcript would support the court's ruling. *See Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995).

[5] The Opics initially argued on appeal that the trial court erred in admitting the second and third pages of Exhibit 10 and Exhibits 76-81, but they withdrew this argument in their reply brief, maintaining their objection only as to Exhibit 10.

of discretion absent the ability to review the exhibit. Further, the Opics acknowledge that Exhibit 76 was the "full version" of Exhibit 10, and thus they have waived any challenge to the admissibility of Exhibit 10. Moreover, the Opics stipulated to the admission of Exhibit 10 in the joint pretrial statement. We find no abuse of discretion.

C. Marital Liability

¶16 In Arizona, the marital community "is liable for the intentional torts of either spouse if the tortious act was committed with the intent to benefit the community, regardless of whether in fact the community receives any benefit." *Selby v. Savard*, 134 Ariz. 222, 229, 655 P.2d 342, 349 (1982) (citations omitted). The Opics assert that the trial court erred by permitting the Plaintiffs to offer evidence on the issue of martial liability and entering a judgment against the martial community when the issue was not properly pled or disclosed. We disagree.

¶17 To the extent that a specific allegation of community liability in a complaint may be required, *see Garrett v. Shannon*, 13 Ariz. App. 332, 334, 476 P.2d 538, 540 (1970), the Opics' argument fails because they did receive advance notice of Plaintiffs' intent to present evidence of marital liability at trial. The joint pretrial statement filed approximately one month before trial confirms this conclusion. The statement

included, as a contested issue of fact and law submitted by the Opics, "[w]hether the marital community [could] be liable for fraud or punitive damages when the tortfeasor was just one spouse." A joint pretrial statement "controls the subsequent course of the litigation" and has the effect of amending the pleadings. *Carlton v. Emhardt*, 138 Ariz. 353, 355, 674 P.2d 907, 909 (App. 1983) (citations omitted). Because the issue of the liability of the marital community was specifically included in the statement by the Opics, the issue was adequately pled and disclosed for trial. Thus, the trial court did not err in allowing presentation of evidence as to marital liability.

D. Damages

¶18 The Opics argue that the Plaintiffs failed to establish their damages to the requisite degree of certainty. The Opics request that this court vacate the jury's consequential damage determination and order a new trial as to the issue of damages.

¶19 Generally, "once the right to damages has been established, uncertainty as to amount of damages will not preclude recovery." *Nelson v. Cail*, 120 Ariz. 64, 67, 583 P.2d 1384, 1387 (App. 1978). The burden is placed on the party seeking damages, however, to prove them with "reasonable certainty," and the party's evidence must provide "some basis for estimating his loss." *Gilmore v. Cohen*, 95 Ariz. 34, 36,

386 P.2d 81, 82 (1963). An award of damages may not be based on speculation. *Walter v. Simmons*, 169 Ariz. 229, 236, 818 P.2d 214, 221 (App. 1991).

¶20 As evidence of their damages, Plaintiffs presented Larson's testimony, along with his written proposals containing the cost to excavate and remove the debris from Lot C. Larson testified that the current cost to remove the debris from the lot totaled $76,840. His total bid was based on the cost to excavate and remove all trash and debris, and he opined that a 100 by 100 foot hole would be necessary to excavate the lot. Larson further stated that his initial proposal in 2006 totaled $54,000, but that he had raised the amount in 2008 to $76,840 to reflect increased material costs, dump fees, fuel costs, and equipment charges. Larson stated that the updated proposal was good as of the day of the trial, and that, as a licensed contractor, he would not accept the project for less than $76,840. Although the Opics argue that Larson stated his damage estimate was based on "guesswork," Larson was actually referring to the "guesswork" involved in estimating the size of the hole he would be required to dig. Specifically:

> Q [Counsel for the Opics]. Would you say that there's a certain amount of guesswork in what it ultimately comes out to be? Have to basically guess certain variables that you're doing on the project?

> A [Larson]. Could be [ ] guesswork, as far as a 100 by 100 foot area. 10,000 square foot can be added up. You can get to that number a whole different variations. So yeah, I mean I didn't—I knew it wasn't going to be an exact hundred by hundred foot hole.
>
> Q. So when you come up with the cost to do this, there's some sort of some inherent speculation in there, wouldn't you say?
>
> A. To a degree. You know, a little bit.

Therefore, we do not believe this indicates that the Plaintiffs did not prove their damages with reasonable certainty. Rather, it only indicates that Larson, understandably, had to estimate certain aspects of the project, such as how large the hole would need to be. On this record, we find that Plaintiffs provided sufficient evidence to allow a jury to calculate with reasonable certainty the amount of damages.

E. Economic Loss Doctrine

¶21 The Opics argue that the Plaintiffs' fraud claims are barred by the economic loss doctrine because the economic tort damages sought by Plaintiffs are identical to the damages sought under contract. The Opics contend that the fraud claims cannot stand because they are "interwoven and indistinct from the heart of the contractual agreement." They assert that the contract carefully established the warranties, inspection periods, and remedies for parties who believe that they did not receive the benefit of their bargain. The Opics do not draw any distinction

between the three fraud-related claims asserted by Plaintiffs. Instead, they refer only to Plaintiffs' "fraud claims."

¶22 Under certain circumstances, the economic loss doctrine prevents plaintiffs from recovering economic damages in tort. *Flagstaff Affordable Housing Ltd. P'ship v. Design Alliance, Inc.*, 223 Ariz. 320, ___, ¶ 1, 223 P.3d 664, 665 (2010). Economic loss "refers to pecuniary or commercial damage, including any decreased value or repair costs for a product or property that is itself the subject of a contract between the plaintiff and defendant[.]" *Id*. at ___, ¶ 11, 223 P.3d at 667. The doctrine limits a contracting party to purely contractual remedies for economic losses, unless otherwise accompanied by physical injury or injury to other property. *Id*. at ¶ 12. In Arizona, this doctrine has been applied only to product liability and construction defect cases. *See id.* at ___, ¶¶ 1, 17, 223 P.3d at 665, 668.

¶23 Here, Plaintiffs sought only "economic" losses, as there was no physical injury or injury to property other than Lot C. Thus, the Opics have presented a plausible argument that the doctrine should be applied in this case, which would prevent Plaintiffs from pursuing any tort claims against the Opics. We decline to apply the doctrine, however, because even if it applies to bar a common law fraud claim that relates to a contract involving the sale of land, we are not persuaded, under

existing Arizona case law, that the doctrine applies to a consumer fraud claim.

¶24 The Consumer Fraud Act (the "Act") makes unlawful the use "of any deception . . . fraud, false pretense, false promise, misrepresentation, or concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise[.]"[6] A.R.S. § 44-1522 (Supp. 2009).[7] In 1974, our supreme court recognized that a private cause of action exists against a party who violates the Act, even though it was not explicitly provided for by statute. *Sellinger v. Freeway Mobile Home Sales, Inc.*, 110 Ariz. 573, 521 P.2d 1119 (1974). In *Sellinger*, the plaintiffs sued to recover damages in connection with the sale of a mobile home based upon a number of alleged defects. *Id*. at 574-75, 521 P.2d at 1120-21. The complaint included claims for breach of contract and consumer fraud. *Id*. at 575, 521 P.2d at 1121. The trial court dismissed the consumer fraud count, finding that the Act did not create a private right of action. *Id*. This court affirmed but our supreme court accepted review. *Id*. at 574, 521 P.2d at

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[6] Merchandise means "any objects, wares, goods, commodities, intangibles, real estate, or services." Ariz. Rev. Stat. ("A.R.S.") § 44-1521 (2003).

[7] We cite to the current version of the applicable statutes if no revisions material to this decision have since occurred.

1120. In construing the Act, the court recognized that statutes "which are designed to redress existing grievances and introduce regulations conducive to the public good are remedial." *Id*. at 576, 521 P.2d at 1122 (citations omitted). The court also recognized a trend away from the doctrine of "caveat emptor toward caveat venditor" and that a private remedy is "highly desirable in order to control fraud in the marketplace." *Id*. Thus, the court concluded that "a person who has been damaged by the practices declared to be unlawful may exert a claim by reason of such acts." *Id*.

¶25 The Opics have not cited, nor has our research revealed, any authority supporting the notion that the economic loss doctrine as recognized in Arizona would bar a claim filed under the Act. Instead, a plaintiff filing a claim under the Act is entitled to bring that action because the Arizona Legislature inferentially created that right. *See Sellinger*, 110 Ariz. at 576, 521 P.2d at 1122. Nothing in the language of the Act suggests that it is intended to apply only in non-contractual situations. Instead, the Act specifically applies to the "sale or advertisement of any merchandise," which necessarily means that parties involved in the sale of the merchandise have in fact entered into some type of contractual relationship; otherwise, there would be no sale. A.R.S. § 44-1521. Moreover, the Act provides that "[t]he provisions of this

article are in addition to all other causes of action, remedies and penalties available to this state." A.R.S. § 44-1533(A) (2003).

¶26 Here, there is no question that the parties entered into a contract for the sale of merchandise. Plaintiffs alleged in their complaint that the Opics made false representations relating to the condition of Lot C, constituting an unlawful practice under § 44-1522. We agree with the trial court's determination that although Plaintiffs' claims arise out of contract, the Opics had "a statutory duty not to commit the other theories." Thus, Plaintiffs had the right to file an action for damages under the Act irrespective of any contractual rights they may have bargained for with the Opics. The trial court did not err in finding that the economic loss doctrine did not bar Plaintiffs' consumer fraud claim.[8]

F. Negative Inference Instruction

¶27 The Opics contend that the trial court should have provided a negative inference instruction to the jury. They argue that deposition testimony revealed that the Plaintiffs received multiple proposals to remove debris from the lot, but that they only presented the proposal from Larson at trial. The

[8] In light of this conclusion, we need not address the Opics' related argument that they were prejudiced by the jury's consideration of the fraud claims.

Opics requested a jury instruction that would "[allow] the jury to draw an inference against a party who fails to disclose or does not present evidence that is uniquely held by the non-disclosing party." The trial court denied their requested instruction, and the Opics argue on appeal that this denial caused them prejudice.

¶28 We review a trial court's refusal to give a requested jury instruction for an abuse of discretion, but we will not reverse on this basis unless prejudice results. *Brethauer v. General Motors Corp.*, 221 Ariz. 192, 198, ¶ 24, 211 P.3d 1176, 1182 (App. 2009). "A trial court must give a requested 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 Center Inc.*, 144 Ariz. 6, 10, 695 P.2d 255, 259 (1985) (citations omitted).

¶29 In his deposition in 2007, Seagar stated that he believed there were "other proposals or bids on the property." At trial, however, he clarified that he was actually referring to the number of construction bids, and he confirmed that there was only one proposal for the removal of the debris from the lot. Additionally, the Peñas testified that there were no other bids besides Larson's for the removal of debris.

¶30 Further, the Opics indicated in the reply to their proposed jury instructions that the instruction was necessary because Seager was to be unavailable at trial, and they would therefore not be able to question him on the bids. Seager did testify at trial, however, and the Opics were given the opportunity to cross-examine him. Thus, the anticipated need for such an instruction no longer existed, and the trial court did not err in refusing to submit the instruction to the jury.

G. Fraud Claims Against Jamie Opic

¶31 At trial, the jury was instructed that it could find the Opics liable for common law fraud,[9] fraudulent concealment, and statutory consumer fraud. As to fraudulent concealment, the jury was instructed that to prevail on their claim, Plaintiffs "must prove that the Opics had a legal or equitable obligation to reveal information or facts they instead concealed."[10]

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[9] Fraud requires proof of the following nine elements: "(1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent that it be acted upon by the recipient in a manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the right to rely on it; (9) his consequent and proximate injury." *Enyart v. Transamerica Ins. Co.*, 195 Ariz. 71, 77, ¶ 18, 985 P.2d 556, 562 (App. 1998) (citation omitted). The jury was instructed on these nine elements.

[10] Arizona case law describes the tort of fraudulent concealment as follows: "One party to a transaction who by concealment or other action intentionally prevents the other from acquiring material information is subject to the same liability to the other, for pecuniary loss as though he had

Regarding consumer fraud, the jury was instructed that in order for the Plaintiffs to establish their consumer fraud claim, they had to prove:

> 1) Opics used deception, made a false promise, made a misrepresentation, or concealed, suppressed, or omitted a material fact in connection with the sale or advertisement of real property;
>
> 2) Opics intended that others rely upon such deception, false promise, misrepresentation, or concealment, suppression, and/or omission of a material fact;
>
> 3) [Plaintiffs] suffered damages as a result of reliance on [the Opics'] deception, false promise, misrepresentation, concealment, suppression, or omission of a material fact; and
>
> 4) [Plaintiffs'] damages.

See A.R.S. § 44-1522 (the Consumer Fraud Act). Jamie Opic separately argues that there was insufficient evidence presented at trial to support the allegation that she knew of the buried debris on the property at the time of sale or close of escrow. Therefore, she asserts that the trial court erred in allowing the jury to consider fraud claims against her. Specifically, Jamie argues that there was no testimony to prove that she had

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stated the nonexistence of the matter that the other was thus prevented from discovering." *Wells Fargo Bank v. Ariz. Laborers, Teamsters and Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 496, ¶ 87, 38 P.3d 12, 34 (2002) (citing Restatement (Second) of Torts § 550 (1976)).

any reason to believe debris was buried on the Plaintiffs' lot, and any other references to knowledge she may have had required the jury to make a speculative inference. We disagree.

¶32 We first note that Jamie's argument does not attempt to distinguish between any of the fraud claims presented to the jury. Her argument appears to be a general attack on the jury's verdict against all three claims based on her lack of knowledge of burying of any debris. As such, we will sustain the jury's verdict if the evidence is sufficient to support any of the fraud claims because the compensatory damages awarded for each claim are identical. Additionally, punitive damages could appropriately be awarded by the jury for any of the three fraud claims. *See Rhue v. Dawson*, 173 Ariz. 220, 232, 841 P.2d 215, 227 (App. 1992) ("[F]raud and deliberate, overt, dishonest dealings will suffice to sustain punitive damages."); *see also Sellinger*, 110 Ariz. at 577, 521 P.2d 1123 (recognizing that punitive damages may be awarded in connection with consumer fraud claim). Here, the evidence was sufficient to sustain the jury's verdict regarding the Plaintiffs' consumer fraud claim.

¶33 We find it significant that the Opics have not challenged the jury's verdict finding Jamie liable for breach of contract. The land sale contract required the sellers to disclose "all material latent defects and any information concerning the Property *known* to Seller . . . which materially

and adversely affect the consideration to be paid by Buyer." (Emphasis added.) Consistent with this disclosure requirement, Jamie prepared the Seller's Property Disclosure Statement ("SPDS") for the sale of the property. The SPDS stated that the "manufactured home on [the] property [had been] removed, [and the] land ha[d] been scrubbed." Because the jury found Jamie liable for breach of contract, the jury impliedly determined she had knowledge of information regarding the property that she failed to disclose. As such, Jamie cannot reasonably contend on appeal she had no knowledge of the buried debris because the jury implicitly found she was aware of "known" material defects. This finding is sufficient to support the first element of Plaintiffs' claim for consumer fraud based on Jamie's misrepresentation or omission of material facts in connection with the sale of the property.

¶34 Further, we find that the record supports the jury's conclusion that Jamie breached her disclosure obligations under the contract. Although the record presents substantially contradicting evidence, it is not our function to reweigh the evidence on appeal. *See In re Estate of Pouser*, 193 Ariz. 574, 579, 975 P.2d 704, 709 (1999) (noting that appellate court does not "reweigh conflicting evidence or redetermine the preponderance of the evidence").

¶35 According to Jamie, she did not know that Tim instructed Stephens to rent a trackhoe and bury the debris. Jamie also testified that the only knowledge she had of the work Stephens performed was that "he did everything but finish grading the lot and collapsing the septic[.]" Jamie conceded, however, that her husband did not have "anything to do with [their] finances," and that she "took over" the project with Stephens after they had initially hired him. Tim confirmed that Jamie handled the invoices from Stephens, and "when things went bad, the contact was between my wife Jamie and Scott Stephens." Jamie acknowledged she received an invoice from Stephens for 34.5 hours of work with a rented trackhoe, which also indicated Stephens was charging the Opics an additional $4,500 for removal of the debris. The invoice also included the notation "*per our discussion*" and the description "extremely hard digging." Jamie admitted she had called Stephens and discussed the invoice charges with him. She testified that she believed the 34.5 hours with the rented trackhoe was for digging up the septic tank and breaking up the patio foundation. She believed the "extremely hard digging" referred to Stephens' work on the septic tank. Jamie also testified that she had seen the invoices reflecting the continual overloading and excessive disposal charges for the dumpsters, but denied that she later stopped supplying Stephens with dumpsters.

¶36 Contrary to Jamie's testimony, Stephens stated that the Opics were responsible for supplying the dumpsters for the projects and that the invoices he gave to the Opics were for labor and rental of the trackhoe. The Opics did pay for several dumpsters but then stopped ordering them when it became too expensive. According to Jamie, she never paid Stephens any money because he did not finish the project. She stated that Stephens had not "finished the grading or the septic collapsing," that there were still "quite a few piles of rocks and dirt," and some "debris that needed to be cleared off." Although Jamie first testified that she had observed Stephens working only "one time," she later admitted that she would "periodically" check on Stephens, possibly in "intervals every three to four weeks."

¶37 Stephens further testified that both Tim and Jamie Opic "frequently" visited the job site. Stephens stated that Tim visited "at least two or three times a week," and though he could not remember if Jamie was there with Tim "every time or not," she also visited the site. A neighbor of the property also testified that Jamie was present on the property during the "clean-up."

¶38 We find a sufficient evidentiary basis for a reasonable jury to find Jamie had knowledge of the burial of debris on Lot C prior to close of escrow of the lot. The jury

could have reasonably concluded that she misrepresented or omitted a material fact in connection with the sale of Lot C by indicating that the mobile home had been removed from the property and the land had been "scrubbed." Thus, the trial court did not err in denying the Opics' motion for JMOL, or, in the alternative, a new trial, as to Jamie Opic's liability on Plaintiffs' fraud claims.

II. Attorneys' Fees

¶39 The Opics and Plaintiffs request attorneys' fees on appeal pursuant to A.R.S. § 12-341.01 (2003). "In any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney fees." A.R.S. § 12-341.01. In our discretion, we award Plaintiffs reasonable attorneys' fees incurred on appeal upon their compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶40 For the foregoing reasons, we affirm the judgment of the trial court.

/s/
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MICHAEL J. BROWN, Judge

CONCURRING:

/s/
_____
PATRICK IRVINE, Presiding Judge

/s/
_____
DONN KESSLER, Judge