IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 10/28/10
RUTH WILLINGHAM, ACTING CLERK
BY: DLL

SUTTON PLACE IMPROVEMENT ASSOCIATION, an Arizona non-profit corporation,	)	1 CA-CV 09-0788
	)	DEPARTMENT A
Plaintiff/Counterdefendant/ Appellant,	)	**MEMORANDUM DECISION**
v.	)	Not for Publication – (Rule 28, Arizona Rules of Civil Appellate Procedure)
WILLIAM L. MARTIN and AMY M. AMARO-MARTIN,	)	
Defendants/Counterclaimants/ Appellees.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CV2007-008302

The Honorable A. Craig Blakey, II, Judge

AFFIRMED

Gutilla Murphy Anderson, P.C. Phoenix
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B A R K E R, Judge

¶1 Sutton Place Improvement Association ("Sutton Place"), a homeowners' association, filed a claim in the superior court against William Martin ("Mr. Martin") and his wife Amy Amaro-Martin ("Mrs. Martin") (collectively, "the Martins") seeking permanent injunctive relief from the Martins' alleged violations of their residential deed restrictions. The Martins counterclaimed alleging that Sutton Place had violated the Arizona Civil Rights Act (Arizona Revised Statutes ("A.R.S.") section 41-1491), the Federal Fair Housing Act (42 U.S.C. § 3604), and the parties' implied covenant of good faith and faith dealing.

¶2 The jury ultimately awarded the Martins $200,000 in compensatory damages on their counterclaims. Thereafter, Sutton Place filed a Motion for Remittitur requesting a reduction in the jury verdict. The trial court denied both Sutton Place's Motion for Remittitur as well as Sutton Place's original Request for Permanent Injunctive Relief. Sutton Place now appeals both of these rulings. In addition, Sutton Place appeals various evidentiary rulings made by the trial court during the course of litigation. For the reasons set forth below, we affirm the trial court's rulings.

Facts and Procedural Background

¶3 The Martins own a residential property within the Sutton Place housing community. The property is subject to

various deed restrictions that are enforced by Sutton Place through its Board of Directors ("Board"). One such deed restriction states that all plans for improvement to the exterior of real property within the subdivision must be submitted to and approved by Sutton Place's Board prior to making such improvements ("Deed Restriction").

¶4 In December 2003, pursuant to the Deed Restriction, the Martins began discussing with the Board extensive changes they wished to make to the exterior of their house. In May 2005, the Board approved the Martins' proposed renovation plans. After obtaining final approval from the city of Phoenix in January 2006, the Martins began demolition in February 2006.

¶5 In April 2006, Sutton Place sent the Martins the first of a series of informal complaints claiming that the Martins were not proceeding in accordance with the plans previously approved by the Board. In April 2007, Sutton Place filed a lawsuit against the Martins requesting that the court enjoin the Martins from making unapproved modifications to their house.

¶6 The Martins counterclaimed that Sutton Place had selectively enforced the Deed Restriction against them based upon their race. Mr. Martin is African American and Mrs. Martin is Hispanic. The Martins maintained that because of their race Sutton Place had treated their project with more scrutiny and rigor than other projects in the community. For example, the

Martins claimed they were the only property owners in the community to be sued by Sutton Place. The Martins alleged that this difference in treatment violated the Arizona Civil Rights Act (A.R.S. § 41-1491), the Federal Fair Housing Act (42 U.S.C. § 3604) and the parties' implied covenant of good faith and fair dealing.

¶7 Before the case went to trial, the Martins filed a complaint with the Arizona Attorney General's Office, Civil Rights Division, alleging that Sutton Place had violated the Arizona Fair Housing Act by discriminating against them in the enforcement of their Deed Restriction on the basis of Mr. Martin's and Mrs. Martin's race. Following an investigation, the Attorney General's Office dismissed the complaint, finding insufficient evidence to establish a violation of the Arizona Fair Housing Act. Accompanying the dismissal was a document entitled "Final Investigative Report" ("Report"). The Report contained (1) summaries of interviews conducted by the investigator of various Board members and members of the Sutton Place community, (2) factual observations made by the investigator during the investigation, and (3) a four-page letter from Sutton Place to the investigator laying out Sutton Place's defense to the Martins' allegations of discrimination.

¶8 The Martins made a motion in limine to exclude the Report[1] under Rule 403 of the Arizona Rules of Evidence. At the parties' pretrial conference, the trial court granted the Martins' motion in part, ruling that the Report would be excluded except for purposes of impeachment. Specifically, the parties were permitted to ask witnesses (1) whether the statements had been made under oath to an investigator and (2) whether they had told the investigator "XYZ" (meaning the specific statement in the Report attributed to them). The parties were prohibited from asking witnesses whether the investigator was from the Attorney General's Office.

¶9 During the same pretrial conference, Sutton Place sought to exclude all references at trial to Sutton Place's insurance coverage under Rules 403 and 411 of the Arizona Rules of Evidence. The Martins countered that Sutton Place had opened the door to the discussion of insurance. The Martins informed the court that during the course of litigation, Sutton Place sent the Martins a cease and desist letter demanding that the

[1] Both parties appear confused as to whether the trial court's ruling precluded all documents released by the Attorney General's Office in connection with the investigation, (i.e., the complaint, the final investigative report, the dismissal, and the denial of application for reconsideration), or whether it precluded only the Report. We find that the court's ruling was limited to the Report. The Martins' motion in limine referenced only the Report, and the trial court granted that motion without expanding the ruling to other documents.

Martins remove their newly installed outdoor firepit. Sutton Place stated that due to an underwriter's policy its insurer would not renew Sutton Place's insurance policy unless the firepit was removed. The underwriter, however, later informed the Martins that no policy prohibiting outdoor firepits existed. Once the Martins delivered basic information to the insurer about the firepit – information that the Board was in possession of – the insurer renewed Sutton Place's coverage. The Martins later learned that the insurer had only discovered the firepit because a member of the Board - Mr. Baker - informed the insurer about it.

¶10 In ruling on Sutton Place's motion to exclude all evidence of its insurance, the trial judge stated,

> I guess I'm going to have to play it by ear as it comes up. And with respect to Mr. Baker's role in it, if any, I'm going to allow that portion of it. It may be that it does show an intent by the association - I don't know at this time - to harass or otherwise make it more difficult to go forward with the project.

¶11 Sutton Place also objected on relevancy grounds to calling as a witness Mr. Calderon. Mr. Calderon was an insurance adjuster for Sutton Place's insurance carrier and was connected to the insurer's decision to renew Sutton Place's coverage. The trial court overruled the objection and allowed Mr. Calderon to testify.

¶12 At trial, the Martins' counterclaims were submitted to the jury and Sutton Place's Request for Permanent Injunctive Relief was submitted to the court. The jury found for the Martins and in a general verdict awarded them $200,000 in compensatory damages. Sutton Place filed a Motion for Remittitur under Rule 59(i) of the Arizona Rules of Civil Procedure requesting a reduction in the jury verdict. The trial court denied the motion. Additionally, the trial court denied Sutton Place's original Request for Permanent Injunctive Relief against the Martins' alleged unapproved house modifications.

Discussion

1. Exclusion of Attorney General Report

¶13 Sutton Place argues on appeal that the trial court abused its discretion by not admitting in its entirety the Report issued by the Attorney General's Office. A trial court has considerable discretion in ruling on the admissibility of evidence, and we will not reverse such a ruling absent (1) a clear abuse of discretion or misapplication of the law; and (2) resulting prejudice. *State v. Hensley*, 142 Ariz. 598, 602, 691 P.2d 689, 693 (1984); *Rimondi v. Briggs*, 124 Ariz. 561, 565, 606 P.2d 412, 416 (1980); *Conant v. Whitney*, 190 Ariz. 290, 292, 947 P.2d 864, 866 (App. 1997). "An 'abuse of discretion' is discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Torres v. N. Am. Van Lines,*

Inc., 135 Ariz. 35, 40, 658 P.2d 835, 840 (App. 1982) (quoting *Quigley v. City Court of Tucson*, 132 Ariz. 35, 643 P.2d 738 (1982)). That "the circumstances could justify a different conclusion than that reached by the [trial court] does not warrant the [appellate] court in substituting its judgment for that of the [trial court]. A difference in judicial opinion is not synonymous with 'abuse of discretion.'" *Quigley*, 132 Ariz. at 37, 643 P.2d at 740.

¶14 Here, the trial court excluded the evidence based on the Martins' objection under Rule 403 of the Arizona Rules of Evidence. Rule 403 provides that otherwise admissible evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Ariz. R. Evid. 403. Our supreme court has stated, "if other evidence is available of equal probative value but without the attendant risks of the offered evidence, then a greater probability of substantial outweighing exists." *Shotwell v. Donahoe*, 207 Ariz. 287, 296, ¶ 34, 85 P.3d 1045, 1054 (2004) (quoting *State v. Gibson*, 202 Ariz. 321, 324, ¶ 17, 44 P.3d 1001, 1004 (2002)).

¶15 The process of weighing the prejudicial impact of evidence against its probative value is peculiarly within the

function of the trial court. *Crackel v. Allstate Ins. Co.*, 208 Ariz. 252, 266, ¶ 53, 92 P.3d 882, 896 (App. 2004). Indeed, because "[t]he trial court is in the best position to balance the probative value of challenged evidence against its potential for unfair prejudice," it has broad discretion in deciding whether to exclude evidence under Rule 403. *State v. Harrison*, 195 Ariz. 28, 33, ¶ 21, 985 P.2d 513, 518 (App. 1998), *aff'd*, 195 Ariz. 1, 985 P.2d 486 (1999). The trial court did not elaborate on its ruling. However, findings are not required. "Trial judges are presumed to know the law and to apply it in making their decisions." *Feltrop v. Missouri*, 501 U.S. 1262, 1263 (1991) (quoting *Walton v. Arizona*, 497 U.S. 639, 653 (1990)).

¶16 In reviewing this issue, we look first to the probative value of the Report. *See Shotwell*, 207 Ariz. at 296, ¶ 34, 85 P.3d at 1054 ("A proper Rule 403 balancing of probative value and prejudicial effect begins with a proper assessment of the 'probative value of the evidence on the issue for which it is offered.'" (quoting *Gibson*, 202 Ariz. at 324, ¶ 17, 44 P.3d at 1004)). Sutton Place argues that many of the Report's interview summaries and factual observations are probative of key issues at trial. Although we agree that the Report contains relevant evidence, we also find that this evidence does not make the Report in its entirety highly probative. We reach this

conclusion because of the availability of the same evidence through less prejudicial means. *See id.* ("[I]f other evidence is available of equal probative value but without the attendant risks of the offered evidence, then a greater probability of substantial outweighing exists." (quoting *Gibson*, 202 Ariz. at 324, ¶ 17, 44 P.3d at 1004)). Sutton Place has failed to identify any factual observations or witness statements that could not have been obtained by presenting less prejudicial physical evidence or by calling individual witnesses to testify at trial. Indeed, four out of seven of the witnesses interviewed in the Report did testify at trial. Thus, we cannot say that the Report's broadly accessible, and to some degree repetitive, evidence gave the Report more than minimal probative value.

¶17 Sutton Place argues that the Report in its entirety had probative value because it could have been used to conduct more complete impeachment through prior inconsistent statements. First, Sutton Place argues that the admitted Report would have added credibility to the witnesses' prior statements by establishing that they were made to an investigator from the Attorney General's Office, rather than a private investigator. However, by allowing the parties to establish that the statements were given to an investigator under oath, the prior statements had sufficient credibility to conduct proper

impeachment. Any additional value to be gained by establishing that the statements were given to an investigator specifically from the Attorney General's Office was minimal.

¶18 Second, Sutton Place argues that admitting the Report would have allowed a more complete impeachment because it would have been extrinsic evidence of the witnesses' prior statements. We again determine that the trial court's ruling adequately maintained the Report's impeachment value in this regard. The court's ruling permitted the parties to confront witnesses by reading aloud, in the presence of the jury, the exact language contained in the Report. Any additional value that might have been gained by admitting into evidence a hard copy of the same statement was minimal. Moreover, the court's ruling did not preclude Sutton Place from introducing other extrinsic evidence of witnesses' statements – such as calling the investigator to testify to what witnesses said during their interviews, in the event the witnesses denied the statements attributed to them.[2]

[2] Sutton Place briefly argues that under Rule 613(b) of the Arizona Rules of Evidence it was "entitled" to use the Report as extrinsic evidence of prior inconsistent statements. We disagree. Rule 613(b) merely establishes what requirements must be met before extrinsic evidence of a prior inconsistent statement may be admitted. "The Rule does not state the converse, namely that extrinsic evidence of a prior statement must be admitted in all cases" where the requirements are met. *United States v. Soundingsides*, 825 F.2d 1468, 1470 (10th Cir. 1987) (applying the federal rule). "[W]here it is sought to impeach a witness by showing a prior inconsistent statement and the witness admits the prior inconsistent statement, the witness

Indeed we see no such requests. Thus, the court's ruling adequately preserved the potential impeachment value of the Report.

¶19 Next, we consider the other side of the Rule 403 balancing test, i.e., danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, wasted time, or needless presentation of cumulative evidence. *See* Ariz. R. Evid. 403. Consistent with the trial court's ruling, the Report presented a danger of misleading the jurors in their role as fact finders and creating unfair prejudice.

¶20 Many of the Report's factual observations were actually factual conclusions. Moreover, many of those conclusions were stated in the Report without the supporting facts on which the investigator relied to reach those conclusions. For example, the Report concluded, without specific factual support, that "a majority of the houses [in the Sutton Place community] showed continuity in architecture and

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is thereby impeached and further testimony is not necessary." *Id.* (quoting *United States v. Jones,* 578 F.2d 1332, 1340 (10th Cir. (1978)). Here, for example, one witness's (Hall's) response to whether she made a statement in the Report implied an admission. Counsel chose not to follow up with an explicit question as to whether she admitted or denied the statement. Under these circumstances, in light of the impeachment permitted, the trial court did not abuse its discretion under Rule 613(b) by not admitting the Report as extrinsic evidence. *See State v. Garza*, 216 Ariz. 56, 66, ¶ 37, 163 P.3d 1006, 1016 (2007) (stating that appellate courts review evidentiary rulings for abuse of discretion).

paint color," that the Martins' addition to their house "did not show any continuity in architectural design or paint color," and that the Ellegood's house (another house in the community with a second-story addition comparable to the Martins' but which did not receive comparable scrutiny) "aesthetically blended into the Association." Like other factual conclusions in the Report, these conclusions were relevant to central issues in the case. Here, the conclusions cut against the Martins' claims that their renovation project was treated differently because of their race and not because the project simply did not fit in with the rest of the community.

¶21 However, because many of the conclusions in the Report were relevant to key issues at trial, the judge could have reasonably anticipated that many of the facts supporting those conclusions would be presented to the jury. To admit into evidence the investigator's conclusions, when the foundational evidence supporting those conclusions would be presented at trial, would "amount to admitting the opinion of an expert witness as to what conclusions the jury should draw, even though the jury [would have] the opportunity and the ability to draw its own conclusions from the evidence presented . . . ." *Johnson v. Yellow Freight Sys., Inc.*, 734 F.2d 1304, 1309 (8th Cir. 1984). Therefore, the trial court had a basis to determine

that the Report's factual conclusions presented a danger that the jury would be mislead in its fact finding.[3]

¶22 Additionally, the trial court could have reasonably concluded that the Report was unfairly prejudicial to the Martins because it contained a four-page letter from Sutton Place outlining its defense to the complaint filed by the Martins with the Attorney General's Office. Given the overlap between the Martins' complaint to the Attorney General's Office and the Martins' counterclaims at trial, Sutton Place's four-page letter amounted to a summary of its defense at trial. The trial court could have considered it unfairly prejudicial for Sutton Place to have been able to place this summary in the hands of the jury without giving the Martins a similar opportunity to do so.

¶23 To conclude on this issue, as the Arizona Supreme Court noted in *Shotwell*, when it rejected a "per se rule" for the admission of Equal Employment Opportunity Commission reasonable cause determinations, there are significant benefits in the trial court having the authority to make case-by-case

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[3] We are aware of the rule laid out in *Shotwell,* stating that a public report's inclusion of "some conclusory statements . . . is not, by itself, enough to render it inadmissible." 207 Ariz. at 295, ¶ 32, 85 P.3d at 1053. Significantly, however, the *Shotwell* court did not state that conclusory statements may not be *considered* in weighing evidence under Rule 403.

decisions. 207 Ariz. at 294, ¶¶ 22-23, 85 P.3d at 1052. The court noted:

> Trial judges shackled by a per se rule lack the ability to control the effects of potentially unfair, prejudicial, duplicative, time consuming, confusing, and irrelevant evidence . . . . The discretionary approach allows trial judges, on a case-by-case basis, to apply the Rules of Evidence in a common-sense manner . . . in the context of the cases in which they are presented.

Id. at ¶ 23. Here, the facts of record support the trial court's ruling. Thus, there was no abuse of discretion in the trial court's refusal to admit the Report.

2. Admission of Evidence Related to Sutton Place's Insurance

¶24 Sutton Place argues that the trial court abused its discretion in admitting evidence of Sutton Place's insurance coverage over its objections based on Rules 403, 411, and 402.

¶25 As to the objections under Rules 403 and 411, the court's ruling was to "play it by ear as it comes up" with the possible exception of Mr. Baker's involvement in the insurance-renewal process. The court left open the issue of whether other insurance-related evidence would be admissible.[4]

[4] In ruling on the remainder of Sutton Place's pretrial motion, the court stated, "I guess I'm going to have to play it by ear as it comes up." This did not cause Sutton Place's Rule 403 or Rule 411 objections to become standing objections. We will review Sutton Place's later objections and their associated rulings only on the grounds raised by Sutton Place at those times.

¶26 Thus, we will first review for abuse of discretion the court's rulings under Rules 403 and 411 to permit evidence of Mr. Baker's involvement in the insurance-renewal process. Thereafter, we will review Sutton Place's other objection under Rule 402.

a. Rule 403 Objection

¶27 We begin with the court's ruling under Rule 403 and consider the probative value of evidence related to Mr. Baker's involvement in the insurance-renewal process. During the pretrial conference, the Martins informed the court that the Board sent the Martins a threatening cease and desist letter stating that if the Martins did not remove their new firepit, the Board would file a temporary restraining order forcing them to do so. The Board was arguably obligated to send the letter because, according to Sutton Place, unless the Martins removed the firepit, the entire community would lose its insurance coverage. However, the Martins informed the court that Mr. Baker, a member of the Board, became the catalyst of that obligation when he informed the insurer about the firepit. Mr. Baker did this even though such firepits were not prohibited under Sutton Place's insurance policy.

¶28 A reasonable inference to draw from these facts, although certainly not the only inference, is that Mr. Baker went out of his way to inform the insurer about the firepit in

order to create a justifiable and legitimate ground on which the Board could harass the Martins. We therefore find that evidence of Mr. Baker's involvement in the insurance-renewal process could reasonably have been seen by the court as substantially probative of the Martins' claims of harassment.

¶29 Next we consider the prejudicial effect of evidence related to Mr. Baker's role in the insurance-renewal process. Sutton Place argues that admitting evidence of Sutton Place's insurance created a risk that the jury would improperly inflate its award, believing that Sutton Place's insurer would cover the cost. Although this may be a danger in certain circumstances, that danger was tempered here. Evidence of Mr. Baker's involvement only informed the jury that Sutton Place had insurance coverage that might be affected by an outdoor firepit. From this, the jury is not necessarily led to a conclusion that Sutton Place also had insurance to cover it for racial discrimination or for violations of good faith and fair dealing.

¶30 Accordingly, the court did not abuse its discretion in determining that the probative value of Mr. Baker's role in the insurance-renewal process was not substantially outweighed by the risk of unfair prejudice.

b. Rule 411 Objection

¶31 We next review the trial court's decision to overrule Sutton Place's Rule 411 objection under the same abuse of discretion standard. Rule 411 states:

> Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

¶32 Rule 411 does not prohibit the manner in which insurance evidence was used in this case. The rule states that insurance evidence may be used for other purposes besides establishing that because a party had insurance it acted wrongfully. Ariz. R. Evid. 411. The Martins' reference to evidence relating to Sutton Place's insurance was for the purpose of establishing harassment and discrimination on the part of the Board. The Martins clearly did not seek to introduce insurance evidence to imply that *because* Sutton Place had insurance it discriminated against them. The following excerpt from the Martins' counsel's closing argument accurately identifies the use to which this was put.

> Martins decided they wanted to put a fireplace on their roof, and all of a sudden the insurance company is called – by Don Baker no less, and they try to say that, "Oh, you're trying to have our insurance cancelled. This is all your fault, Mr. Martin. How could you do this to us?"

> Well, the minute Mr. Martin gave them the information they needed about the fireplace, guess what? The insurance policy was renewed.

¶33 Under these circumstances, the Martins' use of Sutton Place's insurance was permissible under Rule 411. The trial court did not abuse its discretion in overruling the objection.

c. Rule 402 Objection

¶34 Sutton Place also requests review of the trial court's decision to allow the in-court testimony of Mr. Calderon under Rule 402 of the Arizona Rules of Evidence. We also review this ruling for an abuse of discretion. *See Garza*, 216 Ariz. at 66, ¶ 37, 163 P.3d at 1016 (stating that appellate courts "review evidentiary rulings for abuse of discretion").

¶35 Rule 402 provides, "All relevant evidence is admissible, except as otherwise provided . . . ." Ariz. R. Evid. 402. Relevant evidence is anything that has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ariz. R. Evid. 401. "The threshold for relevance is a low one . . . ." *State v. Roque*, 213 Ariz. 193, 221, ¶ 109, 141 P.3d 368, 396 (2006).

¶36 In its objection, Sutton Place informed the court that Mr. Calderon would testify regarding the decision by Sutton Place's insurance carrier of whether or not to renew Sutton

Place's insurance policy. However, as outlined above, the Martins asserted that Sutton Place used the insurance-renewal process as an opportunity to harass the Martins. Mr. Baker's calling the insurer about the firepit was evidence showing it was more likely that Sutton Place harassed the Martins in connection with the insurance-renewal process. The trial court did not abuse its discretion in allowing Mr. Calderon to testify at trial over Sutton Place's relevancy objection.

3. Denial of Sutton Place's Request for Permanent Injunctive Relief

¶37 Sutton Place argues that the trial court abused its discretion in denying Sutton Place's Request for Permanent Injunctive Relief. The decision to grant or deny injunctive relief "is within the sound discretion of the trial court, and its decision will not be reversed absent an abuse of that discretion." *Valley Med. Specialists v. Farber*, 194 Ariz. 363, 366, ¶ 9, 982 P.2d 1277, 1280 (1999).

¶38 Sutton Place argues that in reaching its decision on the permanent injunction the trial court relied in part on the jury's verdict. Sutton Place also argues that because the jury's verdict was based on improper evidence – specifically, the exclusion of the Attorney General Report and the inclusion of evidence of Sutton Place's insurance - the trial court's ruling was also based on improper evidence. Sutton Place

concludes that because such reliance was improper, the court's decision to deny the permanent injunction was an abuse of discretion.

¶39 We have already found that the trial court acted within its discretion when it excluded the Attorney General Report and also when it permitted evidence of Sutton Place's insurance. As a result, neither the jury's verdict nor the trial court's ruling was tainted by reliance on improper evidence. Therefore, the trial court did not abuse its discretion by denying Sutton Place's request for permanent injunction.

4. Denial of Sutton Place's Motion for Remittitur

¶40 Sutton Place requests that this court reverse the trial court's ruling denying its Motion for Remittitur. We will review the trial judge's decision on such a motion for an abuse of discretion, recognizing that he had substantial latitude in deciding whether to upset the verdict. *See Creamer v. Troiano*, 108 Ariz. 573, 575, 503 P.2d 794, 796 (1972) (stating that a court's "ruling on additur, remittitur, and new trial, because of an inadequate or excessive verdict, will generally be affirmed, because it will nearly always be more soundly based than ours can be"). Our reason for deference is clear, "The judge sees the witnesses, hears the testimony, and has a special perspective of the relationship between the evidence and the

verdict which cannot be recreated by a reviewing court from the printed record." *Reeves v. Markle*, 119 Ariz. 159, 163, 579 P.2d 1382, 1386 (1978). Moreover, where, as here, the trial court has refused to interfere with the jury's determination of damages, appellate courts "will declare an award of damages excessive . . . only when from the facts the amount at first blush suggests passion or prejudice on the part of the jury." *Skousen v. Nidy*, 90 Ariz. 215, 219, 367 P.2d 248, 252 (1962) (citing *City of Phoenix v. Brown*, 88 Ariz. 60, 67, 352 P.2d 754, 759 (1960)). In other words, the award must "shock the conscience of this court" before we will tamper with the jury's determination. *Acuna v. Kroack*, 212 Ariz. 104, 114, ¶ 36, 128 P.3d 221, 231 (App. 2006) (quoting *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 57, ¶ 36, 961 P.2d 449, 455 (1998)).

¶41 We are not shocked by the amount the jury awarded the Martins in compensatory damages. There was substantial evidence presented at trial from which a reasonable jury could award them $200,000. Mr. Martin testified that Sutton Place's actions caused him to suffer emotional distress and an increase in his blood pressure severe enough to require medication. He testified that because of Sutton Place's actions, living in his community had become "agonizing," and that "there [was] no enjoyment living there." He also testified that he was unable to move from the community for financial reasons.

¶42 Mrs. Martin testified that Sutton Place's actions had affected her relationship with her spouse and that her children had felt the impact. She testified that she had stopped using her community pool for fear of "irate" neighbors and that her children played in the alley adjacent to their house. She stated, "I feel really isolated. I feel I can't even go inside the community." These facts all supported the judgment.

¶43 Sutton Place also contends that there was a misconception by the jury of the principles of law governing the estimate of damages. Sutton Place argues that in reaching its determination of damages it was improper for the jury to rely on Mr. Martin's approximation of his and his wife's losses due to increases in interest rates. Importantly, however, because the jury issued a general verdict on damages, Sutton Place cannot say whether the jury relied on this testimony at all in determining the Martins' damages. Moreover, even without the addition of the Martins' potential losses due to increase in interest rates, $200,000 was not high enough to shock the conscience of this court.

¶44 Sutton Place also points to the statement made by the Martins' counsel during her closing argument that "$25,000 would be a reasonable figure to compensate the Martins for the humiliation and the anguish that they have suffered." However, just as the court instructed the jury in this case,

statements made during closing argument are not evidence. *See also Libertore v. Thompson*, 157 Ariz. 612, 621, 760 P.2d 612, 621 (App. 1988) ("That a jury's award against a defendant exceeds the suggestion of plaintiff's counsel does not alone prove prejudice."). Accordingly, the statement made by the Martins' counsel during closing argument does not preclude the jury from assessing the evidence presented at trial in the manner it saw fit. Moreover, counsel merely stated that $25,000 would be a "reasonable figure." This does not preclude other "reasonable figures," even if they are not specifically argued. The jury may reasonably have seen counsel's statement as an expression of the Martins' desire to not overreach in their request.

¶45 Further, our case law has upheld verdicts for compensatory damages even though they are in excess of the amounts suggested by counsel in closing argument. *Ritchie v. Kasner*, 221 Ariz. 288, 301, ¶¶ 37-38, 211 P.3d 1272, 1285 (App. 2009) (upholding a jury award of $5 million when $4 million was requested); *Mammo v. State*, 138 Ariz. 528, 532, 675 P.2d 1347, 1351 (App. 1983) (upholding a remittitur of $300,000 when only $250,000 had been requested in the pleadings). We recognize that counsel here did not, as was the case in *Ritchie*, say in closing something to the effect of the award is "completely within your discretion . . . You may think that you should

award more, or you should award less. It's completely within your discretion." 221 Ariz. at 301, ¶ 37, 211 P.3d at 1285. However, we decline to establish a "magic words" test. In short, counsel's statement did not limit the jury from awarding what it viewed as proper compensation for the damages suffered so long as that award is supported by the evidence, as it is here. Accordingly, the trial court did not abuse its discretion in denying Sutton Place's Motion for Remittitur.

5. Attorneys' Fees and Costs

¶46 Sutton Place requests that the attorneys' fees awarded to the Martins be vacated. It asserts that this would be proper if relief is granted, because the Martins would no longer be the prevailing parties. Sutton Place also requests attorneys' fees on Martins' counter-claim pursuant to 42 U.S.C § 3613(C)(2) and A.R.S. § 12-341.01. The Martins request their fees pursuant to A.R.S. §§ 12-341.01, 12-342, and 33-1256(H).

¶47 In the trial court, the Martins were awarded their fees pursuant to A.R.S. § 12-341.01. In the exercise of our discretion we also award fees to the Martins pursuant to that same provision in an amount to be determined upon compliance with Arizona Rule of Civil Appellate Procedure 21. Sutton Place's request for fees is denied, as is its request for us to vacate the fees awarded to the Martins below. The Martins are awarded their costs on appeal.

Conclusion

¶48 For the foregoing reasons, we affirm.

/s/
_____
DANIEL A. BARKER, Judge

CONCURRING:

/s/
_____
DONN KESSLER, Presiding Judge

/s/
_____
JON W. THOMPSON, Judge