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Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 04/03/2012
RUTH A. WILLINGHAM,
CLERK
BY: sis

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

IRENE E. D'AMICO,) No. 1 CA-CV 09-0493
) 1 CA-CV 10-0569
Plaintiff/Counterdefendant/) 1 CA-CV 10-0762
Appellee/Cross-Appellant,) (Consolidated)

v.)

STRUCTURAL I COMPANY,)
) DEPARTMENT B
Defendant/Counterclaimant/)
Appellant/Cross-Appellee.)

IRENE E. D'AMICO,) **MEMORANDUM DECISION**

Plaintiff/Appellant,) (Not for Publication -
v.) Rule 111, Rules of the
) Arizona Supreme Court)

STRUCTURAL I COMPANY,)
)
Defendant/Appellee.)

IRENE E. D'AMICO,)
)
Plaintiff/Counterdefendant/)
Appellee,)

v.)

STRUCTURAL I COMPANY,)
)
Defendant/Counterclaimant/)
Appellant.)

Appeal from the Superior Court in Maricopa County

Cause No. CV2006-009862

The Honorable Jeanne M. Garcia, Judge

AFFIRMED IN PART, REVERSED IN PART, REMANDED

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J O H N S E N, Judge

¶1 Structural I Company appeals a jury verdict in favor its former chief executive officer, Irene D'Amico, on her claim for breach of her employment agreement. D'Amico cross-appeals the jury's verdict in favor of Structural I on its claim against her for breach of fiduciary duty. We have consolidated this appeal and cross-appeal with two other appeals arising out of the same proceeding. For the following reasons and those set forth in a companion opinion filed this date pursuant to Arizona Rule of Civil Appellate Procedure 28(g), we affirm in part, reverse in part and remand.

FACTS AND PROCEDURAL HISTORY

¶12 Structural I is a family-owned framing company founded and operated by Mary Jo and Doug McLeod.¹ The McLeods' son Brett was the company's director of operations in California, and Chad Trott, who was "like a son" to the McLeods, was director of operations in Arizona.

¶13 Toward the end of 2001, the McLeods wanted to begin transitioning toward retirement. While they wanted Brett and Chad eventually to take over Structural I, the McLeods did not think they were ready to do so then. The McLeods had been seeing a counselor, Sharon Cottor, about personal and business matters. Cottor suggested the McLeods hire a "bridge CEO" who could run Structural I while mentoring Brett and Chad to prepare them to take over the company. Asked if she knew of someone to fill the bridge CEO position, Cottor named D'Amico.

¶14 Structural I initially hired D'Amico as a consultant. Pleased with her work, the McLeods eventually asked her to work for Structural I full time. D'Amico agreed, and the parties negotiated an employment agreement (the "Agreement") dated as of July 18, 2003.

¶15 Under the Agreement, D'Amico would have the title of CEO. Her salary would be \$200,000 per year, with a performance-

¹ We view the evidence in the light most favorable to sustaining the jury's verdicts. See *S Dev. Co. v. Pima Capital Mgmt. Co.*, 201 Ariz. 10, 18, ¶ 16, 31 P.3d 123, 131 (App. 2001).

based incentive ("PBI") based on the company's net income, as defined by the Agreement. The Agreement was for a term of five years and provided that D'Amico could be terminated only for cause. The Agreement defined "cause" as: "(i) the conviction of any felony or any crime involving moral turpitude, dishonesty, or other act of gross misconduct against the Company; (ii) participation in a fraud or act of dishonesty against the Company which adversely affects the Company in a material way." The Agreement also included a future option of an ownership interest for D'Amico, though it was silent as to timeframe and percentage. The starting date of the Agreement was September 1, 2003, and it continued "through December 31, 2008."²

¶16 Troubles began in 2005. In September of that year, D'Amico proposed a succession plan by which she, Brett and Chad each would take a one-third interest in Structural I. Brett and Chad believed D'Amico misled them by falsely telling each of them that the other had agreed that D'Amico could take a one-third ownership interest in the company. For their part, the McLeods viewed D'Amico's proposal as an attempt to obtain a part-ownership for herself against their express wishes that she facilitate a succession plan for Brett and Chad to take over the company.

² Because an appendix to the Agreement lists 2003 as year one and 2007 as year five, Structural I argued that it instead terminated on December 31, 2007.

¶17 In October of 2005, the McLeods informed D'Amico they did not agree with the way she had calculated her 2004 PBI and believed Structural I had overpaid her. The disagreement over PBI continued into early 2006, when PBI for 2005 was calculated.

¶18 There also were issues surrounding the preparation of Structural I's 2005 financial statements. Structural I's year-end statements were calculated using the estimated cost of completion ("ECC") of ongoing projects. Brett and Chad were responsible for preparing the ECCs. In mid-February 2006, D'Amico sent the final 2005 financial statements to the McLeods, Brett and Chad. She then sent them to Structural I's outside accountant and lender. At internal company meetings on February 22 and 23, it became clear there were major errors in the ECC for a California project that was under Brett's supervision. The errors required the 2005 financial statements to be revised downward. After the revision, D'Amico re-sent the financial statements to the outside accountant and the lender. At trial, the McLeods testified they had told D'Amico not to deliver the revised financials to the lender because they wanted to deliver them personally and explain the discrepancy.

¶19 At a meeting on April 5, 2006, the McLeods informed D'Amico she was being terminated. When D'Amico asked to know why, Mary Jo McLeod told her there were "a lot of causes," but was not more specific.

¶10 D'Amico filed a complaint against Structural I for breach of contract, alleging her termination was without cause and the company disputed her wage claim in bad faith. Structural I counterclaimed, alleging breach of fiduciary duty, fraud, unjust enrichment, fraudulent concealment and replevin.

¶11 After a 13-day jury trial in October and November of 2008, the jury returned six special verdicts. The jury found that Structural I breached the Agreement by shorting D'Amico a total of \$29,792 in PBI for 2004 and 2005. The jury also found Structural I breached the Agreement by terminating D'Amico without cause and failing to pay her 2006 PBI and her salary through the end of the Agreement. The jury awarded D'Amico \$547,000 for her salary for the duration of the Agreement, plus \$177,054, which the parties stipulated would have been D'Amico's 2006 PBI. Of the total wages assessed of \$753,846, the jury found there was a good-faith dispute over \$229,792. The jury also found for D'Amico on Structural I's claims for fraudulent inducement, fraud and unjust enrichment. It concluded, however, that D'Amico breached her fiduciary duty to Structural I and awarded Structural I \$150,000 in damages.

¶12 Both parties filed post-trial motions, which the superior court denied. After calculating prejudgment interest, entering awards of attorney's fees and costs and setting off the

verdicts against each other, the court entered judgment in favor of D'Amico for \$910,616.

¶13 Structural I appealed, and D'Amico cross-appealed. We suspended the appeal to allow the superior court to rule on motions for relief from judgment pursuant to Arizona Rule of Civil Procedure 60(c) filed by both parties. The superior court denied the motions, and the parties took separate appeals from that judgment. We then ordered the three appeals consolidated.

¶14 We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution, and pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-2101(A)(1) and (2) (2012).³

DISCUSSION

I. Appeal and Cross-Appeal from the Judgment Entered After Trial.

A. D'Amico's Appeal from the Verdict for Structural I on the Claim for Breach of Fiduciary Duty.

¶15 D'Amico argues the superior court erred by denying her Motion for Judgment as a Matter of Law and Motion for a New Trial pursuant to Arizona Rules of Civil Procedure 50(b) and 59(a) on Structural I's claim for breach of fiduciary duty. We review *de novo* the superior court's denial of a motion for judgment as a matter of law. *Sec. Title Agency, Inc. v. Pope*, 219 Ariz. 480, 492, ¶ 51, 200 P.3d 977, 989 (App. 2008). A

³ Absent material revisions after the relevant date, we cite a statute's current Westlaw version.

motion for judgment as a matter of law should be granted only when the evidence presented has "so little probative value" that a reasonable juror could not find for the claimant. *Id.* (quoting *Shoen v. Shoen*, 191 Ariz. 64, 65, 952 P.2d 302, 303 (App. 1997)). We review a superior court's denial of a motion for a new trial on the grounds that the verdict is against the weight of the evidence for abuse of discretion. *Dawson v. Withycombe*, 216 Ariz. 84, 95, ¶ 25, 163 P.3d 1034, 1045 (App. 2007). When reviewing the denial of post-trial motions, we view the evidence in the "light most favorable to upholding the jury verdict" and will affirm "if any substantial evidence exists permitting reasonable persons to reach such a result." *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 53, ¶¶ 12-13, 961 P.2d 449, 451 (1998).

¶16 To prevail on its claim for breach of fiduciary duty, Structural I was required to show that D'Amico owed the company a fiduciary duty, she breached the duty and damages resulted. *John E. Shaffer Enters. v. City of Yuma*, 183 Ariz. 428, 432, 904 P.2d 1252, 1256 (App. 1995). D'Amico does not dispute that as CEO of Structural I, she owed the company a fiduciary duty. See *McCallister Co. v. Kastella*, 170 Ariz. 455, 457, 825 P.2d 980, 982 (App. 1992) (citing Restatement (Second) of Agency § 2 (1958)). Although D'Amico argues on appeal she did not breach her fiduciary duty, we need not decide that issue because the

record contains no evidence that Structural I suffered damages as a result of any alleged breach.

¶17 To recover for a breach of fiduciary duty, a corporation must suffer actual pecuniary damages. *AMERCO v. Shoen*, 184 Ariz. 150, 155-56, 907 P.2d 536, 541-42 (App. 1995). Although Structural I argues it was damaged by D'Amico's "breach[ing] the trust," it points to no evidence at trial of pecuniary damages, and our review of the record reveals none.

¶18 We note that Structural I called an expert accounting witness, Gary Freed, who testified that, in theory, a revised financial statement lowering a company's income might adversely affect the banking relationship. This evidence, however, was not enough to establish that Structural I suffered any pecuniary damages as a result of D'Amico's alleged breach. "Generally, damages that are speculative, remote or uncertain may not form the basis of a judgment." *Lewin v. Miller Wagner & Co.*, 151 Ariz. 29, 34, 725 P.2d 736, 741 (App. 1986); see *Coury Bros. Ranches, Inc. v. Ellsworth*, 103 Ariz. 515, 521, 446 P.2d 458, 464 (1968); see also *Farr v. Transamerica Occidental Life Ins. Co. of Cal.*, 145 Ariz. 1, 6, 699 P.2d 376, 381 (App. 1984) (plaintiffs who allege injury to their credit must show actual, rather than "speculative or uncertain," damage to credit). Freed's testimony concerned only hypothetical damage to a banking relationship that might result when a company downwardly

revises its yearly financial statements. Such "speculations, guesses or estimates of witnesses" may not form the basis of a damage award. *Coury*, 103 Ariz. at 521, 446 P.2d at 464.⁴

¶19 Accordingly, because Structural I failed to offer evidence that it was damaged by any breach of fiduciary duty by D'Amico, she was entitled to judgment as a matter of law on that claim.

B. Structural I's Appeal from the Verdict for D'Amico on Her Claim for Breach of Contract.

¶20 As noted, D'Amico argued Structural I breached the Agreement in terminating her, purportedly without cause. Structural I argues the superior court erred by denying its Motion for Judgment as a Matter of Law and Motion for a New Trial pursuant to Arizona Rules of Civil Procedure 50(b) and 59(a) on the jury's verdict in favor of D'Amico on her claim for breach of contract. The motion was based on several grounds, which we address in turn.

1. Inconsistent verdicts.

¶21 Structural I first argues the jury's conclusion that D'Amico breached her fiduciary duty necessarily means that

⁴ The parties dispute whether D'Amico owed Structural I a fiduciary duty in negotiating the Agreement by which she became the company's CEO. We need not decide that issue, however, because although Structural I alleges D'Amico breached by failing to disclose she had consulted an attorney in those negotiations, Structural I does not argue on appeal that it incurred any pecuniary damages as a result of the alleged breach.

Structural I had cause to terminate D'Amico. But after the verdicts were announced, Structural I failed to move pursuant to Arizona Rule of Civil Procedure 49(c) for resubmission of the verdicts before the jury was excused. Having failed to move for resubmission, Structural I waived any complaint that the jury's verdicts were inconsistent. *Trustmark Ins. Co. v. Bank One, Arizona, NA*, 202 Ariz. 535, 543, ¶¶ 38-39, 48 P.3d 485, 493 (App. 2002); *Gonzalez v. Gonzalez*, 181 Ariz. 32, 35-36, 887 P.2d 562, 565-66 (App. 1994). "The reason for the rule is obvious; the error is capable of correction if it is raised as soon as the verdict is returned." *Id.* at 35, 887 P.2d at 565. The superior court thus did not err in denying Structural I's Motion for Judgment as a Matter of Law and Motion for a New Trial on this basis.

2. Burden of proof for cause for termination.

¶22 Structural I next argues a jury instruction improperly shifted the burden of proving cause for termination from D'Amico to Structural I. The following instructions were given to the jury:

Irene D'Amico claims that Structural I owes her additional amounts under the Employment Agreement after it terminated her employment. Structural I claims that it does not owe her the amounts because it terminated her employment for cause under the Employment Agreement . . . Structural I must prove its claim by the "More Probably True" burden of proof.

* * *

The parties do not dispute that Structural I and Irene D'Amico were parties to the Employment Agreement. They also do not dispute that the Employment Agreement provides for payment to Irene D'Amico if Structural I terminates her for other than "cause" as that term is defined in the Employment Agreement.

* * *

Structural I has the burden of proof on showing it terminated Irene D'Amico for cause . . . by the "More Probably True" Burden of Proof.

¶123 A discharged employee who sues for breach of an employment contract has the "initial burden" of proving breach. *Palicka v. Ruth Fisher Sch. Dist. No. 90 of Maricopa County*, 13 Ariz. App. 5, 9, 473 P.2d 807, 811 (1970). Once the employee offers proof of the contract and the fact of dismissal, however, "the burden of establishing good cause as a defense" rests with the employer. *Id.* Discharge for cause is an affirmative defense; accordingly, under Arizona law, "[t]he burden is on the employer to prove justification for the discharge." *Chapin v. Klein*, 128 Ariz. 94, 94, 623 P.2d 1250, 1250 (App. 1981).

¶124 Structural I argues *Palicka* does not apply because it involved a "statutory claim." But the court's discussion in that case of the employer's burden to come forth with evidence came in its analysis of the employee's breach of contract claim.

Palicka, 13 Ariz. App. at 9, 473 P.2d at 811. Structural I further urges us to reject *Chapin* and rely instead on *Guo v. Maricopa County Medical Center*, 196 Ariz. 11, 992 P.2d 11 (App. 1999). *Guo*, however, was a summary judgment case and did not address the burden of proof. As noted, at trial in this case, neither party disputed the existence of the Agreement or the fact that D'Amico had been terminated. As a result, the burden fell to Structural I to prove its affirmative defense of termination for cause.

3. Testimony of Sharon Cottor.

¶125 Structural I next argues it is entitled to a new trial on D'Amico's claim for breach of contract because the superior court improperly admitted testimony by Sharon Cottor. In our separate opinion, we hold Structural I lacks standing to argue that Cottor's testimony should have been precluded on privilege grounds. Structural I also argues, however, that the superior court erred in permitting Cottor to testify about Brett McLeod's drug and alcohol use because the prejudice of that evidence outweighed its probative value.

¶126 Under Arizona Rule of Evidence 403, relevant 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" We will affirm the superior court's evidentiary ruling absent abuse of discretion.

Readenour v. Marion Power Shovel, Inc., 149 Ariz. 442, 450, 719 P.2d 1058, 1066 (1986). "Because 'probative value' and 'the danger of unfair prejudice' are not easily quantifiable factors, we accord substantial discretion to the trial court in the Rule 403 weighing process." *Hudgins v. Southwest Airlines, Co.*, 221 Ariz. 472, 481, ¶ 13, 212 P.3d 810, 819 (App. 2009).

¶127 Structural I argues that Cottor's testimony about Brett's drug use was highly prejudicial and had "no probative value" because D'Amico offered it in support of her "unclean hands" defense, which the court ultimately barred on disclosure grounds. But in overruling Structural I's objection to Cottor's testimony, the superior court specifically stated it was not relying on D'Amico's unclean hands defense. And D'Amico argues the testimony about Brett's drug use was highly probative to show why Brett, not D'Amico, was responsible for the problems with the company's financial performance.

¶128 Given that Structural I contended at trial that D'Amico was to blame for the company's poor financial performance, and bearing in mind the substantial discretion we accord the superior court, we cannot say the court abused its discretion in concluding the danger of unfair prejudice this testimony presented did not "substantially outweigh" its probative value.

4. Testimony of Gary Freed.

¶129 Structural I next argues the superior court erred in barring expert witness Gary Freed from testifying about issues it asserts were relevant to its defense of D'Amico's breach of contract claim.

¶130 "The admissibility of expert testimony is within the sound discretion" of the superior court, and we will not overturn its ruling absent an abuse of that discretion. *Webb v. Omni Block, Inc.*, 216 Ariz. 349, 352, ¶ 6, 166 P.3d 140, 143 (App. 2007). Under Arizona Rule of Evidence 702, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue," an expert witness "may testify thereto in the form of an opinion or otherwise."⁵ While expert testimony may embrace "an ultimate issue" to be determined by the trier of fact, it will be rejected if it fails to assist the trier of fact in understanding the evidence or determining a fact at issue. *Webb*, 216 Ariz. at 353, ¶ 12, 166 P.3d at 144 (citing Ariz. R. Evid. 704). "Witnesses are not permitted as experts on how juries should decide cases." Ariz. R. Evid. 704,

⁵ Arizona Rule of Evidence 702 recently was revised. See Order Amending the Arizona Rules of Evidence and Rule 17.4(f), Arizona Rules of Criminal Procedure, Ariz. Sup. Ct. No. R-10-0035, at 64 (Sept. 7, 2011). We refer to the rule in effect at the time of trial.

cmt.; see also *Pincock v. Dupnik*, 146 Ariz. 91, 96, 703 P.2d 1240, 1245 (App. 1985) (expert could not testify to ultimate issue when testimony was "within the knowledge of the average juror").

¶131 Here, the superior court excluded Freed's opinion that D'Amico's actions constituted "indicia of fraud" and his opinion of how a certified public accountant such as D'Amico would have interpreted the Agreement's language concerning the term of the Agreement.⁶ The court permitted Freed to testify about CPA rules and regulations, but did not allow him to offer an opinion as to whether D'Amico breached those rules.

¶132 Structural I argues Freed should have been permitted to testify that D'Amico acted dishonestly in breaching certain standards applicable to CPAs, thereby demonstrating "indicia of fraudulent activity." We disagree. Structural I did not allege D'Amico breached the standard of care owed by a CPA and does not argue the jury required Freed's assistance in assessing whether D'Amico acted negligently. As we understand Structural I's argument, it sought to use Freed's testimony to establish D'Amico's knowledge and intent in its claims against her for fraud and fraudulent inducement. The superior court did not abuse its discretion when it precluded Freed's testimony on

⁶ Structural I argued it had cause to terminate D'Amico because, *inter alia*, she had committed fraudulent and/or dishonest acts.

those issues while allowing Freed to testify about CPA rules and regulations. Knowledge and intent are matters jurors are well qualified to assess without the assistance of an expert.

¶133 Nor did the court err in precluding Freed from testifying about how a CPA likely would interpret the Agreement's language as to the term of the contract. To the extent that parol evidence was admissible on the question of the length of the contract, the relevant issue was the parties' intent, not the intent of the typical CPA.

5. Alleged ER 4.4 violation.

¶134 Structural I finally argues the superior court erred by failing to grant a new trial based on alleged ethical violations by D'Amico's counsel. It argues her counsel violated Arizona Rule of Professional Conduct 4.4(a) by engaging in *ex parte* communication with Sharon Cottor.

¶135 Rule 4.4(a) provides that "a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden any other person, or use methods of obtaining evidence that violate the legal rights of such a person." Likewise, our supreme court has made clear that an attorney may not engage in *ex parte* communications with an opposing party's treating physician without the party's consent. *Duquette v. Superior Court*, 161 Ariz. 269, 277, 778 P.2d 634, 642 (App. 1989).

¶136 Structural I argues D'Amico's counsel had improper *ex parte* communications with Cottor on several unspecified occasions. Because Cottor provided the McLeods with personal counseling, Structural I argues these *ex parte* communications "violate[d] the legal rights of" the McLeods.

¶137 We need not decide, however, whether D'Amico's counsel acted improperly, and if so, whether his conduct could be the basis for a new trial, because Structural I has not demonstrated and the record does not reflect how the alleged misconduct actually influenced the verdict. See *Maxwell v. Aetna Life Ins. Co.*, 143 Ariz. 205, 215, 693 P.2d 348, 358 (App. 1984) (misconduct grounds for new trial only "where it appears probable the misconduct actually influenced the verdict"). We therefore hold the superior court did not abuse its discretion in denying Structural I's motion for new trial on this ground.

II. D'Amico's Appeal from the Denial of Her Motion for Relief from Judgment.

¶138 D'Amico appeals the superior court's denial of her Motion for Relief from Judgment Based upon Newly Discovered Evidence pursuant to Arizona Rules of Civil Procedure 60(c)(2) and (3). These provisions permit the court to relieve a party from a final judgment for "(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(d)" or "(3) fraud . . . ,

misrepresentation or other misconduct of an adverse party.” Ariz. R. Civ. P. 60(c)(2)-(3). We review the superior court’s denial of a Rule 60(c) motion for abuse of discretion. *Norwest Bank (Minn.), N.A. v. Symington*, 197 Ariz. 181, 184, ¶ 11, 3 P.3d 1101, 1104 (App. 2000).

¶39 D’Amico’s motion was based on facts she contends she discovered while trying to recover on her judgment against Structural I following trial. She alleged she discovered Structural I had been sold to Brett and Chad for \$20,000 and Structural I, with the assistance of its attorneys, “engaged in a scheme to rid itself of assets” in order to avoid paying her judgment. Her motion argued that the superior court should vacate Structural I’s judgment on the breach of fiduciary duty claim and treble the damages awarded to her on her breach of contract claim.

¶40 As an initial matter, D’Amico’s request for relief from the \$150,000 judgment for breach of fiduciary duty is now irrelevant because we have reversed that judgment. As to D’Amico’s request for treble damages, she offers no authority for the proposition that facts occurring after an employee’s termination bear on whether the superior court should exercise its discretion to award treble damages pursuant to A.R.S. § 23-355(A). We therefore affirm the superior court’s denial of D’Amico’s Rule 60(c) motion.

III. Structural I's Appeal from the Denial of Its Motion for Relief from Judgment.

¶41 Structural I appeals the superior court's denial of its Rule 60(c)(6) Motion for Relief from Judgment. Before trial, the McLeods filed a complaint against Cottor with the Arizona Board of Behavioral Health Examiners. As a result of the Board's investigation into the complaint, Cottor entered into a consent agreement with the Board for the surrender of her license on January 11, 2010, more than a year after the trial. Under the agreement's terms, Cottor agreed to relinquish her license, while neither admitting nor denying the Board's findings of fact and conclusions of law. Structural I's motion for relief from judgment argued the Board's findings entitled it to a new trial on D'Amico's claim for breach of contract.

¶42 Rule 60(c)(1)-(5) permits the superior court to "relieve a party . . . from a final judgment" for several enumerated reasons. See *Gorman v. City of Phoenix*, 152 Ariz. 179, 181, 731 P.2d 74, 76 (1987). Rule 60(c)(6) is an "equitable catch-all" that permits the superior court to set aside a judgment for "any other reason justifying relief." *Panzino v. City of Phoenix*, 196 Ariz. 442, 446, 999 P.2d 198, 202 (2000). To obtain relief under Rule 60(c)(6), a party must show "a reason for setting aside the judgment other than one of the reasons set forth in the preceding five clauses of rule

60(c)" and "extraordinary circumstances of hardship or injustice justifying relief." *Hilgeman v. Am. Mortg. Sec's, Inc.*, 196 Ariz. 215, 220, ¶ 15, 994 P.2d 1030, 1035 (App. 2000).

¶43 So far as we can understand, Structural I argues the consent agreement demonstrates that Cottor testified at trial in this case about privileged matters, that Cottor and D'Amico discussed the litigation in non-privileged business coaching sessions, and based on these conversations, both testified falsely, and that Cottor falsified the notes she relied on in her deposition in this case.

¶44 The consent agreement recites that Cottor violated A.R.S. § 32-3251(12)(t) (2012) by disclosing "a professional confidence or privileged communication." While it is clear from the agreement that this conclusion of law refers in some fashion to Cottor's relationship with the McLeods, the agreement does not specify the confidential or privileged communication that Cottor disclosed. Item 56 of the agreement's findings states that in her deposition in this case, Cottor "verbally disclosed sensitive information of a personal nature" regarding the McLeods. With regard to Cottor's actual trial testimony, however, the consent agreement simply states that Cottor was allowed to testify about sessions "she identified as Family Business Consultation Sessions."

¶145 On appeal, Structural I does not point to any particular testimony by Cottor, but argues only generally that she improperly testified about confidential matters from her personal counseling sessions with them. Upon our close reading of Cottor's trial testimony, the only testimony that might be at issue concerned Brett's substance abuse. If we construe Structural I's argument to pertain to that testimony, its Rule 60(c) motion could succeed only if the superior court was obligated to conclude that Cottor's testimony caused an unjust result.

¶146 We cannot conclude, however, that even if Cottor had not testified about Brett's substance abuse, that information would not have come before the jury. D'Amico was aware of Brett's substance abuse issues because she participated in an "intervention" and testified about it at trial. To the extent that D'Amico was unaware of the severity of Brett's drug problems, those problems would have been disclosed prior to trial even absent Cottor's deposition testimony. In defending against Structural I's claim that she mismanaged the company, D'Amico argued that problems with the California project under Brett's supervision led to the downward revision of the company's 2005 financial statements. To the extent that Brett was experiencing a substance abuse problem at the time, Structural I would have been obligated to disclose that fact in

response to interrogatories and the McLeods would have been subject to examination about it in their depositions. And, of course, the McLeods and Brett himself would have been subject to cross-examination on the issue at trial. Accordingly, we cannot conclude that Cottor's deposition and trial testimony about the substance abuse necessarily rendered unjust the jury's verdict in favor of D'Amico on her claim for breach of contract. See *Hilgeman*, 196 Ariz. at 220, ¶ 15, 994 P.2d at 1035.

¶147 Structural I's argument that D'Amico and Cottor met in non-privileged sessions to discuss the litigation and subsequently lied about it finds no support in the consent agreement. Finally, Structural I argues Cottor falsified the notes she relied on in her deposition regarding her business counseling sessions with the McLeods. The Board found that sometime before her deposition, Cottor prepared summary notes of her sessions, and represented them as her contemporaneous notes. Again, it is difficult to see how this conduct prejudiced Structural I, because Cottor clarified during her trial testimony that it was her practice to take very brief contemporaneous notes during her sessions and summarize them later.

¶148 In denying Structural I's motion for relief from judgment, the superior court found that "the circumstances are not extraordinary and [] there is no severe injustice that

requires correction” and that Structural I failed to establish that the outcome of the trial would have been any different had the jury been permitted to hear the relevant findings in the consent agreement. Because we agree, we conclude the superior court did not abuse its discretion in denying Structural I’s Rule 60(c)(6) motion.

CONCLUSION

¶149 We reverse the judgment in favor of Structural I on its claim for breach of fiduciary duty against D’Amico. For the reasons stated above and in our companion opinion, we vacate and remand for further proceedings consistent with this decision the superior court’s denial of D’Amico’s request for treble damages. Otherwise, we affirm the judgment and the superior court’s denial of both parties’ post-trial motions.

¶150 Both parties have requested costs and attorney’s fees on appeal pursuant to A.R.S. § 12-341.01 (2012). D’Amico also asks for attorney’s fees pursuant to A.R.S. § 12-349 (2012) in Structural I’s appeal from the denial of its motion for relief from judgment, on the ground that the appeal is frivolous. In our discretion, we decline both parties’ requests for attorney’s fees. Because D’Amico prevailed more substantially than Structural I on the appeal and cross appeal from the judgment entered after trial, D’Amico is entitled to her costs of that appeal, upon compliance with Arizona Rule of Civil Appellate

Procedure 21. Each side shall bear its own costs in the separate appeals from the denials of the respective motions for relief from judgment.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
MARGARET H. DOWNIE, Judge

/s/
LAWRENCE F. WINTHROP, Chief Judge