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

KENNETH JOHN NARDELLI and TAMMY M. NARDELLI, husband and wife, Plaintiffs/Appellants/ Cross-Appellees, v. METROPOLITAN GROUP PROPERTY AND CASUALTY INSURANCE COMPANY, a Rhode Island corporation; METROPOLITAN PROPERTY AND CASUALTY INSURANCE COMPANY, a Rhode Island corporation, Defendants/Appellees/ Cross-Appellants.	1 CA-CV 10-0350 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2004-019991

The Honorable A. Craig Blakey, II, Judge

AFFIRMED IN PART, VACATED IN PART, AND REMANDED WITH INSTRUCTIONS

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N O R R I S, Judge

¶1 This timely appeal and cross appeal arise out of a lawsuit filed by Plaintiffs/Appellants/Cross-Appellees, Kenneth and Tammy Nardelli ("the Nardellis"), against Defendants/Appellees/Cross-Appellants, Metropolitan Group Property and Casualty Insurance Company and Metropolitan Property and Casualty Insurance Company (collectively "MetLife"), for breach of the implied covenant of good faith and fair dealing. After a jury awarded the Nardellis $155,000 in compensatory damages and $55 million in punitive damages, the superior court reduced the punitive damages to $620,000.

¶2 In a separate opinion filed simultaneously with this memorandum decision, we have addressed the arguments raised by the parties regarding bad-faith liability and punitive damages. *See Nardelli v. Metro. Grp. Prop. & Cas. Ins. Co.*, 1 CA-CV 10-0350 (Ariz. App. May 1, 2012). In this memorandum decision, we address the other arguments raised by the parties concerning sanctions under Arizona Rule of Civil Procedure ("Rule") 68, the

accrual of post-judgment interest, hearing and transcript costs, and attorneys' fees and costs on appeal.

I. Rule 68 Sanctions

¶3 On cross appeal, MetLife argues the superior court should not have awarded the Nardellis sanctions under Rule 68 even though the judgment eventually entered by the superior court far exceeded the Nardellis' November 9, 2004 $55,000 offer of judgment. Ariz. R. Civ. P. 68.[1] As it did in the superior court, MetLife argues the Nardellis' offer of judgment was invalid as a matter of law because they failed to allocate or apportion the offer between themselves. We agree.[2] *Pima Cnty. v. Pima Cnty. Law Enforcement Merit Sys. Council*, 211 Ariz. 224, 227, ¶ 13, 119 P.3d 1027, 1030 (2005) (meaning and effect of court rule is question of law subject to de novo review).

¶4 Under certain circumstances, Rule 68 authorizes the superior court to impose sanctions against a party who does not accept an offer of judgment. In *Duke v. Cochise County*, 189 Ariz. 35, 938 P.2d 84 (App. 1996), we held a single,

[1]The Arizona Supreme Court amended Rule 68 in 2008. The Rule now allows multiple parties to make a joint unapportioned offer to a single offeree. The parties have never contested the applicability of the version of Rule 68 in effect when they made their offers of judgment.

[2]Given our resolution of this issue, we need not address the Nardellis' argument the superior court miscalculated pre-judgment interest under Rule 68.

unapportioned lump sum offer -- made by three plaintiffs who were presenting one joint claim for wrongful death and two individual claims for emotional distress and false imprisonment -- was invalid under the Rule. Relying on case law from other jurisdictions and the language of the Rule, we explained a joint, unapportioned settlement offer submitted by multiple parties -- in that case, plaintiffs -- failed to provide the offeree with a meaningful opportunity to evaluate his or her chances of doing better at trial as compared to the offer:

> An offeree presented with an unapportioned joint offer cannot make a meaningful choice between accepting the offer on any single claim or continuing the litigation to judgment on all claims. Imposing sanctions for failing to accept what is in effect an unspecified and unapportioned offer of judgment deprives the offeree of the opportunity to assess his or her chances of doing better at trial against one or more of the parties covered by the joint offer. On the other hand, requiring joint offers to be specifically allocated between multiple parties or claims places no greater burden on the party making the offer.

189 Ariz. at 41, 938 P.2d at 90. In a subsequent case, we applied the principle enunciated in *Duke* -- invalidating joint, unallocated offers -- to a situation in which the offeror defendant made a joint, unapportioned offer to multiple plaintiffs, specifically, a husband and wife. *Gamez v. Brush Wellman, Inc.*, 201 Ariz. 266, 34 P.3d 375 (App. 2001). In so

doing, we rejected the plaintiffs' argument the offer did not need to be apportioned between them "due to the 'derivative and joint nature'" of the wife's claims. *Id.* at 273, ¶ 21, 34 P.3d at 382; *see also Greenwald v. Ford Motor Co.*, 196 Ariz. 123, 993 P.2d 1087 (App. 1999) (offer of judgment submitted by defendant in wrongful death case which failed to apportion as to individual beneficiaries invalid under Rule 68; wrongful death claim requires apportionment if more than one beneficiary represented in the action).

¶5 Here, although the Nardellis asserted a single cause of action for breach of the duty of good faith and fair dealing against MetLife, when they submitted the offer of judgment to MetLife they were seeking damages, as they alleged in their First Amended Complaint, for their "anxiety, worry, anger, mental and emotional distress, fear, feelings of hopelessness, insecurity." As MetLife points out, emotional distress damage claims are "distinctly personal to each spouse," and are not derivative claims, nor are they claims that belong to the marital community like a claim for lost wages. *See Jurek v. Jurek*, 124 Ariz. 596, 598, 606 P.2d 812, 814 (1980) ("compensation for [husband's] injuries to his personal well-being should belong to him as his separate property" although lost wages and expenses incurred by community for medical care

resulting from husband's personal injury would be community property); *Brumbaugh v. Pet Inc.*, 129 Ariz. 12, 14, 628 P.2d 49, 51 (App. 1981) (applying *Jurek*, damages recovered by wife for pain, suffering, and mental anguish constitute wife's separate property). Accordingly, the Nardellis' unapportioned offer of judgment to MetLife was invalid under Rule 68.

¶6 In so holding, we reject the Nardellis' argument they were not required to apportion their offer of judgment because MetLife submitted an unapportioned offer of judgment to them and treated them as "one entity" at trial. MetLife's failure to comply with the requirements of Rule 68 does not excuse the Nardellis' failure to do so. *Smyser v. City of Peoria*, 215 Ariz. 428, 442, ¶ 48, 150 P.3d 1186, 1200 (App. 2007) (rejecting defendant's argument that plaintiff's submission of unapportioned offer excused defendant's failure to apportion offer). Further, the apportionment rule was designed to allow the offeree a meaningful opportunity to evaluate and assess his or her chances of doing better at trial against one or more of the parties. MetLife's apparent decision to treat the Nardellis as "one entity" at trial does not change the fact the Nardellis' joint, unapportioned offer failed to permit this evaluation.

¶7 We also disagree with the Nardellis' argument their offer of judgment was valid because it was similar to the offer

of judgment we upheld in *Sheppard v. Crow-Barker-Paul No. 1, Ltd.*, 192 Ariz. 539, 968 P.2d 612 (App. 1998). In *Sheppard*, a parent asserted a claim for personal injuries on behalf of his minor child and his own claim for the cost of his child's medical care. The parent submitted an offer of judgment to the defendant which did not distinguish between the two claims. We distinguished *Duke* and the cases following it, noting they did not involve "a single plaintiff acting as a representative of another in the capacity of next friend, conservator, or guardian ad litem," and instead involved "multiple plaintiffs, multiple claims, or both." *Id*. at 549, ¶ 57, 968 P.2d at 622. We then explained the two claims were "ordinarily two aspects of an individual personal injury claim," and had been divided solely because of the child's minority. *Id.* at ¶ 58.

¶8 Here, neither of the Nardellis was acting as a representative of the other and, more importantly, as discussed, Tammy and Ken Nardelli were each entitled to assert and recover damages for the emotional distress and pain and suffering they separately sustained. *Cf*. *Smyser*, 215 Ariz. at 442, ¶ 47, 160 P.3d at 1200 (distinguishing *Sheppard*; unallocated offer of judgment submitted by parent in medical malpractice and wrongful death action on her behalf and on behalf of minor children "should have been split between [parent] and her children not

based on the children's minority but on the separate nature of the loss suffered by each.").

¶9 The offer of judgment the Nardellis submitted to MetLife failed to comply with Rule 68. We thus vacate that portion of the judgment awarding Rule 68 sanctions and remand to the superior court for entry of an amended judgment deleting the sanctions.

II. Post-Judgment Interest

¶10 By letter dated December 30, 2009 ("December 30 letter"), MetLife, through counsel, offered to wire transfer to the Nardellis' counsel's client trust account the full amount of the judgment entered by the superior court on November 23, 2009, plus post-judgment interest through the date of the wire. MetLife explained it was making the tender to terminate the accrual of post-judgment interest. As discussed in more detail below, the Nardellis refused the tender. Subsequently, on MetLife's motion and over the Nardellis' objection, the superior court terminated the accrual of post-judgment interest as of December 30, 2009, finding MetLife's tender unconditional.

¶11 On appeal, the Nardellis argue the superior court should not have terminated the accrual of interest as of December 30, 2009, asserting MetLife's tender was not unconditional because its December 30 letter also stated if the

judgment was reversed or vacated in whole or in part it would be entitled to recover from the Nardellis the amount of any overpayment with interest. According to the Nardellis, this statement made the tender conditional because MetLife had "refused to give up its rights in the amount tendered" regardless of the outcome of any appeal. The superior court rejected this argument, and so do we. *See Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 507, 917 P.2d 222, 236 (1996) (whether party is entitled to interest is matter of law court reviews de novo).

¶12 Under Arizona law, a valid tender relieves the debtor from "any interest or penalties due for a failure to pay the debt when due." *Peterson v. Cent. Ariz. Light & Power Co.*, 56 Ariz. 231, 237, 107 P.2d 205, 208 (1940). This is true even if the creditor refuses the tender. *Dull v. Dull*, 138 Ariz. 357, 359, 674 P.2d 911, 913 (App. 1983). These rules also apply to judgments. *Welch v. McClure*, 123 Ariz. 161, 165-66, 598 P.2d 980, 984-85 (1979) (citing *Peterson*, unconditional tender will stop running of interest on a judgment); *Dull*, 138 Ariz. at 359, 674 P.2d at 912 (same).

¶13 In the vernacular, an unconditional tender is one with no strings attached. Accordingly, a tender is conditional when the debtor attaches a condition to it that the creditor cannot

accept the tender without compromising his or her legal right to recover additional sums which he or she claims due. *Pleasant v. Ariz. Storage & Distrib. Co.*, 34 Ariz. 68, 78, 267 P. 794, 798 (1928). A tender is not made conditional if it is submitted, however, with a "declaration that it is without prejudice either to the contention by [the debtor] that no more is due, or to a claim by the creditor that an acceptance does not amount to an admission by the latter that the tender covers the entire debt." *Peterson*, 56 Ariz. at 237-38, 107 P.2d at 208.[3] Further, a tender is not conditional if it is submitted with a condition "the person making the tender has a legal right to insist upon." *Dull*, 138 Ariz. at 359, 674 P.2d at 913 (tender by husband of payment pursuant to dissolution decree, with request former wife execute quit claim deed to family home, did not make tender

[3]The Nardellis suggest a tender is conditional, under *Peterson*, unless the party who makes the tender relinquishes all rights to recover the amount tendered. We disagree; indeed, *Peterson* held the opposite:

> In the present case, it appears very clearly that plaintiff, in making its tenders, did not in any manner require the county to admit that the amount tendered was the full amount of the legal taxes due, but merely stated that they were without prejudice to the right of either party to insist, in proper proceedings in court, on the one hand, that the amounts tendered were the full debt, and on the other that they were not.

Id. at 238, 107 P.2d at 208.

conditional; requirement wife execute deed "was part and parcel of the court's decree. It was not some condition tacked on by the husband to gain some advantage or thing of value which he did not already have a right to by virtue of the court's existing order").

¶14 Here, MetLife's tender was not conditional because it essentially reserved its right to appeal (or cross-appeal) the judgment in the Nardellis' favor and, if successful in whole or in part, seek recovery of any overpayment.

¶15 First, in its December 30 letter, MetLife specifically advised the Nardellis its tender was "**not** conditioned on [their] filing of a notice of satisfaction of the Judgment or relinquishment of any rights, including the right to appeal."

¶16 Second, in advising the Nardellis it was making the tender without relinquishing its appeal rights or its right to seek repayment of any overpayment if successful on appeal, MetLife was simply asserting its legal rights, similar to the situation in *Dull*. *See generally Webb v. Crane Co.*, 52 Ariz. 299, 320, 80 P.2d 698, 708 (1938) (even though execution of judgment has not issued, payment of judgment "must be regarded as compulsory." Payment does "not releas[e] errors, nor deprive the payor of his right to appeal," unless it was made in compromise and settlement, pursuant to an agreement not to

appeal.); *In re Matter of 1969 Chevrolet*, 134 Ariz. 357, 360-61, 656 P.2d 646, 649-50 (App. 1982) (citing with approval Restatement of Restitution § 74) (person who has conferred a benefit upon another in compliance with judgment is entitled to restitution if the judgment is reversed or set aside); Restatement (Third) of Restitution and Unjust Enrichment § 18 (transfer of property in compliance with judgment that is subsequently reversed or avoided gives disadvantaged party a claim in restitution as necessary to avoid unjust enrichment).[4] MetLife's tender was not, therefore, conditional. We thus affirm the superior court's ruling MetLife's tender terminated the accrual of additional post-judgment interest after December 30, 2009.[5]

[4]In its December 30 letter and on appeal, MetLife asserts it will also be entitled to interest at the statutory rate if entitled to restitution. Whether MetLife is entitled to interest and, if so, what the applicable rate is, are issues the parties have not briefed and are not before us. We express no opinion on these issues.

[5]In their reply brief, the Nardellis argue MetLife's tender was conditional because, on December 30, they were disputing the superior court's calculation of pre-judgment interest. This argument is not properly before us as the Nardellis did not raise it in their opening brief, thus depriving MetLife of the opportunity to respond to it. *See Dawson v. Withycombe*, 216 Ariz. 84, 111, ¶ 91, 163 P.3d 1034, 1061 (App. 2007). Further, MetLife's tender was for the full amount of the judgment entered by the court in November 2009 with interest to the date of the wire. The judgment entered by the court, not the Nardellis' objection to it, controlled the amount of the tender.

III. Amended Judgment and Discrepancy in Post-Judgment Interest

¶17 After the court determined MetLife's tender terminated the accrual of interest, the Nardellis submitted -- and MetLife objected to -- a proposed form of amended judgment. After briefing, on July 19, 2010, the superior court entered an amended judgment but failed to include $15,562.14 in post-judgment interest that had accrued from the date of the original judgment, November 23, 2009, through MetLife's December 30 tender. Although, before entry of the amended judgment, MetLife acknowledged the Nardellis were entitled to this sum, the Nardellis did not contest this omission in the superior court or, as far as the record reveals, bring it to the superior court's attention. Instead, they have asked us to modify the judgment or direct the superior court to do so. Because we are remanding this matter for entry of an amended judgment, the superior court will need to determine the accrual of post-judgment interest on the amended amount of the judgment. Accordingly, there is no need for us to resolve this issue.

IV. Hearing and Transcript Costs

¶18 MetLife also argues the superior court should not have taxed it $27,397 for hearing and transcript costs under Arizona Revised Statutes ("A.R.S.") section 12-332 (2001). We agree. *Bennett v. Baxter Grp., Inc.*, 223 Ariz. 414, 422, ¶ 36, 224 P.3d

230, 238 (App. 2010) (whether certain expenditures are taxable costs is a matter of law subject to de novo review on appeal). Transcript costs are not a recoverable cost under that statute. Instead, they can be recovered by the successful party as a cost on appeal. A.R.S. § 12-331(4) (2003). Thus, on remand the superior court should vacate the award for hearing and transcript costs.

V. Attorneys' Fees and Costs on Appeal

¶19 The Nardellis and MetLife have each requested an award of attorneys' fees under A.R.S. § 12-341.01 (2003). Because the Nardellis and MetLife have each been partially successful and partially unsuccessful on appeal, we deny their competing requests for attorneys' fees. For the same reason, we refuse to award either side costs on appeal pursuant to A.R.S. § 12-342 (2003).[6]

[6]MetLife argues the "offer of judgment/settlement offer" it submitted to the Nardellis constituted a written settlement offer under A.R.S. § 12-341.01(A), thus requiring us to vacate the attorneys' fees the superior court awarded to the Nardellis. Even if we view MetLife's Rule 68 offer of judgment as a written settlement offer under this statute, we nevertheless reject MetLife's argument. Although in our simultaneously issued opinion we have reduced the punitive damages to $155,000, the total amount of damages the Nardellis recovered ($310,000 in compensatory and punitive damages) exceeds MetLife's $300,001 offer.

CONCLUSION

¶20 For the foregoing reasons, we vacate that portion of the superior court's judgment awarding the Nardellis Rule 68 sanctions and hearing and transcript costs. We affirm, however, the superior court's decision terminating the accrual of post-judgment interest after December 30, 2009. Finally, we remand this matter to the superior court so it may determine the accrual of post-judgment interest and enter an amended judgment consistent with this decision and the opinion filed simultaneously with this decision.

/s/
_____
PATRICIA K. NORRIS, Judge

CONCURRING:

/s/
_____
MICHAEL J. BROWN, Presiding Judge

/s/
_____
PETER B. SWANN, Judge