DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

SC34,	)	No. 1 CA-CV 11-0240
	)	
Plaintiff/Appellee,	)	DEPARTMENT E
	)	
v.	)	**MEMORANDUM DECISION**
	)	Not for Publication
THE DESERT MOUNTAIN MASTER ASSOCIATION, an Arizona non-profit corporation,	)	(Rule 28, Arizona Rules of Civil Appellate Procedure
	)	
	)	
Defendant/Appellant.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CV2007-052952 & CV2008-000971 (Consolidated)

The Honorable Robert A. Budoff, Judge

AFFIRMED

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G E M M I L L, Judge

¶1 The Desert Mountain Master Association ("DMMA") raises

several issues on appeal in this breach of Covenants, Conditions, and Restrictions ("CC&Rs") action. For the following reasons, we affirm the judgment in favor of SC34.

FACTS AND PROCEDURAL HISTORY

¶2 We view the facts and evidence in the light most favorable to sustaining the jury's verdict. *See Inch v. McPherson*, 176 Ariz. 132, 136, 859 P.2d 755, 759 (App. 1992).

¶3 Richard and Susan Pallan ("Pallan" for Richard Pallan unless context requires otherwise) created SC34 to purchase Lot 34 and build a home in the community of Sunset Canyon at Desert Mountain in Scottsdale. The Pallans were the only members of the L.L.C. SC34 made the necessary arrangements to build the home, but a few weeks prior to breaking ground on July 31, 2007 a severe storm flooded Lot 34. The home of SC34's neighbors and co-plaintiffs, Herb and Marsha Anderson ("Anderson" for Herb Anderson unless context requires otherwise), was also flooded due to the storm.[1] In December of 2007, following another storm, the drainage system overflowed again but caused no damage to the Andersons' home or Lot 34.

¶4 SC34 and the Andersons ("Plaintiffs") requested that DMMA repair the drainage system to avoid further flooding.

[1] Both the Anderson and SC34 cases were consolidated on DMMA's motion in July 2009. The Andersons settled with defendants prior to trial.

Plaintiffs grew increasingly frustrated by DMMA's lack of communication and lack of action. The Andersons hired experts to determine the cause of the flood after repeated requests for a response from DMMA. The Andersons and Pallans filed separate lawsuits (in October 2007 and January 2008, respectively).

¶5 DMMA hired engineer David Deatherage in October or November of 2007 to evaluate the drainage system for Lot 34 and to make recommendations to the Homeowners' Association ("HOA") on how to proceed. At Deatherage's suggestion, DMMA implemented temporary measures building soil berms around the perimeter of the drainage inlet and removing a metal grate covering the drainage culvert. In February 2008, Deatherage also created and stamped[2] a revised engineering plan which included recommendations to add a spillway, geotextile fabric to prevent erosion of the soil berms, and creation of a "riprap" channel.[3] DMMA accomplished these interim repairs in March 2008. Deatherage testified that this plan would withstand the 100-year

[2] Deatherage is a registered professional engineer ("PE"), with the ability to stamp plans. Stamping means that the plans meet a professional standard of care according to the PE's knowledge and ability. *See* Ariz. Rev. Stat. ("A.R.S") § 32–125(E) (2007) (providing that a registered professional engineer is "responsible for all documents that the registrant signs, stamps or seals").

[3] Riprap is large angular rock of irregular shape made of granite or limestone that interlocks with itself.

storm standard.[4] Deatherage, in March 2008, made further recommendations to improve the drainage system, but DMMA did not adopt them by the time these issues went to trial.

¶6 In contrast, SC34's expert, Hal Marron, testified that the interim repairs were inadequate to withstand another 100-year storm event. SC34's hydrology expert, Jonathan Fuller, also testified that the interim repairs were incapable of supporting a 100-year storm event.

¶7 In January 2008, the Pallans, individually and on behalf of SC34, filed an amended complaint against DMMA alleging breach of contract and a request for injunctive relief. SC34's breach of contract action was based on DMMA's alleged violations of the Master Association's CC&Rs, specifically sections 8.1 (HOA board shall use a reasonable standard of care in providing repair, management, and maintenance), 8.1(a) (discretion of the HOA board to repair the common areas of the Master Association – DMMA), and 9.2 of Sunset Canyon's CC&Rs (common areas are the responsibility of the Master Association).

¶8 On DMMA's motion, the trial court dismissed the Pallans as individuals from the action. After a jury trial, SC34 was awarded $777,000 in damages. The trial court also granted SC34 injunctive relief and awarded attorneys' fees and

[4] It is undisputed that an engineered drainage system must meet the 100-year storm event standard or it is considered inadequate because it fails to meet current building standards.

costs to SC34 in its final judgment.

¶9 DMMA timely appeals and we have jurisdiction pursuant to A.R.S. § 12-2101(A)(1) (Supp. 2012).[5]

ANALYSIS

¶10 On appeal DMMA challenges the trial court's decisions to: a) deny a motion to offset pretrial settlement damages; b) deny a directed verdict on the damage claims and to allow the calculation of the loss of use damages, c) deny a special verdict; d) deny certain jury instructions and exclude related evidence; and e) deny a motion to continue the trial.

I. Pretrial Settlement Damages

¶11 SC34 settled with the following co-defendants prior to trial for an amount totaling $215,000: the property developer, Desert Mountain Properties ("DMP"); DMP's engineer, Rick Engineering; and DMP's contractor, Blucor. DMMA contends that it is entitled to a $215,000 credit or offset against the jury award given to SC34.

¶12 We review issues applying settlement offsets to damages awards *de novo* because they are questions of law. *See Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 507, 917 P.2d 222, 236 (1996).

¶13 Both parties cite *Am. Home Assur. Co. v. Vaughn*, 21

[5] Unless otherwise specified, we cite the current versions of statutes when no material revisions have been enacted since the events in question.

Ariz. App. 190, 192, 517 P.2d 1083, 1085 (1974), for the proposition that a settlement offset against a damage award is required if the plaintiff is seeking recovery from multiple defendants based on the "same incident or transaction." DMMA claims SC34's damages all arise from the same event - SC34's inability to build on Lot 34 because of inadequate flood protection.

¶14 In reaching our decision on this issue, we have considered the facts and the law and the jury instructions given by the court. Two of these jury instructions, which were requested by DMMA, are pertinent and significant. First, the trial court included a "No Liability for Original Design or Construction" instruction that directed the jury as follows:

> "The Desert Mountain Master Association was not involved in the original design or construction of the drainage infrastructure. *Therefore, it cannot be held liable for any of SC34, LLC's damages arising out of the original construction or design*."

(Emphasis added.)

¶15 Second, the court instructed the jury that DMMA was not liable to SC34 "for any action or inaction by DMMA that resulted in damages that were incurred" before the initial flood:

> The Desert Mountain Master Association's obligations under the CC&Rs were not potentially implicated until after the July 31, 2007 storm. If you find that the

> Defendant [DMMA] breached the applicable CC&Rs on or after August 1, 2007, then you must determine whether the breach caused any damage to [SC34]. A breach of the CC&Rs causes the injury if the alleged injury would not have happened without the breach. *The Desert Mountain Master Association is not liable to SC34, LLC for any action or inaction by DMMA that resulted in damages that were incurred before August 1, 2007.*

(Emphasis added.)

¶16 Our supreme court has noted that we must presume that jurors follow the trial court's instructions, in the absence of some reason to conclude otherwise. *See State v. Newell*, 212 Ariz. 389, 403, ¶ 68, 132 P.3d 833, 847 (2006); *State v. Ramirez*, 178 Ariz. 116, 127, 871 P.2d 237, 248 (1994) ("absent some evidence to the contrary, we presume that the jury read and followed the relevant instruction"). Accordingly, the jury was directed by the trial court that DMMA was not liable to SC34 for any damages arising out of the original construction or design or for any action or inaction that may have caused damages prior to August 1, 2007. In other words, the jury was essentially instructed that DMMA was not liable for the actions of the settling defendants in designing and constructing the drainage and flood control system. Because the damages awarded by the jury did not include damages for the deficient design and construction, DMMA is not entitled to a credit or offset for its payments to the settling defendants.

¶17 Additionally, DMMA's liability was not triggered until mother nature revealed that the drainage system was improperly designed and built by the defendants who settled prior to trial. DMMA was obligated, based on the terms of the CC&Rs, to maintain the common areas and repair the drainage system if something went awry, in accordance with a "reasonable standard of care." DMMA did not do so in a reasonable or timely manner, according to the jury. Thus, SC34 was allowed to recover its alleged damages because DMMA did not reasonably repair and maintain the drainage system.

¶18 We agree with the trial court that SC34's claim for damages against DMMA was different and separate from the claims against DMP and its agents.

II. Damages at Trial

¶19 DMMA challenges several trial and post-trial rulings made by the trial court regarding damages. We analyze DMMA's arguments concerning the trial court's rulings on damages at trial and post-trial together when appropriate.

¶20 During trial, DMMA moved for an initial Judgment as a Matter of Law ("JMOL") on SC34's claimed damages in accordance with Rule 50 of the Arizona Rules of Civil Procedure. The trial court denied the motion pertaining to SC34's damages claims. Subsequently, DMMA moved for a new trial in January of 2011, essentially renewing its JMOL claims concerning damages. *Cf.*

Ariz. R. Civ. P. 50(b); Ariz. Rule Civ. P. 59. The trial court denied DMMA's motion for a new trial.

¶21 Our review for denial of JMOL is *de novo*. *See Felder v. Physiotherapy Assocs.*, 215 Ariz. 154, 162, ¶ 36, 158 P.3d 877, 885 (App. 2007). And we view the "evidence in the light most favorable to the nonmoving party." *Saucedo ex rel. Sinaloa v. Salvation Army*, 200 Ariz. 179, 181, ¶ 9, 24 P.3d 1274, 1276 (App. 2001). A motion for JMOL must 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." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990); *see also* Ariz. R. Civ. P. 50(a)(1). Additionally, we review a motion for a new trial for an abuse of discretion. *See Hudgins v. Sw. Airlines, Co.*, 221 Ariz. 472, 486, ¶ 37, 212 P.3d 810, 824 (App. 2009). With these principles in mind, we address the damages issues.

A. Diminution of value damages

¶22 DMMA makes several arguments that the trial court erred by allowing SC34 to recover diminution of value damages. First, DMMA contends that the trial court erred when it allowed the jury to consider diminution of value damages. Second, according to DMMA, because "[s]tigma damages compensate a party for permanent injuries to property" and SC34's injuries were

only temporary, SC34 received an improper windfall.[6] Third, DMMA asserts that there was no evidence to support an award for these damages. Next, DMMA argues that the trial court erred because it denied DMMA's motion for a new trial based on DMMA's alleged new evidence. Finally, DMMA argues that SC34 admitted that no diminution in value damages would stand if the repairs to Lot 34 were made.

1. Jury instruction

¶23 We analyze DMMA's jury instruction and permanent injury arguments together because these are interrelated. We review a court's jury instructions for an abuse of discretion. *See A Tumbling-T Ranches v. Flood Control Dist. of Maricopa Cnty,* 222 Ariz. 515, 533, ¶ 50, 217 P.3d 1220, 1238 (App. 2009). We review *de novo* whether jury instructions properly state the law. *See Romero v. Sw. Ambulance*, 211 Ariz. 200, 204, ¶ 8, 119

[6] The parties refer in the record to diminution in value damages interchangeably with "stigma" damages. In real estate parlance, stigma damages are a "psychological perception of a property's marketability or value." In practice, stigma damages generally are "a facet of permanent damages" to compensate a party for "a property's diminished market value [even] in the absence of 'permanent physical' harm." *Walker Drug Co. v. La Sal Oil Co.,* 972 P.2d 1238, 1246 (Utah 1998). In this case, SC34 argued that because the drainage system had not been adequately repaired, the perceived value of the property was diminished. It is not necessary to decide here whether this category of damages should be called "stigma" damages or diminution in value damages. Because the jury instructions required the jury to decide whether DMMA's breach resulted in a "reduction in value" of the property, we will use the more general "diminution in value" to describe these damages.

P.3d 467, 471 (App. 2005). "An instruction will warrant reversal only if it was both harmful to the complaining party and directly contrary to the rule of law." *State Farm Fire & Cas. In. v. Grabowski*, 214 Ariz. 188, 192, ¶ 13, 150 P.3d 275, 279 (App. 2007).

¶24 The final jury instructions stated in part: "SC34's claims for damages include: Any reduction in value that you find resulted from any breach of contract by DMMA after July 31, 2007." Diminution of value damages are an accepted remedy under Arizona law. *See, e.g., Blanton & Co. v. Transamerica Title Ins. Co.*, 24 Ariz. App. 185, 188, 536 P.2d 1077, 1080 (1975); *Mikol v. Vlahopoulos*, 86 Ariz. 93, 95, 340 P.2d 1000, 1001 (1959). *Blanton* states:

> Generally, the measure of damages for a permanent injury to land is the difference in the market value of the land immediately before and immediately after the injury, but if the land may be restored to its original condition, the cost of restoration may be used as the measure of damages if it does not exceed the diminution in the market value of the land.

24 Ariz. App. at 188, 536 P.2d at 1080.

¶25 We stated in *A Tumbling-T*: "An injury to real property may be characterized as permanent or temporary." 222 Ariz. at 534, ¶ 54, 217 P.3d at 1239. Moreover, "[a]n injury is temporary if its cause is abatable (or preventable) and repair costs are otherwise reasonable; that is, the costs to repair do

not exceed the damaged property's diminished value." *Id.* In *A Tumbling-T*, we reviewed two cases holding that the threat of flooding may be either temporary or permanent. First, in analyzing *City of Tucson v. Apache Motors*, 74 Ariz. 98, 106, 245 P.2d 255, 260 (1952), the *A Tumbling-T* court found a temporary injury "dictating landowners sue for each successive injury, if the injury was originally difficult to foresee and is unlikely to reoccur except at unpredictable intervals and is otherwise capable of abatement." *Id.* Conversely, in analyzing *Clausen v. Salt River Valley Water Users' Ass'n*, 59 Ariz. 71, 85-86, 123 P.2d 172, 178 (1942), the *A Tumbling-T* court found a permanent injury where "a jury determined that [the flooding] was so menacing and dangerous that it depreciates the value of the [landowner's] property." *Id.* (internal quotations omitted).

¶26 In *A Tumbling-T*, we upheld the jury verdict, concluding that in light of the arguments and evidence presented, the jury must have determined the injury to be permanent. 222 Ariz. at 534, ¶ 55, 217 P.3d at 1239. We declined to reweigh the credibility of the expert testimony because that is the function of the jury. *A Tumbling-T,* at 535, ¶ 59, 217 P.3d at 1240. Moreover, we concluded that the evidence in the record supported a diminished land value measurement for damages. *Id.*

¶27 Both DMMA and SC34 cite *McCormick v. City of Portland*,

82 P.3d 1043 (Or. App. 2004) in support of their respective positions. We believe the key sentence from *McCormick* is: "Whether the damages that plaintiffs incurred were temporary or permanent is a question for the factfinder." 82 P.3d at 1049. At this trial, the question whether the diminution in value was temporary or permanent was presented to the jury for determination.

¶28 Both parties presented expert testimony from real estate appraisers on diminution in value damages. The consensus opinion by both parties' experts was that Lot 34 was worth approximately one million dollars (DMMA's expert: $1,000,000; SC34's expert: $1,050,000) before the July 31, 2007 storm, and subsequent flooding affected the lot. DMMA's expert opined that there were no permanent damages associated with Lot 34. On the other hand, SC34's expert testified that there was $840,000 in lost value if a permanent repair was not made.

¶29 The jury was empowered to determine expert testimony credibility. The jury was entrusted to determine any reduction in value, and it found for SC34. The jury specifically determined that no permanent repair was made by the time the jury went into deliberations. The jury's overall conclusion, in response to a special interrogatory, was that "[b]ased on the evidence presented, [DMMA had not] modified, repaired, reconstructed and maintained the drainage system to protect Lot

34 from flooding . . . as of this date[.]"

¶30 Similar to *A Tumbling-T*, we can presume — from the jury's answer to the special interrogatory, the arguments of counsel, and the damages awarded — that the jury found the injury was permanent. The finding that SC34 was entitled to diminution of value damages under the given instruction is consistent with the finding that DMMA had failed to repair the drainage system. We find no error in the jury instruction or the jury's finding of permanent injury to Lot 34.

2. Evidence of diminution of value damages

¶31 DMMA further contends that the jury's finding for diminution of value damages was unsupported by the evidence. DMMA claims that SC34's appraisal expert did not offer an opinion on DMMA's temporary or interim repairs to the drainage system.

¶32 Peter Martori, SC34's appraisal expert, did testify to what the "impaired value would be if -- if no permanent repairs were made." At the time of trial, DMMA had not completed any permanent repairs to the drainage system. The jury heard DMMA's engineers testify that the interim repairs were used to buy time for the final repairs and "[t]he final improvements should overcome the remaining design and/or construction deficiencies in the storm drain system." Martori testified that the perceived damages correspond to whether a flood system works

properly: the lower the certainty that the system works, the higher the stigma damages. DMMA's expert appraiser, Jan Sell, also confirmed the necessity of certainty as it applies to lost value damages.

¶33 Accordingly, the jury was presented evidence sufficient to permit a finding that diminution of value damages was applicable to Lot 34 because the drainage system repair was incomplete or inadequate.

3. New evidence

¶34 DMMA filed a motion for new trial arguing that lost value damages were inappropriate because new evidence became available after trial. DMMA claims entitlement to a new trial on the basis that DMMA began the final repairs to the drainage system. DMMA contends these repairs constitute newly discovered evidence under Rule 59(a)(4). DMMA reasons that the final repairs necessitate a finding that the diminution in value damages were improperly awarded because Lot 34's defects were temporary.

¶35 As previously stated, we review a denial of a motion for a new trial for an abuse of discretion. *Hudgins*, 221 Ariz. at 486, ¶ 37, 212 P.3d at 824. The trial court is accorded "substantial latitude" on whether it will upset a jury verdict based on post trial motions. *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 53, ¶ 12, 961 P.2d 449, 451 (1998). According to the

Arizona Supreme Court in *Hutcherson*, the reason the trial court is given so much deference is because "[t]he [court] 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." *Id.* (internal quotation and citations omitted).

¶36 The trial court by signed minute entry denied DMMA's motion for a new trial because it was not warranted under the Rule 59(a) requirements. DMMA admits that evidence of post-trial repairs is not generally considered newly discovered evidence. But DMMA cites *Mulkins v. Bd. of Supervisors of Page Cnty.*, 330 N.W.2d 258, 262 (Iowa, 1983) in support of an extraordinary exception: if a failure of justice will result based on conditions after the trial, the court has grounds to grant a new trial.

¶37 The trial court and the jury were already aware that DMMA had been working on a plan to correct the drainage system. SC34's expert engineer, Hal Marron, testified that he had only just received a current example of the final plans on the eve of trial. SC34's counsel argued the jury would have to decide if DMMA made or would make sufficient permanent repairs. In this case, the jury found that SC34 was entitled to damages based on the evidence presented at trial. Because DMMA had not made permanent repairs for over three years, the jury could have

permissibly decided that the damage was permanent. Based on this record, we conclude that the trial court did not abuse its discretion by denying the motion for new trial.

4. Judicial admission

¶38 DMMA's final argument hinges on statements made by SC34's counsel prior to trial. DMMA argues that SC34's attorney admitted that there was no diminution of value damages during oral argument on motions for summary judgment. SC34's attorney said that SC34 was seeking the damages assessed by the appraisal expert, Martori, unless "everything is repaired and gives the potential buyer enough certainty that there is a repair, then there won't be any stigma damages."

¶39 Our supreme court defined a judicial admission as:

> An express waiver made in court or preparatory to trial by the party or his attorney conceding for the purposes of the trial the truth of some alleged *fact,* has the effect of a confessory pleading, in that the *fact* is thereafter to be taken for granted; so that the one party need offer no evidence to prove it and the other is not allowed to disprove it. . . . It is, in truth, a substitute for evidence, in that it does away with the need for evidence.

State v. Fulminante, 193 Ariz. 485, 492, ¶ 17, 975 P.2d 75, 82 (1999) (quoting 9 Wigmore, Evidence § 2588, at 281 (Chadbourn rev. 1981)).

¶40 Based on our interpretation, SC34's attorney was speculating hypothetically on what his expert witness *might* say

if there was an engineered maintenance plan in place, and if the property then met the necessary requirements for an engineered repair plan. At trial the jury heard Martori's testimony and DMMA had the opportunity to challenge his testimony through cross-examination and through its own expert's testimony. We conclude that the attorney's statements did not rise to the level of an admission. He was not attempting to substitute his statements in place of his expert Martori's testimony. We find no error.

B. Loss of use damages

¶41 DMMA also challenged the loss of use damages in both its JMOL and motion for new trial. DMMA challenged both the basis of the loss of use damages and the measure of calculating the damages.

1. SC34's loss of use damages

¶42 According to DMMA, SC34 failed to prove a *prima facie* case for loss of use damages. DMMA contends the jury should not have been permitted to determine loss of use damages because SC34 was unable to prove that it suffered any such damages. DMMA argues that only the Pallans offered evidence of loss of use and because they were not parties, no loss of use damages should stand. SC34 counters that it did suffer loss of use damages because it was unable to build a home for the Pallans for over three years due to DMMA's failure to repair the

drainage system.

¶43 We review a damages award for an abuse of discretion. *See Gonzales v. Ariz. Pub. Serv. Co.*, 161 Ariz. 84, 90, 775 P.2d 1148, 1154 (App. 1989). We also view the evidence, including all reasonable inferences arising therefrom, in a light most favorable to supporting the jury's verdict. *See McFarlin v. Hall*, 127 Ariz. 220, 224, 619 P.2d 729, 733 (1980). "[I]f any substantial evidence exists permitting reasonable persons to reach such a result, we will affirm the judgment." *Hutcherson*, 192 Ariz. at 53, ¶ 13, 961 P.2d at 451.

¶44 Pallan testified to the following: SC34 was an L.L.C. created by Pallan and his wife; Pallan was the managing member of SC34; Pallan and his wife created SC34 to purchase the lot to allow the previous owners to temporarily maintain their golf club membership; and the Pallans loaned SC34 the money to purchase Lot 34 with the expectation of forgiving the debt once SC34 completed construction of the home. When questioned about damages, Pallan testified: "I have a huge amount of money tied up in this lot for over three years now, and it's been unable to be used. It couldn't be sold; it couldn't be built on. I believe that I'm entitled to be compensated for the fact that I couldn't use it."

¶45 DMMA further argues that SC34's opening and closing statements were focused on the Pallans' loss, not SC34's loss.

However, the jury was instructed that opening and closing remarks were not evidence. The jury also received instructions regarding the measure of SC34's loss of use of property — *not the Pallans' loss of use*. As already explained, we will presume that juries follow the trial court's instructions, in the absence of evidence to the contrary. *See Newell*, 212 Ariz. at 403, ¶ 68, 132 P.3d at 847; *Ramirez*, 178 Ariz. at 127, 871 P.2d at 248.

¶46 Due to the drainage issues, SC34 was unable to build a home for over three years and subsequently obtain forgiveness of the loan advanced by the Pallans. Although there was some question whether SC34 or the Pallans themselves were damaged, we conclude that a reasonable jury could find that SC34 was deprived of its principal use of Lot 34.

¶47 DMMA further contends that the jury improperly awarded damages to SC34 by ignoring SC34's corporate form and allowing the Pallans to recover personal damages. DMMA cites cases from other jurisdictions for the premise that a member of an L.L.C. as an individual cannot recover damages for losses to the L.L.C. itself. *See, e.g., Katz v. Katz*, 867 N.Y.S.2d 100, 103 (N.Y. App. Div. 2008) ("Since the husband is merely a member of the LLC, he does not have the right to recover rent and other damages from the wife in his individual capacity."); *Wasko v. Farley*, 947 A.2d 978, 988 (Conn. App. Ct. 2008) (stating that a

member of an L.L.C. may not recover for injury to the company because an L.L.C. is a distinct legal entity).

¶48 We will not disturb the jury's conclusion that SC34 suffered loss of use damages. At trial, SC34 pursued its damages but Mr. Pallan was a principal representative of SC34. The jury was provided sufficient evidence to find that SC34 itself was unable to put Lot 34 to its intended use and its investment of funds was unproductive for a period of time.

¶49 In a similar argument, DMMA asserts that the loss of use claim was a personal injury, and that SC34 as an L.L.C. was incapable of recovering from such an injury. We disagree. A corporate entity can assert claims for injuries to or loss of use of property owned by the entity. *See e.g. Johnson v. Foundry, Inc.,* 702 N.W.2d 274, 278 (Minn. Ct. App. 2005) (noting that while "a corporation cannot sustain bodily injury, [] a corporation may sustain property damage") (citation omitted). The right to recover for property damages includes the damages caused by the loss of use of property. *Antolovich v. Brown Group Retail, Inc.,* 183 P.3d 582, 610 (Colo. Ct. App. 2007) (confirming the "loss of use and enjoyment of property can, depending on their nature, derive from either a property injury or a personal injury"). As we explained above, SC34's loss of use claim was based on the inability to use the property that SC34 owed. SC34 may recover for the loss of use of its

property.

¶50 We conclude the trial court did not err in allowing the jury to consider SC34's loss of use damage claim.

2. Calculating loss of use damages

¶51 DMMA argues that the trial court erred when it allowed SC34 to use improper methods to calculate loss of use damages. SC34 offered two theories for measuring its damages: a statutory rate of interest method and the lost opportunity costs method based on the alternative of investing money into a hedge fund.

i. Statutory interest rate method

¶52 SC34 relies on A.R.S. § 44-1201(A) (Supp. 2012) to support one of its methods for calculating loss of use damages. Section 44-1201(A) as it then read provided a statutory prejudgment interest rate of ten percent per annum unless another contract rate is specified.

¶53 The Restatement (Second) of Contracts § 348(1) (1981) recognizes interest as a method of calculating loss of use damages. Section 348(1) states: "If a breach delays the use of property and the loss in value to the injured party is not proved with reasonable certainty, he may recover damages based on the rental value of the property *or on interest on the value of the property*." (Emphasis added.) Comment b. to that same section provides: "Another possible basis for recovery, as a

last resort, is the interest on the value of the property that has been made unproductive by the breach, if that value can be shown with reasonable certainty." *See PurCo Fleet Servs., Inc. v. Koenig*, 240 P.3d 435, 442 (Colo. App. 2010) (recognizing interest method for calculating loss of use damages); Alan E. Brownstein, *What's The Use? A Doctrinal and Policy Critique of the Measurement of Loss of Use Damages*, 37 Rutgers L. Rev. 433, 535 (1985) (characterizing interest method of calculating loss of use damages as simple and easy to calculate in an appropriate fashion).

¶54 Here, Pallan testified that he calculated the loss of use damages as $314,000 or $330,000 using the statutory interest method. His calculations were based on the expert opinions offered at trial concerning the value of Lot 34. Sell valued the lot at $1,000,000 and Martori valued the lot at 1,050,000. Pallan carefully explained to the court and jury how he calculated the interest using the statutory method.

¶55 Viewing the damages calculations in a light most favorable to upholding the jury's verdict, we conclude that using the statutory interest rate to calculate damages was not an abuse of discretion. There was sufficient evidence to support a reasonable jury's conclusion that loss of use damages were appropriate and that calculating those damages based on an accrual of interest was also proper.

ii. Lost opportunity cost

¶56 Pallan and SC34 offered an alternative way to calculate loss of use damages aside from the statutory rate. Under the lost opportunity cost theory, Pallan measured the interest on the land based on the performance of the appraisal amounts for Lot 34 (as principal) had those amounts of money been placed into Pallan's hedge fund. DMMA argues that the lost opportunity cost theory was improper because it was not related to the loss of SC34's use of the property.

¶57 For reasons similar to those pertaining to the statutory interest rate calculation, we find the trial court did not abuse its discretion in allowing testimony of the lost opportunity cost hedge fund calculation. The Restatement allows for the recovery of "interest on the value of the property," when a breach delays the use of property. Restatement (Second) of Contracts § 348(1) (1981). DMMA does not identify, nor does our caselaw suggest, any basis for limiting the interest rate that may be applied to the value of the property. The lost opportunity cost method was not, as DMMA argues, an attempt by the Pallans to recover improper damages, but simply an alternative to *measuring* SC34's loss of use damages. After Pallan testified to his loss of use damages, DMMA had the opportunity to present evidence to contradict the reasonableness or amount of his calculation. At that point, the assessment of

the accuracy and reliability of damages becomes a question of fact for the jury. *Cnty of La Paz v. Yakima Compost Co.,* 224 Ariz. 590, 608, ¶ 54, 233 P.3d 1169, 1187 (App. 2010). The jury was in the position to accept or deny this calculation for the loss of use damages. The trial court did not abuse its discretion in allowing the lost opportunity cost testimony.

¶58 Because we find no error in the damage claims presented at trial, we do not address DMMA's argument that the trial court erred in denying its request for a special verdict form delineating by category the damages found by the jury.

III. Jury instructions and related evidence

¶59 DMMA also argues that it is entitled to a new trial because the trial court denied DMMA's requested jury instructions regarding substantial performance, impracticability, reasonable standard of care, and damages associated with DMP and its agents. DMMA further challenges certain evidentiary rulings made by the court. We will first address the jury instruction issues and then the evidentiary issues.

A. Jury instructions

¶60 We review jury instructions under an abuse of discretion standard. *A Tumbling-T Ranches,* 22 Ariz. at 533, ¶ 50, 217 P.3d at 1238. "A trial court must give a requested instruction if: 1) the evidence supports the instruction, 2)

the instruction is appropriate under the law, and 3) the instruction pertains to an important issue and was not adequately covered by another instruction." *State ex rel. Miller v. Wells Fargo Bank of Ariz., N.A.*, 194 Ariz. 126, 132, ¶ 39, 978 P.2d 103, 109 (App. 1998). We will not overturn the jury's verdict, however, based on an improper instruction "unless there is substantial doubt about whether the jury was properly guided." *City of Phoenix v. Clauss*, 177 Ariz. 566, 568, 869 P.2d 1219, 1221 (App. 1994). Reversal is not required absent prejudice that affects a substantial right of the appellant. *Id.* "We will not presume prejudice; it must appear affirmatively in the record." *Id.* at 568-69, 869 P.2d at 1221-22.

1. Substantial performance

¶61 DMMA argues that the interim repairs satisfied the 100-year flood standard and proved that DMMA substantially performed its obligations as required by the CC&Rs. Therefore, according to DMMA, the Revised Arizona Jury Instruction ("RAJI") explaining substantial performance (RAJI (Civil) Contracts 10) should have been given. Substantial performance is a concept most readily applicable to construction contracts where one party has performed a substantial portion of the contract but the other contracting party refuses to pay or honor its end of the bargain because the performance is not fully complete. *See*

15 Williston on Contracts § 44:52 (4th ed. 2011). Even assuming the jury agreed that DMMA had substantially performed its obligations, DMMA could still be liable for damages for breach. *See* Restatement (Second) of Contracts § 237 cmt. d (1981) ("If there has been substantial although not full performance, the building contractor has a claim for the unpaid balance and the owner has a claim only for damages.").

¶62 SC34, however, already honored its end of the bargain. It purchased a lot and no evidence was introduced that SC34 failed to pay its HOA assessment fees. DMMA was obligated to maintain and support the 100-year storm standard in all of its drainage systems. DMMA's experts testified that the interim repairs were sufficient to meet the 100-year storm standard. The jury decided otherwise based on opposing testimony presented by SC34. We conclude on this record that a substantial performance instruction was not required by the law and may have confused the jury.

2. Impracticability

¶63 DMMA contends that the trial court improperly denied its request for an impracticability jury instruction based on RAJI (Civil) Contracts 29. DMMA also argues that the trial court improperly precluded evidence of DMMA's financial situation that would have warranted an impracticability instruction.

¶64 "[W]e will not disturb a trial court's rulings on the admission or exclusion of evidence unless a clear abuse of discretion appears, or the court misapplied the law, and prejudice results." *Wendland v. AdobeAir, Inc.*, 223 Ariz. 199, 202, ¶ 12, 221 P.3d 390, 393 (App. 2009).

¶65 The trial court excluded evidence about DMMA's financial status. DMMA subsequently made two offers of proof. DMMA's witnesses would have testified that DMMA lacked sufficient funds to repair the drainage system and therefore it was impracticable for DMMA to make the repairs.

¶66 In support of its argument that its financial condition created an impractical condition beyond its control so that it could not perform its contractual obligation, DMMA relies on *Mobile Home Estates, Inc. v. Levitt Mobile Home Sys., Inc.*, 118 Ariz. 219, 222, 575 P.2d 1245, 1248 (1978). *Mobile Home* defines commercial frustration as a situation in which a "contract is discharged where its purpose is frustrated and rendered impossible of performance by a supervening event not reasonably foreseeable." *Id.* (internal quotation omitted).

¶67 Pursuant to DMMA's requested RAJI (Civil) Contracts 29, impracticable means "something more than that the performance would have been somewhat more difficult or costly." DMMA's own offer of proof explained that it actually had several options to remedy Lot 34: it could have raised membership

assessments; asked SC34 to cover the costs until liability was settled, or taken out a loan to cover any shortfall in monies to pay the drainage system repairs. DMMA chose not to pursue any of those alternatives. Moreover, twice during the litigation, DMP offered to substantially fund the costs for construction repairs.

¶68 DMMA had reasonable alternatives to ensure it fulfilled its obligations. The trial court did not abuse its discretion when it rejected the impracticability instruction and the related testimony.

3. Reasonable homeowners' association instruction

¶69 DMMA's next argues the court erred in denying its request to instruct the jury that the HOA must have acted as a reasonable HOA would under similar circumstances. The trial court denied the jury instruction and excluded evidence of an HOA standard of care because the relevant issue before the jury was breach of contract. The trial court, however, gave the following jury instruction entitled "Breach of the Covenants, Conditions and Restrictions":

> SC34, LLC alleges that [DMMA] breached its obligations pursuant to the recorded [CC&Rs] by failing to comply with § 8.1 and §8.1(a) of the Master Association CC&Rs and Section 9.2 of the Sunset Canyon CC&R[]s. *Those sections require [DMMA] to use a reasonable standard of care in providing for the repair, management and maintenance of the drainage infrastructure*.

(Emphasis added.)

¶70 DMMA supports its argument for an HOA standard of care instruction with *Tierra Ranchos Homeowner's Ass'n v. Kitchukov*, 216 Ariz. 195, 201, ¶ 25, 165 P.3d 173, 179 (App. 2007). In *Tierra Ranchos*, we adopted the Restatement (Third) of Property Servitudes § 6.13 (2000), to help analyze discretionary decisions made by HOAs. *Id.* at 201-02, ¶¶ 26-27, 165 P.3d at 179-80. DMMA cites § 6.13 cmt. c for the general proposition that an HOA has the "duty to use ordinary care to manage the property and financial affairs of the community." DMMA concludes its proposed instruction was warranted under the law and permits DMMA to present evidence concerning its finances and reliance on expert testimony.

¶71 We are not persuaded that the jury needed a specific instruction defining the standard of care for an HOA. The standard of care expressed under Restatement § 6.13 (1) states that it applies only "in addition to duties imposed by statute and the governing documents." We have held that even when CC&Rs authorize the exercise of discretion when complying with its provisions, "the association still must comply with the [CC&Rs] requirements." *Johnson v. Pointe Comm'n Ass'n Inc.,* 205 Ariz. 485, 490, ¶ 24, 73 P.3d 616, 621 (App. 2003).

¶72 In this case, the governing documents are the CC&Rs,

which provide the basis for SC34's breach of contract claim. The jury instructions explained under the CC&Rs, DMMA was required to use a "reasonable standard of care" in repairing the drainage system. The jury was asked to evaluate the evidence and determine whether DMMA's actions were reasonable *according to its obligations under the CC&Rs*. The question of reasonableness is generally a question for the jury. *See e.g. Booth v. State,* 207 Ariz. 61, 65, ¶ 10, 83 P.3d 61, 65 (App. 2004).

¶73 Furthermore, DMMA provided testimony that it acted reasonably under the circumstances. DMMA's expert Bill Overton, a former DMMA community manager and certified community association manager, testified that he had instructed HOA boards on executing a reasonable standard of care. Overton also testified that it was reasonable for the HOA board to rely on an engineer's analysis and recommendations when he was asked to explain a hypothetical drainage issue. The jury also heard from DMMA's engineering experts and the recommendations those experts made to the HOA board.

¶74 The jury therefore was able to discern whether DMMA acted reasonably in accordance with the contractual standard. We assume the jury found SC34's evidence that DMMA had not maintained a reasonable standard of care to be more persuasive because it awarded damages to SC34. *See Estate of Reinen v. N.*

Ariz. Orthopedics, Ltd., 198 Ariz. 283, 287, ¶ 12, 9 P.3d 314, 318 (2000) (stating witness credibility and the weight of the testimony is within the province of the jury).

¶75 We conclude that the trial court properly instructed the jury and that no further instruction regarding reasonableness was necessary.

4. Allocation of damages

¶76 DMMA contends that it was entitled to an allocation of damages instruction because during the final pretrial conference, the trial court stated to DMP, DMMA, and SC34: "The jury will be instructed to determine loss of use damages and then apportion those loss of use damages between DMMA and DMP based upon the evidence that is presented." (Emphasis omitted). The trial court was ruling on DMP's motion *in limine* when it made the finding.

¶77 DMP, however, settled with SC34 prior to trial. The only defendant at trial was DMMA and the only remaining claim aside from injunctive relief was for breach of contract. In *Fidelity and Deposit Co. of Md. v. Bondwriter Sw., Inc.*, we held that comparative fault principles including allocation of fault have no application to a breach of contract claim. 228 Ariz. 84, 88-89, ¶¶ 19-23, 263 P.3d 633, 637-38 (App. 2011) (stating that tort law is based on fault, while contract law is based on recovery of the benefit of the bargain) (citations omitted).

Therefore, based on our holding in *Fidelity*, the trial court properly denied DMMA's requested jury instructions for an allocation of damages.

B. Exclusion of related evidence

¶78 DMMA next argues that the trial court made several evidentiary errors by: 1) precluding expert testimony to discuss the professional standard of care incorporated in the CC&Rs; and 2) precluding evidence of DMMA's finances.

¶79 As mentioned above, we review a trial court's exclusion of evidence for an abuse of discretion. *See Wendland*, 223 Ariz. at 202, ¶ 12, 221 P.3d at 393. Although, we have essentially addressed the first issue raised here, *see supra* ¶¶ 69-75, we address it again briefly in the evidentiary context.

1. Expert testimony

¶80 The basis for DMMA's first argument is that section 8.1 of the CC&Rs requires the board to use a reasonable standard of care in providing for repairs, management, and maintenance. DMMA concedes that a breach of contract case generally does not delve into a standard of care analysis. DMMA argues, however, that because this contract required the HOA to follow a particular standard of care, expert testimony was necessary to explain the appropriate standard to the jury.

¶81 We are not persuaded by DMMA's argument. In *Woodward v. Chirco Const. Co.,* 141 Ariz. 520, 521, 687 P.2d 1275, 1276

(App. 1984), we quoted *People v. Cole*, 301 P.2d 854, 856 (Cal. 1956), and determined that:

> [T]he decisive consideration in determining the admissibility of expert opinion evidence is whether the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness or whether, on the other hand, the matter is sufficiently beyond the common experience that the opinion of an expert would assist the trier of fact.

Laypersons, including jurors, are the people that make up the various HOA boards found within our state — including DMMA. An HOA board's actions and responsibilities are generally within the grasp of laymen and jurors. We are not prepared to conclude, as DMMA argues, that SC34 needed to establish the breach of a "specialized" standard of care. The relevant issue was a breach of contract made between the HOA and the layman homeowners. *See Asphalt Eng'rs, Inc. v. Galusha*, 160 Ariz. 134, 136, 770 P.2d 1180, 1182 (App. 1989) (concluding the jury could determine without expert testimony whether the contract was breached). Furthermore, as we explained above, DMMA was able to present evidence through testimony of the reasonableness of DMMA's actions under the CC&Rs agreement. The trial court did not abuse its discretion by excluding DMMA's proposed expert witness testimony.

ii. DMMA financial information

¶82 DMMA's final evidentiary error argument turns on section 5.2 of the CC&Rs. DMMA claims evidence of the HOA's finances was highly relevant because section 5.2 expressly limits how much the HOA board can spend in a given year on maintenance and repairs. According to DMMA, the final repair cost would exceed its five percent cap on annual expenditures, thus the HOA board acted reasonably by only authorizing the interim repairs.

¶83 In DMMA's motion *in limine* filed on August 20, 2010, DMMA, not SC34, argued that evidence of DMMA's finances or reserves should not be admitted, unless the trial court agreed to allow DMMA to present an expert to testify to DMMA's "specialized" standard of care. The trial court gave no explanation why it precluded either party from submitting evidence regarding DMMA's respective financial condition. The trial court limited any discussion about financial expenditures to issues related only to the drainage infrastructure.

¶84 We conclude that the trial did not abuse its discretion in excluding evidence of DMMA's financial condition. The trial court could have concluded it would be inappropriate and confusing to allow either party to argue DMMA's finances, which has limited relevance to the breach of contract claim. Furthermore, DMMA's offer of proof describing its underfunded

financial condition was actually applicable to the Sunset Canyon HOA, not DMMA itself. Sunset Canyon was neither a party to this suit nor the party responsible for repairs. DMMA, as the Master Association according to the CC&Rs, was the party responsible for the maintenance and repair of the common areas, not Sunset Canyon. We find no error excluding this evidence.

IV. Motion to Continue Trial

¶85 Lastly, DMMA argues that the trial court should have granted DMP's motion to continue the trial (in which DMMA joined) so that DMMA could make the permanent repairs and implement a final maintenance plan. DMMA claims it was severely prejudiced because it was forced to admit to the jury that its interim repairs were unsatisfactory, that it had agreed to additional repairs, and that those repairs were incomplete.

¶86 We review a denial of a motion to continue for an abuse of discretion. *See Ornelas v. Fry*, 151 Ariz. 324, 329, 727 P.2d 819, 824 (App. 1986). "Inherent in the concept of abuse of discretion is a showing of prejudice resulting from the exercise of that discretion." *E. Camelback Homeowners Ass'n v. Ariz. Found. for Neurology and Psychiatry*, 18 Ariz. App. 121, 128, 500 P.2d 906, 913 (1972).

¶87 At oral argument before the trial court, DMMA asserted that if the court continued the trial for ninety days, in all probability, the repairs would be complete and the diminution in

value damages would be moot. SC34 countered that DMMA had a track record of failing to follow court orders and a record of creating ongoing delay. SC34 pointed out that it brought legal action against DMMA in October of 2007. The trial court initially set a firm trial date for May 17, 2010. On April 6, 2010, at DMMA's request, the trial court continued the trial date from May 17 to September 13, 2010. Thus, DMMA had already been granted more time.

¶88 After hearing argument from all parties, the trial court denied the second motion to continue. Nonetheless, the trial court concluded, against SC34's objection, that it was fair to allow the DMMA to present evidence at trial of DMMA's anticipated or expected repairs to the drainage system in order for the jury to determine whether the claimed damages existed.

¶89 We conclude that the trial court did not abuse its discretion by denying DMMA's motion to continue under these circumstances. SC34 was entitled to its day in court. There was no guarantee that the permanent repairs would be accomplished even given an additional 90 days. The court accommodated DMMA by allowing it to present evidence of its engineering and maintenance plans. The court decided that a determination of damages was a factual question for the jury. *See Acheson v. Shafter*, 107 Ariz. 576, 579, 490 P.2d 832, 835 (1971) ("In Arizona, the law is well-settled that the amount of

an award for damages is a question peculiarly within the province of the jury"). The jury was free to reject SC34's theories on damages and accept DMMA's proffered evidence. Witnesses and experts testified about repairs both interim and permanent. The jury was charged with solving this dispute. We find no abuse of discretion.

CONCLUSION

¶90 Based on the foregoing analysis, we affirm the judgment of the trial court.

¶91 Both parties ask for attorneys' fees and costs based on A.R.S. §§ 12-341.01 (Supp. 2012), 12-342 (2003), and Arizona Rules of Civil Appellate Procedure (ARCAP) 21. SC34 is the successful party but in our discretion we decline to award any attorneys' fees. We will award SC34 its taxable costs on appeal contingent upon its compliance with ARCAP 21.

/s/
_____
JOHN C. GEMMILL, Judge

CONCURRING:

/s/
_____
PATRICIA A. OROZCO, Presiding Judge

/s/
_____
PHILIP HALL, Judge