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

TROON H PAD, L.L.C., a Nevada limited liability company; TROON K PAD, L.L.C., a Nevada limited liability company, Plaintiffs/Appellees, v. FIRST AMERICAN TITLE INSURANCE COMPANY, a California corporation, Defendant/Appellant.	1 CA-CV 11-0491 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-026473

The Honorable Jeanne M. Garcia, Judge

AFFIRMED

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P O R T L E Y, Judge

¶1 Appellant First American Title Insurance Company ("First American") appeals the judgment entered after a jury found it liable for bad faith and punitive damages. First American argues that the trial court erred by denying its motion in limine, motion for new trial, and motion for judgment as a matter of law. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Three Sticks, LLC[1] ("Three Sticks") purchased two parcels of real property for development. Three Sticks purchased title insurance on the parcels through Camelback Title ("Camelback"), an agent for First American. The First American title insurance policies, however, omitted that residential Conditions, Covenants and Restrictions ("CC&Rs") governed the parcels. Subsequently, Three Sticks transferred its ownership interests in the parcels to Troon H Pad, L.L.C. and Troon K Pad, L.L.C. (collectively "Troon"). Troon went to Camelback to ensure their interests were protected, but Camelback issued

[1] Three Sticks' manager was John Vatistas ("Vatistas").

"Fairway Endorsements," instead of Additional Insured ("AI") Endorsements.[2]

¶3 Before they began developing the parcels, Troon discovered the CC&Rs and the incorrect endorsements. After being informed of the mistakes, Camelback issued the correct endorsements. Troon subsequently requested First American to provide coverage for the CC&Rs under the policies. The claim was denied because First American did not have a record that Camelback had issued the corrected endorsements. After Troon submitted additional information and met with First American on September 10, 2008, First American again denied the claim because the policies were issued to Three Sticks and not Troon.

¶4 Troon sued First American and Camelback for breach of contract and negligence.[3] First American thereafter moved for summary judgment, arguing that Three Sticks, rather than Troon, was the insured under the policies. After Troon responded, First American accepted Troon's claim for coverage. Despite accepting the claim, First American filed a reply and argued that fact issues existed regarding the genuineness of the endorsements. The court, however, denied the motion without considering First American's reply.

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[2] Fairway Endorsements provide continuing coverage when a change in LLC membership occurs. AI Endorsements, however, transfer title insurance from one purchaser to another.

[3] Camelback was dismissed from the lawsuit before trial.

¶5 Troon filed its amended complaint on June 29, 2009, adding allegations that First American had acted in bad faith and seeking punitive damages. First American subsequently accepted coverage of Troon's claims, and the trial proceeded only on the issues of breach of contract, bad faith, damages and punitive damages.

¶6 Before trial, First American filed an unsuccessful motion in limine to preclude Troon from "offering any evidence in support of, or making any references to, their insurance bad faith claim." After Troon presented its case, First American unsuccessfully moved for judgment as a matter of law ("JMOL") on Troon's bad faith and punitive damages claims. The jury subsequently awarded Troon $627,000 in contract damages, $200,000 in bad faith damages, and $750,000 in punitive damages. First American unsuccessfully renewed its JMOL motion and moved for new trial. This appeal followed.

DISCUSSION

¶7 First American raises five issues on appeal.[4] First American's principle argument, however, is that Troon failed to

[4] First American argues that the court erred when the court denied its: (1) motion in limine; (2) JMOL on Troon's claim for bad faith and punitive damages; and (3) motion for new trial. First American also argues that the punitive damages award is constitutionally excessive. First American's last argument is contingent – if we agree with it on the other issues, then we should remand the award of attorneys' fees to Troon for redetermination.

disclose its theory and computation of bad faith damages and the trial court failed to enforce the disclosure rules and preclude Troon from presenting any evidence of bad faith damages to the jury.

I. Denial of the Motion in Limine

¶8 First American contends that the court improperly denied its motion in limine because Troon had not disclosed evidence of bad faith damages. Although First American argued that Troon had violated the disclosure requirements of Arizona Rule of Civil Procedure ("Rule") 26.1(a)(7), the court denied the motion because "the damages of policy benefits and attorneys' fees have been disclosed and . . . punitive damages require no further disclosure." We review a trial court's ruling on a motion in limine for an abuse of discretion. *Warner v. Sw. Desert Images, LLC*, 218 Ariz. 121, 133, ¶ 33, 180 P.3d 986, 998 (App. 2008); *see also Soto v. Brinkerhoff*, 183 Ariz. 333, 335, 903 P.2d 641, 643 (App. 1995) (stating that we review a ruling on discovery and disclosure issues for an abuse of discretion). An abuse of discretion occurs where the court's reasons for its actions are "clearly untenable, legally incorrect, or amount to a denial of justice." *State v. Chapple*, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n.18 (1983).

¶9 Rule 26.1 "requires a claimant to disclose a computation and the measure of damage alleged, the documents and

testimony on which damages are based and the names, addresses and telephone numbers of damage witnesses." *SWC Baseline & Crimson Investors, L.L.C. v. Augusta Ranch Ltd. P'ship*, 228 Ariz. 271, 284, ¶ 47, 265 P.3d 1070, 1083 (App. 2011) (quoting Rule 26.1(a)(7)) (internal quotation marks omitted). The "disclosure requirements are intended to allow parties a reasonable opportunity to prepare." *Id.* (internal quotation marks omitted).

¶10 Despite First American's arguments relying on *Hoffman v. Construction Protective Services, Inc.*, 541 F.3d 1175 (9th Cir. 2008), the trial court denied the motion in limine. In addition to determining that Troon did not need expert testimony to prove its bad faith claim, the court found that Troon's disclosures about damages were sufficient. We agree that Troon's disclosures before and after the amended complaint was filed provided First American with a reasonable opportunity to prepare for trial.

¶11 Unlike *Hoffman* where the lead class action plaintiffs provided no damage calculation for any class member other than themselves and were precluded by the district judge from introducing damage evidence at trial pursuant to the federal rules of civil procedure, *id*. at 1177-78, Troon provided information that allowed First American to conduct discovery and prepare for trial consistent with the state rules of civil

procedure. For example, First American was put on notice that its delays were hindering Troon's ability to complete the development of its parcels within the remaining five-year construction easement window. Additionally, Troon disclosed that they sought "damages incurred as a direct and proximate result of the material breaches by [First American] in denying liability as provided under the Policies," and "[c]osts and attorneys' fees." Although the initial Rule 26.1 statement provided that Troon would "base [its] computation of damages on the exhibits attached to the Complaint, the testimony of [its] agents and representatives, and the testimony of any expert that may be retained[,]" its supplemental disclosures clarified that Troon was "seeking damages for the diminution in market value of the parcels," "damages incurred as the direct and proximate result of the unknown title defect as well as First American's breach in failing and refusing to acknowledge the Troon Entities as insureds under the policies or to pay benefits . . . under the policies," and "punitive damages for First American's tort[i]ous bad faith conduct in an amount to be determined at trial."

¶12 Although Troon disclosed that it was seeking to recover $725,000 for the diminution of value of the parcel, First American also knew, even without specific numbers, that Troon was seeking to recover attorneys' fees and costs as part

of its bad faith claim. First American had sufficient timely information to allow it to prepare to litigate the bad faith damages claim. *See*, *e.g.*, *SWC Baseline*, 228 Ariz. at 284, ¶ 47, 265 P.3d at 1083 (citing *Waddell v. Titan Ins. Co.*, 207 Ariz. 529, 537, ¶ 33, 88 P.3d 1141, 1149 (App. 2004)). As a result, and following Arizona's civil procedural requirements, the court did not abuse its discretion by denying First American's motion in limine.

II. Denial of JMOL Motion

¶13 First American also contends that the court erred by denying its motion for JMOL for bad faith and punitive damages. In the motion, First American claimed that "[t]he evidence [was] insufficient to submit the bad faith claim to the jury" because "[b]ad faith damages here could be based on nothing but speculation." First American also argued that punitive damages could not be considered in the absence of bad faith compensatory damages, especially because its conduct did not rise to the requisite level necessary to award punitive damages.

¶14 We review the denial of a JMOL motion de novo. *Hudgins v. Sw. Airlines, Co.*, 221 Ariz. 472, 486, ¶ 37, 212 P.3d 810, 824 (App. 2009). We view the evidence and all reasonable inferences in the light most favorable to Troon, the nonmoving party, *id.,* and "in a light most favorable to upholding the jury verdict." *Nardelli v. Metro. Grp. Prop. & Cas. Ins. Co.*, 634

Ariz. Adv. Rep. 11, ¶ 18, 277 P.3d 789, 794 (App. May 1, 2012); *Sec. Title Agency, Inc. v. Pope*, 219 Ariz. 480, 498, ¶ 83, 200 P.3d 977, 995 (App. 2008). We will overturn the denial of a "motion for JMOL [only] if the facts supporting the claim had so little probative value, given the quantum of evidence required, that reasonable people could not agree that such damages were in order." *Hudgins*, 221 Ariz. at 486, ¶ 37, 212 P.3d at 824 (quoting *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990)) (internal quotation marks omitted); Ariz. R. Civ. P. 50(a)(1) (explaining that a JMOL is appropriate when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue").

(A) Bad Faith Damages

¶15 First American argues that we should reverse the JMOL ruling on bad faith damages because Troon failed to disclose its bad faith damage computation, and the evidence disclosed was insufficient to support the bad faith damages verdict of $200,000. We disagree.[5]

[5] Despite Troon's argument to the contrary, First American preserved the issue for appeal because its motion in limine adequately preserved the disclosure issue. *See State v. Lichon,* 163 Ariz. 186, 189, 786 P.2d 1037, 1040 (App. 1989) (stating that a motion in limine will preserve an issue for appeal if "the objectionable matter is brought to the attention of the trial court in a manner sufficient to advise the court that the error was not waived").

¶16 Our review of a JMOL ruling is confined to examining whether sufficient evidence supported the verdict. Ariz. R. Civ. P. 50(a)(1). Because we have determined that the court did not abuse its discretion by denying First American's motion in limine, we need not revisit the issue.

¶17 First American next contends that our decision in *SWC Baseline* requires a reversal of the bad faith damages award. Again, we disagree.

¶18 In *SWC Baseline*, we examined whether the plaintiff had disclosed its actual damages stemming from the wrongful recording of a forged real estate property document. 228 Ariz. at 284, ¶ 50, 264 P.3d at 1083. We found that the plaintiff's "initial disclosure statement argued its damages included reasonable rent, and its supplemental disclosure statement asserted it had been damaged by the value of the deprivation of [its] rights to use and enjoyment of its property." *Id.* at ¶ 48 (internal quotation marks omitted). Moreover, despite the fact that the plaintiff had never "disclos[ed] the sum it would seek in damages at trial," *id.*, the plaintiff presented expert testimony and a comparable lease and "argued it had suffered lost rent of $765 a month." *Id.* at ¶ 49. We rejected the argument that the disclosure statements had been sufficient because the plaintiff never "revealed that it would claim $765 a month in damages" and "did not disclose its contention that it

could have entered into a lease at the same rate . . . but for the alleged wrongful recordings." *Id.* at ¶ 50.

¶19 Here, Troon disclosed that they sought

> [D]amages for the diminution in market value of the parcels as measured by the difference between the value of each parcel without the encumbrance of the CC&R's and the value of each Parcel with the CC&R's in place. Per the June 30, 2009 appraisal report prepared by Dennis Lopez, this figure is no less than $725,000.00, when assessed as of the date that the encumbrance was discovered, i.e., May 6, 2008. The Troon Entities also seek all damages incurred as the direct and proximate result of the unknown title defect as well as First American's breach in failing and refusing to acknowledge the Troon Entities as insureds under the policies or to pay benefits to Plaintiffs under the policies. Such damages include fees incurred in contemplation of developing the project, including architecture and engineering services (in amounts to be disclosed), as well as services provided by Plaintiffs' real estate consultant . . . .[6] Plaintiffs . . . also seek their attorneys' fees and costs incurred herein as to each and every count contained in their First Amended Complaint, pursuant to A.R.S. § 12-341.01 and other applicable law, together with punitive damages for First American's tort[i]ous bad faith conduct in an amount to be determined at trial.

¶20 First American contends that more was needed than the computation of unpaid policy benefits leading to the diminution

[6] The court granted First American's motion for summary judgment on the recoverability of the fees for "architect, engineering, and real estate consulting" services because Troon conceded that it could not discover expenses before it discovered the mistake in the title insurance policies.

of the parcels' value. First American omits that it was provided disclosure information to allow it to prepare for trial. *See* ¶ 11. Additionally, a plaintiff suing for breach of contract and bad faith can clearly recover more than contract damages. *See Rawlings v. Apodaca*, 151 Ariz. 149, 161, 726 P.2d 565, 577 (1986) ("When . . . tort damages are recoverable, plaintiff is not limited to the economic damages within the contemplation of the parties at the time the contract was made" but instead "may recover all the losses caused by defendant's conduct."). The "more" could include monetary losses, which can include expenses such as costs and attorneys' fees, as well as non-pecuniary expenses such as frustration and inconvenience.[7] *See Filasky v. Preferred Risk Mut. Ins. Co.*, 152 Ariz. 591, 597, 734 P.2d 76, 82 (1987) (permitting compensatory damages for an

[7] The final instructions recognized the broad approach to the measure of damages and provided that:

> If you find that First American is liable to Plaintiffs on their bad faith claims, you must then decide the full amount of money that will reasonably and fairly compensate each Plaintiff for each of the following elements of damages proved by the evidence to have resulted from First American's breach of the duty of good faith and fair dealing:
>
> 1. The *unpaid benefits of the policies*;
>
> 2. Monetary loss or damage experienced.

(Emphasis added.)

insurer's bad faith that included "[d]amages for pain, humiliation, or inconvenience, as well as *pecuniary* losses for expenses such as attorney's fees") (emphasis added). Consequently, Troon's disclosure was sufficient to allow First American to prepare for trial and, when considering the resulting evidence, to allow the jury to compute compensatory bad faith damages.

¶21 Additionally, and unlike the plaintiff in *Walter v. Simmons*, who "presented absolutely no evidence from which a jury could reasonably compute the amount of this damage," 169 Ariz. 229, 236, 818 P.2d 214, 221 (App. 1991), Troon presented disclosed expert testimony that the CC&Rs had diminished the parcels' value by twenty-five percent, and demonstrated that First American had paid nothing to resolve the claim since the discovery of the CC&Rs impeded the development of the parcels. Troon's expert, Dennis Lopez, testified that the vacant land parcels had been purchased for $2,850,000 in 2005. Although the value of the property had increased to $2,900,000, the CC&Rs had reduced the value of the parcels to $2,175,000, a diminution of $725,000. As a result, Lopez's testimony, and Vatistas's testimony about Troon's attorneys' fees, as well as the inconvenience and frustration felt by First American's behavior, provided sufficient evidence to permit the jury to compute the bad faith damages.

¶22 First American next argues that there was no evidence that supported the $200,000 bad faith award because no evidence showed that First American's delay in stipulating to coverage caused Troon any losses. Although it is undisputed that Troon had to prove that First American's "breach was a cause of Plaintiffs' damages," we disagree with First American's argument that Troon did not present sufficient evidence of causation for the jury to make the damages award.

¶23 In addition to Lopez, the jury heard from Suzanne Johnson ("Johnson"), a consultant for Troon. She spoke with First American's in-house lawyer, Douglas Thiel ("Thiel"), after discovering that the residential CC&Rs governed the parcels. She told him "time was of the essence" because the properties were subject to a five-year construction easement and the matter "needed to be resolved quickly." Because the issue remained unresolved, Troon's development of the parcels "came to a complete halt." In fact, after a meeting on September 10, 2008, Johnson emailed Thiel to emphasize that "th[e] claim needed to be resolved." Thiel never responded to that email or others Johnson sent to him. Thiel, moreover, never suggested that First American "would assist in any way in that process by payment or otherwise." In fact, Thiel admitted that, despite being asked to approach the Troon North Homeowners' Association

to determine if they would release Troon from the CC&Rs, he did nothing to explore the option.

¶24 The jury also heard about the difficulty Troon faced to get First American to accept coverage while it was telling the court that the AI Endorsements were manufactured. In addition, Vatistas testified that Troon had lost an investor because the title defect affected the ability of the parcels to be developed. In addition to his other testimony, Vatistas testified that:

> if there were not the delays, the back and forth, you're covered, you're not covered, you're a fraud, you're not a fraud . . . it wouldn't have delayed my ability to develop the property or the properties. My construction easement expired . . . . This month it expires. I can't build anything on it, none. . . . How am I going to refinance it? There's no way to do that.

Accordingly, and viewing the evidence in Troon's favor, we conclude that there was sufficient evidence to support the jury's bad faith damage award.

¶25 First American also contends that the only non-speculative evidence supporting the bad faith award was the claim that Troon had "close to $50,000 in attorneys' fees," and that sum could not support a damage award of $200,000.[8] Despite

[8] Troon argues that First American waived the argument because it was not raised in the trial court. First American, however, raised the issue in its motion for new trial and argued that "[t]he only testimony to which a dollar amount was attached was

the argument, the court instructed the jury that it could consider the unpaid benefit of the policies along with "[m]onetary loss," which would include the attorneys' fees, "or damage experienced." The jury, as a result, was free to consider the inconvenience and frustration Troon experienced after discovering the CC&Rs, their omission from the title insurance policies and First American's resulting behavior. Moreover, because the jury, as the finder of fact, has great latitude in fixing the amount of any tort award, we will not disturb the award despite any uncertainty so long as the parties do not dispute that some damage resulted from the tortious conduct. *Rawlings,* 151 Ariz. at 161, 726 P.2d at 577; *see also Acuna v. Kroack*, 212 Ariz. 104, 114, ¶ 36, 128 P.3d 221, 231 (App. 2006) (stating "[w]e will not disturb a jury's damage award unless it is 'so unreasonable and outrageous as to shock the conscience of the court'"). Consequently, there was sufficient evidence to support the bad faith damage verdict.

(B) Punitive Damages

¶26 First American asserts that the trial court erred by denying its JMOL motion because there was insufficient evidence to support the punitive damages award.[9] Punitive damages are

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the statement by John Vatistas that he spent $50,000 on attorneys[']] fees to file the complaint."

[9] Troon argues that First American waived its challenge to punitive damages because it was not specifically raised in the

properly awarded in egregious tort cases "to punish the wrongdoer and deter others from emulating the misconduct." *Hudgins*, 221 Ariz. at 486, ¶ 38, 212 P.3d at 824; *see also Rawlings*, 151 Ariz. at 161, 726 P.2d at 577 ("[P]unitive damages may not be awarded in a bad faith tort case unless the evidence reflects 'something more' than the conduct necessary to establish the tort."). Because punitive damages are reserved for egregious cases, they are only appropriate "if clear and convincing evidence exists that the tortfeasor possessed an 'evil mind' while engaging in aggravated and outrageous conduct." *Hudgins*, 221 Ariz. at 486, ¶ 38, 212 P.3d at 824. Moreover, to recover punitive damages, a plaintiff must demonstrate that the tortfeasor's conduct was the proximate cause of the harm. *Saucedo ex rel. Sinaloa v. Salvation Army*, 200 Ariz. 179, 182-83, ¶ 13, 24 P.3d 1274, 1278-79 (App. 2001).

¶27 In reviewing the issue, we first examine whether the evidence demonstrated that First American's conduct was "aggravated, outrageous, and performed with an 'evil mind.'"

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motion to renew its JMOL (hereinafter "50(b) motion") or its motion for new trial. First American's motion for JMOL (hereinafter "50(a) motion"), however, challenged punitive damages. Because the issue was raised in the 50(a) motion and First American renewed the 50(a) motion after trial, the issue has been preserved for appeal. *See La Bonne v. First Nat'l Bank of Ariz.*, 75 Ariz. 184, 190, 254 P.2d 435, 439 (1953) (holding that appellees' position was waived because nothing in appellees' 50(a) motion *or* 50(b) motion supported the appellees' present position) (emphasis added).

Hudgins, 221 Ariz. at 487, ¶ 40, 212 P.3d at 825. A person acts with an evil mind if it can be inferred from his statements, expressions, conduct, or objectives that he is "consciously aware of the evil of his actions," or "of the spitefulness of his motives." *Id.* However, "[m]ere gross negligence or even reckless disregard of circumstances" will not suffice to "support an award of punitive damages." *Id.*

¶28 Additionally, in the context of insurance bad faith, an insured seeking punitive damages must show that the insurer "unjustifiably damaged the objectives sought to be reached by the insurance contract," and "was guided by an evil mind which either consciously sought to damage the insured or acted intentionally, knowing that its conduct was likely to cause unjustified, significant damage to the insured." *Rawlings*, 151 Ariz. at 162, 726 P.2d at 578; *see also Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 333, 723 P.2d 675, 682 (1986) ("The knowledge of the harm its denial was causing the [plaintiff]s is definitely relevant to proving an 'evil mind.'"). Moreover, a variety of conduct can constitute an "evil mind," such as "fraudulent conduct and deliberate, overt and dishonest dealings." *Rawlings*, 151 Ariz. at 163, 726 P.2d at 579 (quoting *Farr v. Transamerica Occidental Life Ins. Co.*, 145 Ariz. 1, 8, 699 P.2d 376, 383 (App. 1984)) (internal quotation marks omitted); *see also Farr*, 145 Ariz. at 8, 699

P.2d at 383 (holding that "a willful and knowing failure to process or pay a claim known to be valid . . . will support punitive damages"). An insurer whose conduct is not "aggravated, outrageous, oppressive or fraudulent," however, does not act with an "evil mind" even if it "follows a tough claims policy." *Linthicum*, 150 Ariz. at 333, 723 P.2d at 682 (internal quotation marks omitted); *see also Filasky*, 152 Ariz. at 598, 734 P.2d at 83 (holding that an insurer did not act with an "evil mind" even though the insured "frustrated [the plaintiff]'s attempts at resolving her claims by engaging in such dilatory tactics as not returning her telephone calls, ignoring her pleas for personal assistance in completing forms, repeating requests with which [the plaintiff] had already complied, and rejecting [plaintiff's] claims" without providing any reasons for doing so).

¶29 Because our review is confined to determining whether the court erred by denying First American's JMOL motion, we only review whether there was a "legally sufficient evidentiary basis" for the judge to allow the jury to decide the issue. Ariz. R. Civ. P. 50(a)(1) (explaining that a JMOL is appropriate when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue"). A motion for JMOL on an "issue of punitive damages must be denied if a reasonable jury

could find the requisite evil mind by clear and convincing evidence." *Thompson v. Better-Bilt Aluminum Prods. Co.*, 171 Ariz. 550, 558, 832 P.2d 203, 211 (1992). Moreover, in "denying such a motion[,] the judge is not a fact finder," so "the evidence and all reasonable inferences that may be drawn from the evidence should be construed in a light most favorable to the non-moving party." *Id.* Finally, the jury "is in the best position to consider whether" First American's "motive or conduct evinced the 'evil mind,'" *Rawlings*, 151 Ariz. at 163, 726 P.2d at 579, so the "jury's decision to award punitive damages should be affirmed if any reasonable evidence exists to support it." *Filasky*, 152 Ariz. at 599, 734 P.2d at 84; *see also Thompson*, 171 Ariz. at 558-59, 832 P.2d at 211-12 (holding that "[w]hile any single piece of evidence, taken alone, might not be clear and convincing evidence of an 'evil mind,' several such pieces of evidence, taken together, might clear the evidentiary hurdle" and ultimately concluding that there was a "sufficient basis to send the punitive damages issue to the jury" because the defendant "was pursuing a course of conduct to serve its own interests despite knowledge that its acts were wrongful"); *cf. Filasky*, 152 Ariz. at 598, 734 P.2d at 84 (finding that the evidence that the defendant acted with an evil mind was "slight and inconclusive at best," so the "trial judge erred in submitting the issue of punitive damages to the jury").

¶30 The key issue was whether First American intentionally delayed the processing of Troon's claim despite its knowledge of the AI Endorsements, whether through its agent or directly. First American initially denied the claim because Three Sticks, rather than Troon, was insured, and Troon never submitted the correct endorsements to First American. Despite the knowledge of its agent who issued the AI Endorsements and the September 2008 meeting to resolve the endorsement issue, Thiel never asked about the endorsements and "did absolutely nothing to determine . . . whether or not there w[ere] any endorsements . . . in [First American's] files." And, he admitted that he "consciously disregarded doing any further investigation to simply find out why the wrong endorsements were issued." He compounded his negligence by sending a letter after the meeting that stated: "we have completed our investigation" and "[i]t appears from our examination of the recorded documents that . . . [neither] Three Sticks nor the Equitable Troon entities have any rights under the policies."

¶31 Despite the investigation, First American later discovered the AI Endorsements, told Troon that it was accepting the claims, but publicly questioned the genuineness of the endorsements in its reply to its motion for summary judgment by stating that the "endorsements were . . . manufactured." Although it was free to question the documents, First American

did so after contacting Camelback and being apprised that the AI Endorsements were genuine.

¶32 The court listened to the testimony and considered that the evidence was sufficient to go to the jury. After being properly instructed, the jury was free to independently determine whether the evidence demonstrated that First American's conduct was tough claim practices, negligence or egregious behavior. The jury was able to consider the history of the case, including First American's claim that its agency agreement with Camelback was in default at the time it issued the endorsements despite having earlier renewed the agency agreement for five years. Consequently, based on the totality of the evidence, there was sufficient evidence for the jury to determine that punitive damages were appropriate.

III. Due Process Challenge to the Punitive Damages Award

¶33 First American also raises a due process challenge to the punitive damages award. Although it concedes that it did not raise the issue to the trial court, First American argues that we have "discretion to consider constitutional questions not raised below because of the great importance of constitutional rights" and seeks to distinguish our ruling in *Marquette Venture Partners II, L.P. v. Leonesio*, 227 Ariz. 179, 184-85, ¶¶ 23-25, 254 P.3d 418, 423-24 (App. 2011). Although we have discretion to review the issue, we will not exercise it to

review the constitutional challenge to a punitive damage award not first raised in the trial court. *Id.* We find the better practice is to raise the issue to the trial court, and then we can review the court's ruling. *See generally Hudgins*, 221 Ariz. at 489, ¶ 49, 212 P.3d at 827 (addressing whether the trial court erred by not reducing the $4 million punitive award as excessive under the due process clause); *Pope*, 219 Ariz. at 490, ¶ 40, 200 P.3d at 987 (addressing whether the trial court erred by setting aside the punitive damage award and whether the award was unconstitutionally excessive).

IV. Denial of the Motion for New Trial

¶34 First American also contends that the trial court erred by denying its motion for new trial. Because our standard of review of a denial of a motion for new trial is less stringent than a denial of a JMOL, *Warne Invs., Ltd. v. Higgins*, 219 Ariz. 186, 194, 195 P.3d 645, 653 (App. 2008) (stating that we "review the denial of a motion for new trial under an abuse of discretion standard"), we conclude that the trial court did not abuse its discretion by denying the new trial motion.

ATTORNEYS' FEES

¶35 Troon requests its attorneys' fees and costs on appeal pursuant to Arizona Revised Statutes ("A.R.S.") section 12-341.01 (West 2013) ("In any contested action arising out of a contract . . . the court may award the successful party

reasonable attorney fees."), A.R.S. § 12-341 (West 2013) ("The successful party to a civil action shall recover from his adversary all costs expended or incurred therein unless otherwise provided by law."), and ARCAP 21. Because Troon is the successful party on appeal, we award Troon its reasonable attorneys' fees and costs on appeal upon compliance with ARCAP 21.

CONCLUSION

¶36 Based on the foregoing, we affirm the trial court's rulings and the judgment.

/s/
_____
MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/
_____
PATRICIA A. OROZCO, Judge

/s/
_____
RANDALL M. HOWE, Judge