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

TINA M. PLACOURAKIS, a single person, Plaintiff/Counterdefendant/ Appellee/Cross-Appellant, and AMERICAN MORTGAGE SPECIALISTS, INC., an Arizona corporation; RONNELL SHAW and JANE DOE SHAW, husband and wife; ROBERT ANCHA and JANE DOE ANCHA, husband and wife; Counterdefendants/Appellees, NEW CENTURY MORTGAGE CORPORATION, a California corporation, Third Party Defendants/ Appellees, v. CHARLES T. DAVIS aka CHILI DAVIS, a single person, Defendant/Counterclaimant/ Third Party Plaintiff/ Appellant/Cross-Appellee.	No. 1 CA-CV 09-0112 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2003-015063

The Honorable Richard J. Trujillo, Judge (Retired)

The Honorable Timothy J. Ryan

AFFIRMED IN PART; VACATED IN PART; REMANDED

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D O W N I E, Judge

¶1 Defendant/Counterclaimant Charles Davis and Plaintiff/Counterdefendant Tina Placourakis both appeal from the judgment of the superior court. For the following reasons, we affirm in part, vacate in part, and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

¶2 Davis and Placourakis were romantically involved but never married. In 2000, Placourakis and her children moved into Davis's Arizona home. In 2001, the parties purchased a residence at 8913 Calle de las Brisas in Scottsdale ("Las Brisas property"). Davis made a down payment of $78,427.60; Placourakis financed the remainder of the purchase price with a mortgage in her name alone.

¶3 In 2002, Placourakis refinanced the original mortgage. Davis signed a quit claim deed in connection with that refinance.[1] Thereafter, Placourakis re-conveyed the property to Davis and herself as joint tenants with right of survivorship.

¶4 The parties' relationship ended, whereupon Placourakis and her children moved into the Las Brisas property. In 2003, Placourakis sued Davis, alleging fifteen counts in her amended complaint.[2] Placourakis claimed that the parties had a "partnership and/or joint venture" with respect to the Las Brisas property, and she sought to quiet title in her name. Davis filed an answer and counterclaim. He alleged, *inter alia,* that the parties purchased the Las Brisas property for rental income investment purposes, and he sought to quiet title in his name.[3]

¶5 In October 2004, Placourakis refinanced the Las Brisas property ("2004 refinance") through lender New Century Mortgage Corporation ("New Century"). American Mortgage Specialists

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[1] At the time, the parties held the property as joint tenants with right of survivorship.

[2] Placourakis alleged: assault, battery, intentional infliction of emotional distress, interference with contractual relations, breach of contract, conversion, negligence, quantum meruit, unjust enrichment, breach of partnership/joint venture, breach of fiduciary duty, breach of the implied covenant of good faith and fair dealing, accounting, quiet title, and dissolution of partnership and/or joint venture.

[3] Alternatively, Davis sought partition of the property.

("AMS") was the mortgage broker; Ronnell Shaw was the loan officer. AMS employee Robert Ancha notarized a deed purportedly signed by Davis conveying his interest in the property to Placourakis. At the close of escrow, Placourakis received cash back, and additional payments were made on her behalf to creditors. The encumbrance on the Las Brisas property increased by roughly $60,000 as a result of the 2004 refinance.

¶6 Davis learned of the 2004 refinance by reviewing public records. He thereafter filed an amended counterclaim naming AMS, Shaw, Ancha (collectively, "AMS"), and New Century as parties. He alleged that a forged deed was used to transfer his interest in the Las Brisas property, and he sought damages caused by the 2004 refinance.

¶7 In February 2006, Davis moved to compel AMS to respond to a request for documents relating to the 2004 refinance; he requested sanctions against AMS for its failure to comply. Davis also sought Arizona Rule of Civil Procedure 37 sanctions against Placourakis for her failure to disclose the 2004 refinance. The superior court did not fully resolve Davis's motions until after trial, as we discuss *infra.*

¶8 In March 2006, a jury trial began. After Davis presented his evidence, AMS moved for judgment as a matter of law on the amended counterclaim, arguing that Davis had failed

to prove any damages arising from the 2004 refinancing.[4] The trial court granted AMS's motion.

¶9 The jury awarded Placourakis $30,000 on her conversion claim, $60,000 on the assault claim (plus $120,000 in punitive damages), and $40,000 on the battery claim (plus $100,000 in punitive damages). The jury found in favor of Davis on Placourakis's breach of contract claim, and it stated in response to a special interrogatory that Davis's down payment on the Las Brisas property was not a gift to Placourakis.[5]

¶10 The court held further proceedings to resolve the remaining equitable claims.[6] It issued a ruling dated July 25, 2006 that contained detailed findings of fact and conclusions of law, including:

- Davis "authorized no part" of the 2004 refinance. His signature on the deed was forged.

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[4] Like the trial court and the parties, we use the terms "directed verdict" and "judgment as a matter of law" interchangeably.

[5] Placourakis withdrew her claims for interference with contractual relations and accounting before trial. The court granted both Placourakis's and Davis's motions for directed verdict on the respective claims for intentional infliction of emotional distress and breach of fiduciary duty. Placourakis's negligence, quantum meruit, and unjust enrichment claims were not presented to the jury.

[6] Although the June 29, 2006 proceeding has been described as a "bench trial," the parties agreed to oral argument in lieu of presenting evidence.

- Placourakis obtained the 2004 refinancing without advising Davis and without making proper disclosures under Rule 26.1.
- Placourakis's signature on the 2004 deed of trust was forged.
- AMS is not liable to Davis "under the Quiet Title cause of action." However, AMS "does have to address the motion for sanctions filed by [Davis]." Davis is to supplement his motion, which "may include a request for additional sanctions in light of the Findings of Fact set forth above."
- Under a theory of equitable subrogation, New Century is entitled to an "amended/substituted encumbrance" applicable to Davis and Placourakis in the sum of $363,696.61.[7]
- Davis is entitled to "a return of his proceeds" invested in the Las Brisas property in the amount of $214,762.76 (plus interest).
- Davis is the prevailing party for purposes of the bench trial.

¶11 Davis supplemented his sanctions requests. The court received supplemental briefing from the other parties and heard

[7] This is the amount of the Washington Mutual deed of trust that New Century satisfied as a result of the 2004 refinance.

argument. It issued a February 13, 2007 ruling that stated, in relevant part:

> As to [Davis's] Request for Attorney's Fees and Costs against [AMS] for violation of Discovery and Disclosure Obligations pursuant to Civil Rule 37, which the Court had previously granted but deferred consideration of the sanction,
>
> **IT IS ORDERED** awarding Mr. Davis his Attorney's Fees and Costs which he incurred: 1) in connection with having to seek the requested discovery, 2) in having to file the Motion to Compel, 3) in filing the supplement filed on September 29, 2006, and 4) oral argument (and supplemental oral argument) on the motion.

The court also awarded sanctions against Placourakis for her disclosure violation, stating:

> [A]s a sanction under Civil Rule 37, [Davis] is entitled to consideration of $57,900.00, the amount of encumbrance added to the existing debt by the October 2004 refinancing.

Finally, the court set aside the directed verdict it had previously entered for AMS and ordered a new trial to allow Davis to offer proof of damages stating:

> The Court's decision to defer consideration of sanctions seems to have played a role in whether Mr. Davis understood that trial, not a post trial hearing on sanctions, was the appropriate time to offer proof of damages.

¶12 AMS moved to vacate the order setting aside the directed verdict. The court granted AMS's motion. Davis filed a Motion for New Trial for Damages Arising from AMS's Conduct,

which the court denied. Judge Ryan referred several specific matters[8] and "all further proceedings" to Judge Trujillo, who assumed Judge Ryan's civil calendar.

¶13 Judge Trujillo held a hearing regarding Davis's sanctions and attorneys' fees requests. On October 9, 2008, Judge Trujillo entered a final judgment that incorporated the results of the jury trial, bench trial, and post-trial proceedings. The judgment awarded Davis $17,750 "pursuant to Rule 37." It dismissed all claims and defenses "not specifically identified and discussed."

¶14 After unsuccessfully moving to amend the judgment, Davis timely appealed. Placourakis timely cross-appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003) and -2101(B) (2003).

DISCUSSION

¶15 Davis presents four issues for our review. We address those matters first before considering the cross appeal.

1. Directed Verdict for AMS

¶16 We review the grant of a directed verdict *de novo,* "viewing the evidence in the light most favorable to the party

[8] The matters were: (1) Davis's anticipated fee application pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-341, 12-341.01, 12-349, 12-350 and Arizona Rule of Civil Procedure 11; (2) fees and costs incurred by Davis in connection with the motion to compel against AMS; and (3) Davis's objections to the proposed form of judgment lodged by Placouraksis.

opposing the motion." *Gemstar Ltd. v. Ernst & Young,* 185 Ariz. 493, 505, 917 P.2d 222, 234 (1996). We find no error in the trial court's ultimate determination that AMS was entitled to judgment as a matter of law on the amended counterclaim. The record supports the conclusion that Davis failed to prove damages attributable to AMS.

¶17 Davis alleged in his amended counterclaim that AMS executed, notarized, and recorded forged documents. He asserted damages arising from AMS's conduct as follows:

> DAVIS has been damaged by the conduct of PLACOURAKIS, AMS, SHAW, and ANCHA described herein in an amount to be proved at trial which specifically includes, but is not limited to, the value of his interest in the Property purportedly extinguished by, and the amount of the increase in the indebtedness against the Property resulting from, the execution, notarization and recording of the Fraudulent Warranty Deed and the October 2004 Refinancing, plus all of the costs and attorneys' fees incurred in the presentation and prosecution of this First Amended Counterclaim.

¶18 In his sanctions motion filed before trial, Davis recognized that the sanctions request and damage claims were separate and distinct. He argued:

> If AMS' defense were dismissed [as a Rule 37 sanction], Mr. DAVIS *would still have to prove the damages he suffered as the result of AMS' conduct.* Thus, an appropriate sanction would be the entry of Judgment against AMS, SHAW and ANCHA, before trial, that they are liable to Mr. DAVIS *for any and all damages he establishes at trial*

> that he suffered as the result of the forgery of the Fraudulent Warranty Deed and the October 2004 Refinancing. (Emphasis added.)

¶19 In enumerating the contested matters for the jury trial, Davis himself identified damages owed by AMS. He also listed as a contested issue whether he was entitled to recover reasonable costs, attorneys' fees, and double or treble damages under A.R.S. §§ 12-341, 12-341.01, 12-349 and/or 33-420. Davis, however, did not list any damage exhibits in the joint pretrial statement.[9] Additionally, before the jury trial, there was discussion about the fact that New Century would not participate because it had agreed to be bound by the damages verdict for or against AMS. The following colloquy ensued:

> THE COURT: [A]s to the damages portion of Mr. Davis's claims as it relates to AMS and New Century, you are willing to be bound by any jury findings as to the damages suffered, understanding that you are not going to be here to independently develop the theory of diminished value of damages or no damages. . . .
>
> [MR. KEATING, NEW CENTURY'S COUNSEL]: We can't contribute to that anyway. We have no knowledge.
>
> . . . .

[9] The joint pretrial statement was filed after the court: (1) ruled that certain matters raised by New Century and AMS were "issues of law that could be handled in a bifurcated hearing followed by trial on the issues in chief;" and (2) identified the bench trial issues as quiet title, partition, and contribution.

> THE COURT: Mr. Keating's avowal was that [AMS's counsel] will argue damages and he'll be bound by any damages determined by the jury, that he doesn't need to be here to do that. His issue is one of vicarious liability on whatever theory is advanced by Mr. Davis.

¶20 Davis's claim for money damages from AMS was a legal claim that required evidence at trial to support it. The court properly granted judgment as a matter of law to AMS on the amended counterclaim.

2. Awards Against AMS

¶21 Davis contends the trial court should have ordered AMS to pay him additional sums – over and above the $17,750 awarded pursuant to Rule 37. We conclude otherwise.

¶22 Davis's amended counterclaim requested money damages from AMS, not equitable relief. Davis sought fees and costs attributable to the 2004 refinancing and prosecution of the amended counterclaim. He cited a number of provisions, including A.R.S. §§ 12-341, 12-341.01(C), 12-349(A), (B), 33-420, and Rules 11 and 37.

¶23 Davis argues that the trial court was *required* to impose additional monetary sanctions against AMS, stating:

> JUDGE RYAN's Findings of Fact establish as a matter of law that AMS violated the notary statutes, unreasonably expanded and delayed the action, asserted a defense without substantial justification, which was groundless and not made in good faith, abused the disclosure and discovery process,

> and that AMS' Answer to [the amended counterclaim] was not well grounded in fact but was interposed to cause unnecessary delay and needlessly increase the cost of litigation.

¶24 We have already determined that the court properly granted judgment as a matter of law to AMS regarding damages arising from the 2004 refinance. Davis cites no authority for the proposition that he is entitled, under the cited statutes and rules, to recover fees incurred in litigating his unsuccessful counterclaim, and we are aware of none.

¶25 We also disagree with Davis's contention that the final judgment terms are the result of an impermissible horizontal appeal. A horizontal appeal is a request that a second trial judge reconsider a decision of the first judge in the same matter, even though no new circumstances have arisen in the interim, and no other reason justifies reconsideration. *Donlann v. Macgurn,* 203 Ariz. 380, 385, ¶ 29, 55 P.3d 74, 79 (App. 2002).

¶26 Judge Ryan granted Davis's application for fees and costs against AMS while he presided over the case. As we discussed *supra,* he identified four specific categories of fees and costs that Davis was entitled to recover as Rule 37 sanctions. Judge Ryan did not rule during the bench trial phase that Davis was entitled to recover anything more than Rule 37 sanctions. Nor did he determine the amount that AMS must pay.

¶27 Judge Trujillo properly considered and ruled on the outstanding issues. Before entering judgment, Judge Trujillo considered the competing forms of judgment lodged by the parties, reviewed prior minute entries, and heard oral argument. He entered judgment "in conformance with the form of judgment lodged by [Placourakis] for the reason that it accurately tracks the rulings of the Court and verdicts entered by the jury."

¶28 We find no abuse of discretion relating to the size of the award. *See Hays v. Gama*, 205 Ariz. 99, 102, ¶ 17, 67 P.3d 695, 698 (2003) (appellate court reviews the imposition of sanctions under Rule 37 for an abuse of discretion). Judge Trujillo's award represented sanctions under Rule 37, not damages Davis allegedly incurred due to AMS's conduct in connection with the 2004 refinance.

3. Las Brisas Property

¶29 The final judgment awarded Placourakis "sole and complete interest, right, and title" to the Las Brisas property "to the exclusion of Davis." Davis first argues that *he* should have been awarded fee ownership of the property. His claim is premised on the contention that the court erred by "mixing capital contributions and withdrawals with mortgage payments that resulted in negligible reduction of principal encumbrances." According to Davis, the court instead should

have focused on contributions made to principal, citing *Drahos v. Rens,* 149 Ariz. 248, 717 P.2d 927 (App. 1985).

¶30 *Drahos* involves a markedly different context. It addressed apportionment of property in a dissolution proceeding --factoring in a husband's sole and separate property interest, as well as interests of the marital community. *Id.* at 249-51, 717 P.2d at 928-30. Because Davis and Placourakis never married, no "community" exists between them. *See Cook v. Cook,* 142 Ariz. 573, 577, 691 P.2d 664, 668 (1984) ("The law will not give to non-marital cohabiting parties the benefit of community property rights, since these rights derive solely from the marital relationship." (citations omitted)). Davis cites no authority for his claim that Arizona law requires a court sitting in equity to rely solely on principal contributions in dividing property after a non-marital relationship ends, and we are aware of none.

¶31 Davis next contends that if we reject his claim for fee ownership, we must conclude that the trial court erred by not ordering the Las Brisas property sold. We agree with this contention.

¶32 In the joint pretrial statement, the parties listed as one of their agreed-upon contested issues:

> Whether the las Brisas house should be partitioned and sold pursuant to A.R.S. §

> 12-1211, et seq. and, if so, the respective interests of each party in the proceeds?

All participants agreed that partition was an equitable issue properly resolved by the court after the jury trial. In her bench trial memorandum, Placourakis argued that the "equitable partition portion of this litigation is akin to a partnership dissolution, where the court is asked to equitably divide the partnership assets." Davis, on the other hand, took the position that the property must be sold and the sales proceeds equitably divided based on the respective capital contributions of the parties.

¶33 The right of partition is an "incident of common ownership." *McCready v. McCready,* 168 Ariz. 1, 3, 810 P.2d 624, 626 (App. 1991). Partition is a statutory procedure and, absent an agreement by the parties to voluntarily divide the property, "any remedy must comply with the statutory scheme." *Cohen v. Frey,* 215 Ariz. 62, 65, ¶ 6, 157 P.3d 482, 485 (App. 2007); *see also* A.R.S. §§ 12-1211, *et seq.* "[W]hen there are but two parties and each desires to have allotted to himself or herself the whole cotenancy property, the court cannot arbitrarily decide that one shall have the property to the exclusion of the other." *McCready,* 168 Ariz. at 4, 810 P.2d at 627. Instead:

> Under the [partition] statute, if it appears to the court that a fair division of the property cannot be made without depreciating the value thereof, it is required to render

> a judgment directing that the property be sold. The court is also required to appoint a commissioner to conduct the sale and divide the proceeds between the parties according to their respective interests.

Id. at 3, 810 P.2d at 626.

¶34 Placourakis does not dispute these established legal tenets. Nor does she contend that the Las Brisas property, a single-family residence, can be physically divided. She argues instead that the parties agreed to deviate from the statutory partition requirements. She asserts that Davis "clearly agreed that the Court could award the property to Placourakis, provided that he was reimbursed for his interest in the property."

¶35 We recognize that parties may agree to a voluntary partition of property, "which may be effected in any manner upon which the cotenants agree." *Id*. Placourakis has not, however, cited the portions of the record that establish such an agreement, and our review has disclosed none. At most, Davis agreed with the court's notion of procuring a mutually-agreeable appraisal, with Placourakis then buying out his interest. Nothing in the record establishes that Davis agreed to the equalization approach ultimately employed by the trial court.

¶36 As this court concluded in *McCready,* "[T]he trial court lacked jurisdiction to render the particular order entered because the only lawful means for disposing of the subject property in the absence of an agreement between the parties for

a voluntary disposition was to follow the applicable partition statutes." *Id*. We thus vacate those portions of the judgment: (1) awarding Placourakis the Las Brisas property; and (2) granting Davis offsetting financial considerations in recognition of financial contributions he made to the property.[10] We remand these matters to the trial court for further proceedings consistent with the partition statutes.

4. Evidence about time-barred claims

¶37 Prior to trial, Davis moved for partial summary judgment on Placourakis's assault and battery claims. He argued that certain alleged events, including holding a loaded gun to Placourakis's head, swinging a baseball bat at her, and chipping her tooth, were time-barred because the conduct (which he denied) occurred more than two years before Placourakis filed suit. Placourakis opposed the motion, contending there were numerous instances of assault and battery that occurred within the statute of limitations period. She suggested that the court "simply bar assault and battery claims based on misconduct that occurred before August 5, 2001 (two years before suit was filed)." The trial court ruled as follows:

> The motion is granted as to any torturous [sic] conduct that occurred prior to August

[10] Placourakis acknowledges that the purpose of the offsetting awards was to "'compensate' Davis for his interest in Las Brisas."

> 5, 2001 and that this includes the allegations of an instance of holding a loaded firearm at Plaintiff's head, swinging a baseball bat to Plaintiff's head, Plaintiff's chipped tooth and incidences involving a hotel room in New York City. No acts that occurred prior to August 5, 2001 may form the factual predicate for those causes of action. However, the Court's ruling does not affect any other evidentiary purpose with which this information might come in.

¶38 Placourakis later moved *in limine* to admit evidence about the time-barred events for two separate purposes: (1) to support her punitive damage claims; and (2) to show "intent and/or motive." The court granted her motion.

¶39 Davis contends the court erred by allowing evidence about the time-barred events because they were not "a proximate cause of any harm allegedly inflicted by the conduct [] timely alleged" and because its admission violated Arizona Rules of Evidence 403 and 404(b).[11]

¶40 We will not overturn a trial court's decision to admit evidence absent a clear abuse of discretion and resulting prejudice. *Schwartz v. Farmers Ins. Co. of Ariz.,* 166 Ariz. 33,

[11] Davis did not object to Placourakis's testimony about the time-barred events at trial. Generally, alleged error that is not objected to at trial will not be considered on appeal. However, in cases involving motions *in limine* properly made and ruled on before trial, objections raised in connection with the motion are preserved for purposes of appeal, without the need for a specific objection at trial. *State v. Lujan,* 136 Ariz. 326, 328, 666 P.2d 71, 73 (1983).

37, 800 P.2d 20, 24 (App. 1990). We find no abuse of discretion here.

¶41 Placourakis argued that evidence about the time-barred incidents was relevant to establish the "duration and severity of Davis' alleged misconduct," as a factor the jury could consider in determining the *amount* of punitive damages to award, not as evidence of the "evil mind" necessary to establish entitlement to punitive damages in the first instance. *See Hawkins v. Allstate Ins. Co.,* 152 Ariz. 490, 497, 733 P.2d 1073, 1080 (1987) (holding that one category of evidence relevant to punitive damages is "[t]he duration of the misconduct, the degree of defendant's awareness of the harm or risk of harm, and any concealment of it"). We agree.

¶42 Evidence about past conduct may be admissible even if the conduct itself is not actionable. See *id*. at 499, 733 P.2d at 1082 (finding testimony about insurer's practices fifteen years prior to the claim at issue was relevant in assessing the amount of punitive damages because it provided evidence about the duration of the misconduct and established facts from which the jury could determine the reprehensibility of the conduct). The evidence at issue here was relevant to demonstrate the duration and severity of Davis's assaultive behaviors.

¶43 Placourakis claimed she was subjected to "weekly, sometimes daily, abuse, both physical and verbal." One of her

disclosure statements included over twenty pages of discussion about abusive incidents allegedly occurring within two years of her complaint--including Davis hitting or kicking her, confining her to a closet or shower for hours at a time, threatening to cut her face with broken glass, and restraining her movement.

¶44 In its final instructions, the trial court instructed the jury that:

> In determining whether Charles Davis is liable to Tina Placourakis on her claims of assault, and/or battery, you may only consider events alleged to have taken place on or after August 5, 2001. *Any events that are alleged to have occurred before that date are not to be considered in making your decision regarding liability for those claims.*[12] (Emphasis added.)

The court also properly instructed jurors about punitive damages, stating, in pertinent part:

> If you find Charles Davis liable to Tina Placourakis, for assault or battery for conduct occurring on or after August 5, 2001, you may consider assessing additional damages to punish Charles Davis or to deter Charles Davis and others from similar misconduct in the future. Such damages are called "punitive" damages.
>
> . . . .
>
> The law provides no fixed standard for the amount of punitive damages you may assess,

[12] This limiting instruction also constrained a juror's ability to consider evidence about the time-barred events for impermissible purposes under Arizona Rule of Evidence 404(b). The evidence was not admitted to prove that Davis acted in conformity with alleged prior acts of assault and battery.

> if any, but leaves the amount to your discretion. However, if you assess punitive damages, you may consider the character of Charles Davis' conduct or motive, the nature and extent of the harm to plaintiff that Charles Davis caused, the nature and extent of Charles Davis' financial wealth, and the duration of the harm.

We presume that jurors follow their instructions. *See State v. Velazquez,* 216 Ariz. 300, 307-08, ¶ 24, 166 P.3d 91, 98-99 (2007).

¶45 Evidence about the duration and severity of Davis's conduct was relevant to the punitive damage award. Reasonable jurors could conclude that an individual with a pattern and practice of assaultive behaviors should pay more in punitive damages than a person who engaged in isolated acts. The degree of reprehensibility of a defendant's misconduct is "the most important indication of the reasonableness" of a punitive damage award. *Hudgins v. Sw. Airlines,* 221 Ariz. 472, 490, ¶ 52, 212 P.3d 810, 828 (App. 2009). To assess where misconduct falls on the "reprehensibility scale," we consider whether:

> The harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

*Id. (*quoting *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 419 (2003)); *see also Florez v. Delbovo,* 939 F. Supp. 1341, 1347-48 (N.D. Ill. 1996) ("acts of violence or threats of bodily harm . . . [are] the most reprehensible" for punitive damage purposes).

¶46 We also find no basis for reversal under Arizona Rule of Evidence 403. Decisions under Rule 403 involve a balancing process that is "truly discretionary with the trial judge." *Readenour v. Marion Power Shovel,* 149 Ariz. 442, 450, 719 P.2d 1058, 1066 (1986). Because the trial court is best situated to conduct the Rule 403 balancing test, we will reverse its ruling only for a clear abuse of discretion. *State v. Canez,* 202 Ariz. 133, 153, ¶ 61, 42 P.3d 564, 584 (2002). Not all harmful evidence is unfairly prejudicial; evidence that is relevant and material will generally be adverse to the opponent. *State v. Schurz,* 176 Ariz. 46, 52, 859 P.2d 156, 162 (1993).

¶47 The trial court did not err in allowing the jury to consider evidence about the time-barred incidents in deciding the amount of punitive damages. Davis's denial of the those events was a factor for the jury to consider, but it did not render the evidence inadmissible.

5. Taxable Costs

¶48 The trial court ruled that Davis was the prevailing party for purposes of the bench trial. Davis thereafter filed a

statement of costs "in connection with the Bench Trial," requesting $9,552.40. AMS (but not Placourakis or New Century) objected, arguing that Davis was not successful against it and that some of the enumerated items fell outside the statutory definition of taxable costs.

¶49 The trial court never ruled on Davis's costs request. The final judgment, however, ordered him to pay taxable costs as follows: (1) $8,233.14 to Placourakis; and (2) $1,892.00 to AMS.

¶50 We cannot reconcile the seemingly-inconsistent decisions bearing on taxable costs. We thus vacate all cost awards and remand the issue of taxable costs to the superior court for a ruling on Davis's application, followed by reconsideration, if appropriate, of the cost awards entered in favor of AMS and Placourakis.

6. Equitable Subrogation

¶51 As part of the 2004 refinance, New Century paid off an existing mortgage of $363,696.61 held by Washington Mutual. The trial court concluded that under a theory of equitable subrogation, New Century was entitled to an "amended/substituted encumbrance" applicable to Davis and Placourakis in the sum of $363,696.61. Davis challenges this decision.

¶52 An appellate court has a duty to inquire into its own jurisdiction. *Soltes v. Jarzynka,* 127 Ariz. 427, 429, 621 P.2d

933, 935 (App. 1980). New Century filed for Chapter 11 bankruptcy protection on April 2, 2007. At that time, an automatic stay was imposed pursuant to 11 U.S.C. § 362(a). We have no additional information regarding the status of New Century's bankruptcy.

¶53 New Century has not filed an answering brief in this appeal. Because the most recent information in the record reflects that there is a stay affecting our ability to alter the judgment to the financial detriment of New Century, we decline to address the equitable subrogation issue.

7. Fees and Costs Under A.R.S. § 12-1103

¶54 Finally, the trial court did not err by not awarding Davis fees and costs against Placourakis and New Century under A.R.S. § 12-1103(B) (2003). That statute gives the court discretion to award a successful quiet title litigant fees and costs under certain enumerated circumstances. Davis was not successful on his quiet title claims.

Cross Appeal

1. Rule 37 Sanctions

¶55 The court ruled that Placourakis obtained the 2004 refinancing without advising Davis and that she failed to make appropriate disclosures about it. It determined that Davis was "entitled to consideration of $57,900.00, the amount of

encumbrance added to the existing debt by the October 2004 refinancing." The final judgment states:

> Pursuant to Rule 37 of the Arizona Rules of Civil Procedure, **IT IS ORDERED, ADJUDGED AND DECREED** granting the Motion for Imposition of Sanctions against Placourakis submitted by Davis in part, and awarding Davis an additional credit against the amounts awarded against him and in favor of Placourakis in this Judgment in the amount of . . . $57,900 . . . for disclosure violations related to the October 2004 refinancing of the Law [sic] Brisas Property.

Placourakis claims that, even assuming she committed a disclosure violation, "the amount of that sanction is clearly disproportionate to any harm or prejudice suffered by Davis."

¶56 Rule 37 authorizes "appropriate sanctions." Ariz. R. Civ. Proc. 37(c)(1). The sanction must have some relationship to the violation. *Taliaferro v. Taliaferro*, 188 Ariz. 333, 341, 935 P.2d 911, 919 (App. 1996) (holding that the sanction "should bear some relationship to the expenses directly caused by the sanctionable conduct").

¶57 Placourakis argues that disclosure about the 2004 refinancing would not have resolved any dispute between the parties or simplified the trial. Placourakis has not, however, provided us with a transcript of the hearing that addressed Davis's sanctions request. It is the duty of an appealing party to insure that we receive a complete record. *Rancho Pescado,*

Inc. v. Nw. Mut. Life Ins. Co., 140 Ariz. 174, 189, 680 P.2d 1235, 1250 (App. 1984). Where the record is incomplete, we presume that the missing portions would support the findings of the trial court. *Bee-Gee, Inc. v. Ariz. Dep't of Economic Sec.,* 142 Ariz. 410, 414-15, 690 P.2d 129, 133-34 (App. 1984). On the record before us, we cannot find that the trial court abused its considerable discretion in fashioning a sanctions order.

2. Taped Conversations

¶58 Finally, Placourakis argues that the trial court erred by admitting "very limited portions" of taped conversations between herself and Davis. She asks that we address this issue only if we remand for a new trial. Because we uphold the jury verdicts in favor of Placourakis, we need not address this claim.

CONCLUSION

¶59 For the reasons stated, we affirm the jury verdicts. We further affirm judgment as a matter of law for AMS. We vacate those provisions of the final judgment awarding the Las Brisas property to Placourakis and granting Davis certain offsetting credits, remanding those matters to the superior court for further proceedings consistent with this decision. Finally, we vacate all awards of taxable costs and remand that issue to the trial court for further appropriate proceedings. We deny AMS's request for Rule 25 sanctions against Davis for

bringing a frivolous appeal. Because each party to this appeal prevailed to some degree, we make no award of costs incurred on appeal.

/s/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
MAURICE PORTLEY, Presiding Judge

/s/
PATRICIA A. OROZCO, Judge