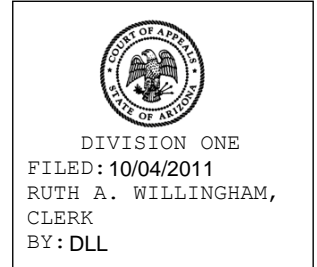


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



WALTER W. WENZEL, JR. and CHERYL) 1 CA-CV 10-0338
L. WENZEL, husband and wife,)
) DEPARTMENT C
Plaintiffs/Appellees,)
) **MEMORANDUM DECISION**
v.) (Not for Publication -
) Rule 28, Arizona Rules
RANDY E. GRAY and KIMBERLY L.) of Civil Appellate
GRAY, husband and wife,) Procedure)
)
Defendants/Appellants.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CV2006-015259

The Honorable John A. Buttrick, Judge

AFFIRMED

Sherman & Howard L.L.C. Phoenix
By Thomas M. Quigley and Jamey G. Anderson
Attorneys for Plaintiffs/Appellees

Molever Conelly P.L.L.C. Scottsdale
By Peter Michael Salcido
Attorneys for Defendants/Appellants

K E S S L E R, Judge

¶1 Defendants/Appellants Randy E. Gray and Kimberly Gray
appeal from a jury verdict in favor of Plaintiffs/Appellees

Walter W. Wenzel and Cheryl Wenzel. The Grays argue the trial court erred in denying their motion for judgment as a matter of law or for new trial because the verdict was not supported by the evidence and the jury awarded excessive damages. They also contend the court made an erroneous evidentiary ruling at trial that warrants reversal. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND¹

¶2 This action arises out of a dispute between the Grays and the Wenzels concerning the Wenzels' investment in Gray Mobile Tire Service, Inc. (the "Company"), a company originally owned and operated by the Grays. Beginning in November 2004, the Wenzels invested in the Company based on the Grays' promises that the Wenzels would be 50% shareholders in the Company, would have equal say in management, and would be paid wages of \$10,000 per month (collectively) plus automobile and health benefits for their work at the Company.

¶3 The Wenzels provided capital to the Company through a home equity line of credit on their house and personal credit cards used solely for the benefit of the Company. In addition, the Wenzels provided the Company four vehicles for business use.²

¹ "[W]e view the evidence in the light most favorable to upholding the jury verdict." *S Dev. Co. v. Pima Capital Mgmt. Co.*, 201 Ariz. 10, 13, ¶ 3, 31 P.3d 123, 126 (App. 2001).

² The Wenzels had previously owned two of the vehicles; they purchased the remaining two specifically for the Company's use.

The Grays promised the Wenzels that the Company would pay all amounts due on the line of credit and credit cards and would assume all debts and liabilities associated with the vehicles, including the monthly payments, insurance, and licensing and registration fees.

¶4 Shortly after the Wenzels' investment, Kimberly Gray informed the Wenzels that the Grays had decided to give 10% of the Company stock to Traci Gray, a friend and past employee of the Grays.³ Because the Grays had made this decision unilaterally, the Wenzels assumed that only the Grays' shares would be reduced. They later learned that the Grays intended to reduce the Wenzels' shares to account for some of the shares given to Traci.

¶5 By May 2005, the Wenzels had invested approximately \$300,000 in the Company but did not have a writing proving their ownership interest. The Grays presented a Shareholder Agreement to the Wenzels that stated the Grays owned 46% of the Company stock, the Wenzels owned 44% of the stock, and Traci owned the remaining 10%. When Walter Wenzel objected to the proposed share distribution, Kimberly Gray told him that if the Wenzels disagreed they could walk away from their investment. The Wenzels, believing they would lose their substantial investment

³ Traci Gray is not related to Randy and Kimberly Gray, and we refer to her separately and not as part of "the Grays."

in the Company unless they signed the Shareholder Agreement, executed that document even though it allegedly did not accurately reflect their agreement with the Grays.

¶6 The following year, in August 2006, the Company fired Walter Wenzel. It then fired Cheryl Wenzel in December 2006. After terminating the Wenzels' employment, the Company did not pay the Wenzels' credit cards and line of credit for several months. In February 2007, the Company permanently stopped paying the amounts due on the vehicles the Wenzels had provided to the Company. Without consulting the Wenzels, the Company determined it no longer had a need for the vehicles and left them, along with the payment books, at the Wenzels' home.

¶7 The Wenzels filed this action against the Grays and the Company for breach of contract, breach of fiduciary duty, unjust enrichment, fraudulent representation or omission, promissory estoppel, negligent misrepresentation, innocent misrepresentation, securities fraud, and declaratory judgment regarding the amount of Company shares the Wenzels owned.⁴

¶8 The jury returned a verdict in favor of the Wenzels except for their unjust enrichment claim. It awarded the Wenzels \$18,000 in damages for the Grays' breach of contract, \$276,731.73 in damages for the Grays' breach of their fiduciary

⁴ The Wenzels also asked the court to appoint a receiver for the Company. The court denied their application.

duty, \$207,477.60 in damages for securities fraud, and found that the Wenzels were entitled to 50% of the issued shares of the Company.⁵

¶9 The Grays, joined by the Company, renewed their motion for judgment as a matter of law ("JMOL") or, in the alternative, moved for a new trial. The trial court denied the motions and entered judgment for the Wenzels. The Grays timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B), (F)(1) (2003).

DISCUSSION

¶10 As they argued below, the Grays contend the trial court erred in denying their motion for JMOL or new trial on the Wenzels' securities fraud claim because the jury erroneously awarded the Wenzels excessive damages. They also assert the court erred in sustaining the Wenzels' objection to a document created by witness Mark Chester and excluding that evidence at trial. Finally, they challenge the sufficiency of the evidence supporting the jury's verdict for the Wenzels on their claims for breach of contract, breach of fiduciary duty, securities fraud, and declaratory judgment.

⁵ The jury also awarded damages on the Wenzels' other claims, but those claims are not before us on appeal.

I. The trial court properly denied the Grays' motion for JMOL or motion for new trial.

¶11 We review the trial court's denial of a motion for JMOL *de novo*, viewing the facts and all reasonable inferences therefrom in the light most favorable to the non-moving party. *Warner v. Sw. Desert Images, LLC*, 218 Ariz. 121, 131, ¶ 25, 180 P.3d 986, 996 (App. 2008). We will not disturb the court's denial of a motion for new trial absent an abuse of discretion. *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 53, ¶ 12, 961 P.2d 449, 451 (1998).

¶12 The Wenzels sought the remedy of rescission for their securities fraud claim. The court instructed the jury that the measure of damages was the amount the Wenzels paid for Company stock, plus interest, less any income they received "by dividend, principal, interest, or otherwise, from [their] ownership of the [Company] stock." The Wenzels presented evidence that they invested \$300,923.62 in the Company by incurring debt on its behalf and the Company made payments on the debt totaling \$97,461.34. The jury awarded the Wenzels \$207,477.60 as damages for their securities fraud claim.⁶

⁶ The jury's verdict totals \$4,015.32 more than the amount of the Wenzels' investment minus return. This additional amount corresponds to the money the Wenzels paid on debts they had incurred on behalf of the Company that the Company failed to pay. The Grays do not challenge this aspect of the award.

¶13 The Grays argue the jury erred when determining the rescission amount by failing to deduct the amount the Wenzels received from their stock ownership from the amount of their investment, and thus the trial court should have granted them JMOL or a new trial. In particular, they contend the Company paid the Wenzels \$117,097.20 in distributions that the jury was required, but failed, to deduct from the Wenzels' investment.

¶14 The Wenzels offered sufficient evidence that they did not receive any distributions from the Company and instead all the money they received was salary for the work they performed for the Company. The Wenzels testified that the Grays had agreed they would be paid a monthly salary of \$10,000 for their work at the Company.

¶15 The Company's bookkeeper, Traci Gray, testified that although the \$10,000 monthly payments from the Company to the Wenzels were classified as \$5,000 of "draws" and \$5,000 of "salary," the payments were intended as salary for the Wenzels' work. Traci also testified that although she was a shareholder, she never received any "draws" because the Company was not paying her any wages. Further, it was undisputed at trial that the Company stopped paying the entire \$10,000 monthly amount to the Wenzels when it fired them, even though they remained shareholders. In fact, the Grays admitted at oral argument that

their salary doubled when the Wenzels' employment was terminated.

¶16 From this evidence, the jury could have reasonably concluded that the payments the Company categorized as "draws" were not distributions to the Wenzels, but salary for their work at the Company. See *Standard Chartered PLC v. Price Waterhouse*, 190 Ariz. 6, 39, 945 P.2d 317, 350 (App. 1997) (holding that a reviewing court must "search for a reasonable way to read the verdict[] as expressing a coherent view of the case, and must exhaust this effort before it is free to disregard the jury's verdict[] and remand the case for a new trial"). Thus, the evidence was sufficient to support a determination by the jury that the Wenzels did not receive any distributions from the Company that offset their investment for purposes of calculating their rescission remedy.

¶17 The trial court did not err in denying the Grays' motion for JMOL or new trial on the grounds that the jury awarded excessive damages to the Wenzels on their securities fraud claim.

II. The trial court did not abuse its discretion by excluding the Chester notes.

¶18 The Grays next argue the court erred in excluding a document created by witness Mark Chester. Generally, we review challenges to the court's admission or exclusion of evidence for

an abuse of discretion. *Yauch v. S. Pac. Transp. Co.*, 198 Ariz. 394, 399, ¶ 10, 10 P.3d 1181, 1186 (App. 2000). If the evidentiary ruling is predicated on a question of law, we review that ruling *de novo*. *Id.*

¶19 At trial, the Grays offered testimony from Mark Chester, an attorney who represented the Company with respect to the preparation and execution of the Shareholder Agreement. He testified that during a meeting in January 2005, the parties agreed the Grays owned 46%, the Wenzels 44%, and Traci 10% of the Company stock. The Grays also sought to introduce notes Chester took during the meeting that reflected the above ownership interests. The Wenzels objected to the admission of the notes on the grounds that they contained hearsay, lacked foundation, and were duplicative.

¶20 The trial court sustained the objection on the hearsay grounds. The Grays contend the court's ruling was erroneous because the alleged out-of-court statement—that the Wenzels owned 44% of the Company shares—was not offered for its truth and was an admission by a party-opponent.⁷

⁷ The Grays also cite several other hearsay exceptions: excited utterance, records of regularly conducted activity, and the catch-all "other exceptions" category. See Ariz. R. Evid. 803(2), (6), (24). However, they make no argument on appeal regarding the application of these exceptions to the facts in this case. Accordingly, we do not consider whether the court erred in excluding the notes pursuant to any of these exceptions. *State v. Moody*, 208 Ariz. 424, 452 n.9, ¶ 101, 94

¶21 "Hearsay evidence is a statement, oral or written, made at a time when there was no opportunity to cross-examine the declarant and offered to prove the truth of the words spoken or written." *Fairway Builders, Inc. v. Malouf Towers Rental Co.*, 124 Ariz. 242, 258-59, 603 P.2d 513, 529-30 (App. 1979) (finding the trial court did not abuse its discretion by excluding hearsay statements) (citation and internal quotation marks omitted).

¶22 Chester's notes meet the hearsay definition, as they contain an out-of-court statement (Chester's notations) that the Grays sought to introduce for the truth of its content; that is, to show that the Wenzels agreed they would receive 44%, not 50%, of the Company stock. Further, the notes contained additional hearsay because they were also offered to prove the truth of the statements made to Chester by the Wenzels, the Grays, and Traci regarding their respective ownership interests in the Company. Thus, the trial court properly excluded the notes.

¶23 However, even if the court's ruling had been in error, the Grays would not have suffered any prejudice because Chester testified at trial about the events at the meeting. *Taeger v. Catholic Family & Cmty. Servs.*, 196 Ariz. 285, 296, ¶ 38, 995

P.3d 1119, 1147 n.9 (2004) ("In Arizona, opening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised. Failure to argue a claim usually constitutes abandonment and waiver of that claim.") (citation omitted).

P.2d 721, 732 (App. 1999) (finding no prejudice and therefore no abuse of discretion in the trial court's exclusion of an exhibit because the party introduced the relevant portions of the excluded exhibit through testimony). We find no reversible error in the trial court's exclusion of Chester's notes.

III. Sufficient evidence supports the jury's verdict.

¶24 Finally, the Grays argue that the verdict against them for breach of contract, breach of fiduciary duty, securities fraud, and declaratory judgment were not justified by the evidence and contrary to law. Because the Grays did not challenge the sufficiency of the evidence supporting the breach of fiduciary duty verdict in their motion for JMOL or new trial, we do not consider that issue on appeal. A.R.S. § 12-2102(C) (2003) (stating that on appeal from a final judgment, an appellate court "shall not consider the sufficiency of the evidence to sustain the verdict or judgment in an action tried before a jury unless a motion for a new trial was made"); see also *Acuna v. Kroack*, 212 Ariz. 104, 111 n.9, ¶ 27, 128 P.3d 221, 228 n.9 (App. 2006).⁸

⁸ The Wenzels assert the Grays did not adequately argue on appeal that the other portions of the verdict were not supported by the evidence and therefore they abandoned them. See *Moody*, 208 Ariz. at 452 n.9, ¶ 101, 94 P.3d at 1147 n.9. In our discretion, we determine that the Grays' argument is adequate for us to consider.

¶25 The record contains sufficient evidence to support the jury's verdict for the Wenzels on their claims for breach of contract, securities fraud, and declaratory judgment. The evidence showed that the Wenzels invested in the Company based on the Grays' promise that they would be 50% shareholders in the Company, would have equal say in management, and would be paid wages of \$10,000 per month plus automobile and health benefits. Yet, after the Wenzels made their investment, the Grays gave Traci Gray 10% of the Company stock and reduced the Wenzels' share to 44% of the stock. When the Wenzels objected, the Grays told them they could either accept the reduced shares or walk away from their investment. Based on this evidence, a reasonable jury could determine that the Grays breached their agreement with the Wenzels, committed securities fraud, and that the Wenzels were entitled to 50% of the Company stock. Thus, the jury's verdict on these claims are supported by the evidence.

IV. The Wenzels are entitled to an award of reasonable attorneys' fees on appeal.

¶26 Both parties request attorneys' fees on appeal pursuant to A.R.S. § 12-341.01(A) (2003), which provides for a discretionary award of reasonable attorneys' fees to the successful party in a contested action arising out of a

contract.⁹ In addition, the Wenzels cite A.R.S. § 44-2001 (2003), which provides that a successful plaintiff in a securities fraud action may recover his or her attorneys' fees. As the underlying issues arise out of contract and the Wenzels prevail on appeal, we will award the Wenzels their reasonable attorneys' fees on appeal and appellate costs upon their compliance with Rule 21 of the Arizona Rules of Civil Appellate Procedure.

⁹ The trial court awarded the Wenzels attorneys' fees and costs. The Grays do not contest that award.

CONCLUSION

¶27 For the foregoing reasons, we affirm the judgment in favor of the Wenzels.

/s/
DONN KESSLER, Judge

CONCURRING:

/s/
PATRICIA A. OROZCO, Presiding Judge

/s/
MICHAEL J. BROWN, Judge