DIVISION ONE
FILED: 12/08/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

SENIOR ADVISORY GROUP OF AMERICA, INC., an Arizona corporation, Plaintiff/Counterdefendant/ Appellant, v. CHRIS MCDOWELL and ELIZABETH LANGFORD, husband and wife, Defendants/Counterclaimants/ Appellees.	No. 1 CA-CV 11-0080 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)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. CV 2009-000297

The Honorable John Christian Rea, Judge

AFFIRMED

Jackson White P.C. Mesa
By Roger R. Foote
John N. Skiba
Attorneys for Plaintiff/Counterdefendant/Appellant

Vescio Law Firm P.C. Glendale
By Theresa L. Seifert
Lynda R. Vescio
Attorneys for Defendants/Counterclaimants/Appellees

D O W N I E, Judge

¶1 Senior Advisory Group of America, Inc. ("SAG") appeals from the judgment entered in favor of Chris McDowell after a jury trial. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

¶2 SAG, a wholesaler of insurance products, was founded by Steve Stern. It is one of 13 independent marketing organizations that sell a fixed annuity called BalancePlus Annuity and belongs to the Annexus Group. SAG and other members of the Annexus Group employ marketers who search for agents to sell their products.

¶3 In September 2008, Steve Stern asked McDowell if he would be interested in working for SAG. McDowell declined an employee position, but agreed to work as an independent contractor through at least the end of the year. He began work in October 2008 at a flat rate of $8500 per month. Shortly thereafter, SAG asked McDowell to help create a new database. McDowell was reportedly responsible for the migration of information from SAG's old database to its new one. The database contained detailed information about each of SAG's agents. The data ranged from an agent's contact information to

[1] We view the facts in the light most favorable to sustaining the jury's verdict. *Flanders v. Maricopa County*, 203 Ariz. 368, 371, ¶ 5, 54 P.3d 837, 840 (App. 2002).

how often an agent sold products. To assist in the process, Brad Stern, SAG's vice president, gave McDowell a copy of SAG's old database.

¶4 When McDowell and SAG were negotiating his contract, McDowell told the Sterns that he was currently working with and would continue to work for other clients. On December 17, 2008, while working for SAG, McDowell acquired a 15% interest in Ignite Financial Group ("Ignite"), an insurance wholesaler. Dennis Rackers owned the remaining 85%. McDowell informed SAG of his ownership interest in Ignite on January 2, 2009. Ignite was never a member of the Annexus Group, and it ceased doing business in March 2009 because it was unsuccessful.

¶5 On January 10, 2009, McDowell terminated his contract with SAG after it accused him of not doing his job and threatened to take legal action. McDowell still possessed the copy of SAG's database that Brad Stern had given him. Six days later, SAG filed a lawsuit in the superior court, accusing McDowell of breach of contract, misappropriation of trade secrets, conspiracy, unjust enrichment, and misrepresentation.[2] McDowell counterclaimed, alleging defamation and interference with prospective business advantage.

[2] SAG also named Ignite as a party to the conspiracy claim. Ignite failed to appear or defend in the proceedings and is not a party to this appeal.

¶6 A five-day jury trial ensued. After SAG presented its case-in-chief, McDowell moved for judgment as a matter of law ("JMOL") on all of SAG's claims. The court granted the motion as to the unjust enrichment and conspiracy claims, as well as the breach of contract claim stemming from an alleged violation of a non-disclosure provision. The court denied McDowell's motion as to SAG's misappropriation of trade secrets and negligent misrepresentation claims. After McDowell presented his case, SAG moved for JMOL on the counterclaims. The court granted the motion as to the claims for interference with prospective business advantage and punitive damages, but denied the motion as to the defamation counterclaim. The jury returned a unanimous verdict in favor McDowell on all of SAG's remaining claims. It also found in favor of McDowell on the defamation claim and awarded him $153,000 in damages.

¶7 SAG renewed its motion for JMOL and filed a motion for new trial. McDowell moved for an award of attorneys' fees and costs. The court denied SAG's renewed JMOL motion and its motion for new trial. It awarded McDowell $87,437.54 in attorneys' fees and costs.

¶8 The court entered final judgment on December 10, 2010, and SAG filed a timely appeal. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-2101(A)(1) and (A)(5)(a).

DISCUSSION

I. Sufficiency of the Evidence

¶9 SAG contends the defamation counterclaim should not have been submitted to the jury because there was no proof it made defamatory statements about McDowell. We will affirm the jury's verdict if there is substantial evidence to support it. *See Gonzales v. City of Phoenix*, 203 Ariz. 152, 153, ¶ 2, 52 P.3d 184, 185 (2002). "Substantial evidence is any relevant evidence from which a reasonable person might draw a conclusion." *Mealey v. Arndt*, 206 Ariz. 218, 221, ¶ 12, 76 P.3d 892, 895 (App. 2003) (internal quotation marks and citation omitted).

¶10 McDowell's defamation counterclaim alleged: (1) Brad and/or Steve Stern "published by way of written and/or spoken words, false and defamatory communications regarding McDowell to third parties[;]" (2) SAG knew "the statements it made about McDowell to third parties were false and defamed McDowell, or SAG acted in reckless disregard of the truth of the matters it published, or acted negligently in failing to obtain the truth of the matters it published to third parties[;]" and (3) SAG's false and defamatory statements brought McDowell "into contempt, disrepute, ridicule, and/or impeached his honesty, integrity, virtue or reputation." At the conclusion of trial, the court instructed the jury on the defamation claim as follows:

> Defendant Chris McDowell has alleged that Plaintiff Senior Advisory Group has defamed him. To prove a claim for defamation, Defendant, as a private person must prove that SAG made a statement to a third party about McDowell and: a) knew that the statement was false and that it defamed McDowell; b) acted in reckless disregard of the truth of the statement; or c) acted negligently in failing to ascertain the truth of the statements.

¶11 SAG does not challenge this jury instruction. A statement is defamatory when it is false and brings the defamed person into disrepute, contempt, or ridicule, or impeaches his honesty, integrity, virtue, or reputation. *Turner v. Devlin*, 174 Ariz. 201, 203–04, 848 P.2d 286, 288-89 (1993) (citation omitted).

¶12 According to SAG, there was no evidence that it or its agents made defamatory statements about McDowell. After considering the trial evidence and the reasonable inferences therefrom in the light most favorable to sustaining the verdict, we conclude otherwise. We concur with the trial court's determination that there was "sufficient circumstantial evidence for the jury to infer the existence of the elements of defamation."

¶13 Direct and circumstantial evidence have equal probative value, and a verdict may be supported entirely by circumstantial evidence. *See Lohse v. Faultner*, 176 Ariz. 253, 259, 860 P.3d 1306, 1312 (App. 1992). Considered together, the

trial testimony of Mike Rossi, Dennis Rackers, Ron Shurts, and Chris McDowell could lead reasonable jurors to find that SAG, through the Sterns, falsely told third parties that McDowell had misappropriated SAG's proprietary information -- specifically, its database.[3] Rackers, for example, testified that Shurts questioned him after Steve Stern told Shurts that Rackers was using SAG's database. On January 24, 2009, Shurts sent an email to several members of the Annexus Group that read:

> I will assume at this point that Chris McDowell did not steal the database from Shurwest and SAG. I will also assume if he did he is not generating lists for the internal marketers of names [sic] they think are random. I know [Rackers] would never participate in this kind of bulls***. We support the relationship with [Rackers] and Medallion West under the right circumstances.
>
> We don't need to talk about what would happen if this kind of illegal activity is going on. I know everyone thinks that we manage the Annexus model based on what WE think is right or wrong, however it is based on integrity regardless on [sic] previous relationship. This will be the last time I send an e-mail regarding this IGNITE s***. Tell Chris don't F*** with this situation.

[3] Indeed, that contention was the basis for SAG's claims against McDowell. Counsel for SAG underscored this fact when cross examining McDowell at trial, stating, "[Y]ou understand that the central issue in this case, sir, is whether or not you misappropriated information from Senior Advisory Group's database?"

¶14 Shurts testified that he sent this e-mail *after* speaking with Rackers about SAG's database, and thus, after speaking with Steve Stern. Shurts further testified:

> Q. Has Steve Stern ever stated to you specifically that Chris McDowell stole the information in his database?
>
> A. I don't know that he specifically has told me that directly.
>
> . . . .
>
> Q. Okay. . . . [H]ad information or accusations come to your attention that [McDowell] had stolen [SAG's] databases?
>
> . . . .
>
> Q. Okay. . . . What about Mr. Stern, did he ever say anything?
>
> A. I don't think so, maybe.
>
> . . . .
>
> Q. Okay. So, [Steve Stern] never told you that Mr. McDowell stole his database?
>
> A. The conversation I had with Steve is that there was definitely an issue, there was definitely a problem.

¶15 When asked whether anyone told him that McDowell stole the database from SAG, Rossi testified that he did not believe the word "stole" was used, though there were "inference[s]" that McDowell had unauthorized access to SAG's database.

¶16 In reviewing the trial evidence, it is not an appellate court's role to reweigh the evidence to determine

whether we would reach the same verdict as the jury. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). The appellate court must not "'take the case away from the jury' by combing the record for evidence supporting a conclusion or inference different from that reached here . . . . 'Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.'" *Flanders v. Maricopa County*, 203 Ariz. 368, 371, ¶ 5, 54 P.3d 837, 840 (App. 2002) (quoting *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 56, ¶ 27, 961 P.2d 449, 454 (1998)).

¶17 Although the evidence of defamation could have been stronger, it was nonetheless substantial enough to convince eight jurors that SAG had defamed McDowell. *See* Restatement (Second) of Torts § 566 cmt. a, b (defendant may be subject to liability for an expression that is based on some facts regarding plaintiff or his conduct that have not been stated by defendant, but are assumed to exist by the communicating parties). We find no basis upon which to disturb the jury's verdict as to the defamation counterclaim.[4]

[4] We decline to address SAG's contention that, even if its statements were defamatory, they were conditionally privileged. SAG did not make this claim before or during trial. "[F]ailure to raise an issue at trial . . . waives the right to raise the issue on appeal." *State v. Gatliff*, 209 Ariz. 362, 364, ¶ 9,

II. Damages

¶18 SAG next argues that McDowell failed to present sufficient evidence to support the jury's compensatory damage award. Arguably, SAG has waived this claim by failing to raise it until its motion for new trial. *See, e.g., Conant v. Whitney*, 190 Ariz. 290, 293, 947 P.2d 864, 867 (App. 1997) (arguments first raised in motion for new trial deemed waived); *Ruck Corp. v. Woudenberg*, 125 Ariz. 519, 522, 611 P.2d 106, 109 (App. 1980) (issue raised on appeal was "not raised until the motion for a new trial. By then it was too late."). SAG sought JMOL as to punitive damages, but did not argue at trial that McDowell had also failed to prove compensatory damages.

¶19 But even assuming that SAG adequately preserved this issue for appellate review, we find no basis for reversal. "It is the genius of the common law that difficult damage questions are left to juries." *Felder v. Physiotherapy Assocs.*, 215 Ariz. 154, 163, ¶ 40, 158 P.3d 877, 886 (App. 2007) (quoting *Walker v. Mart*, 164 Ariz. 37, 41, 790 P.2d 735, 739 (1990)); *see also Meyer v. Ricklick*, 99 Ariz. 355, 358, 409 P.2d 280, 282 (1965) ("[T]he law does not fix precise rules for the measure of damages but leaves their assessment to a jury's good sense and unbiased judgment.").

---

102 P.3d 981, 983 (App. 2004) (alteration in original) (citation omitted).

¶20 McDowell testified that, as of the time of trial, he had been unemployed in the insurance industry for 18 months. The undisputed evidence was that he had earned $8500 per month as an independent contractor for SAG. Multiplying that figure by 18 equals $153,000 –- the amount of the compensatory damage award. McDowell testified that this segment of the insurance industry is a "fairly close-knit group of people." His theory, which the jury was free to accept or reject, was that he could not find re-employment in his chosen field because of SAG's defamatory statements. There was sufficient evidence in the record to support the compensatory damage award.

III. Attorneys' Fees Award

¶21 SAG next claims the superior court erred in awarding McDowell attorneys' fees under A.R.S. § 12-341.01(A) because his defamation counterclaim was not interwoven with SAG's contractual claims.

¶22 In his fee application, McDowell argued he was entitled to a fee award because the contract and defamation claims were interwoven. SAG did not contest this assertion or even address it in its responses. Because we do not consider arguments and theories not presented to the superior court, SAG has waived this argument for purposes of appeal. *Richter v. Dairy Queen of S. Ariz., Inc.*, 131 Ariz. 595, 596, 643 P.2d 508, 509 (App. 1982).

¶23 SAG also fleetingly suggests, in the "issues" section of its opening brief, that we should reverse the amount of the fee award. It does not, however, develop this argument further, and we therefore do not address it.[5] *See Ace Auto. Products, Inc. v. Van Duyne*, 156 Ariz. 140, 143, 750 P.2d 898, 901 (App. 1987) (it is not the appellate court's role to develop arguments that were not clearly made).

CONCLUSION

¶24 We affirm the judgment of the superior court. In the exercise of our discretion, we deny McDowell's request for attorneys' fees incurred on appeal. However, McDowell is entitled to recover his appellate costs upon compliance with ARCAP 21(a).

/s/
MARGARET H. DOWNIE,
Presiding Judge

CONCURRING:

/s/
PETER B. SWANN, Judge

/s/
DONN KESSLER, Judge

[5] McDowell's fee application included an affidavit itemizing fees and costs totaling $91,657.66. In response, SAG argued the award should be reduced by $6842.50 because McDowell was seeking fees for work that was administrative in nature and/or unrelated to the case. After considering McDowell's affidavit and "[SAG's] specific objections," the court awarded McDowell $87,437.54 in fees and costs.