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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ALAN KELLY and WANDA KELLY, husband and wife, Plaintiffs/Appellants/ Cross-Appellees, v. KINO SPRINGS GOLF, L.L.C., an Arizona limited liability company; KINO SPRINGS RANCH, L.L.C., an Arizona limited liability company, Defendants/Appellees/ Cross-Appellants.	2 CA-CV 2012-0072 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF SANTA CRUZ COUNTY

Cause No. CV08044

Honorable James A. Soto, Judge

AFFIRMED AS MODIFIED

James F. Miller — Nogales

and

José M. Lerma — Nogales

Attorneys for Plaintiffs/Appellants/Cross-Appellees

Sanders & Parks, P.C.
By G. Gregory Eagleburger — Phoenix
Attorneys for Defendants/
Appellees/Cross-Appellants

E C K E R S T R O M, Presiding Judge.

¶1 This appeal concerns a contract action stemming from a real estate development project. After the jury returned a verdict in favor of the plaintiffs Alan and Wanda Kelly and awarded them damages of $2,000,000, the trial court granted the motion for a new trial filed by defendants Kino Springs Golf, L.L.C., and Kino Springs Ranch, L.L.C. (collectively "Kino"), finding the Kellys had "failed to establish . . . damages with reasonable certainty as required by Arizona law." On appeal, the Kellys maintain this determination was erroneous. In its cross-appeal, Kino contends the court erred by refusing to grant judgment as a matter of law (JMOL) on the issue of damages. Kino additionally argues in the alternative that the court erred by ordering retrial only as to damages, not liability. For the reasons that follow, we affirm the court's grant of Kino's motion for new trial, but we modify the court's order by removing the restriction limiting the new trial to the issue of damages. *See Ehman v. Rathbun*, 116 Ariz. 460, 464, 569 P.2d 1358, 1362 (App. 1977).

Factual and Procedural Background

¶2 We view the evidence presented below in the light most favorable to upholding the jury's verdict. *See Earle M. Jorgensen Co. v. Tesmer Mfg. Co. (Jorgensen)*, 10 Ariz. App. 445, 446, 459 P.2d 533, 534 (1969).

¶3 After establishing and running an "eco resort" in Montana for over a decade, the Kellys moved to Arizona in search of other development opportunities. In 2002, they acquired nearly 170 acres of land in Santa Cruz County through a land swap agreement with Kino, which was an adjacent landowner. The agreement required Kino "to reasonably cooperate with" the Kellys "in obtaining any appropriate zoning, abandonment, amendments to CC&Rs and replatting" for the Kellys' new planned resort. The agreement also called for Kino to "expeditiously" supply the Kellys' property with an electrical power line. The evidence suggested, however, that Kino failed to cooperate in reconfiguring the Kellys' land, and Kino did not provide a power line to the property until 2008.

¶4 The Kellys filed a complaint that year for breach of contract seeking, *inter alia*, consequential damages in the form of expenses and lost profits. The Kellys' development plans had included building and operating a resort called Vermilion Mountain Ranch, as well as constructing and selling five "lodge homes" on their property. They built one of these lodge homes in 2008, after power became available. Alan Kelly and a general contractor who served as a consultant on the project, Hector Ruvalcaba, testified it cost approximately $400,000 to construct the lodge home, which was consistent with Alan's ledger of expenses admitted as an exhibit. A real estate broker, Lois Cooper, testified that the value of the lodge homes in 2005 would have been $660,000 each. Alan thus testified the lost profits from the five lodge homes were at least $750,000.

¶5 In addition to seeking lost profits from these sales, the Kellys sought to recover their actual expenses incurred in developing the lodge home and in making other improvements that would not have been made unless the new resort could have been built as planned. According to Alan's testimony, these costs totaled $90,000, and they included the costs for water lines, a water well, a barn, corrals, and fencing.

¶6 With respect to the resort, Alan provided much of the testimony related to its lost profits based on his own expertise and past experiences. For nearly fifteen years, during the 1980s and 1990s, the Kellys had owned and operated a luxury resort in Montana called Eagle's Nest Lodge. Before starting this business, Alan had received a bachelor's degree in biology and had worked as a fishery biologist and project leader with the United States Fish and Wildlife Service. The Montana resort he operated with Wanda catered to an "exclusive clientele" and offered its guests the chance to fish along the Bighorn River, which Alan described as "the number one trout stream in the world." The resort also provided guests with opportunities to see the natural habitat, tribal lands, and wildlife in the area.

¶7 For twelve years during this same period of time, Alan also served in a partnership with a company known as Orvis. In this capacity, he evaluated the accommodations, activities, and dining offered by other luxury resorts in various states and countries for the purpose of providing Orvis's endorsement. He also developed the criteria for making such evaluations.

¶8 In regard to the Arizona resort, the Kellys apparently planned on funding it themselves, and Alan estimated his initial costs to construct the resort would be

$2,405,000. He testified the resort would offer its clients horseback riding, hiking, and astronomy. Given his past experiences, Alan believed his planned ranch would attract similar clients as his Montana lodge because such clients primarily desire a new experience in different surroundings, and the "high-desert country" offered a unique habitat. Alan testified that he could have charged $1,000 per night for each guest, half of which would have been profit. He planned for the resort to accommodate up to twenty-four guests and to operate five days per week for six months of the year. Assuming varying occupancy rates between twenty-five and one-hundred percent between the years 2004 and 2007, Alan thus calculated his operating profits at $3,240,000, for a total of $835,000 in net profits that were never realized from the resort.

¶9 Kino had filed a pretrial motion, which the trial court denied, seeking to preclude much of this evidence of damages on the grounds that it was speculative and lacked an adequate evidentiary basis. Kino then raised unsuccessful challenges and objections during trial to the evidentiary foundation of the damages. Before the case was submitted to the jury, Kino challenged the evidence supporting the Kellys' damages in a motion for JMOL filed pursuant to Rule 50(a), Ariz. R. Civ. P., which the trial court denied. After the jury returned its verdict in favor of the Kellys, Kino filed a renewed motion for JMOL or, in the alternative, a motion for a new trial pursuant to Rule 59(a), Ariz. R. Civ. P. The court again denied the JMOL motion, but it granted a new trial on the issue of damages.

¶10 In the trial court's written ruling, it noted that Alan "did not compare or contrast [the anticipated profits from the Vermilion Mountain Ranch] with any

specificity, either in his testimony or by way of documentation, to the revenues, expenses, profits, or profit margins he earned or presumably earned at Eagle's Nest Lodge." The court further observed that Alan's work with Orvis only involved assessing the quality of services provided by various resorts, not analyzing their expenses or profitability. The court also found there was no evidence presented as to the revenues, expenses, or profitability of any businesses comparable to what Alan envisioned operating in Arizona. Based on these and other findings, the court concluded the evidence of damages lacked foundation and was not proven with "reasonable certainty" as required by the law. The Kellys filed a timely notice of appeal from the ruling. *See* A.R.S. § 12-2101(A)(5)(a); Ariz. R. Civ. App. P. 9(a); Ariz. R. Civ. P. 54(a), 58(a). Kino's timely cross-appeal followed.

New Trial

Grant of New Trial

¶11 The Kellys maintain their damages were properly proven and the trial court erred in setting aside the jury's verdict. We review an order granting a new trial for a clear abuse of discretion. *Koepnick v. Sears Roebuck & Co.*, 158 Ariz. 322, 325, 762 P.2d 609, 612 (App. 1988). A court abuses its discretion if it commits an error of law in the process of making a discretionary determination. *Romer-Pollis v. Ada*, 223 Ariz. 300, ¶ 12, 222 P.3d 916, 918-19 (App. 2009).

¶12 As noted above, the court granted a new trial here based upon its finding that the Kellys had "failed to establish . . . damages with reasonable certainty as required by Arizona law." The legal sufficiency of evidence is a question of law we review de

novo. *See McBride v. Kieckhefer Assocs., Inc.*, 228 Ariz. 262, ¶¶ 8, 10, 265 P.3d 1061, 1063-64 (App. 2011); *see also* Ariz. R. Civ. P. 59(a)(8) (allowing new trial when verdict "contrary to law"); *cf. Rancho Pescado, Inc. v. Nw. Mut. Life Ins. Co.*, 140 Ariz. 174, 183, 186, 680 P.2d 1235, 1244, 1247 (App. 1984) (concluding evidence failed to establish damages with "reasonable certainty," thereby warranting judgment notwithstanding verdict).[1]

¶13 If a new trial is justified on at least one of the grounds cited in a trial court's order, we will uphold its exercise of discretion. *Reeves v. Markle*, 119 Ariz. 159, 163, 579 P.2d 1382, 1386 (1978). Here, the court found the evidence insufficient as to three categories of damages: lost profits from the resort, lost profits from the sale of the lodge homes, and expenses incurred in anticipation of building the resort. Because we agree with the court that insufficient evidence was presented to establish lost profits from the resort, and because the jury's verdict did not separately identify the different types of damages that were found, we uphold the court's order granting a new trial.

¶14 In a breach-of-contract action, damages must be proven with "reasonable certainty." *Gilmore v. Cohen*, 95 Ariz. 34, 36, 386 P.2d 81, 82 (1963). To receive an

[1]Although the trial court's written ruling suggests it might have determined the jury's verdict was against the weight of the evidence, *see Cano v. Neill*, 12 Ariz. App. 562, 567, 473 P.2d 487, 492 (1970), with the court acting in its capacity as an additional juror, *see Walsh v. Advanced Cardiac Specialists Chartered*, 229 Ariz. 193, ¶ 15, 273 P.3d 645, 649 (2012), appellate review of such a determination would be more deferential to the trial court, *see Mammo v. State*, 138 Ariz. 528, 533-34, 675 P.2d 1347, 1352-53 (App. 1983), and would result in the same outcome in this case. Rather than reviewing the weight of the evidence here, we review its sufficiency because the trial court recited the legal standard for sufficiency in its ruling, and it relied on case law concerning the same.

award for lost future profits, a party must establish both the fact of damages and the amount thereof. *Jorgensen*, 10 Ariz. App. at 450, 459 P.2d at 538. We have said that "[o]nce the fact of damages has been proven, the amount of the damages may be shown with proof of a lesser degree of certainty than is required to establish the fact of damage." *Short v. Riley*, 150 Ariz. 583, 585, 724 P.2d 1252, 1254 (App. 1986). Yet we have also recognized that "the line between the fact of damage and the amount of damage may be blurred when lost profits are at issue." *Felder v. Physiotherapy Assocs.*, 215 Ariz. 154, ¶ 46, 158 P.3d 877, 887 (App. 2007).

¶15 A new business is not precluded by law from recovering an award for lost future profits. *Rancho Pescado*, 140 Ariz. at 184, 680 P.2d at 1245. "[W]here evidence is available to furnish a reasonably certain factual basis for computation of probable losses, recovery of lost profits cannot be denied even though a new business venture is involved." *Jorgensen*, 10 Ariz. App. at 450, 459 P.2d at 538. "The evidence required to prove loss of future profits depends on the individual circumstances of each case" and may include "the profit history from a similar business operated by the plaintiff at a different location." *Rancho Pescado*, 140 Ariz. at 184, 680 P.2d at 1245. When deciding whether a reasonably certain factual basis exists for calculating lost profits, a court must view the evidence presented in the light most favorable to upholding the jury's verdict. *Id.* But "conjecture or speculation cannot provide the basis for an award of damages." *Jorgensen*, 10 Ariz. App. at 452, 459 P.2d at 540; *accord Gilmore*, 95 Ariz. at 36, 386 P.2d at 82.

¶16 We find the cases of *Rancho Pescado*, on which the trial court expressly relied, and *Jorgensen* to be particularly analogous to the circumstances here. Both cases involved new businesses whose putative lost profits were found to be speculative and insufficiently proven as a matter of law. *See Rancho Pescado*, 140 Ariz. at 177, 186, 680 P.2d at 1238, 1247; *Jorgensen*, 10 Ariz. App. at 451-52, 459 P.2d at 539-40. In *Jorgensen*, this deficiency was based on several factors, including the fact that the case concerned "not only a new business, but also . . . the marketing of a new product"; no comparable sales figures had been introduced at trial to establish lost profits; and the evidence of lost profits amounted to estimates from an interested party who had no experience selling the product in question. 10 Ariz. App. at 451-52, 459 P.2d at 539-40. In *Rancho Pescado*, the evidence was similarly deficient because the new business's lost profits were based on optimistic assumptions and projections, much of them supplied by the business's president and based on his own research, with no reliable evidence showing the product could have been successfully marketed. 140 Ariz. at 177, 185-86, 680 P.2d at 1238, 1246-47.

¶17 The presumed profits of the Kellys' unbuilt resort were similarly speculative and unfounded in fact. Although Alan had years of experience operating a resort in Montana, the Vermilion Mountain Ranch he planned to build in southern Arizona would be, in his words, like "apples and oranges" to his prior enterprise. Alan acknowledged that the marketability of a resort depends mainly on its location. Thus, as in *Jorgensen*, the Vermilion Mountain Ranch resort was essentially a new business marketing a new product: a different resort in a different region of the country with a

different habitat offering different activities. And the evidence of lost profits here, like that held to be deficient in *Jorgensen*, amounted to estimates of an interested party with no experience selling the particular product at issue.

¶18 The trial court noted that Alan did not supply any market data or evidence of comparable businesses "that might provide some foundation for his opinions as to what he would have earned operating the proposed lodge" in Arizona, or whether it would have been profitable at all. As had the plaintiff in *Rancho Pescado*, Alan based his damage estimates on optimistic assumptions that, even if they supplied a mathematical basis for calculating damages, did not provide a reasonably certain factual basis to support an award. We therefore agree with the court's legal determination that the evidence of lost profits from the resort failed to meet the reasonable certainty standard required by law.

¶19 The Kellys' arguments based on *Nelson v. Cail*, 120 Ariz. 64, 583 P.2d 1384 (App. 1978), do not alter our conclusion, as that case is factually distinguishable. In *Nelson*, we upheld a jury award of lost anticipated profits for a plumbing contractor who had completed a job pursuant to a contract. *Id.* at 66, 69, 583 P.2d at 1386, 1389. We determined the contractor's testimony that he had expected to make $30,000 in profit was an adequate basis for the jury's award, noting there was (1) an abundance of evidence "concerning [the] details of the materials supplied and the work performed . . . provid[ing] a foundation for his opinion concerning his anticipated profit from the job" and (2) a lack of any foundational objection to his testimony. *Id.* at 67, 583 P.2d at 1387.

¶20 Here, in contrast, the anticipated profits did not concern a resort that had already been constructed or operated; few details of the resort's expenses were offered; and the foundation of Alan's testimony on lost profits was challenged before, during, and after trial as speculative. As *Rancho Pescado* emphasized, "[t]he evidence required to prove loss of future profits depends on the individual circumstances of each case." 140 Ariz. at 184, 680 P.2d at 1245. Unlike in *Nelson*, it is not "clear from the entire record that [Alan] possessed sufficient information upon which to state the amount of his expected profits." 120 Ariz. at 68, 583 P.2d at 1388. Accordingly, the trial court did not err as a matter of law in concluding that the Kellys' evidence of expected profits, as presented, was insufficient evidence to support an award of damages.

¶21 Although we would not ordinarily address a new trial order any further, *see Reeves*, 119 Ariz. at 163, 579 P.2d at 1386, we find it appropriate to briefly discuss the trial court's findings related to the two other categories of damages, as such issues are likely to recur on retrial. The court determined these damages were similarly "speculat[ive]" and were not proven with "reasonable certainty" due to a "lack of sufficient foundation and documentation." To the extent these were legal determinations, they were incorrect.

¶22 While the parties' evidence will likely be different upon retrial, we note generally that the evidence presented in regard to the lodge homes was legally sufficient to support an award of lost profits. A real estate appraisal of a proposed development may provide a reasonably certain factual basis for computing lost profits. *E.g.*, *Rhue v. Dawson*, 173 Ariz. 220, 229, 841 P.2d 215, 224 (App. 1992). Thus, the costs and market

values of the Kellys' lodge homes, to the extent they would have been similar to the one built, were supported by admissible evidence that gave the jury a "rational standard [for] making an award." *Rancho Pescado,* 140 Ariz. at 184, 680 P.2d at 1245.

¶23 Insofar as the Kellys only offered testimonial evidence regarding the development plans of their other lodge homes, this was certainly an "inherent weakness" of the evidence to be considered by the trier of fact, *Gilmore*, 95 Ariz. at 36, 386 P.2d at 83, but it did not cause the evidence to fail as a matter of law. "[T]hat the evidence leaves much to be desired" does not render it legally insufficient. *Nelson*, 120 Ariz. at 68, 583 P.2d at 1388. Both Alan Kelly and the real estate broker, Lois Cooper, made certain assumptions in order to retroactively determine the costs and lost profits of homes that were never built. But what is critical is that the "challenged assumptions had a basis in fact," allowing the jury to "[a]ssess[] their accuracy and reliability." *Cnty. of La Paz v. Yakima Compost Co.*, 224 Ariz. 590, ¶ 54, 233 P.3d 1169, 1187 (App. 2010). Notably, one of the lodge homes had been completed, providing the broker a tangible example of the prospective quality of the unbuilt lodges. In sum, therefore, the evidence presented was adequate to support a factual finding and calculation of lost profits, and any particular flaws with the Kellys' retroactive cost calculations or appraisal could have been exposed through cross-examination or contrary evidence. *See Nelson*, 120 Ariz. at 68, 583 P.2d at 1388 (when sufficient evidence of damages presented, opposing party "may attack the correctness of the amount through cross-examination and additional evidence"); *cf. Short*, 150 Ariz. at 586, 724 P.2d at 1255 (finding argument that damage calculation did not properly allocate certain expenses concerned weight of evidence).

¶24 As to expenses incurred in anticipation of the development of the resort, Alan's testimony was sufficient to support these amounts, and no further foundation or documentation was required. *Cf. Nelson*, 120 Ariz. at 68, 583 P.2d at 1388 (concluding party's testimony of damages in form of extra expenses need not be supported by documentary evidence).

Limitation of New Trial

¶25 Kino maintains the trial court erred in limiting its grant of a new trial exclusively to the issue of damages, arguing the "entwinement of issues between liability and damages precludes a partial new trial." We review the court's decision to limit relief for an abuse of discretion. *See Martinez v. Schneider Enters., Inc.*, 178 Ariz. 346, 348, 873 P.2d 684, 686 (App. 1994); *Trus Joist Corp. v. Safeco Ins. Co. of Am.*, 153 Ariz. 95, 108, 735 P.2d 125, 138 (App. 1986).

¶26 A court is empowered by Rule 59(b) to order a new trial "on all or part of the issues in an action." However, "retrial should be granted on both liability and damages 'when the issues are interwoven and cannot be separated without injustice to the opposing party.'" *Styles v. Ceranski*, 185 Ariz. 448, 451-52, 916 P.2d 1164, 1167-68 (App. 1996), *quoting Anderson v. Muniz*, 21 Ariz. App. 25, 28, 515 P.2d 52, 55 (1973), *overruled on other grounds by Lopez v. Safeway Stores, Inc.*, 212 Ariz. 198, ¶ 9, 129 P.3d 487, 490 (App. 2006). "Partial new trials are not recommended because they create much opportunity for confusion and injustice," *id.* at 451, 916 P.2d at 1167, and "any doubt should be resolved in favor of a trial on all the issues." *Englert v. Carondelet*

Health Network, 199 Ariz. 21, ¶ 15, 13 P.3d 763, 769 (App. 2000). As our supreme court has explained,

> a new trial on the question of damages only will be granted when liability is not contested or has been clearly proved by the plaintiff so that the issues may be deemed separable; on the other hand when liability is contested and the issues are so inextricably entwined that a fair trial could not be given one of the parties on the issue of damages alone then a new trial will be ordered on all issues.

Tovrea Equip. Co. v. Gobby, 72 Ariz. 38, 42, 230 P.2d 512, 515 (1951); *accord In re Thompson's Estate*, 1 Ariz. App. 18, 23, 398 P.2d 926, 931 (1965) (recognizing case law suggesting that if "there is some interrelationship of issues between damages and liability, and . . . if the issue of liability is closely contested, it would be prejudicial to the defendant to retry the case on the issue of damages alone"), *abrogated on other grounds by McKillip v. Smitty's Super Valu, Inc.*, 190 Ariz. 61, 63-64, 945 P.2d 372, 374-75 (App. 1997).

¶27 We find *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931), especially illustrative here. In that case, the jury's verdict established a breach of contract, but it did not establish either the terms of the contract or the date it was breached. *Id.* at 499. The Supreme Court noted that both these items would be material facts in a jury's calculation of damages—including a finding of lost anticipated profits. *Id.* at 499-500. The Court thus concluded that "the question of damages . . . is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a

denial of a fair trial." *Id.* at 500. Based on this determination, the Court then reversed the circuit court's order granting a new trial only on the issue of damages. *Id.* at 496, 500.

¶28 Here, as in *Gasoline Products*, a breach of contract was established at trial, but the jury's verdict did not establish how or when the breach (or breaches) had occurred. Both facts will be material to a jury's calculation of damages. The lost profits here depend upon whether the Kellys, as both a legal and a practical matter, could have developed their property as they had planned and when they had planned.

¶29 Moreover, the evidence of Kino's breaches was contested below. Kino disputed that it had failed to cooperate with reconfiguring the property, and it presented evidence that the reconfiguration had not occurred because the Kellys had failed, among other things, to take the necessary steps to abandon their plat and extinguish the roadways dedicated to the county. Kino also maintained it had not supplied an overhead power line earlier due, in part, to the policy of the electric company and the fact that the Kellys did not request the electrical line until December 2006. The verdict does not clarify which, if any, of these arguments the jury rejected or credited.

¶30 In sum, liability was not a discrete issue that was clearly settled by the jury's verdict; it was a complex question interrelated with the question of damages. We therefore conclude the trial court abused its discretion in granting a new trial limited to the issue of damages. Accordingly, "[t]he order granting a new trial is modified by

eliminating therefrom that portion limiting the issue to be retried to the amount of damages." *Ehman*, 116 Ariz. at 464, 569 P.2d at 1362.[2]

JMOL

¶31 Kino further asserts that the trial court erred in ordering a new trial rather than judgment as a matter of law, reasoning that "if there was a lack of proof," the denial of the post-verdict motion for JMOL "was legally incorrect and should be reversed," with "judgment [being] rendered for Kino." We find no reversible error, given that JMOL is not mandatory when a trial court concludes the evidence is insufficient.

¶32 "Judgment as a matter of law lies where 'there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.'" *Felder*, 215 Ariz. 154, ¶ 36, 158 P.3d at 885, *quoting* Ariz. R. Civ. P. 50(a). Rule 50(b), however, gives a trial court the option of either ordering a new trial or entering JMOL when the evidence presented is legally insufficient to support the jury's verdict. The rule expressly provides that "the court may, in disposing of the renewed motion, . . . reopen the judgment and either order a new trial or direct the entry of judgment as a matter of law." *Id.*

¶33 "'[W]hen considering a Rule 50 motion a trial judge is not required to grant judgment as a matter of law even in a case in which it has the power to do so.'" *Marquette Venture Partners II, L.P. v. Leonesio*, 227 Ariz. 179, ¶ 12, 254 P.3d 418, 422

[2]We note that the parties have not challenged the verdict in favor of the Kellys on Kino's counterclaim for trespass. Neither the trial court's order granting a new trial nor our decision in this appeal affects that verdict.

(App. 2011), *quoting Chalpin v. Snyder*, 220 Ariz. 413, ¶ 23, 207 P.3d 666, 672 (App. 2008). As the Supreme Court explained in regard to the analogous federal rule,[3] "Rule 50(b) permits the . . . court to exercise its discretion to choose between ordering a new trial and entering judgment." *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 402 (2006); *accord Cone v. W. Va. Pulp & Paper Co.*, 330 U.S. 212, 215 (1947) ("[T]he rule does not compel a trial judge to enter a judgment notwithstanding the verdict instead of ordering a new trial; it permits him to exercise a discretion to choose between the two alternatives."). In other words, "[w]hen a trial court concludes that a proper basis exists for granting a timely, well-grounded motion for judgment [notwithstanding the verdict], it has a discretion to grant the lesser relief and to order a new trial instead if justice would thereby better be served." *Jackson v. Wilson Trucking Corp.*, 243 F.2d 212, 214 (D.C. Cir. 1957); *accord Goldsmith v. Diamond Shamrock Corp.*, 767 F.2d 411, 414 (8th Cir. 1985) (noting language of rule "by its very terms gives a court discretion to order a new trial . . . where the moving party otherwise would have been entitled to judgment notwithstanding the verdict").

¶34 Kino implies that the trial court abused its discretion by granting a new trial here, asserting that "the evidence can[]not change" upon retrial. This argument, however, rests upon a false premise. As the court implied in its written ruling, the Kellys may supplement their evidence of damages on the resort's profits, for example, with more

[3]Arizona courts have previously noted the similarity of these rules and relied on federal authorities when interpreting this rule of civil procedure. *E.g.*, *Marquette Venture Partners II*, 227 Ariz. 179, ¶¶ 10-11 & n.6, 254 P.3d at 421 & n.6.

detailed cost estimates and evidence of comparable resorts. Because Kino Springs has otherwise failed to develop an argument on this issue, we need not address it further. *See Ritchie v. Krasner*, 221 Ariz. 288, ¶ 62, 211 P.3d 1272, 1289 (App. 2009) ("Opening briefs must present and address significant arguments, supported by authority that set forth the appellant's position on the issue in question."); *see also In re $26,980.00 U.S. Currency*, 199 Ariz. 291, ¶ 28, 18 P.3d 85, 93 (App. 2000) (declining to consider "bald assertion" unsupported by legal authority).

Attorney Fees

¶35 Both parties have requested an award of attorney fees and costs pursuant to A.R.S. §§ 12-341 and 12-342, as well as Rule 21, Ariz. R. Civ. App. P. Because these statutes and rule concern only "costs," they provide no substantive basis for an award of attorney fees. *See Champlin v. Bank of Am.*, 231 Ariz. 265, ¶ 18, 293 P.3d 541, 545 (App. 2013).

¶36 Kino has additionally requested attorney fees pursuant to A.R.S. § 12-341.01. Because our decision does not affect or determine the amount of the judgment, *see* § 12-342, and because each party has prevailed in part in this appeal, we decline both parties' requests for attorney fees and costs. *See Samaritan Health Sys. v. Caldwell*, 191 Ariz. 479, ¶ 19, 957 P.2d 1373, 1378 (App. 1998).

Disposition

¶37 For the foregoing reasons, we modify the trial court's order by removing the restriction limiting the new trial to the issue of damages. As modified, we affirm the order granting a new trial.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Michael Miller
MICHAEL MILLER, Judge