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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MIGUEL OCHOA-FUENTES and ROSALBA FIGUEROA-BONILLA, Plaintiffs/Appellees, v. DENISE BLANCHETTE, Defendant/Appellant.	2 CA-CV 2012-0097 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. CV20080321

Honorable Gary V. Scales, Judge Pro Tempore

AFFIRMED

Lloyd & Robinson, P.L.L.C.
By Arthur E. Lloyd and Doris Robinson Wait
Payson
Attorneys for Plaintiffs/Appellees

Denise Blanchette
Payson
In Propria Persona

V Á S Q U E Z, Presiding Judge.

¶1 In this contract action, Denise Blanchette appeals from the trial court's judgment in favor of appellees Miguel Ochoa-Fuentes and Rosalba Figueroa-Bonilla (collectively Ochoa-Fuentes) on their claims for unjust enrichment, restitution, and punitive damages arising from Denise and Charles Blanchettes' breach of an agreement to sell a mobile home.[1] For the reasons set forth below, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the trial court's judgment. *Figueroa v. Acropolis*, 192 Ariz. 563, 564-65, 968 P.2d 1048, 1049-50 (App. 1997). In January 2004, Charles and Alonzo Chavez executed an "Option Money Agreement" and "Lease with Option to Purchase" (collectively the Agreement) a mobile home from the Blanchettes. The mobile home was located in a mobile home park in Payson, which, at the time of the Agreement, was owned by the Blanchettes. Under the Agreement, Chavez had an option to purchase the mobile home for $22,500, which he could exercise by paying "option money" of $4,000. Chavez paid $1,000 toward the option when he signed the lease and agreed to make monthly payments thereafter of

[1]Charles Blanchette signed and filed the notice of appeal, without reference to Denise, and apparently died sometime thereafter. Because the notice of appeal does not designate both of the "parties taking the appeal," it is defective. *See* Ariz. R. Civ. App. P. 8(c). And, although the notice was filed timely after entry of the final judgment dated June 14, 2012, the notice erroneously states that Blanchette appeals from the "judgment entered on May 8, 2012"—the trial court's unsigned "Ruling on Under Advisement Action." *See id*. However, both errors are "technical defects" that do not prejudice Ochoa-Fuentes. *See, e.g.*, *Udy v. Calvary Corp.*, 162 Ariz. 7, 11, 780 P.2d 1055, 1059 (App. 1989) (omission on notice of appeal of name of minor child on whose behalf appeal made "technical error"); *Hanen v. Willis*, 102 Ariz. 6, 9-10, 423 P.2d 95, 98-99 (1967) (notice of appeal not rendered defective by error in designating as date of judgment date of minute entry order for judgment rather than date of formal written judgment). We therefore address the merits of Blanchette's appeal.

$500, consisting of $270 in rent and $230 in option money, until the option was paid in full. The Agreement further provided that once the $4,000 was paid, it would be applied to the purchase price and Chavez would pay the balance in monthly installments consisting of principal and interest.

¶3 Chavez made monthly payments until late 2007, when he sold the mobile home to Ochoa-Fuentes, who moved in with his family and continued making payments to the Blanchettes. At trial, Ochoa-Fuentes produced accountings showing that Chavez had paid all but $10 of the option money by December 2004 and testified that when he took possession of the mobile home in 2007, his payments were applied to the purchase price and not rent.

¶4 In March 2008, a woman drove her car into the mobile home, causing extensive damage. Although Denise inspected the damage a few days after the accident, the Blanchettes refused to repair the mobile home and eventually stopped responding to Ochoa-Fuentes's telephone calls. Meanwhile, Charles submitted a claim with the driver's insurance company and ultimately settled it for $21,499 in July 2008. The Blanchettes retained all of the insurance proceeds, made no repairs to the mobile home, and continued to accept monthly payments from Ochoa-Fuentes.

¶5 In September 2008, Ochoa-Fuentes filed this lawsuit in the Gila County Superior Court.[2] Following a bench trial in March 2012, the court entered judgment for

[2]After Charles evaded personal service of process, the trial court determined Ochoa-Fuentes had served him by publication and entered a default judgment on June 1, 2009. On appeal, however, this court determined service by publication was defective

Ochoa-Fuentes in the amount of $12,959 on the claim for unjust enrichment, representing the difference between the insurance proceeds and the amount still owed the Blanchettes under the Agreement, $1,000 for consequential and incidental damages, $8,500 in punitive damages, and $26,191.09 in attorney fees and costs. This appeal followed.

Discussion

Existence of Valid Contract

¶6 Blanchette argues the trial court's judgment is erroneous because Ochoa-Fuentes "never legally owned the mobile [home], and . . . therefore . . . never had any contract rights."[3] She maintains there was insufficient evidence for the court to conclude Ochoa-Fuentes had purchased the mobile home from Chavez, because Ochoa-Fuentes failed to "document[] the transfer." When a party challenges the sufficiency of the evidence, we review the trial court's judgment only to determine whether it is supported by substantial evidence. *Whittemore v. Amator*, 148 Ariz. 173, 175, 713 P.2d 1231, 1233 (1986). "Substantial evidence is evidence which would permit a reasonable person to

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and, accordingly, vacated the judgment. *See Ochoa-Fuentes v. Blanchette*, No. 2 CA-CV 2009-0102 (memorandum decision filed Feb. 25, 2010).

[3]Although Denise filed the briefs in this matter, "In Pro Per, and for Charles Blanchette, deceased," as a non-attorney, she is not permitted to represent Charles's interests on appeal. *See* Ariz. R. Sup. Ct. 31(a); *Byers-Watts v. Parker*, 199 Ariz. 466, ¶ 13, 18 P.3d 1265, 1268 (App. 2001). And although our rules allow a personal representative to pursue an appeal on behalf of a decedent, *see* Ariz. R. Civ. App. P. 9(a), Denise has neither established nor asserted that she is the personal representative for Charles's estate. But, because the trial court entered judgment against both Charles and Denise, we consider Denise's appeal to the extent she asserts her own interests or those of the marital community. *See Samaritan Health Sys. v. Caldwell*, 191 Ariz. 479, ¶¶ 10-11, 18, 957 P.2d 1373, 1376-78 (App. 1998).

reach the trial court's result." *In re Estate of Pouser*, 193 Ariz. 574, ¶ 13, 975 P.2d 704, 709 (1999).

¶7 At trial, Ochoa-Fuentes testified he had purchased the mobile home from Chavez in late 2007, paying him $6,000 and agreeing to continue making the monthly payments to the Blanchettes under the Agreement. He also testified he had a bill of sale from Chavez, had acquired title to the mobile home, and had "paid any taxes that were overdue because it was [his] name and [he] had the title." *See In re 4030 W. Avocado, Cortaro Ridge, Lot 32*, 184 Ariz. 219, 220, 908 P.2d 33, 34 (App. 1995) (title to property creates rebuttable presumption of ownership); *Boone v. Grier*, 142 Ariz. 178, 182, 688 P.2d 1070, 1074 (App. 1984) (same). During his testimony at trial, Charles acknowledged Ochoa-Fuentes had been making monthly payments under the contract before and after the accident and the Blanchettes had accepted these payments from him. *See Kadera v. Superior Court*, 187 Ariz. 557, 566, 931 P.2d 1067, 1076 (App. 1996) (initial down payment and contract requiring payment of principal and interest monthly indicative of an ownership interest in property). Ochoa-Fuentes also produced a bill of sale, executed after the accident, by which Chavez transferred to Ochoa-Fuentes all of his "right, title, and interest" in the mobile home, together with any causes of action or claims against the Blanchettes.[4] This constitutes substantial evidence that Ochoa-Fuentes

[4]Ochoa-Fuentes apparently acquired a certificate of title to the mobile home directly from the Arizona Department of Motor Vehicles. Chavez was unable to transfer title to Ochoa-Fuentes when Ochoa-Fuentes bought the mobile home from him in late 2007 because the Blanchettes had not transferred title to Chavez.

had an ownership interest in the mobile home. *See In re Estate of Pouser*, 193 Ariz. 574, ¶ 13, 975 P.2d at 709.[5]

¶8 Blanchette maintains that even if Ochoa-Fuentes "bought the mobile [home] and thereby acquired equity in it," the trial court's determination as to the amount of equity was clearly erroneous. "We will defer to a trial court's factual findings unless they are clearly erroneous or supported by no substantial evidence." *Cimarron Foothills Cmty. Ass'n v. Kippen*, 206 Ariz. 455, ¶ 11, 79 P.3d 1214, 1218 (App. 2003).

¶9 At trial, Charles testified that each year after he and Chavez had entered into the lease agreement, he prepared a document that detailed all of the payments he had received and how they had been allocated. Charles testified that two of the summaries admitted into evidence, detailing payments from 2004 and 2005, were "false documents . . . not prepared by [him]." However, he could not furnish his own accountings for those time periods, despite testifying that he had prepared them every year. The allegedly false documents from 2004 and 2005 showed that the $4,000 option money had been paid and that the principal balance due on the mobile home also was being paid.

[5]Blanchette also argues the statute of frauds prohibits the trial court's ruling in favor of Ochoa-Fuentes. *See* A.R.S. § 44-101. However, the statute of frauds is an affirmative defense that must be pled and proven. *See* Ariz. R. Civ. P. 8(c); *Abner v. Ariz. Newspapers, Inc.*, 11 Ariz. App. 237, 240, 463 P.2d 543, 546 (1970). Having failed to raise this affirmative defense argument in her answer to Ochoa-Fuentes's complaint, it was waived. *See Abner*, 11 Ariz. App. at 240, 463 P.2d at 546. And even if the defense had not been waived, the purposes of the statute of frauds would not be advanced by its enforcement in this case. *See Trollope v. Koerner*, 106 Ariz. 10, 16, 470 P.2d 91, 97 (1970) (statute of frauds "shield and not a sword," and should "not become an instrument by which fraud is perpetrated"). We therefore do not consider this argument further.

¶10 Although the accountings for 2006 and 2007 similarly showed a declining principal balance, Charles testified the balance was "provisional" because all payments were considered rent under the contract until the option money had been paid in full and Ochoa-Fuentes still owed option money by reason of outstanding late fees and unpaid property taxes. But that testimony is belied by exhibit 38—an accounting Charles had prepared detailing every payment he had received from Chavez or Ochoa-Fuentes. Charles acknowledged that based on exhibit 38, if the full $4,000 of option money had been paid, an additional $9,970 would have been treated as payments toward the purchase price of the mobile home and not rent.

¶11 Based on our review of the various accountings, and Charles's trial testimony, we cannot say the trial court clearly erred in finding that Chavez and Ochoa-Fuentes had paid a combined total of $13,960 toward the $22,500 purchase price under the Agreement. *See Cimarron Foothills Cmty. Ass'n*, 206 Ariz. 455, ¶ 11, 79 P.3d at 1218. This finding was premised on its reasonable conclusion "that the option money was fully paid." The trial court is in the best position to weigh the evidence and determine the credibility of witnesses. *Lehman v. Whitehead*, 1 Ariz. App. 355, 358, 403 P.2d 8, 11 (1965). Where, as here, there is a conflict in the evidence, we will not disturb the court's findings. *Id*.

Failure to Maintain Insurance Coverage and Pay Late Fees

¶12 Next, Blanchette argues Ochoa-Fuentes breached the lease agreement by failing to insure the mobile home and such failure was a material breach that excused Blanchette's duty to repair the mobile home or turn over any of the insurance proceeds.

She also contends Ochoa-Fuentes was in material breach of the contract because he had incurred and did not pay late fees of $570. "We review the trial court's interpretation of the Agreement de novo as a matter of law." *County of La Paz v. Yakima Compost Co.*, 224 Ariz. 590, ¶ 14, 233 P.3d 1169, 1178 (App. 2010). "Our purpose in interpreting a contract is to ascertain and enforce the parties' intent." *ELM Ret. Ctr., LP v. Callaway*, 226 Ariz. 287, ¶ 15, 246 P.3d 938, 941 (App. 2010).

¶13 Here, the Agreement unambiguously provides that "[l]essee shall cause to be placed in force an insurance policy naming lessor as [an] additional insured in an amount not less than the full purchase price." Ochoa-Fuentes apparently concedes he failed to insure the mobile home, but argues the Blanchettes waived enforcement of the insurance provision, or, alternatively, that the breach was not material and therefore did not justify forfeiture of his interest in the mobile home.

¶14 While generally it is true that the victim of a material or total breach of contract is excused from further performance, *Zancanaro v. Cross*, 85 Ariz. 394, 400, 339 P.2d 746, 750 (1959), it is also true that acceptance of rent after knowledge of a breach of a lease results in waiver of a claim for breach and affirmation that the lease is still in force, *Butterfield v. Duquesne Mining Co.*, 66 Ariz. 29, 32, 182 P.2d 102, 103 (1947). Here, the Blanchettes apparently were aware that neither Chavez nor Ochoa-Fuentes acquired insurance on the mobile home but never enforced compliance with that provision of the Agreement, instead, continuing to accept payments from them. Thus, Blanchette is estopped from raising a claim of breach based on the failure to maintain insurance coverage. *Id.*

¶15 Furthermore, even if Blanchette had not waived her claim, the failure to procure insurance was not a material breach justifying her refusal to repair the mobile home or to deliver any portion of the insurance proceeds under the facts of this case. In *Foundation Development Corp. v. Loehmann's, Inc.*, 163 Ariz. 438, 446-47, 788 P.2d 1189, 1197-98 (1990), our supreme court adopted the Restatement (Second) of Contracts § 241 (1981) test for determining whether the breach of a contract provision is material as opposed to trivial or immaterial. It requires the factfinder to consider:

> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
>
> (b) the extent to which the injured party can be adequately compensated [by damages] for the part of that benefit of which he will be deprived;
>
> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
>
> (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
>
> (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Found. Dev. Corp., 163 Ariz. at 446-47, 788 P.2d at 1197-98 (alteration in original), *quoting* Restatement § 241.

¶16 Here, all of these factors support the trial court's conclusion that Ochoa-Fuentes was not in material breach of the Agreement. Blanchette suffered no injury as a result of Ochoa-Fuentes's failure to insure the mobile home, nor was she "deprived of the benefit which [she] reasonably expected." Restatement § 241(a). The damage to the

mobile home was caused by a fully insured third party, and the loss was fully recovered. *See id.* § 241(a), (b). In contrast, if we were to conclude that Ochoa-Fuentes's failure to insure the mobile home constituted a material breach, it would forfeit thousands of dollars of equity, a dire consequence we must consider in reaching our decision. *See id.* § 241(c); *Found. Dev. Corp.*, 163 Ariz. at 447, 788 P.2d at 1198; *Mason v. Hasso*, 90 Ariz. 126, 130, 367 P.2d 1, 3 (1961) (law abhors forefeiture). Moreover, Blanchette offered no evidence that Ochoa-Fuentes had acted in bad faith by failing to maintain insurance coverage. *See* Restatement § 241(e). In sum, even if Blanchette had not waived her claim for breach of the insurance provision by accepting payment without objection, we conclude the breach was not material in any event.

¶17 We similarly reject Blanchette's argument that Chavez was in material breach of the contract because he failed to pay late fees. Although the lease unambiguously provides for the assessment of late fees when a rental payment is more than five days past due, the lease does not specify the day of the month payments are due. Blanchette asserts the "custom of the park" established that payments were due the first day of each month. Even assuming this were true, Blanchette does not dispute that she and Charles continued to accept all of the payments made by Chavez and Ochoa-Fuentes, and the Blanchettes did not produce any documentation at trial suggesting they ever had asked Chavez or Ochoa-Fuentes to pay late fees. We find no error in the trial court's determination that Ochoa-Fuentes was not in material breach of the Agreement.

Award of Damages

¶18 In her final two arguments, Blanchette contends the trial court's award of "punitive damages [was] inappropriate" and Ochoa-Fuentes was "not entitled to restitution." But Blanchette does not support either of these arguments with citations to relevant authority. She therefore has waived them on appeal. *See* Ariz. R. Civ. App. P. 13(a)(6) (appellate brief argument shall contain "citations to the authorities, statutes and parts of the record relied on"); *Polanco v. Indus. Comm'n*, 214 Ariz. 489, n.2, 154 P.3d 391, 393 n.2 (App. 2007) (appellant's failure to develop and support argument waives issue on appeal); *Cullum v. Cullum*, 215 Ariz. 352, n.5, 160 P.3d 231, 234 n.5 (App. 2007) (appellate courts "will not consider argument posited without authority").

¶19 The punitive damages argument is without merit in any event. To support an award of punitive damages, "a plaintiff must prove by clear and convincing evidence that the defendant engaged in aggravated and outrageous conduct with an 'evil mind.'" *Hyatt Regency Phx. Hotel Co. v. Winston & Strawn*, 184 Ariz. 120, 132, 907 P.2d 506, 518 (App. 1995), *quoting Thompson v. Better-Bilt Aluminum Prods. Co.*, 171 Ariz. 550, 556-57, 832 P.2d 209-10 (1992). Such damages are appropriate when the defendant acts with the intent to injure or deliberately interferes with the rights of others, "consciously disregarding the unjustifiably substantial risk of significant harm to them." *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 331, 723 P.2d 675, 680 (1986). In determining whether the defendant's conduct reached the necessary level of culpability, we consider:

> [T]he nature of the defendant's conduct, including the reprehensibility of the conduct and the severity of the harm likely to result, as well as the harm that has occurred, . . . [t]he

> duration of the misconduct, the degree of defendant's awareness of the harm or risk of harm, and any concealment of it.

Thompson, 171 Ariz. at 556, 832 P.2d at 209, *quoting Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 497, 733 P.2d 1073, 1080 (1987). On appeal, we will affirm an award of punitive damages "if any reasonable view of the evidence would satisfy the clear and convincing standard." *Hyatt Regency Phx. Hotel Co.*, 184 Ariz. at 132, 907 P.2d at 518.

¶20 Here, it is undisputed that the vehicle caused extensive damage when it crashed into the mobile home. The door to the home would not close, exposing the family to cold air, dust, and rodents; the bathroom was inoperable; the ceiling was "cracked open"; the walls were smashed in; and the refrigerator did not work. Denise inspected the damage, but the Blanchettes disclaimed responsibility for repairing the mobile home.

¶21 At trial, Charles testified he was not aware of the accident until months after it happened; was not aware that Ochoa-Fuentes and his family were living in the mobile home; and had not made contact with the driver's insurance company until late in the summer months of 2008. This testimony, however, is contradicted by the record. Despite disclaiming any responsibility for repairing the mobile home, Charles reported to the insurance company that he was the owner and settled the claim for $21,499 in July 2008. Indeed, the correspondence between Charles and the insurance company shows that Charles began the claims process shortly after the accident. The correspondence also confirms that Charles knew Ochoa-Fuentes and his family had been residing in the mobile home and was aware of the extent of the damage. And, Charles continued to

accept monthly payments from Ochoa-Fuentes after the mobile home had been damaged until September 2008. Moreover, the Blanchettes refused to engage in good faith discussions to either repair the mobile home or share the insurance proceeds with Ochoa-Fuentes until after this lawsuit was filed. The trial court did not err in concluding Ochoa-Fuentes had established by clear and convincing evidence that the Blanchettes had "engaged in aggravated and outrageous conduct with an 'evil mind.'" *Id.*

Disposition

¶22 For the reasons stated above, the trial court's judgment in favor of Ochoa-Fuentes is affirmed. Ochoa-Fuentes has requested attorney fees and costs on appeal pursuant to A.R.S. § 12-341.01. In our discretion, we grant that request upon compliance with Rule 21, Ariz. R. Civ. App. P.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge*

*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed December 12, 2012.