IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

LINDA L. MASON AND MARK L. MASON,
AS TRUSTEES OF THE MASON FAMILY REVOCABLE TRUST,
Plaintiffs/Appellants,

v.

WHISPER RANCH HOMEOWNERS ASSOCIATION,
AN ARIZONA NON-PROFIT CORPORATION;
JAY TRINKO AND LINA FAJARDO TRINKO, HUSBAND AND WIFE,
Defendants/Appellees.

No. 2 CA-CV 2015-0053
Filed November 24, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. C20121309
The Honorable Christopher Staring, Judge

AFFIRMED

COUNSEL

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By Thomas A. Denker
Counsel for Defendants/Appellees Jay and Lina Trinko

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Miller and Judge Espinosa concurred.

E C K E R S T R O M, Chief Judge:

¶1 Appellants Linda and Mark Mason, as trustees of the Mason Family Revocable Trust (Masons), appeal from the trial court's ruling dismissing their claims with prejudice and awarding attorney fees to appellees Whisper Ranch Homeowners Association (the HOA) and Jay and Lina Trinko (Trinkos). For the following reasons, the judgment of the trial court is affirmed.

Factual and Procedural Background

¶2 In 2012, the Trinkos sought and obtained permission from the HOA to construct a detached garage on their property. Their neighbors, the Masons, disapproved of the project and asked the HOA to rescind its approval. When the HOA did not, the Masons sought a temporary restraining order and an injunction against the Trinkos to prevent them from constructing the building. The court denied both the temporary restraining order and the injunction.

¶3 In addition to seeking the restraining order and injunction to prevent the construction, the Masons alleged claims of breach of contract, breach of fiduciary duty, nuisance, and injunctive relief against the Trinkos, the HOA, and the HOA board members in their individual capacities. In their answer, the Trinkos asserted

counterclaims for abuse of process, defamation, slander of title, nuisance, invasion of privacy/false light, and intrusion upon seclusion.

¶4 The Trinkos' counterclaims were resolved by settlement before trial and dismissed with prejudice. The trial court granted judgment as a matter of law on the Masons' claims against the board members in their individual capacities and on the claim for injunctive relief. The Masons did not include the nuisance claim in their pretrial statement and the court deemed it waived. The Masons' remaining claims of breach of contract and breach of fiduciary duty were heard by a jury, which found in favor of the Trinkos and the HOA.

¶5 The court entered judgment in favor of the Trinkos and the HOA and awarded their attorney fees. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Excluded Witness Testimony

¶6 The Masons first claim the trial court erred in excluding the testimony of Susan Pohlman, a representative of the neighborhood's developer. However, the Masons did not make an offer of proof regarding what her testimony would have been and have therefore failed to preserve this issue for appeal. *See* Ariz. R. Evid. 103(a)(2); *Montano v. Scottsdale Baptist Hosp., Inc.*, 119 Ariz. 448, 453, 581 P.2d 682, 687 (1978).

¶7 The Masons also contend the court erred in prohibiting Mark Mason from testifying as to the amount of diminution in the value of his property after the Trinkos' construction. They base their contention on the "'well established law that an owner of property is always competent to testify as to its value.'" *Bd. of Regents of the Univ. & State Colls. of Ariz. v. Cannon*, 86 Ariz. 176, 178, 342 P.2d 207, 209 (1959). But the trial court did not bar Mason's testimony on grounds he was not competent to testify. Rather, the court excluded this testimony on the basis that Mason had not disclosed it. Indeed, the trial court specifically noted that he was competent to testify about the value.

¶8 Rule 26.1(a)(7), Ariz. R. Civ. P., requires a party to disclose "[a] computation and the measure of damage alleged by the disclosing party." The Masons acknowledged that they had not disclosed a specific amount for the diminution in value of their home. "A trial court has broad discretion in ruling on disclosure and discovery matters, and this court will not disturb that ruling absent an abuse of discretion." *Marquez v. Ortega*, 231 Ariz. 437, ¶ 14, 296 P.3d 100, 104 (App. 2013). The Masons have not provided any explanation of how the trial court abused its discretion in this discovery ruling. Accordingly, we conclude the court did not err in excluding the proposed testimony.

Amended Answer and Counterclaims

¶9 The Masons next claim the trial court erred in denying their motion to strike the Trinkos' amended answer and counterclaims that were filed after the agreed-upon deadline in the joint pretrial conference memorandum. However, the counterclaims raised in the amended answer were resolved by settlement. The Masons, therefore, essentially ask us to reverse the settlement agreement. "Generally, if a party seeks to appeal from a settlement, our appeal is limited to determining whether the parties consented to the judgment or settlement." *Dowling v. Stapley*, 221 Ariz. 251, ¶ 74, 211 P.3d 1235, 1257 (App. 2009). The issue of whether the court erred in allowing the late filing is therefore outside the scope of our review.

Jury Instructions

¶10 The Masons' third claim is that the trial court erred in instructing the jury. The court provided the following instruction: "CC&Rs and Bylaws constitute a contract between the subdivision's property owners as a whole and individual lot owners." The Masons requested an instruction that included the architectural guidelines as part of that contract.

¶11 The Trinkos and the HOA contend the Masons failed to preserve this issue for appellate review because they did not comply with Rule 51(a), Ariz. R. Civ. P. In their reply brief, the Masons do

not claim they satisfied this rule.[1] When an appellant does not respond to a debatable argument made in an answering brief, we may treat this as a confession of error. *See In re $26,980.00*, 199 Ariz. 291, ¶ 22, 18 P.3d 85, 92 (App. 2000). Accordingly, we agree with the appellees that the Masons did not preserve this issue.

Attorney Fees

Trial Fees

¶12 The Masons challenge the trial court's awards of attorney fees to the Trinkos and the HOA, claiming the awards were unreasonable. However, "[a] party challenging the amount of fees requested must provide specific references to the record and specify which amount or items are excessive." *In re Indenture of Trust Dated Jan. 13, 1964*, 235 Ariz. 40, ¶ 47, 326 P.3d 307, 319-20 (App. 2014). The Masons have not done so, and we therefore find no basis to disturb the trial court's award.

Fees on Appeal

¶13 The Trinkos and the HOA have both requested attorney fees on appeal under A.R.S. § 12-341.01. However, such an award is

[1]The Masons instead claim the trial court denied them the opportunity to make a proper objection, but this contention finds no support in the record. The court asked the Masons if there was any further record they wished to make regarding the issue, specifically stating, "I want to make sure . . . that I do not cut you off. Is there anything, any additional record you would like to make on that point?" The Masons, rather than addressing the issue of the instruction, questioned whether they were precluded from raising the issue of the architectural guidelines to the jury. Furthermore, as the court listed each instruction that would be given, it asked each party if they wished to object. The Masons could have returned to the issue at any time. Indeed, the trial court stated, "I really encourage everyone to take the time. This is important. The case goes up on appeal. Records on jury instructions, I want to make sure no one is cut off on making sure they get to make whatever record they want to make."

discretionary, and neither of these parties has explained why it would be appropriate in this case. *See Munger Chadwick, P.L.C. v. Farwest Dev. & Constr. of the Sw., LLC*, 235 Ariz. 125, ¶ 14, 329 P.3d 229, 232 (App. 2014). The Trinkos have additionally requested fees pursuant to A.R.S. § 12-349 and Rule 25, Ariz. R. Civ. App. P. But they have not put forth any argument that this appeal was unjustified or frivolous. We therefore deem this claim waived. *See Little v. State*, 225 Ariz. 466, n.8, 240 P.3d 861, 866 n.8 (App. 2010).

¶14 The HOA has requested its costs on appeal, and, under A.R.S. § 12-341, an award of costs to "[t]he successful party to a civil action" is mandatory. Accordingly, we grant the HOA its costs, pending compliance with Rule 21, Ariz. R. Civ. App. P.

Disposition

¶15 For the foregoing reasons, the judgment of the trial court is affirmed.