IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

PACIFIC OFFICE AUTOMATION, INC.,
AN OREGON CORPORATION LICENSED
TO DO BUSINESS IN THE STATE OF ARIZONA,
Plaintiff/Appellee/Cross-Appellant,

v.

TRENT M. DURAN AND CHRISTINE M. DURAN,
HUSBAND AND WIFE,
Defendants/Appellants,

and

TOUCHSTONE INVESTMENTS, LLC,
Defendant/Cross-Appellee.

No. 2 CA-CV 2016-0052
Filed February 15, 2017

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NOT FOR PUBLICATION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. C20122452
The Honorable Gus Aragón, Judge

AFFIRMED IN PART;
VACATED IN PART AND REMANDED

COUNSEL

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MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Howard and Judge Vásquez concurred.

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

¶1 Following a jury trial, the court entered judgment in favor of plaintiff/appellee/cross-appellant Pacific Office Automation, Inc. (POA) against its former employee defendant/appellant Trent Duran and his wife. Duran appeals the denial of his renewed motion for judgment as a matter of law (JMOL), claiming that POA failed to present evidence he had caused any damages. In its cross-appeal, POA challenges a portion of the judgment relating to attorney fees. For the reasons that follow, we affirm the judgment against Duran but vacate the fee award against POA and remand for reconsideration of that award.

Factual and Procedural Background

¶2 We view the evidence presented below in the light most favorable to upholding the jury's verdicts. *See Earle M. Jorgensen Co. v. Tesmer Mfg. Co.* (*Jorgensen*), 10 Ariz. App. 445, 446, 459 P.2d 533, 534 (1969). Duran worked for seventeen years as a salesman for a company that sold, leased, and serviced office equipment such as printers and copiers. That company, A.B. Dick, was acquired in February 2012 by POA. In the acquisition, POA purchased all A.B. Dick's inventory, assets, and customer contracts. POA also

purchased A.B. Dick's "Intangibles," meaning its "customer lists and data, sales records, telephone listings and goodwill."

¶3 Duran worked approximately two weeks for POA before securing employment with its competitor Touchstone Investments, LLC (Touchstone). During his short time with POA, Duran engaged in several activities that misused POA's property and were contrary to its interests. For instance, he moved a copier into his office to electronically scan POA's hard-copy customer files into his office computer. He then deleted his "user account" and the data on the computer so none of his activities could be traced. In addition, he transferred the data and phone number from his work-provided cell phone to a different phone under his own name and then "wiped" POA's phone of its data, including his work e-mail. He similarly wiped a laptop computer of its data before returning it to POA. He also informed at least one POA customer that he would be leaving POA soon and joining Touchstone.

¶4 Within two days of Duran's departure from POA, its customers had cancelled four of their contracts. After three weeks, the number had grown to eighty-four. Duran later admitted that he eventually contacted all these customers, suggested they cancel their contracts, and brought their business to Touchstone. The president of POA testified about the damages from the contract cancellations using an exhibit admitted at trial. Based on the combined average revenue from each of those cancelled contracts up to the date for disclosure in this case ($419,381), and given POA's forty percent margin of profit, POA sought total damages of at least $167,752.

¶5 When Duran moved for JMOL, the trial court granted the motion in part. Because the evidence established that one of POA's customers, Amphitheater Schools, had cancelled its contracts for independent reasons unrelated to Duran's conduct, the court excluded that portion of POA's claim from the jury's consideration. The Amphitheater contracts represented the majority of the cancellations. The court then denied the JMOL motion in part and submitted the case to the jury. It returned verdicts in favor of POA on the three claims that remained against Duran: breach of contract, breach of the covenant of good faith and fair dealing, and intentional

interference with contractual relations. The jury awarded POA nearly $67,000 in total damages.

¶6 After the trial court had rendered judgment, Duran filed a renewed motion for JMOL and requested a new trial as an alternative remedy. In that motion he challenged the verdicts on the grounds of causation and damages. The court denied the motion in a signed ruling.

¶7 Before trial, the court had granted summary judgment in favor of Touchstone on the single claim POA had asserted against it. Once the trial concluded, the court entered a final judgment awarding $63,439 in attorney fees to Touchstone as a prevailing party. Duran then filed a timely notice of appeal from the judgment and denial of the post-judgment motion. POA filed a timely cross-appeal related to Touchstone's award of attorney fees.

Jurisdiction

¶8 Preliminarily, we must note the basis of our appellate jurisdiction, particularly in light of the trial court's post-judgment ruling disposing of Duran's combined motion for JMOL and a new trial. *See Santee v. Mesa Airlines, Inc.*, 229 Ariz. 88, ¶ 2, 270 P.3d 915, 915-16 (App. 2012) (recognizing independent duty to confirm jurisdiction). Although the clerk of this court revested jurisdiction in the superior court in order to obtain certification of this ruling pursuant to Rule 54(c), Ariz. R. Civ. P., we subsequently held in *Brumett v. MGA Home Healthcare, L.L.C.*, that no certification is required for a ruling on a motion for new trial. 240 Ariz. 421, ¶¶ 11, 18-19, 380 P.3d 659, 666, 668-69 (App. 2016); *see* Ariz. R. Civ. App. P. 6(b)(2) (authorizing review of procedural orders issued by appellate clerk). Furthermore, because the denial of a renewed motion for JMOL under Rule 50(b), Ariz. R. Civ. P., does not affect a judgment or raise any legal issues separate from it, such an order is not separately appealable pursuant to A.R.S. § 12-2101(A)(2). *See Arvizu v. Fernandez*, 183 Ariz. 224, 226-27, 902 P.2d 830, 832-33 (App. 1995). Nor is the order itself a "judgment" that must meet the formal requirements for final judgments set forth in Rules 54 and 58, Ariz. R. Civ. P. *See Assocs. Fin. Corp. v. Scott*, 3 Ariz. App. 1, 4 n.2, 411 P.2d 174, 177 n.2 (1966). A ruling on such a time-extending

motion must simply be signed and entered in accordance with Rule 9(e)(1), Ariz. R. Civ. App. P., as originally occurred in this case.

¶9 Accordingly, we have jurisdiction over Duran's appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1), (5)(a). Our jurisdiction is not based on § 12-2101(A)(2), contrary to his assertion. We have jurisdiction over POA's cross-appeal pursuant to §§ 12-120.21(A)(1) and 12-2101(A)(1).

Duran's Appeal

¶10 As we previously noted, Duran claims the trial court erred by denying his renewed motion for JMOL. In that renewed motion, Duran challenged the evidence related to causation and damages. We review the denial of JMOL de novo. *Golonka v. Gen. Motors Corp.*, 204 Ariz. 575, ¶ 9, 65 P.3d 956, 961 (App. 2003). To the extent Duran also challenges the court's evidentiary rulings, we will not disturb those rulings unless the court abused its discretion and caused prejudice. *Id.*; *accord Selby v. Savard*, 134 Ariz. 222, 227, 655 P.2d 342, 347 (1982).

Causation

¶11 Duran first asserts the jury's verdicts were speculative because POA presented no evidence that any customer contract was cancelled due to his improper acts. He claims, specifically, there was no "causal link between any supposedly bad act of Duran . . . and the loss of any customer contract." We reject this contention.

¶12 POA's claim of breach of the implied covenant of good faith and fair dealing required proof of a contract with Duran, an act by Duran that deprived POA of a reasonably expected benefit of that contract, and resulting damages to POA. *See United Dairymen of Ariz. v. Schugg*, 212 Ariz. 133, ¶¶ 15, 20, 128 P.3d 756, 760, 761 (App. 2006).[1] The tortious interference claim required proof that Duran had intentionally interfered with what he knew were POA's

[1]Because the jury's award of damages did not specifically depend on the additional claim for breach of contract, we need not address that claim further.

contractual relationships, causing a breach or termination of those relationships and resulting damages. *See Neonatology Assocs., Ltd. v. Phx. Perinatal Assocs., Inc.*, 216 Ariz. 185, ¶ 7, 164 P.3d 691, 693 (App. 2007). In addition, this claim required a showing that the interference was "improper as to motive or means." *Id.*, *quoting Wallace v. Casa Grande Union High Sch. Dist. No. 82 Bd. of Governors*, 184 Ariz. 419, 427, 909 P.2d 486, 494 (App. 1995).

¶13 POA had to prove each of its claims by a preponderance of the evidence. *See Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, nn.18, 21, 38 P.3d 12, 31 n.18, 34 n.21 (2002); *see also Brown v. Jerrild*, 29 Ariz. 121, 126, 239 P. 795, 797 (1925) (noting plaintiff's burden). Under this standard, "a fact sought to be proved [must be] more probable than not." *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 25, 110 P.3d 1013, 1018 (2005). Jurors are entitled to use their common sense and experience when deciding cases, *Brooks v. Zahn*, 170 Ariz. 545, 551, 826 P.2d 1171, 1177 (App. 1991), and the law makes no distinction between direct and circumstantial evidence. *Lohse v. Faultner*, 176 Ariz. 253, 259, 860 P.2d 1306, 1312 (App. 1992). On appeal, we do not weigh the evidence to determine its preponderance, *Hillman v. Busselle*, 66 Ariz. 139, 142, 185 P.2d 311, 312 (1947), but must uphold a verdict if reasonable persons could accept the evidence as proving the ultimate facts. *Gonzales v. City of Phoenix*, 203 Ariz. 152, ¶ 2, 52 P.3d 184, 185 (2002).

¶14 Here, the jury could reasonably find that Duran stole POA's customer files and data. The jury could reasonably infer from this theft that Duran's goal was to use this information to solicit business for Touchstone. Based on Duran's contact with POA's customers and the flurry of cancellations following his departure, the jury could then conclude that Duran actually used POA's information to solicit its customers and encourage them to cancel their existing contracts, thereby causing damages to POA. As a matter of common sense, the jury could conclude Duran's misappropriation of customer information was not a gratuitous and inconsequential endeavor.

¶15 Duran suggests that, much like Amphitheater Schools, POA's other customers might have cancelled their contracts for

independent reasons. He also contends that he could have contacted them using only his memory and publicly available information. Such arguments, however, present factual questions that were exclusively reserved for the jury. *See Todaro v. Gardner*, 72 Ariz. 87, 91, 231 P.2d 435, 437 (1951) (trier of fact determines "weight of the evidence . . . and reasonable inferences to be drawn therefrom"); *see also Borrow v. El Dorado Lodge*, 75 Ariz. 139, 144, 252 P.2d 791, 795 (1953) ("[I]f different inferences as to the ultimate facts may be drawn from evidentiary facts, we must accept the inference drawn by the jury."). The mere possibility that the jury was mistaken on the issue of causation does not undermine its verdicts or otherwise suggest its inferences were unreasonable. The preponderance standard "essentially allocates the risk of error equally between the parties involved." *Kent K.*, 210 Ariz. 279, ¶ 25, 110 P.3d at 1018. Contrary to Duran's assertion, it was not "speculation, suspicion and bottomless inference" for jurors to find that his theft of POA's customer data was more than an unrelated coincidence and that it likely caused POA's damages.

Damages

¶16 Duran essentially raises two contentions regarding POA's evidence of damages. First, he maintains POA "expressly disavowed that it was seeking lost profit[s]," which made "POA's damages theory . . . devoid of any legal or factual support." This assertion is belied by the record, as illustrated by our recitation of the facts; thus, we summarily reject it. Second, he contends the damages were supported by insufficient evidence and were not calculated with reasonable certainty, as is required by law. We disagree.

¶17 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, 1064 (App. 2011). Assuming arguendo that POA's recovery was limited to lost profits, POA acknowledges that such damages had to be proven with "reasonable certainty." *Gilmore v. Cohen*, 95 Ariz. 34, 36, 386 P.2d 81, 82 (1963). To receive an 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).

¶18 A party may recover lost profits so long as "evidence is available to furnish a reasonably certain factual basis for computation of probable losses." *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, Inc. v. Nw. Mut. Life Ins. Co.*, 140 Ariz. 174, 184, 680 P.2d 1235, 1245 (App. 1984). 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.

¶19 In this case, POA offered substantial, non-speculative evidence to support the damage award. POA has operated since 1976 and described itself as "the biggest dealer in the country." Its president had been employed by POA for twenty-six years and was capable of reporting its forty percent profitability. Moreover, the president described himself as thoroughly familiar with the document that supported the lost-revenue calculations, exhibit G1A. This document was generated using A.B. Dick's and POA's business software, and it provided an adequate basis for calculating POA's damages with reasonable certainty.

¶20 Duran challenges the evidence of damages because POA did not provide historical evidence of A.B. Dick's profitability. But such evidence was not required; the profitability of a "similar business" can support the award. *Rancho Pescado*, 140 Ariz. at 184, 680 P.2d at 1245. Duran's reliance on *Gilmore* is likewise misplaced, because the testimony related to damages here was not "ambiguous

and confused" as it was in that case. 95 Ariz. at 36, 386 P.2d at 83. That the testimonial evidence here might have left something to be desired did not render it speculative, *see Nelson v. Cail*, 120 Ariz. 64, 68, 583 P.2d 1384, 1388 (App. 1978), or make it "plucked out of the air," as Duran had argued to the trial court.

¶21 As he did below, Duran also contends there was a "substantial non-disclosure due process issue" regarding POA's request for damages and the documents supporting it. However, because Duran's opening brief contains only conclusory assertions regarding "fundamental error" and the denial of "due process," we find these contentions waived on appeal. *See Ritchie v. Krasner*, 221 Ariz. 288, ¶ 62, 211 P.3d 1272, 1289 (App. 2009); *In re $26,980 U.S. Currency*, 199 Ariz. 291, ¶ 28, 18 P.3d 85, 93 (App. 2000).

¶22 Duran further contends the trial court abused its discretion in admitting certain evidence at trial because "POA never disclosed a claim for lost profits" and it "expressly disavowed that it was seeking lost profits." Assuming arguendo Duran has adequately developed this argument on appeal in accordance with Rule 13(a), Ariz. R. Civ. App. P., we will not disturb the judgment on the basis asserted. We note that the proposed jury instructions in the parties' joint pretrial statement provided, in part, "POA seeks to recover damages for lost profits"; POA's president testified in his deposition about the percentage of profit from the revenue on the assumed contracts; and POA's fifth supplemental disclosure statement contained the $167,752 figure representing its lost profits.

¶23 Earlier, during pretrial discovery, POA did maintain that it was entitled to recover damages of lost revenue, and it made two statements that might be construed in isolation as limiting the recovery it sought. Upon further questioning from the trial court about lost profits, however, POA clarified its position on the topic and explained how it would elicit testimony from its president to establish lost profits. The trial court did not interpret POA's statements as disavowing a claim of lost profits, nor could those statements be fairly so construed in context. We thus find that Duran has failed to carry his burden of showing that the trial court abused its discretion with respect to the disclosure or admission of evidence. *See Marquez v. Ortega*, 231 Ariz. 437, ¶ 14, 296 P.3d 100,

104 (App. 2013) (reviewing disclosure and discovery rulings for abuse of discretion); *see also Guard v. Maricopa County*, 14 Ariz. App. 187, 188-89, 481 P.2d 873, 874-75 (1971) (recognizing appellant's burden of showing error).

POA's Cross-Appeal

¶24 As noted above, POA challenges the award of attorney fees it was required to pay to Touchstone pursuant to A.R.S. § 12-341.01. The same law firm, Gabriel & Ashworth, P.L.L.C., represented both Touchstone and Duran in the trial court. POA contends the award to Touchstone is excessive because it includes fees incurred by Duran, a losing party. POA notes that the final judgment recognized POA as the prevailing party as to Duran, and the court consequently required Duran to pay POA's attorney fees.

¶25 When a proceeding includes distinct claims and parties, fees should not be awarded for claims that are unrelated to those on which the party prevailed. *See Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 189, 673 P.2d 927, 933 (App. 1983). Furthermore, § 12-341.01(B) provides that "the award may not exceed the amount paid or agreed to be paid." A party can recover only those fees that were actually incurred by that party. *See Chavarria v. State Farm Mut. Auto. Ins. Co.*, 165 Ariz. 334, 339, 798 P.2d 1343, 1348 (App. 1990).

¶26 In this case, Touchstone's fee application included the time counsel had spent on the litigation through February 2013, when the trial court issued its summary judgment ruling in favor of Touchstone. The affidavit did not clearly distinguish the charges incurred by the different parties, even though POA had asserted only one of its four claims against Touchstone. The affidavit also included the time counsel had devoted to the counterclaim asserted by Duran against POA, which was a separate, unsuccessful claim regarding POA's alleged failure to pay wages.

¶27 We review a trial court's award of attorney fees for an abuse of discretion. *Hale v. Amphitheater Sch. Dist. No. 10 v. Pima County*, 192 Ariz. 111, ¶ 20, 961 P.2d 1059, 1065 (App. 1998). Here, an abuse of discretion is manifest in the record because the trial court based the award on the erroneous finding that "Touchstone's

defenses are intertwined with the counterclaim . . . of Duran." As noted, that unsuccessful counterclaim was a separate claim asserted by a different party. The fees from that counterclaim were not incurred by Touchstone. We therefore vacate the fee award and remand the matter to the trial court for further proceedings related to Touchstone's fee recovery.

Disposition

¶28 For the foregoing reasons, we vacate the award of attorney fees to Touchstone and remand the case for further proceedings on that issue. We otherwise affirm the judgment. Pursuant to A.R.S. §§ 12-341 and 12-341.01, we grant POA's request for costs and attorney fees on appeal, subject to its compliance with Rule 21, Ariz. R. Civ. App. P.