IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

GREG GOODMAN,
Plaintiff/Appellee,

v.

12 UNIVERSITY LLC, AN ARIZONA LIMITED LIABILITY COMPANY, AND
JAMES DILLER AND SHEILA DILLER, HUSBAND AND WIFE,
Defendants/Appellants.

No. 2 CA-CV 2020-0034
Filed November 23, 2020

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NOT FOR PUBLICATION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. C20163644
The Honorable Brenden J. Griffin, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Presiding Judge Staring and Judge Eppich concurred.

V Á S Q U E Z, Chief Judge:

¶1 In this longstanding dispute between the owners of adjoining properties, 12 University LLC, James Diller, and Sheila Diller appeal from the judgment entered pursuant to jury verdicts awarding Greg Goodman damages on his breach-of-contract and trespass claims. The Dillers argue the judgment should be vacated and a new trial ordered because the claims were resolved by previous litigation and thus barred, the trial was marred by various evidentiary errors and attorney misconduct, the damages were not supported by the evidence, and the withdrawal of several of their attorneys over the course of litigation created "irregularity in the proceedings." The Dillers also claim that the trial court's award of attorney fees to Goodman was erroneous. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the jury's verdicts. *See Stafford v. Burns*, 241 Ariz. 474, n.2 (App. 2017). Goodman and the Dillers own neighboring properties near the intersection of Stone Avenue and University Boulevard in Tucson. Goodman's commercial building is separated from the building on the Dillers' property by a passageway located entirely on the Dillers' property. Masses of vines, rooted on the Dillers' property at the base of Goodman's building, completely cover portions of Goodman's wall and climb up onto his roof. A narrow and cracked concrete walkway, partially covered with dirt and debris and overgrown by vines, runs along the middle of the passageway.

¶3 In 2007, Goodman's tenants reported that rainwater was flooding into the basement of Goodman's building. Upon inspection, Goodman determined that the water was entering through the wall adjoining the Dillers' property. He concluded that cracks in the wall

needed to be repaired, so he called James Diller,[1] seeking permission to waterproof the outside of his wall, which required some excavation on the Dillers' property. While doing so, he asked Diller to remove the vines and to direct water from a downspout emptying at the base of the Dillers' building toward the street. Diller told Goodman that Goodman could enter and remove the vines and redirect the downspout himself. After Goodman's workers removed the vines, however, Diller called him, irate that the workers had not removed all the debris and accusing the workers of stealing some corrugated metal and a plastic lawn chair. Further communication between the two deteriorated, and Diller began leaving Goodman hostile voicemails, calling Goodman in one voicemail "a liar," "arrogant," "an idiot," "a fuckup," "stupid" and lacking "the least degree of common sense," a "cocksucker," a "prick," an "asshole," and "an ignorant, nasty son of a bitch." Diller told Goodman, "You will not be getting access in the future . . . . You will not be excavating in the future ever." Diller informed Goodman that access was unnecessary to fix the problem in any event, suggesting that Goodman

> take a nice long weekend, maybe you could spend it with some chimpanzees or, you know, some higher-functioning beings than yourself. And perhaps they can teach you to use crude tools until you can learn to operate a paintbrush and paint some waterproofing on the walls in your basement.
>
> And when the problem goes away, you don't need to call me and tell me that the problem went away. I know that the problem will go away, if you do what needs to be done to waterproof a basement.

¶4 Facing a lawsuit from his tenants to fix the leaks, Goodman sued the Dillers to gain access to the passageway.[2] During the course of these related lawsuits, Diller got into a fistfight with one of Goodman's

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[1] Diller's parents owned the property at this time, but he was apparently in charge of it.

[2] Because Diller's parents still owned the property at this time, they were the defendants in this lawsuit; we include them among "the Dillers" here. After the lawsuit settled, the parents gave the property to Diller, who transferred title to 12 University LLC soon thereafter.

tenants and was charged with assault. Goodman's attorney formulated a plan that would resolve both lawsuits and the criminal charges against Diller, and in 2009, the parties agreed to a three-way settlement in which Goodman's tenant agreed to drop the criminal charges against Diller, Goodman's tenant was to receive money from both Goodman and the Dillers, and the Dillers agreed to grant Goodman a license to access the passageway.

¶5 Diller objected to language in the proposed license agreement, however, and initially refused to grant the promised license. But after a settlement conference, the parties signed a renewable license agreement in November 2013, under which the Dillers granted Goodman "permission to enter upon [the Dillers' property] for the purpose of repairing, maintaining, modifying and/or waterproofing a basement/foundation wall, and the wall above ground on the north and east sides of [Goodman's building]." The agreed-upon scope of work included excavation to specified depths. Access was subject to written approval from the Dillers, which the Dillers were required to provide if Goodman provided two weeks' advance written notice, including a description of the work to be done, a copy of any plans or specifications, the beginning and end dates of the project, a current copy of Goodman's commercial general liability insurance policy, information about the contractor, and lien waivers from those performing the work. If such notice was provided, the Dillers were required to allow access for the described project unless it exceeded the scope of the license agreement. After any project, Goodman was to restore the Dillers' property to its original condition, including replacement of any vegetation except for "creeping vines necessarily destroyed as part of the remedial process contemplated by [the] renewal license agreement." Any disputes were to be resolved by designated arbitrators, except that disputes about damage or replacement of vegetation were to be resolved by a designated landscape architecture professor.

¶6 In August 2015, Goodman's contractor sent the Dillers written notice of a project to remove the vines and excavate and waterproof the exterior of the basement wall. The notice satisfied most of the requirements in the license agreement but did not include a lien waiver. Goodman obtained a lien waiver from the contractor and delivered it to Diller. Upon receipt of the notice, Diller proposed an alternative work plan, which Goodman accepted.

¶7 Nonetheless, Diller refused to provide written approval to do the work, without any explanation of what was deficient about the notice.

Despite his belief that the notice was sufficient, Goodman submitted a second notice from a different contractor. Once again, Diller refused to approve the project, despite Goodman's efforts to appease Diller by modifying the work plan. Diller ignored Goodman's attorney's efforts to determine Diller's objections to the work plan. Goodman eventually sent a letter to the Dillers seeking written approval and stating that he would seek arbitration if written approval was withheld.

¶8 Diller's written response was hostile and abusive, describing Goodman's letter as "ignorant, yet aggressively abusive and threatening, . . . simply demonstrat[ing] that you lack the most basic civility or comprehension of the English language." Diller indicated that the notices had "many deficiencies" but refused to enumerate them, stating that the license agreement "does not obligate me to educate you regarding the terms negotiated and most assuredly does not obligate me to provide legal or technical assistance to you or your agents." Instead, he invited Goodman to "review the entirety of the [license agreement] with someone who can provide whatever instruction and legal advice you may require to understand your obligations and then proceed according to the terms of the [license agreement]."

¶9 Goodman's attorney then sent Diller a letter demanding that Diller agree to arbitrate the dispute. Before arbitration occurred, Diller emailed Goodman indicating that he would approve access for work if Goodman submitted his contract with the contractor and "[l]iability waivers . . . from ALL PERSONS who will perform the work." After Goodman responded that the contract was oral and the required lien waivers had already been provided, Diller made additional demands that Goodman "propose in writing" his intentions for vegetation replacement "prior to the commencement of [the project]." Goodman replied that he was willing to provide "two additional 15 gallon Texas Rangers planted anywhere you choose [in the excavated area]" to replace the one shrub that might be destroyed. When Diller did not promptly respond, Goodman informed him that he would proceed with his arbitration request unless Diller soon responded.

¶10 Diller's response was once again hostile and abusive, accusing Goodman of "belligerence" and castigating him for his "sense of entitlement" and "bipolar demeanor." He stated that he would hold Goodman responsible for "all costs associated with [arbitration by the landscape architecture professor], due to your refusal to submit a proposal which could be approved." Responding through his attorney, Goodman

informed Diller that he would proceed with arbitration if Diller did not provide "unequivocal approval."

¶11 After Diller failed to agree to the selection of an arbitrator, Goodman attempted twice to compel arbitration. Diller thwarted those attempts, and Goodman filed this lawsuit, alleging breach of contract and trespass.

¶12 At trial, Goodman testified that vines continued to grow in the passageway and the Dillers had never done anything to remove them. Evidence showed that the Dillers had extended their downspout across the passageway to within inches of Goodman's wall, emptying at its base. Goodman testified that he had never been able to fix the wall and his basement continued to flood when it rained.

¶13 After the four-day trial, a jury returned verdicts of $85,000 for the difference in value of Goodman's property with and without the repairs and $17,000 in attorney fees and costs on his breach-of-contract claim, and $100,000 in compensatory damages and $60,000 in punitive damages on his trespass claim. The trial court awarded Goodman over $340,000 in attorney fees, plus costs. The court summarily denied the Dillers' post-trial motions for judgment as a matter of law and new trial, and this appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1), (5)(a).

Res Judicata and Settlement and Release

¶14 The Dillers contend that Goodman's claims are barred because they were released in the 2009 settlement agreement and also barred by the doctrine of claim preclusion, formerly referred to as res judicata, when the underlying litigation was dismissed with prejudice. Claim preclusion and settlement and release are matters of law that we review de novo. *Phx. Newspapers, Inc. v. Dep't of Corr.*, 188 Ariz. 237, 240 (App. 1997) (claim preclusion); *see ELM Ret. Ctr., LP v. Callaway*, 226 Ariz. 287, ¶ 15 (App. 2010) (contract interpretation).

¶15 Here, the Dillers did not timely or sufficiently raise these issues in the trial court despite their claim to have raised them "multiple times." They first argued that Goodman's claims were barred by satisfaction and release when they orally moved for judgment as a matter of law on the final day of trial, without any citation to authority, after Goodman had already presented his case. As the court explained in denying the motion, the Dillers raised the issue "too late," and it was one that could not be resolved without briefing. For these reasons, the motion

was insufficient to preserve the issue for appeal. *Cf. Thompson v. Better-Bilt Aluminum Prods. Co.*, 187 Ariz. 121, 129 (App. 1996) (to preserve claim of error in admission of evidence, timely objection must be made); *Aldrich & Steinberger v. Martin*, 172 Ariz. 445, 447 (App. 1992) (only theories of claim preclusion expressly argued in trial court preserved for appeal). Similarly, the Dillers' post-trial motion for judgment as a matter of law and new trial, in which they first argued that Goodman's claims were barred by claim preclusion, was too late to preserve any issue for appeal. *See Conant v. Whitney*, 190 Ariz. 290, 293 (App. 1997) (issues first raised in motion for new trial waived).

¶16 The Dillers suggest that by listing satisfaction and release and claim preclusion as affirmative defenses in their answers to Goodman's complaint and amended complaint and by mentioning them in pretrial statements, these issues were preserved for appeal. But at most these bare references provided notice that the Dillers intended to raise these issues. They did not squarely place the issues before the trial court for rulings and thus were insufficient to preserve the issues for appeal. *See State v. Kinney*, 225 Ariz. 550, ¶ 7 (App. 2010) ("To preserve an argument for review, the defendant must make a sufficient argument to allow a trial court to rule on the issue."); *cf. Standard Chartered PLC v. Price Waterhouse*, 190 Ariz. 6, 43 n.21 (App. 1996) (assertion of issue without argument or authority insufficient to preserve issue for appeal); *Aldrich*, 172 Ariz. at 447.

¶17 At any rate, the Dillers would not prevail on these issues even if preserved. As Goodman correctly points out, the breach-of-contract claim involving the license agreement, which was executed in 2013, cannot possibly be the same as the claim in the previous litigation, which was settled in 2009. Nor, for that matter, is the claim for breach of the settlement agreement the same as the claim settled within that agreement. Therefore, the breach-of-contract claims are not barred by claim preclusion. *See In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 212 Ariz. 64, ¶ 14 (2006) (claim preclusion requires "identity of claims" between previous suit and current litigation). Similarly, Goodman's claim for breach of the 2013 license agreement could not have been settled and released in the 2009 settlement. And Goodman's claim for damages from the Dillers' continuing trespass is not barred by claim preclusion, as successive claims are permitted from ongoing damage caused by a continuing trespass. *See Breiggar Props., L.C. v. H.E. Davis & Sons, Inc.*, 52 P.3d 1133, ¶ 11 (Utah 2002) (successive actions for continuing trespass permitted until trespass abated); *cf. City of Phoenix v. Johnson*, 51 Ariz. 115, 124-25 (1938) ("If, however, the nuisance is of a continuing nature, successive actions may be maintained for the damages occurring from time to time."). Finally, as Goodman

explains, even if the settlement agreement were to have released Goodman's claims for continuing trespass, the Dillers' complete failure to provide the bargained-for access under the settlement and license agreements—which Goodman proved at trial—rendered any such release unenforceable. *Cf. Murphy Farrell Dev., LLLP v. Sourant*, 229 Ariz. 124, ¶ 33 (App. 2012) (in general, material breach by one party discharges other from contract). In short, the Dillers' argument that Goodman's claims are barred is without merit.

Denial of Motion for New Trial

¶18 The Dillers argue that the trial court erred in denying their motion for a new trial because (1) the judgment was not supported by the evidence; (2) they had been prejudiced by erroneously admitted evidence; (3) misconduct by Goodman's counsel prejudiced them; and (4) "turnover" in their legal representation had created irregularity in the proceedings. A court may grant a motion for new trial on any of several grounds materially affecting that party's rights including "irregularity in the proceedings . . . depriving the party of a fair trial," "misconduct of the . . . prevailing party," "excessive . . . damages," "error in the admission . . . of evidence," and "judgment . . . not supported by the evidence." Ariz. R. Civ. P. 59(a)(1). We review the denial of a motion for new trial for an abuse of discretion. *Jaynes v. McConnell*, 238 Ariz. 211, ¶ 13 (App. 2015).

¶19 The Dillers maintain the verdicts were not supported by the evidence because Goodman's expert relied on hearsay to formulate his appraisal. The Dillers cite *Ehman v. Rathbun*, 116 Ariz. 460 (App. 1977), for the proposition that an expert may not rely on hearsay in forming an opinion. But as Goodman points out, this is not a correct statement of the law. "[T]he facts or data an expert relies upon in forming his opinions need not be admissible in evidence if they are of a type reasonably relied upon by experts in that field in forming opinions or inferences on the subject." *Pipher v. Loo*, 221 Ariz. 399, ¶ 8 (App. 2009) (citing Ariz. R. Evid. 703). Tellingly, the Dillers make no effort in their reply brief to address this point of law, choosing instead to "stand on their arguments in the[ir] opening brief" on this issue. They thus have failed to make any argument that the expert could not rely on purported hearsay to support his opinions.

¶20 In any event, it was incumbent on the Dillers to timely challenge the expert's testimony at trial. Their failure to do so waived any claim of error here. *See* Ariz. R. Evid. 103(a)(1) (party must timely object or move to strike to preserve claim of error in admission of evidence); *Woyton*

v. Ward, 247 Ariz. 529, ¶ 16 (App. 2019) (challenge to expert testimony waived on appeal where no objection raised in trial court).

¶21 The Dillers also argue that the trial court erroneously admitted the audio recording of James Diller's obscenity-laced phone message. They contend that the evidence was inadmissible under Rule 403, Ariz. R. Evid., because it was substantially more prejudicial than probative. They contend that the recording's "only perceived relevance . . . is one short line where [Diller] says he will never let Goodman onto his property." But the message showed Diller's hostility toward Goodman, which was highly probative of Diller's intent to harm Goodman. And although the Dillers argue that the transcript of the recording was "just as probative" and "less inflammatory," hearing Diller's tone and inflection may have aided the jury in assessing his level of hostility. *Cf. State v. Sparks*, 147 Ariz. 51, 54 (1985) (indications of credibility conveyed through "vocal inflections" cannot be derived "from a lifeless transcript"). Given the probative value of the recording, the court did not abuse its discretion by admitting it. *See State v. Salazar*, 181 Ariz. 87, 91 (App. 1994) ("Trial courts have broad discretion in balancing probative value against prejudice, and we will not reverse unless error is clear.").

¶22 Similarly, the Dillers contend the trial court's admission of evidence related to Diller's assault of Goodman's tenant violated Rule 403. As an initial matter, the Dillers fail to direct us to any part of the record where they challenged this evidence at trial, and they have therefore waived this issue. *See* Ariz. R. Evid. 103(a)(1); Ariz. R. Civ. App. P. 13(a)(7)(B); *Thompson*, 187 Ariz. at 129.[3] But even if they had timely

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[3]Our review of the record reveals that the Dillers filed a pretrial motion in limine seeking to preclude "any reference, discussion or questioning related to . . . Diller's 2008 arrest" for this incident pursuant to Rules 403 and 404, Ariz. R. Evid., among others. After a hearing—the transcript of which the Dillers have not provided—the trial court denied the motion without prejudice to be reraised at trial. *See* Ariz. R. Civ. App. P. 11(c)(1)(A) (appellant responsible for ordering transcripts deemed necessary). On the first day of trial, Goodman testified about the fistfight and that Diller had been in jail for it; Diller did not object. In these circumstances, the failure to contemporaneously object waived any issue regarding the admissibility of this testimony. *See United States v. Valenti*, 60 F.3d 941, 944-45 (2d Cir. 1995) (issue waived where pretrial evidentiary ruling left issue open and party failed to renew objection at trial); *cf. State v. Lichon*, 163 Ariz. 186, 189 (App. 1989) ("Counsel may not sit back and allow error to occur when a prompt objection might have allowed the court to

objected on this basis, their argument would not prevail on appeal. The assault was probative of Diller's motivation and intent to harm Goodman, as it showed an additional source of potential hostility toward Goodman with respect to the property dispute. And as Goodman points out, it was also relevant to rebut Diller's assertion that the settlement agreement was improperly extracted from him.

¶23 The Dillers cite *Cotterhill v. Bafile*, 177 Ariz. 76 (App. 1993), in support of their argument that evidence of the assault was inadmissible, but that case is inapposite. In *Cotterhill*, we affirmed the trial court's decision to exclude evidence of other bar fights because its probative value was outweighed by a danger of unfair prejudice under Rule 403. *Id.* at 80. The posture here is materially different—unlike *Cotterhill*, the assault on Goodman's tenant has a direct connection to the parties' underlying dispute in this case. Given the relevance of the evidence and our deference to the trial court's determinations of relevance and unfair prejudice, *see State v. Smith*, 215 Ariz. 221, ¶ 48 (2007), we would not find error here even if the Dillers had properly objected.

¶24 The Dillers also claim that evidence of the assault was inadmissible because it was offered for no other reason than "to portray . . . Diller as a bad guy" and was therefore inadmissible under Rule 404(b), Ariz. R. Evid. Once again however, they failed to raise this issue below and have thus waived it on appeal. *See* Ariz. R. Evid. 103(a)(1); *Thompson*, 187 Ariz. at 129. And even if it had been preserved, it lacks merit. Although Rule 404(b) prohibits admission of a person's conduct "to prove the character of a person in order to show action in conformity therewith," it allows such evidence for other purposes, including intent—a relevant purpose here.

¶25 The Dillers also contend that various remarks by Goodman's counsel during trial constitute misconduct warranting a new trial. As Goodman points out, however, the Dillers failed to object to any of these allegedly improper remarks during trial. A party who does not timely object to opposing counsel's improper remarks and fails to request that the trial court admonish the jury to disregard them waives the issue on appeal

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cure the problem."). At the beginning of the third day of trial, the court ruled that it had decided to admit evidence of the criminal allegation because, among other things, it was relevant to show the motives behind Diller's behavior. It invited the Dillers to request a limiting instruction, which they apparently did not do.

unless the misconduct was so serious that "no admonition or instructions by the court could undo the damage." *Liberatore v. Thompson*, 157 Ariz. 612, 619 (App. 1988) (quoting *Schmerfeld v. Hendry*, 74 Ariz. 159, 161 (1952)); *see Copeland v. City of Yuma*, 160 Ariz. 307, 309 (App. 1989) (issue over improper remarks during closing argument waived for failure to object during trial). The argument is therefore waived.

¶26 Last, nothing here compelled the trial court to grant the Dillers' motion for a new trial based on the withdrawal of several of their attorneys throughout litigation. To be sure, it is unusual that the Dillers had, by their own count, "ten previous attorneys that withdrew from representation." But as Goodman points out, many of these attorneys had moved to withdraw because of the Dillers' conduct, such as impugning the attorney's mental capacity, honesty, and communication skills; threatening to file bar complaints or criminal complaints against the attorney; demanding action violating law or ethical rules; and demanding action considered "repugnant" by the attorney or with which the attorney fundamentally disagreed. Indeed, their trial attorney sought to join the growing list of former attorneys based on irreconcilable differences with the Dillers, but his motion to withdraw was denied after the judge met in camera with the Dillers and the attorney. The pattern of withdrawals suggests that the Dillers created their own problems in maintaining legal representation, belying their claim that they had "no real opportunity to try their case."

¶27 The only case the Dillers cite to support their argument, *Metts v. Waits*, 286 S.W. 923, 924 (Tex. Civ. App. 1926), presents a distinct situation in which a party's attorney withdrew "through no fault of the[party]" immediately before trial and the party, despite all efforts, could not secure representation for trial. Here, the Dillers were represented at trial, and the record strongly suggests they were largely responsible for the withdrawal of their previous attorneys. And although they claim that various defenses were "lost somewhere in the shuffle of attorneys," and their trial attorney was not adequately prepared and made mistakes because he was "new to the case," "a party's mere dissatisfaction with his own counsel or allegations of his own counsel's neglect, inadvertence, or mistake do not justify the granting of a new trial in civil cases." *King v. Superior Court*, 138 Ariz. 147, 151 (1983). Thus, the trial court did not abuse its discretion in denying the Dillers' motion for a new trial.

Damages

¶28 The Dillers argue the jury's award of damages should be vacated because it "far exceeded the reality of Goodman's situation." "To be found excessive, damages must be unreasonable, outrageous, and beyond all measure." *Gonzales v. Ariz. Pub. Serv. Co.*, 161 Ariz. 84, 90 (App. 1989). In general, we review a jury's award of damages for abuse of discretion. *Id.* Because the amount of an award is "peculiarly within the province of the trier of fact," an award "will not be disturbed on appeal except for the most cogent of reasons." *Fernandez v. United Acceptance Corp.*, 125 Ariz. 459, 462 (App. 1980).

¶29 We review an award of punitive damages de novo, however, to ensure that the award does not violate due process. *See Arellano v. Primerica Life Ins. Co.*, 235 Ariz. 371, ¶ 34 (App. 2014). "[T]o obtain punitive damages, [a] plaintiff must prove that defendant's evil hand was guided by an evil mind." *Rawlings v. Apodaca*, 151 Ariz. 149, 162 (1986). The defendant's evil mind must be shown by clear and convincing evidence. *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 332 (1986). An evil mind may be shown by evidence that the defendant "intended to injure the plaintiff," or evidence that the defendant "consciously pursued a course of conduct knowing that it created a substantial risk of significant harm to others." *Rawlings*, 151 Ariz. at 162. In reviewing a punitive damage award, we consider "(1) the degree of reprehensibility of defendant's conduct, (2) the disparity between plaintiff's actual or potential harm and the punitive damages award, and (3) the difference between the jury's punitive damages award and the authorized civil penalties in comparable cases." *Arellano*, 235 Ariz. 371, ¶ 35.

¶30 Whether reviewing an award of compensatory or punitive damages, we view the evidence in the light most favorable to upholding the award and will affirm if substantial evidence reasonably supports it. *See id.*; *Fernandez*, 125 Ariz. at 462. Viewed in that light, all aspects of the jury's award are amply supported here. Contrary to the Dillers' implication that they have been "held to pay the entire value of Goodman's building when he conceded the building . . . ha[s] value," the combined amount of the trespass award ($100,000) and the compensatory portion of the breach-of-contract award ($85,000) is only slightly more than half the change in value Goodman's expert placed on the building if it could have been repaired. Indeed, the expert testified that the inability to repair the building effectively reduced the market value of the property to the value of the land, diminishing the property's value by nearly $350,000. The jury's

award of far less than that amount is supported by the evidence; it is by no means unreasonable or outrageous.

¶31 Likewise, the punitive damages award was clearly and convincingly supported by evidence showing a pattern of reprehensible conduct from which the jury could infer that the Dillers intended to harm Goodman. For example a jury could reasonably infer that the Dillers' purpose for altering their downspout to empty very near the base of Goodman's building was to water the invasive vines or flood Goodman's basement. The inference is strengthened by Diller's evident and unrelenting hostility toward Goodman, as shown by his volatile and abusive communications and his general unreasonableness for many years over a narrow strip of land the Dillers have otherwise shown little interest in maintaining or improving.

¶32 The Dillers point to what they purport to be evidence of their benign intentions, maintaining, for example, that they had "good reason to install the downspout the way it was installed" because there was no better option to direct the water elsewhere. The evidence does not support this assertion; indeed, the only record citation they include is to Goodman's testimony stating that the Dillers could have directed the water elsewhere. To the extent there was conflicting evidence whether the Dillers intended to harm Goodman, any conflict is resolved in favor of upholding the jury's award. *See Logerquist v. McVey*, 196 Ariz. 470, ¶ 51 (2000) (weighing conflicting evidence within jury's province); *see also Arellano*, 235 Ariz. 371, ¶ 35. The modest punitive damages award—less than a third of the amount of compensatory damages—lies well within the bounds of reasonable proportionality, and the Dillers cite no case where a punitive damages award of similar proportion has been overturned in similar circumstances.

¶33 The Dillers take issue with the trial court's statement that, in deciding whether to issue a punitive damages instruction, it could consider a minute entry in which a settlement judge found that the Dillers had "failed to negotiate[] in good faith" and had been "lacking candor in their representation to the Court." The Dillers argue that it had "no relevance to the punitive damages in this case" because "the finding of bad faith related to negotiations over the licensing agreement and representations to the court," not the trespass claim. But at trial, the Dillers' objection was based on the minute entry's "heavy prejudicial impact," not its relevance, and the court sustained that objection. *See State v. Lopez*, 217 Ariz. 433, ¶ 4 (App. 2008) ("[A]n objection on one ground does not preserve the issue on another ground."). Moreover, the Dillers have not argued, either below or on appeal, that it was improper for the court to consider the minute entry in its

decision merely because it had ruled it inadmissible at trial. *Cf.* Ariz. R. Evid. 104(a) (court not bound by rules of evidence in deciding preliminary evidentiary issues).

¶34 In any event, as Goodman points out, the Dillers have made no showing that the trial court actually considered the minute entry to support the punitive damages instruction, which was amply supported by other evidence. Indeed, the court did not mention the minute entry among the evidence it considered when it ultimately decided to issue the instruction. Nor do the Dillers claim to have challenged the punitive damages instruction based on improper consideration of the minute entry, and our review of the record reveals no attempt to do so. Thus, to the extent the Dillers contest the punitive damages instruction on this basis, they have waived the issue. *See Data Sales Co. v. Diamond Z Mfg.*, 205 Ariz. 594, ¶ 31 (App. 2003) ("Absent fundamental error, failure to object to a jury instruction waives the issue of error in the instruction."); *see also Cook v. Ryan*, 249 Ariz. 272, ¶ 11 (App. 2020) (issues raised for first time on appeal generally deemed waived).

¶35 In sum, the trial court did not abuse its discretion in sustaining the jury's award of damages, and the punitive damages award was not improper.

Attorney Fee Award

¶36 The Dillers argue that the trial court's award of attorney fees is erroneous and should be vacated. A court may award a successful party its reasonable attorney fees in a contested action arising out of a contract. A.R.S. § 12-341.01(A). The purpose of a fee award is to "mitigate the burden of the expense of litigation to establish a just claim." § 12-341.01(B). A court has broad discretion whether to award attorney fees and may consider factors including (1) "[t]he merits of the claim or defense presented by the unsuccessful party"; (2) whether "[t]he litigation could have been avoided or settled and the successful party's efforts were completely superfluous in achieving the result"; (3) whether the unsuccessful party would suffer "extreme hardship"; (4) whether the successful party prevailed as to all relief sought; (5) whether novel legal questions were presented; and (6) whether the award would discourage parties from litigating or defending legitimate contract issues. *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 570 (1985). We review a grant of attorney fees for abuse of discretion. *Motzer v. Escalante*, 228 Ariz. 295, ¶ 4 (App. 2011).

¶37 The Dillers assert that various factors weighed against awarding attorney fees, such as the merits of their case, their efforts to settle, the hardship they face from the large fee award, and the danger that the award will discourage future parties from litigating meritorious claims. But they fail to specifically address the trial court's reasoning for awarding fees, which touches on many of these same factors. For example, the court found that the Dillers had declined less costly alternatives to resolve the litigation and had not disclosed their finances to the court to demonstrate hardship—findings that the Dillers make no effort to contradict on appeal.

¶38 Meanwhile, none of the Dillers' reasons to overturn the fee award is compelling, and in fact some of their reasoning supports the award. For example, the Dillers assert that it "could not be further from the truth" that they have been "hostile, uncooperative litigants" who forced Goodman to continue litigating his claims. But by their own account, the Dillers' sole offers to settle the claims were to sell their property to Goodman at prices they formulated—over $550,000—without any additional consideration to compensate Goodman for his claims, much less his mounting litigation expenses. They implicitly concede that they rejected Goodman's counteroffer to settle the lawsuit for $30,000 and purchase of their property at fair market value, to be determined by an independent appraiser. Indeed, the Dillers have not directed us to, nor have we found, anything suggesting that they made reasonable efforts to bring this longstanding dispute to an end. In sum, the Dillers have failed to show that the trial court's attorney fee award constituted an abuse of discretion.

Attorney Fees on Appeal

¶39 Goodman has requested his attorney fees on appeal pursuant to the settlement and license agreements and § 12-341.01(A). All relevant considerations under § 12-341.01(A) dictate an award of fees, including the thin merit of many of the issues raised by the Dillers on appeal and the fact that Goodman has prevailed on all issues, the lack of any novel issues, the lack of reasonable efforts to settle, the lack of any evidence of extreme hardship, and the lack of compelling reasons why an attorney fee award in this case would discourage future parties from litigating meritorious claims. *See Associated Indem.*, 143 Ariz. at 570.

Disposition

¶40 We affirm the judgment in favor of Goodman, including the jury's award of compensatory and punitive damages and the trial court's

award of attorney fees. We award Goodman his reasonable attorney fees and costs on appeal upon compliance with Rule 21(b), Ariz. R. Civ. App. P.