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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

LESLEY MILLER, a single woman, Plaintiff/Appellee, v. ROBERT KRAMBER and MARY KRAMBER, husband and wife; and KRAMBER PROPERTIES, INC., an Arizona corporation, Defendants/Appellants.	2 CA-CV 2009-0159 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C-20077399

Honorable Stephen C. Villarreal, Judge

AFFIRMED

Douglas B. Levy, P.C.
By Douglas B. Levy — Tucson

and

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By David L. Abney — Phoenix
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and

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Attorneys for Defendants/Appellants

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

¶1 In this negligence action arising from a motor vehicle accident, defendants/appellants Robert and Mary Kramber and Kramber Properties, Inc. (hereinafter "the Krambers") appeal from the jury verdict and resulting judgment in favor of plaintiff/appellee Lesley Miller and from the subsequent denial of their motion for new trial. The Krambers argue that the trial court should have granted their motion for new trial and that both the judgment against Kramber Properties and the punitive damage award are based on insufficient evidence and should be vacated. Finding no error, we affirm the judgment in its entirety.

Factual and Procedural Background

¶2 The accident occurred on January 5, 2006. That night, Robert Kramber drove his vehicle into the back of Miller's vehicle just as a stoplight had turned green and she had begun to proceed through the intersection. The officer who responded to the scene of the accident estimated Kramber's vehicle was traveling at thirty-five miles per hour when it hit Miller's vehicle. Miller testified that after the accident she walked back to the car behind her and saw a man, whom she later identified as Kramber, in the driver's seat pointing with his left hand to the right. There were no passengers in the

vehicle. Miller went up to the window and asked if Kramber was okay "a couple of times." He responded by saying "[y]es," and by "pointing like he wanted to move his vehicle." Miller noticed that his window was only open a few inches, and he was bleeding from his nose. When Miller turned around to go back to her car because she felt shaky and needed to sit down, Kramber drove away.

¶3 During her brief interaction with Kramber, Miller saw a beer can on the front seat of his car. She also concluded his behavior was consistent with someone who had been drinking alcohol, mainly because "he had kind of a flat affect and he just was wanting to move [his vehicle]." Before Kramber drove away, Miller noticed his distinctive, personalized "Mr. K." license plate. Based on that information, the police officer who responded to the incident was able to identify the vehicle as being registered to Kramber Properties.

¶4 After the accident, Miller refused to be transported to the emergency room. However, the next day, after working her shift as a nurse at a local hospital, she went to the emergency room to be examined by a physician. Miller told the emergency room physician that she "hurt all over and . . . couldn't move [but] . . . didn't have anything [that was] broken." The physician agreed she had no broken bones and gave her muscle relaxers and pain medication to ease the symptoms. Shortly thereafter, Miller began seeing a physical therapist and a rehabilitation physician to treat her injuries.

¶5 Richard Petronella, M.D., testified that Miller had become his patient in January 2006, shortly after the accident. He diagnosed her with "cervical and thoracic strain/sprains, or whiplash-type injuries, [and] soft-tissue injuries to the neck and upper

back," noting these "are pretty common findings in this type of accident." By March, although the injuries to Miller's neck and back mostly had been resolved, problems with her shoulders had grown worse. A computerized axial tomography (CAT) scan revealed a severely deteriorated disc in Miller's lower cervical spine—a problem that had existed before the accident but that a neurologist opined had been "convert[ed from] an asymptomatic condition into a symptomatic one" by the accident. Petronella agreed that the degenerative disc had become symptomatic after the accident and would likely continue to degenerate; thus, he testified, it is a permanent condition. He estimated Miller would need about $3,000 in annual medical care to treat her condition.

¶6 Miller's physical therapist, William Adelman, testified Miller had reported headaches, neck pain, arm pain, low-back pain, and "a burning sensation in a bunch of different locations" at her initial appointment with him. Many of her symptoms improved over the first course of her treatment, which lasted about two months.

¶7 After the first course of treatment ended, according to Adelman, Miller "still was having pain" but "was anxious to get on with work, and so she didn't return [to physical therapy] because it interfered with her work schedule." She returned to see him in June, after being referred by the neurologist who had read her CAT scan. She then reported experiencing neck pain that radiated down her arm. Adelman tried traction treatment, which helped alleviate her pain, but she still periodically experienced episodes of increased pain. Miller underwent nearly four more months of physical therapy before discontinuing treatment. She then returned to Adelman and Petronella in January 2007, complaining she recently had been experiencing a worsening of her symptoms after "she

had been doing well" for a few months. Because Miller previously had been able to obtain some relief with traction, Petronella and Adelman both recommended she obtain a home traction unit.

¶8 Adelman testified that, although he had not treated Miller in over two years at the time of trial, he believed she would "require treatment on and off periodically for this problem for the foreseeable future." He agreed with Petronella that $3,000 per year was an accurate estimate of the medical costs Miller would incur to treat her injuries. Despite Miller's progress toward recovery under Petronella's care and in physical therapy, she testified she still has some degree of pain every day and takes ibuprofen several times a day as well as a stronger prescription pain medication on days she is not working and the pain is especially bad. Miller testified her shoulders still hurt and she has stiffness that causes her difficulty in turning her body or pivoting her head. She rests more and does not enjoy many of the activities she enjoyed before the accident.

¶9 At the time of the accident, Miller was a nurse coordinator at a local hospital. In addition to patient care, Miller directed the administrative aspects of the nursing unit, and she often worked fifty or sixty hours per week. Miller testified she missed "at least a couple of weeks" of work in the first five months after the collision. She also worked fewer hours after the collision because of pain. After being terminated from that position, Miller chose to take seven months to rest and heal before obtaining another nursing position. At her current position, she works an average of slightly over forty hours per week, earning about thirty-six dollars per hour. Miller testified that although she does not allow injuries from the collision to affect her ability to do her job,

she does receive assistance from other members of the nursing staff to lift patients. And she testified she believed she would lose wages as she got older due to the accident.

¶10 The jury awarded Miller $500,000 in compensatory damages and $300,000 in punitive damages. The Krambers filed this timely appeal from the judgment and the trial court's subsequent denial of their motion for new trial.

Motion for New Trial

¶11 The Krambers argue the trial court erred when it denied their motion for new trial. We review the court's ruling for an abuse of discretion. *Boatman v. Samaritan Health Servs., Inc.*, 168 Ariz. 207, 212, 812 P.2d 1025, 1030 (App. 1990). Under Rule 59(a), Ariz. R. Civ. P., a party may be entitled to a new trial, *inter alia*, on the grounds of the prevailing party's misconduct, erroneously admitted evidence, excessive damages, or a verdict that is the result of passion or prejudice or is not justified by the evidence.

¶12 As they argued below, the Krambers contend the verdict must have been based on "passion or prejudice" and attorney misconduct because Miller's counsel repeatedly referred to Kramber's intoxication and leaving the scene, evidence of which they contend was admitted improperly. They also reassert their contention that the amount of the verdict was not justified by the evidence of actual damages Miller suffered.

Evidence of Leaving the Scene and Intoxication

¶13 Over the Krambers' objection, the trial court admitted evidence Kramber had left the scene of the accident and might have been intoxicated. Although the court originally concluded the evidence of flight was relevant to the jury's punitive damage assessment, it later concluded the evidence was only relevant to assess the Krambers'

liability.[1] To support their argument that the flight evidence was wrongly admitted, the Krambers claim they did not contest liability and note the court granted judgment as a matter of law (JMOL) on that issue. They also contend the flight evidence was not admissible on the issue of punitive damages; thus, it was "irrelevant to any issue" in the case.

¶14 Despite the Krambers' contention that liability was not contested, however, they never conceded liability, and the trial court did not grant the JMOL on that issue until after the jury had retired to deliberate.[2] Miller had the burden to prove the Krambers' negligence throughout the trial. *See Smith v. Johnson*, 183 Ariz. 38, 41, 899 P.2d 199, 202 (App. 1995). Thus, the court did not err by admitting the evidence of Kramber's leaving the scene for that limited purpose. *See State v. Speers*, 209 Ariz. 125,

[1]The Krambers suggest the trial court erred by originally deciding to allow the jury to consider the flight evidence when assessing punitive damages and then later retracting that ruling. But a trial court properly can reconsider and change an evidentiary ruling during the course of a trial. *See State v. King*, 180 Ariz. 268, 279, 883 P.2d 1024, 1035 (1994) (law of case doctrine, which protects trial court's rulings from challenge until final judgment, does not prevent trial court "'from reconsidering [its] previous nonfinal orders'"), *quoting Plumb v. State*, 809 P.2d 734, 739 (Utah 1990); *Love v. Farmers Ins. Group*, 121 Ariz. 71, 73, 588 P.2d 364, 366 (App. 1978) ("A court does not lack the power to change a ruling simply because it ruled on the question at an earlier stage."). But even if the trial court's action had been error, the flight evidence was admitted properly on the question of the Krambers' negligence and the jurors were instructed repeatedly and clearly not to consider the evidence in assessing punitive damages. Thus, the Krambers suffered no prejudice from the court's original ruling and subsequent reconsideration of it. *See Walters v. First Fed. Sav. & Loan Ass'n of Phoenix*, 131 Ariz. 321, 326, 641 P.2d 235, 240 (1982) (trial error only reversible if it causes prejudice to appellant's "substantial rights").

[2]Although the court expressly granted the motion at that time, it stated that it implicitly had granted the motion when it gave the jury only one verdict form in favor of Miller. Under either scenario, the motion was not granted until the close of all the evidence.

¶ 30, 98 P.3d 560, 568 (App. 2004) (minimal standard for relevance properly allowed flight evidence based on reasonable inferences that could be drawn from it). Here, the evidence of Kramber's flight was properly admitted to show he had negligently caused the accident.[3] *Cf. Acuna v. Kroack*, 212 Ariz. 104, ¶¶ 18-19, 128 P.3d 221, 226 (App. 2006) (evidence of post-accident conduct, including flight from scene, "material and probative" on issue of "competence to safely drive"); *State v. Salazar*, 173 Ariz. 399, 409, 844 P.2d 566, 576 (1992) (evidence of flight admissible in criminal cases to show consciousness of guilt—that defendant is aware he is committing illegal act); *State v. Lujan*, 124 Ariz. 365, 371, 604 P.2d 629, 635 (1979) (same).

¶15 The evidence suggesting Kramber was under the influence of alcohol at the time of the accident also was admitted properly. *See, e.g., Belliard v. Becker*, 216 Ariz. 356, ¶¶ 14, 16, 166 P.3d 911, 913-14 (App. 2007) (even when defendant concedes negligence and causation, evidence of alcohol consumption relevant to issue of punitive damages insofar as it shows defendant "may have recklessly pursued a course of conduct that would inevitably create a risk of harm to others"). In short, the Krambers have not shown they were entitled to a new trial based on the improper admission of evidence. *See Mammo v. State*, 138 Ariz. 528, 533, 675 P.2d 1347, 1352 (App. 1983) (improper admission of evidence "[wa]s not of a prejudicial nature requiring a new trial").

[3]To the extent Miller argues the flight evidence was indirectly relevant to punitive damages insofar as it proves Kramber was intoxicated, we need not decide that issue because the trial court did not admit it for that purpose. And she did not file a cross-appeal on the punitive damage award.

Attorney Misconduct in Closing Argument

¶16 The Krambers also contend they were entitled to a new trial because Miller's counsel committed misconduct that affected the verdict by repeatedly referring to the evidence of flight in arguing Miller's entitlement to punitive damages in closing argument. *See* Ariz. R. Civ. P. 59(a)(2); *Ring v. Taylor*, 141 Ariz. 56, 68, 685 P.2d 121, 133 (App. 1984) (court can order new trial due to counsel's misconduct when "improper conduct actually influenced the verdict").

¶17 Relevant portions of the closing argument are as follows:

> [MILLER'S COUNSEL]: Now, I want to talk to you a little bit about Robert Kramber. Judge Villarreal has instructed you that the fact that he left the scene of this collision, that he fled like a coward is not to be considered in your award of punitive damages . . . .
>
> . . . .
>
> [MILLER'S COUNSEL]: The reason the punitive damages are warranted in this case is because when you have a man, a mature businessman, he fled the scene—
>
> [KRAMBER'S COUNSEL]: Your Honor, I'm going to object at this point in time. The association of fleeing the scene and punitive damages, it's improper under your instructions.
>
> THE COURT: Well, the jury's been instructed how they can use that evidence. Overruled.
>
> [MILLER'S COUNSEL]: The Court's Instruction No. 15 is "Flight From the Scene of the Accident." It says that if you find—I'll give you an opportunity to get there. "If you find that Defendant Robert Kramber fled the scene of the accident, you may infer a consciousness of guilt for having caused the accident on the part of Defendant Robert

> Kramber." You may infer a consciousness of guilt for having caused the accident on the part of Defendant Robert Kramber.
>
> Of course that's what you're going to find. That's what the evidence demonstrates in this case. "You must not consider this evidence, however, in imposing punitive damages."
>
> He fled the scene of the collision. That's one issue. The collision was caused because he was drinking and he was intoxicated. And him fleeing the scene has nothing to do with the fact that he was bloodied in the face, would not roll down his window, and the police were deprived of an opportunity to test him.

¶18 As is clear from the record, although Miller's counsel mentioned Kramber's flight several times, he repeatedly emphasized the jury could not consider that evidence in assessing punitive damages. And when his argument began to link more directly the concept of punitive damages to the evidence Kramber "fled the scene," Kramber's counsel immediately objected; the trial court overruled the objection but reminded the jurors they had "been instructed how they can use that evidence."

¶19 In addition to being instructed explicitly they were not to use evidence of Kramber's flight from the scene in assessing punitive damages,[4] the jury was instructed

[4]The instruction stated, "If you find that Defendant Robert Kramber fled the scene of the accident, you may infer a consciousness of guilt for having caused the accident on the part of Defendant Robert Kramber. You must not consider this evidence, however, in imposing punitive damages." To the extent the Krambers have argued the jury instruction was erroneous, they did not object to the instruction below, *see State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005) (failure to object below forfeits all but fundamental error review on appeal), and fundamental error is rarely found in civil cases. *Bradshaw v. State Farm Mut. Auto. Ins. Co.*, 157 Ariz. 411, 420, 758 P.2d 1313, 1322 (1988). Moreover, because the instruction does not misstate the relevant law, the Krambers have not shown the trial court committed any error when it gave the instruction. *See State v. Schrock*, 149 Ariz. 433, 440, 719 P.2d 1049, 1056 (1986) (only

the lawyers' closing arguments are not evidence. *See Ring*, 141 Ariz. at 61, 685 P.2d at 126 (new trial not warranted based on attorney misconduct "especially in light of the fact that the jury was instructed that the remarks of counsel were not to be considered as evidence"). We presume the jurors followed the trial court's instructions. *See State v. Velazquez*, 216 Ariz. 300, ¶ 50, 166 P.3d 91, 103 (2007). Moreover, the court is in the best position to determine whether improper attorney conduct influenced the jury's verdict. *See Ring*, 141 Ariz. at 60-61, 685 P.2d at 125-26. The Krambers have not shown the court erred in concluding that attorney misconduct did not entitle them to a new trial under Rule 59(a)(2).

Compensatory Damages

¶20 The Krambers contend that, under the facts of the case, Miller was entitled to, at most, "fair and reasonable compensatory damages in the range of $25,000 to $40,000." The Krambers claim the verdict of $500,000 in compensatory damages "should shock the conscience of anybody who is familiar with the facts of th[e] case and rear-end, soft-tissue injury car accidents in general." "The test for whether the jury award is the result of passion or prejudice is whether the amount of the jury verdict is so unreasonable and outrageous as to shock the conscience." *Mammo*, 138 Ariz. at 532, 675 P.2d at 1351.

¶21 Here, Miller presented evidence supporting her minimum request for $338,468.61 in damages. "[I]f the verdict is supported by adequate evidence, it will not

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when "'it is reasonable to suppose the jury would be misled'" by jury instructions as a whole will we reverse case based on improper instruction), *quoting State v. McNair*, 141 Ariz. 475, 481, 687 P.2d 1230, 1236 (1984).

be disturbed, and the greatest possible discretion is in the hands of the trial judge." *Creamer v. Troiano*, 108 Ariz. 573, 577, 503 P.2d 794, 798 (1972). The fact the jury awarded more than the "base figure" Miller had requested does not render the award the result of passion or prejudice, nor does the amount awarded shock the conscience, given the evidence presented. *See, e.g.*, *Mammo*, 138 Ariz. at 532, 675 P.2d at 1351; *see also Bryant v. Silverman*, 146 Ariz. 41, 47, 703 P.2d 1190, 1196 (1985) ("Arizona allows unlimited recovery for actual damages, expenses for past and prospective medical care, past and prospective pain and suffering, lost earnings, and diminished earning capacity."). The Krambers have not shown they are entitled to a new trial based on an excessive award of damages, nor on any ground they have asserted; therefore, the trial court did not abuse its discretion in denying their motion.

Punitive Damages

¶22 The Krambers ask us to vacate the award of punitive damages, arguing it is not supported by the evidence. They contend Miller did not meet the burden of proof by clear and convincing evidence that they acted with an "evil hand" guided by an "evil mind." "A jury's decision to award punitive damages should be affirmed if any reasonable evidence exists to support it. However, where the trial court submits the issue to the jury on slight and inconclusive evidence, an appellate court may correct the error." *Filasky v. Preferred Risk Mut. Ins. Co.*, 152 Ariz. 591, 599, 734 P.2d 76, 84 (1987).

¶23 A punitive damage award must be supported "by clear and convincing evidence that the defendant engaged in aggravated and outrageous conduct with an 'evil mind.'" *Hyatt Regency Phoenix 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 203, 209-10 (1992). The "evil mind" justifying a punitive damage award is manifested when a defendant intends to injure the plaintiff or when "although not intending to cause injury, defendant consciously pursued a course of conduct knowing that it created a substantial risk of significant harm to others." *Rawlings v. Apodaca*, 151 Ariz. 149, 162, 726 P.2d 565, 578 (1986). Although a plaintiff must always show aggravated and outrageous conduct on the part of the defendant, the "evil mind" element may be inferred from the surrounding circumstances. *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 331-32, 723 P.2d 675, 680-81 (1986). In determining the sufficiency of the evidence supporting the "evil mind" requirement, a court looks to such factors as "'the reprehensibility of the conduct,'" the severity of the actual or potential harm, the defendant's awareness of it, the duration of the misconduct, and any concealment of the harm or risk of harm. *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).

¶24 In denying the Krambers' motion for JMOL, thereby allowing the issue of punitive damages to go to the jury, the trial court found as follows:

> [T]here is sufficient evidence for the issue of punitive damages to go to the jury, given the fact that this was a high-speed accident that occurred at an intersection where the plaintiff was stopped; that the fact of the accident is certainly evidence that the jury could consider in concluding that the defendant was driving the vehicle while under the influence of alcohol; i.e., that he was impaired to the slightest degree by the fact that he had alcohol to drink.

> The fact that a beer was seen on the interior of the car is also evidence that the jury can consider in deciding, in concluding that he was under the influence.
>
> There's also the negative inferences that can be drawn from the questions that the defendant refused to answer at his deposition concerning whether he was driving the car that night, whether he had anything to drink that night; and I think the jury can conclude that he was driving the car and that he had alcohol to drink that night, and that he was under the influence.
>
> There's also the additional evidence that he didn't roll down the window but for, I think, one or two inches. And I think the jury could conclude from that that he was trying to hide the fact that perhaps there was liquor on his breath.
>
> The Court finds that from all this evidence—that a reasonable jury can conclude from this evidence that he was driving under the influence on the night of the accident; therefore, the motion for summary judgment as a matter of law is hereby denied.

¶25 The trial court found the award of punitive damages was supported in part by the jury's ability to draw negative inferences from Kramber's silence. "'An inference is a fact which may be presumed from the proof of the existence or non-existence of other facts. It is a conclusion from a proven fact o[r] facts.'" *Martin v. Schroeder*, 209 Ariz. 531, ¶ 15, 105 P.3d 577, 581 (App. 2005), *quoting Buzard v. Griffin*, 89 Ariz. 42, 48, 358 P.2d 155, 159 (1960) (alteration in *Martin*). Arizona law is clear that, when a party invokes his Fifth Amendment right against self-incrimination in a civil case, "the trier of fact is free to infer the truth of the charged misconduct." *Castro v. Ballesteros-Suarez*, 222 Ariz. 48, ¶ 20, 213 P.3d 197, 202 (App. 2009); *accord Buzard*, 89 Ariz. at 48, 358 P.2d at 158.

¶26 "[A]side from the privilege against compelled self-incrimination, the [Supreme] Court has consistently recognized that in proper circumstances silence in the face of accusation is a relevant fact not barred from evidence by the Due Process Clause." *Baxter v. Palmigiano*, 425 U.S. 308, 319 (1976). "'Silence is often evidence of the most persuasive character.'" *Id*., *quoting United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153-54 (1923). And in *United States v. Hale*, 422 U.S. 171, 176 (1975), the Court recognized that "[f]ailure to contest an assertion . . . is considered evidence of acquiescence . . . if it would have been natural under the circumstances to object to the assertion in question."

¶27 The Krambers rely on *Doe v. Glanzer*, 232 F.3d 1258, 1264 (9th Cir. 2000), implicitly arguing Arizona law requires that "when there is no corroborating evidence to support the fact under inquiry, the proponent of the fact must come forward with evidence to support the allegation, otherwise no negative inference will be permitted." Even were we to conclude corroborating evidence is a requirement in Arizona, there was ample evidence of Kramber's alcohol consumption other than his silence: the high rate of speed at which Kramber was driving his vehicle when he hit Miller's stopped vehicle, the beer can on the seat of the car, Kramber's refusal to roll down his window when interacting with Miller, and Miller's belief Kramber had been drinking alcohol based on her observation of him. The trial court did not err when it allowed the jury to draw negative inferences from Kramber's assertion of his right against self-incrimination.

¶28 Moreover, those inferences, combined with the other evidence, supported the award of punitive damages. *See, e.g.*, *Olson v. Walker*, 162 Ariz. 174, 179, 781 P.2d

1015, 1020 (App. 1989) (court properly allowed issue of punitive damages to go to jury on evidence of driver's intoxication and additional "compelling circumstances"); *cf. Belliard v. Becker*, 216 Ariz. 356, ¶¶ 15-16, 166 P.3d 911, 913-14 (App. 2007) (remanding for trial on punitive damages when evidence of alcohol consumption before driving wrongly precluded, finding such evidence "may be a sufficient basis" for the jury to award punitive damages); *Saucedo ex rel. Sinaloa v. Salvation Army*, 200 Ariz. 179, ¶ 20, 24 P.3d 1274, 1279 (App. 2001) (citing Georgia case for proposition driving under influence of alcohol and causing plaintiff's injuries sufficient aggravating circumstance to justify award of punitive damages).

¶29 The Krambers rely on *Saucedo*, 200 Ariz. 179, ¶ 19, 24 P.3d at 1279, emphasizing its principle that "the conduct giving rise to punitive damages must be a proximate cause of the harm inflicted," and contend that the jury here improperly considered Kramber's post-accident conduct of leaving the scene. But nothing the jury considered here violates the principle set forth in *Saucedo*. As discussed above, we presume the jury followed the trial court's explicit instruction not to consider the flight from the scene when assessing punitive damages.

¶30 Accordingly, the award of punitive damages is affirmed. *See Hyatt Regency*, 184 Ariz. at 132, 907 P.2d at 518 ("This court must affirm a jury's award of punitive damages if any reasonable view of the evidence would satisfy the clear and convincing standard.").

Respondeat Superior

¶31 The Krambers argue there was no evidence presented Robert Kramber was acting in the course and scope of his employment, and thus, the trial court should have granted his motion for JMOL pursuant to Rule 50, Ariz. R. Civ. P. In reviewing the court's denial of a Rule 50 motion, we view the evidence in the light most favorable to the nonmoving party. *Saucedo*, 200 Ariz. 179, ¶ 9, 24 P.3d at 1276. We review the court's ruling de novo. *Id*. Judgment as a matter of law is required "only when the facts presented in support of a claim have so little probative value that reasonable people could not find for the claimant." *Monaco v. HealthPartners of S. Ariz*., 196 Ariz. 299, ¶ 6, 995 P.2d 735, 738 (App. 1999).

¶32 Under the doctrine of respondeat superior, an employer is vicariously liable for an employee's tort committed in the course and scope of employment. *Smith v. Am. Express Travel Related Servs. Co.*, 179 Ariz. 131, 135, 876 P.2d 1166, 1170 (App. 1994). And whether an employee's tort is committed while the employee is within the course and scope of employment is a question of fact for the jury. *Id*. at 136, 876 P.2d at 1171.

¶33 In denying the Krambers' motion for JMOL on the issue, the trial court found "the evidence has been that the car is titled in the corporate name; therefore, I think the jury can make an inference that the use of the car was for a corporate purpose." The jury was also entitled to draw negative inferences from Kramber's silence when asked questions about Kramber Properties' connection to the collision.

¶34 The Krambers insist that, because "Miller's counsel simply did not ask Kramber any questions about his use of the car at the time of the accident," there was no

basis for the jury to infer anything other than that he had been driving the car for personal use that night. But Kramber refused to answer any question relating to the events of that evening, including questions about the route he took home, whether he had been working on any real estate transactions on the date of the accident, and where he had been between 5:00 p.m. and 10:00 p.m. the night of the accident. The record supports the trial court's ruling that the jury could have drawn the necessary inferences from Kramber's silence on those questions, among others. Accordingly, the court did not err in denying the motion for JMOL as to Kramber Properties' liability.

Disposition

¶35 Affirmed.

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

CONCURRING:

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

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