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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

LUPE DeSANTIAGO, individually; DEREK A. CASTILLO, an unmarried man; and SHARON ELIZABETH SUDDUTH, as conservator for PATRICK D. CASTILLO and ADRINA E. CASTILLO, minors, Plaintiffs/Appellees, v. RAMON DANIEL PARGAS and JANE DOE PARGAS, husband and wife; and DISTRIBUTION MANAGEMENT CORPORATION, INC., a New Mexico corporation, Defendants, and AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA, a Pennsylvania corporation, doing business in Arizona, Intervenor/Appellant.	2 CA-CV 2008-0079 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV 2004-00331

Honorable Stephen F. McCarville, Judge

AFFIRMED IN PART; VACATED IN PART; REMANDED

Massey & Finley, P.C.
By Jeffrey R. Finley and Daniel P. Massey — Phoenix

and

Law Office of Scott E. Boehm
By Scott E. Boehm — Phoenix
Attorneys for Plaintiffs/Appellees

Meagher & Geer, P.L.L.P.
By Thomas H. Crouch — Scottsdale
Attorneys for Intervenor/Appellant

B R A M M E R, Judge.

¶1 This case arises out of a fatal automobile accident involving Jose Castillo and Ramon Pargas, a delivery van driver for Distribution Management Corporation (DMC). Appellant American Casualty Company (American Casualty), Pargas's and DMC's primary liability insurance carrier, appeals the trial court's entry of judgment against Pargas and DMC pursuant to a settlement agreement between Pargas, DMC, Pargas's and DMC's excess insurer United National Insurance Company (United National), Castillo's mother Lupe DeSantiago and Castillo's three children, Derek, Patrick, and Adrina Castillo (the Castillos). American Casualty contends the trial court erred in finding the settlement agreement

reasonable and free of fraud or collusion, and in enforcing the agreement on those bases. American Casualty further asserts the court erred in denying a discovery motion it had made and its motion for a new trial. We affirm in part, vacate in part, and remand the case to the trial court.

Factual and Procedural Background

¶2 The relevant facts are undisputed. DMC hired Pargas as a delivery van driver in December 2003. Approximately one month before he was hired, Pargas's license had been reinstated after having been suspended for a driving under the influence of an intoxicant (DUI) violation. On January 26, 2004, Pargas was driving a delivery route for DMC from Phoenix to Tucson and back. Pargas drank alcohol during a layover in Tucson and, after making deliveries there, began driving back to Phoenix while intoxicated. In Eloy, Pargas ran a stop sign and collided with another vehicle, killing its driver, Jose Castillo. At the time of the accident, Pargas had a blood alcohol concentration of .21 percent. Pargas ultimately pled guilty to manslaughter and was sentenced to a 10.5-year prison term.

¶3 In March 2004, Castillo's mother and three children filed a wrongful death action against Pargas and DMC, alleging Pargas had negligently caused Castillo's death and DMC was vicariously liable for Pargas's actions. The Castillos further alleged DMC had negligently hired and supervised Pargas and requested both compensatory and punitive damages. In response to the Castillo's "Requests for Admissions," Pargas admitted he had been intoxicated at the time of the accident, had negligently caused the accident, had been convicted of DUI and aggravated DUI prior to his employment by DMC, and that he was an

alcoholic. Pargas also admitted that, at the time of the accident, he had been delivering and retrieving packages in the course and scope of his employment with DMC.

¶4 In November 2004, the Castillos tendered a $7 million settlement offer to Pargas's and DMC's attorneys, who had been engaged to represent them by American Casualty, their primary insurer.[1] American Casualty did not respond to the offer. Although before the offer expired the Castillos had extended its deadline and had sent American Casualty a letter reminding it of the settlement offer, American Casualty again failed to respond. On March 17, 2005, the Castillos tendered American Casualty a new offer to settle for $6 million. The Castillos also notified American Casualty and United National that, if no settlement was reached within fourteen days, they would "take any and all necessary steps to protect" themselves, including seeking an agreement with Pargas and DMC pursuant to *United Services Automobile Association v. Morris*, 154 Ariz. 113, 741 P.2d 246 (1987),[2] or proceeding to trial.

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[1]Although United National was Pargas's and DMC's excess insurer, "[u]ntil a primary insurer offers its policy limit, the excess insurer does not have a duty to evaluate a settlement offer, to participate in the defense, or to act at all." *Twin City Fire Ins. Co. v. Burke*, 204 Ariz. 251, ¶ 18, 63 P.3d 282, 287 (2003).

[2]A "*Morris* agreement" is "a settlement agreement in which an insured defendant admits to liability and assigns to a plaintiff his or her rights against the liability insurer, including any cause of action for bad faith, in exchange for a promise by the plaintiff not to execute the judgment against the insured." *Safeway Ins. Co. v. Guerrero*, 210 Ariz. 5, n.1, 106 P.3d 1020, 1022 n.1 (2005); *see Morris*, 154 Ariz. 113, 741 P.2d 246. A *Morris* agreement may arise as a result of a variety of circumstances, including, as here, when an insurer allegedly fails to settle the claim against its insured in bad faith. *See Guerrero*, 205 Ariz. 5, n.1, 106 P.3d at 1022 n.1.

¶5 Shortly thereafter, United National informed the Castillos that, because American Casualty had not yet tendered its policy limit, United National could not yet respond to their offers but wished to remain informed of the settlement negotiations. United National also twice contacted American Casualty, unsuccessfully attempting to ascertain whether American Casualty planned to settle, tender its policy limit to United National so it could participate in the defense, or proceed to trial. American Casualty failed to respond to the Castillo's settlement offer before it expired on March 31, 2005.

¶6 In May 2005, American Casualty tendered its policy limit to United National, enabling United National to assume control of Pargas's and DMC's defense. Shortly thereafter, United National and the Castillos began settlement negotiations pursuant to *Morris* and, in August 2005, stipulated to the entry of a judgment for $8.3 million in favor of the Castillos and against Pargas and DMC. Pursuant to the agreement, United National paid the Castillos $2.9 million, including the policy limit American Casualty had tendered. To the extent the Castillos could collect any part of the judgment's $5.4 million balance, they agreed it would only be from American Casualty. United National, Pargas and DMC also assigned to the Castillos their contractual bad faith rights against American Casualty.

¶7 The trial court held an evidentiary hearing to determine whether the settlement agreement was reasonable and free of fraud or collusion. The court granted American Casualty, who contested the enforceability of the agreement, leave to participate in the hearing. After the parties each presented documentary evidence and expert testimony over a period of four days, the court concluded "the proposed Settlement Agreement entered into

by the parties was reasonable, and was not the result of fraud or collusion." The court entered judgment against Pargas and DMC for $5.4 million—the amount of the stipulated judgment less the $2.9 million United National had already paid the Castillos. American Casualty then filed a motion for a new trial pursuant to Rule 59(a), Ariz. R. Civ. P., which the court denied after a hearing. This appeal followed.

Discussion

Motion to compel

¶8 After the trial court granted American Casualty leave to intervene in the hearing on the settlement's enforceability, American Casualty moved to compel United National to release "information pertaining to [its] discussions and evaluations of the case" related to the case's value. American Casualty apparently hoped to discover evidence that, prior to settlement, United National had valued the case at a lesser amount than that to which the parties ultimately agreed, thereby, it proposed, suggesting the settlement amount was the product of fraud or collusion. After argument by the parties, the court denied American Casualty's motion.

¶9 American Casualty argues on appeal that the trial court "patently" and "manifestly" erred in denying its discovery motion, contending the court "denied [it an] opportunity to seek discovery of evidence relating to fraud and collusion because [it had] concluded there [wa]s no evidence of fraud or collusion." American Casualty further argues the court's ruling "pre-judged the issue of fraud or collusion even before the evidence was in," denying American Casualty due process of law. We will not disturb a trial court's ruling on

discovery matters absent an abuse of discretion. *See Link v. Pima County*, 193 Ariz. 336, ¶ 3, 972 P.2d 669, 671 (App. 1998).[3]

¶10 We first note that American Casualty cites no legal authority supporting these arguments and fails to develop them in any substantial way. *See Lohmeier v. Hammer*, 214 Ariz. 57, n.5, 148 P.3d 101, 108 n.5 (App. 2006); *In re $26,980.00 U.S. Currency*, 199 Ariz. 291, ¶ 28, 18 P.3d 85, 93 (App. 2000). At any rate, American Casualty appears to misrepresent the trial court's ruling. The court did not deny American Casualty's motion based on a premature finding that the settlement was not fraudulent or collusive. Rather, the court denied American Casualty's motion because it concluded the evidence American Casualty sought to discover—evidence "that United National agreed to a settlement that was higher than the last offer"—was not "the type of collusion or fraud that would preclude the approval of [the] settlement." And, despite the court's statement that "there [wa]s no such evidence of fraud or collusion in this case," it is clear from the statement's context that the court was not "pre-judging" the issue of fraud or collusion but, rather, emphasizing that the evidence American Casualty sought to compel and the facts it sought to prove would not, as a matter of law, constitute fraud or collusion.[4] Indeed, the court in its minute entry noted "it

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[3]American Casualty asserted for the first time at oral argument that the trial court had abused its discretion in denying the discovery motion on the additional ground that the evidence American Casualty had sought to discover was relevant to whether the amount of the settlement was reasonable. But "arguments raised for the first time at oral argument on appeal are untimely and deemed waived." *Mitchell v. Gamble*, 207 Ariz. 364, ¶ 16, 86 P.3d 944, 949-50 (App. 2004). We, therefore, do not address it.

[4]In a footnote in its brief, American Casualty contends the court's conclusion regarding what constitutes fraud or collusion was "patently erroneous." Because this

[wa]s the burden of the [settlement's] proponents" to prove the settlement's enforceability. It is apparent in the court's minute entries, moreover, that it only determined the settlement was not fraudulent or collusive after considering all the evidence presented at the hearing, including the testimony of both parties' expert witnesses. We, therefore, do not address this argument further.

Morris Agreement

¶11 American Casualty contends the trial court erred in determining the *Morris* agreement was reasonable and free of fraud or collusion.[5] In reviewing a court's determination that a *Morris* agreement was reasonable and free of fraud or collusion, we will not disturb the court's factual findings unless they are clearly erroneous, but review its legal conclusions de novo. *See Associated Aviation Underwriters v. Wood*, 209 Ariz. 137, ¶ 107, 98 P.3d 572, 606 (App. 2004).

¶12 A *Morris* agreement may be enforced against an insurer only if the agreement's proponents prove the agreement is reasonable and not the product of fraud or collusion. *Safeway Ins. Co. v. Guerrero*, 210 Ariz. 5, ¶ 10, 106 P.3d 1020, 1024 (2005); *Morris*, 154 Ariz at 121, 741 P.2d at 254. "The test as to whether the settlement was reasonable and prudent is what a reasonably prudent person in the insureds' position would have settled for

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argument is substantially the same as its argument that the court erred in concluding the agreement was not a product of fraud or collusion, we address it in the context of our discussion of that argument.

[5]American Casualty does not contend in this appeal that the parties were not entitled to negotiate a *Morris* agreement, having apparently raised that issue in a "separate declaratory judgment action, which is pending before the superior court."

on the merits of the claimant's case." *Morris*, 154 Ariz. at 121, 741 P.2d at 254 (emphasis removed). This inquiry requires the trial court to "evaluat[e] the facts bearing on the liability and damage aspects of [the] claimant's case, as well as the risks of going to trial." *Id.* If the proponent of the agreement cannot prove the entire settlement amount reasonable, the court will enforce only the portion proved reasonable. *Id.; Wood*, 209 Ariz. 137, ¶ 106, 98 P.3d at 605. An agreement procured by fraud or collusion, however, is wholly unenforceable. *See Damron v. Sledge*, 105 Ariz. 151, 155, 460 P.2d 997, 1001 (1969); *State Farm Mut. Auto. Ins. Co. v. Paynter*, 122 Ariz. 198, 201, 593 P.2d 948, 951 (App. 1979).

Fraud or collusion

¶13 American Casualty asserts the trial court erred in concluding the settlement was not the result of fraud or collusion. American Casualty contends the settlement was fraudulent or collusive as a matter of law because United National "stipulat[ed] to a judgment well beyond its [policy] limit" but bound itself to only "pay[] less than half of its limit," thereby placing on American Casualty the sole burden to potentially pay the balance. As further evidence of fraud or collusion, American Casualty points to the fact that, prior to the settlement negotiations, United National had valued a likely judgment in the Castillos' favor at less than half the amount for which it ultimately settled. American Casualty concludes: "[i]f that is not the type of fraud or collusion that nullifies a stipulated judgment, nothing is."

¶14 But, again, American Casualty fails to cite any legal authority supporting its position. When a party fails to properly develop an argument, we may deem that argument waived. *See Lohmeier*, 214 Ariz. 57, n.5, 148 P.3d at 108 n.5; *In re $26,980.00 U.S.*

Currency, 199 Ariz. 291, ¶ 28, 18 P.3d at 93. In any event, the facts on which American Casualty relies do not demonstrate fraud or collusion as defined by our courts. "[T]he type of fraudulent and collusive conduct which might bar enforcement of a judgment against the defendant's insurer" is that which "involve[s] collusion by the plaintiff and the insured with respect to the institution of the lawsuit in an effort to defraud the insurance company." *Paynter*, 122 Ariz. at 201, 593 P.2d at 951; *see also Damron*, 105 Ariz. at 155, 460 P.2d at 1001 (settlement collusive when defendant "agrees to perjure himself and testify falsely to statements that are untrue" and "plaintiff is a party to the agreement"). Because American Casualty has suggested neither on appeal nor in the trial court that any of the parties to the settlement engaged in such conduct, and because nothing in the record supports such a conclusion, we cannot say the trial court erred in concluding the settlement agreement was not fraudulent or collusive.

Reasonableness: application of correct legal standard

¶15 American Casualty asserts several reasons why the trial court erred in determining the $8.3 million settlement was reasonable. Among them, it contends the court failed to apply the legal standard established by *Morris* for determining a settlement's reasonableness and merely "pay[ed] lip service" to that case. American Casualty asserts that, rather than objectively evaluating "the strengths, weakness, and risks of each side's case," the court viewed the evidence in the light most favorable to upholding the settlement award and "simply accepted [the Castillos'] version of [the] story." Specifically, American Casualty suggests the court failed to consider the possibility that a jury could conclude DMC was

neither vicariously nor independently liable for the accident and failed to "factor in . . . the risk of a low damage award."

¶16 But, in minute entries in which the trial court explained its reasoning, the court correctly observed that, pursuant to *Morris*, it was required to determine the settlement's reasonableness in light of "what a reasonably prudent person in the insured's position would have settled for on the merits of the claimant[']s case" based on all "the facts bearing on the liability [and] damages aspect[s] of the case." *See Morris*, 154 Ariz. at 121, 741 P.2d at 254. In evaluating the extent of Pargas's and DMC's liability, the court thoroughly discussed the applicable law and the evidence both in favor of and against liability. It ultimately concluded a jury would find that Pargas had negligently caused the accident, that DMC was vicariously liable for that negligence, and that DMC had negligently hired, trained, and supervised Pargas.

¶17 Regarding DMC's vicarious liability, the trial court considered and rejected the possibility DMC would not be found liable for Pargas's actions. It noted that, "despite Pargas'[s] consumption of alchohol, his activities (driving/delivery) were well within the overall purpose of serving [DMC]" because "Pargas'[s] conduct in driving [DMC's] vehicle and causing the crash occurred . . . during working hours and substantially on course between one delivery and another."[6] Indeed, as we previously noted, Pargas admitted during discovery that the accident occurred while he was delivering and retrieving packages for DMC.

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[6]Insofar as American Casualty contends the court erred in its legal determination that DMC would be found vicariously liable for Pargas's actions, American Casualty has failed to cite any authority supporting this contention or develop it in any meaningful way. *See Lohmeier*, 214 Ariz. 57, n.5, 148 P.3d at 108 n.5; *In re $26,980.00 U.S. Currency*, 199 Ariz. 291, ¶ 28, 18 P.3d at 93.

¶18 Similarly, in determining the likely amount of a jury's damage award, the trial court acknowledged "Castillo's highest reported income prior to his death was . . . $14,000 per year," suggesting any compensatory damage award would be relatively low. But, the court observed, the facts also indicated Castillo "had children," was "attempting to improve [his] life," and "had plans to start a new business and possibly purchase a home for his family." The court further noted that, due to the facts underlying Pargas's and DMC's liability, Castillo "would have probably been received sympathetically by any jury," but "the same would not have been true for [DMC]." The court also weighed the competing expert testimony on damages of former Arizona Supreme Court Justices Stanley Feldman and Thomas Zlaket, finding "more reliable" Feldman's opinion that a jury would likely find the defendants liable for $7.5 to $9 million in damages. Based on these findings, the trial court concluded a jury would likely award the Castillos approximately $4 million in compensatory damages and $4.3 million in punitive damages.

¶19 That the trial court ultimately agreed with the settlement's valuation of the case does not mean, as American Casualty apparently contends, that the court "review[ed] [the] record with an eye toward construing it in a way that can somehow sustain an $8,300,000 award." The court's three minute entries totaling seventeen pages demonstrate that it extensively evaluated the merits of each of the Castillos' claims, identified the probable outcome, and estimated the likely damage award, as it was required to do. *See Morris*, 154 Ariz. at 121, 741 P.2d at 254. And, only after completing that analysis did the court conclude

the $8.3 million settlement agreement was reasonable. We, therefore, cannot say the trial court failed to apply the correct legal standard in determining the settlement's reasonableness.

Reasonableness: unreasonable amount as a matter of law

¶20 American Casualty asserts the trial court erred in failing to find the settlement amount unreasonable as a matter of law because the settlement agreement required United National to pay the Castillos only $2.9 million and the Castillos previously had offered to settle for $6 million. American Casualty reasons that, because United National's $2.9 million payment represented an "actual negotiated payment," that amount "is determinative of what a reasonable settlement would be." It further opines that any settlement amount exceeding the amount of the Castillos' previous offer "is *prima facie* unreasonable." American Casualty cites no legal authority supporting its argument and fails to develop it in any meaningful way. *See Lohmeier*, 214 Ariz. 57, n.5, 148 P.3d at 108 n.5; *In re $26,980.00 U.S. Currency*, 199 Ariz. 291, ¶ 28, 18 P.3d at 93. Moreover, we find no support in logic or the law for its proposition that the reasonableness of a settlement should be conclusively determined by what one of the defendants' insurers paid in partial satisfaction of the settlement or by a settlement offer made five months before a final settlement agreement had been reached, when the parties' strategy, incurred expenses, and knowledge or understanding of the facts or the law may have changed. Therefore, we do not address this argument further.

Reasonableness: contrary evidence

¶21 American Casualty next contends the trial court abused its discretion in declining to find: (1) Pargas's, DMC's, and United National's attorneys' preliminary

assessments that the Castillos would likely receive no more than $3 million in damages were accurate; (2) the Castillos would receive a low compensatory damage award; (3) Castillo was contributorily negligent in causing the accident; and (4) two witnesses who testified a caller had informed DMC before the accident of Pargas's erratic driving were not credible.

¶22 As previously noted, we will not disturb the trial court's factual findings unless they are clearly erroneous, "meaning that they are unsupported by substantial evidence." *Felder v. Physiotherapy Assocs.*, 215 Ariz. 154, ¶ 72, 158 P.3d 877, 891 (App. 2007); *see also Wood*, 209 Ariz. 137, ¶ 107, 98 P.3d at 606. "Substantial evidence is evidence which would permit a reasonable person to reach the trial court's result." *Gravel Res. v. Hills*, 217 Ariz. 33, ¶ 14, 170 P.3d 282, 287 (App. 2007). If reasonable people "might differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered substantial." *Ariz. Chuck Wagon Serv., Inc. v. Barenburg*, 17 Ariz. App. 235, 236, 496 P.2d 878, 879 (1972).

¶23 American Casualty does not dispute, and the record establishes, the Castillos presented evidence that the $3 million valuation was inaccurate, the Castillos would have received a sizeable compensatory damages award, Castillo was not contributorily negligent, and a caller had informed DMC of Pargas's erratic driving before the accident. The trial court ultimately adopted the Castillos' evidence as more credible after weighing all the evidence presented and assessing the credibility of the witnesses, as it was required to do. *See Imperial Litho/Graphics v. M.J. Enters.*, 152 Ariz. 68, 72, 730 P.2d 245, 249 (App. 1986). Contrary to American Casualty's suggestion, we do not reweigh the evidence on appeal. *See id.*

Because substantial evidence supported the court's findings, we cannot say it abused its discretion in declining to adopt American Casualty's evidence to the contrary.

Reasonableness: punitive damages

¶24 American Casualty next contends several of the trial court's findings supporting its estimate of a reasonable punitive damages award were clearly erroneous.[7] As we noted, the court concluded a jury would have found DMC vicariously liable for Pargas's negligence in causing the accident. It also determined a jury would have found DMC independently liable for negligently hiring and negligently supervising Pargas. The court concluded DMC would be liable for punitive damages based on each of those claims.[8] Regarding DMC's

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[7]At oral argument in this court, the Castillos asserted for the first time that American Casualty had waived this argument by failing to raise it in its motion for a new trial. But, as previously noted, arguments raised for the first time at oral argument are deemed waived. *See Mitchell*, 207 Ariz. 364, ¶ 16, 86 P.3d at 949-50.

[8]American Casualty asserts "no proof" supported the trial court's conclusion a jury would likely find DMC liable for punitive damages based on its negligently having hired Pargas. But American Casualty ignores the deposition testimony of Edward Malley, the DMC employee who interviewed and hired Pargas. Malley testified Pargas had indicated on his employment application he was a member of Alcoholics Anonymous and Pargas had submitted with his application a copy of his driving record, which stated his license had been suspended for three years. Malley admitted he had failed to note this information during Pargas's interview. Malley stated he had not checked Pargas's criminal history or contacted his references before hiring him, although DMC owner Stephen Griego testified it was company policy to do so. Malley also testified he had hired Pargas immediately after the interview, admitting that, had he noted the reason Pargas's license had been suspended, he would not have hired Pargas because doing so would violate DMC policy and industry standards.

American Casualty fails to explain why this evidence, which the trial court adopted, could not support its conclusion that DMC should have been aware its hiring Pargas was "outrageous . . . or intolerable in that it create[d] a substantial risk of tremendous harm to

negligent supervision of Pargas, the court found DMC would be liable for punitive damages because:

> DMC . . . failed to recognize or ignored that Mr. Pargas had failed to contact DMC on a regular basis on January 26, 2004 as required; failed to properly respond to the contact with Mr. Pargas by [delivery driver Adolfo] Garcia at 12:10 during which Mr. Pargas would have been under the influence of alcohol; failed to properly respond to the bank representative at the Compass bank located at 7000 N. Oracle, or Mr. Garcia who would have contacted DMC in response to their contacts with Mr. Pargas after he had consumed alcohol in violation of company policies and procedures; failed to attempt to contact Mr. Pargas at all after he missed the last delivery scheduled for 1:00 p.m. in Tucson, nearly 1 to 1 ½ hours prior to the accident; and, failed to investigate why Mr. Pargas had failed to meet the Branda driver.

Based on those facts, the court concluded a jury would likely award the Castillos $4.3 million in punitive damages.

¶25 American Casualty contends the trial court clearly erred in: (1) implicitly finding Pargas was required to "contact DMC on a regular basis on January 26, 2004"; (2) finding, based on its erroneous assumption that Garcia was a DMC employee, that "Mr. Garcia would have contacted DMC . . . after [Pargas] had consumed alcohol in violation of company policy"; and (3) finding Pargas had missed a delivery scheduled for 1:00 p.m. on the

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others," and we find otherwise. *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 330, 723 P.2d 675, 679 (1986); *see Warner v. Sw. Desert Images, LLC*, 218 Ariz. 121, ¶ 24, 180 P.3d 986, 995 (App. 2008) (punitive damages liability does not require evidence of defendant's "subjective intent to injure"); *cf. Deerings W. Nursing Ctr. v. Scott*, 787 S.W.2d 494, 496 (Tex. App. 1990) (noting party may be liable for punitive damages for negligently entrusting vehicle to another who causes accident, when entrustor "should have known the entrusted driver was incompetent or habitually reckless" and was "reasonably able to anticipate that an injury would result as a natural and probable cause of the entrustment").

day of the accident. American Casualty asserts the deposition testimony on which the court relied in making those findings does not support them and that no other evidence in the record supports the findings either. Indeed, although the court cited exclusively to the deposition testimony of DMC supervisor Walton Nelson in making the contested findings, Nelson's testimony does not support them.

¶26 First, Nelson did not testify Pargas was required to "contact DMC on a regular basis" the day of the accident. Rather, he had stated new drivers were required to check in with DMC dispatchers "for one week" after completing training, "then it's up to the dispatcher if [the driver must] continue[to check in]." Nelson also testified Pargas had completed training on December 29, 2003, indicating his mandatory probationary period would have ended weeks before the date of accident. Nelson further stated he was not aware whether Pargas had been required by the dispatcher to check in after his first week.

¶27 Nor did Nelson testify, as the trial court found, that a customer whose delivery had been missed "would call DMC directly for information," thereby notifying DMC that Pargas had missed his 1:00 p.m. delivery. Moreover, the record suggests Pargas had not missed that delivery at all. In a letter admitted into evidence, Garcia informed DMC he had met Pargas at the location of the delivery at 12:55 p.m. Nor does Nelson's deposition testimony support a finding that Garcia would have contacted DMC after meeting Pargas and seeing he was intoxicated in violation of DMC's company policies. Nelson never testified Garcia was employed by DMC or subject to their policies and, as American Casualty asserts, the record suggests he was not.

¶28 In their answering brief, the Castillos merely assert "[t]here certainly was evidence" supporting an award of punitive damages against DMC "based on [its negligent] hiring, training and supervision" of Pargas, and that the trial court was "justified in finding $4,300,000 would be a reasonable amount to expect for punitive damages." Although the Castillos elsewhere in their brief specified the facts that supported DMC's independent liability, they do not harness these facts in their argument or explain why the facts justify the punitive damages award. Nor do the Castillos squarely address American Casualty's contention that several of the findings on which the court relied in determining a reasonable punitive damages award were clearly erroneous. "It is not incumbent upon this Court to develop a party's argument where the party has failed to do so." *In re One Rolex Brand Man's Watch*, 176 Ariz. 294, 299, 860 P.2d 1347, 1352 (App. 1993). And, when a party fails to respond in its answering brief to an appellant's assertion of error, "[s]uch an omission can be considered a confession of error." *In re 1996 Nissan Sentra*, 201 Ariz. 114, ¶ 7, 32 P.3d 39, 42 (App. 2001). Indeed, at oral argument before this court, the Castillos readily agreed the court clearly had erred in making the disputed findings.

¶29 Nonetheless, the Castillos suggest that whether DMC's negligent supervision of Pargas supported the punitive damage award is "mostly moot," because the trial court also concluded DMC would have been liable for punitive damages based on its vicarious liability for Pargas's actions. But simply because the court would have found DMC liable for punitive damages, even absent the apparently erroneous findings, does not imply that the court's assessment of the likely amount of punitive damages would remain unchanged. Indeed,

absent the erroneously found facts on which its original estimate of punitive damages was based, the court could conclude a reasonable punitive damage award would be other than $4.3 million. Because the court, absent the erroneous findings, might have reached a different conclusion regarding the value of the punitive damages claim and, therefore, whether the overall settlement was reasonable, we must remand the case to the trial court for it to determine whether, after excluding these erroneous findings and considering only those facts supported by the record, it would have reached the same conclusion regarding the reasonableness of the settlement.

Disposition

¶30 For the aforementioned reasons, we affirm the trial court's denial of American Casualty's motion to compel discovery and finding that the settlement agreement was not fraudulent or collusive. But we remand this matter to the trial court so that it may reconsider the punitive damages issue, consistent with this decision.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge