IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

ARIZONA BILTMORE HOTEL VILLAS CONDOMINIUMS ASSOCIATION, an Arizona nonprofit corporation,
Plaintiff/Appellee,

v.

THE CONLON GROUP ARIZONA, LLC,
a Missouri limited liability company; and MARK FINNEY,
Defendants/Appellants.

No. 1 CA-CV 18-0709
FILED 6-23-2020

Appeal from the Superior Court in Maricopa County
No. CV2015-013012
The Honorable Roger E. Brodman, Judge

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

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OPINION

Presiding Judge David D. Weinzweig delivered the opinion of the Court, in which Judge Jennifer M. Perkins and Judge James B. Morse Jr. joined.

W E I N Z W E I G, Judge:

¶1 Arizona's Nonprofit Corporation Act (the "Act") recognizes a procedural safe harbor for a corporate director to avoid an "award of damages" arising from a "conflicting interest transaction" between the director and the corporation. A.R.S. § 10-3861(B)(1). To gain shelter under the Act, a conflicted director must secure approval for the transaction from a majority of disinterested directors after making "required disclosure." A.R.S. § 10-3862(A). We must define the scope of a "transaction" in this appeal and determine whether a director's perfected safe harbor for one agreement extends to damages arising from his conduct in later, unanticipated litigation.

¶2 Mark Finney and The Conlon Group ("TCG") appeal the superior court's judgment against them for breach of contract, breach of fiduciary duty and negligent misrepresentation. We remand for a recalculation of damages but otherwise affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

¶3 Following a bench trial, we view the facts in the light most favorable to upholding the court's ruling. *Smith v. Beesley*, 226 Ariz. 313, 316, ¶ 3 (App. 2011).

¶4 This lawsuit involves the Arizona Biltmore Hotel Villas, a group of 78 condominiums near the Arizona Biltmore Hotel. The development is governed by a homeowner association, the Arizona Biltmore Hotel Villas Condominiums Association (the "Association"). Most of the condominiums are vacation rentals whose owners collect rent

from the Hotel under a rental pool agreement. TCG owns six of the condominiums. Mark Finney owns and controls TCG. Finney served as president of the Association's Board of Directors (the "Board") from 2004 until 2015.

¶5 Parking for the condominiums is limited to a lot located just south of the development, which has 80 spaces on the north side ("North Spaces") and 103 spaces on the south side ("South Spaces"). Salt River Project ("SRP") maintained control of all the parking spaces under contracts with the federal government. As relevant here, SRP entered two Joint Use Agreements in 1995 that authorized the Hotel to use the North Spaces and the Association to use the South Spaces.

2010 Lawsuit and Hotel Bankruptcy

¶6 A disagreement arose between the Association and the Hotel over access to parking, which escalated into a lawsuit. The Association sued the Hotel in 2010 (the "2010 Lawsuit") for a declaration that the Association had superior and exclusive rights to use the South Spaces under its Joint Use Agreement with SRP.

¶7 Just months later, in February 2011, the Hotel declared bankruptcy, which caused concern among the Association's members over their rental pool agreements and an unpaid promissory note owed by the Hotel to the Association. The Board agreed that the Association needed to hire bankruptcy counsel but left unresolved how fees would be paid.

¶8 As president of the Board, Finney assumed an active role, investigating the "potential costs of litigation" and advising the Board that legal fees could reach $500,000 or more. The Board agreed to propose a special assessment to the Association's members to pay the expected legal fees. In the interim, Finney proposed that TCG—his personal business—immediately hire and fund bankruptcy counsel for the Association. If the Association declined to approve a special assessment to retain counsel, TCG would continue to press the Association's interest in bankruptcy court at TCG's "own expense" in exchange for "all the Association's rights" in the South Spaces "currently being litigated in the 2010 Lawsuit." Given his dual fiduciary responsibilities to the Association and TCG, Finney "openly acknowledged his conflict and excused himself" from the Board's discussion of his proposal. The Board approved Finney's proposal. After the Association members voted against the special assessment in March 2011, TCG and the Association entered a formal agreement in June 2011 (the "Conlon Contract").

The Conlon Contract

¶9 The Conlon Contract required TCG to hire and manage "bankruptcy counsel at its own expense [up to $500,000] to represent [both TCG] and the Association in the [Hotel] Bankruptcy proceedings." In exchange, the Association agreed to "vigorously pursue" the 2010 Lawsuit against the Hotel for "sole control" of the South Spaces under the 1995 Joint Use Agreement, "including any and all necessary appeals, to a final conclusion as needed to obtain control of such parking spaces, all at the Association's sole cost and expense." As relevant here, the Association also promised that it would sublease the South Spaces and "[a]ll revenue or value" derived from them to TCG for 64 years if "the Association successfully obtain[ed] sole control over" the South Spaces in the 2010 Lawsuit, described as the "litigation in Maricopa County Superior Court at CV2010-026686."

¶10 TCG retained a New York law firm to represent the Association in the bankruptcy, but the Association did not prevail in that proceeding. In fact, the bankruptcy court ultimately entered an award *adverse* to the Association, ordering it to pay the Hotel's attorney fees of $352,692. TCG did not pay the legal fees incurred by the firm it had hired to represent the Association. Nor did TCG pay the adverse fee award.

2010 Lawsuit is Dismissed

¶11 SRP later terminated its Joint Use Agreement with the Association, ending the Association's rights to use the South Spaces and ending the Association's 2010 Lawsuit for control of the South Spaces. The superior court thus granted summary judgment for the Hotel and against the Association in the 2010 Lawsuit. The Association unsuccessfully appealed to this court.[1]

¶12 Around this time, the Association's general counsel believed the Association might have remedies against SRP for breach of the 1995 Joint Use Agreement. In March 2013, Finney proposed that the Association sue SRP. The Board's minutes reflect that Finney asked the Board "to place their vote on whether or not to hire a litigation attorney to defend the owner rights to the [South Spaces]." Finney later testified that he understood "owner rights" to mean the rights of his company, TCG. The Board's

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[1] *Ariz. Biltmore Hotel Villas Condo. Ass'n v. Ariz. Biltmore Hotel Master Ass'n*, 1 CA-CV 13-0703, 2015 WL 4599897 (Ariz. App. July 30, 2015) (mem. decision).

minutes do not reflect a discussion of anticipated attorney fees or Finney's understanding of "owner rights." Finney did not recuse from the discussion and proposal. The members of the Board, including Finney, unanimously voted to approve Finney's proposal.

2013 Lawsuit

¶13 Finney hired Cheifetz, Iannitelli & Marcolini, P.C. ("CIM") to litigate the Association's claims against SRP. CIM sued SRP and the Hotel on the Association's behalf in 2013, asserting: (1) breach of contract, damages and specific performance against SRP for wrongful termination of the 1995 Joint Use Agreement and the Association's right to use the South Spaces; and (2) for declaratory judgment against the Hotel for exclusive rights to the North Spaces.

¶14 CIM soon raised concerns about the merits of the Association's lawsuit and shared those concerns in a letter to Finney, warning that the Association's breach of contract claim against SRP "may not be very strong and SRP [would] have many defenses to it," and SRP could recover attorney fees and costs if it prevailed. CIM further advised that the declaratory judgment action against the Hotel for the North Spaces was the "stronger of the two" claims. At Finney's direction, CIM sent the letter only to Finney, and Finney did not forward it to the Board. Later, Finney claimed he forwarded CIM's letter to the Association's property manager but could not confirm it was shared with any Board members, and the Board's meeting minutes do not mention CIM's letter. The superior court later found that the Board was not informed of "CIM's concerns about the SRP litigation."

Finney is Ousted and the Association Settles with SRP

¶15 It was not until April 2014, more than one year after the lawsuit was filed, that CIM's attorneys shared their concerns about the case with the Board. Around the same time, the superior court dismissed the Association's declaratory judgment action against the Hotel over rights to the North Spaces and ordered the Association to pay the Hotel's attorney fees. The Association's breach of contract claim against SRP over the South Spaces continued forward and the Association's legal fees mounted. For his part, Finney threatened to sue the Association if it backed down. The Board finally voted to remove Finney and appointed a new president. It also approved a maximum budget of $365,000 for the 2013 Lawsuit and appointed two directors to monitor Finney's litigation management.

¶16 The Association and SRP pursued settlement talks, which Finney tried to derail. CIM became frustrated with Finney's strategy and told him:

> Our duty is not to [TCG], it is to our client, the Villas Association, and the [condominium] community as a whole. As a member of the Board you have fiduciary duties. Given these fiduciary duties, we are at a complete loss to understand upon what basis you deem it appropriate to intentionally seek to sabotage the Board's efforts to attempt to resolve the pending lawsuit with SRP.

¶17 Finney continued to badger Board members with threatening emails, claiming that acceptance of a settlement offer he did not approve would breach the Conlon Contract. The Association eventually settled with SRP over Finney's strenuous objections.

This Lawsuit

¶18 The Association then sued Finney and TCG, asserting several contract and tort theories, including breach of fiduciary duty (TCG and Finney), negligent misrepresentation (Finney), fraud (Finney), breach of the Conlon Contract (TCG), and breach of Association governing documents (Finney). TCG counterclaimed, alleging breach of the Conlon Contract and unjust enrichment. The superior court heard from 12 witnesses over a seven-day bench trial. It issued a 25-page decision, which separately examined claims relating to the 2010 Lawsuit and 2013 Lawsuit.

¶19 The court found that the Conlon Contract insulated Finney and TCG against the Association's self-dealing claims related to the 2010 Lawsuit, reasoning that their "disclosures in the 2011 timeframe were appropriate to gain protection from the safe harbor provisions" and neither Finney nor TCG "misrepresented the 2010 Lawsuit." The court also found the Conlon Contract valid and enforceable but held that TCG breached the contract by failing to pay the Association's legal fees in the bankruptcy litigation, thus awarding the Association $165,000 in damages.

¶20 The court reached a different conclusion for the 2013 Lawsuit, finding both defendants liable for their conduct and claims associated with the South Spaces. It held "that Finney both breached his fiduciary duties and negligently misrepresented facts to the Association by his actions in engaging the Association in the 2013 Lawsuit for the [South Side] Parking," including a "fail[ure] to disclose material information relating to the cost, likelihood of success and the purpose of the 2013 Lawsuit." Although the

Board had "some knowledge" about the lawsuit, "Finney controlled the information and did not make full and necessary disclosures." What is more, Finney concealed "his belief that the Association was litigating . . . for [TCG]'s benefit," ignoring the Board's direction to "defend *the owner* rights" to the South Spaces.

¶21 The court found Finney and TCG not liable, however, for acts over "the portion of the 2013 Lawsuit involving the North [Side Parking]," reasoning that Finney stood to gain nothing from the North Spaces beyond his pro-rata interest as a unit owner, and he disclosed the potential conflicts in that portion of the lawsuit, which CIM attorneys viewed as the stronger claim.

¶22 The court awarded $479,562 in damages to the Association, plus attorney fees and costs. Finney and TCG timely appealed. We have jurisdiction under A.R.S. § 12-2101(A)(1).

DISCUSSION

I. Safe Harbor for Conflicted Directors.

¶23 The Arizona Nonprofit Corporation Act imposes a duty on nonprofit corporate directors to act in good faith and in the corporation's best interests. A.R.S. § 10-3830(A)(1), (3). The Act recognizes a procedural safe harbor, however, that shields nonprofit directors from "an award of damages" arising from a "conflicting interest transaction" with the corporation. A.R.S. § 10-3861(B)(1). The procedural safe harbor has two requirements. *See* A.R.S. § 10-3862(A). The conflicted director must first disclose "[t]he existence and nature of the conflicting interest" to the disinterested directors, including "[a]ll facts known to the director [about] the subject matter of the transaction that an ordinarily prudent person would reasonably believe to be material to a judgment about whether or not to proceed with the transaction." A.R.S. §§ 10-3860(4), -3862(A) (director must make a "required disclosure"). The disinterested directors must then approve the transaction by majority vote. A.R.S. § 10-3862(A). The Act further requires any person seeking damages from a director's conflicting interest transaction to "prove by clear and convincing evidence" that the director does not qualify for the statutory safe harbor. A.R.S. § 10-3861(C).

¶24 Finney argues the superior court erroneously found the 2013 Lawsuit was a separate "transaction" from the 2010 Lawsuit and the Conlon Contract under the safe-harbor statutes because the "2013 Lawsuit was continued performance under the Conlon Contract." As such, Finney

argues the court's safe-harbor finding for the 2010 Lawsuit also shields him from self-dealing claims arising from the 2013 Lawsuit.

¶25 We review questions of statutory interpretation de novo, *In re Cortez*, 247 Ariz. 534, 536, ¶ 5 (App. 2019), but will defer to the superior court's factual findings unless clearly erroneous, *Castro v. Ballesteros-Suarez*, 222 Ariz. 48, 51, ¶ 11 (App. 2009). We interpret statutes to fulfill the legislature's intent. *Stambaugh v. Killian*, 242 Ariz. 508, 509, ¶ 7 (2017). "[T]he best and most reliable index of a statute's meaning is its language and, when the language is clear and unequivocal, it is determinative of the statute's construction." *State v. Hansen*, 215 Ariz. 287, 289, ¶ 7 (2007) (citations omitted).

¶26 The Act frequently uses but never defines the word "transaction," so "we give the word its common meaning." *Wade v. Ariz. State Ret. Sys.*, 241 Ariz. 559, 562, ¶ 14 (2017). Black's Law Dictionary defines "transaction" as "[t]he act or an instance of conducting business or other dealings" and "[s]omething performed or carried out; a business agreement or exchange." *Transaction*, Black's Law Dictionary (11th ed. 2019).

¶27 We reject Finney's loose, unbounded definition of "transaction" here, which would insulate directors from damages for self-dealing based on stale, uninformative disclosures related to prior agreements and different acts or instances of conducting business. The 2013 Lawsuit represented a distinct "transaction" from the 2010 Lawsuit that was neither mentioned in nor anticipated by the 2011 Conlon Contract. *See Goodman v. Newzona Inv. Co.*, 101 Ariz. 470, 472 (1966) (applying "the intent of the parties [as] expressed in clear and unambiguous language"). For its part, the Conlon Contract required the Association to "vigorously pursue" its then-pending 2010 Lawsuit against the Hotel for control of the South Spaces, and would have required the Association to sublease the South Spaces to TCG "should the Association successfully obtain sole control over" the South Spaces in that lawsuit. But the Association's claim for "sole control" of the South Spaces in the 2010 Lawsuit teetered on its Joint Use Agreement with SRP, and that claim was eviscerated when SRP terminated the Joint Use Agreement in 2012.

¶28 By contrast, the 2013 Lawsuit was only required after and because SRP terminated the Association's right to use the South Spaces. As the superior court found: "At the time the 2011 Conlon Group Contract was executed, neither side could have anticipated that the Hotel and SRP would terminate the Joint Use Agreement to extricate themselves from the Association's claims." The 2013 Lawsuit carried a brand-new price tag. It

also raised new claims against different parties with different lawyers and exposed the Association to extensive new risks.

¶29 The record also confirms that Finney never made the "required disclosures" for safe-harbor protection from the Association's claims of self-dealing in the 2013 Lawsuit. The statute requires more than a director's mere acknowledgement of leadership positions or possessory interests in two conflicted entities. *See* A.R.S. § 10-3860(4). A conflicted director must instead disclose all facts necessary for the disinterested directors to intelligently weigh the risks associated with a conflicting interest transaction before deciding whether to proceed with the transaction. *Id.* Yet Finney did not disclose his self-interested rationale for demanding unremittent action against SRP, which was grounded solely in his desire to "vindicate" his own claims to the South Spaces at the Association's expense.

¶30 Finney also contends the superior court erroneously applied "a preponderance of [the] evidence standard" rather than the clear and convincing standard required under A.R.S. § 10-3861(C). We find no error. Although the court did not recite the "clear and convincing" standard in its minute entry, nothing in the record suggests it applied a different burden of proof. *See Hart v. Hart*, 220 Ariz. 183, 188, ¶ 18 (App. 2009) ("[W]e presume that the trial court knows the law and applies the correct standard, [unless] that presumption [is] rebutted by the record.") (citations omitted). And even so, the record contains clear and convincing evidence that Finney has no right to safe-harbor protection under A.R.S. § 10-3861(B)(1). *See Kent K. v. Bobby M.*, 210 Ariz. 279, 284-85, ¶ 25 (2005) (clear and convincing evidence means something is "highly probable or reasonably certain").

II. Damages and Proximate Cause.

¶31 Finney next challenges the superior court's measure and calculation of damages, as well as its finding of proximate cause. We review for an abuse of discretion. *Gonzalez v. Ariz. Pub. Serv. Co.*, 161 Ariz. 84, 90 (App. 1989).

¶32 Finney claims the superior court erroneously measured the Association's damages as contract rather than tort damages. We find no error. The Association is entitled to compensatory damages under general tort principles, which aim to place the plaintiff in the position it would have occupied had the defendant not committed the tort. *See* Restatement (Second) of Torts § 903 cmt. a. (1979); *see also Standard Chartered PLC v. Price Waterhouse*, 190 Ariz. 6, 34 (App. 1996) ("Compensatory damages are

intended to compensate a tort plaintiff for losses suffered."). The superior court awarded out-of-pocket damages here, a form of compensatory damages, to compensate the Association for legal fees it would not have incurred "had Finney not breached his duties."

¶33 Finney also argues the superior court miscalculated the Association's damages. He argues the court erroneously awarded the Association its legal fees from the 2013 Lawsuit for rights to the North Spaces. We agree. The superior court held that "the Association state[d] no claim against Finney or the Conlon Group for the litigation of the Northern Parking Spaces in the 2013 Lawsuit," yet never deducted the Association's fees on that claim from its total damage award. This was an abuse of discretion. *See Flying Diamond Airpark, LLC v. Meienberg*, 215 Ariz. 44, 50, ¶ 27 (App. 2007) ("A court abuses its discretion if it commits an error of law in reaching a discretionary conclusion."). We remand for the superior court to deduct the Association's legal fees "for the litigation of the Northern Parking Spaces" from the total damages.

¶34 Finney offers the same argument to disprove proximate cause, contending the court never distinguished between legal fees incurred over the North and South Spaces. We disagree. The court distinguished between these claims. It only erred by not deducting the legal fees associated with the North Spaces.

¶35 As for the damages associated with the South Spaces, the record contains ample evidence that Finney proximately caused the Association's damage. *See In re Estate of Jung*, 210 Ariz. 202, 204, ¶ 11 (App. 2005) ("We are bound by a trial court's findings of fact unless they are clearly erroneous.").

¶36 Finney controlled the flow of information to the Board and failed to make "required disclosures" about the 2013 Lawsuit, including its purpose, associated risks, cost and likelihood of success. Finney never told the Board that counsel for the Association warned him about the weakness of the SRP claim and the risks associated with pursuing that claim. The Board only learned about these serious concerns from CIM attorneys in April 2014. And by then, the lawsuit had been pending for more than a year. The Association was damaged when the litigation spiraled out of control, left with an enormous bill for attorney fees incurred in a lost cause. Finney also badgered and threatened the Board to file and press the lawsuit, never disclosing his self-interested motive and belief that the Association would be suing to protect TCG's interests. At a minimum, Finney's conduct

was "a substantial factor in bringing about the harm." *Standard Chartered*, 190 Ariz. at 32 (citations omitted).

III. Hearsay Disclosure Statement.

¶37 Finney also argues the superior court abused its discretion by admitting a Rule 26.1 disclosure statement attached to the report of the Association's damages expert. He claims the disclosure statement was hearsay and represented the Association's only evidence on damages. The record shows neither an abuse of discretion nor prejudice. *See Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 506 (1996) ("We will not disturb a trial court's rulings on the exclusion or admission of evidence unless a clear abuse of discretion appears and prejudice results."). This was a bench trial. "[W]e assume, unless it affirmatively appears to the contrary, that the trial judge only considered the competent evidence in arriving at its final judgment." *Fuentes v. Fuentes*, 209 Ariz. 51, 57, ¶ 29 (App. 2004). Finney's counsel had a full chance to cross-examine Duncan about the disclosure statement at trial; the disclosure statement did not purport to establish causation; and Duncan confirmed on cross-examination that he was not retained to opine on causation. *See id.* at ¶ 28 (defendant not prejudiced by erroneous admission of witness's hearsay budget sheet because witness testified and was subject to cross-examination).

IV. Conlon Appeal.

¶38 TCG largely parrots the arguments raised and addressed above but adds that CIM's evaluation letter is insignificant because the Board "was fully apprised" of the litigation in October 2014 and "voted to continue the lawsuit and left Finney as the point person." We find no clear error on this record. *See Estate of Jung*, 210 Ariz. at 204, ¶ 11. The superior court found that Finney misled the Association to sue in the first instance. The Board's later decision to continue the lawsuit was not an endorsement of the lawsuit, but instead represented an economic decision between unappealing options. As for Finney's continued involvement, the Board designated two more directors to oversee Finney's decisions, which represented neither a vote of confidence nor a retroactive absolution.

V. Attorney Fees and Costs.

¶39 Lastly, Finney argues the superior court erroneously denied his request for costs and attorney fees under A.R.S. §§ 12-341 and -341.01 because he prevailed on various claims asserted in the Association's complaint and successfully defended the Association's claims in relation to the 2010 Lawsuit. We review an award of attorney fees and costs for an

abuse of discretion. *Modular Mining Sys., Inc. v. Jigsaw Techs., Inc.*, 221 Ariz. 515, 521, ¶ 21 (App. 2009). The superior court has discretion to determine the "prevailing party," *Vortex Corp. v. Denkewicz*, 235 Ariz. 551, 562, ¶ 39 (App. 2014), which "will not be disturbed on appeal if any reasonable basis exists for it," *Sanborn v. Brooker & Wake Prop. Mgmt., Inc.*, 178 Ariz. 425, 430 (App. 1994).

¶40 We find no abuse of discretion. "Partial success does not preclude a party from 'prevailing' and receiving a discretionary award of attorneys' fees." *Berry v. 352 E. Virginia, LLC*, 228 Ariz. 9, 14, ¶ 24 (App. 2011); *see also Lee v. ING Inv. Mgmt., LLC*, 240 Ariz. 158, 161, ¶ 10 (App. 2016) ("[T]he superior court may find that a party is the successful party even when the recovery it obtains is 'significantly reduced.'") (citation omitted). The court accounted for Finney's and TCG's success but found the Association "prevailed in the totality of the litigation." The Association secured a substantial judgment and many of the Association's claims were directed at the relief it ultimately recovered. The court also recognized that Finney and TCG did not succeed on their claims.

¶41 All three parties also seek appellate attorney fees and costs. We exercise our discretion to deny attorney fees "[b]ecause neither party has been entirely successful." *WB, The Bldg. Co. v. El Destino, LP*, 227 Ariz. 302, 313-14, ¶ 34 (App. 2011). Finney and TCG are awarded their cost on appeal, however, upon compliance with Arizona Rule of Civil Appellate Procedure 21(b). *See El Destino*, 227 Ariz. at 314, ¶ 34 ("[Appellant] has succeeded in reducing the judgment against it; accordingly, it is entitled to recover its costs on appeal pursuant to A.R.S. § 12-342(A).").

CONCLUSION

¶42 We affirm the superior court's judgment in all respects, but remand for the court to deduct from total damages the Association's legal fees incurred over the North Spaces in the 2013 Lawsuit.

AMY M. WOOD • Clerk of the Court
FILED: AA