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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

MARTIN J. SOLOMON and JUDY V.) 1 CA-CV 06-0239
SOLOMON, Co-Personal)
Representatives of the Estate of) DEPARTMENT B
ILANA SOLOMON, deceased, both)
individually and on behalf of) **SECOND AMENDED**
the Estate of ILANA SOLOMON,) **MEMORANDUM DECISION**
) (Not for Publication -
Plaintiffs-Appellants/) Rule 28, Arizona Rules of
Cross-Appellees,) Civil Appellate Procedure)
) **FILED 10-02-08**
v.)
) (As amended by Order filed 3-26-09)
DEVELOPMENTAL SYSTEMS, INC., an)
Arizona corporation; AMERICAN)
HABILITATION SERVICES, INC., a)
Florida corporation; THE STATE)
OF ARIZONA, a body politic,)
)
Defendants-Appellees/)
Cross-Appellants.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. PB 2002-000496

The Honorable Barbara R. Mundell, Judge

AFFIRMED IN PART, REVERSED IN PART AND REMANDED

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O R O Z C O, Judge

¶1 Appellants, Martin and Judy Solomon individually, and on behalf of the estate of Ilana Solomon (Solomons), appeal the trial court's granting of a new trial after they declined the remittitur and summary judgment precluding punitive damages. Appellees, Developmental Systems, Inc. and American Habilitation Services, Inc., (DSI/AHS) cross-appeal the trial court's award of attorney's fees and allege that the trial court erred by giving the jury a *Willits*¹ instruction and erroneously admitting evidence. The State also cross-appeals the grant of partial summary judgment on claims of misrepresentation and denial of a new trial on the Solomons' action against the State as individuals. For the following reasons we affirm the trial court's granting of a new trial as to damages only, giving of

¹ *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964).

the *Willits* instructions and admission of evidence. However, we reverse the trial court's order denying consideration of punitive damages by the jury, the granting of summary judgment against the State on the claims for fraudulent misrepresentation, consumer fraud or negligent misrepresentation and the award of attorneys' fees.

FACTS AND PROCEDURAL HISTORY

¶2 Ilana Solomon (Ilana), a developmentally disabled adult, drowned while under the supervision and care of Catherine Cash (Cash), a DSI/AHS employee. Ilana was born with a chromosomal abnormality which caused developmental retardation and seizures. Ilana's cognitive ability and functioning level was equal to that of a child of three to four years of age. Ilana was also deaf and communicated only through sign language.

¶3 DSI/AHS is a for-profit corporation under contract with Arizona Department of Economic Security (State). DSI/AHS provides residential and adult day services to developmentally disabled individuals in Arizona. Ilana resided at one of the residential care facilities furnished by DSI/AHS. Ilana required 24-hour supervision and daily care. As part of her care, Ilana required three sitz baths per day.²

² A sitz bath is "a bath . . . in which the hips and thighs of the patient are immersed in hot water for the therapeutic effect of the moist heat in the perineal and anal regions." Webster's Third New International Dictionary 2129 (3rd ed. 1966).

¶4 An instructional training video was prepared to train caretakers on how to properly administer the baths. The training video indicated Ilana should not be left alone under any circumstances during the baths. Furthermore, the instructional video indicated that the depth of the water should be no higher than three fingers above the wrist when the hand is flat in the bottom of the tub. The testimony of several DSI employees confirmed Ilana's vulnerabilities and her need for constant supervision while in the bathtub. Ilana's Individual Support Plan further reflected that she was not permitted to have access to bodies of water without supervision.

¶5 On November 20, 2001, Cash ran a bath for Ilana and placed her in the tub. Cash left the bathroom for five to ten minutes and when she returned, Ilana was unconscious in the tub with her face submerged. Cash removed Ilana from the tub and called her supervisor who instructed her to hang up and call 911, which she did. The 911 operator guided Cash through the CPR procedure until emergency personnel arrived and took over resuscitation efforts. Ilana was pronounced dead at the hospital.

¶6 The Solomons brought an action against DSI/AHS alleging 1) statutory abuse and neglect, 2) wrongful death, 3) fraudulent misrepresentation, 4) consumer fraud, 5) negligent misrepresentation, 6) statutory neglect, 7) breach of contract

and 8) punitive damages. The Solomons also sued the State but did not allege counts 3) fraudulent misrepresentation, 4) consumer fraud or 5) negligent misrepresentation (the misrepresentation claims) against the State.

¶7 DSI/AHS admitted vicarious liability for Cash's acts and omissions during Cash's employment including the events that led to Ilana's death. Furthermore, DSI/AHS admitted that Cash's actions constituted abuse and negligence. DSI/AHS also admitted breach of duty and negligence in failure to monitor Cash's employment-based probation and failure to terminate Cash based on prior incidents.

¶8 The State acknowledged it had "a non-delegable duty to exercise reasonable care for the safety and welfare of disabled clients such as Ilana Solomon." The State also admitted vicarious liability for DSI/AHS "to the extent [DSI/AHS] fails to exercise reasonable care."³

¶9 Following a jury trial, the jury returned a verdict in favor of the Solomons, awarding \$15 million to the estate of Ilana, \$13 million to Martin Solomon and \$17.5 million to Judy Solomon, for a combined total award of \$45.5 million.

³ Although the State acknowledged the aforementioned liability, they maintained they were only liable for compensatory damages and only to the extent that the award exceeded DSI/AHS's available insurance.

¶10 DSI/AHS and the State filed a Motion for a New Trial. Pursuant to Arizona Rule of Civil Procedure 59(a)(5) the trial judge issued a remittitur reducing the total amount of damages to \$7 million or, in the alternative, granting a new trial as to damages only. The Solomons declined the remittitur, the new trial order became effective, and this appeal and cross-appeal were timely filed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) § 12-2101(B), (F)(1) (2003).

SOLOMONS' APPEAL

Remittitur/New Trial

¶11 Plaintiffs argue that the trial court erred in granting a remittitur or the granting of a new trial as to damages only. Upon review, "[t]he greatest possible discretion is given the trial court with respect to the alteration of the verdict and the granting or denial of a new trial." *Mammo v. State*, 138 Ariz. 528, 533-34, 675 P.2d 1347, 1352-53 (App. 1983). This deferential standard is in place because the trial judge "has had the opportunity to hear the evidence and observe the demeanor of witnesses." *Id.* at 534, 675 P.2d at 1353.

¶12 In this case, at trial, the Solomons' requested a total of \$30 million in damages. The jury award exceeded the Solomons' request by \$15.5 million, thereby awarding the Solomons' \$45.5 million. Furthermore, during the course of trial, the Solomons had offered to settle the case for \$6.9

million. These facts support a finding "from which a reasonable judge could conclude that the amount of the judgment was excessive and that remittitur should be entered." *Carter-Glogau Labs. Inc. v. Constr., Prod. & Maint. Laborers' Local 383*, 153 Ariz. 351, 358, 736 P.2d 1163, 1171 (App. 1986). Also, if the remittitur was not accepted, these facts support the trial court ordering a new trial, as to damages only. We therefore find no abuse of discretion in the court's ordering the remittitur and affirm the granting of the new trial as to damages.⁴

Punitive Damages

¶13 Prior to trial, the Solomons filed a motion for a determination of a prima facie case for punitive damages. DSI/AHS filed a cross-motion for summary judgment alleging that, based on the undisputed facts, punitive damages were not

⁴ On appeal DSI/AHS contends that they were entitled to a new trial on all issues because the award was the product of juror passion or prejudice. Arizona Rule of Civil Procedure 59(a) permits a judge to vacate a decision and grant a new trial for various reasons. The trial judge clearly stated that she believed the verdict was excessive and granted the remittitur pursuant to Rule 59(a)(5). Had the judge decided that the verdict was the result of passion or prejudice, she would have set aside the verdict entirely instead of ordering a remittitur or a new trial. *Mammo*, 138 Ariz. at 532, 675 P.2d at 1351; *Alires v. S. Pac. Co.*, 100 Ariz. 6, 14, 409 P.2d 714, 719 (1966) ("By ordering a reduction in damages instead of setting aside the verdicts, the trial judge determined that the verdict was not the result of passion or prejudice.") In this case, the trial judge, when ordering a new trial, did not set aside the verdict, and therefore, the judge implicitly found that the verdict was not the result of passion or prejudice. We find no abuse of discretion here.

warranted. The court granted DSI/AHS's cross-motion finding "that the claims against DSI-AHS do not rise to the level of outrageous, 'evil mind,' reprehensible or conscience [sic] pursuit of a course of conduct knowing that such conduct created a substantial risk of significant harm to others." Furthermore, the court noted that the case was not "outrageous, evil minded, [or] reprehensible."

¶14 Punitive damages may be found where, "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). "In reviewing a decision on a motion for summary judgment, we view the facts and the reasonable inferences to be drawn from those facts in the light most favorable to the party against whom judgment was entered." *Maycock v. Asilomar Dev., Inc.*, 207 Ariz. 495, 496, ¶ 2, 88 P.3d 565, 566 (App. 2004). We review de novo whether genuine issues of fact exist and whether the trial court erred in its application of the law. *Id.* at 498, ¶ 14, 88 P.3d at 568.

¶15 The record shows that Cash left Ilana, a developmentally disabled adult with the mental capacity of a three to four year old, alone in the bathtub, unattended, for

five to ten minutes.⁵ The training video indicated that Ilana should not have been left alone at any time during her bath. The testimony of several DSI employees reflected Ilana's vulnerabilities and her need for constant supervision while in the bathtub. Furthermore, once Cash discovered Ilana unconscious in the tub she called her supervisor instead of 911. It was only after she contacted her supervisor that she finally called for rescue efforts.

¶16 Some could find that the aforementioned actions during and after Ilana's drowning are sufficient evidence upon which the jury could conclude that Cash behaved so recklessly as to be subjected to punitive damages. See *Belliard v. Becker*, 216 Ariz. 356, 358, ¶ 15, 166 P.3d 911, 913 (App. 2007) (finding evidence of a defendant's alcohol consumption could be "a sufficient basis on which the jury could conclude that [defendant] behaved so recklessly as to be subjected to punitive damages").

¶17 Significantly, there was more evidence that DSI/AHS "consciously pursued a course of conduct knowing that it created a substantial risk of significant harm" to Ilana. *Rawlings*, 151 Ariz. at 162, 726 P.2d at 578. That conduct included DSI/AHS's inconsistent hiring and rehiring, continuous disciplinary

⁵ Cash did not testify at trial. In the police report, Cash stated that she had to go to the bathroom and wanted privacy and therefore went to the other bathroom in the house.

proceedings with Cash and failures to inform the Solomons of these incidents. In addition, evidence was offered supporting the conclusion that if DSI/ASH had not made misrepresentations to the Solomons, the Solomons would not have consented to Cash as a primary caregiver for Illana. In other words, the jury could find that without the misrepresentations, Cash would not have been Illana's caregiver and Illana would not have died from Cash's negligence. We respectfully disagree with our dissenting colleague because the alleged misrepresentations may have in fact contributed to Illana's death.

¶18 During her tenure at DSI/AHS, Cash resigned and was rehired twice. Initially, Cash resigned effective May 30, 1994. After Cash's resignation, DSI/AHS sent her a letter stating that because she "did not provide a two week notice, [Cash would] not be eligible for rehire." Cash was rehired but quit two months later, again, without providing two weeks notice. DSI/AHS again stated that she was not eligible for rehire. However, Cash was hired again.

¶19 A performance evaluation of Cash for the period of July 1, 1999 to July 1, 2000 reflected an "unsatisfactory" rating for Cash's management of work time as she "far exceeds overtime hours and tends to stay on duty throughout the whole day." Cash also received numerous "needs improvement" ratings throughout the evaluation. The evaluation therefore placed Cash

on sixty days probation and stated that "[s]hould she fail to demonstrate imediate [sic] improvement in the above noted areas, the result will be demotion to a lesser position or termination."

¶20 Cash was disciplined on May 29, 1991 for failing to follow an intervention program and was thereafter ordered to follow the program "as per policy and procedure." On February 17, 2000 an incident report alleged Cash had created a health and safety threat by leaving three patients in a van, in a parking lot, with no supervisory staff. On June 19, 2000 Cash was required to take a behavior building and communication class for advising a resident to hit another resident which DSI/AHS characterized as "not acceptable . . . at any time." On February 5, 2001, DSI/AHS reprimanded Cash for "display[ing] a lack of cooperation and unprofessional conduct in front of the [resident's] team members."

¶21 On July 12, 2001 yet another incident report was filed alleging suspected neglect or abuse and violation of a patient's rights when Cash demanded that a patient go to her room and when the resident refused, Cash pushed her own chair back and walked toward the patient. In response to the report Cash was "placed on administrative leave until an internal investigation is completed." The investigation report confirmed that Cash "became agitated and verbally abusive towards the [resident]"

despite the fact that the resident's demeanor was "very sweet and shy." Cash was placed on employer-instituted probation for six months. An incident report from July 24, 2001 indicated Cash threatened to beat a patient and referred to the patient as a "worthless piece of meat."

¶22 On August 27, 2001 DSI/AHS issued an employee counseling notice concerning the alleged verbal abuse of one resident and intimidation of another resident. The notice found that "neither abuse nor intimidation took place." However, the notice did find that Cash violated DSI/AHS personnel policy conduct guidelines and the rights of individuals in service, by calling a patient a "spoiled brat," lacked professionalism in violation of DSI/AHS personnel policy by "engaging in a conversation with a subordinate staff regarding the sexual orientation of a second subordinate staff" and demonstrated "a lack of understanding of basic consumer rights principles" by telling patients "to sit on their hands when having a negative behavior, etc." Furthermore, Cash was put on a ninety day probation period with instructions to follow the outlined corrective action. Cash was thereafter suspended from September 11, 2001 to September 30, 2001, however, it is unclear from the record whether the suspension was a result of Cash's actions in August or another unrelated event.

¶23 However, when the Solomons inquired about Cash's qualifications, DSI/AHS employees assured them that Cash was a reliable employee and an excellent manager. The Solomons were only informed of one incident of discipline brought against Cash in which she told a patient to sit on her hands "as a method of managing behavior." DSI/AHS assured the Solomons that this event "was not a neglect or abuse issue but a dignity issue." The Solomons were not made aware of Cash's numerous resignations, designations as not eligible for rehire and subsequent rehires. Nor were they made aware of any of Cash's "suspensions, probations and other disciplinary actions nor her failure to comply with the requirements of her probationary periods."

¶24 Therefore, we find that the trial court erred in granting summary judgment to DSI/AHS and denying the Solomons the opportunity to submit evidence of punitive damages to the jury.

STATE'S CROSS-APPEAL

¶25 As previously stated, the Solomons did not allege counts 3) fraudulent misrepresentation, 4) consumer fraud or 5) negligent misrepresentation (the misrepresentation claims) against the State. The Solomons filed a Motion for Partial Summary Judgment against the State for Non-Delegable Duty. Neither the motion nor its supporting memorandum mentioned the

misrepresentation claims which were not asserted against the State. The trial court granted the partial summary judgment "against the State for any tortious conduct found by the jury against DSI, but only as to compensatory damages. Any judgment against DSI shall be entered jointly and severally against the State."

¶26 On appeal the State contends that the trial court erred in granting the partial summary judgment against the State on the Solomons' misrepresentation claims because: the Solomons did not plead the misrepresentation claims against the State; the Solomons did not seek partial summary judgment on the misrepresentation claims; and the State cannot be liable for DSI/AHS's alleged misrepresentations. We address each in turn.

a. Failure to plead misrepresentation claims against the State

¶27 "In reviewing a trial court's decision on a motion for summary judgment, we determine *de novo* whether any genuine issues of material fact exist and whether the trial court properly applied the law." *Case Corp. v. Gehrke*, 208 Ariz. 140, 143, ¶ 10, 91 P.3d 362, 365 (App. 2004).

¶28 The Solomons' complaint alleges eight counts and only five of the eight counts were pled against the State. A plaintiff cannot obtain summary judgment against a defendant on a claim that was not pled against that defendant. *Trawler Diane Marie, Inc. v. Brown*, 918 F. Supp. 921, 931-32 (E.D.N.C. 1995).

The State can only be liable for claims which were alleged against it in the complaint, not for the claims alleged solely against DSI/AHS. Because the misrepresentation claims were not pled against the State, the trial court erred in granting summary judgment against the State.

¶29 Furthermore, the misrepresentation claims were outside the scope of the motion for summary judgment. The Solomons based their motion on DSI/AHS's performance of the State's non-delegable duty to provide for Ilana's care, health and safety. The Motion had nothing to do with any communications between DSI/AHS and the Solomons, nor did it refer to any statements or communications that DSI/AHS made to the Solomons.

b. Liability for Misrepresentations Made by DSI/AHS

¶30 The State further contends that even if the Solomons had alleged the misrepresentation claims against the State, it would not have been liable because it owed no duty to Martin and Judy Solomon.

¶31 A non-delegable duty

refers to duties for which the employer must retain responsibility, despite proper delegation to another. . . . If the employer delegates performance of a special duty to an independent contractor and the latter is negligent, the employer will remain liable for any resulting injury to the protected class of persons, as if the negligence had been his own.

Ft. Lowell-NSS Ltd. P'ship v. Kelly, 166 Ariz. 96, 101, 800 P.2d 962, 967 (1990). Ilana was within the class of persons protected by the State's non-delegable duty rule. This rule was properly invoked on the Parents' wrongful death claim because it derives from her death and is based upon the negligent performance of the duty owed to her.

¶32 The Solomons argue that the entire case was premised on Ilana's death and the motion for partial summary judgment was based on the discussion of non-delegable duty from the supreme court's analysis in *Wiggs v. City of Phoenix*, 198 Ariz. 367, 369-70, ¶¶ 7-8, 10 P.3d 625, 627-28 (2000). However, *Wiggs* was a wrongful death case which dealt with whether the City of Phoenix had a non-delegable duty for negligence claims. It did not address whether the City of Phoenix had a non-delegable duty for misrepresentation claims.

¶33 The misrepresentation claims regarding Cash made by DSI/AHS to Martin and Judy Solomon do not fall within the meaning of "non-delegable duty" as those claims are not derivative of Ilana's death, but instead are their personal claims for torts committed against the Solomons personally. Also, those claims are not based on the negligent performance of any duty that the State owed to the Solomons. For these reasons, we find that the trial court erred in awarding partial summary judgment against the State to the Solomons for the

misrepresentation claims and we reverse the summary judgment order.⁶

c. Motion for New Trial

¶34 The State also argues that the trial court erred in not granting a new trial on the Solomons' judgment on the misrepresentation claims. Because we previously upheld the trial court's grant of a new trial and find the trial court erred in awarding partial summary judgment on the misrepresentation claims, we need not address this issue.

DSI/AHS' CROSS-APPEAL

Willits Instruction

¶35 Prior to trial the Solomons requested several records, reports and files pertaining to other developmentally disabled individuals under Cash's care and a database which contained Cash's training information. DSI/AHS did not produce all of the

⁶ The Solomons also argue that the State admitted liability and that the State's stipulation is a binding judicial admission. However, as previously stated, the motion for partial summary judgment did not deal with the misrepresentation claims and the State only admitted liability for the claims that were addressed in the motion. The Solomons also argue that the State's argument is groundless because of the doctrine of judicial estoppel. But judicial estoppel was not invoked because the Solomons never asserted that the State was liable on the misrepresentation claims. Lastly, the Solomons argue that the State waived the error because it raised the issue for the first time in a post-trial motion. A motion for a new trial is an appropriate method to challenge summary judgment and such a motion preserves the issue for appeal. *United Bank of Ariz. v. Allyn*, 167 Ariz. 191, 197, 805 P.2d 1012, 1018 (App. 1990).

records, despite the court's order to do so. The court agreed to issue a *Willits* instruction because not all of the records were produced by DSI/AHS and the Solomons had a right to see the records.

¶36 The instruction issued by the court permitted jurors to determine if DSI/AHS withheld pertinent evidence and if so, the jurors could draw an adverse inference against DSI/AHS for having failed to produce the evidence in question:

The following documents were ordered to be produced by this Court to plaintiffs in this litigation:

(1) The complete file for Ilana Solomon's roommate;

(2) The complete files for the three consumers relating to Catherine Cash leaving them in a van on 2/17/2000;

(3) Developmental Systems, Inc.'s ("DSI") training database which contained training information for Catherine Cash.

The defendants failed to produce the documents. If you find that defendants withheld evidence whose contents or quality are in issue, you may infer that the true fact is against their interest.

On appeal DSI/AHS contends that the court erred in providing this instruction.

¶37 "The trial court has substantial discretion in determining how to instruct the jury." *Smyser v. City of Peoria*, 215 Ariz. 428, 439, ¶ 33, 160 P.3d 1186, 1197 (App.

2007). This court will not overturn a verdict even if an erroneous instruction is given “‘unless the error prejudiced the appellant’s substantial rights,’ and prejudice affirmatively appears in the record.” *Id.* (quoting *City of Phoenix v. Clauss*, 177 Ariz. 566, 568-69, 869 P.2d 1219, 1221-22 (App. 1994)).

¶38 In this case, the court determined that DSI/AHS had not produced all of the records the Solomons had requested after filing two motions to compel. The trial court also determined that the Solomons had the right to view the records and documents requested. The instruction allowed the jury to independently determine whether DSI/AHS had withheld pertinent evidence. If the jury believed they had withheld such evidence, then the jury could infer that the documents withheld contained facts adverse to DSI/AHS. Upon review of the record we find the evidence was relevant and therefore find no prejudice in the giving of the instruction. Nor do we find that DSI/AHS’s substantial rights were compromised by the instruction. As a result, we find no error.

Introduction of Evidence

¶39 DSI/AHS contends that the trial court erred when it allowed evidence that supported allegations of neglect, negligent misrepresentation, fraud, consumer fraud and breach of contract. DSI/AHS claims the introduction was error because 1) the Solomons did not seek additional compensatory damages for

the claims, 2) the trial court precluded DSI/AHS from cross-examining Martin Solomon on his personal experience as a personal injury attorney and 3) allowing evidence on the claims may have misled the jury into compounding damages as to each claim instead of one recovery.

a. Failure to Seek Additional Recoverable Compensatory Damages

¶40 DSI/AHS contends that the trial court erred in allowing evidence of liability when the evidence should have been limited to damages. We review a trial court's decision to admit or exclude evidence for abuse of discretion. *John C. Lincoln Hosp. and Health Corp. v. Maricopa County*, 208 Ariz. 532, 543, ¶ 33, 96 P.3d 530, 541 (App. 2004).

¶41 DSI/AHS admitted it was vicariously responsible for Cash's acts and omissions which included negligence and abuse of Ilana in leaving Illana unattended and unsupervised in the bathtub, negligence in failing to terminate Cash in response to Cash's leaving residents in a van unattended and, breach of duty in failing to monitor Cash's probation. DSI/AHS only admitted liability for wrongful death and statutory abuse, not as to whether Illana was neglected⁷, negligent misrepresentation, fraud, consumer fraud and breach of contract. Therefore, the

⁷ In this case "neglect" was defined to the jury as "a pattern of conduct without the person's informed consent resulting in deprivation of food, water, medication, medical services, shelter, clothing, heating or other services necessary to maintain minimum physical or mental health."

Solomons should be allowed to prove the claims alleged against DSI/AHS to which DSI/AHS did not admit liability.

¶42 DSI/AHS cites *Larsen v. Decker*, 196 Ariz. 239, 995 P.2d 281 (App. 2000), *Duke v. Cochise County*, 189 Ariz. 35, 938 P.2d 84 (App. 1996), *Drozda V. McComas*, 181 Ariz. 82, 887 P.2d 612 (App. 1994) and *Wry v. Dial*, 18 Ariz. App. 503, 503 P.2d 979 (1972) for the proposition that if liability is admitted, the only issue at trial should be damages. The flaw in this argument is that in the above cited cases, liability as to all claims was admitted. In this case, DSI/AHS only admitted liability as to negligence and abuse. They did not admit liability as to the remaining counts of neglect, breach of contract, consumer fraud, negligent misrepresentation, and common law fraud.

¶43 Furthermore, as previously noted, we have held that the trial court erred in precluding the Solomons from requesting punitive damages. On remand, the trial court should consider whether this evidence might also be relevant to punitive damages.

b. Evidence of Martin Solomon's Experience as a Personal Injury Attorney

¶44 DSI/AHS contends that the trial court committed reversible error by precluding DSI/AHS from revealing that Martin Solomon was an attorney and from questioning Martin's

knowledge of the nursing home industry from his experience as a personal injury attorney. This ruling, in turn, prohibited them from rebutting the Solomons' arguments on claims for common law fraud, negligent misrepresentation and consumer fraud. DSI/AHS further argues that the trial court erred in determining that the issue was one of a heightened standard of reliance instead of an issue of justifiable reliance.

¶45 Prior to trial the Solomons filed a motion in limine to preclude mention of Martin Solomon's occupation. DSI/AHS responded to the motion claiming that Martin's background as an attorney in the nursing home industry made him an "educated consumer" in regards to developmentally disabled services and the Arizona Adult Protective Services Act." DSI/AHS urged denial of the motion claiming that the information pertaining to Martin's background was not going to be offered to prove a heightened duty but rather that the Solomons "should not be allowed to mislead the jury into believing he was not aware of the regulations that governed DSI or that [Martin] was not aware of the issues that arise in cases involving abuse and neglect under the Arizona Adult Protective Services Act."

¶46 The judge granted the motion to prohibit any mention of Martin Solomon's occupation without comment. During the trial DSI/AHS argued that they should be able to cross-examine Martin Solomon on his knowledge of the nursing home industry.

The judge denied DSI/AHS' requests finding that DSI/AHS had not raised the issue in their pretrial statement and that there was no connection between Martin Solomon's background and what the Solomons claimed they knew about Cash's ability to care for Ilana or why Martin Solomon should not have relied on DSI/AHS's representations. Martin Solomon subsequently testified and was cross-examined by DSI/AHS.

¶47 We review a trial court's decision to admit or exclude evidence for abuse of discretion. *John C. Lincoln Hosp.*, 208 Ariz. at 543, ¶ 33, 96 P.3d at 541. In this case, the trial court determined that there was no link between Martin Solomon's background and the question of reliance on DSI/AHS's representations of Cash and the care facility. During arguments on the matter the judge questioned DSI/AHS about the reliance standard:

Even if we were to allow [Martin Solomon's background] in, let's assume we did, how is he supposed to learn about Catherine Cash's employment record where she left people in a van, where she did all these other things that were never revealed to Mr. Solomon and his wife?

How would that expertise in the nursing home industry have given him the knowledge that he relied upon in allowing Catherine Cash to care for his daughter?

From this line of questioning it is apparent that the judge understood that DSI/AHS wanted to introduce the evidence on the

issue of justifiable reliance. Thus, the judge's ruling indicates that she weighed the competing interests and determined that there was not a connection between Martin's profession and his reliance on statements made by DSI/AHS regarding Cash. We find that the judge's ruling was within her considerable discretion to determine admission of the evidence. *See Salt River Project Agric. Improvement and Power Dist. v. Miller Park, L.L.C.*, 216 Ariz. 161, 167-68, ¶ 30, 164 P.3d 667, 673-74 (App. 2007). As a result, we do not find this decision to be an abuse of discretion.

¶48 Furthermore, DSI/AHS was not precluded from cross-examining Martin Solomon; the prohibition applied only to Mr. Solomon's employment. Trial judges retain broad discretion to impose reasonable limits on cross-examination. *State v. Carreon*, 210 Ariz. 54, 63, ¶ 36, 107 P.3d 900, 909 (2005). This limitation was based on the judge's decision that Martin Solomon's profession was not relevant to his reliance on the statements made by DSI/AHS about Cash. We do not find this limitation to be outside the bounds of the trial judge's discretion.

c. Misleading the Jury

¶49 DSI/AHS further contends that allowing evidence of the additional claims and instructing the jury on those claims confused the jury into compounding the damages award. A trial

court's decision to admit evidence is reviewed for an abuse of discretion. See *Carreon*, 210 Ariz. at 63, ¶¶ 36-37, 107 P.3d at 909. Furthermore, the judge retains ample discretion in jury instructions and we will not overturn a verdict even if the instruction is erroneous unless we can find affirmative prejudice in the record. See *Smyser*, 215 Ariz. at 439, ¶ 33, 160 P.3d at 1197.

¶50 The jury instructions allowed for an award to the estate of Ilana Solomon for "[t]he nature, extent, and duration of Ilana Solomon's injuries [and the] pain, discomfort, suffering, and anxiety experienced by Ilana Solomon." The instructions also permitted the jury to award damages to the estate for breach of contract and breach of the duty of good faith and fair dealing under the contract with DSI/AHS. Furthermore, an instruction for individual awards for Martin and Judy was included "to compensate the Solomons for damages proved by the evidence to have resulted from defendant's deception, fraud, false promise, misrepresentation, suppression or omission of a material fact."

¶51 The verdict form provided for only one amount of damages per plaintiff, i.e., one award each for the estate of Ilana Solomon, Judy Solomon and Martin Solomon. The form reflected DSI/AHS's admissions of abuse, wrongful death, "negligent hiring, training, supervision and retention."

Furthermore, the form provided for the jury to make findings on the claims of neglect, consumer fraud, negligent misrepresentation, and common law fraud.

¶52 On retrial, the trial court should ensure that the instructions do not permit and verdict forms do not allow any compounding of damages.

John Huse Testimony

¶53 DSI/AHS contends that the trial court erred in admitting testimony of John Huse (Huse) because the Solomons failed to timely disclose his testimony. Arizona Rule of Civil Procedure 26.1 requires prompt disclosure of information including the names of witnesses and the factual basis of claims and defenses. In compliance with this rule, the Solomons served the disclosure statement prior to trial. Huse was listed as a potential witness and was identified as a past or present DSI/AHS employee who would testify to:

[T]estify as to the care, treatment plan, and supervision rendered to Ilana Solomon; regarding Ilana Solomon's physical and mental condition while she was under the care of [DSI/AHS]; regarding the events surrounding the death of Ilana Solomon and the investigation completed by [DSI/AHS]; regarding representations made to [the Solomons] as to [DSI/AHS's] ability to provide appropriate care to developmentally disabled individuals such as Ilana Solomon; regarding [DSI/AHS's] responses to the concerns of [the Solomons] over their daughter's condition and needs while under the care of [DSI/AHS]; regarding [DSI/AHS's]

policies and procedures; and regarding the hiring, training, and supervision provided by [DSI/AHS].

In response to the disclosure statement, DSI/AHS filed a motion in limine to preclude Huse's testimony. The motion was denied by the trial court. On appeal, DSI/AHS again claims that the disclosure was insufficient because it did not reflect a conversation Huse had with Martin Solomon shortly after the death of Ilana.

¶54 We review a trial court's decision to admit evidence for abuse of discretion. *John C. Lincoln Hosp.*, 208 Ariz. at 543, ¶ 33, 96 P.3d at 541. "The disclosure rules are designed to allow the parties a 'reasonable opportunity' to prepare, 'nothing more, nothing less.'" *Waddell v. Titan Ins. Co.*, 207 Ariz. 529, 537, ¶ 33, 88 P.3d 1141, 1149 (App. 2004) (quoting *Bryan v. Riddel*, 178 Ariz. 472, 476 n.5, 875 P.2d 131, 135 n.5 (1994)).

¶55 In this case, Huse was a former DSI/AHS employee and his testimony reflected the summary in the disclosure statement. The substance of the testimony did not concern Huse's conversation with Martin Solomon and while the specific conversation was not cited in the disclosure statement, there was sufficient detail to encompass the conversation. Furthermore, the record does not reflect that DSI/AHS did not have an opportunity to rebut Huse's testimony or that Huse's

testimony sufficiently deviated from the disclosure statement to require a finding of prejudice. As a result, we find that the trial court did not abuse its discretion in permitting Huse to testify at trial.⁸

Attorneys' Fees at Trial

¶56 DSI/AHS contends that the trial court erroneously awarded Ilana's Estate attorneys' fees. Focusing first on those fees awarded under A.R.S. § 12-341.01(A), DSI/AHS cites *Barmat v. John & Jane Doe Partners A-D*, 155 Ariz. 519, 747 P.2d 1218 (1987) to support their claim that attorneys' fees were not warranted because the cause of action arose under tort and not contract. Section 12-341.01(A) authorizes attorneys' fees to a prevailing party on a claim arising under contract. A.R.S. § 12-341.01(A) (2003). According to the supreme court in *Barmat*, when the law imposes special duties because of the nature of the relationship, such as innkeeper and guest, the contractual provisions between the parties do not negate the tort duties. 155 Ariz. at 522-23, 747 P.2d at 1221-222. Also "where the implied contract does no more than place the parties in a relationship in which the law then imposes certain duties recognized by public policy, the gravamen of the subsequent

⁸ Even if the disclosure statement were to be found inadequate, because we affirm the trial court's order of a remittitur or granting a new trial on damages, DSI/AHS will now have sufficient notice to prepare for and rebut Huse's testimony.

action for breach is tort, not contract." *Id.* at 523, 747 P.2d at 1222. Thus, the court held that in those situations, attorneys' fees are not warranted pursuant to A.R.S. § 12-341.01(A). *Barmat*, 155 Ariz. at 522-23, 747 P.2d at 1221-222. In this case as well, the contractual provisions do not negate the tort duties. The implied contract in this case did no more than place the parties in a relationship in which the law imposed duties recognized by public policy. Therefore, the Solomons are not statutorily entitled to attorneys' fees and we vacate the attorneys' fees awarded that were made pursuant to A.R.S. § 12-341.01(A).

¶57 DSI/AHS next alleges that the trial court erred in awarding attorneys fees pursuant to A.R.S. § 46-455. They initially argue that because A.R.S. § 46-455(H) provides that fees may be awarded "after a determination of liability" and they admitted liability for abuse, fees should not have been awarded after they admitted liability. They further argue that most attorneys' fees statutes only award attorneys' fees to the prevailing party (A.R.S. § 12-341.01(A)) or the successful party (A.R.S. § 12-1580(E)). We find no merit in these arguments. First, DSI/AHS did not admit liability as to neglect. Second, we do not read the statute to restrict fees to only those that are incurred to establish liability. DSI/AHS also alleges that the trial court's award of attorneys' fees is not supported by

the evidence. The trial court did not abuse its discretion in assessing the separate amounts for abuse and neglect. It was intimately familiar with the facts, the time and effort of the parties, and the presentation of the case at trial. Lastly, they argue that the trial court applied the wrong legal standard when, faced with conflicting affidavits, the court decided the amount of fees to be awarded without holding an evidentiary hearing. We disagree; contrary to DSI/AHS' argument, an award of attorneys' fees is not like a motion for summary judgment. The trial court may consider the conflicting affidavits and make a determination as to the appropriate amount of fees. We therefore find no error.

CONCLUSION

¶158 The trial court did not abuse its discretion in ordering the remittitur or ordering a new trial on damages, or in giving a *Willits* instruction, or in the admission of evidence. Therefore these orders are affirmed. However, we reverse the orders precluding punitive damages, awarding attorneys' fees and granting summary judgment against the State on the misrepresentation claims.

PATRICIA A. OROZCO, Judge

CONCURRING:

JOHN C. GEMMILL, Judge

B A R K E R, Judge, concurring in part and dissenting in part.

¶159 The majority decision is very well done, and I concur with it except as to punitive damages.

¶160 In Arizona and elsewhere, "punitive damages are proper when the conduct giving rise to punitive damages contributes to, or is a cause of, the injury." *Saucedo v. Salvation Army*, 200 Ariz. 179, 184, ¶ 20, 24 P.3d 1274, 1279 (App. 2001). The only injuries at issue here are based on the death of Ilana and the damages that flow from the death. The conduct that caused the death was Cash's failure to properly attend to Ilana while she was in the tub. Depending upon the account, Cash left Ilana either to use the bathroom or to phone her son. *Supra* ¶ 15 n.5.

¶161 Although Cash's conduct can in no way be countenanced, it does not rise to the level of punitive damages. In *Rawlings*, the Arizona Supreme Court held:

We do not believe that the concept of punitive damages should be stretched. We restrict its availability to those cases in which the defendant's wrongful conduct was guided by evil motives.

. . . .

. . . To obtain punitive damages, plaintiff must also show that the evil hand . . . was guided by an evil mind which

either consciously sought to damage the insured or acted intentionally, knowing that its conduct was likely to cause unjustified, significant damage

Rawlings, 151 Ariz. at 162, 726 P.2d at 578. Cash did act intentionally when she left Ilana alone; however, the facts do not support the requirement that the act be done with an evil mind.

¶62 The Solomons also point to prior conduct of Cash that was unacceptable and DSI/AHS's failure to disclose it. *Supra* ¶¶ 17-23. However, none of this conduct proximately caused the death. The conduct goes to whether the Solomons would have agreed to Cash as a caregiver, not whether Cash acted with an evil mind when she left Ilana in the tub. Thus, it should not be considered in determining whether punitive damages are permissible. See *Saucedo*, 200 Ariz. at 184-86, ¶¶ 20-22, 24 P.3d at 1279-81. Accordingly, I find no error in the trial court's grant of summary judgment on the issue of punitive damages.

DANIEL A. BARKER, Presiding Judge