IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

MELISSA SMITH, *Plaintiff/Appellee*,

v.

BLAIR EDWARDS OLSEN, *Defendant/Appellant*.

No. 1 CA-CV 22-0565
1 CA-CV 23-0041
(Consolidated)
FILED 05-30-2024

Appeal from the Superior Court in Maricopa County
No. CV2017-053483
The Honorable Bradley H. Astrowsky, Judge

AFFIRMED IN PART; REVERSED IN PART; REMANDED

COUNSEL

Clark Hill PLC, Scottsdale
By Ryan J. Lorenz, Barrett N. Lindsey
Counsel for Defendant/Appellant

Michael P. Fiflis Attorney at Law, Scottsdale
By Michael P. Fiflis
Counsel for Plaintiff/Appellee

OPINION

Judge Andrew M. Jacobs delivered the opinion of the Court, in which Presiding Judge Michael J. Brown and Judge Samuel A. Thumma joined.

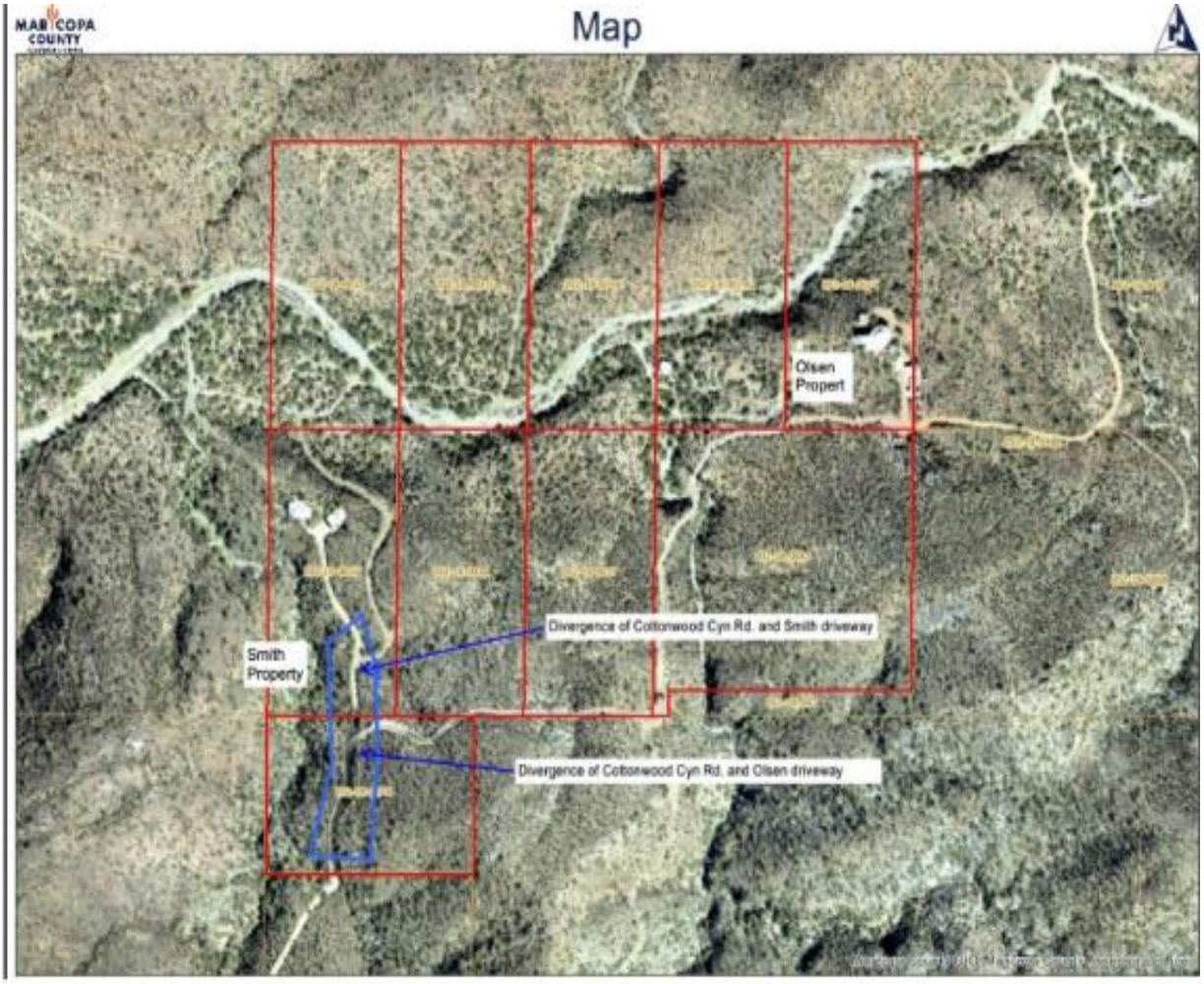
J A C O B S, Judge:

¶1 Defendant Blair Olsen appeals a jury's award of $1,500,500 in compensatory damages and $1,500,000 in punitive damages in an easement dispute with his neighbor, plaintiff Melissa Smith. Olsen argues that: (1) barring him from objecting to trial exhibits or offering his own witnesses or exhibits at trial as a sanction for failing to participate in preparing the joint pretrial statement or to attend the final pretrial conference was an abuse of discretion; and (2) the jury's damage awards were excessive. We affirm the sanction as consistent with Arizona Rule of Civil Procedure 16 and within the superior court's discretion. We vacate the compensatory damage award of $375,000 for negligent infliction of emotional distress as duplicative of the identical award for intentional infliction of emotional distress. Additionally, because the punitive damage award is unconstitutionally excessive, we direct its reduction to $525,000.

FACTS AND PROCEDURAL HISTORY

A. Smith Sues Olsen Over Disagreements and Conflicts Arising from an Easement They Share.

¶2 Smith and Olsen live in the same general area in a sparsely populated portion of Cave Creek, Arizona. Their land is separated by three or four five-acre parcels of private land. Both Smith and Olsen access their homes using a twenty-foot-wide dirt road, Cottonwood Canyon Road. They both have an easement "for ingress, egress and access . . . in and along the existing roadway of Cottonwood Canyon Road" (the "Easement"). Cottonwood Canyon Road forks south of Olsen's property, and Smith must drive past the fork below Olsen's property to reach her home, located to the east and slightly north. This aerial photograph depicts the areas at issue:



¶3 Smith moved into her home in the mid-1980s and Olsen moved into his home in the mid-1990s. For a time, they peacefully coexisted on their properties while using the Easement. That relationship later soured and turned into a long-term, ongoing verbal and physical sparring match.

¶4 In June 2017, Smith filed this case against Olsen, asserting Olsen breached the Easement by frustrating her use of it. She also asserted Olsen intentionally and negligently inflicted emotional distress on her, assaulted her and trespassed onto her property and into her car, and intentionally interfered with her contractual relations.

¶5 The case had various starts and stops, and was complicated procedurally by the COVID-19 pandemic. The parties conducted extensive pretrial motion practice concerning the Easement, maintenance of the road, for injunctive relief, enforcement of a provisional partial settlement, sanctions, and contempt.

B. Without Good Cause, Olsen Failed to Comply With the Court's Order to Participate in the Joint Pretrial Statement and to Appear at the Final Trial Management Conference, Leading the Court to Impose Sanctions Under Rule 16.

¶6 On October 30, 2018, the court ordered the parties to prepare and file a Joint Pretrial Statement by February 28, 2019 in anticipation of a trial later set for April 2019. That order warned the parties that the deadlines set "are firm dates and will not be extended or modified by this court absent good cause." The order reminded the parties that they needed to list all their trial witnesses in a Final Trial Witness List, and that "all trial exhibits must be listed in the Joint Pretrial Statement along with objections," and that "objections must be listed . . . to be preserved." The order required the parties to "deliver all trial exhibits to the courtroom clerk . . . at the time of the Final Trial Management Conference on March 15, 2019."

¶7 Despite these court-ordered requirements, Olsen did not provide any materials to Smith's counsel or otherwise participate in the preparation of a Joint Pretrial Statement. Smith timely submitted a Joint Pretrial Statement, listing 45 witnesses, 227 exhibits, and leaving blanks for the portions Olsen had declined to provide.

¶8 At the March 15, 2019 final trial management conference, Smith appeared and was represented by counsel. However, Olsen, who was then self-represented, failed to appear. The day before the hearing, Olsen had left a phone message with the court's chambers, which the court paraphrased as "basically, that because of something [Smith's counsel] or [Smith] have allegedly done, he's unable to leave his property and can't come to court. And then he also said that he does not have phone access. And so therefore, he – he may not appear, and he may appear telephonically, but I don't know." At the hearing, Smith disputed Olsen's assertions. The court indicated it did not find Olsen's statements to be true or untrue. The court advised "if he does call, I can inform my [judicial assistant] to put him through on the phone, even though he did not file a motion to appear telephonically . . . ." Olsen, however, did not call or participate in the hearing in any fashion.

¶9 The court went forward with the hearing, noting Olsen had not filed any joint pretrial statement. Smith avowed she sent Olsen the draft pretrial statement "on February 13, 2019, and asked for [Olsen's] portion of the joint pretrial. [She] sent him a couple drafts after that, and didn't get any response." The court confirmed Smith submitted her trial exhibits and learned Olsen provided none.

¶10 In addressing consequences for Olsen's nonparticipation, Smith pointed out the "pretrial order indicates that objections [to exhibits] are waived, if not put in the joint pretrial," and moved to admit all of Smith's exhibits, given the lack of objections from Olsen. The court declined, stating "I don't do blanket admissions," clarifying Smith would need to move their admission at trial, but stating "it's a pretty good chance they will come into evidence" after they were later "presented and offered." While noting Olsen could still show good cause for not participating in the joint pretrial process, the court suggested Olsen may have waived objections to Smith's trial exhibits and waived presenting his own exhibits and witnesses.

¶11 The minute entry following the final trial management conference warned Olsen he needed to show good cause, or his nonparticipation in the joint pretrial statement and the final trial management conference would "waiv[e] his right to object to any of Plaintiff's exhibits offered, present witnesses other than himself, and present exhibits at trial." Olsen never filed a motion or took any other action seeking to show good cause for his failure to participate in the preparation of the joint pretrial statement or attend the final trial management conference.

C. A Ten-Day Jury Trial Results in a $3 Million Verdict.

¶12 After the court's waiver ruling, trial was postponed several times for a variety of reasons, including the COVID-19 pandemic. The postponement orders permitted the filing of an amended joint pretrial statement. In mid-2021, after judicial rotations, Judge Astrowsky took the case over from Judge Campagnolo. In a September 2021 order, the court set trial for May 2022, which it later set as a ten-day trial from May 31 to June 21, 2022.

¶13 The September 2021 order required the filing of an amended joint pretrial statement by March 25, 2022. Smith filed her portion six months early, in October 2021. As in 2019, Olsen (now represented by counsel) did not participate in preparing the joint pretrial statement. He neither filed a joint pretrial statement, nor sought leave to do so. Nor did he file any motion with the court seeking to explain or excuse his failure to participate in the joint pretrial process.

¶14 At the April 1, 2022 final pretrial conference, the court affirmed the March 2019 sanction order. The court confirmed Olsen would be allowed to testify and cross-examine witnesses, but could not present exhibits or object to the admission of Smith's exhibits. During the ten-day trial, the court consistently enforced this sanction, sometimes pausing to explain that in its absence, certain documents would not have been admitted. Referring to Exhibit 3, a twenty-page timeline of Olsen's supposed behavior since the 1990s, the court said "[j]ust so the record is clear, had things been done properly, by [Olsen] and/or his counsel beforehand at the time that this was an issue, Exhibit 3 may not have come in. But because of that and Judge Campagnolo's ruling . . . I'm going to let [it] in." While allowing Smith to introduce exhibits without the opportunity for Olsen to pose evidentiary objections, the court allowed Olsen to object at trial to testimony for hearsay, relevance and where questions were argumentative or misstated testimony.

¶15 Smith's evidence catalogued Olsen's claimed conduct over the twenty-two-year period from 1996 to 2018, including the mistreatment of third parties. Smith's evidence indicated Olsen claimed (while unarmed) to have the authority to hold Smith and others by using a gun to report illegal activity to law enforcement. Similar evidence was received about a 1996 assault on two persons unrelated to Smith on a forest service trail away from the road at issue in this case. The jury heard evidence of a January 1997 altercation with a real estate agent Olsen claimed was trespassing on the private road at issue in this case. The jury also heard evidence of Olsen having a 2000 confrontation with a real estate agent and neighbors; a 2001 assault charge in Cave Creek Municipal Court; assaults on a surveyor in 1998; and screaming obscenities at other third parties in 2005. Smith also provided evidence of Olsen "approach[ing] and [being] aggressive with other third parties at a Circle K" and a third party who worked with Smith to obtain an injunction against harassment against Olsen after he tailgated and honked at them once.

¶16 Smith introduced evidence of Olsen's treatment of her, her family, and her pets. Olsen thought Smith's dogs had killed his dog and had to be talked out of shooting the dogs he believed killed his dog. Smith also offered evidence Olsen violated an injunction against harassment. Olsen also harassed Smith's daughter by calling her derogatory names, forcing her off of the Easement, and telling false stories about her to the police, friends, and on social media. Olsen also made derogatory comments about Smith's husband. Olsen claimed to others that Smith had "black teeth or rotten teeth" so many times he could not identify all the times he did so. Finally, Olsen installed a sign on the Easement, illuminated at night, reading "Punto escénico del diente negro" which roughly translates as "Black Tooth Scenic Point."

¶17 Smith also introduced evidence of Olsen interfering with her property rights. Olsen piled rock and debris into the Easement. Olsen told Smith through counsel that he was maintaining the road and wished to be paid. Olsen and Smith disagreed through counsel about Olsen's efforts to grade or modify the road. Olsen modified the road, including trying to put pavers at the intersection of Olsen's and Smith's drives and piling asphalt gravel for use in paving the road, in ways that limited or blocked Smith's access to the road. Smith testified she could not get through a gate three times in June-July 2017, which by implication she attributed to Olsen.

¶18 Some of Smith's evidence addressed both harassment and interference with property rights. Olsen drove aggressively past her on the road at issue, which she characterized as threatening, intimidating, and unsafe. Olsen drove Smith's Prius a modest distance without her permission. Smith testified Olsen placed cameras on his property looking towards her home and surveilled her. She presented evidence Olsen slashed her tires and her guest's tires, noisily drove a bulldozer at two in the morning, and used his bulldozer to block the Easement. Smith introduced evidence Olsen chased Smith and her guests off the Easement, made threatening comments, shot a contractor's rental equipment, turned off Smith's utility access, and placed rattlesnakes on the Easement. Olsen apparently posted a sign telling potential buyers of property on the road that they could be liable for contributing to maintaining it and that he ran machinery on the road, played loud music from his home, and put up varieties of signage on the road.

¶19 After a ten-day trial, the jury deliberated and returned these verdicts for Smith totaling $3,000,000 (an additional $500 award for vehicle trespass is not at issue on appeal):

Claim	Compensatory Damages	Punitive Damages	Compensatory + Punitive Damages
Breach of Easement	$600,000	Not applicable	$600,000
Intentional Infliction of Emotional Distress	$375,000	$1,000,000	$1,375,000
Negligent Infliction of Emotional Distress	$375,000	Not applicable	$375,000
Assault	$75,000	$250,000	$325,000
Trespass	$75,000	$250,000	$325,000
Totals	$1,500,000	$1,500,000	$3,000,000

¶20 The court later awarded Smith $460,820.08 in attorney's fees pursuant to A.R.S. § 12-341.01, plus $4,047.35 in taxable costs. The court ultimately entered a final judgment awarding Smith $3,465,367.43.

¶21 After trial, Olsen filed a motion for remittitur, a motion to vacate judgment and a motion for new trial and motion for judgment as a matter of law. Smith filed no responses. The court denied these motions, explaining that the Rule 16 sanction was appropriate for failing to appear and failing to make objections in the pretrial process.

¶22 After entry of final judgment under Arizona Rule of Civil Procedure 54(c), Olsen timely appealed, challenging the evidentiary sanction and the punitive damage awards. We have jurisdiction over this appeal under A.R.S. § 12-2101(A) and Article 6, Section 9 of the Arizona Constitution.

DISCUSSION

I. The Superior Court Properly Sanctioned Olsen for Refusing to Participate in the Joint Pretrial Order Process By Finding He Waived His Objections to Smith's Exhibits and His Right to Introduce Exhibits and Call Witnesses.

¶23 We review sanctions under Rule 16, such as the court's ruling that Olsen waived his objections to Smith's exhibits and waived presenting exhibits or witnesses of his own (other than himself), for an abuse of discretion. *Estate of Lewis v. Lewis*, 229 Ariz. 316, 323 ¶ 20 (App. 2012).

A. Rule 16 Required the Court to Sanction Olsen, and that Rule's Reference to Rule 37 Authorized this Sanction, Demonstrating it Was Not an Abuse of Discretion.

¶24 Rule 16's commands that are at issue here are simple. Parties must jointly prepare the joint pretrial order and attend the final pretrial conference. If they don't, absent good cause, the court "must" issue such orders as are just to balance out their refusal. Ariz. R. Civ. P. 16(h)(1)(A)-(C). Rule 16(h), called "Sanctions," refers the court to Rule 37(b)(2)(A)(ii)-(vii) to fashion a just sanction order. The court's orders requiring participation in the pretrial process, with which Olsen failed to comply, reinforced these obligations.

¶25 Rule 37 in turn authorizes the court sanctioning a refusal to make disclosures, cooperate in discovery, or comply with court orders to "prohibit[] the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence." Ariz. R. Civ. P. 37(b)(2)(A)(ii). That rule contemplates sanctions that fit, and are a consequence of, the misconduct. Where a party wrongfully refuses to participate concerning certain matters – here, cooperatively determining in advance what may be used as trial exhibits - sanctions may include barring the party from introducing at trial or objecting to the introduction of trial exhibits. Rule 37(b)(2)(A)(ii)'s logic even more directly supports barring Olsen from calling witnesses or presenting exhibits. Olsen as the "disobedient party" was barred from proving up matters he would not preview in the pretrial order, just as Rule 37(b)(2)(A)(ii) bars parties hiding the ball in discovery or disclosure from proving those matters up at trial. For these reasons, Rule 16's reference to Rule 37(b)(2)(A)(ii) makes the sanction order a permissible exercise of discretion. *See also* Ariz. R. Civ. P. 7.4(d) (reaffirming power to sanction parties for refusal to participate in joint filings required by rule or order).

¶26 Olsen's citation to *Zimmerman v. Shakman*, 204 Ariz. 231 (App. 2003) does not suggest a different result. There, we reversed a superior court's dismissal of a case where the court barred a party from introducing any evidence, and then dismissed the case because, without introducing evidence, it was impossible for the sanctioned party to carry their burden at trial. *Id.* at 236 ¶¶ 22-23. Here, the court was more restrained. It did not bar Olsen from introducing evidence – it set a deadline for him to submit his trial exhibits, and he did not comply or attend the joint pretrial conference, resulting in sanctions addressing exhibits, but not testimony. Likewise, the court did not enter a judgment deriving from Olsen's waiver regarding exhibits and objections. To the contrary, it allowed him to attend trial and cross-examine the plaintiff Smith and her witnesses.

¶27 Olsen is right that a court's broad discretion under Rule 16 is more limited where sanctions are more severe, as when it strikes a pleading or enters a default judgment. *See Estate of Lewis*, 229 Ariz. at 323-24 ¶¶ 18-20 (App. 2012). But Olsen's citation to *Lewis* for this point misses the mark because the court here entered neither of those harsher sanctions. *See Long v. Steepro*, 213 F.3d 983, 986 (7th Cir. 2000) ("We are particularly vigilant in requiring proportionality 'where the draconian sanction of dismissal is imposed.'"). Rule 37(b)(2)(A)(ii) suggested the court choose the sanction that most closely fit what Olsen failed to do. Olsen has shown no abuse of discretion in the sanction of waiver here: it was proportionate and dictated by Olsen's litigation choices.

¶28 The court also had the discretion to impose the sanction because it had warned the parties they had to provide their objections in the pretrial order on pain of waiving them. The court's October 30, 2018 order warned Smith and Olsen that the failure to participate in the joint pretrial statement would result in the waiver of objections to exhibits. Knowing that, Olsen did not object to Smith's 227 trial exhibits in the Joint Pretrial Statement of March 2019.

¶29 Even after the court repeatedly invited additional joint pretrial statements, Olsen failed to submit, or seek permission to submit, his own Joint Pretrial Statement objecting to Smith's exhibits. This is waiver. *See Compass Bank v. Bennett*, 240 Ariz. 58, 60-61 ¶ 11 (App. 2016) (defining waiver as the intentional relinquishment of a known right). Given Olsen's repeated waiver of his objections, his argument that the court abused its discretion by admitting Smith's trial exhibits fails.

B. Olsen's Argument That the Admission of Objectionable Evidence Shows the Sanction Was Error Fails.

¶30 Much of Olsen's argument is premised on the idea that by admitting Smith's exhibits – including Exhibit 3, a twenty-page summary of the evidence – the court received at trial a considerable amount of hearsay, irrelevant, or otherwise objectionable evidence, thereby prejudicing Olsen. While that premise is correct, the conclusion Olsen would have us draw from it is not. Waiving objections to evidence includes waiving potentially valid objections. Olsen's citation to *Elia v. Pifer*, 194 Ariz. 74 (1998), illustrates why the court did not err by letting in otherwise objectionable exhibits. Citing *Elia*, Olsen correctly states that "[a] trial court's decision to admit or exclude evidence will not be reversed unless the ruling constitutes a 'clear abuse of discretion [] and prejudice results.'" *Id.* at 79 ¶ 22. As explained in paragraphs 24-29, above, there was no abuse of discretion in doing so, so the fact that prejudice may have resulted does not create reversible error. *See id*. It would be a bootstrap to suggest that the wholesale admission of prejudicial information to which a litigant waived objection in the superior court must, now on appeal, be reviewed for objectionability for the first time. Olsen cites no authority for this proposition. Moreover, we are aware of none, and *Elia* supports the contrary result.

¶31 Olsen's request for relief is similarly deficient. He asks us to reverse and remand for the superior court to "direct[] the proper preparation of joint pretrial filings." But the superior court directed exactly that in 2019 and 2021, and Olsen twice chose not to participate. It would be illogical to undo a sanction and thus void the jury's verdict to order a process Olsen failed to participate in when previously ordered to do so and might well skip again. Olsen has shown no abuse of discretion in the superior court's response to his waiver of his participation in these critical aspects of the pretrial and trial process.

II. The Jury's Awards of Compensatory Damages for Breach of Easement, Assault, Trespass, and Intentional Infliction of Emotional Distress Were Supported by Sufficient Evidence, and Do Not Shock the Judicial Conscience.

¶32 Olsen challenges the jury's awards of $1,500,000 in compensatory damages and $1,500,000 in punitive damages as suggesting passion and prejudice that shocks the judicial conscience. *See Acuna v. Kroack*, 212 Ariz. 104, 114 ¶¶ 36, 39 (App. 2006) (explaining that we will set aside jury verdicts that are so excessive as to shock the judicial conscience,

or which suggest by their magnitude that they are based in passion or prejudice). While Olsen's waiver created a trial in which the jury saw and heard otherwise inadmissible evidence, that situation did not entitle Smith to awards based upon passion and prejudice. *See id.; see also Hyatt Regency Phx. Hotel Co. v. Winston & Strawn*, 184 Ariz. 120, 135-36 (App. 1995) (similar). We must decide if any component of the jury's verdict is so excessive as to shock the judicial conscience or if, instead, they are plausibly assessments of actual damage. The former must be reversed or remitted, while the latter must stand.

A. The Jury's Verdict for $600,000 For Breach of Easement Is Supported By the Record and Does Not Shock the Judicial Conscience.

¶33 The jury awarded Smith $600,000 for breach of the Easement, which Olsen argues shocks the judicial conscience. While we recognize this contract claim has a foundation different from Smith's tort claims, Olsen has nonetheless not shown this verdict lacked a sufficient relationship to the trial evidence.

¶34 First, Smith argued she lost $30,000 per year in rent because of Olsen's interrupting access to her house. Olsen argues that essentially no damages for breach of Easement were justified, but the evidence of years of lost rental income defeats that argument.

¶35 Second, despite arguing Smith was entitled to no damages for periods more than six years before the filing of the complaint, Olsen's counsel did not ask the court to instruct the jury on a statute of limitations defense or as to any limited time period within which damages would be appropriate. In addition, reliance on a statute of limitations is an affirmative defense, Ariz. R. Civ. P. 8(d)(1)(P), placing the burden of proof on Olsen, *Beck v. Nevell*, 256 Ariz. 361, 367 ¶ 18 (2024), who clearly did not meet his burden. Nor did Olsen's counsel argue a statute of limitations defense in closing, either generally or as applied to damages. This waiver also cuts against remitting the damage award. *See Bradshaw v. State Farm Mut. Auto. Ins. Co.*, 157 Ariz. 411, 419-20 (1988) (explaining that party waives an argument when they fail to raise it through an objection or a proposed jury instruction).

¶36 Third, there was abundant evidence Olsen interrupted Smith's ability to access her home through the breaches of easement, as we explained in detail in paragraphs 17 and 18. While this type of damage does not lend itself to ready computation, that does not mean the jury is

precluded from assigning an economic value to it. *See Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946) (explaining that jury may reasonably estimate damage awards that are not susceptible of ready computation). Based on the totality of the record, Olsen has not shown that the $600,000 compensatory damage award for breach of the Easement shocks the judicial conscience. As such, we decline to vacate it. *See Fischer v. State*, 242 Ariz. 44, 52 ¶ 28 (2017) (explaining court of appeals does not sit as fourteenth juror).

B. The Jury's Awards of $75,000 in Compensatory Damages for Assault and Trespass Are Supported By the Record and Do Not Shock the Judicial Conscience.

¶37 There is ample evidence in the record to support the jury's verdicts for assault and for trespass. Smith testified to a number of episodes of running Smith off of the Easement by his use of vehicles, and also verbal assaults.

¶38 Smith's evidence also included testimony that Olsen came on her property without permission in a series of threatening interactions, and testimony that someone (implicitly Olsen) had come on her property, disrupting her possessions and creating hazards.

¶39 While the jury was free to disregard some or all of this testimony, it apparently accepted at least some of it and found it reasonable to award $75,000. Nothing about the size of these awards suggests passion or prejudice. We decline to disturb them.

C. The Jury's Award of $375,000 for Intentional Infliction of Emotional Distress Is Supported By the Record and Does Not Shock the Judicial Conscience.

¶40 There is likewise evidence in the record to support the jury's verdict awarding Smith $375,000 for intentional infliction of emotional distress. Smith testified to a host of hostile and threatening interactions with Olsen, including those summarized in Paragraphs 15 through 18 above as well as what she claims was harassment, intimidation on the common road, placing harassing signs disparaging Smith's appearance, poisoning her dog, and putting poisonous snakes near her house.

¶41 Olsen testified that he meant her no harm, and presented his side of what he sees as disagreements among neighbors. While the jury was free to accept either Smith's or Olsen's proofs, the jury awarded Smith $375,000 for what she persuaded the jury was a conscious, hostile campaign of intimidation intended to injure her emotionally. Olsen has not shown that this award is untethered to the substantial proofs or that its size represents passion and prejudice. We therefore affirm it.

III. The Verdict for Negligent Infliction of Emotional Distress Duplicates the Verdict for Intentional Infliction of Emotional Distress, and Is Vacated.

¶42 In addition to suggesting it shocks the judicial conscience, Olsen challenges the award of negligent infliction of emotional distress as improperly duplicative of the award for intentional infliction of emotional distress. We agree with Olsen on the latter point and vacate the jury's award of $375,000 for negligent infliction of emotional distress.

¶43 The award violates the precept that a plaintiff may not receive two separate awards of damage to compensate it for the selfsame injury. *See* RESTATEMENT (THIRD) OF TORTS: REMEDIES § 3 ("One Satisfaction (No Double Recovery)") cmt. D, Tentative Draft No. 1 (April 2022) ("Plaintiff can recover once for each harm suffered, no matter how many ways that harm is described or how many legal rules were violated to inflict it."). When asked whether the facts supporting Smith's claims for intentional and negligent infliction of emotional distress differed, Smith's counsel conceded at argument before this court what the record shows: "I think the operative facts are exactly the same for both." Because the claims arise from the same conduct, they are duplicative, which is fatal to the award for negligent infliction of emotional distress.

IV. Although the Record Supports the Jury's Decision to Award Punitive Damages, its Verdict of $1.5 Million in Punitive Damages Was Unconstitutionally Excessive and Must Be Reduced.

A. The Record Supports the Jury's Decision to Award Punitive Damages.

¶44 As a matter of Arizona law, punitive damages are awarded to punish and deter conduct. *Swift Transp. Co. of Ariz. LLC v. Carman in and for Cnty. of Yavapai*, 253 Ariz. 499, 505 ¶ 20 (2022). A plaintiff is entitled to punitive damages when they show through clear and convincing evidence that a defendant acted with an evil mind. *Id.* (quoting *Gurule v. Ill. Mut. Life and Cas. Co.*, 152 Ariz. 600, 601 (1987) ("[U]nless the evidence establishes

that . . . [the] defendant acted with an evil mind, punitive damages are unnecessary because compensatory damages adequately deter.")). An evil mind can be found where the defendant intended conduct or acted with reckless disregard for the consequences of conduct. *Rawlings v. Apodaca*, 151 Ariz. 149, 163 (1986).

¶45 The record here reflects intentional conduct aimed at Smith from which the jury could find the state of mind required for punitive damages. *Swift*, 253 Ariz. at 505 ¶ 20. Olsen repeatedly intimidated Smith, preventing her from full use of the shared Easement. Olsen engaged in behavior to obstruct Smith's access to the Easement, tried to run Smith off the road, trespassed into Smith's vehicle, trespassed onto Smith's property, and violated orders enjoining him from harassing Smith. And again, the evidence before the jury concerned a very long pattern of claimed harassment. The jury was at liberty to reject and disregard it, or to adopt it. Thus, we reject Olsen's contention that this was not a punitive damages case.

B. Because the Punitive Damage Awards Are Excessive in Light of the Degree of Reprehensibility Present, We Reduce Them to $525,000, to Reflect a 1:1 Ratio of Compensatory Damages to Punitive Damages.

¶46 As a matter of federal constitutional law, we next assess if the punitive damage award was reasonable in the circumstances. The United States Constitution limits the amount of punitive damages courts may award. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). In reviewing the punitive damages award, the United States Supreme Court directs us to consider the: (1) defendant's degree of reprehensibility; (2) ratio of compensatory damages and punitive damages award; and (3) comparison of punitive damages award and civil penalties in similar cases. *Nardelli v. Metro Grp. Prop. & Cas. Ins. Co.*, 230 Ariz. 592, 609 ¶¶ 83-84 (App. 2012) (quoting *State Farm*, 538 U.S. at 418). These three principles are known as the *Gore* guideposts, because the United States Supreme Court first set them forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996). *State Farm*, 538 U.S. at 418. Applying them, we review the punitive damages award *de novo*. *Nardelli,* 230 Ariz. at 609 ¶ 83.

1. Olsen's Conduct Was Sufficiently Reprehensible to Justify a Substantial Award of Punitive Damages.

¶47 Reprehensibility is "[p]erhaps the most important indicium of the reasonableness of a punitive damages award." *Arellano v. Primerica Life Ins. Co., Co.*, 235 Ariz. 371, 379 ¶ 36 (App. 2014) (quoting *Gore*, 517 U.S. at 575). When analyzing reprehensibility, we consider five factors including: (1) physical versus economic harm; (2) indifference to or a reckless disregard of a person's health or safety; (3) financial vulnerability of target; (4) repetition of conduct; and (5) intentional versus accidental harm. *Arellano*, 235 Ariz. at 379 ¶ 36 (App. 2014). No single factor is more important than the others. *Id.*

a. The Evidence Regarding Physical Harm Cuts Modestly Against Reprehensibility.

¶48 When considering whether the harm was physical versus economic, we must weigh physical harm more heavily. *Gore*, 517 U.S. at 576. Smith argues that the harm to her from harassment was physical, claiming "Olsen's conduct has made Smith chronically sick, nervous and very stressed out; it has also changed her personality." Smith argues she fears Olsen, is on guard, and is lonely. Yet Smith cites no instances in which Olsen's conduct specifically caused a physical manifestation of harm. *See Ford v. Revlon, Inc.*, 153 Ariz. 38, 41 (1987) (requiring anxiety to result in physical symptoms, such as high blood pressure, a nervous tic, chest pains, or rapid breathing). We thus agree with Olsen that Smith's harm was largely economic, which should be accorded less weight. This factor reduces the degree of reprehensibility.

b. The Record Shows Reckless Behavior by Olsen, Which Supports Reprehensibility.

¶49 Conduct that displays a reckless disregard for another person's health or safety more clearly supports punitive damages than would mere negligent action. *Gore*, 517 U.S. at 576. For the same reasons we found the jury's substantial awards for assault and intentional infliction of emotional distress supported by the record, we agree with Smith that Olsen's conduct supports this factor. By its substantial award for assault, the jury accepted Smith's testimony that Olsen imperiled her safety by running her off the shared road, that he violated injunctions against harassment, derided her appearance, and campaigned to make her life miserable over a period of years. This conduct, accepted as true by the jury, supports an award of punitive damages.

c. Evidence Suggesting Smith Was Financially Vulnerable Lends Some Support for Reprehensibility.

¶50 When the target of tortious conduct is financially vulnerable, that factor supports punitive damages. *Gore*, 517 U.S. at 576. Smith argues Olsen's conduct "was fueled in part by Smith's financial vulnerability and Olsen's new-found wealth," which misapprehends this factor. Conduct need not be motivated by financial vulnerability; it is merely necessary that the target be financially vulnerable. As Smith argued in closing, Olsen's harassment cost her substantial income, making her more financially vulnerable. While this factor is less supportive of punitive damages than the pervasive and intentional nature of Olsen's conduct, it lends further support to reprehensibility. *See id.*

d. The Repetitive Nature of the Conduct at Issue Supports Reprehensibility.

¶51 Repetitive conduct tends to support punitive damages, while isolated conduct tends to undercut such awards. *State Farm*, 538 U.S. at 419. Even if one confines the analysis of Olsen's behavior to the limitations periods of the claims at issue in this case, the record demonstrates repetition of conduct that supports punitive damages. There were repeated attempts to run Smith off the road, trespass into Smith's vehicle and onto her property, and violations of injunctions against harassment. Olsen engaged in repetitive behavior directed at Smith, which supports reprehensibility.

e. The Intentional Nature of the Conduct at Issue Supports Reprehensibility.

¶52 Intentional and willful conduct likewise supports an award of punitive damages. *Gore*, 517 U.S. at 576. The reasons we affirm the jury's verdict for intentional infliction of emotional distress likewise support this factor. Assault, which the jury also found, is an intentional tort. This factor supports reprehensibility.

2. The 2.67:1 and 3:1 Ratios Between the Jury's Punitive and Compensatory Damage Awards Were Unreasonably High.

¶53 An award of punitive damages must be reasonable compared to the associated award of compensatory damages. *Gore*, 517 U.S. at 580-81. The appropriate ratio is highly fact-specific. *State Farm*, 538 U.S. at 425. Recognizing there is no bright-line rule to calculate punitive damages, a high ratio is only appropriate in situations where the defendant acted egregiously, or the damages are difficult to calculate. *Hudgins v. Southwest Airlines, Co.*, 221 Ariz. 472, 491 ¶ 57 (App. 2009) (citing *State Farm*, 538 U.S. at 426). Where, as here, "compensatory damages are substantial," a lesser

ratio is warranted, recognizing "[t]he precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *State Farm*, 538 U.S. at 425.

¶54 The jury here awarded substantial compensatory damages. *See Nardelli*, 230 Ariz. at 611 ¶ 96 (finding $155,000 in compensatory damages substantial). For that reason, it may be appropriate to award punitive damages in an amount equal to the compensatory damages. *State Farm*, 538 U.S. at 425 (suggesting that a 1:1 between punitive damages and compensatory damages may "reach the outermost limit of the due process guarantee" when compensatory damages are substantial). Our courts have thus repeatedly reduced punitive damage awards that exceeded the awards of compensatory damages for the same claims, imposing 1:1 ratios. *Nardelli*, 230 Ariz. at 612 ¶ 100 (vacating punitive damage award in 4:1 ratio, directing entry of award at 1:1 ratio); *Hudgins*, 221 Ariz. 491, 492 ¶¶ 58, 65 (reversing punitive damage award in 8:1 ratio, directing entry of award at 1:1 ratio); *Sec. Title Agency, Inc. v. Pope*, 219 Ariz. 480, 504 ¶ 108 (App. 2008) (reducing punitive damage award from 5.7 ratio to 1:1 ratio).

¶55 The jury's punitive damages awards in this case exceed these constitutional limitations. Awarding $375,000 in compensatory damages for intentional infliction of emotional distress, the jury then returned a verdict awarding $1 million award of punitive damages for the same conduct. It likewise awarded Smith $75,000 of compensatory damages for each of assault and trespass and awarded her $250,000 of punitive damages for each. These awards represent ratios of 2.67:1 (the intentional infliction claim), and 3:1 (assault and trespass claims).

¶56 Applying these legal standards, the 2.67:1 and 3:1 ratios are excessive. True, there is intentional and repetitious conduct. And while the jury had sufficient evidence to find intentional infliction of emotional distress, the trial evidence does not reflect the most extreme instance of that tort. Finding some award of punitive damages justified – while not those outer-limit ratios – gives considerable respect to Smith's proof and the jury's decision to award punitive damages while honoring our constitutional responsibility to independently evaluate awards of punitive damages.

3. The Comparison of Civil and Criminal Penalties Does Not Impact the Punitive Damage Award.

¶57 We turn to the final guidepost, the disparity between the punitive damages award and civil penalties for analogous conduct. *State Farm*, 538 U.S. at 428. The parties, however, made no argument on this point. *See Hudgins*, 221 Ariz. at 492 ¶ 61 ("We find this guidepost the least helpful in this case. No party contends a comparable penalty for [the] misconduct [at issue] exists."). This factor is a wash.

4. Applying the *Gore* Guideposts, the Award of Punitive Damages Must be Reduced to a 1:1 Ratio to Their Associated Compensatory Damages.

¶58 For two reasons, the awards of punitive damages must be reduced to a 1:1 ratio with their associated awards of compensatory damages. This results in punitive damage awards of $375,000 for intentional infliction of emotional distress, $75,000 for assault, and $75,000 for trespass.

¶59 *First*, as just explained, courts have repeatedly found reducing awards from ratios of greater than 1:1 to 1:1 justified, mindful of *State Farm*'s admonition that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *See Hudgins*, 221 Ariz. at 491 ¶ 57 (quoting *State Farm*, 538 U.S. at 425); *Pope*, 219 Ariz. at 504 ¶ 108 (reducing punitive award to 1:1 ratio, "particularly given the substantial compensatory damages awarded").

¶60 *Second*, as to the reprehensibility factors, the lack of financial harm and the modest showing of financial vulnerability somewhat offset the intentional and repetitive nature of the conduct at issue. Reducing the ratio to 1:1 takes account of Smith's proofs and honors due process requirements. *See Pope*, 219 Ariz. at 504 ¶ 108 (reducing punitive damage award to amount equal to substantial "compensatory damages assessed" by the jury in reliance on *State Farm*'s 1:1 ratio: "because application of due process principles to punitive damage awards depends so much on the facts and the record, there are few absolute rules").

CONCLUSION

¶61 For these reasons, we affirm the judgment's awards to Smith of $600,000 for breach of the Easement, $375,000 for intentional infliction of emotional distress, $75,000 for assault, and $75,000 for trespass. We vacate the judgment for Smith for $375,000 for negligent infliction of emotional distress. Finally, we remand to allow the superior court to enter a judgment for punitive damages for intentional infliction of emotional distress reduced from $1,000,000 to $375,000, to remit the judgment for punitive damages for assault from $250,000 to $75,000, and to remit the judgment for punitive damages for trespass from $250,000 to $75,000.

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