

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK
APR 30 2007
COURT OF APPEALS
DIVISION TWO

TUCSON GASTROENTEROLOGY)
SPECIALISTS, P.C.; TUCSON)
GASTROENTEROLOGY INSTITUTE,)
L.L.C.; TUCSON THERAPEUTIC)
RESEARCH, INC.; JOSE L. HURTADO,)
M.D., and ANA LUISA ROSALES,)
M.D., husband and wife; and JOHN J.)
McNERNY, JR., M.D., and KATRIN B.)
McNERNEY, husband and wife,)
)
Plaintiffs/Counterdefendants/)
Appellees/Cross-Appellants,)
)
v.)
)
SYLVAIN SIDI, M.D., and CAROLE K.)
SIDI,)
)
Defendants/Counterclaimants/)
Appellants/Cross-Appellees.)
)

2 CA-CV 2006-0108
DEPARTMENT B

MEMORANDUM DECISION
Not for Publication
Rule 28, Rules of Civil
Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20036852

Honorable Carmine Cornelio, Judge

AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED WITH DIRECTIONS

Bryan Cave LLP
By J. Alex Grimsley

Phoenix

and

Mary Clare Bonaccorsi and William F. Zieske

Chicago, Illinois
Attorneys for Plaintiffs/
Counterdefendants/
Appellees/Cross-Appellants

Snell & Wilmer L.L.P.

By Jeffrey Willis, Andrew M. Jacobs,
and Sarah K. Jezairian

Tucson
Attorneys for Defendants/
Counterclaimants/
Appellants/Cross-Appellees

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

¶1 This case arises from a letter signed by appellant Sylvain Sidi, M.D., and his wife Carole on May 31, 2002. The letter had been drafted by the attorney for the medical practice Sidi coowned with two other doctors, appellees Jose Hurtado and John McNerney. That practice included three entities, Tucson Gastroenterology Specialists (TGS), Tucson Gastroenterology Institute (TGI), and Tucson Therapeutic Research Institute (TTRI). The letter stated Sidi was resigning from the practice, his share of it would be purchased by the other two doctors, and the value of his share of the entities would be determined in accordance with preexisting written agreements and, in the absence of present agreements, future agreements “incorporating terms and conditions orally agreed upon by the parties and [their] accountant.”

¶2 Sidi, Hurtado, and McNerney negotiated the buyout throughout the summer. But before they reached a final agreement, Sidi, through counsel, challenged the validity of the May 31 resignation letter. In response, Hurtado and McNerney filed a complaint for declaratory judgment to determine “what the relationship and rights of the parties were.” After a jury trial at which Sidi challenged the enforceability of the letter and the parties disputed the value of the practice, Sidi now appeals from the trial court’s findings that he resigned from the practice and the value of his share was only \$1.666 million. In this vein, he asserts the trial court erred in admitting prejudicial evidence and denying his motion for judgment as a matter of law (JMOL) on three claims he contends the court should not have submitted to the jury. He also argues he is entitled to prejudgment interest and an additur to the \$1.666 million judgment in his favor for the value of his share of the practice.

¶3 Hurtado and McNerney (hereinafter “the practice”) cross-appeal, contending the trial court erred when it later granted Sidi JMOL on three claims and overturned the jury’s verdicts. The practice also contends the trial court erred in denying its request for attorney fees both as sanctions for Sidi’s alleged misconduct in the litigation and because it was the prevailing party. We agree with the practice that the court erred when it granted JMOL in Sidi’s favor on the practice’s claim that Sidi breached the TGI operating agreement. Therefore, we affirm the court’s judgment in part and reverse it in part and remand the case with instructions to the trial court to reinstate the jury verdict against Sidi in the amount of \$275,000 on the breach of operating agreement claim.

FACTUAL BACKGROUND

¶4 We view the facts in the light most favorable to sustaining the judgment. *See Cimarron Foothills Cmty. Ass'n v. Kippen*, 206 Ariz. 455, ¶ 2, 79 P.3d 1214, 1216 (App. 2003). Around the time Sidi signed the letter on May 31, 2002, he hired an attorney to represent him in the buyout of his share of the practice. TGS already had a buy/sell agreement in place, and Sidi soon began receiving payments for his share of that entity in accordance with that agreement. However, TGI and TTRI did not have buy/sell agreements in place when Sidi signed the letter. The attorneys negotiated throughout the summer and reached an agreement in principle for a buyout formula. And, at Sidi's request, he, Hurtado, and McNerney met three times during the summer to discuss in part the possibility of Sidi's returning to the practice of medicine. One idea was for Sidi to only perform research. Another was to create a "practice within a practice" that would involve Sidi's renting space from TGS to see his own group of patients but not returning as a "full-time partner and member of [the] group." But, by the last meeting, Hurtado and McNerney "thought it was still too soon [for Sidi] to consider doing anything in the way of medical care," after his suicide attempt.

¶5 Then Sidi, through letters sent by his new attorney Jeffrey Willis in October 2002, threatened to contest the validity of the resignation letter as well as his offer to sell his interest in the practice. Believing that negotiations for the buyout had ended, the practice sought a declaratory judgment to determine "what the relationships and rights of the

parties were.” The complaint sought a declaration that Sidi had resigned from TGI, TGS, and TTRI. The practice also claimed Sidi had breached the TGI operating agreement by resigning, he had made defamatory statements in a letter to their patients he had mailed in July 2003 informing them his office had moved, and the defamatory statements had tortiously interfered with the practice’s business relationships. The tortious interference claim was dismissed before trial. The practice eventually amended its complaint to claim Sidi had breached the implied covenant of good faith and fair dealing by ending buyout negotiations. The practice also included a claim for promissory estoppel, arguing it had relied on Sidi’s resignation to its detriment.

¶6 Sidi answered the complaint, contending the May 31 letter was “obtained under circumstances such that it has no legal force or effect.” He counterclaimed for an accounting of his share of the value of the practice and reimbursement of loans he had made to the practice. He also alleged that Hurtado and McNerney had: (1) breached their fiduciary duty to him as well as the covenant of good faith and fair dealing; (2) committed fraud against him by causing the resignation letter to be prepared at a time when they knew Sidi was incompetent, thereby invalidating any actions taken by the practice since June 1, 2002; and (3) tortiously interfered with his business relationships. Finally, he requested an award of attorney fees and costs and sought a declaratory judgment that he was still part owner of the practice.

¶7 The jury found Sidi had breached the operating agreement and the covenant of good faith and fair dealing and awarded the practice \$275,000 and \$250,000 respectively. The jury also awarded the practice \$250,000 on its alternative promissory estoppel claim. The jury found the practice had not proved its defamation claim against Sidi, and Sidi had not proved the practice breached the covenant of good faith and fair dealing or its fiduciary duty.

¶8 And, in responding to three sets of interrogatories, the jury found that Sidi had not proved he was incompetent when he signed the May 31 letter nor that he or the practice was operating under a mutual mistake of fact in relation to the letter. The jury found he had not proved he signed the letter as the result of constructive fraud or a breach of fiduciary duty by his former partners. It found his actions during the summer of 2002 showed he had ratified the letter, acquiesced in the terms of the letter, and waived the right to claim and was estopped from claiming the letter was not valid.

¶9 The jury therefore found the May 31 letter was enforceable; there was an offer by Sidi capable of acceptance; the practice accepted the offer; the letter contained consideration; the terms of the letter were sufficiently certain and complete to form a binding agreement; the letter was an offer by Sidi to resign as an employee, officer, and director of TGS, officer and director of TTRI, and manager of TGI; and the offer was not contingent on the practice's purchase of his ownership in those companies. Finally, the jury valued Sidi's interest in TGI and TTRI at \$1.666 million.

¶10 The trial court, in its judgment, adopted most of the jury’s findings and declared that Sidi no longer owns or has any interest in the practice and that the award of \$1.666 million for his interests was “a fair amount within the parameters understood and agreed to by the parties as of the May 31, 2002, letter and subsequent thereto during the Summer of 2002.” However, the court concluded that, although the practice had proved that Sidi had breached the covenant of good faith and fair dealing and its claim of promissory estoppel, the “evidence of damages was speculative.” Accordingly, it rejected the jury’s damage awards of \$250,000 on each of those claims. The court also rejected the jury’s verdict on the practice’s claim that Sidi had breached TGI’s operating agreement, finding it was not supported by sufficient evidence as to both the breach and the damages. Finally, the court denied the practice’s application for sanctions and attorney fees and Sidi’s application for prejudgment interest. This appeal and cross-appeal followed.

APPEAL

Enforceable Agreement

¶11 Sidi argues the trial court erred by denying his motion for judgment as a matter of law that he remains an owner of TGI and TTRI. This inquiry necessarily involves a determination of whether the May 31 letter constituted an enforceable agreement regarding Sidi’s interest in TGI and TTRI, a question of law we review *de novo*. See *Andrews v. Blake*, 205 Ariz. 236, ¶ 12, 69 P.3d 7, 11 (2003).

¶12 An enforceable agreement requires “an offer, an acceptance, consideration, and sufficient specification of terms so that obligations involved can be ascertained.” *Contempo Constr. Co. v. Mountain States Tel. & Tel. Co.*, 153 Ariz. 279, 281, 736 P.2d 13, 15 (App. 1987). Sidi argues the agreement is unenforceable because the specific terms of the sale of his interest in TGI and TTRI were not specified. Rather, the letter states the purchase of his interest would be completed “in accordance with agreements to be entered into incorporating terms and conditions orally agreed upon by the parties.”¹

¶13 “The requirement of certainty is relevant to the ultimate element of contract formation, i.e., whether the parties manifested assent or intent to be bound.” *Rogus v. Lords*, 166 Ariz. 600, 602, 804 P.2d 133, 135 (App. 1991). If the parties’ actions “show conclusively that they have intended to conclude a binding agreement, even though one or more terms are missing or are left to be agreed upon[,] . . . courts endeavor, if possible, to attach a sufficiently definite meaning to the bargain.” Restatement (Second) of Contracts § 33 cmt. a (1981); see *Schade v. Diethrich*, 158 Ariz. 1, 9, 760 P.2d 1050, 1058 (1988) (adopting Restatement view); *AROK Constr. Co. v. Indian Constr. Servs.*, 174 Ariz. 291, 297, 848 P.2d 870, 876 (App. 1993) (policy of law favors enforcement of contract when it

¹The full text of that portion of the letter states that the purchase of Sidi’s interest in TGS, TGI, and TTRI “will be completed in accordance with agreements presently in effect relating to each of those entities, or if there is no such agreement, in accordance with agreements to be entered into.” Because TGS already had an agreement in effect at the time of the letter, Sidi does not argue the terms were not sufficiently specific as to that entity, but only as to TGI and TTRI.

is clear parties intended to be bound); *see also Joy v. City of St. Louis*, 138 U.S. 1, 43, 11 S. Ct. 243, 255 (1891) (contract containing provision for “fair and equitable compensation . . . as may be agreed upon” held sufficiently definite to be enforceable).

¶14 Here, there is ample objective evidence of the parties’ intent to be bound by the letter. James Sakrison, the attorney for the practice at the time of the May 31 letter, testified that the practice’s accountant Jon Young had asked to meet about buy/sell agreements for all entities in May 2002 because of concerns about Sidi’s health. The two met on May 29, and according to Sakrison, Young stated the doctors had previously agreed the buyout would be based on one-third of the cash flow for five years or, essentially, one-third of “the earnings of the company for a period of five years.” Sakrison began to draft buy/sell agreements after the meeting.

¶15 On July 3, he sent a draft of a proposed purchase agreement for Sidi’s interest in TGI and TTRI to the attorney representing Sidi in the buyout, Terry Roman. Sakrison testified he communicated with Roman several times during the summer of 2002 regarding the buyout and they exchanged drafts of proposed purchase agreements. Sakrison did not understand there was “any disagreement [with Roman] on the overall buyout provisions. It was just some of the wording and some of the provisions that needed to be cleaned up.” He testified that, based on his memorandum detailing his conversation with Roman, they were “basically in accord” as to the agreement for TTRI and TGI. He sent a second draft to Roman with proposed changes in September. Although he did not receive a response from

Roman, Sakrison received a letter from Sidi's new attorney Willis in October. The letter stated that

although the parties have discussed the possible buyout of Dr. Sidi's interest in TGI [and T]TRI . . . , it is still possible that Dr. Sidi may wish to retain his ownership in these entities. This is particularly true if Dr. McNerney and Dr. Hurtado are unwilling to pay an appropriate price on acceptable terms for his interest in these companies.

At the end of October, Sakrison received another letter from Willis stating that the May 31 letter was not an effective resignation because Sidi was taking medication and under a physician's care when he signed the document.

¶16 Young testified, based on his notes of a February 2002 board meeting of the practice, that the doctors attempted to draft a buy/sell agreement for TGI and TTRI. No agreements as to TGI were reached at that meeting. But, by April, Young testified, they had decided on a cash flow approach but had not decided on the "cap rate" or the "payout." Young believed "it was all parties' intention to draft, sign and execute a buy/sell agreement with TGI."²

¶17 McNerney testified the first time any problem with Sidi's resignation was brought to his attention was in the second letter Willis sent in October 2002. McNerney testified that he was concerned by Willis's first letter's statement about a "possible buyout"

²Although the witnesses discussed TGI separately from TTRI at times in their testimony, the jury's award of \$1.666 million was for both entities. And the parties have not treated the entities separately in their arguments on appeal. Therefore, we presume all references to one entity necessarily include the other.

because “[t]here was nothing possible about it. That’s what we were trying to reach an agreement to.” He testified they had relied on the letter to “invest lawyer’s time, money, accountant’s time and money to go forward with the buyout.” McNerney testified that after a meeting in April, the doctors had “agreed in principle” on a buyout formula of one-third of a multiple of five times cash flow and this agreement was the oral agreement referred to in the May 31 letter. Hurtado similarly testified they were negotiating a buyout with Sidi in summer 2002 and the practice had offered to buy Sidi’s interest in TGI at five times cash flow. Hurtado also first learned about Sidi’s challenge to the resignation in Willis’s letter.

¶18 This evidence, taken together and viewed in the light most favorable to upholding the judgment, shows the parties intended to fulfill the terms of the May 31 letter by negotiating an agreement for the buyout of Sidi’s interest in the practice. There was testimony that the buyout issue was discussed at meetings prior to May 31, 2002; that the three doctors had agreed in principle on the buyout formula; and that the parties simply disagreed on the appropriate multiplier for the yearly cash flow. Furthermore, that the parties had already reached an agreement on the buyout of TGS and Sidi had been receiving payments in accordance with that agreement since shortly after the May 31 letter suggests an intent to reach an agreement and sell the other two entities of the practice as well. *See Schade*, 158 Ariz. at 10, 760 P.2d at 1060 (“The fact that one of [the parties], *with the knowledge and approval of the other*, has begun performance is nearly always evidence that

they regard the contract as consummated and intend to be bound thereby.’”), *quoting* 1 Arthur Corbin, *Corbin on Contracts* § 95, at 407 (1963).

¶19 Finally, the language of the letter itself demonstrated that Sidi had not only agreed to resign and accept a buyout, but that he had also reached a general understanding with the practice as to the general terms of that buyout. *See supra*, n.1.

¶20 Although Sidi argues the above events are insufficient as a matter of law to form a contract, the cases he relies on do not compel that conclusion. Sidi quotes *Ripps v. Mueller*, 21 Ariz. App. 159, 160, 517 P.2d 512, 513 (1973), for the proposition that “agreements to make an agreement are not specifically enforceable when material terms are left to future negotiation.” But we made that statement in addressing a claim for specific performance, a problem we do not address here. *See id.* at 159-60, 517 P.2d at 512-13.

¶21 Sidi also relies on *Goldbaum v. Bloomfield Building Industries, Inc.*, 10 Ariz. App. 453, 459 P.2d 732 (1969), arguing “a putative agreement is unenforceable if the only method for determining the consideration to be paid is via some future agreement between the parties.” There, Division One of this court found that the conflict in the testimony about the parties’ understanding of the phrase “ten per cent participation agreement” rendered the contract “vague, indefinite, uncertain and therefore unenforceable.” *Id.* at 458, 459 P.2d at 737. In reaching this conclusion, the court relied on the Restatement of Contracts § 32 illus. 10 (1932), which states in part that if “the only method of settling the price is dependent on future agreement of the parties, and [if] either party may refuse to agree, there

is no contract.” *See* 10 Ariz. App. at 458, 459 P.2d at 737. But, in the May 31 letter, Sidi agreed that the buyout “will be completed,” specified the manner by which a buyout price would be determined, and did not suggest that his agreement was contingent on a more specific final agreement regarding the ultimate terms of the buyout. Viewing the letter in its entirety and in light of the evidence of Sidi’s intent to be bound by it, we conclude the letter’s reference to future agreements does not render the agreement unenforceable. Accordingly, we affirm the portion of the judgment declaring that Sidi no longer owns an interest in TGI or TTRI.

Prejudgment Interest

¶22 Sidi argues the trial court erred by denying his request for prejudgment interest on the award of \$1.666 million for his share of TGI and TTRI. We review *de novo* whether a party is entitled to prejudgment interest. *Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 508, 917 P.2d 222, 237 (1996). A party is entitled to prejudgment interest as “a matter of right” on a liquidated claim. *Id.* ““A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion.”” *La Paz County v. Yuma County*, 153 Ariz. 162, 168, 735 P.2d 772, 778 (1987), quoting *Ariz. Title Ins. & Trust Co. v. O’Malley Lumber Co.*, 14 Ariz. App. 486, 496, 484 P.2d 639, 649 (1971).

¶23 Sidi contends each of the practice’s three methods for determining the value of his interest resulted in a liquidated amount on which he was entitled to prejudgment

interest. The practice's expert, James Travis, testified that Sidi's share of the value of the business was \$1 million. But, on cross-examination, he conceded he had mistakenly subtracted two figures from the calculation, which if corrected, would render the value of Sidi's interest \$1.866 million. In response to an interrogatory, the jury found Sidi's interest in the practice was worth \$1.666 million.

¶24 During a post-trial hearing, the practice maintained that the difference between the jury's verdict and the expert testimony on valuation demonstrated that the jury exercised its discretion—and, therefore, Sidi's interest in the practice was not a liquidated claim. The court emphasized that the earnings, which were the basis of the award in any event, were “established numbers” and “defined amounts.” At the conclusion of the hearing, the court stated it was “going to make a determination that interest accrues from and after June 1st, 2002, on the amount of 1 million 666.”

¶25 However, four days after the hearing, the trial court reversed itself and concluded Sidi was not entitled to prejudgment interest for three independently dispositive reasons: (1) the amount owed Sidi was open to opinion and discretion; (2) “award[ing] Dr. Sidi interest on a buyout he sought to avoid would be wrong”; and (3) interest does not accrue on a liquidated amount until it becomes “due” and the practice's debt to Sidi did not

become due until Sidi's claims were rejected by the jury.³ We conclude the trial court correctly rejected Sidi's request for prejudgment interest on the last ground.

¶26 Assuming *arguendo* Sidi's interest in the practice was sufficiently subject to exact calculation to be deemed liquidated, Sidi would not be entitled to prejudgment interest on that amount until "the date it first accru[ed]." *Alta Vista Plaza, Ltd. v. Insulation Specialists Co.*, 186 Ariz. 81, 83, 919 P.2d 176, 178 (App. 1995). In Arizona, such interest does not accrue from the date of loss, but rather, from the date the claimant first makes a demand for payment. *Id.*; *Rawlings v. Apodaca*, 151 Ariz. 180, 186, 726 P.2d 596, 602 (App. 1985), *vacated in part on other grounds*, 151 Ariz. 149, 726 P.2d 565 (1986). Demand can be made by making a request for payment or by filing a complaint. *Alta Vista*, 186 Ariz. at 83, 919 P.2d at 178. Sidi did neither. Far from making any demand for payment of a sum certain, Sidi disputed the appropriate amount of the buyout for some months, then contended, as he contends on appeal, that he had not resigned from the practice at all. *See Homes & Son Constr. Co. v. Bolo Corp.*, 22 Ariz. App. 303, 306, 526 P.2d 1258, 1261 (1974) (prejudgment interest does not accrue until plaintiff provides "sufficient information and supporting data so as to enable the debtor to ascertain the amount owed"). Because Sidi never made a demand for payment of his interest in the

³The court's judgment incorporated the jury's verdict, but awarded no interest, ordering the practice to pay Sidi \$1.666 million for "the value of [his] interest in TGI and TTRI as of June 1, 2002."

practice, the trial court correctly concluded under Arizona law that Sidi's right to payment of interest did not accrue before the jury returned its verdict.⁴

Additur

¶27 Sidi argues the trial court erred when it denied his request for an additur. Specifically, he complains the trial court neglected to correct the jury's failure to award him \$1.866 million for his share of the practice—the minimum the practice's own expert

⁴Because we affirm the trial court's ruling on this ground, we do not address the trial court's other two bases for denying Sidi's request for prejudgment interest. We note, however, that one member of our supreme court, citing a prominent commentator on remedies, has called into question the applicability of the liquidated-unliquidated distinction to cases like this involving restitution of property. *See La Paz County v. Yuma County*, 153 Ariz. 162, 169-71, 735 P.2d 772, 779-81 (1987) (Feldman, J., dissenting in part), *citing* Dan Dobbs, *Handbook on the Law of Remedies* § 3.5, at 164-74 (1973). "Prejudgment interest is particularly appropriate in restitution cases because interest is the value of money or property over time and is properly payable when the owner has been deprived of the use of his property or money." *Id.* at 170, 735 P.2d at 780. Here, the practice has taken a persistent position that Sidi resigned on a date certain in 2002, and as discussed, the practice's own expert testified that Sidi was entitled to \$1.866 million in compensation for his interest in the property. *See id.* (explaining that holding another's property and then returning it by paying its money value is restitution). Under this theory, whether or not the amount was liquidated, and whether or not Sidi made demand for that amount, he would be entitled to interest. *See id.* at 170-71, 735 P.2d at 780-81. But Sidi has made no such argument to this court, and we follow the prior holdings of our court unless provided strong reason to depart from them. *See Lowing v. Allstate Ins. Co.*, 176 Ariz. 101, 107, 859 P.2d 724, 730 (1993).

Sidi also argues post-judgment interest must accrue from the date the original judgment was entered, January 9, 2006, rather than the date the corrected judgment was entered, April 14, 2006. However, he does not point to any ruling by the trial court we should review for this purported claim of error. Therefore, we disregard this argument. *See Spillios v. Green*, 137 Ariz. 443, 447, 671 P.2d 421, 425 (App. 1983) ("We have no obligation to search the record for . . . error.").

conceded that share was worth. Sidi emphasizes the trial court itself recognized the jury's award was deficient in failing to add \$200,000 to its award of \$1.666 million to account for Travis's admitted failure to eliminate directors' fees from his calculation. We will not disturb a trial court's decision on a motion for additur absent a clear abuse of discretion. *Bond v. Cartwright Little League, Inc.*, 112 Ariz. 9, 16, 536 P.2d 697, 704 (1975). And a court's "ruling on additur, remittitur, and new trial, because of an inadequate or excessive verdict, will generally be affirmed, because it will nearly always be more soundly based than ours can be." *Creamer v. Troiano*, 108 Ariz. 573, 575, 503 P.2d 794, 796 (1972).

¶28 On appeal, Sidi argues only that the trial court abused its discretion in denying his request for an additur because (1) the practice's own expert witness conceded that Sidi was owed the additional \$200,000 and (2) the trial court appeared to acknowledge that the jury had erroneously overlooked that amount in computing damages. But Sidi provides no authority of any kind for his implicit and nontrivial argument that a trial court is required to grant an additur when a witness for the opposing party has apparently conceded the additional amount is owed. We generally do not consider arguments presented without citation to authority. *Ness v. W. Sec. Life Ins. Co.*, 174 Ariz. 497, 503, 851 P.2d 122, 128 (App. 1992). And Sidi has not argued the jury lacked any basis in the record to disregard all or part of the expert's testimony in reaching the \$1.666 million figure. *See State v. Roberts*, 138 Ariz. 230, 232-33, 673 P.2d 974, 976-77 (App. 1983) (trier of fact may reject

even uncontradicted and unimpeached evidence from disinterested witness when other evidence provides basis for doing so).

¶29 Rather, Sidi rests the entire thrust of his argument on the trial court’s conjecture that the jury had reached the \$1.666 million figure erroneously. On the basis of that speculation, Sidi suggests the trial court had implicitly found the jury had made a mistake—and, therefore, its failure to grant an additur to correct the mistake was an abuse of discretion. However, because the trial court ultimately decided not to grant the additur, we do not believe it intended those comments to constitute a finding that the jury lacked a sufficient basis for its award. And the fact the trial court ruled in apparent contradiction of those comments would not itself be relevant to our analysis. *See Reid v. Reid*, 20 Ariz. App. 220, 221, 511 P.2d 664, 665 (1973) (recognizing “the trial court has discretion to change its mind in order to render a correct decision”). In the absence of any concrete argument by Sidi that the jury lacked a sufficient basis in the record for the amount of its verdict, we find no abuse of discretion in the court’s ultimate ruling.

Admission of Evidence

¶30 At the beginning of May 2002, Sidi attempted to take his life. While deposing Sidi’s psychiatrist and listed expert witness, Dr. Richard Popeski, the practice learned that Sidi had attempted to commit suicide largely because he feared he had contracted AIDS⁵ during an extramarital sexual encounter. Sidi filed a motion in limine to preclude evidence

⁵Acquired immune deficiency syndrome.

on that subject, permanently seal the deposition transcripts, and restrict dissemination of the testimony, arguing that the subject was irrelevant and unduly prejudicial.

¶31 Following a hearing, the trial court granted the motion without prejudice to the practice's raising it again during trial and allowed the practice to raise the issue during Carole Sidi's deposition and with medical experts whose testimony was relevant to the issue of Sidi's incompetency. Because the court "worried that there is more dirt on the wall tendency than substantive testimony," it explained, "my rulings on the motions in limine are my best attempt to understand what the situation is and how the factual scenario plays out" and invited counsel to revisit the decision "either immediately prior to trial or with this court during trial and after the presentation of some evidence."

¶32 A month before trial, Sidi again moved to preclude testimony and evidence of the reasons he attempted to commit suicide and of his sex life, including extramarital affairs. The trial court granted the motion in part and denied it in part, allowing the practice to present evidence "as to Dr. Sidi's psychological condition at or about the time of the attempted suicide," but disallowing it to elicit testimony regarding Sidi's sex life. The trial court specifically found that "the reasons and history that brought Dr. Sidi to his attempted suicide are relevant."

¶33 During her opening statement, counsel for the practice stated,

Dr. Sidi was also very concerned about his health. The evidence will show that Dr. Sidi in 2002 had an extramarital sexual encounter with somebody he met in a bar, went back to a hotel room, and later started really worrying about the fact

that he might have HIV⁶ or AIDS. He had a rash, and he was very concerned that he may have had AIDS.

On the fifth day of trial, the parties agreed the practice need not prove Sidi was concerned about HIV or AIDS with the understanding that the practice would not “elicit any testimony on that topic” from any witnesses.

¶34 Sidi argues on appeal the trial court erred in allowing the practice to present the issue to the jury in opening statement because of its prejudicial nature. We review a trial court’s decision on a motion in limine to preclude evidence for a clear abuse of discretion, *State ex rel. Collins v. Superior Court*, 132 Ariz. 180, 182, 644 P.2d 1266, 1268 (1982), and recognize that “[i]n determining the relevancy and admissibility of evidence, the trial judge is invested with considerable discretion,” *State v. Hensley*, 142 Ariz. 598, 602, 691 P.2d 689, 693 (1984).

¶35 Evidence is generally admissible if it is relevant. Ariz. R. Evid. 402, 17A A.R.S. “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Ariz. R. Evid. 401. Relevant evidence may be inadmissible “if its probative value is substantially outweighed by the danger of unfair prejudice.” Ariz. R. Evid. 403. “‘The greater the probative value, . . . and the more significant in the case the issue to which it is addressed, the less probable that factors of

⁶Human immunodeficiency virus.

prejudice . . . can substantially outweigh the value of the evidence.” *State v. Gibson*, 202 Ariz. 321, ¶ 17, 44 P.3d 1001, 1004 (2002), quoting Joseph M. Livermore et al., *Law of Evidence* § 403, at 82-83, 84-86 (4th ed. 2000). We view the ““evidence in a light most favorable to its *proponent*, maximizing its probative value and minimizing its prejudicial effect.”” *State v. Castro*, 163 Ariz. 465, 473, 788 P.2d 1216, 1224 (App. 1989), quoting *United States v. Jamil*, 707 F.2d 638, 642 (2d Cir. 1983), quoting *United States v. Brady*, 595 F.2d 359, 361 (6th Cir. 1979) (emphasis in *Castro*).

¶36 At the outset, we note that we are limited in our review of this issue because we do not have relevant portions of the record. Sidi is responsible for providing transcripts or other record documents necessary for this court to consider the issues he raises on appeal. See Ariz. R. Civ. App. P. 11(b)(1), 17B A.R.S.; see also *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995) (“When a party fails to include necessary items, we assume they would support the court’s findings and conclusions.”). Relevant portions of the supporting memoranda for the first motion in limine and the opposition to the motion are redacted. And we do not have the transcript of the hearing on July 25, 2005, at which the trial court decided to allow evidence and testimony on the issue. Thus, for those omitted portions of the record, we must assume they support the trial court’s conclusions. See *id.*

¶37 Sidi does not dispute that the evidence was relevant, but rather, contends that the trial court erred in denying his motion after first granting it, asserting the “jury [was] subjected to inflammatory, prejudicial, and unproven claims.” To determine whether

proffered evidence should be excluded, a court must assess any prejudicial impact by determining whether the evidence has “‘an undue tendency to suggest decision on an improper basis,’ such as emotion, sympathy, or horror.” *State v. Schurz*, 176 Ariz. 46, 52, 859 P.2d 156, 162 (1993), *quoting* Fed. R. Evid. 403 advisory comm. note. “The fact that the trial court previously ruled the evidence was inadmissible as prejudicial . . . does not mean the prejudice continues to outweigh its probative value throughout the trial.” *State v. Martinez*, 127 Ariz. 444, 447, 622 P.2d 3, 6 (1980).

¶38 The practice contended to the trial court, and again here, that Sidi’s fear of having AIDS was relevant to his psychological state of mind at the time he signed the May 31 letter because it provided motivation for him to leave Tucson—and therefore rebutted Sidi’s contention that he did not intend to resign from his practice in Tucson. Sidi said in his deposition that he had no intention of leaving Tucson after getting out of the hospital following his attempted suicide, despite the fact that his wife had boxed their belongings while he was in the hospital and had told doctors at the hospital that she wanted to move to San Diego. The practice argued Sidi not only intended to resign but also leave town and the evidence was relevant “‘directly to the Sidis’ desire and motivation to flee town and certainly tend[ed] to make the existence of that fact more probable.’”

¶39 Because Sidi had also raised the issue that he was incompetent at the time he signed the resignation letter, the practice contended that the evidence was relevant to his state of mind at the time. Its attorney told the trial court:

I also think it's relevant, Your Honor, to show Sidi's competence. He is sitting in the hospital after the suicide attempt and is directing that [the] HIV test not be done by the hospital at Northwest but be sent to a lab in North Carolina. He is kind of running the show. Again, I think that shows a level of his thinking at the time and his competency arguably.

At the end of the hearing, the trial court granted the motion without prejudice, but allowed continued discovery on the issue. It reversed this decision two and a half months later, ultimately agreeing with the practice that the evidence was relevant.

¶40 We agree the practice sufficiently showed that Sidi's fear of having AIDS was relevant in some degree to his state of mind around the time of his attempted suicide—and, more importantly, to his intent to resign from the practice and leave Tucson. We also recognize, as does our law, the potential prejudicial and inflammatory nature of such evidence. *See Boswell v. Phoenix Newspapers*, 152 Ariz. 1, 6 n.4, 730 P.2d 178, 183 n.4 (App. 1985) (characterizing false charges that one has a contagious or venereal disease as slander per se); *see also* Restatement (Second) of Torts § 572 (1977) (“One who publishes a slander that imputes to another an existing venereal disease or other loathsome and communicable disease is subject to liability without proof of special harm.”).

¶41 But Sidi makes only general statements why that prejudice, occurring only during the opening statement, was sufficient to outweigh its probative value. Although the portions of the record before us and the arguments of counsel on appeal suggest that the AIDS testimony, albeit relevant, was cumulative at best to other more direct evidence on the same factual issues, we must assume that the trial court appropriately balanced its probative

value against its potential prejudicial effect in the context of all the admissible evidence. *See Hensley*, 142 Ariz. at 602, 691 P.2d at 693. Given the unique ability of the trial court to conduct that weighing process, we decline to second-guess its conclusion in the absence of a complete record. Thus, on the limited record before us, we conclude the trial court did not abuse its discretion when it ruled the practice could present evidence of Sidi's fears about having HIV.

Judgment as a Matter of Law

¶42 Sidi argues the trial court erred by initially denying his motion for JMOL on three claims asserted by the practice: breach of the TGI operating agreement, breach of the implied covenant of good faith and fair dealing, and promissory estoppel.⁷ Although the trial court eventually rejected the jury's verdict in favor of the practice on each of these claims, Sidi asserts their presence in the case confused the jury and caused him prejudice. We review *de novo* the trial court's denial of JMOL. *See United Dairymen of Ariz. v. Schugg*, 212 Ariz. 133, ¶ 13, 128 P.3d 756, 760 (App. 2006).

¶43 First, we note that it is procedurally appropriate for a trial court to deny a motion for JMOL and yet eventually grant judgment in favor of the movant after trial. Rule 50(b), Ariz. R. Civ. P., 16 A.R.S., Pt. 1, specifically provides: "Whenever a motion for [JMOL] made at the close of all the evidence is denied or for any reason is not granted, the

⁷As we conclude in our resolution of the cross-appeal, the trial court erred by granting JMOL on the breach of the operating agreement claim after trial. Therefore, we need not address whether the court erred in not granting it before submitting the claim to the jury.

court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion.” Thus, the trial court eventually granted judgment in favor of Sidi by a process specifically authorized by our rules.

¶44 In seeking a new trial on this basis, Sidi relies on *Standard Chartered PLC v. Price Waterhouse*, 190 Ariz. 6, 39, 945 P.2d 317, 350 (App. 1996), in which we determined that only one claim had been properly submitted to the jury among “multiple improperly submitted claims” and that “jury confusion on both liability and damages gave rise to a verdict unsupported by the evidence and contrary to law.” But that case did not hold that remaining verdicts must always be reversed when some claims have been submitted improperly to the jury, a holding that would contradict the intent of Rule 50 to allow trial judges to reconsider the legal sufficiency of a claim after trial. Rather, we held that the record demonstrated sufficient prejudice to do so under the circumstances of that case. And the potential for juror confusion in that case was much greater than that here. There, the trial lasted eleven and one-half months, the plaintiff asserted some of the same causes of action on behalf of two separate subsidiaries, only one claim of eight was found to have been properly submitted to the jury, and the jury’s “irreconcilably inconsistent” verdicts tangibly demonstrated it had been confused. *Standard Chartered*, 190 Ariz. at 15, 38-39, 945 P.2d at 326, 349-50.

¶45 Here, by contrast, the jury appeared confused only to the extent that it redundantly found in the practice’s favor on both promissory estoppel and breach of the

implied covenant of good faith and fair dealing when those claims were pled in the alternative. Moreover, the jury asked during deliberations whether it could just write “lawyer/accounting fees” in lieu of specific damages for those claims—a question that shows the jurors were aware of the practice’s failure to present evidence of a specific amount of damages on those claims. Nor do the jury’s other verdicts otherwise suggest that it was prejudicially influenced by the submission of those claims. Indeed, the jury found in Sidi’s favor on the practice’s defamation claim against him even though it found in the practice’s favor on several other claims. This suggests the jury appropriately assessed the merits of each claim separately. Accordingly, we decline to conclude that the trial court’s submission of these claims to the jury unfairly prejudiced Sidi, even though the trial court later rejected the jury verdicts on those claims and granted judgment in favor of Sidi.

Attorney Fees

¶46 Finally, Sidi requests attorney fees on appeal pursuant to A.R.S. §§ 12-341.01(A) and 12-342. Both statutes limit fee awards to the successful or prevailing party. § 12-341.01(A) (court may award fees to “successful party” in contract case); § 12-342 (provides award of costs on appeal to parties who prevail on appeal). Each party had a partial judgment against it and in its favor in the trial court, and although on appeal we have reversed that judgment on one issue in favor of the practice, Sidi has still prevailed on several of the practice’s remaining claims. Accordingly, we can conclude either that both parties prevailed or that neither did. Under either scenario, we find little logic in ordering

either side to pay the other's attorney fees. Therefore, we decline to award Sidi or the practice attorney fees on appeal.

CROSS-APPEAL

Rejected Jury Verdicts

¶47 The practice argues the trial court erred when it substituted its own decision for that of the jury on the practice's claims for breach of an operating agreement, breach of the implied covenant of good faith and fair dealing, and promissory estoppel. We review *de novo* a trial court's decision to reject a jury's verdict. *Anderson v. Nissei ASB Mach. Co.*, 197 Ariz. 168, ¶ 10, 3 P.3d 1088, 1092 (App. 1999). In doing so, we "view the evidence most favorably to sustaining the jury's verdict, and must not disturb that verdict 'if reasonable minds could differ as to the inferences to be drawn from the facts.'" *Id.*, quoting *Adroit Supply Co. v. Elec. Mut. Liab. Ins. Co.*, 112 Ariz. 385, 390, 542 P.2d 810, 815 (1975). Therefore, we determine "whether sufficient evidence supports the jury's verdict." *Id.*

¶48 As to the claim that Sidi breached TGI's operating agreement, the practice points to the plain language of the agreement stating that "[a]ny voluntary act of a Member that constitutes a withdrawal from [TGI] shall constitute a material breach of this Agreement." The trial court found "no reasonable jury could conclude that there was a breach of the Operating Agreement by voluntarily withdrawing, while, at the same time, TGI/Plaintiffs' agreed to purchase Sidi's interests." But the agreement itself suggests that

a party breaching it by withdrawing would still be entitled to a buyout of his interest: it states that TGI may collect damages for a member's breach of the agreement, which will "offset any cash or other property otherwise distributable to such Member by [TGI]." Therefore, the plain language of the agreement was sufficient evidence from which the jury could have concluded Sidi breached the agreement.

¶49 The trial court also found the evidence of damages on all three claims was too speculative. The practice's expert witness, James Travis, a business appraiser, testified that when Sidi breached the agreement by withdrawing from TGI, it sustained damages in the form of lost profits, accounting fees, and other litigation costs. On the other two claims, the practice claimed as damages the accounting and attorney fees it had incurred between June and October 2002.

¶50 "The burden was on the plaintiffs to show the amount of their damages with reasonable certainty. It is firmly established, of course, in this state as elsewhere, that 'certainty in amount' of damages is not essential to recovery when the *fact* of damage is proven." *Gilmore v. Cohen*, 95 Ariz. 34, 36, 386 P.2d 81, 82 (1963) (citation omitted). Although the practice relies heavily on this proposition to support the jury's damage awards, the *Gilmore* court further explained: "This is simply a recognition that doubts as to the extent of the injury should be resolved in favor of the innocent plaintiff and against the wrongdoer. But it cannot dispel the requirement that the plaintiff's evidence provide some basis for estimating his loss." And Arizona courts have long held "that 'conjecture or

speculation’ cannot provide the basis for an award of damages,” *id.*, quoting *McNutt Oil & Refining Co. v. D’Ascoli*, 79 Ariz. 28, 34, 281 P.2d 966, 970 (1955), and “the evidence must make an ‘approximately accurate estimate’ possible,” *id.*, quoting *Martin v. LaFon*, 55 Ariz. 196, 199, 100 P.2d 182, 183 (1940).

¶51 We agree with the trial court that the evidence of damages on the breach of implied covenant and promissory estoppel claims amounted to nothing more than conjecture and speculation. The practice did not offer a dollar figure or even a method for the jury to calculate the damages other than to guess at what the practice’s attorney and accounting fees had been during the summer of 2002. In fact, at the hearing on the motions for JMOL, the practice conceded “the jury could simply hear that there w[ere] attorneys’ fees and accounting fees and make up a number.” See *Walter v. Simmons*, 169 Ariz. 229, 236, 818 P.2d 214, 221 (App. 1991) (disallowing damages award that included claim for attorney fees because plaintiff “presented absolutely no evidence from which a jury could reasonably compute the amount of this damage”); see also *Earle M. Jorgenson Co. v. Tesmer Mfg. Co.*, 10 Ariz. App. 445, 451-52, 459 P.2d 533, 539-40 (1969) (only evidence of damages—estimate made by defendant’s president based on conferences with dealers unwilling to commit to order product in advance—did not meet test for making an “approximately accurate estimate possible”; damages not proved with reasonable certainty); cf. *Nelson v. Cail*, 120 Ariz. 64, 68, 583 P.2d 1384, 1388 (App. 1978) (testimony by plaintiff that expected profit was \$30,000 sufficient evidence of damages; defendant could

have but chose not to “attack[] the correctness of the amount through cross-examination and additional evidence”).

¶52 On the other hand, as to its claim Sidi breached the TGI operating agreement, the practice’s witness did testify about specific damages. He reached a precise monetary figure of \$812,000 for TGI’s lost profits resulting from Sidi’s not performing surgeries, overtime the other doctors worked in order to make up for Sidi’s absence, and accounting fees and other litigation costs. *Compare Harris Cattle Co. v. Paradise Motors, Inc.*, 104 Ariz. 66, 69, 448 P.2d 866, 869 (1968) (finding evidence of damages sufficient when expert testified about lost profits based on prior salespeople’s sales), *with Gilmore*, 95 Ariz. at 36, 386 P.2d at 83 (sole evidence of lost profits in form of ambiguous and confused testimony by plaintiffs insufficient to establish damages with reasonable certainty). The jury, as the trier of fact, was ultimately responsible for weighing the testimony and resolving the question of the amount of damages. *See Jowdy v. Guerin*, 10 Ariz. App. 205, 210, 457 P.2d 745, 750 (1969). Although the jury only awarded the practice \$275,000, we find no authority for the proposition, nor does the practice point to any, that the jury must award the same amount of damages the expert testified about for the damages to have been proved with reasonable certainty. Accordingly, we find the jury verdict on the practice’s claim that Sidi breached the operating agreement was supported by sufficient evidence, and we reinstate the verdict on that claim.

Attorney Fees and Sanctions

¶53 The practice argues the trial court abused its discretion by refusing to award the practice its attorney fees and costs. The trial court found “neither party was the successful party” for an award of fees under A.R.S. § 12-341.01(A), which allows a court to award fees to the successful party in a contract action. We review for an abuse of discretion a trial court’s decision to deny an award of attorney fees under § 12-341.01(A). *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 570, 694 P.2d 1181, 1184 (1985).

¶54 The practice contends it is clearly the successful party because it “prevailed on all but one of [its] claims and defenses and prevailed on all of [Sidi]’s claims and defenses.” Although a trial court must identify a successful party when awarding attorney fees under § 12-341.01(A), in the absence of such an award, we find no requirement a trial court must identify a successful party when declining to award fees. And, even were we to decide the practice was the successful party, § 12-341.01 did not require the trial court to award the practice fees. Rather, that provision states: “In any contested action arising out of contract, express or implied, the court *may* award the successful party reasonable attorney fees.” (Emphasis added.) The practice has not shown the court abused its discretion when it declined to award attorney fees under § 12-341.01.

¶55 The practice also argues the trial court erred by denying its motion for attorney fees and costs as sanctions. We review a trial court’s decision on a request for sanctions pursuant to Rule 37(b), Ariz. R. Civ. P., 16 A.R.S., Pt. 1, for an abuse of discretion. *Poleo v. Grandview Equities, Ltd.*, 143 Ariz. 130, 133, 692 P.2d 309, 312 (App. 1984). The

practice enumerates at length Sidi's alleged misconduct. But the trial court concluded both sides had acted unreasonably and had committed discovery abuses. For example, the court stated after trial its "view of the litigation is . . . that it was uncontrolled litigation by the lawyers letting the clients make heated discussions [sic]. If I had my way, I'd sanction both sides but they would net out." The trial court was supervising the litigation when the parties committed any alleged misconduct or abuse and was therefore in the best position to determine whether sanctions were warranted. We decline to substitute our judgment for that of the trial court and find no abuse of discretion in its ruling. *See Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 350, 687 P.2d 354, 358 (1984) (in reviewing denial of attorney fees, we will not substitute our judgment for trial court's).

¶56 For the foregoing reasons, we affirm the judgment in part and reverse it in part and remand the case to the trial court with instructions to reinstate the verdict in the practice's favor for Sidi's breach of the TGI operating agreement.

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

PHILIP G. ESPINOSA, Judge

GARYE L. VÁSQUEZ, Judge