

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK
JAN -5 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

WAYNE HAYES and DANA HAYES,)	
husband and wife,)	2 CA-CV 2011-0018
)	DEPARTMENT A
Plaintiffs/Appellees,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 28, Rules of Civil
DEXTER CONSTRUCTION, Inc.,)	Appellate Procedure
Arizona Registrar of Contractors)	
License No. 248355; WAYNE)	
ANTHONY DEXTER AND DORA)	
LUZ DEXTER REVOCABLE TRUST;)	
and WAYNE ANTHONY DEXTER)	
and DORA LUZ DEXTER, husband)	
and wife, dba DEXTER)	
CONSTRUCTION,)	
)	
Defendants/Appellants.)	

APPEAL FROM THE SUPERIOR COURT OF SANTA CRUZ COUNTY

Cause No. CV09190

Honorable Monica L. Stauffer, Judge

AFFIRMED IN PART; VACATED IN PART

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B R A M M E R, Judge.

¶1 Appellants Wayne and Dora Dexter, Dexter Construction, Inc., and the “Dexter Revocable Trust” (collectively “Dexter”) appeal from the trial court’s judgment in favor of appellees Wayne and Dana Hayes (collectively “the Hayes”). Dexter argues the court erred by entering judgment against Dexter Construction, Inc. (Dexter Construction) and the “Dexter Revocable Trust” (trust) when those parties never were served the amended complaint, by awarding damages on claims that had been adjudicated in Dexter’s favor during a Registrar of Contractors (ROC) proceeding, by awarding punitive damages in a matter arising from contract, and by awarding attorney fees incurred by the Hayes in the ROC proceeding. We affirm in part but vacate the portion of the judgment against Dexter Construction and the trust, and the punitive damages award.

Factual and Procedural Background

¶2 “We view the facts in the light most favorable to sustaining the trial court’s judgment.” *Sw. Soil Remediation, Inc. v. City of Tucson*, 201 Ariz. 438, ¶ 2, 36 P.3d 1208, 1210 (App. 2001). The Hayes entered into a contract with Wayne Dexter for the construction of a home. After multiple problems arose with their home, the Hayes filed a complaint against Wayne and Dora Dexter and two subcontractors, later amending the complaint, by leave of the trial court, to add Dexter Construction and the trust as defendants. The Hayes also filed a separate administrative complaint with the ROC. The ROC issued a final order revoking Wayne Dexter’s contractor’s license unless he

provided a licensed contractor to fix the Hayes' wood floors on or before the effective date of the order.

¶3 The trial court granted the Hayes' motion for partial summary judgment as to liability for the wood floors on the basis of res judicata following the ROC's final order. After a one-day bench trial, the court issued a minute entry awarding the Hayes compensatory damages for the replacement of the wood floors, stucco and drywall repair, driveway repair, various over-charges, theft, and rent. The court also awarded the Hayes \$10,000 in punitive damages plus attorney fees and costs. The court fixed the amount of attorney fees in a signed judgment following Dexter's objection to the Hayes' application for attorney fees and costs. This appeal followed.¹

Discussion

Amended Complaint

¶4 Dexter argues the trial court erred in entering judgment against Dexter Construction and the trust because neither had been served with process after the court had allowed the Hayes to amend their complaint. The court allowed the Hayes to amend their complaint seven days before trial to add Dexter Construction and the trust as parties.

¹The notice of appeal was filed prior to the entry of final judgment and thus was premature. Because the notice of appeal was filed after the trial court signed the judgment, but before it was filed with the clerk's office, its filing was "merely ministerial" and we have jurisdiction over the appeal. *See Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, ¶ 37, 132 P.3d 1187, 1195 (2006) (notice of appeal can be filed after court made final decision but before formal judgment entered if no decision could change and only remaining task "merely ministerial").

On appeal, the Hayes do not dispute that they never served either Dexter Construction or the trust but rather contend Dexter has waived the argument because it was not raised in the trial court.

¶5 When a motion for leave to amend the complaint is granted, the plaintiff must “file and serve the amended pleading within ten days of the order granting the motion, unless the court otherwise orders.” Ariz. R. Civ. P. 15(a)(2). And “[a] party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within ten days after service of the amended pleading, whichever period may be the longer.” Ariz. R. Civ. P. 15(a)(3). Service upon a corporation must be effected by “delivering a copy of the summons and of the pleading to a partner, an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process.” Ariz. R. Civ. P. 4.1(k). “If a defendant is not properly served with process, any resulting judgment is void and must be vacated upon request.” *Hilgeman v. Am. Mortg. Sec., Inc.*, 196 Ariz. 215, ¶ 8, 994 P.2d 1030, 1033 (App. 2000).

¶6 Dexter Construction was not served properly and the judgment against it is void.² *See id.* The trial started and concluded before the time expired in which Dexter

²Although Dexter Construction never was made a party below, it is a proper party to this appeal. *See* Ariz. R. Civ. App. P. 1 (appeal may be taken “by any party aggrieved by the judgment”); *Abril v. Harris*, 157 Ariz. 78, 80-81, 754 P.2d 1353, 1355-56 (App. 1987) (non-party can appeal adverse judgment if interest of non-party direct, substantial, immediate).

Construction should have been served, *see* Ariz. R. Civ. P. 15(a)(2), which also denied it the opportunity to respond to the amended complaint even had it been served properly, *see* Ariz. R. Civ. P. 15(a)(3). We find little merit to the Hayes' perfunctory waiver argument. Wayne Dexter's presence at trial could not waive service for, or confer jurisdiction over, Dexter Construction because a corporation cannot be represented in *propria persona* and cannot appear in court by an officer who is not an attorney.³ *See Ramada Inns, Inc. v. Lane & Bird Adver., Inc.*, 102 Ariz. 127, 128, 426 P.2d 395, 396 (1967). Consequently, Wayne's presence at trial and failure to object on behalf of Dexter Construction to lack of service has no effect.

¶7 Additionally, we find no support for the entry of judgment against a trust as a party. Pursuant to A.R.S. § 14-10202, courts have jurisdiction over the trustees of a trust, or its beneficiaries, as opposed to the trust, and they must be served with process to become parties to a legal action, *see* Ariz. R. Civ. P. 4. And nothing in the record discloses the terms of the purported trust, nor who are its settlors, trustees, or beneficiaries. Accordingly, neither the corporation nor any party associated with the ostensible trust was served properly so as to put them on notice that their interests were at risk in this action. Therefore, we vacate the entry of judgment against Dexter Construction and the trust.

³We also note Wayne Dexter was not the listed statutory agent for Dexter Construction.

Previously Adjudicated Claims

¶8 Dexter also argues the trial court erred in awarding damages for claims that had been adjudicated previously by the ROC.⁴ According to Dexter, “the parties appeared and litigated all claims before the ROC, including the home’s floors, stucco, drywall, driveway, insulation overcharge, electrical overcharge, tile overcharge and rent.” And following the court’s grant of the Hayes’ motion for summary judgment based on the ROC’s final order, Dexter asserts the only issue to be decided at trial was the repair or replacement cost for the floors. Dexter contends the court’s award of damages unrelated to the floors was barred by the doctrine of res judicata. The application of claim preclusion or res judicata is an issue of law we review de novo. *Better Homes Constr., Inc. v. Goldwater*, 203 Ariz. 295, ¶ 10, 53 P.3d 1139, 1142 (App. 2002).

¶9 At trial the Hayes sought compensatory damages for Dexter’s alleged breach of contract. The ROC’s powers are “limited to suspending or revoking a contractor’s license, or attaching conditions to the license,” and “[m]oney damages may not be awarded.” *Sunpower of Ariz. v. Ariz. State Registrar of Contractors*, 166 Ariz. 437, 440, 803 P.2d 430, 433 (App. 1990), quoting *J.W. Hancock Enters., Inc. v. Ariz. State Registrar of Contractors*, 142 Ariz. 400, 406, 690 P.2d 119, 125 (App. 1984). A plaintiff is allowed to seek money damages in court proceedings in addition to pursuing

⁴The Hayes contend Dexter has waived this argument on appeal by failing to raise it in the trial court. However, Dexter objected generally at trial to addressing issues that already had been decided by the ROC.

the remedies available through the ROC. *Bentivegna v. Powers Steel & Wire Prods., Inc.*, 206 Ariz. 581, ¶ 15, 81 P.3d 1040, 1044 (App. 2003). Because the remedy the Hayes sought at trial was not available in the ROC proceedings, their claims were not barred by the doctrine of res judicata.⁵ See *In re Marriage of Gibbs*, 227 Ariz. 403, ¶ 6, 258 P.3d 221, 224 (App. 2011) (res judicata precludes claim where former judgment on merits rendered by court of competent jurisdiction and matter now at issue was or might have been determined in former action).

Punitive Damages

¶10 Dexter argues the trial court erred in awarding punitive damages because generally they are not available in contract actions. Dexter further contends the record does not support such an award. At trial, the Hayes argued Dexter's conduct was reprehensible and wreaked havoc on them. After noting that Dexter's "lack of actions and reprehensible conduct have caused additional and extensive harm to the [Hayes]," the court awarded \$10,000 in punitive damages. We review the court's award of punitive damages for an abuse of discretion. See *Miscione v. Bishop*, 130 Ariz. 371, 375, 636 P.2d 149, 153 (App. 1981).

¶11 Generally punitive damages are inappropriate in breach of contract actions absent the assertion of an additional tort claim, such as fraud. *Rhue v. Dawson*, 173 Ariz.

⁵We also note the ROC stated it lacked jurisdiction to address some of the issues Hayes addressed at trial and that Dexter asserts are precluded, including the insulation overcharge, electrical overcharge, drywall, tile overcharge, and rent.

220, 232, 841 P.2d 215, 227 (App. 1992); *see also Miscione*, 130 Ariz. at 374-75, 636 P.2d at 152-53 (punitive damages “not usually awarded in contract actions, unless there is an accompanying tort”). Deliberate, overt, and dishonest dealings also can sustain an award of punitive damages. *Rhue*, 173 Ariz. at 232, 841 P.2d at 227. But punitive damages are awarded only “in the most egregious of cases.” *Sec. Title Agency, Inc. v. Pope*, 219 Ariz. 480, ¶ 81, 200 P.3d 977, 995 (App. 2008), *quoting Medasys Acquisition Corp. v. SDMS, P.C.*, 203 Ariz. 420, ¶ 17, 55 P.3d 763, 767 (2002). In determining whether punitive damages are appropriate, our inquiry is focused on the wrongdoer’s mental state and whether the plaintiff has proved by clear and convincing evidence that the defendant acted with an “evil mind” and “engaged in aggravated and outrageous conduct.” *Hilgeman*, 196 Ariz. 215, ¶ 22, 994 P.2d at 1036, *quoting Hyatt Regency Phx. Hotel Co. v. Winston & Strawn*, 184 Ariz. 120, 132, 907 P.2d 506, 518 (App. 1995); *see also Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 331, 723 P.2d 675, 680 (1986) (“evil mind” requirement in addition to evidence of “outwardly aggravated, outrageous, malicious, or fraudulent conduct”). The defendant must have acted with the “intent to injure” or must have “deliberate[ly] interfere[d] with the rights of others, consciously disregarding the unjustifiably substantial risk of significant harm to them.” *Linthicum*, 150 Ariz. at 331, 723 P.2d at 680.

¶12 The award of punitive damages was inappropriate here because the Hayes had brought an action only for breach of contract and had not alleged a tort claim. *See Rhue*, 173 Ariz. at 232, 841 P.2d at 227. Moreover, the record contains insufficient

evidence of Dexter having an evil mind, “illustrating a desire to harm or consciously disregard” the Hayes’ rights, necessary to support a punitive damages award. *See Linthicum*, 150 Ariz. at 332, 723 P.2d at 681. And the Hayes did not prove by clear and convincing evidence that Dexter had acted with an “evil mind.” *See Quintero v. Rogers*, 221 Ariz. 536, ¶¶ 15-16, 212 P.3d 874, 879 (App. 2009). There was no testimony presented at trial that focused on Wayne Dexter’s mental state and indicated he had intended to harm the Hayes or had been deliberately dishonest.

¶13 Although the Hayes label Dexter’s actions “reprehensible,” the breach of contract here does not rise to the level of aggravated and outrageous conduct necessary to support an award of punitive damages. *See Hilgeman*, 196 Ariz. 215, ¶ 22, 994 P.2d at 1036. The Hayes point to Dexter’s “fail[ure] to place a completion date in their contract” and “fail[ure] to oversee their subcontractors,” and contend Dexter “extorted change order funds in the amount of \$3,225.00” and delivered the house “five months late.” These assertions are insufficient to permit calling this one of “the most egregious of cases,” thus warranting an award of punitive damages. *See Pope*, 219 Ariz. 480, ¶ 81, 200 P.3d at 995, *quoting Medasys Acquisition Corp.*, 203 Ariz. 420, ¶ 17, 55 P.3d at 767. Therefore, the trial court abused its discretion in awarding punitive damages to the Hayes.

Attorney Fees

¶14 Dexter also contends the trial court erred in awarding the Hayes attorney fees and costs related to the ROC proceeding.⁶ The court awarded the Hayes “attorney fees and cost of this litigation” but specifically declined to award attorney fees and costs incurred in matters involving the ROC. Dexter has waived this argument on appeal by failing to specify, with citation to the record, which portion of the court’s attorney fee award arguably is for fees incurred during the ROC proceedings. *See* Ariz. R. Civ. App. P. 13(a)(6) (appellate brief argument shall contain “citations to the authorities, statutes and parts of the record relied on”); *Polanco v. Indus. Comm’n*, 214 Ariz. 489, n.2, 154 P.3d 391, 393-94 n.2 (App. 2007) (appellant’s failure to develop and support argument waives issue on appeal). Therefore, we do not address the argument further.

Disposition

¶15 For the foregoing reasons, we vacate the punitive damages award and the judgment against Dexter Construction and the trust. In all other respects, the trial court’s judgment is affirmed. The Hayes request an award of attorney fees on appeal but have failed to specify a basis for such an award. We therefore deny the request. *See Roubos v.*

⁶We note that Dexter’s notice of appeal refers only to the trial court’s January 4 ruling, which did not fix the amount of attorney fees awarded. A notice of appeal must “designate the judgment or part thereof appealed from.” Ariz. R. Civ. App. P. 8(c). However, that error did not mislead or prejudice the Hayes and thus we will construe the notice of appeal as sufficient. *See Hill v. City of Phx.*, 193 Ariz. 570, ¶ 10, 975 P.2d 700, 702-03 (1999).

Miller, 214 Ariz. 416, ¶ 21, 153 P.3d 1045, 1049 (2007) (party requesting fees must state statutory or contractual basis for award).

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge