2014 IL App (1st) 131999-U

FOURTH DIVISION
July 24, 2014

No. 1-13-1999

IN THE APPELLATE
COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MARY ANN SCHUH, Plaintiff-Appellee, v. PLAZA DES PLAINES CONDOMINIUM ASSOCIATION, Defendant-Appellant.	)	Appeal from the Circuit Court of Cook County. No. 2012M1163263 The Honorable Rhoda Davis Sweeney, Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Howse and Justice Lavin concurred in the judgment.

HELD: Appellant condominium association which ignored condominium owner's requests for assistance in remediating water infiltration issue such that owner was forced to incur expenses on her own account in order to remedy water infiltration issue is unable to show the award of damages was in error. Affirmed.

¶ 1 **ORDER**

¶ 2 Defendant-appellant Plaza Des Plaines Condominium Association (the Association)

appeals from an order of the circuit court awarding damages in the amount of $27,497 ($5497 in actual damages and $22,000 in punitive damages) after granting judgment in favor of plaintiff-appellee Mary Ann Schuh's complaint in which Schuh alleged, in pertinent part, the Association breached its fiduciary duty to her, a condominium owner. On appeal, the Association challenges the award of both actual and punitive damages. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Mrs. Schuh is an elderly woman[1] who owns a condominium unit at 905 Center Street, in Des Plaines, Illinois (the building), which unit is part of the Association. Mrs. Schuh resides in the unit. Mrs. Schuh's daughter, Cindy, also owns and resides in a unit in the building.[2] Cindy has been involved with and assisted her mother "in all dealings related to the water infiltration in the unit."

¶ 5 In February 2013, Mrs. Schuh filed a first amended complaint in which she alleged, in pertinent part, that the Association breached the fiduciary duty it owed to her.[3] Specifically, Mrs. Schuh alleged that she is an owner-occupant of a condominium, a member of the Association,

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[1] Mrs. Schuh was 81-years-old at the time of trial.

[2] The information regarding what occurred at trial is presented on appeal via a bystander's report pursuant to Supreme Court Rule 323.

[3] The initial complaint alleged three counts: count I, alleging breach of fiduciary duty; count II, alleging breach of contract; and count III, an action to compel Association records. During the course of the underlying litigation, both counts II and III were withdrawn, such that our review here is limited to count I, alleging breach of fiduciary duty.

and subject to the bylaws of the Association. She alleged that, after suffering substantial water damage to her condominium, the Association ignored her requests to remedy the damage, and she eventually had to contract out and spend her own money to remedy the water damage issues. She then requested the Association reimburse her for the costs incurred for water damage and mold remediation, but the Association refused to reimburse her. Mrs. Schuh alleged the Association breached its fiduciary duty to her by failing to provide proper care, up-keep, replacement and improvement, despite having received notice from Mrs. Schuh. Mrs. Schuh alleged she had incurred damages in the amount of $6,497.14 plus "interest, costs, attorneys fees, and punitive damages."

¶ 6 At trial, Cindy testified that, on August 14, 2010, the day after a hard rain, Schuh discovered water running from an electrical outlet in her unit. On August 15, 2010, the back of the outlet cover was wet. On August 16, Cindy called the Des Plaines Fire Department, which responded, assessed the electrical outlet, and determined the outlet was unsafe to use. Cindy testified that, on August 17, 2010, she contacted Woodland Windows, the company that had recently replaced all of the windows in the building, regarding the water infiltration. The next day, Woodland Windows inspected the property. On August 20, Woodland Windows wrote Cindy a letter stating that the windows were not the problem. On August 21, a 6-inch water mark appeared on the exterior wall to the unit, and the paint was bubbling. On September 3, Cindy emailed the building management company, Hughes Management, regarding the water infiltration. Cindy did not receive a response from Hughes Management. On September 8, Cindy telephoned Hughes Management and left a message, but did not receive a call back. On

September 9, Cindy again called Hughes Management. She spoke with Dennis Hughes, who informed her the company was "working on it."

¶ 7 On September 13, 2010, the homeowner insurance adjuster visited the unit and informed Cindy that the management company was responsible for the repairs. On September 14, 2010, Cindy sent a work order to Hughes Management via email and a telephone call. Cindy spoke with Peggy Bookman, who said she was "waiting to hear from people."

¶ 8 Eight months later, on May 25, 2011, Hughes Management sent Kipcon Great Lakes to inspect Mrs. Schuh's unit, 11 other units, and the roof. The resulting July 2011 Kipcon report states, in part:

> "The [Plaza Des Plaines Condominium Association] has a history of water infiltration issues and has had several remediation projects completed. Specifically periodic spot tuck pointing was performed from 1996-2002 at various units and areas including balcony and window areas. In 2007 several major projects were undertaken at the property: A Balcony Restoration Project primarily the repair and resurfacing of the concrete balcony decks; Exterior Wall Restoration repairing walls and replacing face brick at the walls of the balconies of both buildings; Roof Replacement project including tear-off down to the metal decking repairs and installation of multiple membranes.
>
> The Association also has recently completed a window replacement project throughout both buildings. Water infiltration issues

remain an ongoing problem in various units in both the 901 and 905 buildings. The purpose of this inspection report is to review the areas where water infiltration has been reported, determine the source of the water if possible from visual observations and provide recommendations for remediation to the Association.

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11. 905 Unit 504 [Mrs. Schuh's unit]: Water infiltration reported and noted at living room window. Water stain observed on wall above window and bubbling at wall on interior also noted. In addition the area around and above the balcony door was also observed to be wet. This unit was revisited June 22, 2011 and extensive repairs were being performed. The walls were open the entire width of the living room exterior wall and were observed to be wet. A full report was requested but no further information was received from the repair company. An open mortar joint was observed to be located directly above the area where water stains were observed on the interior. The balcony having a south elevation should have had the two courses of brick replaced and the walls in that area repaired and sealed at the time of the 2007 exterior wall project, pursuant to the detailed drawings of the project."

¶ 9

In the findings and recommendations section, Kipcon wrote:

"FINDINGS:

Water infiltration has been an ongoing problem at the property in some area at least from 1996. Periodic spot tuck pointing had been performed at various areas. It is typical for brick facade to require full wall re-pointing every 25 years in this climate region particularly with temperature swings that promote constant expansion and contraction of various materials including mortar and brick. In 2007 an extensive repair was performed on all the balconies particularly at the brick above the sliding glass doors. The balcony decks were also refurbished.

New windows have been installed at most units in the building. The windows themselves that were inspected in the units were of high quality and installation was observed to be proper based on the visual observations. However, it must be noted that window installation requires removal of old windows which will most often cause damage to the walls of the building. Old mortar near the area will be disturbed and chipping and breaking is likely to occur during the process. This could allow for water that enters the area to find a path to the interior of the building.

Also even though new windows were installed the lintels of the building were not covered. These open lintels could be a source of water infiltration. The lintels are most likely original in nature other than those noted to have been replaced during the prior work performed. Open lintels

were observed to be rusting and enough space was present that could allow for water infiltration, particularly when there are driving rains.

There are therefore several likely sources of the water infiltration into the building as follows: Open and cracked mortar joints specifically at or above the window areas. Open and rusted lintels especially those directly above the newly installed windows. Cracked or damaged window sills allowing water to collect and run into or down the building walls. Unknown as they could not be observed are blocked weep holes, deteriorated flashing between the cinder block and brick walls and failing prior tuck pointing repairs."

Kipcon recommended the following:

"1. Have an exterior restoration company inspect all open lintels, especially those at the areas noted in the report. These should be repaired or replaced and then covered preferably including a drip edge.

2. Have an exterior restoration company inspect the walls of the buildings in and around the elevations and areas where water is infiltrating the building for the purpose of establishing areas of tuck pointing to be performed.

3. Have an exterior restoration company examine the exterior for prior areas of patching and caulking which may now be

failing, including cracked concrete sills.

4. Have the roof installers inspect the roof regularly and particularly to ensure the proper pitch for storm water dispersal, to caulk any open seams and to repair any poorly caulked areas. Also tin investigate any algae or other growth that may be occurring.

5. More extensive invasive testing is also an option, including removing courses of brick to examine the interior walls and flashing, and/or water testing could be performed on the walls to better pinpoint the entry points of the water into the structure."

¶ 10 On June 9, 2011, All Suburban Mold Testing performed mold testing on the east wall of the living room in Mrs. Schuh's unit. Cindy testified that she retained All Suburban because the condominium management company was taking a long time to address possible mold in the building, that she did not trust the condominium association, and she wanted an independent inspection. Cindy testified she thought there may be mold in the unit and that the drywall would need to be replaced. Counsel for the Association objected to this testimony on the basis that Cindy could not testify to the presence of mold due to lack of foundation and because she is not an expert. The court overruled the objection. All Suburban found stachybotrys bacteria on 51-75% of the sample collected from the east living room wall. On June 13, All Suburban notified Cindy by email that "The mold found in your mothers condo is Stachybotrys. This type of mold is toxic and should be remediated. It's most worry some [*sic*] to children and the elderly." The Association objected to this testimony as hearsay, and the trial court overruled the objection,

stating that Cindy could testify about what she read. All Suburban recommended calling Indoor Air Repair for remediation services. Cindy paid $400 for the mold testing service before and after remediation.

¶ 11 Cindy retained Indoor Air Repair for remediation services for Mrs. Schuh's unit. The total cost of the remediation was $2,187.14, which Mrs. Schuh paid in full.

¶ 12 Cindy also retained A.B.C. Home Remodeling to replace the insulation and drywall that was removed during the mold remediation process, to paint the living room ceiling white, reinstall the existing electrical outlet, and to clean away debris. A.B.C. charged $1,900 for this work, which Mrs. Schuh paid in full. According to Cindy, there was no further water infiltration trouble following the work performed by A.B.C. Home Remodeling.

¶ 13 Cindy also retained Carpet Values/Carpet One to replace Mrs. Schuh's carpet that had been damaged from the water infiltration. The cost for the carpet replacement was $2,000, which Mrs. Schuh paid in full.

¶ 14 On cross-examination, Cindy admitted that neither she nor her mother told the Association they were going to have the mold remediation work done on the unit, but only asked the Association for reimbursement after the work had been performed. On re-direct, Cindy explained that she was unable to inform the Association in advance of the mold remediation because neither the Association nor its property manager returned her telephone calls or emails.

¶ 15 Cindy testified that she asked the Association for reimbursement of Mrs. Schuh's costs. At that time, the Association, through counsel, responded: "The Association remains unconvinced about the exact nature of the alleged damages and the work that was actually

performed."

¶ 16 The Association's property manager, Dennis Hughes, testified for the Association. According to Hughes, Cindy telephoned him in September 2010 regarding a one-time water leak from an electrical outlet. He testified that he had never been in Mrs. Schuh's apartment, but that Woodland Windows had inspected the windows in Mrs. Schuh's apartment to determine if the source of the water infiltration was from the newly-installed windows. Hughes testified that the Association hired Kipcon to inspect the Association's buildings to determine the source of the water infiltration.

¶ 17 On cross-examination, Hughes admitted he could not be sure if he had actually spoken with Cindy, but noted that there are a number of assistants in his office who may have spoken with her.

¶ 18 Hughes testified that he took action to alert the Association of the water infiltration issues, but could not remember anything specific he had done in the regard. He testified that the Association sent a water leak survey to each of the owners who had reported water leaks in their unit.

¶ 19 Hughes testified that other unit owners experienced water infiltration problems and were each offered reimbursement for damages, but Mrs. Schuh refused the reimbursement. The record before us, which we again note is a bystander's report, notes the following:

> "Mr. Hughes testified that he had reviewed all the documents received by Defendant's counsel in this matter. Mr. Hughes was asked if he was aware that [Mrs. Schuh] had

> demanded reimbursement from the Association, and he said he was not sure. Mr. Hughes was then presented with the demand letter that was sent to the Association to refresh his recollection and Mr. Hughes recalled seeing that letter.
>
> Mr. Hughes was asked why the Association offered to reimburse other unit owners but not [Mrs. Schuh] despite the fact she had sent a demand letter requesting just that[.] Mr. Hughes said he did not know."

¶ 20 Kipcon Great Lakes, LLC, general manager Ronald Katz also testified at trial. When Katz first visited Mrs. Schuh's apartment on May 25, 2011, he neither saw evidence of mold nor was told of mold by the unit owner. He admitted on cross-examination, however, that he was not looking for evidence of mold when he first went to the property and that, even if there was mold, he may not have seen it if it were behind the drywall. Katz testified that the Association called him back to Mrs. Schuh's unit on June 22, 2011, to review work being done on the unit. He testified that, when he arrived at the unit, the workers were not wearing protective gear and the unit owner was sitting in the kitchen nearby where the mold remediation was being performed. This led him to believe there was no toxic mold present in the unit. He testified that, as an experienced mold remediation professional, he would have required workers to wear protective gear and would not have allowed a homeowner to remain on the premises. He testified that he did not see any evidence of mold at that time. Katz admitted on cross-examination that the affected drywall had already been removed from the unit when he arrived on June 22, 2011, and

that there was no way he could know whether the mold found in Mrs. Schuh's unit was toxic. He also admitted that, although the mold remediation workers were not wearing protective gear, they had set up protective plastic sheeting along the walls of the unit. Additionally, he admitted he could not know whether the mold remediation workers had worn protective masks when the drywall was removed because he was not present at that time.

¶ 21 The court questioned Katz about the report Mrs. Schuh had received from IMS Laboratories stating there was mold in the unit. Katz replied that he had not seen the report. He then read through the report and testified that the report showed the presence of stachybotrys mold. He explained that stachybotrys was a genus of mold that included many species, one of which was black mold that could be toxic. According to Katz, however, there was no proof that the mold in Mrs. Schuh's unit was toxic.

¶ 22 Mrs. Schuh testified she was out of the unit having surgery and then in post-operative rehabilitation during part of the mold remediation process. She testified that she was in the unit when the drywall and insulation were removed. She described the insulation as "soaked" when it was removed. Mrs. Schuh also testified that she saw mold on the bottom of the carpet when the carpet was removed. The Association's counsel objected to Mrs. Schuh's ability to testify to the presence of mold because Mrs. Schuh is not an expert, but the court overruled the objection, stating that Mrs. Schuh could testify as to what she saw and noting that the court would weigh her credibility appropriately. Mrs. Schuh also testified that all of the invoices she had received for the repair work to her unit had been paid.

¶ 23 After closing arguments, the court entered judgment for Mrs. Schuh, continued count III

and the attorney's fee issue, and granted Mrs. Schuh leave to submit a memorandum regarding punitive damages. The bystander's report describes the ruling thus:

> "The Judge stated that in August 2010 the Plaintiff had seen water streaming from the outlet and bubbling on the wall. She stated that the Schuhs had made numerous calls to the Association and received no response. The Judge stated that after all that time had passed with nothing from the Association; the Schuhs' hired a contractor to do the work. The Judge stated that the Schuhs had seen black under the carpet and wet walls which was circumstantial evidence of mold; the Judge stated that the Plaintiff was a credible elderly woman.
>
> The Judge awarded $1,900 for the drywall removal and replacement. She stated that the Association had reimbursed other owners to replace their drywall and it was outrageous that they would not reimburse the Plaintiff. The Judge also awarded $400 for the mold testing. She then awarded the Plaintiff for half of the mold remediation work invoice ($2,197.14). She entered judgment for $3,497 plus costs in favor of the Plaintiff."

¶ 24 At the subsequent punitive damages hearing, the court asked Mrs. Schuh's counsel to explain what was being sought and why he thought his client was entitled to attorney fees as punitive damages. Mrs. Schuh's counsel stated that, because the Association failed to do its job,

Mrs. Schuh spent $12,415 in attorney fees over a period of 19 months. Counsel argued that the Association did not do its job because it believed Mrs. Schuh would not spend the time and money necessary to have a court tell the Association it was wrong. Counsel argued that the Association's behavior was malicious and warranted punitive damages because: (1) it breached its fiduciary duty in an aggravated circumstance such as wantonness, willfulness, malice, or oppression; and (2) there was extremely egregious behavior.

¶ 25 Counsel for the Association argued in response that the Association did not disregard Mrs. Schuh's complaint, but that it took time to address Mrs. Schuh's problem because the inspections and repair work involved the whole building and not just one unit.

¶ 26 The trial court noted that it took nearly two years to address Mrs. Schuh's unit, which showed indifference to Mrs. Schuh's rights. It specifically found Mrs. Schuh and Cindy Schuh to be extremely credible. The court stated it believed there was mold in the unit and that Mrs. Schuh had obviously suffered. It stated that Mrs. Schuh was an elderly person without sufficient resources available and, even after she hired an attorney, the Association continued to show an indifference to her needs. The court entered an award of $12,000 in punitive damages as attorney fees and $10,000 in punitive damages, writing a memorandum order stating:

> "The condominium had a fiduciary duty to keep plaintiff's apartment dry, clean and safe from mold and failed to do so thereby, in an egregious, willful manner, breached its fiduciary duty to Mary Ann Schuh. It breached its fiduciary duty by not repairing plaintiff's apartment in a timely manner and forced her to live there for months in an unsafe

condition. Mary Ann Schuh was forced to spend her own money to repair the unit. The Association defendant acted with reckless indifference to the rights and needs of Mary Ann Schuh who was forced to use her own funds to repair an apartment and then hire a lawyer to help her recover her reasonable costs.

IT IS HEREBY ORDERED;

1. That Mary Ann Schuh is awarded a judgment of $5497.00 in damages against the Plaza Des Plaines Condominium Association;

2. That Mary Ann Schuh is awarded a judgment of $12,000 in attorney's fees as punitive damages against the Plaza Des Plaines Condominium Association; and

3. That Mary Ann [Schuh] is awarded a judgment of $10,000 in punitive damages against the Plaza Des Plaines Condominium Association."

¶ 27 In May 30, 2013, the court clarified its prior order that count III, an action to compel Association records was withdrawn, and that count II, the breach of contract count, was withdrawn after the trial court ruled in favor of Mrs. Schuh on count I, the breach of fiduciary duty count. The trial court also denied the Association's motion to reconsider.

¶ 28 The Association appeals.

¶ 29 II. ANALYSIS

¶ 30 On appeal, the Association contends that the trial court erred in its award of damages.

First, the Association argues that the award of damages, that is, a total recovery in excess of $10,000 violates the rules regarding small claims cases. The Association asks this court to limit the damages awarded to Mrs. Schuh to under $10,000. Next, the Association contends that the award of punitive damages should be reversed outright or, in the alternative reduced, as there was "no basis in the evidence for a finding that the Association breached its fiduciary duty to Plaintiff in any manner, much less in an egregious and willful manner." Finally, the Association challenges the court's computation of compensatory damages. For the following reasons, we affirm.

¶ 31 I. Small Claims Proceedings

¶ 32 We first address the Association's claim that the court erroneously awarded total damages in excess of the limited allowed in small claims matters.

¶ 33 A "small claim" is a "civil action based on either tort or contract for money not in excess of $10,000, exclusive of interest and costs." Ill. S. Ct. R. 281 (eff. Jan 1, 2006). In a small claims action, the rules of evidence are relaxed and the hearing is informal. Ill. S. Ct. 286(b) (eff. Aug. 1, 1992). Supreme Court Rule 286(b) further provides that the rules of evidence are relaxed in small claims proceedings in the following manner:

> "At the informal hearing all relevant evidence shall be admissible and the court may relax the rules of procedure and the rules of evidence. The court may call any person present at the hearing to testify and may conduct or participate in direct and cross-examination of any witness or party." Ill. S. Ct. R. 286(b) (eff.

Aug. 1, 1992).

Judicial review of a Supreme Court Rule is a question of law subject to *de novo* review. *State Farm Insurance Co. v. Kazakova*, 299 Ill. App. 3d 1028, 1031 (1998).

¶ 34 At the outset, we note that this case was not filed as a small claims matter. Additionally, there is nothing in the record nor in the minimal bystander's report before us that shows an agreement by the parties to proceed under the relaxed procedures of small claims proceedings, nor any discussion or ruling by the trial court stating that it would proceed under these relaxed procedures. Although the Association argues it was prejudiced where the court considered incompetent evidence, that is, evidence allowable under small claims rules but not in a general court setting, the only instance to which the Association directs us is a portion of the bystander's report in which the Association's objection was overruled by the trial court's reliance on Supreme Court Rule 286. The entirety of that portion of the bystander's report reads as follows:

> "Cindy testified that her and her mother first became aware of a water issue in August of 2010 when water was running out of one of Mary Ann's electrical outlet. Cindy testified that after noticing the water running from the electrical outlet she called the Des Plaines fire department. Cindy testified that the fire department told her that the outlet was unsafe to use. Counsel for the Association objected to what the fire department told Cindy as hearsay. The court overruled the objection relying on Illinois Supreme Court Rule 286."

Whether or not this information was properly allowed, it had no bearing on the court's ruling in favor of Mrs. Schuh. After the trial, the parties each submitted proposed bystander's reports. The court elected to use the report prepared by counsel for Mrs. Schuh. Counsel for the Association brought objections and clarifications to the court's attention, and the court held a hearing on the matter. At the hearing, the court made it clear that what impacted its decision was the fact that the walls and carpeting were wet, that the carpeting and walls had a black substance growing on them, and that the Association ignored Mrs. Schuh's requests for assistance. Any evidence before the court regarding the fire department representative's determination that the outlet was unsafe to use had no impact on the outcome of this case. We acknowledge the Association did make other objections at trial, but the bystander's report does not detail the bases for the court's ruling on those objections. The Association as the appellant bore the burden of presenting this court with an adequate record. *Landros v. Equity Property & Development*, 321 Ill. App. 3d 57, 63 (2001). The Association, if it had concerns specific to the allegedly relaxed proceedings, had ample opportunity to make record of this during the hearing on the bystander's report. As evidenced by the transcript in the record of the hearing, the Association did not do so.

¶ 35 Moreover, even if the court relied on Supreme Court Rule 286, the record before us does not reflect an objection by the Association to this process. The Association, accordingly, waived this issue. See *Dienstag v. Margolies*, 396 Ill. App. 3d 25, 38 (2009) ("To preserve a trial error for review on appeal, a party must make a timely objection."). We acknowledge that the bystander's report reflects an argument during the hearing on punitive damages and attorney fees in which the Association's attorney stated that the case "should be transferred and not treated as a

small claim action." However, although the Association's brief would lead us to believe that was the end of the discussion, the bystander's report actually continues on, stating:

> "The Judge asked the [Association's attorney] what she thought a small claim was and suggested that the attorney read the rule again. The Judge stated that the attorney should read the local rules because her courtroom hears cases up to $30,000 or $40,000; she said that she routinely has cases seeking $70,000 before her. The Judge then stated that since the Plaintiff only sought and was awarded less than $30,000 in compensatory damages, her courtroom was the proper jurisdiction to hear the case."

Contrary to the Association's representations before us, this portion of the bystander's report does nothing to illuminate: (a) whether the case was tried under Supreme Court Rule 286; or (b) whether the Association's attorney objected at trial to the relaxed proceedings under Supreme Court Rule 286. Even if we were to address this issue, however, we would uphold the circuit court's judgment. The circuit court awarded a judgment of $5497 in compensatory damages against the Association. It also expressly awarded $22,000 in additional punitive damages against the Association. The Association maintains that anything in excess of $10,000 exceeded the small claims limit in this case. However, the small claims rules do not address punitive damages, and the small claims limit of $10,000 only applies to the *underlying claim itself*, not to an award of punitive damages. See S. Ct. R. 281 (eff. Jan. 1, 2006) (defining a "small claim" as a "civil action based on either tort or contract for money not in excess of $10,000, exclusive of interest and costs"). We therefore reject the Association's contention that anything–including

punitive damages–in excess of $10,000 is contrary to the small claims rules.

¶ 36 The Association's reliance on *Benson v. Abbott*, 326 Ill. App. 3d 599 (2001), for the proposition that, pursuant to Supreme Court Rule 281, a court cannot award a plaintiff more than $10,000.[4] The *Benson* case is inapposite to the issue at bar for a number of reasons, the most pertinent here that the challenged award in the *Benson* case was based solely in tort; the court never considered if the small claims rules were a limit on non-compensatory damages such as punitive damages or attorney fees.

¶ 37 ii. The Punitive Damage Award

¶ 38 Next, the Association challenges the award of punitive damages, arguing that the award should be reversed in its entirety. The Association specifically challenges the court's determination that its breach of fiduciary duty rose to a level that would allow punitive damages. In the alternative, the Association asks this court, if it finds that the award was not an abuse of discretion, to reduce the punitive damages amount.

¶ 39 The purpose of punitive damages is not compensation, but punishment of the offender and deterrence of the wrongdoer and others. *Loitz v. Remington Arms Co.*, 138 Ill. 2d 404, 415 (1990). Punitive damages may be awarded "where the defendant's conduct is willful or outrageous due to evil motive or a reckless indifference to the rights of others." *Tully v. McLean*, 409 Ill. App. 3d 659, 669-70 (2011). In reviewing a trial court's decision to award punitive damages, this court takes a three-step approach, considering: "(1) whether punitive damages are

[4] At the time of the *Benson* decision, the small claims limit was $5,000. That limit has since been raised to $10,000.

available for the particular cause of action, using a *de novo* standard; (2) whether, under a manifest weight of the evidence standard, the defendant or defendants acted fraudulently, maliciously or in a manner that warrants such damages; and (3) whether the trial court abused its discretion in imposing punitive damages." *Caparos v. Morton*, 364 Ill. App. 3d 159, 178 (2006). A trial court is in the best position to observe the conduct and assess the credibility of the witnesses, and we will not substitute our judgment for that of the trial court in matters of the credibility of the witnesses, the weight to be given the evidence, or the inferences to be drawn therefrom. *Tully*, 409 Ill. App. 3d at 670-71. In this case, the trial court awarded Mrs. Schuh a total of $22,000 in punitive damages, consisting of $12,000 in attorney fees as punitive damages plus an additional $10,000 in punitive damages.

¶ 40 a. Availability of Remedy

¶ 41 As to the first consideration, we review *de novo* whether punitive damages were available as a matter of law for a plaintiff's cause of action. See *Tully*, 409 Ill. App. 3d at 670. The parties agree that a trial court may award punitive damages in a breach of fiduciary duty case. *Tully*, 409 Ill. App. 3d at 670; *In re Estate of Hoellen*, 367 Ill. App. 3d 240, 253 (2006).

¶ 42 b. The Factual Determination

¶ 43 We review the next consideration, whether the Association acted in a manner that warrants punitive damages, under a manifest weight standard of review. *Gambino v. Boulevard Mortgage Corp.*, 398 Ill. App. 3d 21, 68 (2009). "A ruling is against the manifest weight of the evidence if it is arbitrary, unreasonable, arbitrary and not based on the evidence, or when the opposite conclusion is clearly evidenced from the record." *Tully*, 409 Ill. App. 3d at 670. Under

this standard, we offer deference to the trial court's findings of fact because it is in the "best position to observe the conduct and demeanor of the parties and the witnesses." *Tully*, 409 Ill. App. 3d at 670. A trial court's assessment of punitive damages is a "highly factual decision that should be a reflection of the fact finder's determination of maliciousness." *Gambino*, 398 Ill. App. 3d at 70 (2009).

¶ 44 The Association asserts that the court erred in finding it acted in an egregious and willful manner, and with reckless indifference to the rights and needs of Mrs. Schuh. Our review of the record, however, shows the trial court's determination was not against the manifest weight of the evidence. Rather, the evidence before us shows a pattern of neglect and a reckless indifference to Mrs. Schuh, to whom it owed a fiduciary duty. Specifically, Mrs. Schuh sought to be reimbursed her out-of-pocket expenses for the water infiltration and resulting mold damage. The Association ignored her repeated requests to inspect and repair her unit from August 2010 until May 2011, at which time it finally sent an inspector to her unit and other units. Eventually, in June 2011, Mrs. Schuh hired a mold testing company to assess her unit. This company informed her there was mold present that should be remediated. Mrs. Schuh hired a company to remediate the mold. She requested reimbursement from the Association. The Association refused to reimburse her. Mrs. Schuh then hired an attorney and incurred attorney fees in order to demand that the Association reimburse her for the mold remediation. The Association continued to refuse to reimburse her.

¶ 45 The trial court, which was in the best position to observe the witnesses and make credibility determinations, found Mrs. Schuh and Cindy "extremely credible." It found the

Association "acted with reckless indifference to the rights and needs of Mary Ann Schuh who was forced to use her own funds to repair an apartment and then hire a lawyer to help her recover her reasonable cost." These findings are not against the manifest weight of the evidence, but rather, are supported by the above-recited facts, including that Mrs. Schuh attempted to enforce her rights with the Association for many months, but was repeatedly ignored by the Association, which did not make any attempt to repair the water infiltration damage. When the Association finally responded to Mrs. Schuh's request for reimbursement, it denied the request, stating that it "remains unconvinced about the exact nature of the alleged damages and the work that was actually performed," even after its own report showed that there was a water infiltration issue with the common elements of the building.

¶ 46 We note here that the parties disagree as to whether a particular affidavit by the secretary of the Association, which was attached as an exhibit to the Association's response to Mrs. Schuh's petition for attorney fees as well as an exhibit to the Association's motion to reconsider, can properly be considered by this court. The Association relies on the following statement from the affidavit in which the secretary avers: "the board had to determine a comprehensive approach to the correction of the problem for the benefit of all owners. The first step in the correction is always the elimination of the source of the water infiltration." This affidavit and the above statement on which the Association relies has no impact on our decision herein, where the clear issue is the fact that the Association ignored Mrs. Schuh's requests for assistance until such time as she was forced into acting on her own behalf.

¶ 47 In addition, the Association appears to misapprehend the trial court's ruling when it states:

"[e]ssentially, the trial court found the egregious and willful conduct to be the Association's (1) failure to timely repair the unit and (2) failure to keep the unit safe from mold." Rather, the offending conduct, as the court plainly stated in the hearing on the bystander's report, which transcript is in the record on appeal, was that the Association actively avoided its obligations to Mrs. Schuh, causing her to endure an unsafe condition, which caused the growth of a mold-like substance. For example, the court noted:

> "THE COURT: The complaint by the resident was that the water had gushed through her apartment; that it took months and months and months for the association to remedy the wet, wet walls. The carpeting was still wet. And there was a black substance growing on the wall and the carpeting. So the Court ruled the way the Court did, not on the basis of a lab report that there was actual mold. *** It doesn't matter to the Court that it was maybe not actual mold. But the fact was, and [Cindy] was very credible, that there was black stuff growing in a wet area that was ignored by the condo association for a very very long time."

¶ 48 Here, while the Association's behavior may not have been due to an "evil motive" (see *Tully*, 409 Ill. App. 3d at 669-70 (Punitive damages may be awarded "where the defendant's conduct is willful or outrageous due to evil motive or a reckless indifference to the rights of others")), the circuit court found that the behavior was egregious, willful, and done with "reckless indifference" to the rights of Mrs. Schuh. That is sufficient to support an award of punitive

damages, and the Association has failed to present this court with any evidence that the court's determination was against the manifest weight of the evidence.

¶ 49 c. Abuse of Discretion

¶ 50 As to the third consideration, we do not find that the trial court abused its discretion in assessing punitive damages in this case. A trial court does not abuse its discretion unless no reasonable person could assume its view. *Caparos*, 364 Ill. App. 3d at 180. We find that a reasonable person could find Mrs. Schuh deserved an award of punitive damages on the breach of fiduciary duty claim.

¶ 51 We note here that the Association urges us to find an abuse of discretion because the award conflicts with its business judgment. "Under the business judgment rule, " ' "[a]bsent evidence of bad faith, fraud, illegality, or gross overreaching, courts are not at liberty to interfere with the exercise of business judgment by corporate directors." ' " *Feliciano v. Geneva Terrace Estates Homeowners Ass'n*, 2014 IL App (1st) 130269, ¶ 39 (quoting *Goldberg v. Astor Plaza Condominium Ass'n*, 2012 IL App (1st) 110620, ¶ 63 (quoting *Fields v. Sax*, 123 Ill. App. 3d 460, 467 (1984)). "The rule protects directors who have been careful and diligent in performing their duties from being subjected to liability for honest mistakes of judgment." *Feliciano,* 2014 IL App (1st) 130269, ¶ 39. To begin with, the Association has waived this argument by failing to raise it at trial. See *Village of Arlington Heights v. Nat'l Bank of Austin*, 53 Ill. App. 3d 917, 919 (1977) ("An appellant who fails to raise a certain defense at trial may not raise that defense for the first time on review"). Even if the Association had properly raised this defense, however, we would still find the argument unavailing. As noted, the business judgment rule is designed to

protect directors who have been careful and diligent in their duties, but who make "honest mistakes of judgment." *Feliciano*, 2014 IL App (1st) 130269, ¶ 39. That is not what occurred in this case, where the Association was neither diligent nor careful in performing its duties, but instead chose to ignore the plight of Mrs. Schuh. The Association did not carefully and diligently go about its duties, inadvertently making an honest mistake of business judgment; the Association simply failed to do its job, something not protected by the business judgment rule.

¶ 52 iii. Modification of the Punitive Damages Award

¶ 53 Next, the Association urges us to modify the amount of the punitive damages award because "there is no evidence that the association acted with an intentional premeditated scheme to harm the Plaintiff, that any actual harm occurred, or that the Association acted with malice." The Association argues that the trial court's computation of damages was so excessive as to indicate "passion, partiality, or corruption." We disagree.

¶ 54 To determine whether an award is excessive in a given case, Illinois courts look to a fact-specific set of relevant circumstances, including: "(1) the nature and enormity of the wrong, (2) the financial status of the defendant, and (3) the potential liability of the defendant." *Turner v. Firstar Bank, N.A.*, 363 Ill. App. 3d 1150, 1161 (2006). "The highly factual nature of the assessment of punitive damages dictates that a great amount of deference should be afforded the determination made at the trial court level, and to reflect that deference and the highly factual nature of the determination, we review the assessment of punitive damages on a manifest-weight-of-the-evidence standard." *Turner*, 363 Ill. App. 3d at 1161-62. "A judge or jury's assessment of punitive damages will not be reversed unless the manifest weight of the evidence shows that

the assessment was so excessive as to demonstrate passion, partiality, or corruption on the part of the decision-maker." *Franz v. Calaco Development Corp.*, 352 Ill. App. 3d 1129, 1145 (2004).

¶ 55 Here, the Association has failed to present evidence sufficient to show that the award was against the manifest weight of the evidence, and "so excessive as to demonstrate passion, partiality, or corruption on the part of the decision-maker." See *Franz*, 352 Ill. App. 3d at 1145. Rather, the record before us reveals that the Association acted with, at minimum, indifference in dealing with an elderly woman to whom it had a fiduciary responsibility. The trial court, in formulating the punitive damages award, considered the $12,000 in attorney fees Mrs. Schuh had incurred in her efforts to enforce her rights against the Association. It is proper for the trial court to consider attorney fees in a punitive damages formulation. See, *e.g.*, *Chicago Title & Trust Co. v. Walsh*, 34 Ill. App. 3d 458, 471 (1975) ("When fixing an award for exemplary damages, the court may properly consider as one element the amount of the plaintiff's attorney fees"). "The amount of the award 'should send a message loud enough to be heard but not so loud as to deafen the listener.' " *Dubey v. Public Storage, Inc.*, 395 Ill. App. 3d 342, 348 (2009) (quoting *Hazelwood v. Illinois Central Gulf R.R.*, 114 Ill. App. 3d 703, 713 (1983)). Because the Association is unable to overcome the high level of deference provided the trial court's determination in this regard, and is unable to show the award was against the manifest weight of the evidence, we believe the award here was sufficient to punish the Association for its conduct and to deter it and others from similar conduct in their future transactions with those with him they owe a fiduciary duty. Therefore, we affirm the award of punitive damages.

¶ 56 iv. Compensatory Damages

¶ 57 Finally, the Association challenges the trial court's award of compensatory damages. Specifically, the Association argues that the award for mold inspection and remediation, that is, the actual compensatory damages award of $1,498.57, is against the manifest weight of the evidence where there was no breach of fiduciary duty because the Plaza Des Plaines Condominium Declaration, Association, Bylaws, and Amendments [the Declaration] required Mrs. Schuh to obtain prior written approval from the Board before making changes to the condominium unit, which she did not do. Additionally, the Association again argues that its action–or inaction–is protected by the business judgment rule.

¶ 58 "A ruling is against the manifest weight of the evidence if it is arbitrary, unreasonable, arbitrary and not based on the evidence, or when the opposite conclusion is clearly evidenced from the record." *Tully*, 409 Ill. App. 3d at 670. Under this standard, we offer deference to the trial court's findings of fact because it is in the "best position to observe the conduct and demeanor of the parties and the witnesses." *Tully*, 409 Ill. App. 3d at 670.

¶ 59 Here, the trial court very specifically, found the Association breached its fiduciary duty to Mrs. Schuh in an "egregious, willful manner," that, by not repairing her apartment in a timely manner, it "forced [Mrs. Schuh] to live there for months in an unsafe condition," and "forced" Mrs. Schuh to spend her own money to repair her apartment. The court found that the Association acted with "reckless indifference to the rights and needs" of Mrs. Schuh." Additionally, the court, at the hearing on the bystander's report explained it had ruled the way it did because it took "months and months and months" for the Association to remedy the "wet, wet walls," and that the Association ignored Mrs. Schuh's requests for assistance "for a very very

long time." For the Association to now come before this court of review and argue that it should not be held responsible for the cost of the repairs because Mrs. Schuh failed to get its permission before acting to remedy the unsafe condition in her unit is disingenuous. The crux of the issue at trial was the fact that, although Mrs. Schuh repeatedly sought help from the Association, the Association repeatedly ignored those requests. The Association has failed to show the trial court's award of damages in the amount of $1,498.57 was an abuse of discretion.

¶ 60 III. CONCLUSION

¶ 61 For all of the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 62 Affirmed.