IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

LEON DEWEERDT and ELSIE DEWEERDT, husband and wife,
Plaintiffs/Appellants,

v.

HONEST AIR, INC., an Arizona corporation,
Defendant/Appellee.

No. 1 CA-CV 14-0700
FILED 8-23-2016

Appeal from the Superior Court in Maricopa County
No. CV2008-091922
The Honorable Colleen L. French, Judge *Pro Tempore*

AFFIRMED

COUNSEL

Leon and Elsie DeWeerdt, Mesa
Plaintiffs/Appellants

Lewis Brisbois Bisgaard & Smith, LLP, Phoenix
By Phillip S. McClure, Bruce C. Smith
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Presiding Judge Kent E. Cattani delivered the decision of the Court, in which Judge Samuel A. Thumma and Judge Randall M. Howe joined.

C A T T A N I, Judge:

¶1 Leon and Elsie DeWeerdt appeal from a jury verdict finding Honest Air, Inc. liable for breach of implied warranty but rejecting the DeWeerdts' remaining claims. For reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 The DeWeerdts purchased a home in May 2006. During the inspection period, the DeWeerdts discovered the air conditioning unit needed repairs. The sellers hired Honest Air to make the necessary repairs. After closing escrow, however, the DeWeerdts discovered significant water damage they claim resulted from Honest Air's improper repairs. The DeWeerdts sued Honest Air alleging breach of contract, breach of express warranty, breach of implied warranty, and negligence *per se*. The DeWeerdts later named the sellers as co-defendants.

¶3 The DeWeerdts reached a confidential settlement with the sellers. The case against Honest Air went to trial, and the jury found for Honest Air on all claims. The DeWeerdts then sought and were granted a new trial on the ground that the defense verdicts were not justified by the evidence. *See* Ariz. R. Civ. P. 59(a)(8).

¶4 Before the second trial, the DeWeerdts filed an amended complaint against Honest Air seeking "no less than $24,593.47" in damages. They also moved *in limine* to exclude all evidence of their confidential settlement with the sellers. The superior court granted the motion in part, finding the fact of settlement to be admissible but barring Honest Air from introducing the amount of the settlement.

¶5 The second jury found for the DeWeerdts on their breach of implied warranty claim and awarded $4,000 in damages, but found for Honest Air on the other claims. The superior court then denied Honest Air's request for an offset based on the settlement between the DeWeerdts and the sellers. The court declined to award attorney's fees, but awarded

Honest Air its costs. The DeWeerdts timely appealed from the entry of final judgment.

DISCUSSION

¶6 The DeWeerdts argue that (1) the jury's findings were not supported by sufficient evidence (specifically, that the jury ignored Honest Air's violations of the building code and that the damages award was unreasonably low), (2) the jury was influenced by improperly admitted evidence of the settlement agreement with the sellers, and (3) the court was biased against them. We address each argument in turn.

I. Sufficiency of the Evidence.

¶7 This claim is not properly before the court because the DeWeerdts did not file a motion for new trial in superior court after the second trial. Under A.R.S. § 12-2102(C), an appellate court "shall not consider the sufficiency of the evidence to sustain the verdict or judgment in an action tried before a jury unless a motion for a new trial was made." *See also Marquette Venture Partners II, L.P. v. Leonesio*, 227 Ariz. 179, 182, ¶ 7 (App. 2011); *Lewis v. S. Pac. Co.*, 105 Ariz. 582, 583 (1970). Because the DeWeerdts did not seek a new trial, their claim fails.

¶8 We further note that because the DeWeerdts have not provided transcripts from the second trial, appellate review of this type of claim is precluded. The superior court granted the DeWeerdts' request for a transcript-preparation fee waiver on April 12, 2016, but the DeWeerdts have failed to provide transcripts for four months thereafter. As the appellants, they were obligated to obtain and file the transcripts necessary to support their appeal. *See* ARCAP 11(c)(1)(A), (B). Without the requisite transcripts, we presume the evidence supported the second jury's verdict. *See Renner v. Kehl*, 150 Ariz. 94, 97 n.1 (1986).

II. Evidence of the Settlement Agreement.

¶9 The DeWeerdts argue that the second jury awarded an unreasonably small measure of damages because of confusion resulting from the superior court's decision to allow evidence of their settlement with the sellers and from the jury instruction referencing the settlement and a potential offset. But the jury heard only that there was some type of settlement with the sellers; the settlement agreement was not admitted into evidence and neither of the sellers testified at the second trial. And more importantly, the jury was expressly instructed not to consider the amount of the settlement in determining damages:

> A settlement was reached between Plaintiffs DeWeerdt and the [sellers]. The fact a settlement was reached may only be considered by you in determining the credibility of witnesses and not for any other purpose. If you find in favor of Plaintiffs, you should award full damages, in accordance with the damages instructions I give you. The Court may offset any damages you award by the amount of the settlement after a verdict is entered.

We presume jurors follow the instructions given, *see Elliott v. Landon*, 89 Ariz. 355, 357 (1961), and the DeWeerdts have not presented any evidence rebutting this presumption. Thus, the DeWeerdts have not established that evidence of their settlement with the sellers improperly influenced the jury's verdict.

III. Judicial Bias or Prejudice.

¶10 The DeWeerdts contend that the trial judge was biased because she allowed or presented "negative views" of the DeWeerdts' settlement. But we presume trial judges are free of bias and prejudice. *See Stagecoach Trails MHC, L.L.C. v. City of Benson*, 232 Ariz. 562, 568, ¶ 21 (App. 2013). Judicial bias or prejudice ordinarily must "arise from an extra-judicial source and not from what the judge has done in his participation in the case." *State v. Thompson*, 150 Ariz. 554, 557 (App. 1986). Thus, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky v. United States*, 510 U.S. 540, 555 (1994); *see also State v. Ellison*, 213 Ariz. 116, 129, ¶ 40 (2006). Here, the DeWeerdts have not offered any evidence of bias apart from the court's rulings, and have not overcome the presumption that the trial judge was free of bias and prejudice.

CONCLUSION

¶11 For the foregoing reasons, we affirm the judgment in the second trial. As the successful party on appeal, Honest Air is entitled to its costs incurred on appeal upon compliance with ARCAP 21.

Amy M. Wood • Clerk of the court
FILED: AA