

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

MICHAEL K. REILLY, AN INDIVIDUAL,
Plaintiff/Appellant,

v.

PHILIP L. CANALE AND TERRA CANALE, HUSBAND AND WIFE,
Defendants/Appellees.

No. 2 CA-CV 2015-0090
Filed February 4, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. C20114665
The Honorable James E. Marner, Judge

VACATED

COUNSEL

Mesch, Clark & Rothschild, P.C., Tucson
By Melvin C. Cohen and Paul A. Loucks
Counsel for Plaintiff/Appellant

Brier, Irish, Hubbard & Erhart, PLC, Phoenix
By Craig T. Irish

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Law Office of Terrence A. Jackson, Tucson
By Terrence A. Jackson
Co-counsel for Defendants/Appellees

MEMORANDUM DECISION

Presiding Judge Howard authored the decision of the Court, in which Judge Espinosa and Judge Staring concurred.

H O W A R D, Presiding Judge:

¶1 Appellant Michael Reilly appeals from the trial court's grant of a motion for a new trial following a jury verdict in his favor. The court granted the motion for a new trial based, in part, on an allegedly erroneous jury instruction. Reilly argues the court erred in granting the motion because appellees Philip and Terra Canale (the Canales) had failed to properly object to the jury instruction at issue and because the instruction was not erroneous. We conclude the court erred by granting the motion for a new trial and vacate the court's ruling and reinstate the jury verdict.

Factual and Procedural Background

¶2 In reviewing the grant of a new trial, we defer to the factual findings made by the trial court. *State Farm Fire and Cas. Co. v. Brown*, 183 Ariz. 518, 521, 905 P.2d 527, 530 (App. 1995). "If the court's findings are also conclusions of law, however, we are not bound by them." *Id.* In 2004, Reilly and Philip Canale agreed to form Sierra Pipeline, LLC. They agreed that each would have a fifty percent ownership interest in the company, but pursuant to their agreement, Reilly was not included as a member in the company's articles of organization. Philip Canale was the manager for the company.

¶3 In 2004, Reilly and Canale also agreed to purchase real property under the name Cedar Vista LLC, with the intention of developing a subdivision. They agreed that Reilly would have a thirty-five percent ownership interest in the company, and Canale

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would have a sixty-five percent interest. Again, Reilly was not included as a member on the articles of organization. The parties also decided that Philip Canale would be the manager for that company.

¶4 Cedar Vista contracted for Sierra Pipeline to perform construction work. Sierra Pipeline performed work for the project for thirty months, beginning in late 2005. Cedar Vista paid Sierra Pipeline at the end of the first year for the work that had been performed thus far. Unbeknownst to Reilly, Cedar Vista did not pay Sierra Pipeline for any of the work it completed after that time and, at some point, Sierra Pipeline stopped billing Cedar Vista for its work. Sierra Pipeline used its profits from other projects to cover its cost for the Cedar Vista project. Canale did not tell Reilly that Cedar Vista was not going to pay Sierra Pipeline for its work until after that project had been completed.

¶5 Reilly sued the Canales for, inter alia, breach of fiduciary duty. A jury found that Philip Canale had breached his fiduciary duty and awarded Reilly \$1.4 million in damages. The Canales then filed a motion for a new trial, alleging, in part, that one of the jury instructions erroneously informed the jury that Philip Canale was, presumptively, Reilly's partner, which was a question of fact for the jury to decide. The trial court granted the motion, agreeing with the Canales that the instruction was erroneous and that their objection had been properly preserved. We have jurisdiction over Reilly's appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(5)(a).

Sufficiency of Objection at Trial

¶6 Reilly first argues the trial court erred by granting the new trial because the Canales waived the argument supporting their motion by failing to object to the first sentence of the jury instruction at trial as required by Rule 51(a), Ariz. R. Civ. P. We review an order granting a new trial for an abuse of discretion, *Mill Alley Partners v. Wallace*, 236 Ariz. 420, ¶ 7, 341 P.3d 462, 464 (App. 2014), but review "questions related to the . . . application of court rules de novo," see *In Re Indenture of Trust Dated Jan. 13, 1964*, 235 Ariz. 40, ¶ 41, 326 P.3d 307, 318 (App. 2014).

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¶7 Rule 51(a) requires that, in order to “assign as error the giving or the failure to give [a jury] instruction,” a party must “object[] thereto . . . stating distinctly the matter objected to and the grounds of the objection.” Objections must state the specific ground on which they are based; general objections are insufficient. *Long v. Corvo*, 131 Ariz. 216, 217, 639 P.2d 1041, 1042 (App. 1981). An objection on the ground that an instruction does not accurately “state the law is a general objection” and therefore insufficient under Rule 51(a). *Spillios v. Green*, 137 Ariz. 443, 446, 671 P.2d 421, 424 (App. 1983).

¶8 “[A]bsent fundamental error, the superior court may not grant a new trial based on an erroneous instruction to which no objection was raised at trial.” *Mill Alley Partners*, 236 Ariz. 420, ¶ 8, 341 P.3d at 465. To do so exceeds the court’s legal discretion and the order must be set aside. *Long*, 131 Ariz. at 217, 639 P.2d at 1042.

¶9 While discussing jury instructions at the close of trial, the trial court proposed Final Instruction Three. It read, in relevant part:

Philip Canale was Michael Reilly’s partner in Sierra Pipeline LLC and Cedar Vista LLC. Partners owe a special duty to one another, which is called a fiduciary duty. This duty requires partners to deal in utmost good faith with one another and fully disclose to one another all material facts relating to partnership affairs within their knowledge.

See State Bar of Arizona, Revised Arizona Jury Instructions (Civil) 5th Commercial Torts 1D (2013).

¶10 The Canales objected on the grounds that the instruction failed to adequately state the law regarding the duties that partners have to one another, arguing the court’s proposed instruction imposed too high a burden of good faith and fair dealing. At no point during this exchange did the Canales challenge the first sentence of the instruction which later became the basis for

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their motion for a new trial. The court overruled their objection and gave the instruction without modification.

¶11 Following the jury verdict, the Canales filed a motion for new trial. They contended Final Instruction Three was erroneous because first, it presupposed the existence of a partnership and second, because it presumed that a partnership existed between Reilly and Philip Canale as opposed to between Reilly and one of the limited liability corporations. The Canales argued that a jury should determine the existence of a partnership and the identity of its members unless the court could so determine as a matter of law, and thus Final Instruction Three was contrary to the law.

¶12 Rule 51(a) requires that an objection “stat[e] distinctly the matter objected to and the grounds of the objection.” As discussed above, the Canales did not object to the identification of Philip Canale as Reilly’s partner. Rule 51(a) provides for a discrete, distinct moment when a party must object with specificity to put the court on notice and give it an opportunity to correct any problems before instructing the jury. *See Nielson v. Flashberg*, 101 Ariz. 335, 340, 419 P.2d 514, 519 (1966) (“The purpose of [Rule 51(a)] requiring distinct statements as to the matters objected to is so that the court may not be led into involuntary error.”). Thus, the Canales failed to satisfy the requirements of Rule 51(a), and the objection could not serve as an “assertion of the alleged error as a ground for a new trial.” *See Long*, 131 Ariz. at 217, 639 P.2d at 1042; *see also* Ariz. R. Civ. P. 51(a).

¶13 The Canales, however, argue that their objection was properly made a short time before the discussion of the jury instructions. Prior to discussing jury instructions, Reilly had moved to amend his pleadings to assert a derivative claim against the partnership. He argued that the partnership statutes authorized a claim based on the partnership related to Cedar Vista. The court had previously granted judgment as a matter of law in favor of the Canales on Reilly’s derivative action claims on the ground that Reilly was not a member of either of the limited liability corporations.

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¶14 While opposing Reilly’s motion, the Canales argued that allowing Reilly to add certain claims under the partnership statutes would be erroneous because the identity of the partners was unclear. The trial court concluded that the amendment was improper at that stage in the proceedings and might be confusing to the jury, especially on the question of whether a partnership existed and between which entities. The court consequently denied the motion to amend the pleadings. After this, the parties and the court proceeded to settle the jury instructions, and the Canales objected to Final Instruction Three on the ground it did not accurately state the law.

¶15 In its order granting a new trial, the trial court found the Canales’ argument on the motion to amend constituted a sufficient objection to Final Instruction Three. The court explained “[t]he transcript submitted demonstrates that [the Canales] adequately objected, especially in light of the Court’s observations on [Reilly’s] motion to amend the pleadings that took place shortly before objections . . . were made to the jury instructions and which were referenced by [the Canales].” Because whether an objection satisfies Rule 51(a) involves the application of a court rule, we review the objection de novo. *See In Re Indenture of Trust*, 235 Ariz. 40, ¶ 41, 326 P.3d at 318.

¶16 The Canales’ arguments in response to Reilly’s motion to amend the pleadings could not satisfy Rule 51(a)’s requirements. *See* Ariz. R. Civ. P. 51(a); *see also Long*, 131 Ariz. at 217, 639 P.2d at 1042. An objection to an instruction must “stat[e] distinctly the matter objected to and the grounds of the objection” later raised in the motion for new trial. Ariz. R. Civ. P. 51(a). At no point during the discussion on the motion to amend did the Canales argue that Final Instruction Three was incorrect, or that it would be incorrect to add an instruction presupposing that the two were partners. Instead, the Canales argued that amending the pleadings to allow a new cause of action after the close of trial would be confusing to the jury in light of questions regarding the identities of the putative partners.

¶17 The trial court’s comments in denying the motion to amend the complaint indicate that the court would have been pre-

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disposed to sustain an objection to the first sentence of Final Instruction Three had the issue been presented. However, by failing to raise this argument in the specific context of the jury instruction, as required by the explicit language of Rule 51(a), the Canales failed to “alert[Reilly] and the trial court of problems with the instruction.” *Williams v. Thude*, 188 Ariz. 257, 260, 934 P.2d 1349, 1352 (1997). Consequently, the objection was waived and could not support a motion for new trial. *Long*, 131 Ariz. at 217, 639 P.2d at 1042.

¶18 We conclude the trial court abused its discretion in granting a new trial because the objection raised at trial did not pertain to the argument urged in the motion for new trial and because the Canales’ response to an unrelated motion did not constitute a legally sufficient objection to a jury instruction under Rule 51(a). *See Long*, 131 Ariz. at 217, 639 P.2d at 1042 (Under Rule 51(a), court may not grant new trial on different grounds than those raised in original objection.); *Mill Alley Partners*, 236 Ariz. 420, ¶ 8, 341 P.3d at 465.

Propriety of Final Instruction Three

¶19 Even had the objection to Final Instruction Three not been waived, the trial court did not err by giving the instruction. Reilly argues the court abused its discretion in granting a new trial because the only evidence admitted showed Reilly and Philip Canale were partners and Final Instruction Three therefore did not prejudice the Canales. Because the parties did not present any evidence to the contrary, a rational jury would have found that Reilly and Philip Canale were partners even if the court had given the Canales’ proposed instruction instead of Final Instruction Three. *See Gemstar Ltd. v. Earnst & Young*, 185 Ariz. 493, 504, 917 P.2d 222, 233 (1996) (reversal based on trial court’s jury instruction justified only if it is both erroneous and “create[s] substantial doubt as to whether or not the jury was properly guided in its deliberations”), quoting *Melancon v. USAA Cas. Ins. Co.*, 174 Ariz. 344, 347, 849 P.2d 1374, 1377 (App. 1992). Furthermore, the Canales were not prejudiced by the giving of Final Instruction Three because the court could have found that Reilly and Philip Canale were partners as a matter of law. *See id.* at 505, 917 P.2d at 234 (whether fiduciary

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relationship exists question of fact only if sufficient conflicting evidence to submit issue to jury).

¶20 We review the grant of a new trial for abuse of discretion, *Mill Alley Partners*, 236 Ariz. 420, ¶ 7, 341 P.3d at 464, but “review whether a jury instruction correctly states the law de novo,” *A Tumbling-T Ranches v. Flood Control Dist. of Maricopa Cty.*, 222 Ariz. 515, ¶ 50, 217 P.3d 1220, 1238 (App. 2009). A trial court lacks discretion to grant a new trial based on a jury instruction that was either proper or not prejudicial. *Gemstar*, 185 Ariz. at 504, 917 P.2d at 233; see also *City of Phoenix v. Harlan*, 75 Ariz. 290, 293-94, 255 P.2d 609, 611-12 (1953). A court need only instruct the jury on legal theories that are supported by the evidence. *Gemstar*, 185 Ariz. at 503, 917 P.2d at 232.

¶21 Under Arizona law, “the association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership.” A.R.S. § 29-1012(A). Absent a writing, whether a partnership exists is generally a question of fact. *Bohmfolk v. Vaughan*, 89 Ariz. 33, 38, 357 P.2d 617, 620-21 (1960). But “[if] the evidence is insufficient to support a verdict, the trial court has a duty to decide the issue.” *Rhoads v. Harvey Publ’ns, Inc.*, 145 Ariz. 142, 148, 700 P.2d 840, 846 (App. 1984).

¶22 Although the parties contested the issue of partnership in their pretrial statement, the evidence at trial established they were partners in their personal capacity. On direct examination, Reilly testified that he and Philip Canale had agreed to co-own both Sierra Pipeline and Cedar Vista; they created the first entity to perform underground contracting work and the second to purchase land for development. The parties both testified at trial that they held Sierra Pipeline as equal owners; Cedar Vista was divided sixty-five percent to thirty-five percent with the Canales owning the larger interest. In fact, Philip Canale specifically testified that he and Reilly were “partners” and “essentially like partners” in both companies. He further admitted that he did not distinguish between owners and members of a limited liability company (LLC) and believed that it “made no difference” in his business relationship with Reilly whether the companies were LLCs or not.

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¶23 Reilly also called Chris Linscott, a certified public accountant, as a witness. After reviewing certain financial documents pertaining to the two companies, Linscott opined “there was a 50 percent equal ownership in Sierra Pipeline and a 65 for the Canales and 35 percent for . . . Reilly ownership in Cedar Vista.” Further, those financial documents reflected that the companies were both held by the Canales and “partner two” which led Linscott to conclude “there [were] two partners. One is the Canales, and one is . . . Reilly.”

¶24 The Canales could not identify any evidence, either in their brief or at oral argument, other than the existence of the LLCs, to support their theory that Reilly was partners with one or both of the LLCs. Nevertheless, they argued they were entitled to any inference from the fact of the LLCs’ existence. “An inference is a fact which may be presumed from the proof of the existence or non-existence of other facts. It is a conclusion from a proven fact o[r] facts.” *Martin v. Shroeder*, 209 Ariz. 531, ¶ 15, 105 P.3d 577, 581 (App. 2005), quoting *Buzard v. Griffin*, 89 Ariz. 42, 48, 358 P.2d 155, 159 (1960) (alteration in *Martin*). The mere existence of the LLCs does not allow a presumption that Reilly was a partner to one of them; it does not support such a conclusion. In the absence of any contrary evidence, we cannot say the facts were disputed or that a fact finder could draw any alternate inferences.

¶25 Based on the undisputed evidence, Reilly and Philip Canale carried on two businesses for profit as co-owners, and were therefore partners. See § 29-1012(A). Because the evidence was undisputed, no factual issue was present to refute a finding that the partnership existed as a matter of law. See *Rhoads*, 145 Ariz. at 148, 700 P.2d at 846. Further, even had the jury been instructed differently, a rational jury would have found that the two parties were partners; as established by the uncontested testimony. Thus, the Canales could not show that the jury instruction prejudiced them, even if they could show error. See *Gemstar*, 185 Ariz. at 504, 917 P.2d at 233. Because the instruction was not improper and moreover was not prejudicial, the trial court abused its discretion

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when it granted the Canales a new trial based on that instruction. *See id.*; *City of Phoenix*, 75 Ariz. at 293-94, 255 P.2d at 611-12.¹

Disposition

¶26 Based on the foregoing, we vacate the order of the trial court granting a new trial.

¹Reilly also argues that the Canales admitted and stipulated that Philip Canale was Reilly's partner. Because we find the insufficiency of the evidence argument dispositive, we do not reach this argument. Likewise, we do not reach Reilly's argument that the trial court erred by granting judgment as a matter of law on his derivative claims.