IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

DAVID PARRI,
Plaintiff/Appellee,

v.

AHMAD N. ZARIFI AND SAMIA ZARIFI, HUSBAND AND WIFE,
Defendants/Appellants.

No. 2 CA-CV 2015-0163
Filed August 15, 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NOT FOR PUBLICATION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. C20131920
The Honorable Gus Aragón, Judge

AFFIRMED

COUNSEL

Durazzo, Eckel & Hawkins, P.C., Tucson
By Neal Eckel and Eric Hawkins
Counsel for Plaintiff/Appellee

The Law Firm of Thomas C. Piccioli, Tucson
By Thomas C. Piccioli
Counsel for Defendants/Appellants

MEMORANDUM DECISION

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

E S P I N O S A, Judge:

¶1 Ahmad and Samia Zarifi appeal from the trial court's judgment and subsequent denials of their motions for new trial, contending the court committed reversible error "in refusing [their comparative negligence] jury instructions and/or in failing to allocate fault." For the following reasons, we affirm.

Factual and Procedural Background

¶2 In April 2013, appellee David Parri filed a complaint against the Zarifis, Robert and Natalie Lee, and RL Ventures arising from defective remodeling work done on his home. Parri alleged several counts, including breach of contract, breach of implied warranty, breach of fiduciary duty, "personal liability," and various counts of fraud. In September 2014, the trial court dismissed all claims against the Lees, and several of the tort and fraud claims asserted against the Zarifis and RL Ventures.

¶3 RL Ventures filed for bankruptcy on "the eve of trial," and the proceedings against it in this matter were automatically stayed pursuant to federal bankruptcy statutes. At a hearing, the trial court asked the remaining parties if they wished to proceed in light of RL Ventures's bankruptcy, and the Zarifis and Parri confirmed they were prepared for trial. The trial proceeded against the Zarifis on negligence[1] and breach of implied warranty claims.

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[1]It is not entirely clear from the record when the negligence claim was added, but it appears the parties interpreted the "personal liability" count as a claim for negligence. We note, however, that a claim for "[n]egligence as to Zarifi" was listed in the parties' joint

¶4 On the third day of trial, the Zarifis requested jury instructions on comparative fault.[2] The trial court gave the Zarifis "until 1:05 p.m. [the next] day . . . to bring any available documentation on the issue to the Court's attention." They failed to do so and the court declined to give the instruction.

¶5 The jury returned a verdict in favor of Parri on the negligence and breach of implied warranty counts and awarded him $400,000 in compensatory damages. The trial court signed a judgment reflecting the jury's verdicts, but it was not final as it lacked language pursuant to Rule 54(b) or 54(c), Ariz. R. Civ. P. The Zarifis filed a timely motion for new trial, arguing they were "deprived of a fair trial because of surprise and irregularities in the proceedings" relating to the negligence count, and claiming "the jury should have been instructed on comparative fault." Parri responded that the Zarifis' lack of objection "any time before or during trial" to the negligence count raised in the pretrial statement precluded them from doing so after trial. Parri further argued that the Zarifis' failure to raise the comparative fault defense before trial or "brief the court on case law [in] support" of their position when provided leave to do so waived the issue.

¶6 The trial court denied the motion, noting the Zarifis had "provided no case law, authority or disclosure showing that they had put the Court or any party on notice that they intended to argue comparative fault or that they would ask the jury to apportion fault as between themselves and RL Ventures," and, because RL Ventures was in bankruptcy, entered a final judgment pursuant to Rule 54(b),

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pretrial statement, and it appears the Zarifis offered no objection to Parri's assertion of that claim.

[2] The Zarifis previously had submitted proposed jury instructions "Fault 1-4" of the Revised Arizona Jury Instructions, for when there is "no comparative fault," or alternatively, "Fault instructions 5-11" relating to comparative negligence "[i]f RL Ventures is also at fault." *See* Rev. Ariz. Jury Instr. ("RAJI") (Civil) Fault 1-11 (5th ed. 2013).

Ariz. R. Civ. P. The Zarifis filed a second motion for new trial, which the court also denied, and from which they timely appealed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1), (5)(a).

Discussion

¶7 The Zarifis contend the trial court reversibly erred in refusing to instruct the jury "on comparative fault and/or by failing to allocate fault in the verdict." Specifically, they argue "A.R.S. § 12-2506(B) requires the trier of fact to consider the [relative] fault of plaintiffs, defendants, and nonparties," and they maintain their comparative fault claim was not waived by their failure to raise it in the joint pretrial statement because it is "not an affirmative defense and [they] had no obligation to plead or otherwise assert it." We review the trial court's denial of a requested jury instruction for abuse of discretion, viewing the evidence in the light most favorable to the party requesting the instruction. *Strawberry Water Co. v. Paulsen*, 220 Ariz. 401, ¶ 21, 207 P.3d 654, 662 (App. 2008).

¶8 The trial court must give a proposed jury instruction if it is: (1) supported by the evidence; (2) proper under the law; and (3) pertains to an important issue and is not otherwise covered by any other instruction. *Id.*; *see also AMERCO v. Shoen*, 184 Ariz. 150, 156, 907 P.2d 536, 542 (App. 1995) (trial court must instruct jury on all valid legal theories framed by pleadings and supported by substantial evidence). If an issue is not supported by the evidence, however, it is improper to instruct the jury on it. *Czarnecki v. Volkswagen of Am.*, 172 Ariz. 408, 411, 837 P.2d 1143, 1146 (App. 1991).

¶9 Section 12-2506(A), A.R.S., limits a defendant's liability in an action for property damage to "the amount of damages allocated to that defendant in direct proportion to [his] percentage of fault." In assessing percentages of fault, the trier of fact shall consider the fault of all persons who contributed to the damage "regardless of whether the person was, or could have been, named as a party to the suit." § 12-2506(B); *see also Zuern v. Ford Motor Co.*, 188 Ariz. 486, 490-91, 937 P.2d 676, 680-81 (App. 1996).

¶10 In denying the Zarifis' motion for new trial, the trial court noted their failure to raise the issue of comparative fault, stating "[t]he issues to be presented at trial were framed by the Joint Pretrial Statement, which says nothing about comparative fault or asking the jury to assign fault to any other party, former party, or nonparty." *See Aetna Cas. & Sur. Co. v. Dini*, 169 Ariz. 555, 557, 821 P.2d 216, 218 (App. 1991) (pretrial statement controls subsequent course of litigation and issues not raised therein generally cannot be raised at trial); *see also* Ariz. R. Civ. P. 26.1(a) (party required to timely disclose legal defenses and factual bases for them). The Zarifis now argue the court was "mistaken" in its belief that they needed to "indicate [their] intent to ask the jury to consider the fault of RL[Ventures]," because "[c]omparative fault is not an affirmative defense and [the] Zarifi[s] had no obligation to plead or otherwise assert it." Parri responds that the Zarifis' requested jury instructions were properly declined due to their non-disclosure of any comparative fault claim, citing *Englert v. Carondelet Health Network*, 199 Ariz. 21, 25, 13 P.3d 763, 767 (App. 2000), and also asserts the defense was unsupported by the evidence because the Zarifis neither argued nor offered any evidence at trial that RL Ventures was at fault, citing *Strawberry Water Co.*, 220 Ariz. 401, ¶ 22, 207 P.3d at 662.

¶11 We need not, however, address whether the trial court properly declined the Zarifis' requested instruction on the basis of non-disclosure. Because the Zarifis failed to make the trial transcripts part of the record on appeal, we have no meaningful way of discerning whether the evidence at trial supported a comparative fault instruction. *See Rancho Pescado, Inc. v. Nw. Mut. Life Ins. Co.*, 140 Ariz. 174, 189, 680 P.2d 1235, 1250 (App. 1984) (appealing party has duty to provide all necessary transcripts on appeal). "If a party claims that the trial court's ruling was not justified by the evidence, that party has the duty to furnish a transcript," and "[i]n the absence of a transcript, this court will assume that the evidence supported the trial court's [ruling]." *Retzke v. Larson*, 166 Ariz. 446, 449, 803 P.2d 439, 442 (App. 1990); *see also Bee-Gee, Inc. v. Ariz. Dep't of Econ. Sec.*, 142 Ariz. 410, 414, 690 P.2d 129, 133 (App. 1984).

¶12 On the record before us, we cannot disagree with Parri's claim that there was no evidence of RL Venture's fault offered at trial, and we therefore cannot say the evidence supported a comparative fault instruction. *See Strawberry Water Co.*, 220 Ariz. 401, ¶ 22, 207 P.3d at 662; *cf. City of Phoenix v. Clauss*, 177 Ariz. 566, 569, 869 P.2d 1219, 1222 (App. 1994). Thus, we cannot find an abuse of discretion in the trial court's refusal to instruct the jury on that issue.

Attorney Fees

¶13 Parri requests attorney fees pursuant to A.R.S. § 12-349, arguing the Zarifis' appeal "was brought without substantial justification because it is groundless." *See* § 12-349(A)(1) (in civil appeal, court shall assess reasonable attorney fees and expenses if party "[b]rings or defends a claim without substantial justification"). Though the Zarifis' failure to provide transcripts has precluded meaningful review of their argument on appeal, we cannot say the claim was groundless and there is no evidence that the appeal was not brought in good faith. *See* § 12-349(F) ("without substantial justification" means claim or defense is groundless and not made in good faith); *see also Johnson v. Brimlow*, 164 Ariz. 218, 221-22, 791 P.2d 1101, 1104-05 (App. 1990) (an appeal is frivolous when "brought for an improper purpose or based on issues which are unsupported by any reasonable legal theory"). Accordingly, we deny Parri's request for attorney fees.

Disposition

¶14 For the foregoing reasons, the judgment of the trial court is affirmed.