IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

REBECCA S. SCHLEDORN, *Plaintiff/Counter-Defendant/Appellant*,

v.

ERIC J. WEIHERER, *Defendant/Counter-Claimant/Appellee*.

No. 1 CA-CV 16-0191
FILED 9-26-2017

Appeal from the Superior Court in Maricopa County
No. CV 2013-012586
The Honorable Douglas Gerlach, Judge

AFFIRMED

COUNSEL

Geiger Law Offices, PLC, Glendale
By Timothy R. Geiger
Counsel for Plaintiff/Counter-Defendant/Appellant

Jackson White, PC, Mesa
By Eric M. Jackson, Roger R. Foote
Counsel for Defendant/Counter-Claimant/Appellee

MEMORANDUM DECISION

Judge Margaret H. Downie delivered the decision of the Court, in which Presiding Judge Michael J. Brown and Judge Jennifer B. Campbell joined.

D O W N I E, Judge:

¶1 Rebecca Schledorn appeals from a judgment entered against her after a jury trial. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Eric Weiherer gave Schledorn an engagement ring when they got engaged in November 2003. In 2004, the parties traded that ring for a different engagement ring, paying an additional $3,788 in the process. The second ring was later returned to the jeweler in exchange for $10,266.80. In November 2009, Weiherer bought Schledorn a diamond costing approximately $11,757 that was placed in a setting from an earlier ring.[1]

¶3 Meanwhile, in 2005, Weiherer acquired title to a home in Phoenix as his sole and separate property. Schledorn testified that she contributed $10,000 of the $52,942.99 down payment on the property, but also acknowledged receiving $10,000 from a home equity line of credit. Weiherer testified that Schledorn contributed only $5,000. Weiherer was the sole obligor on the mortgage and home equity line of credit. The parties lived together in the home until 2013, when Weiherer obtained an order of

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[1] Although Schledorn challenges the characterization of the 2009 ring as an engagement ring, the parties submitted a joint pretrial statement that stated, as an uncontested material fact:

> In November 2009, Defendant purchased a diamond for Plaintiff for approximately $11,757.00 which was placed on the platinum setting of the Second Ring *as an engagement ring*.

(Emphasis added.) Additionally, Schledorn did not object to jury instructions that referred to the 2009 ring as an "engagement ring."

forcible detainer against Schledorn. When Schledorn left the residence, she took the 2009 ring with her.

¶4 Schledorn sued Weiherer, alleging breach of contract and asserting a 50% equitable interest in the home and other assets. Weiherer filed a counterclaim alleging, as relevant here, conversion of the 2009 ring.[2]

¶5 After a three-day trial, the jury awarded Schledorn $5,750.00 for her interest in the home, $21,955.59 in connection with non-IRA accounts, and $0 for IRA investments. The jury awarded Weiherer $7,617.70 on his counterclaim.

¶6 Both parties requested attorneys' fees pursuant to Arizona Revised Statutes ("A.R.S.") section 12-341.01. The superior court awarded Weiherer $20,134.42 in fees and costs. Schledorn timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

DISCUSSION

I. Valuation Evidence

¶7 Schledorn attempted to offer her opinion at trial about the current value of the home. Weiherer objected based on Arizona Rules of Evidence 701 and 702 and because Schledorn was neither an expert nor an owner of the property. The superior court sustained his objection. Schledorn contends this ruling was legally erroneous and caused her prejudice.

¶8 We will affirm the superior court's evidentiary rulings absent a clear abuse of discretion and resulting prejudice. *Catchings v. City of Glendale*, 154 Ariz. 420, 426 (App. 1987). If an evidentiary ruling is based on a question of law, we consider the legal issue *de novo*. *Felder v. Physiotherapy Assocs.*, 215 Ariz. 154, 166, ¶ 55 (App. 2007).

¶9 Even assuming *arguendo* that Schledorn's testimony was improperly excluded, she has demonstrated no corresponding prejudice, which must be evident from the record. *United Cal. Bank v. Prudential Ins. Co.*, 140 Ariz. 238, 295 (App. 1983). Schledorn did not make an offer of proof regarding her proposed valuation testimony. *See Molloy v. Molloy*, 158 Ariz. 64, 68 (App. 1988) (Offers of proof serve to enable appellate courts "to determine whether any error was harmful."). We thus have no way of

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[2] Weiherer also alleged that Schledorn converted other property, but those claims were resolved before trial.

knowing whether or how her testimony might have differed from other valuation evidence presented to the jury, *see Creach v. Angulo*, 186 Ariz. 548, 550 (App. 1996) ("[E]rror must have been prejudicial to the substantial rights of the party."); nor can we determine whether there was adequate foundation for such testimony.

II. Jury Instructions

¶10 Schledorn next argues the jury instructions given regarding the 2009 ring were inadequate. The court instructed:

> Eric Weiherer claims that the ring he gave to Rebecca Schledorn in 2009 was a conditional gift based on the relationship which terminated, and upon its termination, the ring should have been returned to him, or Rebecca Schledorn should have compensated him for the value of the ring.
>
> On this claim, Eric Weiherer must prove that the ring was a conditional gift and the value of the ring.
>
> . . .
>
> A gift may be conditional upon the continuance of a relation, and if conditional, the donor is entitled to its return if the relation terminates. The condition may be stated in specific words or it may be inferred from the circumstances.
>
> If you find that Rebecca Schledorn should have returned the ring given to her in 2009 by Eric Weiherer, you must award Eric Weiherer damages for the full value of the ring.

The court also instructed jurors that the parties had stipulated that on or about June 7, 2013, Schledorn "broke off the engagement," which was consistent with the undisputed material facts in the joint pretrial statement, including the parties' averment that "[o]n or about June 7, 2013, Plaintiff broke off the engagement with Defendant."

¶11 Although Schledorn contends the court should have given additional instructions about how the relationship ended and whether Weiherer could be awarded only a portion of the ring's value, she requested no such instructions. "A party who objects to . . . the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds for the objection." Ariz. R. Civ. P. 51(c)(1). "A party's failure to object to an erroneous jury instruction waives all but fundamental

error." *Mill Alley Partners v. Wallace*, 236 Ariz. 420, 423, ¶ 8 (App. 2014). Fundamental error review applies sparingly in civil cases "and may be limited to situations where the instruction deprives a party of a constitutional right." *Id.* at 423, ¶ 9. Schledorn does not assert a cognizable constitutional deprivation, and we decline to further consider her argument —raised for the first time on appeal — that the court should have *sua sponte* composed and given additional instructions not requested. *See State v. Gatliff,* 209 Ariz. 362, 364, ¶ 9 (App. 2004) (failure to raise an issue at trial, including requesting a jury instruction, precludes raising that issue on appeal).

III. Attorneys' Fees and Costs

¶12 Schledorn's final contention is that the superior court erred by awarding Weiherer costs and attorneys' fees pursuant to A.R.S. § 12-341.01(A), which provides, in pertinent part:

> If a written settlement offer is rejected and the judgment finally obtained is equal to or more favorable to the offeror than an offer made in writing to settle any contested action arising out of a contract, the offeror is deemed to be the successful party from the date of the offer and the court may award the successful party reasonable attorney fees.

¶13 Weiherer served an offer of judgment on Schledorn on January 27, 2015, for $50,000, including "all damages, taxable court costs, interest and attorneys' fees." In determining that Weiherer was the successful party from that date forward, the superior court correctly observed that it was required to compare the offer of judgment to "the sum of the (i) net amount of the verdict and (ii) reasonable attorney's fees and costs that Schledorn had incurred up to that date." *See Hall v. Read Dev., Inc.*, 229 Ariz. 277, 279, ¶ 9 (App. 2012) ("[A]n offeror is the successful party, even if an offeree obtains a favorable judgment, if the offeror previously made a written offer for an amount equal to or greater than the final judgment."). The superior court concluded:

> Under the terms of the offer of judgment, Schledorn would have received $50,000.00 and the engagement ring (for purposes of the analysis here, the court assumes a value of $7,617.70). The net amount of the verdict in Schledorn's favor was $20,087.89. Schledorn's Application . . . states that, as of January 27, 2015, her attorney's fees and costs were $52,313.40. Thus, Weiherer's offer did not exceed the sum of

> the net verdict and Schledorn's stated fees and costs. If that were the end of the inquiry, she would be the successful party.
>
> The inquiry, however, does not end there. Applying the settlement comparison test does not require the court to accept the $52,000-plus as the relevant amount of attorney's fees and costs to be factored into the analysis. Instead, the court is required to factor in only "reasonable" attorney's fees that Schledorn had incurred as of January 27, 2015.

(Footnotes omitted.)

¶14 The superior court noted that Schledorn's asserted accrual of $52,313.40 in attorneys' fees as of January 27, 2015, was "unsupported with admissible evidence" and that the proffered time records were "not authenticated by anyone having personal knowledge of their preparation." The court then proceeded to analyze several factors relevant to determining a reasonable fee as of that point in time. *See Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 570 (1985). It concluded that, as of January 27, 2015, "Schledorn had not incurred reasonable attorney's fees in an amount that exceeded even $20,000.00." The court nevertheless added $20,000 to the net verdict of $20,087.89 in favor of Schledorn, correctly concluding that the total did not exceed Weiherer's January 2015 offer of judgment.

¶15 Viewing the record in the light most favorable to affirming the superior court's ruling, *Berry v. 352 E. Virginia, L.L.C.*, 228 Ariz. 9, 13, ¶ 21 (App. 2011), we discern no abuse of discretion. In making the comparison dictated by A.R.S. § 12-341.01(A), trial courts "exercise their discretion to determine the amount of *reasonable* attorneys' fees incurred up to the date of the offer" of judgment. *Hall*, 229 Ariz. at 282, ¶ 16 (emphasis added).

¶16 Moreover, the court did not award Weiherer the full amount of fees he incurred after the offer of judgment, concluding "a substantial award would impose an extreme hardship on Schledorn" and because an award under § 12-341.01(A) "is intended to mitigate, and not reimburse dollar-for-dollar, the expense of litigation." The court instead awarded Weiherer $19,000 in fees.

¶17 Schledorn alleges Weiherer was not entitled fees under A.R.S. § 12-341.01 because he asserted only a tort claim. But Schledorn did not raise this argument in the superior court and has thus waived it. *See Trantor v. Fredrikson*, 179 Ariz. 299, 300 (1994). Moreover, Weiherer prevailed on Schledorn's contract-based claim to proceeds from an IRA account. *See Lacer v. Navajo Cty.*, 141 Ariz. 392, 394 (App. 1984) ("A party is entitled to

an award of its attorney's fees under A.R.S. § 12–341.01 if judgment in its favor is based upon the absence of the contract sued upon by the adverse party."). And the jury awarded her substantially less than she requested on her contract claims.

¶18 Schledorn also contends the court abused its discretion by assigning "some weight" to an oral settlement offer by Weiherer. The court stated:

> Weiherer maintains, and Schledorn has presented nothing to refute, that, on August 27, 2013, before this action was initiated, he offered to pay her $48,000.00. Schledorn's response memorandum . . . quarrels with the amount because it did not include Weiherer's claim regarding the ring. But, unless one were to assume the unsupportable, i.e., that the value of the claim exceeded $27,000.00 (which is far more than the value that Weiherer placed on the claim . . .), that offer, if accepted would have left Schledorn better off financially than she is today with the jury verdict in hand. Stated otherwise, in 2013, Schledorn was given an opportunity to avoid this litigation, but by rejecting Weiherer's offer and choosing to pursue this action through trial, Schledorn's financial position worsened.

¶19 The court did not consider the oral settlement offer in the context of comparing the net verdict amount to that offer. It instead discussed settlement efforts generally when analyzing the fees Schledorn had reasonably incurred as of January 27, 2015. *See Associated Indem.*, 143 Ariz. at 570 (in determining reasonableness of fees, court may consider whether litigation could have been avoided or settled).

¶20 Schledorn also contends the court exhibited "clear bias" by stating that she "benefitted hugely from Weiherer's generosity" and that "his generosity allowed her to enjoy a lifestyle that she was not capable of providing for herself." But "[o]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *State v. Henry*, 189 Ariz. 542, 546 (1997). A litigant challenging a judge's impartiality must overcome a strong presumption that trial judges are free of bias and prejudice. Overcoming this presumption means proving a hostile feeling or spirit of ill-will, or undue friendship or favoritism, towards one of the

litigants. *State v. Cropper,* 205 Ariz. 181, 185, ¶ 22 (2003). Schledorn has made no such showing.

CONCLUSION

¶21 For the foregoing reasons, we affirm the judgment of the superior court. Both sides have requested an award of attorneys' fees on appeal. We deny Schledorn's request because she has not prevailed. In the exercise of our discretion, we will award Weiherer a reasonable sum of attorneys' fees, as well as taxable costs, upon compliance with Arizona Rule of Civil Appellate Procedure 21.

AMY M. WOOD • Clerk of the Court
FILED: AA