IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 08/25/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

TANA RYAN, Personal Representative of the ESTATE OF PATRICK RYAN, individually, and for and on behalf of herself,	)	1 CA-CV 10-0016
	)	DEPARTMENT B
Plaintiff/Appellant,	)	**MEMORANDUM DECISION** Not for Publication – (Rule 28, Arizona Rules of Civil Appellate Procedure)
v.	)	
SAN FRANCISCO PEAKS TRUCKING COMPANY, INC., an Arizona corporation; GERALD ROBERT MORGAN and JANE DOE MORGAN, husband and wife,	)	
Defendants/Appellees.	)	

Appeal from the Superior Court in Maricopa County

Cause Nos. CV2004-007979, CV2005-050446 (Consolidated)

The Honorable Robert A. Budoff, Judge, Retired

AFFIRMED

UDALL, SHUMWAY & LYONS, PLC — Mesa
By H. Micheal Wright
Lincoln M. Wright
Attorneys for Plaintiff/Appellant

DEAN R. COX, LLC — Prescott
By Dean R. Cox
Attorney for Defendants/Appellees

B R O W N, Judge

¶1 Tana Ryan, individually and on behalf of the Estate of Patrick Ryan ("Tana"), appeals a judgment in favor of San Francisco Peaks Trucking Company, Inc. ("SFP") and its employee Gerald Robert Morgan on Tana's claims for negligence and wrongful death.[1] Tana asserts that the court erred by allowing SFP to present evidence at trial regarding her settlements with nonparties. She also challenges the court's award of sanctions to SFP pursuant to Arizona Rule of Civil Procedure 68 ("Rule 68"). For the following reasons, we affirm.[2]

BACKGROUND

¶2 In April 2002, Tana and her husband, Patrick Ryan, were involved in a motor-vehicle collision with Morgan, who was driving a semi-tractor-trailer owned by SFP. Patrick was driving a motorcycle; Tana was his passenger. Patrick and Tana were both injured in the collision, and Patrick later died from his injuries.

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[1] Morgan died prior to trial from causes unrelated to the collision. His estate was never substituted as a defendant and the court entered judgment for both SFP and Morgan. Hereinafter, unless otherwise noted, we refer to SFP and Morgan collectively, and in the singular, as "SFP."

[2] Pursuant to Arizona Rule of Civil Appellate Procedure 28(g), we address the trial court's denial of Tana's motion for summary judgment regarding SFP's nonparty-at-fault allegations by separate opinion filed herewith. The factual background of the case is set forth in the opinion.

¶3 Tana filed a complaint against SFP for negligence and wrongful death. The complaint also alleged claims for negligence and wrongful death against John and Emily Zboncak, who were involved in the accident in a separate vehicle. The following year, Tana filed a separate lawsuit against certain medical facilities and professionals involved in Patrick's care, alleging claims for medical malpractice, negligence, abuse of a vulnerable adult, and wrongful death. The cases were consolidated in the trial court. Prior to trial, Tana settled with all defendants except SFP; SFP then identified all of the dismissed defendants as nonparties at fault.

¶4 At trial, SFP questioned Tana about her acceptance of money from the dismissed defendants and argued that those settlements demonstrated the validity of Tana's claims against the dismissed defendants. The jury returned a general verdict in favor of SFP.

¶5 SFP submitted an application for an award of $64,476.79 in taxable costs and reasonable expert witness fees as a sanction under Rule 68(g). Tana objected to the statement of costs, arguing that SFP's offers of judgment were invalid and not made in good faith, and that the fees of SFP's biomechanical engineering expert, Joseph Peles, Ph.D., were unreasonable. The court found the offers of judgment were properly apportioned and not made in bad faith and that, although Peles' fees were high,

they were not unreasonable. It entered a judgment on the defense verdict and awarded SFP its requested costs and expert witness fees. Tana filed a timely notice of appeal.[3]

DISCUSSION

I. Evidence of Settlements

¶6 At trial, SFP's counsel questioned Tana about her settlements with the dismissed defendants and mentioned the settlements in his opening statement and closing argument. Tana argues that SFP sought to use the fact of her settlements with the dismissed defendants as evidence of their liability, in violation of Arizona Rule of Evidence 408. *See* Ariz. R. Evid. 408 (evidence of settlement is not admissible to prove liability for or invalidity of a claim). However, as Tana did not object to SFP's questions or counsel's statements at trial, we will not consider the issue for the first time on appeal. *See Martinez v. Jordan*, 27 Ariz. App. 254, 256, 553 P.2d 1239, 1241 (1976) (refusing to consider appellant's argument that questions on cross-examination and counsel's closing argument were

[3] After Tana filed her notice of appeal, the trial court considered her motion to correct the form of judgment and entered an amended judgment. We express no opinion regarding the validity of the amended judgment. *See Cont'l Cas. Co. v. Indus. Comm'n*, 111 Ariz. 291, 294, 528 P.2d 817, 820 (1974) (stating that generally an appeal divests the trial court of jurisdiction to proceed except in furtherance of the appeal).

impermissible because appellant waived any error by failing to object at trial).

¶7 Tana asserts that she objected to SFP's questions and argument at trial regarding her settlements with the dismissed defendants. In her briefs, however, she cites only one instance, which occurred during SFP's cross-examination of her about her settlement with the Zboncaks, in which her counsel stated, "Foundation, Your Honor, and prior rulings." However, because the subsequent sidebar conference was not captured by the audio recording system, and because Tana has not provided a summary of it as part of the record on appeal, we are unable to accept her contention that she objected on Rule 408 grounds at trial. *See* ARCAP 11(c) ("If a certified transcript is unavailable, the appellant may prepare and file a narrative statement of the evidence or proceedings from the best available means, including the appellant's recollection."); *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995) ("When a party fails to include necessary items, we assume they would support the court's findings and conclusions."). Moreover, the portions of the trial transcript included in the record on appeal contain numerous instances in which SFP raised the issue of Tana's settlement with the dismissed defendants without objection from Tana. *See State v. Woratzeck*, 134 Ariz. 452,

454, 657 P.2d 865, 867 (1983) (failure to object to inadmissible evidence waives the objection).

¶8 Tana contends nonetheless that her counsel's reference to "prior rulings" was sufficient to preserve an objection to the introduction of settlement evidence. She asserts that "prior rulings" referred to rulings made by the trial court during the final pretrial conference, when "the issue of whether settlements with [nonparties] would be admissible was extensively discussed and counsel's objections were made." We disagree with Tana's analysis of the record.

¶9 Tana cites a portion of the pretrial conference transcript that reflects that SFP sought to introduce in evidence two copies of a release demonstrating that Tana accepted monies from Patrick's automobile insurance carrier shortly after the collision. SFP argued the document was admissible as an admission by a party-opponent and that it intended to use the release to attack Tana's argument at trial that Patrick bore no fault for the collision. When SFP's counsel explained that one copy of the release was redacted to exclude any reference to insurance and the amount of money Tana received, Tana objected, arguing that if it was going to be used to demonstrate that a settlement occurred, then "the amount that she got and who paid . . . is relevant." SFP asserted that if the jury was told that Tana settled with the insurer for

$25,000, it wanted to question her about the amount of her separate settlement with a hospital that had also been a defendant. The court excluded the insurance release, but ruled SFP could elicit testimony from Tana that she had settled a claim against, and received money from the hospital; it further directed that the jury would not be told about any insurance company or settlement amount. We do not discern from this exchange any objection by Tana to the introduction of the fact of her settlements with nonparties. Moreover, we note that Tana failed to raise any objection when the trial court ruled during the pretrial conference that the hospital settlement was admissible.

¶10 In sum, we conclude that Tana failed to properly object to the admissibility of settlements with nonparties. Nowhere in the record before us did Tana assert a violation of Rule 408 or make any reference to the inadmissibility of settlement negotiations. Accordingly, Tana waived any objection to the admissibility of this evidence.

II. Rule 68 Sanctions

¶11 "At any time more than 30 days before the trial begins, any party may serve upon any other party an offer to allow judgment to be entered in the action." Ariz. R. Civ. P. 68(a). If the offer to allow judgment is not accepted, and the offeree "does not later obtain a more favorable judgment . . .

the offeree must pay, as a sanction, reasonable expert witness fees and double the taxable costs, as defined in A.R.S. § 12-332, incurred by the offeror after making the offer . . . ." Ariz. R. Civ. P. 68(g).

¶12 The trial court awarded SFP its costs and expert witness fees incurred in the litigation because the jury verdict for SFP was more favorable to SFP than was its offer to pay Tana to settle the matter before trial. Tana challenges the award of sanctions on the grounds that SFP made its offers of judgment in bad faith and that the fees of SFP's biomechanical engineering expert, Peles, were not reasonable.

¶13 Rule 68 requires that the court award sanctions if the offeree does not obtain a judgment that is more favorable than the offer. *Id*. The criteria are objective; the imposition of sanctions is mandatory and not tied to a determination of the offeror's motives. Nevertheless, Tana urges us to depart from the plain language of the Rule and hold that the trial court's award of sanctions to SFP was in error because SFP's offers of judgment were not made in good faith. In support of her argument, she relies on *August v. Delta Air Lines, Inc.*, 600 F.2d 699 (7th Cir. 1979), a Title VII civil rights case in which the Seventh Circuit Court of Appeals affirmed the trial court's denial of the defendant's motion for costs pursuant to Federal Rule of Civil Procedure 68, which is substantially similar to

Arizona's Rule 68. The court wrote that "at least in a Title VII case," a "liberal, not a technical, reading" of the federal version of Rule 68 was appropriate and ruled that because, in the context of the case, the defendant's $500 offer of judgment did not justify serious consideration by the plaintiff, the defendant was not entitled to an award of sanctions. *Id*. at 702. The court expressly declined to decide whether such an approach should be applied outside Title VII cases. *Id*.[4]

¶14 The purpose of Rule 68 is to encourage settlement. *Smyser v. City of Peoria*, 215 Ariz. 428, 441, ¶ 44, 160 P.3d 1186, 1199 (App. 2007). It is intended to be coercive and its terms therefore are mandatory and serve its purpose. Requiring the trial court to disregard the plain language of the Rule and determine whether an offer was made in bad faith before awarding sanctions would only encourage satellite litigation on that issue and introduce uncertainty into the offer-of-judgment process. We therefore find no error in the trial court's decision to award SFP sanctions pursuant to Rule 68.

¶15 Tana also asserts that the trial court erred in awarding SFP the full amount of Peles' expert fees, which she

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[4] Tana also cites *Gay v. Waiters' and Dairy Luncheons' Union Local No. 30*, 86 F.R.D. 500 (D.C. Cal. 1980). In that case, the court held that because the relevant offers of judgment were clearly good faith offers to settle, the element of discretion discussed in *August* was not involved. *Id*. at 502.

contends were unreasonable. "Reasonable expert witness fees," within the meaning of Rule 68, are not limited to those fees incurred for testifying at trial, but include all reasonable fees incurred after offer of judgment, such as fees for the expert's time spent reviewing depositions, conferencing with attorneys, and preparing to testify. *Levy v. Alfaro*, 215 Ariz. 443, 445, ¶¶ 4, 14, 160 P.3d 1201, 1203 (App. 2007). In general, a trial court has wide latitude in assessing an award of expert witness fees, and we will not disturb its award absent an abuse of discretion. *Lohmeier v. Hammer*, 214 Ariz. 57, 62, ¶ 18, 148 P.3d 101, 106 (App. 2006).

¶16 Our review of the record reflects that there was sufficient evidence to support the trial court's award. Trial in this case came four years after the complaint was filed; the litigation was interrupted for a special action, change of counsel, and a trial continuance. Peles was thus required to keep himself familiar with the details of the case and provide services to SFP for several years. He provided billing statements that adequately detailed the general type of work he performed, his hourly rate, and related expenses. Further, we find no error in the trial court's refusal to consider the fees charged by Tana's expert witnesses as the benchmark for assessing Peles' fees, given "the different skills, training, and experience of the [] experts, as well as the different

amounts of time they spent on the case." *Id*. at 62, ¶ 20, 148 P.3d at 106. Accordingly, the trial court did not abuse its discretion in awarding SFP the full amount of Peles' expert witness fees.

CONCLUSION

¶17 Based on the foregoing and for the reasons stated in the opinion filed herewith, we affirm the judgment of the trial court.

/s/
_____
MICHAEL J. BROWN, Judge

CONCURRING:

/s/
_____
DIANE M. JOHNSEN, Presiding Judge

/s/
_____
JOHN C. GEMMILL, Judge