

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK
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COURT OF APPEALS
DIVISION TWO

KELLEY ROLLINGS, Trustee of the)
Rollings Trust dated April 22, 1982;)
DONALD B. ROLLINGS, Trustee of the)
Rollings Trust dated April 1, 1989; and)
BACON INDUSTRIES, INC., an Arizona)
corporation,)
)
Plaintiffs/Appellants,)
)
v.)
)
THE CITY OF TUCSON,)
)
)
Defendant/Appellee.)
_____)

2 CA-CV 2006-0183
DEPARTMENT B

MEMORANDUM DECISION
Not for Publication
Rule 28, Rules of Civil
Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20020509

Honorable Richard S. Fields, Judge

REVERSED AND REMANDED

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E C K E R S T R O M, Presiding Judge.

¶1 Plaintiffs/appellants Kelley Rollings, trustee of the Rollings Trust; Donald B. Rollings, trustee of the second Rollings Trust; and Bacon Industries, Inc., an Arizona corporation (Rollings) appeal from an adverse jury verdict and judgment on their claims of negligence, nuisance, and trespass. The claims arose out of damage sustained by Rollings's historic adobe buildings, which Rollings claims resulted from continuously leaking water lines operated by appellee the City of Tucson. On appeal, Rollings argues the trial court erred in refusing to give three of its requested instructions to the jury. Those instructions would have advised the jury that: 1) Rollings did not need to prove the City had been negligent in order to be successful on its nuisance and trespass claims; 2) no duty existed on Rollings's part to mitigate damages for purposes of its nuisance and trespass claims; and 3) it was the City's burden to apportion damages based on fault. Because the jurors received confusing instructions that could have misled them on the elements of Rollings's nuisance and trespass claims, we reverse the judgment and remand for a new trial.

¶2 Rollings owns various nineteenth and twentieth century adobe buildings in an historic district south of downtown Tucson. In its complaint against the City, Rollings alleged that water had escaped from the City's water lines, migrated underground onto Rollings's property, and caused damage to Rollings's structures. Rollings contended the City's conduct constituted an ongoing trespass and nuisance. It further contended that the City's failure to maintain and repair leaking water lines constituted negligence by the City.

¶3 The City filed a motion to dismiss Rollings’s claims, which the trial court treated as a motion for summary judgment and denied. In doing so, the trial court rejected the City’s assertion that Rollings needed to establish the City had been negligent to prevail on its nuisance and trespass claims and stated:

[T]here is no reason that Rollings should be required to show that the City of Tucson was negligent in how it chose to fix the water mains. It does not matter that the city chose to fix the water mains by one method over another. If a water main leak cause[d] a continuing nuisance, then liability existed until the leak actually stopped and the escaped water was no longer capable of causing further damage.

The court found *City of Phoenix v. Johnson*, 51 Ariz. 115, 75 P.2d 30 (1938), “directly applicable.” In that case, our supreme court held that when a public utility creates a nuisance, “the fact of the proper construction and efficient operation does not constitute a defense to an action for damages.” *Id.* at 130, 75 P.2d at 37.

¶4 During trial, Rollings presented evidence that the City’s water lines had leaked in the past and continued to leak on all but one¹ block in front of Rollings’s properties and that the City’s own records showed such leaks existed. One of Rollings’s experts testified at trial that the cast iron pipe originally installed had long since exceeded its life span, but only a section of one line had been replaced. Rollings’s experts found the moisture content of the soil several feet below ground level was much higher than expected around Rollings’s

¹Rollings’s expert did not review the one street on which the City had replaced some of the original piping.

structures, the moisture was too deep to be the result of rainfall, and moisture had been transmitted laterally at deeper levels. From this, Rollings's civil engineering, hydrology, and municipal water systems expert concluded water had migrated onto Rollings's properties from the City's leaking pipes. According to another expert, the moisture caused the soils to at least partially collapse, an event that undermined the structures of Rollings's buildings. The damage included, for example, cracking, deterioration at the base of the walls, extensive upheaval, and buckling of floors.

¶5 The City presented evidence that damage to the adobe structures had been caused by weathering, a normal occurrence with adobe, and by the improper use of materials in plastering portions of the adobe walls. And, according to the City's expert, the placement of concrete, asphalt, paving, or brick on Rollings's properties had sealed the soil surface, locking moisture from rain in the soils. The City also presented evidence that the mains adjacent to Rollings's property had either been replaced or repaired between 1995 and 2000, and testing done by the City revealed no leaks, at least in some of those mains. The jury found in favor of the City on all claims.

¶6 Rollings argues the trial court committed reversible error by refusing to specifically instruct the jury that it was not required to prove the City had acted negligently or wrongfully to be successful on its nuisance or trespass claims. Although the trial court seemed to agree that Rollings's proposed instructions correctly stated the law, it denied the requested instructions, explaining: "As to your request that I include in the instructions that

you needn't prove negligence for a nuisance, to describe a horse I don't need to negate that it's a cow. And especially if you brought them both." Rollings contends this was error because the instructions were otherwise confusing and the parties had an ongoing dispute during the trial over whether Rollings must prove the City had been negligent in order to recover any damages. According to Rollings, that dispute "overflowed into closing arguments, with each side arguing for a different legal standard," essentially depriving Rollings of a proper adjudication of its nuisance and trespass claims. The City insists that the jury instructions the court gave adequately set forth the law applicable to the case, and thus the trial court did not err in refusing Rollings's additional requested instructions.²

¶7 We review a trial court's refusal to give a requested jury instruction for an abuse of discretion "and will reverse only if the instructions, taken as a whole, misled the jurors." *Lashonda M. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 77, ¶ 7, 107 P.3d 923, 926 (App. 2005), quoting *State v. Petrak*, 198 Ariz. 260, ¶ 9, 8 P.3d 1174, 1178 (App. 2000); see also *Pima County v. Gonzalez*, 193 Ariz. 18, ¶ 7, 969 P.2d 183, 185 (App. 1998) (instructions correct if they properly guide jury in arriving at correct decision); *Rodriguez v. Schlittenhart*, 161 Ariz. 609, 614, 780 P.2d 442, 447 (App. 1989) (same). "[A] jury verdict will not be overturned as a result of improper jury instructions unless there is substantial doubt as to whether the jury was properly guided in its deliberations."

²In the trial court, the City challenged Rollings's statement of the law that the jury could find the City liable for nuisance or trespass without finding it negligent, but does not raise that argument on appeal.

Thompson v. Better-Bilt Aluminum Prods. Co., 187 Ariz. 121, 126, 927 P.2d 781, 786 (App. 1996). A trial court does not err when it “refuse[s] to give a requested instruction that is covered adequately by the given instructions.” *Haynes v. Syntek Fin. Corp.*, 184 Ariz. 332, 341, 909 P.2d 399, 408 (App. 1995). “The test is whether the instructions, viewed in their entirety, adequately set forth the law applicable to the case.” *State v. Rosas-Hernandez*, 202 Ariz. 212, ¶ 31, 42 P.3d 1177, 1185 (App. 2002).

¶8 The trial court instructed the jury that Rollings had asserted “three independent causes of action” and had described each one and its elements. Although Rollings does not dispute that the instructions correctly stated the elements of nuisance, trespass, and negligence, Rollings argues that when viewed within the context of other instructions, these instructions suggested that the jury had to find the City had been negligent in order to find it liable under any of the three causes of action. We agree that when viewed in their entirety, the jury instructions could have so misled the jury.

¶9 After correctly instructing the jury on the elements of each cause of action, the trial court gave three additional instructions that pertained to the negligence claim only. One of those instructions advised the jury that “[a] water distributor may not be held liable for leaks unless the injuries complained of are proximately caused by its negligence.” Although the written version of that instruction was entitled “Negligence Instruction,” the trial court did not read that label when formally instructing the jury on the law, nor did it otherwise specify that the instruction applied to the negligence claim only. Without such

guidance, a reasonable juror could have concluded that the City, as the “water distributor,” simply could not be held liable under any of the three causes of action unless it had proximately caused the injuries by its negligence.

¶10 Moreover, the court also generally instructed the jury, “If you find that the City of Tucson was not at fault on any of the three causes of action, then your verdict must be for the City of Tucson.” The only definition the court provided for “fault” elsewhere in the instructions stated that “[f]ault is negligence that was a cause of the Plaintiffs’ damages.” Thus, under one reasonable interpretation of the instructions as a whole, a finding of “fault” was required to return a verdict in favor of Rollings on any of the three causes of action, and a finding of “fault” required a finding of negligence. And, even if jurors somehow understood that the definition of “fault” provided in the instructions applied to the negligence claim only, a common understanding of “fault” is that a party at fault is culpable, or responsible, for a wrong or error. *See The American Heritage Dictionary* 493 (2d college ed. 1991). But, under Arizona law pertaining to claims of trespass or nuisance, Rollings was not required to demonstrate that the City had committed any wrong or error—only that the City’s water had invaded Rollings’s property and had caused Rollings damage. *See, e.g., Johnson*, 51 Ariz. at 130, 75 P.2d at 37.

¶11 The City contends that the written headings on the instructions sufficiently clarified these ambiguities. It observes correctly that those instructions pertaining exclusively to the negligence claim were labeled as negligence instructions. But, as noted,

the trial court did not read the labels when it instructed the jury. And, although the written instructions were available for the jury's review during deliberations, the jury was not required to refer to them. Nor is there anything in the record before us suggesting they did review the headings. Moreover, the mere label, "Negligence Instruction # __," did not necessarily clarify to a person who was not trained in the law that the instruction pertained to the negligence *cause of action* only—as opposed to a description of the concept of negligence as conceivably pertaining to all three causes of action.

¶12 Finally, the City's closing argument exacerbated the existing ambiguity in and potentially misleading nature of the instructions. It openly encouraged an incorrect interpretation of the instructions. In its summation, the City emphasized repeatedly that it had done nothing wrong and could not be found negligent if no leak could be found. At one point, the City told the jury:

You know, the law does not require that we be perfect. You don't have to be an A student, you don't have to be a B student, but you have to be a C student, and we rose above that. And what I'm saying to you is, what did we do wrong? Absolutely nothing.

Had such comments been confined to a discussion of the negligence cause of action, they would have been proper and expected. But the City's counsel continued:

Now there's going to be some water that escapes from the system, we know that. But, ladies and gentlemen of the jury, if you're insisting that we're perfect, if you're insisting that nothing like that happens, then we may as well shut the doors. Because you've been told that you can't come up with a system that's not going to lose a certain amount of water.

And that's what makes this trespass claim so tough for me. Because [Rollings] say[s] to you that if a line does leak, and there is a problem, you're automatically responsible for trespass because the water's going to go on someone's property. Isn't that a catch-22 situation? We can do the best job we can for you but still be liable for trespass. That's what they're trying to say. And, folks, again, that simply is not right.

¶13 Because we are reluctant to assume that the City's trial counsel knowingly misrepresented the law to the jury, we can only conclude that counsel believed that the instructions did not bar him from suggesting to the jury that some neglect or wrongdoing was an element of trespass. Counsel's own confusion about the law of trespass—after the jury had already been instructed—only reinforces our conclusion that jurors with considerably less legal training may have been similarly confused. And, the City's closing argument undoubtedly increased the risk of such confusion.

¶14 The City maintains that Rollings cannot challenge the statements the City made during summation because Rollings did not object to them at trial. *See Copeland v. City of Yuma*, 160 Ariz. 307, 309-10, 772 P.2d 1160, 1162-63 (App. 1989) (prompt objection to inappropriate comments made during closing arguments necessary to preserve issue on appeal when requesting reversal based on prejudice). However, Rollings has not claimed that it is entitled to relief because the City's closing argument was improper. When determining whether a trial court's instructions misled the jury, we must determine in the context of the trial whether the instructions could have caused confusion. Closing arguments, conducted here immediately after the court instructed the jury, are especially

relevant for that purpose. *See State v. Bruggeman*, 161 Ariz. 508, 510, 779 P.2d 823, 825 (App. 1989) (“Closing arguments of counsel may be taken into account when assessing the adequacy of jury instructions.”); *see also State v. Gomez*, 211 Ariz. 111, ¶ 14, 118 P.3d 626, 629 (App. 2005); *State v. Morales*, 198 Ariz. 372, ¶ 5, 10 P.3d 630, 632 (App. 2000).

¶15 In a similar vein, the City contends that Rollings waived its claim because Rollings did not challenge the trial court’s denial of the clarifying instruction with sufficient specificity. First, we note that the City raised this argument for the first time in oral argument and we could reject it for that reason alone. *See Jones v. Burk*, 164 Ariz. 595, 597, 795 P.2d 238, 240 (App. 1990) (issue raised for first time in oral argument not considered). But, because the City raises a non-trivial concern in the context of the record before us, we choose to address the argument on its merits.

¶16 Rule 51(a), Ariz. R. Civ. P., provides in pertinent part that “no party may assign as error . . . the failure to give an instruction unless that party objects thereto[,] . . . stating distinctly the matter objected to and the grounds of the objection.” Although Rollings has more comprehensively supported its argument on appeal than it did before the trial court, we believe Rollings complied with the rule. Before the trial court, Rollings not only formally submitted the instructions in question, it also specifically objected to the trial court’s failure to provide them. Rollings alerted the court to both the case authority demonstrating that the instructions contained a correct statement of law and to the concern that the jury might be confused as to the proper elements on nuisance and trespass in the

absence of the clarifying instructions. Finally, albeit in a related argument, Rollings contended below that the remaining instructions “overemphasize[d] fault,” a concept it argued was inapplicable to the nuisance and trespass claims. Thus, Rollings complied with the requirements of Rule 51(a).³

¶17 In short, Rollings specifically objected to the trial court’s failure to give its proposed instructions on the ground that the jury would otherwise be confused as to whether Rollings had to show the City’s negligence to prevail on the nuisance and trespass claims. It has so argued on appeal, and we have addressed that very question.

CONCLUSION

¶18 In sum, a conscientious juror reasonably could have misunderstood the instructions as requiring a showing of negligence to support a verdict in favor of Rollings on the nuisance and trespass claims. Rather than clarifying any ambiguities in the instructions, the City’s summation encouraged the jury to adopt an incorrect understanding of them. Because the instructions were ambiguous in a material respect, we find there is “substantial doubt as to whether the jury was properly guided in its deliberations,” *Thompson*, 187 Ariz.

³On appeal, Rollings more specifically identifies the instructions that, in its view, could have confused the jury. Had Rollings contended on appeal that the trial court erred in providing those instructions, we would deem those arguments waived under Rule 51(a) and our own rules addressing proper preservation of claims. *See In re Estates of Spear*, 173 Ariz. 565, 567, 845 P.2d 491, 493 (App. 1992) (no consideration of issues raised for first time on appeal). Instead, Rollings argues that the trial court erred in failing to provide his proposed clarifying instruction—a claim he did raise in the trial court.

at 126, 927 P.2d at 786, and the trial court erred in failing to provide the clarifying instruction proffered by Rollings.

¶19 The judgment in favor of the City and against Rollings is reversed on the nuisance and trespass claims, and this matter is remanded for further proceedings.⁴ We affirm the jury’s verdict on the negligence claim and the statute of limitations question.⁵

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

PHILIP G. ESPINOSA, Judge

GARYE L. VÁSQUEZ, Judge

⁴Rollings also argues the trial court erred in “failing to instruct the jury as to the City’s burden of proof regarding the apportionment of damages among possible sources of moisture.” Because the jury did not find the City liable on any of Rollings’s claims, we need not consider this issue on appeal. *See Snethen v. Gomez*, 6 Ariz. App. 366, 370, 432 P.2d 914, 918 (1967) (“Where no liability is found, even erroneous instructions on cause and damages are immaterial.”). We also need not decide whether the trial court erred in refusing to instruct the jury that Rollings had no duty to mitigate damages for purposes of its nuisance and trespass claims because we are reversing on another ground, and this issue will not necessarily recur on retrial. *See Schneider v. Cessna Aircraft Co.*, 150 Ariz. 153, 163, 722 P.2d 321, 331 (App. 1985) (on retrial, trial court must exercise its discretion in considering issues based on evidence presented).

⁵In its briefing, Rollings has not challenged either finding or otherwise articulated why they should be reversed.

