: **THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**
***See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24**

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

VICKI HARDY, Plaintiff/Appellee, v. CHAMAN L. LUTHRA, M.D., Defendant/Appellant.	)	1 CA-CV 11-0553 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Yuma County

Cause No. S1400CV200900127

The Honorable John N. Nelson, Judge

AFFIRMED

Schultz & Rollins, Ltd. — Tucson
By Silas H. Shultz

and

Knapp & Roberts, P.C. — Phoenix
By David L. Abney
Co-Counsel for Plaintiff/Appellee

Udall Law Firm, LLP — Tucson
By Peter Akmajian
and Michele G. Thompson

and

Jones, Skelton & Hochuli, P.L.C. — Phoenix
By Eileen Dennis GilBride
Co-Counsel for Defendant/Appellant

N O R R I S, Judge

¶1 This appeal arises out of an order entered by the superior court granting Plaintiff/Appellee Vicki Hardy a new trial in her medical negligence action against Defendant/Appellant Chaman Luthra, M.D. The superior court granted Hardy a new trial after the jury returned a verdict in Dr. Luthra's favor, finding it should not have allowed the jury to consider Dr. Luthra's argument that another doctor who treated Hardy, Barry Sandoval, M.D., was a nonparty at fault. As discussed below, we hold the superior court did not abuse its discretion and affirm its order granting a new trial.

FACTS AND PROCEDURAL BACKGROUND

¶2 On March 5, 2007, Dr. Luthra performed cataract surgery on Hardy. As discussed below, *see infra* ¶ 9, the parties dispute Dr. Luthra's actions during the surgery, but agree the surgery was complicated by the rupture of the posterior capsule and the resulting prolapse of the vitreous[1] while Dr. Luthra was fracturing and removing the natural lens of Hardy's eye.

[1]At trial, Hardy's expert explained that "the posterior capsule separates the front part of the eye from the back part of the eye. And [doctors] try very hard to avoid breaking that capsule because then it allows the [vitreous] behind the eye to come forward and inside."

¶3 On March 6, the day after the surgery, Hardy returned to Dr. Luthra's office. When the bandage over her eye was removed, Hardy could see "[j]ust white," and had only "light perception vision." Dr. Luthra performed an ultrasound scan (referred to by the experts at trial as a "B-scan") of Hardy's eye. Dr. Luthra testified he saw no "indication of a retinal detachment" and told Hardy there was blood in her eye from the surgery and it could "take one to two weeks for the bleeding to clear up, and then [he] would know better what . . . the status of the retina [was]."[2] On March 12, Luthra again performed a B-scan of Hardy's eye and found no evidence of retinal detachment. He testified that during this visit Hardy "could count her fingers . . . at three feet" and considered this to be additional evidence Hardy's retina had not detached. Hardy, however, testified that her vision had not "improved at all from the point in time when [she] had the patch taken off." When

[2]Hardy's expert at trial also explained that "[t]he best way to think about the retina and its relationship to the eyeball is to make believe you are in a giant room that is shaped like a basketball. The wallpaper in that room is the retina . . . [and] is very loosely applied to the wall of the eye or the wall of the room. So if you . . . touched this wallpaper and pulled away you would either tear the wallpaper or you would pull it away from the wall of the eye. Retinal tears simply occur in most circumstances when the interior structure of the eye, the vitreous, which is a sticky kind of blob of JELL-O like material pulls away from the retina, tugs on it and tears it."

Dr. Luthra then told her to "come back in two to three weeks," Hardy "decided to take a second opinion."

¶4 Four days later, on March 16, Hardy consulted Barry Sandoval, M.D., another ophthalmologist. During that visit, Dr. Sandoval performed a B-scan of Hardy's eye and did not find evidence of retinal detachment. Dr. Sandoval also gave Hardy medication to relieve the "mildly elevated" pressure in her eye, which he measured at 24.[3] Hardy returned to Dr. Sandoval's office for a follow-up visit on March 22, and he reported she still only had "light perception" vision and her eye pressure had dropped to 8, but did not conduct a B-scan. On March 29, Dr. Sandoval again evaluated Hardy and discovered her eye pressure had dropped to 2, which Hardy's expert later testified was "clearly indicative of a retinal detachment in this context." Dr. Sandoval then referred Hardy to Alyssa Kim, M.D., an ophthalmologist who specialized "in vitroretinal diseases and surgery."

¶5 On March 30, Hardy consulted Dr. Kim, who performed another B-scan which showed Hardy "had a total retinal

[3]Dr. Sandoval explained "the average range of [eye] pressures go from 11 millimeters of mercury up to 21 millimeter[s] of mercury; the mean is 16. Postoperatively, with the inflammation in the eye it is not uncommon to see pressures in the 20's, and sometimes even higher, necessitating the use of medications to control the pressure, such as [Hardy] had when she came to see [him]."

detachment." On April 5, Dr. Kim operated on Hardy's eye "to try to correct the retinal detachment." During the surgery Dr. Kim confirmed Hardy's retina had detached and "[a] giant retinal tear was also present from the 3 o'clock position to almost the 9 o'clock position." In her deposition, Dr. Kim explained "you can have a tear and not have a detachment. Generally, though, if a tear is left untreated, it will progress to a detachment." Dr. Kim also found "lens remnants" in Hardy's eye, which she removed. Dr. Kim's attempts to reattach Hardy's retina were unsuccessful. Another doctor later removed most of Hardy's left eye and implanted a prosthesis.

¶6 On March 4, 2009, Hardy sued Dr. Luthra and Dr. Sandoval, asserting they had negligently damaged her left eye. On June 18, 2009, pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2603(B) (Supp. 2011), Hardy served the preliminary expert opinion affidavit of John Hofbauer, M.D., on Dr. Luthra and Dr. Sandoval. In his affidavit, Dr. Hofbauer provided a preliminary opinion that Dr. Luthra "fell below the applicable standards of care for cataract surgery . . . and in his postoperative care," and caused the damage to Hardy's eye. Dr. Hofbauer also stated

> it [was his] further opinion that [Dr. Sandoval] fell below the applicable standard of care in failing to recognize the immediate need for a retinal consult

> including contacting Dr. Luthra to determine the facts surrounding Dr. Luthra's March 5, 2007 lengthy, traumatic eye surgery. This failure contributed to Ms. Hardy's eventual loss of her left eye.

(the "preliminary opinion").

¶7 Subsequently, Dr. Hofbauer changed his preliminary opinion regarding Dr. Sandoval's fault. As Hardy explained in a February 2010 supplemental disclosure statement, "[a]fter reviewing the depositions and materials [Dr. Hofbauer] does not now think Dr. Sandoval fell below the applicable standard of care even though he had some concern when he initially looked at the medical records." On March 4, 2010, the parties stipulated to Dr. Sandoval's dismissal from the lawsuit with prejudice.

¶8 Shortly thereafter, Dr. Luthra designated Dr. Sandoval as a nonparty at fault, asserting "Dr. Hofbauer's current opinion regarding Dr. Sandoval is illogical given his opinion regarding Dr. Luthra," and "the jury may find fault with Dr. Sandoval if the jury believes [Dr. Hofbauer's preliminary opinion]." *See* A.R.S. § 12-2506(C) (2003) (allowing joint and several liability for "any nonparties at fault"). Over Hardy's objections before and during trial, the superior court permitted Dr. Luthra to argue Dr. Sandoval was a nonparty at fault.

¶9 During trial, Hardy presented testimony from medical experts supporting her theory Dr. Luthra fell below the standard

of care and caused the giant retinal tear during surgery by attempting to retrieve pieces of her natural lens that had fallen back into the vitreous after the posterior capsule ruptured and, in so doing, applied traction to the retina causing it to tear.[4] *See supra* note 2. Dr. Luthra, in turn, denied he had attempted to retrieve lens fragments from Hardy's vitreous and emphasized he did not describe any such procedure in his operative report. Dr. Luthra also presented testimony from medical experts who stated he had not negligently caused Hardy's eye injury. And, as discussed in detail below, Dr. Luthra cross-examined Dr. Hofbauer regarding his preliminary opinion. Over Hardy's objection, the superior court instructed the jury on Dr. Sandoval's comparative fault, and the jury found in favor of Dr. Luthra.

¶10 Hardy moved for a new trial under Arizona Rule of Civil Procedure ("Rule") 59(a)(6), asserting the court should not have allowed the jury to consider Dr. Sandoval as a nonparty at fault. Over Dr. Luthra's opposition, the superior court

[4]Although Hardy's counsel emphasized this theory at trial, her causation expert, Michael Balis, M.D., testified he believed Dr. Luthra caused the retinal tear by "tugging on the vitreous" while manipulating the artificial lens. Dr. Balis testified his opinion was based on the assumption that Dr. Luthra did not do anything other than what he described in his operative report, but agreed that if Dr. Luthra had attempted to retrieve lens fragments from the vitreous in the back of Hardy's eye, that could have also caused a retinal tear.

granted Hardy a new trial, finding it had "committed error in letting the non party at fault theory go to [the] jury," because Dr. Hofbauer's testimony was "insufficient" to establish Dr. Sandoval's fault "to a reasonable degree of medical probability."[5] The superior court further found there was "adequate evidence to conclude this caused confusion and a distraction to the jury. There was considerable testimony and evidence devoted to the non party at fault issue . . . which the jury should not have considered."

DISCUSSION

¶11 On appeal, Dr. Luthra argues the superior court should not have granted Hardy a new trial because he was entitled to use Dr. Hofbauer's preliminary opinion as substantive evidence Dr. Sandoval was a nonparty at fault. Dr. Luthra further argues that even if the superior court should not have allowed the jury to consider Dr. Sandoval's fault, "the error, if any, was harmless as a matter of law . . . [because] the jury rendered a

[5]The superior court's findings focused on the evidence supporting Dr. Sandoval's "fault"; that term is statutorily defined for purposes of joint and several liability as "an actionable breach of legal duty, act or omission proximately causing or contributing to injury or damages sustained by a person seeking recovery." A.R.S. § 12-2506(F)(2). Thus, "fault," as used by the superior court, encapsulates both breach of the standard of care and causation, and we use the term accordingly here.

defense verdict . . . [and] did not need to consider whether Dr. Sandoval was also at fault."

¶12 As discussed below, we agree a preliminary opinion provided pursuant to A.R.S. § 12-2603(B) can be admissible as prima facie evidence of a nonparty's fault. In a medical negligence case, however, the preliminary expert opinion must satisfy the elements of a medical negligence claim to be admissible as prima facie evidence. Here, as the superior court essentially found, Dr. Hofbauer's preliminary opinion failed to satisfy these elements when it was elicited and presented to the jury by Dr. Luthra in the context of Dr. Hofbauer's entire opinion. As we explain, the superior court did not abuse its discretion in making this finding and, consequently, concluding it should not have allowed Dr. Luthra to argue to the jury Dr. Sandoval's fault. And, as we explain, the superior court did not abuse its discretion in concluding the nonparty at fault issue confused and distracted the jury and therefore entitled Hardy to a new trial. *See Delbridge v. Salt River Project Agric. Improvement & Power Dist.*, 182 Ariz. 46, 53, 893 P.2d 46, 53 (App. 1994) (citation omitted) (superior court "has considerable discretion in the grant or denial of a motion for new trial, and we will not overturn that decision absent a clear abuse of discretion"); *Sadler v. Ariz. Flour Mills Co.*, 58 Ariz.

486, 490, 121 P.2d 412, 413 (1942) ("The granting of a new trial is different from an order refusing a new trial, for in the former the rights of the parties are never finally disposed of as in the latter they may be. The courts accordingly are more liberal in sustaining an order for new trial than where it is denied.").

I. Preliminary Opinion as Prima Facie Evidence of Fault

¶13 As Dr. Luthra points out, in *Ryan v. San Francisco Peaks Trucking Co.*, 228 Ariz. 42, 263 P.3d 863 (App. 2011), this court recently addressed the use of preliminary expert opinion testimony as substantive evidence in asserting health care professionals are nonparties at fault. There, we held "a defendant may rely on a plaintiff's preliminary expert opinion affidavit to establish prima facie proof of fault by a nonparty, provided that the affidavit is admissible under the rules of evidence and satisfies the elements of a medical malpractice claim." *Id.* at 50, ¶ 30, 262 P.3d at 871.

¶14 We explained, however, that "[b]ecause an allegation of comparative fault relating to nonparties is an affirmative defense, the defendant must prove the nonparty is actually at fault." *Id.* at 48, ¶ 22, 262 P.3d at 869 (citation omitted). The superior court "may instruct a jury on assigning fault to a non party only if evidence offered at trial is adequate to

support the jury finding that the non[]party was negligent." *Id.* (quoting *A Tumbling-T Ranches v. Flood Control Dist. of Maricopa Cnty.*, 222 Ariz. 515, 540, ¶ 83, 217 P.3d 1220, 1245 (App. 2009)). A defendant asserting a nonparty at fault affirmative defense must make the same evidentiary showing as a plaintiff in a medical malpractice case, i.e., "must prove negligence by presenting evidence that the healthcare provider(s) fell below the standard of care and that these deviations from the standard of care proximately caused the claimed injury." *Id.* at 48-49, ¶ 23, 262 P.3d at 869-70 (citations omitted).

¶15 Thus, under long-established principles of medical negligence law, to argue his nonparty at fault affirmative defense at trial, Dr. Luthra was required to "produce testimony based upon reasonable medical probabilities," *Benkendorf v. Advanced Cardiac Specialists Chartered*, 228 Ariz. 528, 531, ¶ 10, 269 P.3d 704, 707 (App. 2012) (quotation omitted), that Dr. Sandoval breached the standard of care and by so doing caused or contributed to Hardy's eye injury. *See also* A.R.S. § 12-563(1)-(2) (2003) (claimant must show "health care provider failed to exercise that degree of care, skill and learning expected of a reasonable, prudent health care provider . . . [and s]uch failure was a proximate cause of the injury").

¶16 On appeal, Dr. Luthra argues he "properly used Dr. Hofbauer's preliminary opinion as substantive evidence of Dr. Sandoval's fault" by asking Dr. Hofbauer about his preliminary opinion in the following exchange on cross-examination:

> Q. [A]t the initial phase of this case, you were provided with the medical records of the healthcare providers involved in this case; is that right?
>
> A. Yes.
>
> Q. And you were asked . . . to review the medical records and to offer your opinion about whether or not the healthcare providers involved in this case met or did not meet the standard of care, correct?
>
> A. Yes.
>
> * * *
>
> Q. And in [your preliminary] affidavit, Dr. Hofbauer, you did opine that . . . Dr. Sandoval fell below the standard of care, correct?
>
> A. Yes, I did.
>
> Q. And you said that [Dr. Sandoval] fell below the standard of care in failing to recognize the immediate need for a retinal consult including contacting Dr. Luthra to determine the facts surrounding . . . [the] lengthy, traumatic eye surgery, right?
>
> A. Correct.
>
> Q. And you said that failure contributed to the loss of the eye, correct?
>
> A. Yes.
>
> * * *

> Q. But then you subsequently have changed your mind on that topic and no longer feel that Dr. Sandoval fell below the standard of care?
>
> A. Yes.

During Hardy's re-direct examination, Dr. Hofbauer clarified, as discussed in greater detail at paragraphs 27-28 *infra*, he had "changed [his] mind and decided that [he] didn't think Dr. Sandoval fell below the standard of care after [he] learned more about the actual events and the testimony of the witnesses," and believed Dr. Sandoval's "care of [Hardy] was reasonable given the circumstances."

¶17 Based on the totality of the Dr. Hofbauer's testimony at trial, the superior court found his testimony was "deficient" as prima facie evidence of Dr. Sandoval's fault. Based on our review of the record, the superior court did not abuse its discretion in making this finding. *See Ryan*, 228 Ariz. at 46, ¶ 12, 262 P.3d at 867 (quotation omitted) (appellate court reviews evidentiary rulings for an abuse of discretion); *Morrison v. Acton*, 68 Ariz. 27, 32, 198 P.2d 590, 593 (1948) ("Both negligence and proximate cause are . . . questions of fact for the jury *if* the evidence is of sufficient weight and character to warrant their submission.") (emphasis added); *see also Doherty v. Aleck*, 641 S.E.2d 93, 95 (Va. 2007) (citation

omitted) (challenge to the certainty of expert witness's testimony in malpractice case "properly considered a challenge to the admissibility of the evidence, not a challenge to the sufficiency of the evidence").

¶18 Although Dr. Hofbauer's preliminary opinion, taken alone, initially constituted prima facie evidence of Dr. Sandoval's fault sufficient to allow the claim against Dr. Sandoval to proceed, when presented with additional facts before trial, Dr. Hofbauer withdrew his preliminary opinion and at trial confirmed he no longer believed Dr. Sandoval was at fault. Thus, his trial testimony, taken as a whole, failed to demonstrate to a reasonable medical probability that Dr. Sandoval had breached the standard of care and proximately caused or contributed to the damage to Hardy's eye, and therefore was incapable of supporting a finding by the jury that Dr. Sandoval was at fault. *Ryan*, 228 Ariz. at 48, ¶ 22, 262 P.3d at 869; *see supra* ¶ 14; *see also Struckman v. Burns*, 534 A.2d 888, 895 (Conn. 1987) (citations omitted) ("Whether an expert's testimony is expressed in terms of a reasonable probability that an event has occurred does not depend upon the semantics of the expert or his use of any particular term or phrase, but rather, is determined by looking at the entire substance of the expert's testimony.").

¶19 Dr. Luthra argues on appeal that "*Ryan* dictates the result here." This argument overlooks a critical difference between *Ryan* and this case. *Ryan* did not involve a situation where, as here, the expert had substantially changed his opinion based on additional information such that his opinion no longer "satisfie[d] the elements of a medical malpractice claim." *Ryan*, 228 Ariz. at 50, ¶ 30, 262 P.3d at 871. Indeed, in *Ryan* we expressly noted the plaintiff did not assert at trial that "the affidavits failed to adequately prove negligence on behalf of the nonparties or that the jury should not have been instructed as to nonparties at fault due to lack of sufficiency of the evidence" and had not raised those arguments on appeal. *Id.* at n.11. That is not the case here. *See supra* ¶ 8.

¶20 Dr. Luthra further argues the jury was entitled to rely solely on Dr. Hofbauer's preliminary opinion because his subsequent "repudiation" went to weight, not admissibility. We disagree. Dr. Hofbauer's preliminary opinion was just that –- preliminary, and subject to amendment or revision. *See Ryan*, 228 Ariz. at 50, ¶ 32, 262 P.3d at 871 (citations omitted) (although plaintiff was "accountable for the substance of the statements set forth in the [preliminary] affidavits . . . nothing prevented [her] from amending her affidavits or

disclosing additional information advising [the other party] that her expert affidavits were based on limited facts").[6]

¶21 The record also supports the superior court's finding Dr. Luthra "presented no other expert testimony in support of fault on the part of Dr. Sandoval." Specifically, with respect to causation, no expert testified Dr. Sandoval's treatment of Hardy or his failure to refer her to a retinal specialist earlier caused or contributed to her eye injury. Dr. Balis, Hardy's causation expert, testified Hardy's eye was not "salvageable at the time Dr. Sandoval saw her." Dr. Luthra's standard of care expert, Jonathan Macy, M.D., testified he believed Dr. Sandoval had met the standard of care, and although he believed Dr. Sandoval would have discovered a retinal detachment if he had performed a B-scan of Hardy's eye on March 22, at that point the "cat was already out of the bag" and "the harm was already done."

[6]The record reflects Dr. Hofbauer revised his preliminary opinion in good faith and articulated valid reasons for doing so. *See infra* ¶¶ 27-28. Our decision in this case should not be read as suggesting a claimant can avoid accountability for statements in a preliminary affidavit made pursuant to A.R.S. § 12-2603(B) by amending or revising it without a legitimate and demonstrable reason for doing so. *See* Ariz. R. Civ. P. 11(a), 37(c)(1). Further, unless experts are allowed, in good faith, to supplement or refine their opinions upon receipt of facts obtained during discovery, their opinions would be of limited practical assistance to the finder of fact, and would be inconsistent with Arizona Rule of Evidence 702.

¶22 Dr. Luthra's causation expert, Clive Sells, M.D., testified he believed Hardy's retina tore sometime between March 16 and April 5, while she was in Dr. Sandoval's care, but did not suggest Dr. Sandoval was at fault; rather, when asked by Hardy's counsel to identify a "traction event" that caused the tear during this time period, he stated "tears don't occur . . . typically from a single event. . . . The vitreous constricts with time, secondary to inflammation or even old age." When pushed by Hardy's counsel to identify a more specific cause, he answered "[t]he combination of hemorrhage and vitreous after a complicated cataract surgery." This testimony did not implicate Dr. Sandoval's care, or even suggest a "possible" cause that could be supported by "sufficient additional evidence indicating the specific causal relationship." *See Benkendorf*, 228 Ariz. at 530 n.4, ¶ 8, 269 P.3d at 706 n.4 (quotation omitted). Thus, for the reasons discussed above, the superior court did not abuse its discretion in finding Dr. Luthra had failed to present prima facie evidence of Dr. Sandoval's fault.

II. New Trial

¶23 As he did in the superior court, Dr. Luthra argues the superior court abused its discretion in granting a new trial because "[t]he defense verdict rendered harmless any error in allowing the jury to hear comparative fault evidence." The

superior court, however, found "there [was] adequate evidence to conclude this caused confusion and a distraction to the jury. There was considerable testimony and evidence devoted to the non party at fault issue for which the jury should not have considered."

¶24 The record amply supports the superior court's characterization of the significance of its error. The nonparty at fault issue permeated the trial: the parties discussed Dr. Sandoval's fault in their opening statements; they pointedly examined every expert about what Dr. Sandoval did, did not do, or should have done; and they extensively discussed whether he was at fault during closing arguments. As the superior court found, the record reflects this discussion added an additional layer of distraction to an already complex and fact-intensive trial. Thus, we cannot say the superior court abused its discretion in granting Hardy's motion for a new trial.[7] "[W]e generally afford the trial court wide deference because '[t]he

[7]Our dissenting colleague argues "any fault by Dr. Luthra was entirely dependent on events that did not involve Dr. Sandoval." *See infra* ¶ 34. We note, however, that throughout the trial Dr. Luthra attempted to link his liability to that of Dr. Sandoval, and argued in closing that "if one is going to find that Dr. Luthra is at fault on the referral issue, then Dr. Sandoval has to share that blame." We further note that none of the cases our dissenting colleague cites in support of her position that "[t]he defense verdict rendered any error by the court harmless," *see infra* ¶ 33, involve situations where, as here, the superior court expressly found its error was prejudicial and warranted a new trial.

judge sees the witnesses, hears the testimony, and has a special perspective of the relationship between the evidence and the verdict which cannot be recreated by a reviewing court from the printed record.'" *Cal X-Tra v. W.V.S.V. Holdings, L.L.C.*, 229 Ariz. 377, 403, ¶ 88, 276 P.3d 11, 37 (App. 2012) (quotation and citations omitted). *See also Ryan*, 228 Ariz. at 46 n.5, ¶ 12, 262 P.3d at 867 n.5 (citation omitted) ("[B]ecause of the substantial prejudice that could have resulted if the jury were allowed to consider inadmissible evidence relating to the alleged nonparties at fault, we consider [appellant's] arguments on the merits."); *Englert v. Carondelet Health Network*, 199 Ariz. 21, 28, ¶ 18, 13 P.3d 763, 770 (App. 2000) (citations omitted) ("[T]he trial court was in a better position than this court to assess the effect of [the error] on the jury."); *Reeves v. Markle*, 119 Ariz. 159, 163, 579 P.2d 1382, 1386 (1978) (citations omitted) ("Whenever a new trial order is justified by any of the grounds cited in the order, an appellate court will not disturb the lower court's exercise of its discretion.").

III. Use of Preliminary Opinion for Impeachment

¶25 The superior court also found that, under A.R.S. § 12-2603(G), it should not have allowed Dr. Luthra to impeach Dr. Hofbauer with his preliminary opinion because there was a "substantial change in facts." Because the question of whether

Dr. Luthra may impeach Dr. Hofbauer with his preliminary opinion pursuant to A.R.S. § 12-2603(G) may arise again on remand, we address it here.[8]

¶26 The superior court explained that "[u]pon a review of the affidavit and trial testimony of Dr. Hofbauer [it concluded] that there was a substantial change in facts" and it should not have allowed Dr. Luthra to impeach Dr. Hofbauer with his preliminary opinion.[9] Under A.R.S. § 12-2603(G), "[a] preliminary expert opinion affidavit may be used for impeachment only upon a finding of the court that the facts upon which the affidavit were based have not substantially changed and that the facts were known to the expert at the time the affidavit was prepared."

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[8]Dr. Luthra argues on appeal Hardy is "precluded" from challenging Dr. Hofbauer's impeachment because she "first raised this argument in her motion for new trial, which is too late." The record reflects, however, that Hardy moved in limine to preclude Dr. Luthra "from mentioning or in any way introducing any evidence relating" to Dr. Sandoval's fault, which would include impeaching Dr. Hofbauer with his preliminary opinion. In addition, Dr. Luthra's response to Hardy's new trial motion did not argue she had waived her impeachment argument, and the superior court accordingly addressed impeachment in its ruling on Hardy's motion. We therefore reject Dr. Luthra's waiver argument.

[9]We also note the superior court instructed the jury it could consider whether Dr. Hofbauer (along with the other witnesses) was "contradicted by anything [he] said or wrote before trial" in evaluating his testimony.

¶27 At trial, Dr. Hofbauer testified on cross-examination he had originally believed Dr. Sandoval was negligent because he "did not contact Dr. Luthra to ask him about the surgery or talk to him about the surgery or even get his records." Dr. Hofbauer explained, however, he had changed his mind after reading Dr. Luthra's deposition because "[Dr. Luthra] basically said the same thing in his operative report, so it was [his] impression that had Dr. Sandoval talked to Dr. Luthra he would not have been told about this aggressive attempt to get lens material out of the vitreous." On re-direct, Dr. Hofbauer further explained that he believed "Dr. Sandoval had no knowledge of what actually happened in the surgery . . . [and his] impression [was] that Dr. Luthra would not have given him that information."

¶28 As discussed above, *see supra* ¶ 9, Hardy's claim against Dr. Luthra was premised on the theory Dr. Luthra did more during his surgery than he documented in his operative report. Dr. Hofbauer's testimony reflects that when he read Dr. Luthra's deposition he discovered a fact not "known to [him] at the time [his] affidavit was prepared," A.R.S. § 12-2603(G), i.e., had Dr. Sandoval contacted Dr. Luthra to ask about the surgery, Dr. Luthra would not have provided any information that would have prompted Dr. Sandoval to immediately refer Hardy to a retinal specialist, and, therefore, Dr. Sandoval's failure to

contact Dr. Luthra could not have caused or contributed to Hardy's eye injury. We agree with the superior court this was a "substantial change in facts" that should have prevented Dr. Luthra from impeaching Dr. Hofbauer with his preliminary opinion.

¶29 Dr. Luthra argues that "'read[ing] the depositions' is not a change in 'facts'" and "such an interpretation would render the statute a nullity" as "experts could never be impeached with their preliminary affidavits because by definition, preliminary affidavits are always prepared before discovery is undertaken." We disagree; we read this provision as the Legislature's attempt to strike a balance between "curb[ing] frivolous medical malpractice suits," *Ryan*, 228 Ariz. at 50, ¶ 31, 262 P.3d at 871, and unduly subjecting plaintiffs who have meritorious complaints to impeachment based on pre-discovery statements made in preliminary affidavits. The provision anticipates that in some situations, such as this one, "substantially changed" facts will require medical experts to alter their preliminary opinions. Dr. Luthra offers a straw man argument which we reject; it does not follow that because Dr. Hofbauer discovered a "substantial change in facts" by reading depositions taken in this case such will happen in *every* case and make "the statute a nullity."

CONCLUSION

¶30 For the foregoing reasons, we affirm the superior court's order granting Hardy a new trial and remand this matter for further proceedings consistent with this decision. As the prevailing party on appeal, Hardy is entitled to recover her costs on appeal subject to her compliance with Arizona Rule of Civil Appellate Procedure 21.

___/s/_____
PATRICIA K. NORRIS, Judge

CONCURRING:

___/s/_____
DONN KESSLER, Judge

T I M M E R, Presiding Judge, dissenting,

¶31 I respectfully dissent. Even assuming the superior court erred by permitting Dr. Luthra to introduce evidence that Dr. Sandoval was a non-party at fault and instructing the jury it could assign a percentage of fault to Dr. Sandoval if the jury found Dr. Luthra liable, the error was harmless and did not affect the verdict.

¶32 The court instructed the jury in relevant part as follows:

> If you find that Chaman L. Luthra was at fault, then Chaman L. Luthra is liable to Vicky Hardy and your verdict must be for Vicky Hardy. You should then determine the full amount of Vicky Hardy's damages and enter that amount on the verdict form. You should then consider Chaman L. Luthra's claim that Barry Sandoval M.D. was at fault.

Additionally, the court provided the jury with three forms of verdict. Verdict form #1 finds in favor of Hardy and has a line to enter the amount of damages. Verdict form #2 repeats the language in verdict form #1 and adds lines to enter percentages of fault attributable to Drs. Luthra and Sandoval. Verdict form #3 finds in favor of Dr. Luthra. The jury found in favor of Dr. Luthra and used verdict form #3.

¶33 We presume the jury followed the court's instructions, *Perkins v. Komarnyckyj*, 172 Ariz. 115, 119, 834 P.2d 1260, 1264 (1992), and no reason appears suggesting the jury failed to do

so here. Consequently, because the jury determined Dr. Luthra was not at fault for Hardy's injury, the jury never reached the issue whether Dr. Sandoval bore a portion of Dr. Luthra's alleged fault. The superior court was wrong, therefore, in concluding the admission of evidence concerning Dr. Sandoval affected the verdict. The defense verdict rendered any error by the court harmless. *See Gibson v. Boyle*, 139 Ariz. 512, 518, 679 P.2d 535, 541 (App. 1983) (holding court's error in instructing jury on imputed spousal negligence on claim by estate of wife-passenger against third-party driver in accident harmless error in light of defense verdict by same jury on child-passenger's claim against driver, which demonstrates jury entered defense verdict on estate's claim regardless of instruction); *see also Spiller v. Brady*, 169 F.3d 1064, 1067 (7th Cir. 1999) (holding erroneous contributory negligence instruction harmless error when jury returns a general defense verdict); *cf. Hunter v. Burke*, 958 S.W.2d 751, 757 (Tenn. Ct. App. 1997) (concluding failure to instruct on comparative fault harmless in light of defense verdict).[10]

¶34 Finally, I disagree with the Majority that permitting

[10]Other courts have reached similar conclusions. *See, e.g.*, *Gardner v. SPX Corp.*, 272 P.3d 175, 184, ¶¶ 36-38 (Utah Ct. App. 2012); *Rosenfeld v. Seltzer*, 993 So. 2d 557, 560 (Fla. Dist. Ct. App. 2008); *Trejo v. Keller Indus., Inc.*, 829 S.W.2d 593, 600 (Mo. Ct. App. 1992); *Bertsch v. Brewer*, 640 P.2d 711, 715-16 (Wash. 1982).

Dr. Luthra to pursue a non-party at fault claim against *Dr. Sandoval* so confused and distracted the jury that it affected assessment of *Dr. Luthra's* alleged fault. *See supra* ¶¶ 23-24. The alleged wrongful acts and omissions of these doctors were undertaken individually and at different times. Thus, any fault by Dr. Luthra was entirely dependent on events that did not involve Dr. Sandoval, and the jury's assessment of these events was not likely influenced by evidence of Dr. Sandoval's alleged fault.

¶35 I would reverse the superior court's order granting a new trial and remand for entry of a judgment in favor of Dr. Luthra.

___/s/_____
ANN A. SCOTT TIMMER, Presiding Judge