DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

PORFIRIO NAVARRO, Plaintiff/Appellant, v. CARLTON A. BOONE, Defendant/Appellee.	1 CA-CV 09-0412 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2007-017441

The Honorable John A. Buttrick, Judge

AFFIRMED

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and
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H A L L, Judge

¶1 Porfirio Navarro (Navarro) appeals from the trial court's judgment in his negligence suit against Carlton A. Boone (Boone). For the reasons that follow, we affirm the trial court's judgment.

FACTS AND PROCEDURAL HISTORY

¶2 This case arises from an automobile accident involving vehicles owned by Navarro and Boone. On July 20, 2006, Navarro was a passenger in his pickup, which his friend M.B. was driving on Interstate 10. When M.B. slowed or stopped for traffic, Boone collided with the rear of Navarro's pickup in his van. Navarro's pickup also crashed into the truck in front of it, causing damage to the front end.

¶3 The parties disputed which collision occurred first. According to Navarro, the rear impact with Boone's van occurred first, whipping his head "backwards and then forward," and pushed the pickup into the vehicle in front of it. M.B. corroborated this account, and claimed that after the accident, Boone apologized and said that he didn't see the pickup because he was "grabbing [his] phone on the floor." Boone, however, denied reaching for a phone and claimed that Navarro's pickup hit the vehicle in front of it before his van's collision with the pickup.

¶4 Navarro filed a negligence suit against Boone seeking damages for property damage, loss of income, and medical expenses. The day before the crash, a shop had finished repairing damage to Navarro's pickup from a prior crash, leaving it "brand new again" before the collision with Boone. Boone stipulated to admit into evidence an estimate for the repairs to Navarro's pickup, which totaled $3,658.49. Navarro also presented evidence that he suffered a personal injury in the accident that required medical care and caused him to miss work.

¶5 At trial, Boone called R.A., a traffic accident reconstructionist and biomechanical engineer, as an expert witness. R.A. testified that, in his expert opinion, Navarro's pickup struck the truck in front of it before being struck by Boone's van. R.A. also analyzed Navarro's damage estimate, and testified that $2,300.00 of the damage done to Navarro's pickup was from the rear-end collision. Boone did not allege any comparative fault. Navarro, the only other party, was not driving, and Boone did not allege that he interfered with M.B., the driver.

¶6 After the defense rested, Navarro moved for a directed verdict[1] with respect to liability under Arizona Rule of Civil

[1] We use the terms "directed verdict" and "judgment as a matter of law" (JMOL) interchangeably, because "the tests for granting a directed verdict and a JMOL motion are the same."

Procedure 50(a), arguing that Boone had admitted a violation of Arizona Revised Statutes (A.R.S.) section 28-701(A) (Supp. 2009) by failing to control his speed to avoid collision. Boone argued that he had done everything possible to avoid the surprise of the collision that occurred in front of him, and the jury could therefore find him not liable. The court denied the motion, concluding that there was a valid evidentiary basis for a reasonable jury to believe that Boone was not liable "on these facts."

¶7 On the last day of trial, Navarro informed the court that Boone never filed a nonparty-at-fault notice alleging fault by M.B. or any other nonparty. On this basis, Navarro asked the court to reconsider his motion for judgment as a matter of law (JMOL), arguing that "no possible percentage" of negligence could be attributable to M.B., the driver of Navarro's truck. The court again denied the motion, stating that it was still "within the jury's province to find that there was no negligence here . . . on the part of the defendant." Instead, the court instructed the jury that "[i]f . . . defendant was at fault . . . your verdict must be for plaintiff." The court also issued a negligence per se instruction based on A.R.S. § 28-

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Warner v. Southwest Desert Images, LLC, 218 Ariz. 121, 127 n.4, 180 P.3d 986, 992 n.4 (App. 2008) (internal quotations omitted).

701(A) (requiring a person to "control the speed of a vehicle as necessary to avoid colliding with any . . . vehicle"). Navarro did not request a special verdict or interrogatory for the jury.

¶8 The jury returned a general verdict finding Boone liable for $2,300.00 of Navarro's damages. Navarro renewed his motion for JMOL after the trial ended under Rule 50(b), arguing that the jury could not have reasonably found Boone liable for $2,300.00 in damages without impermissibly allocating fault to a nonparty. Navarro also moved for a new trial under Rule 59(a), alleging jury misconduct and arguing that the verdict was not justified by evidence or law for reasons similar to those in his JMOL motion. The court denied both motions, concluding that "the jury's damage award [wa]s supported by the evidence."

¶9 Navarro filed a timely notice of appeal. We have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

DISCUSSION[2]

¶10 Navarro raises three issues on appeal: (1) whether the court's denials of his post-verdict motions for JMOL and a new trial were in error because the jury verdict improperly failed to allocate 100% of fault; (2) whether the court erred by failing to include interpreter services in its costs award; and

[2] Pursuant to our order issued on March 19, 2010, we have disregarded arguments that we determined were made for the first time in the reply brief.

(3) whether the court erred by failing to include charges for cancelling a deposition as costs. We address each in turn.

I. Allocation of Fault

¶11 Navarro argues on appeal that the jury's $2,300.00 verdict only awarded compensation for rear-end damage to his truck. Navarro claims that this result improperly allocated fault to M.B., a nonparty, after Boone's failure to file a nonparty-at-fault notice. As we understand his claims, Navarro contends that the court should have granted its post-verdict motion for JMOL with respect to the property damage award in the entire amount of his estimate.

¶12 We review a trial court's denial of a motion for JMOL de novo. *A Tumbling-T Ranches v. Flood Control Dist.*, 222 Ariz. 515, 524, ¶ 14, 217 P.3d 1220, 1229 (App. 2009). We view the evidence presented at trial "in a light most favorable to upholding the jury's verdict." *Acuna v. Kroack*, 212 Ariz. 104, 106, ¶ 3, 128 P.3d 221, 223 (App. 2006) (citing *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 53, ¶ 13, 961 P.2d 449, 451 (1998)). We affirm "if any substantial evidence exists permitting reasonable persons to reach such a result." *Id.* at 111, ¶ 24, 128 P.3d at 228 (quoting *Hutcherson*, 192 Ariz. at 53, ¶ 13, 961 P.2d at 451). We "uphold a general verdict if evidence on any one count, issue or theory sustains the

verdict." *Mullin v. Brown*, 210 Ariz. 545, 551, 115 P.3d 139, 145 (App. 2005) (internal quotation omitted). We will affirm the trial court's judgment "even if the [] court has reached the right result for the wrong reason." *City of Phoenix v. Geyler*, 144 Ariz. 323, 330, 697 P.2d 1073, 1080 (1985).

¶13 Navarro's motion for JMOL raised an issue of comparative fault in tort. Arizona has adopted the Uniform Contribution Among Tortfeasors Act (UCATA), A.R.S. §§ 12-2501 to -2509 (2003), which makes each tortfeasor liable only for his or her share of fault. A.R.S. § 12-2506(A). UCATA abolished joint and several liability in favor of comparative fault, in which the trier of fact determines and apportions fault as a whole when multiple parties allegedly share liability for one indivisible injury. *See* § 12-2506(C); *Larsen v. Nissan Motor Corp.*, 194 Ariz. 142, 146, ¶ 9, 978 P.2d 119, 123 (App. 1998); *see also* Restatement (Third) of Torts: Apportionment Of Liability § 7 (2000) (stating that plaintiff's negligence proportionally reduces his recovery if it is the "legal cause of an indivisible injury to the plaintiff"). A trier of fact assessing comparative fault may consider "[n]egligence or fault of a nonparty . . . if the defending party gives notice before trial." A.R.S. § 12-2506(B); *see also* Ariz. R. Civ. P. 26(b).

¶14 In this case, the parties presented two different characterizations of the accident at trial. Under Navarro's version of the facts, Boone's van impacted the pickup first and pushed it into a second impact with the truck in front, causing both front- and rear-end damage in one incident. But in Boone's version, Navarro's pickup first hit the truck in front, resulting in front-end damage, and then was hit by Boone's van, causing the rear-end damage in a separate, subsequent incident. Boone's theory was supported by Boone's own testimony that Navarro struck the car in front first, which was in turn corroborated by R.A.'s expert testimony. Thus, Boone's version of the events results in two separate events for the purposes of assessing property damage.

¶15 We conclude that the jury could have accepted Boone's account and viewed the accident as two distinct events, making the general verdict's allocation of fault and liability clearly permissible. The jury likely decided from the facts that Navarro's pickup first collided with the truck in front of it, and that Boone was simply not at fault for that impact. It could have further concluded that Boone was 100% at fault for the second impact, resulting in the damage to the rear of the pickup. This result leaves no comparative fault unallocated. It is supported by R.A.'s testimony, including his $2,300.00

estimate of the repair cost for damages attributable to the rear-end collision, which rebutted Navarro's damages estimate.

¶16 Admittedly, Boone's account may have required apportionment of fault for the accident as a single, indivisible event with respect to any damages for physical injuries suffered by Navarro. *See, e.g.*, *Piner v. Superior Court*, 192 Ariz. 182, 962 P.2d 909 (1998) (requiring apportionment of fault when plaintiff's truck was rear-ended by one motorist, and subsequently, before plaintiff was examined for his injuries, by another motorist several hours later). But Navarro has only challenged the jury's verdict with respect to their assessment of property damage, and not to their evaluation of the personal injury damages he claimed relating to his lower back injury. Moreover, Boone presented evidence from which a jury could have concluded that Navarro's lower back injury was not caused by the rear impact. R.A. testified that in general, lower back injuries were very unlikely to be caused in a rear-end collision because the lower back is supported by the seatback. He further testified that the forces and distortions inflicted on Navarro's lower back by lifting boxes later in the day were "much more" than anything he could have encountered in the accident. Boone also called an orthopedic surgeon, R.L., to offer his expert

opinion that Navarro's soft-tissue injuries resulted from his work, rather than the accident.

¶17 Finally, we disagree with Navarro's argument that *Acuna* controls the result here. In that case, the court vacated a portion of the judgment imposing 30% of the total liability based on a negligent entrustment claim because it was unsupported by substantial evidence and should have been dismissed as a matter of law. *Acuna*, 212 Ariz. at 115, ¶ 40, 128 P.3d at 232. The court reallocated that portion of the fault to the remaining defendant, thereby increasing the judgment against him, because the overturned claim did not change the amount of damages and "Arizona law . . . requires a trier's fault allocation in each action to total one hundred percent." *Id.* As we have explained, a reasonable interpretation of the general verdict in this case is that the jury found Boone 100% at fault for the only damage that he caused. Accordingly, we uphold the jury's verdict.[3]

II. Fees for Interpreter Service, Cancelled Deposition

¶18 Navarro argues that the fees for the interpreter he employed to translate his testimony at trial were taxable costs

[3] Consistent with this result, we also affirm the trial court's denial of a new trial under the lower abuse of discretion standard. This result also obviates discussion of Boone's waiver argument under Rule 49(c).

under A.R.S. § 12-332(A)(1) (2003). He contends that this is so because "by statute and court rules, a professional interpreter is a witness charging a fee for being a witness," and that, for a plaintiff not proficient in English, an interpreter is essential to provide the plaintiff "access to justice." Boone objects, noting that § 12-332(A)(1) does not specifically list interpreters as a taxable cost and generally does not provide for the payment of expert witness fees. We will not disturb the trial court's cost award absent an abuse of discretion. *Hunt Inv. Co. v. Eliot*, 154 Ariz. 357, 361, 742 P.2d 858, 862 (App. 1987).

¶19 "A party to a civil action cannot recover its litigation expenses as costs without statutory authorization." *Schritter v. State Farm Mut. Auto. Ins. Co.*, 201 Ariz. 391, 392, ¶ 6, 36 P.3d 739, 740 (2001). Section 12-332(A)(1) includes "[f]ees of officers and witnesses" as taxable costs in superior court.

¶20 Confronted with the application of § 12-332 to expert witnesses in *State v. McDonald*, we held that "the word 'cost' has been limited in its meaning by A.R.S. § 12-332, wherein no provision was made for the allowance of expert witness fees." 88 Ariz. 1, 14, 352 P.2d 343, 351 (1960). We reasoned that the phrase "[f]ees of . . . witnesses" in § 12-332 referred to those

fees provided by § 12-303, which requires a material witness in a civil trial to be paid twelve dollars per day and limited travel expenses. *Id.* at 13, 352 P.2d at 350. We concluded that "[s]hould it be deemed advisable to effect a change in the law, we believe it should be done by the legislature and not by judicial fiat." *Id.* at 14, 352 P.2d at 351.

¶21 The same logic applies here. Section 12-332 does not expressly provide for interpreters' fees. To the extent that interpreters are considered witnesses, *see* Ariz. R. Evid. 604 (subjecting an interpreter to the rules relating to expert qualification); Ariz. R. Evid. 702 (allowing expert testimony by a witness qualified by knowledge, training, or education), we agree with *McDonald* that § 12-332(A)(1)'s inclusion of witness fees only refers to those fees provided by § 12-303. We also note that Navarro could have requested that he be provided an interpreter by the court pursuant to Arizona Rule of Civil Procedure 43(c), under which the trial court could have directed that the interpreter's fees be taxed as costs.

¶22 Navarro also contends that the trial court erred by failing to award him costs under § 12-332(A)(2) for a deposition-cancellation fee charged by the court reporter when his attorney had a scheduling conflict. Section 12-332(A)(2) classifies the "[c]ost of taking depositions" as a taxable cost.

Navarro claims that the cost of cancelling depositions should be included as a cost of taking them. Boone counters that cancellations are not specifically provided for in the statute, and emphasizes that only the cost of *taking* a deposition is taxable.

¶23 Although expenses not enumerated in § 12-332(A) are not recoverable as costs, *Fowler v. Great American Ins. Co.*, 124 Ariz. 111, 114, 602 P.2d 492, 495 (App. 1979), we have held that certain costs incidental to the taking of depositions are taxable under § 12-332(A)(2). In *Fowler*, we held that § 12-332(A)'s taxable costs included "reasonable and necessary travel expenses incurred for the taking of depositions." *Id.* (citing *Young's Market Co. v. Laue*, 60 Ariz. 512, 141 P.2d 522 (1943)). In *Visco v. First National Bank of Arizona*, we held that the cost of making copies of depositions was taxable, reasoning that it was "a cost incidental to the taking of the deposition." 3 Ariz.App. 504, 508-09, 415 P.2d 902, 906-07 (1966).

¶24 The deposition was cancelled because Navarro's attorney was involved in another court proceeding. We cannot conclude that the trial court abused its discretion when it declined to assess Boone the fee that Navarro incurred when his attorney was unable to attend a deposition scheduled by Navarro.

CONCLUSION

¶25 For the foregoing reasons, we affirm the trial court's judgment.

/s/
PHILIP HALL, Judge

CONCURRING:

/s/
PATRICK IRVINE, Acting Presiding Judge

/s/
PATRICIA A. OROZCO, Judge