NOTICE: 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. 31.34

DIVISION ONE
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RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JOHN GRANVILLE,	No. 1 CA-CV 11-0133
Plaintiff/Appellant,	DEPARTMENT A
v.	**MEMORANDUM DECISION**
VINCE LEROY HOWARD,	Not for Publication – (Rule 28, Arizona Rules
Defendant/Appellee.	of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-053833

The Honorable Michael R. McVey, Judge

REVERSED AND REMANDED

Rakestraw Law LLC — Phoenix
By Leslie L. Rakestraw
Attorneys for Plaintiff/Appellant

Edythe H. Kelly & Associates — Tempe
By Edwin R. Roberts
Attorneys for Defendant/Appellee

T I M M E R, Judge

¶1 John Granville appeals the superior court's order denying his motion for a new trial after a jury entered a verdict in favor of defendant Vince Leroy Howard in Granville's

suit for medical expenses incurred for injuries purportedly suffered as a result of a motor vehicle accident. For the reasons that follow, we decide the trial court erred by permitting an expert witness to offer an undisclosed opinion, and Granville suffered prejudice as a result. We therefore reverse and remand for a new trial. Because other issues raised on appeal are likely to be raised on remand, we address them.

BACKGROUND[1]

¶2 On March 3, 2008, Granville stopped his pickup truck at a yield sign at the end of a freeway off-ramp and was struck from behind at a low rate of speed by a car driven by Howard. Granville alleges that, as a result of the accident, he injured his neck and back. Dr. Scott Young, a chiropractor, diagnosed Granville with soft tissue injuries and treated him in twenty-eight sessions for almost three months and at a cost of $4,745.05.

¶3 In October 2008, Granville filed suit against Howard, seeking damages to compensate him for his injuries.[2] The case was referred to compulsory arbitration, and an arbitrator ruled in favor of Granville, awarding him compensatory damages of

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[1] We view the facts in the light most favorable to sustaining the jury verdict. *Walter v. Simmons*, 169 Ariz. 229, 231, 818 P.2d 214, 216 (App. 1991).

[2] Howard had previously paid for repair of Granville's rear bumper.

$4,745.05. Howard appealed the award to the superior court, and the parties tried the case to a jury. Howard admitted he rear-ended Granville's truck, but defended the suit by contending the accident was so minor that Granville could not have been injured as a result.

¶4 The jury found in favor of Howard. Thereafter, the court entered judgment against Granville for $17,885.50 for taxable costs, Rule 68 sanctions, and expert witness fees. Granville filed a motion for new trial, which the court denied. This timely appeal followed.

DISCUSSION

I. Verdict contrary to weight of evidence

¶5 Granville initially argues the trial court erred by failing to grant a new trial because the jury could not justifiably enter a defense verdict in light of Howard's admission he rear-ended Granville's truck. According to Granville, if the jury agreed with Howard that Granville did not suffer injuries, it should have entered a verdict for Granville and then awarded $0. Because it did not, Granville asserts the jury necessarily found Howard bore no fault for the accident – a conclusion that is contrary to the weight of the evidence and requires a new trial.[3] We review the trial court's ruling for an

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[3] To the extent Granville argues in his opening brief that the jury filled out the wrong verdict form, he waived this issue by

abuse of discretion. *Styles v. Ceranski*, 185 Ariz. 448, 450, 916 P.2d 1164, 1166 (App. 1996).

¶6 We agree with Howard that Granville confuses the concepts of admitted negligence and fault. To establish liability for negligence, "a plaintiff must prove four elements: (1) a duty requiring the defendant to conform to a certain standard of care; (2) a breach by the defendant of that standard; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) actual damages." *Gipson v. Kasey*, 214 Ariz. 141, 143, ¶ 9, 150 P.3d 228, 230 (2007). "Where there are no damages in a negligence case, there is simply no cause of action upon which a plaintiff can recover." *Walsh v. Advanced Cardiac Specialists Chartered*, 227 Ariz. 354, 357, ¶ 9, 258 P.3d 172, 175 (App. 2011).

¶7 Howard admitted he rear-ended Granville's truck, thus satisfying the elements of duty and breach; i.e., Howard breached his duty to not hit Granville's vehicle. Howard did not admit, however, Granville suffered injuries as a result of

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not raising it in his motion for new trial. *Matcha v. Winn*, 131 Ariz. 115, 116, 638 P.2d 1361, 1362 (App. 1981). Similarly, Granville argues in his reply brief that the trial court should not have given a comparative fault jury instruction. Because this argument was not made in his motion for new trial nor argued in the opening brief, we do not address it. *Romero v. Sw. Ambulance*, 211 Ariz. 200, 204, ¶ 7 n.3, 119 P.3d 467, 471 n.3 (App. 2005) (holding issue raised for first time in reply brief waived on appeal).

the accident. Thus, in order to prevail at trial, Granville was required to prove the elements of causation and damages.

¶8 The record reveals sufficient evidence from which the jury could find that Granville was not injured as a result of the accident: Robert D. Anderson, a biomechanical engineer and accident reconstructionist, testified the accident occurred at such a low speed that the forces on Granville were equivalent to what he would have experienced had he abruptly braked. Anderson further testified the change in velocity of Granville's pickup truck due to the impact with Howard's car was only 1.6 to 2.6 miles per hour, the forces Granville experienced were less than half the forces incurred from bumper car collisions, and the force exerted on his spine would have been no greater than when Granville bent over to tie his shoe.

¶9 The jury also heard evidence permitting it to conclude that Granville's symptoms arose from prior accidents. Granville was injured in two vehicle accidents in 2005. He suffered pain in his lower back as a result of the first accident and pain in his lower body as a result of the second. When Granville ceased chiropractic care in November 2005 for injuries sustained in the last of the accidents that year, Granville rated his pain level as five out of ten. On an assessment form provided Dr. Young after the accident with Howard, Granville indicated he was

experiencing pain in his lower back and legs but did not state he was having pain in his neck or mid-back.

¶10 Stephen G. Brown, a board certified orthopedic surgeon, opined that based on his review of Granville's records, pre-existing conditions likely caused Granville's symptoms prior to the accident with Howard. Dr. Brown further opined that Granville had no injury from the accident or, at the most some soreness, and he "essentially required no care."

¶11 Although Granville introduced his own testimony and that of Dr. Young in support of the complaint, the jury was entitled to disregard it in favor of the above-described evidence and find that Granville was not injured by Howard's negligence in rear-ending Granville's truck. Thus, the jury was free to enter a defense verdict, and the trial court did not err by refusing to order a new trial on this basis.

II. Preclusion of expert testimony

¶12 Granville next argues a new trial is required because the trial court erroneously denied his motion in limine to preclude the testimony of Anderson and Dr. Brown. We review the trial court's ruling on a motion in limine for an abuse of discretion and resulting prejudice. *Warner v. Sw. Desert Images, LLC*, 218 Ariz. 121, 133, ¶ 33, 180 P.3d 986, 998 (App. 2008); *Crackel v. Allstate Ins. Co.*, 208 Ariz. 252, 268, ¶ 59, 92 P.3d 882, 898 (App. 2004). Whether a witness is competent to

testify on a given subject rests in the sound discretion of the trial court. *Carrel v. Lux*, 101 Ariz. 430, 441, 420 P.2d 564, 575 (1966).

A. Anderson

¶13 Granville argues the court erred by allowing Anderson to testify because his testimony (1) could not assist the jury in finding the facts in issue, and (2) lacked foundation.[4] We address each argument in turn.

Assisting the jury

¶14 Expert testimony is permissible if, among other requirements, the expert's "scientific, technical, or other specialized knowledge will assist the trier of fact . . . to determine a fact in issue." Ariz. R. Evid. ("Rule") 702. Granville argues that because Anderson could only assess the *potential* for injury in the accident rather than whether Granville was actually injured, Anderson's testimony was not of any assistance to the jury. We disagree. Anderson's testimony regarding the physics of the accident assisted the jury in deciding whether the accident was capable of causing injury to

[4] Granville also argues the court erred because Anderson's testimony constituted an improper comment on Dr. Young's credibility. Granville waived this issue by failing to raise it to the trial court. Regardless, we reject the argument because Anderson did not offer an opinion on Dr. Young's credibility; he merely offered testimony that conflicted with Dr. Young's opinion.

Granville. *Lohmeier v. Hammer*, 214 Ariz. 57, 64-65, ¶ 19, 148 P.3d 101, 108-09 (App. 2006) (holding that biomechanical engineer can testify about the forces involved in an accident and whether such forces are capable of causing injury to an individual because he had superior knowledge compared to an ordinary juror); *cf. Benkendorf v. Advanced Cardiac Specialists Chartered*, 626 Ariz. Adv. Rep. 12, ¶ 15 (App. Jan. 24, 2012) (holding that expert witness called by defense in medical malpractice action may testify about "possible" causes of injury). Anderson was not required to opine whether Granville was actually injured in order to assist the jury.

Foundation

¶15 Granville asserts Anderson's testimony lacked foundation because his crash studies involved only young, healthy individuals who, unlike Granville, did not suffer from any spinal ailments. An expert's opinion can be based on facts "of a type reasonably relied upon by experts in the particular field," Arizona Rule of Evidence 703, and if the source is reliable. *Standard Chartered PLC v. Price Waterhouse*, 190 Ariz. 6, 44, 945 P.2d 317, 355 (App. 1996). Anderson testified he had participated in hundreds of crash tests since 1991 and published the results in publications used by experts in the field of biomechanics and accident reconstruction. We are unaware of any authority requiring a biomechanical engineer to base opinions

regarding motion, velocity, and forces in an accident involving an infirm plaintiff to only rely on crash tests involving infirm volunteers – and we are dubious such tests exist for obvious ethical reasons. Granville's citation to *Eskin v. Garden*, 842 A.2d 1222 (Del. 2004), does not present us with such authority. That case held only that a trial court may admit biomechanical expert opinion that a particular injury did or did not occur if satisfied the expert's testimony reliably creates a connection between the human body's general reactions and the specific individual and accident at issue. Here, Anderson did not opine about whether Granville suffered injury.[5] For these reasons, we decide Anderson's lack of experience and knowledge about crash victims with similar spinal conditions to Granville's went to the weight of his testimony rather than its admissibility.

¶16 Granville also contends that in light of Anderson's lack of experience with people having Granville's physical ailments, Anderson's testimony had a tendency to confuse the issues or unfairly prejudice Granville, and the court should

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[5] Granville expresses frustration about the number of times Anderson has been permitted to testify as an expert witness in the trial court. He presumes this testimony has been for the defense in accident cases and then extrapolates that "trial courts are allowing biomechanical experts such as Anderson to tell juries to render defense verdicts." Although such testimony would be improper, *State v. Moran*, 151 Ariz. 378, 383, 728 P.2d 248, 253 (1986), Granville fails to point to any such testimony by Anderson. And we are unaware of any restriction of the number of times an expert may testify in a trial. We therefore reject this argument.

have precluded it pursuant to Arizona Rule of Evidence ("Rule") 403. Any risk of confusion was negligible, however, as Granville could highlight the perceived flaw in Anderson's studies to the jury. Indeed, Granville did so during his cross-examination of Anderson.

B. Dr. Stephen Brown

¶17 Granville also argues the court erred by allowing Dr. Brown to testify because (1) his testimony lacked foundation, (2) he improperly dictated that Granville's chiropractic care was unnecessary, (3) he inappropriately blamed Granville for any injury by commenting on his weight and smoking habit, and (4) any probative value of his testimony was outweighed by Rule 403 considerations. We address each argument in turn.

Foundation

¶18 Granville asserts that because Dr. Brown never examined him, his opinions lacked foundation. We disagree. An expert can base an opinion on matters personally observed or on facts the expert has been made aware of. Rule 703. Here, Dr. Brown relied on matters he was made aware of - Granville's medical records - to testify he believed Granville sustained essentially no injury as a result of the accident. And according to Dr. Brown, no reason existed to examine Granville months after his treatment had ended and he was asymptomatic.

Dr. Brown's testimony did not lack foundation merely because he never personally examined Granville.

Dictating care

¶19 Granville argues the court improperly allowed Dr. Brown to dictate his care by opining in his report that chiropractic care was unnecessary in this case. According to Granville, permitting this testimony undercut the established principle that he should be allowed to recover any medical expenses as long as he used reasonable care in selecting a provider. We disagree. As previously explained, *see supra* ¶¶ 7-11, a pivotal issue in the case was whether the accident caused injury to Granville which, in turn, required medical care. Dr. Brown addressed that issue squarely by opining that care was unnecessary. Indeed, his testimony was a fair response to Dr. Young's testimony that chiropractic treatment was needed for Granville's soft tissue injuries. Dr. Brown did not testify there was no need for care *despite* Granville's injuries; he testified Granville was *not injured* and therefore there was no need for care. Dr. Brown's testimony was appropriate.

¶20 In a related argument, Granville asserts Dr. Brown is biased against chiropractors as evidenced by deposition testimony that all chiropractic care is worthless, except for patients who seek temporary relief from pain, and chiropractors should not provide long-term care. Granville consequently

contends the court erred by failing to preclude the doctor's testimony as he lacked objectivity. Dr. Brown's views on chiropractic care, however, did not bear on his opinion that Granville did not suffer any injuries in the accident with Howard. Further, Dr. Brown did not reiterate these views at trial, so Granville did not suffer any prejudice from the statements. And we do not detect any evidence that Dr. Brown falsified his opinion merely because he holds chiropractors in low esteem, and Granville does not point out such evidence. In short, we do not discern any bias from Dr. Brown nor any unfair prejudice to Granville.

Comment on weight and smoking

¶21 Granville asserts the court should have precluded Dr. Brown from testifying because in his May 2009 report he effectively blamed Granville's injury on his weight and smoking habit. *See Allen v. Devereaux*, 5 Ariz. App. 323, 326, 426 P.2d 659, 662 (1967) ("A tort-feasor takes his victim as he finds him and cannot excuse himself by saying it's the plaintiff's fault that he is suffering because he won't try to lose some weight.") We disagree. Dr. Brown's report did not blame Granville's injuries on his weight or smoking habit; he opined Granville did not suffer any injuries as a result of the 2008 accident. Moreover, defense counsel did not elicit any opinions from Dr. Brown at trial about Granville's weight or smoking habit.

Rule 403

¶22 Granville next argues the trial court erred because the probative value of Dr. Brown's testimony was outweighed by its unfair prejudicial effect on the jury, in violation of Rule 403. We disagree. For the reasons previously explained, *see supra* ¶¶ 17-21, we reject Granville's argument to the extent it is based on an alleged lack of foundation, an improper dictation of care, Dr. Brown's alleged bias, and his reference to Granville's weight and smoking habit. Additionally, simply because Dr. Brown's testimony supports Howard's position does not mean it is unfairly prejudicial, as Granville implicitly contends. Also, Granville is wrong that Dr. Brown, a medical doctor, was an improper defense expert because he is not a chiropractor. Unlike in medical malpractice actions, there is no requirement in personal injury cases that an expert physician testifying for the defense be in the same discipline or specialty as the witness who treated the plaintiff or testified for him. *See* Ariz. Rev. Stat. ("A.R.S.") § 12-2604(A) (Supp. 2010) (providing that in a medical malpractice action, a medical professional offering testimony against another professional must be in the same specialty). The trial court did not err by rejecting Granville's Rule 403 argument.

III. Failure to disclose opinion

¶23 Granville argues the trial court erred by permitting Dr. Brown to testify about whether someone with Granville's medical history prior to the 2008 accident would have symptoms because Howard never disclosed "the substance of the facts and opinions to which [Dr. Brown was] expected to testify" concerning pre-2008 symptoms. Ariz. R. Civ. P. ("Rule") 26.1(a)(6). Howard counters the trial court did not err because he adequately disclosed Dr. Brown's opinion and, alternatively, Granville opened the door to the question. Howard further contends that even if error occurred, it was harmless, and therefore a new trial is not warranted. The trial court has broad discretion in ruling on discovery and disclosure matters, and we will not disturb its ruling on Granville's objection to Dr. Brown's testimony absent an abuse of that discretion. *Link v. Pima County*, 193 Ariz. 336, 338, ¶ 3, 972 P.2d 669, 671 (App. 1998); *see also Lopez v. Safeway Stores, Inc.*, 212 Ariz. 198, 201, ¶ 8 n.2, 129 P.3d 487, 490 n.2 (App. 2006) (holding new trial warranted based on erroneous evidentiary ruling only if objecting party's substantial rights were prejudiced).

¶24 On redirect examination, Granville's counsel asked Dr. Young: "[I]f [Granville] testified in court yesterday that he was pain free before the 2008 automobile collision, do you have any reason to disbelieve him?" Dr. Young responded he did not.

Later, when Dr. Brown was on the stand, Howard's counsel asked him, "[K]nowing what his MRI findings are from the prior 2005 accident, what would you expect this gentlemen's [sic] pain complex symptom to be after 2005 up until the time of the March 2008 accident?" The court sustained Granville's objection that this requested opinion had not been disclosed. Howard's counsel then asked "a general question": "If you have arthritis in your neck or in your back like – like what we saw here, would you expect somebody to have continuing symptoms?" The court overruled Granville's non-disclosure objection and Dr. Brown answered that someone in an equivalent position would most likely continue to have symptoms.

¶25 A party has a duty to disclose the "substance of the facts and opinions" on which an expert is expected to testify. Rule 26.1(a)(6). In our view, Howard did not fully comply with his duty under Rule 26.1. Although he disclosed that Dr. Brown had reviewed Granville's pre-2008 medical records, x-rays, and MRI findings, Howard never disclosed that Granville or anyone in his condition would have experienced continuing symptoms immediately before the accident. Howard's disclosure of Dr. Brown's opinion that the 2008 accident did not injure Granville failed to give fair notice that he would also opine on symptoms Granville suffered before the accident. *See* Ariz. R. Civ. P. 37(c), State Bar Committee Note to 1996 and 1997 Amendments;

Bryan v. Riddel, 178 Ariz. 472, 477, 875 P.2d 131, 136 (1994) (holding test for sufficiency of disclosure is whether disclosure "fairly expose[s] the facts and issues to be litigated"); *Englert v. Carondelet Health Network*, 199 Ariz. 21, 25, ¶ 7, 13 P.3d 763, 767 (App. 2000) (to same effect).

¶26 We also disagree that Granville opened the door to Dr. Brown's undisclosed opinion by eliciting Dr. Young's opinion that he knew of nothing to counter Granville's claim that he was pain-free before the 2008 accident. Contrary to Howard's assertion on appeal, which is not supported by any citation to the record, Granville disclosed Dr. Young's opinion via a letter dated September 16, 2009. Dr. Young wrote, "The bottom line is that the patient [Granville] was performing his activities of daily living without pain with these preexisting issues, but had pain in the referenced areas after the 03/03/08 [motor vehicle accident]." In light of this disclosure, Howard was required to disclose any rebuttal opinion by Dr. Brown. *See* Rule 26.1(b)(2) (requiring supplemental disclosures). Dr. Young's disclosed opinion did not open the door for Howard to elicit an undisclosed rebuttal opinion.

¶27 For all these reasons, we decide the trial court erred by ruling that Howard had sufficiently disclosed the substance of Dr. Brown's testimony concerning pre-2008 symptoms. We therefore consider whether the error prejudiced Granville's

substantial rights. *Lopez*, 212 Ariz. at 201, ¶ 8 n.2, 129 P.3d at 490 n.2.

¶28 By disclosing new information or areas of testimony for use during trial, the proponent of such evidence "inevitably" prejudices its opponents. Rule 37(c), State Bar Committee Note to 1996 and 1997 Amendments ("Prejudice at this point [disclosure at trial] is inevitable."); *see also Allstate Ins. Co.*, 182 Ariz. at 288, 896 P.2d at 258 (recognizing that prejudice of late disclosure increases as trial approaches). Granville argues he suffered prejudice to his substantial rights by the non-disclosure because Dr. Brown's opinion regarding pre-2008 symptoms provided a critical explanation to jurors regarding why Dr. Young found symptoms that needed treatment after the 2008 accident, and Granville was not prepared to address this opinion. We agree.

¶29 Howard essentially asserts that Dr. Brown's testimony was superfluous because the jury could have concluded without this testimony that Granville was experiencing continuing pain at the time of the 2008 accident. Among other things, Howard cites Granville's pre-existing medical condition, the fact he had rated his pain level as five out of ten when he ceased chiropractic care in November 2005, and the similarity of his symptoms post-2008 accident to his condition in 2005. But none of this evidence directly contradicts Granville's testimony he

was pain-free at the time of the 2008 accident and Dr. Young's opinion that he knew of no medical reason why Granville's testimony was not accurate – only Dr. Brown's testimony accomplished this.

¶30 The importance of Dr. Brown's undisclosed opinion is revealed in Howard's closing argument. Counsel's central theme was that Granville lied about his ongoing pain symptoms and used the 2008 accident as a fortuitous method to collect money for treatment. Counsel highlighted to the jury that "Dr. Brown, who is a board-certified orthopedic surgeon, testified that with the MRI results that showed on [Granville], he would expect someone with an arthritic condition in his back [] to have on-going problems [] off and on . . . and he would have these problems throughout the time of 2005 all the way up to 2008." In sum, Granville's credibility regarding his pre-2008 accident condition was a critical issue at trial, and Dr. Brown's undisclosed opinion directly bore on this issue. Because Granville was unprepared to meet the opinion due to the lack of disclosure, he suffered prejudice to his substantial rights. We therefore reverse and remand for a new trial.

CONCLUSION

¶31 For the foregoing reasons, we reverse and remand for a new trial.

/s/
Ann A. Scott Timmer, Judge

CONCURRING:

/s/
Maurice Portley, Presiding Judge

/s/
Andrew W. Gould, Judge