IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

SUSAN SZIGETI,
Plaintiff/Appellant,

v.

MARANA HEALTH CENTER, INC., AN ARIZONA CORPORATION,
Defendant/Appellee.

No. 2 CA-CV 2014-0054
Filed November 24, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c); Ariz. R. Civ. App. P. 28(c).

Appeal from the Superior Court in Pima County
No. C20121684
The Honorable Leslie Miller, Judge

AFFIRMED

COUNSEL

William B. Blaser, Tucson
Counsel for Plaintiff/Appellant

Renaud Cook Drury Mesaros, PA, Phoenix
By John A. Klecan, David E. McDowell, and Michael J. Kuehn
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Judge Vásquez authored the decision of the Court, in which Presiding Judge Kelly and Judge Howard concurred.

V Á S Q U E Z, Judge:

¶1 In this personal-injury action, Susan Szigeti appeals from the trial court's judgment and denial of her motion for a new trial entered after a jury verdict in favor of appellee Marana Health Center, Inc. (MHC). Szigeti argues the court erred by denying her request for a jury instruction on comparative fault and by precluding a witness's testimony. For the following reasons, we affirm.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to upholding the jury's verdict." *Jimenez v. Wal-Mart Stores, Inc.*, 206 Ariz. 424, ¶ 2, 79 P.3d 673, 674 (App. 2003). In March 2010, Aaron Viestenz, an MHC employee, picked up Szigeti in a company transport van after a doctor's appointment. Because Szigeti is confined to a wheelchair, Viestenz hooked her chair to the floor and buckled a seatbelt across her chest to secure her in the van. While driving Szigeti home, another driver pulled out in front of Viestenz, who made a "quick abrupt stop" to avoid a collision. Although there was no collision, Szigeti fell from her wheelchair to the floor of the van and suffered a tri-malleolar fracture to her left ankle.

¶3 Szigeti filed a lawsuit against Viestenz and MHC, alleging claims of negligence and respondeat superior. In response, Viestenz and MHC asserted a defense of comparative fault, arguing that Szigeti "wholly or partially caused" or "proximately contributed to" her injury by unbuckling the seatbelt. The parties stipulated to dismiss Szigeti's claims against Viestenz and to bifurcate the trial on the issues of liability and damages. A jury found in favor of MHC on liability. The trial court denied Szigeti's

motion for a new trial, and this appeal followed.[1] We have jurisdiction pursuant to A.R.S. §§ 12-120.21 and 12-2101(A)(1), (2).

Jury Instructions

¶4 Szigeti argues the trial court erred by refusing to give her requested Revised Arizona Jury Instruction (RAJI) Fault 9, which would have provided:

> On MHC's claim that Szigeti was at fault, you must decide whether MHC has proved that Szigeti was at fault and, under all the circumstances of this case, whether any such fault should reduce Szigeti's full damages. These decisions are left to your sole discretion.
>
> If you decide that Szigeti's fault should reduce Szigeti's full damages, the court will later reduce those damages by the percentage of fault you have assigned to Szigeti.

See State Bar of Arizona, *Revised Arizona Jury Instructions (Civil)* Fault 9 (2013). Szigeti maintains she has a constitutional right under article XVIII, § 5 of the Arizona Constitution to have a jury determine comparative fault. And, she reasons, without RAJI Fault 9, the jury was not "fully and properly instructed" on that concept and therefore could not determine its application here.

[1]Szigeti filed her notice of appeal before the trial court entered a signed order denying her motion for a new trial or a final judgment. Pursuant to Rule 9.1, Ariz. R. Civ. App. P., this court thus suspended the appeal and revested jurisdiction in the trial court. The trial court entered a signed order denying the motion for a new trial and a final judgment. Szigeti then filed an amended notice of appeal, and this court reinstated the appeal.

¶5 On the last day of trial before final jury instructions, Szigeti requested to "make [a] record" on RAJI Fault 9.[2] She noted that the instruction was "on negligence and comparative fault" and would "help[] the jury to understand what they are supposed to do." The trial court refused to give the instruction, however, explaining:

> [W]e have a bifurcated trial [and] are only discussing . . . fault here. And it would be impermissible for that instruction to be given or for either of you to attempt to argue how these percentages of fault will be applied [in] any later [damages] proceeding.
>
> . . . [W]e do not want [the jurors] speculating as to how this information might later be used and [we do not want to] manipulate their determination on the issue of fault as a result of anything we tell them here today.
>
> So I want to keep this focused on what we have agreed that this case deals with and ensure that the jury is focused on the issues of negligence and fault as otherwise set forth in the instructions.

¶6 Only objections made at trial may be raised on appeal. *Selby v. Savard*, 134 Ariz. 222, 228, 655 P.2d 342, 348 (1982). A party may not raise one objection before the trial court and urge another on appeal. *Sulpher Springs Valley Elec. Coop., Inc. v. Verdugo*, 14 Ariz. App. 141, 146, 481 P.2d 511, 516 (1971). This court "generally do[es]

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[2]Although Szigeti did not request RAJI Fault 9 in her written, proposed jury instructions, MHC did. Szigeti apparently requested RAJI Fault 9 in an off-the-record, in-chambers discussion settling the final jury instructions, during which the trial court denied her request because the instruction dealt with damages, not liability.

not consider issues, even constitutional issues, raised for the first time on appeal." *Englert v. Carondelet Health Network*, 199 Ariz. 21, ¶ 13, 13 P.3d 763, 768 (App. 2000).

¶7 Although Szigeti objected to the trial court's refusal to give RAJI Fault 9 because it was a fault, not damages, instruction and would "help[] the jury," she did not raise the constitutional argument that she is asserting on appeal before the trial court until her motion for a new trial. An issue first raised in a motion for a new trial, however, is waived.[3] *Conant v. Whitney*, 190 Ariz. 290, 293-94, 947 P.2d 864, 868 (App. 1997); *see also Watson Constr. Co. v. Amfac Mortg. Corp.*, 124 Ariz. 570, 582, 606 P.2d 421, 433 (App. 1979).

¶8 Szigeti nevertheless urges us to review for fundamental error. *See Bradshaw v. State Farm Mut. Auto. Ins. Co.*, 157 Ariz. 411, 420, 758 P.2d 1313, 1322 (1988) (absent fundamental error, party waives argument on appeal that trial court failed to give instruction when no objection made below). "Fundamental error is that which 'goes to the very foundation' of a case." *Data Sales Co. v. Diamond Z Mfg.*, 205 Ariz. 594, ¶ 31, 74 P.3d 268, 275 (App. 2003), *quoting State Consol. Publ'g Co. v. Hill*, 39 Ariz. 163, 167, 4 P.2d 668, 669 (1931). "The doctrine of fundamental error is sparingly applied in civil cases and may be limited to situations where the instruction deprives a party of a constitutional right." *Bradshaw*, 157 Ariz. at 420, 758 P.2d at 1322. Under this standard, we will not reverse a verdict based on improper jury instructions unless the appellant proves both error and prejudice. *See Clark v. Muñoz*, 235 Ariz. 201, ¶ 12, 330 P.3d 958, 960 (2014); *Romero v. Sw. Ambulance*, 211 Ariz. 200, ¶ 8, 119 P.3d 467, 471 (App. 2005). Szigeti cannot meet that burden here. *Cf. Johnson v. Elliott*, 112 Ariz. 57, 61, 537 P.2d 927, 931 (1975) (reviewing for

[3]Szigeti seems to suggest her constitutional argument was properly raised at trial in the off-the-record, in-chambers discussion settling the final jury instructions. But that discussion is not part of our record on appeal, as it must be to preserve the argument. *See* Ariz. R. Civ. App. P. 11(a) (record on appeal includes official documents and certified transcripts); *Lewis v. Oliver*, 178 Ariz. 330, 338, 873 P.2d 668, 676 (App. 1993) (we only consider those matters in record before us).

fundamental error where no objection made until motion for new trial).

¶9 Jury instructions "must be viewed as a whole and not piecemeal." *Kauffman v. Schroeder*, 116 Ariz. 104, 106, 568 P.2d 411, 413 (1977). When reviewing jury instructions, we consider "whether they correctly stated the law, allowed the jury to understand the issues, and provided the jury with the correct rules for reaching a decision." *Lohmeier v. Hammer*, 214 Ariz. 57, ¶ 13, 148 P.3d 101, 105 (App. 2006). In doing so, we also may consider the accompanying verdict forms. *Id.* A trial court need not give an instruction if "the gist of the instruction" is provided through the other instructions. *DeMontiney v. Desert Manor Convalescent Ctr. Inc.*, 144 Ariz. 6, 10, 695 P.2d 255, 259 (1985); *see also Hyatt Regency Phx. Hotel Co. v. Winston & Strawn*, 184 Ariz. 120, 137, 907 P.2d 506, 523 (App. 1995) (trial court does not commit fundamental error by refusing requested instruction if instructions given provide "basic outline of the law").

¶10 Under Arizona's comparative-fault scheme, "the trier of fact consider[s] the fault of all persons who contributed to the harm," and each person is responsible "for only his or her percentage of fault and no more." *Natseway v. City of Tempe*, 184 Ariz. 374, 376, 909 P.2d 441, 443 (App. 1995) (emphasis omitted); *see also* A.R.S. § 12-2506(C) (trier of fact determines "relative degree of fault" of claimant, defendants, and nonparties). Thus, negligence by a plaintiff will not bar an action for damages but will reduce those damages in proportion to the degree of the plaintiff's fault. *Cheney v. Ariz. Superior Ct.*, 144 Ariz. 446, 448, 698 P.2d 691, 693 (1985), *citing* A.R.S. § 12-2505. As Szigeti points out, this scheme is part of our constitutional framework under article XVIII, § 5, which provides: "The defense of contributory negligence . . . shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury." *See Gunnell v. Ariz. Pub. Serv. Co.*, 202 Ariz. 388, ¶¶ 22-23, 46 P.3d 399, 405 (2002) (discussing constitutionality of comparative-fault statutes).

¶11 Here, the jury instructions and verdict forms as a whole correctly stated the law of comparative fault in an understandable manner, thereby allowing the jury to decide the issue. As part of the final jury instructions, the trial court gave RAJI Fault 5, 6, 7, 8,

and 11, all of which explain the concept of comparative fault. *See* State Bar of Arizona, *Revised Arizona Jury Instructions (Civil)* Fault 5-8, 11 (2013). Of particular note, the court instructed the jury: "If you find that the Defendant was at least partially at fault, then your verdict must be for the Plaintiff. You should then consider the Defendant's claim that the Plaintiff was at fault . . . ." By entering a verdict for MHC, the jury thus necessarily concluded that it was not even partially at fault. The court further instructed: "If you find more than one person at fault for . . . Szigeti's injury, you must then determine the relative degrees of fault of all those whom you find to have been at fault." In addition, the verdict form finding in favor of Szigeti required the jury to enter "the relative degrees of fault" of all those it found to be at fault "as percentages of the total fault" for her injury.[4]

¶12 The trial court thus gave "the gist" of RAJI Fault 9 through the other jury instructions and the verdict forms. *DeMontiney*, 144 Ariz. at 10, 695 P.2d at 259. Thus, even if we concluded fundamental error review was appropriate in these circumstances, Szigeti cannot meet her burden of showing that the court committed fundamental-error by refusing to instruct on RAJI Fault 9. *See Clark*, 235 Ariz. 201, ¶ 12, 330 P.3d at 960; *cf. Hyatt Regency Phx. Hotel Co.*, 184 Ariz. at 137, 907 P.2d at 523. And, we cannot say Szigeti was deprived of her constitutional right under article XVIII, § 5.

Evidence Preclusion

¶13 Szigeti also contends the trial court erred by precluding Viestenz from testifying that "the seatbelt buckle was tested by [MHC] after the incident and it worked properly." Despite acknowledging "[t]here was a stipulation that had been read to the jury that the seatbelt buckle was working properly after the incident," Szigeti maintains at least one juror was "confused." We

[4]Because the jury did not use this verdict form, it is not part of our record. However, the final jury instructions, which are part of our record, provided this explanation in entering the degrees of fault on the verdict form.

review the preclusion of evidence for a clear abuse of discretion. *Catchings v. City of Glendale*, 154 Ariz. 420, 426, 743 P.2d 400, 406 (App. 1987).

¶14 In their joint pretrial statement, the parties stipulated that "[t]here was no manufacturing or design defect known with the three point seat-belt used on [Szigeti] in the back of the Transport Van." The trial court read the parties' stipulations to the jury on the first day of trial after counsel read Viestenz's deposition testimony to the jury but before he testified.[5]

¶15 On appeal, Szigeti argues that, aside from the stipulation, evidence on the seatbelt testing "was twice denied to the jury": first "after an . . . objection [during Viestenz's] testimony," and second "after a bench conference regarding . . . jury question[s]" in response to Viestenz's testimony. As to Szigeti's objection during Viestenz's testimony, we do not have a transcript of that portion of the trial. Although Szigeti contends "[t]he testimony to which the objection was sustained was the same as . . . Viestenz's previous deposition testimony," that deposition testimony also is not part of our record. As the appellant, Szigeti has the burden to ensure that the record on appeal contains all the necessary documents for this court to consider the issues raised. *See Blair v. Burgener*, 226 Ariz. 213, ¶ 9, 245 P.3d 898, 902 (App. 2010); *see also* Ariz. R. Civ. App. P. 11(b)(1). "When a party fails to include necessary items, we assume they would support the [trial] court's findings and conclusions." *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995). Nevertheless, our record does include a transcript from the bench conference on the jury questions.

¶16 After Viestenz testified, the jurors submitted several questions for him that the trial court first reviewed with counsel. One juror posed the following two-part question: (1) "Is it true that

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[5]We do not have this portion of the trial transcript. *See Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995) (discussing appellant's duty to provide appellate court with record). However, the parties seem to agree on appeal that the stipulation from their joint pretrial statement was read to the jury.

the lap and shoulder harness belonged to [MHC]?" and (2) "If so, have these harnesses failed in the past? Have they been tested with the model of wheelchair that the plaintiff owned?" During the bench conference, the court indicated it could "definitely ask" the "first part." But as to the second part, the court wanted to "see how the rest of [the questioning] goes" because it thought it may "need to repeat the stipulation." In response, Szigeti's counsel acknowledged the stipulation but noted, "that's why I wanted to ask the question" during Viestenz's examination. Another juror similarly asked, "Were any tests done to see if the restraint would partially latch." The court refused to ask the question, without any comment from Szigeti.[6]

¶17 Generally, all relevant evidence is admissible. Ariz. R. Evid. 402; *see also* Ariz. R. Evid. 401 (defining relevant evidence). However, a "court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . needlessly presenting cumulative evidence." Ariz. R. Evid. 403. A trial court has broad discretion in excluding cumulative evidence. *Elia v. Pifer*, 194 Ariz. 74, ¶ 42, 977 P.2d 796, 805 (App. 1998).

¶18 Here, the trial court suggested that it did not want to ask the particular jury questions because the resulting testimony would be cumulative of the stipulation. Szigeti concedes that the stipulation provided that the seatbelt was working properly after the incident and that Viestenz would have said the same. Moreover, the court did not preclude the testimony outright but instead stated it wanted to see if other questioning resolved the confusion and also suggested it would consider rereading the stipulation to the jury. However, nothing in the record indicates that Szigeti raised the issue

[6]On appeal, Szigeti points only to this second, unchallenged question as the basis for her argument. *See Romero*, 211 Ariz. 200, ¶ 6, 119 P.3d at 470-71 (an objection on one ground does not preserve issue on another). Nevertheless, both jury questions dealt with post-accident seatbelt testing, and the discussion concerning this question occurred after the discussion on the two-part question, to which Szigeti did object. We therefore address the issue as it pertains to both questions generally.

again after additional testimony or asked the court to reread the stipulation. Indeed, follow-up questioning of Viestenz by Szigeti's counsel after the court asked the jury questions did not touch on this issue. And, Szigeti does not explain on appeal her failure to follow-up below. We therefore cannot say the court abused its discretion by precluding Viestenz's testimony. *See Catchings*, 154 Ariz. at 426, 743 P.2d at 406; *Elia*, 194 Ariz. 74, ¶ 42, 977 P.2d at 805.

¶19 Szigeti nevertheless maintains the jury was "confused" and needed "more than a legal stipulation." As evidence of that confusion, she points to the parties' stipulation that the other driver was at least partially at fault and contends the jury "ignored" that stipulation by "award[ing] nothing against him." But, as the instructions properly pointed out, the jury only needed to assign fault to the other driver if it first found MHC at fault. *See* § 12-2506(B) ("Assessments of percentages of fault for nonparties are used only as a vehicle for accurately determining the fault of the named parties. Assessment of fault against nonparties does not subject any nonparty to liability . . . ."). Because the jury found in favor of MHC, it did not need to address whether to assign any portion of fault to the other driver. We therefore disagree that this is evidence of jury confusion.

Disposition

¶20 For the foregoing reasons, we affirm.