IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

JESUS BORQUEZ AND JAMIE BORQUEZ,
HUSBAND AND WIFE,
Plaintiffs/Appellants,

v.

TOYOTA INDUSTRIES CORPORATION,
TOYOTA INDUSTRIAL EQUIPMENT MANUFACTURING, INC.,
TOYOTA MATERIAL HANDLING, U.S.A., INC.,
TOYOTALIFT, INC., AND
TOYOTALIFT OF ARIZONA, INC.,
Defendants/Appellees.

No. 2 CA-CV 2015-0232
Filed December 1, 2016

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NOT FOR PUBLICATION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)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. CR20122621
The Honorable Stephen C. Villarreal, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Presiding Judge Vásquez and Chief Judge Eckerstrom concurred.

M I L L E R, Judge:

¶1 A jury found the forklift designer, manufacturer, distributor, and dealership not liable for injuries plaintiff Jesus Borquez[1] sustained in a workplace forklift accident. He now appeals the trial court's pretrial grant of partial summary judgment for defendants on the issue of whether they violated an industry standard known as ANSI B:56.1, as well as a related ruling precluding his expert witness from testifying that defendants had violated that standard. For the reasons below, we affirm.

Factual and Procedural Background

¶2 In reviewing a grant of summary judgment, we view the facts in the light most favorable to Borquez, the nonmovant. *Rasor v. Nw. Hosp., LLC*, 239 Ariz. 546, ¶ 2, 373 P.3d 563, 565 (App. 2016). As it pertains to the issues on appeal, Borquez contends the forklift he was operating did not have an industry-required, accurate nameplate describing the limits of safe operation. Further, even though the rollover accident did not occur as a result of

[1]Jesus's wife Jamie Borquez is also a plaintiff and appellant. Although we refer to "Borquez" in the singular throughout for convenience, Jamie's interests are the same as Jesus's for relevant purposes and our conclusions apply to her.

exceeding the missing limits, he maintains if he had known about the limits, he never would have used the forklift.

The ANSI Standards

¶3 ANSI/ITSDF B56.1-2005 [2] (hereinafter, "ANSI") is a collection of industry safety standards applicable to industrial lift trucks such as the forklift at issue. The issue at summary judgment focused on the applicability of these standards, and thus, we must describe the relevant provisions in some detail. ANSI is divided into two main sections, one "For the User" and one "For the Manufacturer." To comply with ANSI, a lift truck's manufacturer must affix to the truck a nameplate containing information such as the truck model number, truck weight, and capacity information. The required contents of the nameplate vary depending on whether the truck is manufactured with an "attachment." The ANSI definition of "attachment" includes carton clamps—vertical paddles that a lift truck operator can open and close in order to grip the sides of a load—but expressly excludes conventional forks.

¶4 ANSI ¶ 7.5.4, located in the section "For the Manufacturer," provides:

> (a) If the truck is equipped with platform or load carriage and forks, the nameplate shall . . . show the capacity and load center at maximum elevation of the truck load-engaging means. In addition, the rated capacity and capacities at other load centers and load elevations may be shown.
>
> (b) If the truck is originally equipped with a front-end attachment[], the truck nameplate shall also be marked

[2] ANSI is an acronym for the American National Standards Institute. ITSDF is the Industrial Truck Standards Development Foundation.

> to identify the attachment[] and show the weight of the truck and attachment combination and capacity of the truck and attachment combination at maximum elevation of the load-engaging means with the load laterally centered. . . . If the load can be offset more than a substantial predetermined amount[3] and is to be used in that mode . . . then the capacity of the truck and attachment combination at maximum elevation of the load-engaging means shall be given with the load in the maximum offset condition.

ANSI ¶ 7.6.4(*i*), in the same section, adds:

> When trucks are fitted with side shifting attachments that may displace the center of gravity[] a substantial predetermined amount from the longitudinal center plane of the truck and the truck is to be used in that mode . . . an additional lateral stability test shall be conducted with the load fully shifted to the least stable configuration.

Finally, ANSI ¶ 4.2.3, in the section "For the User," provides:

> If the truck is equipped with a front-end attachment[], . . . the user shall see that the truck is marked to identify the attachment[], show the weight of the truck and attachment combination, and show the

[3] For the relevant lift truck, a "substantial predetermined amount" within the meaning of ANSI is anything over 100 millimeters (about four inches).

> capacity of the truck with [the] attachment[] at maximum elevation with the load laterally centered.

The Lift Truck and Its Nameplate

¶5 In August 2005, Borquez's employer, Republic Plastics, ordered a Toyota lift truck and a non-Toyota carton clamp attachment from defendant Toyotalift of Arizona, Inc. (hereinafter, "Toyotalift AZ"), an independent dealership. Toyotalift AZ ordered the carton clamps from a different manufacturer, Cascade Corporation.[4] Toyotalift AZ ordered the lift truck from defendant Toyota Material Handling, U.S.A., Inc. (hereinafter, "TMHU"), the distributor. Toyota Industrial Equipment Manufacturing, Inc. (hereinafter, "TIEM") manufactured the lift truck with conventional forks, as designed by defendant Toyota Industries Corporation (hereinafter, "TIC"), and affixed a nameplate showing the truck's centered capacity—its capacity with the mast at its maximum height of 189 inches and the load laterally centered with the truck on flat ground—to be 3000 pounds. TMHU shipped the lift truck to Toyotalift AZ.

¶6 After receiving the lift truck and the carton clamps, Toyotalift AZ removed the truck's factory-installed forks and installed the carton clamps on the truck. The carton clamps had substantial offset or side-shifting capability, meaning they could move a load back and forth laterally, parallel to the ground and perpendicular to the forward trajectory of the lift truck.

¶7 Toyotalift AZ asked TMHU to create a new nameplate showing the lift truck's capacity with the carton clamps attached. At TMHU's request, TIEM entered the truck's and carton clamps' specifications into a computer algorithm to calculate the truck's new capacity. The algorithm calculated that with the carton clamps, the lift truck's centered capacity was 1650 pounds.

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[4] Cascade Corporation was originally a defendant in this action, but it settled with Borquez before trial.

¶8 TIEM also used the algorithm to calculate the lift truck and attachment combination's capacity under more extreme conditions. Specifically, TIEM calculated the truck's offset capacity with the mast at its maximum height of 189 inches, the load in the maximum offset position of 13.5 inches, and the truck in the least stable configuration on an 8.9 percent incline—to be negative 550 pounds.

¶9 TMHU gave Republic Plastics a "Product Bulletin" which included the text of ANSI ¶¶ 7.5.4(b) and 7.6.4(*i*). The product bulletin warned: "It has been determined that with your lift truck [and] attachment combination, the calculated capacity for the offset position is considerably lower than the centered capacity rating. . . ." The product bulletin then included a form that gave Republic Plastics two options for the updated nameplate: it could elect to receive a nameplate that included only the centered capacity, or it could choose one that showed both the centered and the offset capacities. A representative of Republic Plastics elected the first option. TMHU then provided Toyotalift AZ with a new nameplate showing only the centered capacity of 1650 pounds. Toyotalift AZ affixed the new nameplate to the lift truck a few days after delivery to Republic Plastics.

The Accident

¶10 In 2011, Borquez was at work at Republic Plastics. While he was operating the lift truck, it began to tip over to the right. He unbuckled his seat belt and tried to jump clear, but instead was pinned beneath the truck as it fell, causing serious injuries.

¶11 At the time of the accident, the truck was on flat ground. The truck's mast was raised to a height of approximately 110 inches, the carton clamps were side-shifted 4 and 3/16 inches to the right, and the truck was not carrying any load. Borquez testified this was the farthest he had ever side-shifted the carton clamps before. Borquez also admitted he had been backing up and turning the forklift with the mast elevated when it began to tip, which was contrary to his training.

The Pretrial Rulings

¶12 Borquez brought this action against TIC, TIEM, TMHU, Toyotalift AZ, and others, alleging negligence and strict products liability. He alleged the lift truck with the carton clamp attachment was defective and unreasonably dangerous, and argued ANSI required the defendants to print the truck's offset capacity on the nameplate.

¶13 Defendants moved for partial summary judgment on the issue of whether they had violated ANSI. The trial court granted the motion, determining they had not. Citing ANSI ¶ 7.5.4(b), located in the section "For the Manufacturer," the court held ANSI requires a lift truck's nameplate to include offset capacity only if the manufacturer has "originally equipped" the truck with front-end attachments that can be substantially offset. The court reasoned that Toyotalift AZ was not a "manufacturer" within the meaning of ANSI because it had received a complete work-ready forklift from TMHU equipped with standard forks, and later had made modifications to it by adding the carton clamps. The court relied on *Leon v. Caterpillar Industries, Inc.*, 69 F.3d 1326, 1335-41 (7th Cir. 1995), in which the court held that a manufacturer who had sold a forklift in a work-ready condition was not liable in products liability for injuries caused by a "deadman's switch" subsequently installed by the dealership, even though the manufacturer had known the modification would occur. *Cf. Hull v. Eaton Corp.*, 825 F.2d 448, 458 (D.C. Cir. 1987) (district court properly dismissed vicarious liability claim against forklift manufacturer for injury caused by dealer's post-manufacture modifications); *Hardy v. Hull Corp.*, 446 F.2d 34, 35-36 (9th Cir. 1971) (applying Arizona law to affirm directed verdict for mold press manufacturer where evidence showed device not sold in defective condition, but instead danger arose from post-sale modification by plaintiff's employer); *O.S. Stapley Co. v. Miller*, 103 Ariz. 556, 560, 447 P.2d 248, 252 (1968) (question of fact as to whether after-market boat steering system modification was proximate cause of boat accident meant directed verdict against steering system manufacturer was error). Thus, the court concluded ANSI did not require the nameplate to show the truck's offset capacity.

¶14 Plaintiffs moved for reconsideration of the partial summary judgment ruling. The trial court denied that motion, but in doing so, it observed that ruling was "narrow in scope and [did] not foreclose the possibility that Defendants may be liable to Plaintiffs based on the lack of side-shifting capacity on the [nameplate]. The question of whether the [nameplate] should have included side-shifting capacity, regardless of ANSI standards, is a jury question."

¶15 Defendants later moved to preclude Borquez's expert witness, Peter Poczynok, from testifying at trial that the lift truck was defective in any respect. The court denied that motion, ruling that Poczynok would be "allowed to testify that the lift [truck] was unstable" and that the defendants "should have warned the end user of the unstable condition." However, in accordance with its earlier rulings, the court added that at trial, "care must be exercised to avoid opining that the failure to warn was in violation of ANSI standards."

¶16 The case proceeded to a jury trial, which resulted in a defense verdict. Borquez appeals, and we have jurisdiction pursuant to A.R.S. §§ 12-2101(A)(1) and 12-120.21(A)(1).

Analysis

¶17 Summary judgment is appropriate only if "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). We review de novo whether any genuine material factual disputes existed and whether the trial court applied the law correctly. *See, e.g.*, *Ponce v. Parker Fire Dist.*, 234 Ariz. 380, ¶ 9, 322 P.3d 197, 199 (App. 2014). We review a decision to preclude expert testimony for an abuse of discretion. *See, e.g.*, *Baroldy v. Ortho Pharm. Corp.*, 157 Ariz. 574, 589, 760 P.2d 574, 589 (App. 1988).

¶18 To prevail on a strict products liability claim based on inadequate warnings, the plaintiff "must prove, among other things, that the manufacturer had a duty to warn of the product's dangerous propensities, and that the lack of an adequate warning made the product defective and unreasonably dangerous." *Watts v.*

Medicis Pharm. Corp., 239 Ariz. 19, ¶ 10, 365 P.3d 944, 948 (2016). It is well established that applicable ANSI or other industry standards will be admitted as evidence relevant to the issue of whether a product was defective. *Hohlenkamp v. Rheem Mfg. Co.*, 134 Ariz. 208, 212-13, 655 P.2d 32, 36-37 (App. 1982); *but see Rossell v. Volkswagen of Am.*, 147 Ariz. 160, 166-67, 709 P.2d 517, 523-24 (1985) (rejecting rule that compliance with industry standard was complete defense in negligent design case; deciding otherwise would "tend to permit commercial defendants to prevail as a matter of law if their conduct complied with a general, negligent practice prevailing in their industry"). But the issue at the partial summary judgment stage was the interpretation and application of ANSI standards, not their admissibility. Indeed, the text of ANSI ¶¶ 7.5.4(b) and 7.6.4(*i*) was admitted into evidence as part of the product bulletin.

¶19 Borquez argues the question of who is a "manufacturer" within the meaning of ANSI is a question of fact which should have prevented partial summary judgment. He essentially contends Toyotalift AZ "originally equipped" the lift truck with the carton clamps as part of the manufacturing process, and rejects characterization of this installation as an after-market modification. He emphasizes that the lift truck had factory-installed knobs which could control the functions of various attachments including the side-shifting of carton clamps. He also maintains defendants at least constructively knew from the beginning that this lift truck ultimately would be fitted with carton clamps.

¶20 Defendants assert that determining who is a "manufacturer" under ANSI is a question of law. In its summary judgment ruling, the trial court apparently assumed as much, looking to *Leon* and certain federal regulations to answer the question of who is a "manufacturer" in products liability law in general, and then incorporating that definition into ANSI. The court concluded the manufacturing process here ended when TMHU delivered a work-ready lift truck with conventional forks to Toyotalift AZ. Toyotalift AZ thus was not a manufacturer, and ANSI's offset capacity labeling provisions applicable to a lift truck manufactured with a side-shifting attachment would not apply to it. Furthermore, the manufacturer defendants had fully complied with

ANSI's centered capacity labeling requirement for lift trucks factory-equipped with conventional forks. In sum, the court ruled no defendant breached a duty imposed by ANSI.[5]

¶21 Although the ANSI standards at issue are similar in style to a statute or regulation, they are not law as to the defendants in this case.[6] The court's ruling discussed legal authorities such as *Leon*, but it referred to them only inasmuch as they shed light on the ultimate issue of who is a "manufacturer" within the meaning of ANSI. The ruling is problematic to the extent the court relied upon its interpretation of a non-legally-binding ANSI standard to arrive at its conclusion that defendants were "entitled to judgment as a matter of *law*." Ariz. R. Civ. P. 56(a) (emphasis added); *cf. Willink v. Boyne USA, Inc.*, 987 F. Supp. 2d 1082, 1082-84 (D. Mont. 2013) (ANSI standards not law in Montana, and therefore not definitive source of legal duty).

¶22 Even assuming Borquez is correct that the court erred by reading and interpreting ANSI as though it were law rather than letting the jury decide what ANSI required with the help of expert testimony, reversal is not required because the error was harmless.

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[5] Defendants also asserted at oral argument that the trial court's ruling was correct because there was no genuine factual dispute as to whether ANSI required offset capacity on the nameplate. We need not address this argument because even if we rejected it, we would nevertheless affirm the court's ruling under the harmless error analysis below.

[6] The relevant ANSI standards have been incorporated by reference into federal Occupational Safety and Health Administration (OSHA) regulations. *See* 29 C.F.R. § 1910.178(a)(2) (2006). Those regulations, however, govern only the conduct of the employer. *See Minichello v. U.S. Indus., Inc.*, 756 F.2d 26, 29 (6th Cir. 1985). Borquez's employer, Republic Plastics, is not a party to this litigation.

Harmless Error

¶23 In general, trial error necessitates reversal only if it has prejudiced the appellant's substantial rights. *See Warner v. Sw. Desert Images, LLC*, 218 Ariz. 121, ¶ 10, 180 P.3d 986, 992 (App. 2008). Here, the pretrial rulings did not prevent Borquez from presenting the substance of his failure-to-warn claim. Furthermore, notwithstanding any pretrial error, the jury could have reasonably determined that Borquez failed to establish causation. Any error was therefore harmless.

Failure-to-Warn Argument Not Precluded

¶24 As the trial court observed in its ruling on the motion for reconsideration, the partial summary judgment ruling was narrow and limited to the issue of whether the defendants had violated ANSI-imposed warning requirements. Borquez remained free to argue, and did argue, that the lift truck was defective and unreasonably dangerous because the defendants failed to warn of the lift truck's propensity to tip under certain conditions, whether or not ANSI required them to do so. *Accord Veliz v. Rental Serv. Corp. USA, Inc.*, 313 F. Supp. 2d 1317, 1325 (M.D. Fla. 2003) ("Issues relating to the adequacy of a defendant's warnings are ordinarily questions for the jury.").

¶25 Nor did preclusion of Poczynok's opinion that ANSI required a warning prevent Borquez from arguing defendants' failure to warn made the lift truck defective and unreasonably dangerous. *See Atchison, Topeka & Santa Fe Ry. v. Parr*, 96 Ariz. 13, 18, 391 P.2d 575, 578-79 (1964) (rejecting argument that expert testimony required to show product was unreasonably dangerous; jurors could conclude as much based solely on "their own good judgment"); *see also Rossell*, 147 Ariz. at 167-68, 709 P.2d at 524-25. When asked at trial if the lift truck "pass[ed] the [ANSI stability] test," Poczynok replied, "No." He also opined that, knowing what they knew, defendants "[a]bsolutely" should have disclosed the lift truck and carton clamps' offset capacity in order to prevent tip-over accidents within the realm of the truck's foreseeable use. *See generally Piper v. Bear Med. Sys., Inc.*, 180 Ariz. 170, 174-77, 883 P.2d 407, 411-14 (App. 1993), *citing* A.R.S. § 12-683(2) ("[A] manufacturer

may be liable for a failure to warn of dangers of product modifications that it knew or had reason to know were occurring."). Poczynok was precluded only from opining that *ANSI required* such a warning following after-market installation of carton clamps. We disagree with Borquez that this "created an insurmountable prejudice" against him.

¶26 For the first time at oral argument, Borquez advanced a new theory of why the partial summary judgment ruling was not harmless. He argued the Rule 56 ruling was expanded at the conclusion of trial to permit defendants to argue they had complied with ANSI but he was not allowed to argue the opposite, resulting in fundamental unfairness. The record shows that defendants requested an instruction stating "ANSI Standards do not require [them] to include side-shifting capacity on this forklift's data plate," but the court declined the instruction unless Borquez violated its pretrial ruling during closing. We deem this contention waived because it was raised for the first time at oral argument, *Mitchell v. Gamble*, 207 Ariz. 364, ¶ 16, 86 P.3d 944, 949-50 (App. 2004), but even if it were preserved, we do not see how the court's mere warning that it would remedy a nonobservance of its earlier rulings with a curative instruction made those rulings any more prejudicial to Borquez.

ANSI Test Number 3 vs. TIEM's Internal Stability Test

¶27 In addition, any error was harmless because Borquez failed to prove causation under the operating condition he contended was absent from the nameplate. *See generally* Restatement (Third) of Torts (Products Liability) § 2 cmt. p (1998) (product modification and alteration "are not discrete legal issues" but rather "aspects of the concepts of defect, causation, and plaintiff's fault"). For the sake of argument we adopt Borquez's position that ANSI required some or all defendants to print the offset capacity of the truck-attachment combination on the nameplate. ANSI includes a set of constraints referred to in this litigation as "Test Number 3" which is used to calculate offset capacity. For relevant purposes, Test Number 3 assumes the lift truck's mast is at its full height of 189 inches, the carton clamps are fully offset at 13.5 inches, and the truck is in the least stable

configuration on a six percent incline. Under Test Number 3 conditions, the relevant lift truck and carton clamps have an offset capacity of positive 992 pounds.

¶28 The negative 550 pounds figure Borquez emphasized at trial came not from any test dictated by ANSI, but rather from TIEM's own more stringent internal stability test, which assumed an 8.9 percent incline rather than Test Number 3's six percent incline. In other words, assuming ANSI did require offset capacity on the nameplate, if defendants had complied with that requirement using the ANSI-prescribed Test Number 3, the nameplate would have shown an offset capacity of positive 992 pounds, not negative 550 pounds. Therefore, Borquez's assertion that he would not have used a lift truck with a negative capacity on the nameplate would not have been sufficient to show causation. *See Menz v. New Holland N. Am., Inc.*, 507 F.3d 1107, 1111, 1113 (8th Cir. 2007) (to prove causation in failure to warn case, plaintiff must show warning would have altered his behavior).

Offset Capacity Test Conditions vs. Accident Conditions

¶29 Furthermore, there is no dispute that the actual accident conditions were substantially different from the conditions for either Test Number 3 or TIEM's own internal stability test. Assuming for the sake of argument that ANSI required the defendants to warn of the truck's alleged propensity to tip with the mast at a height of 189 inches and an offset of 13.5 inches while on an incline, Borquez did not explain how defendants' failure to do so was causally connected to his accident, which occurred on flat ground with the mast elevated to about 110 inches and the carton clamps offset 4 and 3/16 inches.

¶30 Defendants introduced a demonstration video showing the same type of lift truck with the same type of carton clamps standing still on flat ground, lifting heavier loads to greater height and greater offset than the actual accident conditions without even beginning to tip. Defendants argued the demonstration proved the lift truck would not have tipped but for Borquez adding centripetal force by negligently backing up and turning with the clamps raised, in violation of his training. *Cf. Times Mirror Co. v. Sisk*, 122 Ariz. 174,

180, 593 P.2d 924, 930 (App. 1978) (evidence of crew negligence admissible in products liability case to show airplane crash was due to crew negligence rather than defect). Admission of Poczynok's opinion that ANSI required a nameplate with offset capacity on it would have done nothing to rebut this demonstration evidence.

¶31 Borquez admitted he knew the lift truck could tip if driven with the carton clamps elevated, but he did so anyway. In that respect, the facts of the present case are strikingly similar to *Menz*. The plaintiff in *Menz* knew his tractor with an after-market front-end loader could tip on an incline, and he had been instructed to keep the loader bucket low to the ground while hauling to avoid an accident. 507 F.3d at 1112-13. Nevertheless, he raised the loader bucket while on an incline, which resulted in a tip-over accident. *Id.* at 1109. The court granted the tractor manufacturer's motion for summary judgment on the failure-to-warn claim because the plaintiff failed to establish causation—he did not show that additional warnings would have altered his behavior. *Id.* at 1112-13.

¶32 In sum, any error was harmless and does not require reversal. *Warner*, 218 Ariz. 121, ¶ 10, 180 P.3d at 992.

Disposition

¶33 We affirm for the reasons stated. We also grant appellees' request for their costs on appeal pursuant to A.R.S. §§ 12-341 and 12-342(A), upon their compliance with Rule 21, Ariz. R. Civ. App. P.