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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JOSE L. RINCÓN and ADRIANA RINCÓN, surviving parents of JOSE L. RINCÓN, JR., Plaintiffs/Appellees, v. GLENDA L. RUMSEY, Defendant/Appellee, CITY OF TUCSON, Defendant/Appellant.	2 CA-CV 2010-0150 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20081087

Honorable Kenneth Lee, Judge

REVERSED AND REMANDED

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B R A M M E R, Presiding Judge.

¶1 The City of Tucson (City) appeals from a remitted judgment entered against it in favor of appellees Jose and Adriana Rincón on their wrongful death claim, in which they asserted the City negligently had caused the death of their son, Jose Rincón Jr. (Jose Jr.), who was killed in a traffic collision. The City also appeals from the trial court's order denying its motion for a new trial. It argues the court committed reversible error in admitting Jose's and Adriana's testimony about who was "responsible" for Jose Jr.'s death and by admitting the testimony of two witnesses who observed the driving habits of other drivers at the intersection where the collision occurred. The City also contends the court abused its discretion in denying a motion for a new trial in which the

City, in addition to claiming the court erred in admitting that testimony, also had alleged (1) the court's damages instruction contained erroneous language, (2) codefendant Glenda Rumsey's counsel engaged in improper conduct, and (3) the verdict was "the result of passion and prejudice."

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to sustaining the verdict." *Pima County v. Gonzalez*, 193 Ariz. 18, ¶ 2, 969 P.2d 183, 184 (App. 1998). In January 2008, Jose Jr. was killed as he rode his bicycle when he was struck from behind by a car driven by Rumsey in the eastbound bicycle lane on Broadway Boulevard, east of Vozack Lane in Tucson. Rumsey was intoxicated at the time of the collision and was convicted of manslaughter, assault, aggravated assault, driving under the influence, and extreme driving under the influence. Rumsey had been drinking at Chuy's Mesquite Broiler restaurant for several hours before the collision.

¶3 Adriana and Jose Rincón brought a wrongful death civil action against Rumsey, JBL Restaurant Investments, L.L.C., dba Chuy's (Chuy's), and the City. They alleged Rumsey had operated her motor vehicle negligently, Chuy's had served Rumsey excessive amounts of alcohol, and the City had created a dangerous situation by negligently constructing the intersection where the collision occurred so that it guided merging motor vehicles into the bicycle lane.

¶4 Before trial, the Rincóns and Chuy's reached a confidential settlement agreement. In a joint pretrial statement, the remaining parties agreed the Rincóns

claimed Rumsey and the City were "at fault for the wrongful death of their son," the City claimed Rumsey was at fault, and Rumsey, although admitting she was at fault, claimed the City also was at fault. The statement also acknowledged the Rincóns had "resolved their issues with Chuy's," but that Rumsey and the City had named Chuy's as a non-party at fault. The trial court read the statement to the jury during voir dire.

¶5 At trial, over the City's objection, the Rincóns presented testimony from two witnesses who, near the time of the collision, had observed drivers entering the bicycle lane as they attempted to merge at the intersection where Jose Jr. was struck. Rumsey elicited testimony from the Rincóns on cross examination regarding who they held responsible for Jose Jr.'s death.

¶6 After an eight-day trial, the jury entered a verdict in favor of the Rincóns for $40 million, apportioning liability 34% against Rumsey, and 33% each against Chuy's and the City. The City filed a motion for a new trial and, alternatively, a motion for remittitur. The trial court denied the motion for a new trial but granted the motion to remit and ordered the judgment remitted to $12 million. The Rincóns accepted the remission and judgment was entered. This appeal followed.

Discussion

Rincóns' Testimony

¶7 The City argues the trial court committed reversible error in admitting the Rincóns' testimony about who was "at fault" or "responsible" for their son's death. It contends the testimony was inadmissible pursuant to Rules 602, 701, and 704 cmt., Ariz.

R. Evid., because it was not based on the witnesses' personal knowledge or observation, nor was it helpful to a clear understanding of a fact in issue. "We review evidentiary rulings for an abuse of discretion and generally affirm a trial court's admission or exclusion of evidence absent a clear abuse or legal error and resulting prejudice." *John C. Lincoln Hosp. & Health Corp. v. Maricopa County*, 208 Ariz. 532, ¶ 33, 96 P.3d 530, 541 (App. 2004).

¶8 The City objected to the following exchange between Rumsey's counsel and Jose during cross-examination:

> Q What I'd like to do now is ask you the question that was asked at your deposition. I'd like for you to share with the jury your opinion as to who and what, in your mind, without reaching any legal conclusions, without allocating fault quantity to my client, or Chuy's, or City of Tucson, just as a father, not as a lawyer or one who has been exposed to so many lawyers in the last couple of years, who, in your opinion, and what was at fault for the loss of your son?
>
> [Counsel for City]: Objection.
>
> THE COURT: Counsel approach.
>
> (The following discussion was held at the bench.)
>
> [Counsel for City]: That's not relevant, Your Honor. It invades the province of the jury.
>
> [Counsel for Rumsey]: I'm not asking for a legal conclusion. . . . We've heard how my client tried to pass fault to the City at that time. We've heard the allegations. Let him tell the jury why we're here today.

The trial court overruled the objection and allowed Jose to respond. His answer included his opinion as to the responsibility of all three original defendants:

> But I think what it boils down to in trying to, in trying to validate him and his innocence is you sort of look at where was the negligence. And an obvious one is where the criminal charges were filed. That's one. And another one is where she was, and the responsibility of the establishment . . . . And as I've come to know now because of what went on in the criminal trial, and because of what has come to light in the depositions and discovery . . . , is that my son was two feet in the bike lane. He was not a risk taker. He was where he thought he was safe. But he should have been five feet over, two feet in the bike lane. And that's very concerning and disturbing. And that's a third reason why we're here today.[1]

¶9 The City also objected to the following portion of Adriana's testimony on cross-examination by Rumsey's counsel:

> Q I'm going to pose to you the same question that I posed to Mr. Rincon, and I want to preface the question for purposes of not over-stepping here, you are not an attorney, are you?
>
> A No, I'm not.
>
> Q You do not have legal training, do you?
>
> A None whatsoever.
>
> Q I'm not asking you to give a legal opinion, to reach any legal conclusions, I'm not asking you to apportion anything or quantify anything, okay, but what I'm asking you to tell us, tell the jury is, do you have an opinion, a personal

[1]The City additionally challenges on appeal Jose's testimony that a "perfect storm" of all three variables caused his son's death, contending this testimony provided the foundation for Rumsey's closing argument proposing that the jury apportion equal fault to all three defendants. However, Jose's "perfect storm" statement was in response to an additional question by Rumsey's counsel to which the City did not object. Therefore, the City cannot challenge the admissibility of that testimony on appeal. *See* Ariz. R. Evid. 103(a)(1) (preservation of error requires timely objection).

> opinion, as the mother of Jose, . . . as to who is responsible for the death of your son?
>
> [Counsel for City]: Objection, Your Honor, foundation, form.
>
> THE COURT: Overruled.
>
> A I just think about the five feet of asphalt that could have saved him. Any one of those variables taken alone, he would be here. I'd have a 16-year-old driving me crazy. That's all.

¶10 Rule 704, Ariz. R. Evid., provides that opinion testimony "is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." However, Rule 701 requires that lay opinion testimony be "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." *See also* Ariz. R. Evid. 704 cmt. (opinion must assist trier of fact to understand evidence or determine fact in issue); Ariz. R. Evid. 602 (witness must "ha[ve] personal knowledge of the matter"). For example, in *Groener v. Briehl*, 135 Ariz. 395, 398, 661 P.2d 659, 662 (App. 1983), the court held that, under Rule 701, an eyewitness to an accident should not have been allowed to testify as to his opinion that the collision was unavoidable. The witness had no knowledge of the details necessary to make such a determination, and his opinion did not aid the jury in determining a fact in issue, but rather "merely told the jury how in this witness' opinion the jury should decide the case." *Id.*; *see also State v. Koch*, 138 Ariz. 99, 102-03, 673 P.2d 297, 300-01 (1983) (statement witness "quite sure" of defendant's guilt properly excluded as not based on perception and not helpful to jury where witness had no

knowledge of circumstances), *citing State v. Henricks*, 653 P.2d 479, 482 (Mont. 1982) (witness opinion based upon contact with parties after accident not rationally based on perception). Moreover, "a witness who testifies as to the ultimate cause of [an] accident must be qualified as an expert witness." *Rimondi v. Briggs*, 124 Ariz. 561, 564, 606 P.2d 412, 415 (1980).

¶11 Because the Rincóns' opinions as to fault were based solely on their subjective beliefs and not on their rational perceptions, they were not helpful to the jury. Like the witness in *Groener*, the Rincóns had no perception-based knowledge of the details necessary to determine causation, and their opinions were not helpful in assisting the jury to determine a fact in issue. The Rincóns were not present when the accident occurred. Instead, their opinions were based on their observations at both Rumsey's criminal trial and this one, as well as discussions with their attorney, including many matters not in evidence, and they "merely told the jury how . . . [it] should decide the case."[2] *See Groener*, 135 Ariz. at 398, 661 P.2d at 662; *see also Koch*, 138 Ariz. at 102-03, 673 P.2d at 300-01 (discussion with suspect after crime insufficient to support opinion regarding responsibility without knowledge of circumstances). Therefore, the trial court erred in permitting the Rincóns to give their opinions about who was at fault or responsible for the collision. *See* Ariz. R. Evid. 701.

[2]To the extent the Rincóns had some knowledge of the intersection based on post-accident observations, this nonetheless fails to provide sufficient foundation to support an opinion as to the cause of the accident. *See Rimondi*, 124 Ariz. at 564, 606 P.2d at 415 (witness testifying to ultimate cause must be qualified as expert); Ariz. R. Evid. 702 (expert qualified by knowledge, skill, experience, training, or education).

¶12 In ruling on the City's motion for a new trial, the trial court reasoned the challenged questions were helpful to the jury as something other than an opinion of fault because they were "directly relevant to help the jury get a clear understanding . . . that despite the [Rincóns'] resolution of their issues with Chuy's, it was still their belief and legal position that all three were responsible." A plaintiff's assertions of fault may be relevant and admissible when offered to establish something other than their truth. *See Henry ex rel. Estate of Wilson v. Health Partners of S. Ariz.*, 203 Ariz. 393, ¶ 15, 55 P.3d 87, 91 (App. 2002) (complaint allegations relevant to "undercut" plaintiff's strategy). For example, the allegations in a complaint filed against multiple defendants may be relevant to discredit a plaintiff's claim at trial that a particular defendant's negligence had been minimal. *Id.*

¶13 Here, however, the Rincóns acknowledged they had sued Chuy's claiming it was at fault. A stipulation to that effect was read to the jury. There is no evidence the Rincóns later attempted to minimize Chuy's fault, or that their opinions of fault were helpful to impeach any prior testimony as contrary to the assertions in their complaint. Furthermore, the testimony goes beyond that approved in *Henry*. It includes improper testimony about the cause of the accident based on information allegedly obtained from judicial proceedings and discussions with counsel. Moreover, even if Rumsey had desired to demonstrate the Rincóns still claimed Chuy's was responsible, she did not need to elicit testimony about the City's alleged negligence and causation to do so. Therefore, the challenged testimony does not fit within the circumstances contemplated in *Henry*.

The Rincóns' legal position had not been placed in issue, and the court abused its discretion in permitting them to testify about their opinions as to who was responsible for Jose Jr.'s death. *See* Ariz. R. Evid. 701.

¶14 "'In order to justify reversal, . . . the trial error must be prejudicial to the substantial rights of the appealing party.'" *Warner v. Sw. Desert Images, LLC*, 218 Ariz. 121, ¶ 10, 180 P.3d 986, 992 (App. 2008), *quoting Walters v. First Fed. Sav. & Loan Ass'n of Phoenix*, 131 Ariz. 321, 326, 641 P.2d 235, 240 (1982); *see also* Ariz. R. Civ. P. 61 (no error is ground for granting new trial unless affects substantial right). The improper admission of the Rincóns' testimony is reversible error if we are unable to conclude the jury would have reached the same verdict without the testimony. *See Kott v. City of Phoenix*, 158 Ariz. 415, 419, 763 P.2d 235, 239 (1988); *Groener*, 135 Ariz. at 398, 661 P.2d at 662.

¶15 Although the question is close, we cannot conclude the jury would have reached the same verdict without the Rincóns' testimony regarding fault. We cannot be certain the jury fully realized the Rincóns did not have sufficient perception to know whether or the extent to which the parties were responsible for Jose Jr.'s death. For example, although both Jose and Adriana expressly provided an opinion as a parent, rather than as a legal expert, the jury may have been unduly persuaded by their references to their knowledge of evidence presented at the criminal trial. *See Groener*, 135 Ariz. at 398-99, 661 P.2d at 662-63 (reversible error where jury may not have realized lack of sufficient perception). Notably, Rumsey apparently felt the testimony was important

enough and had sufficient impact to emphasize it to the jury in closing argument. It is also difficult to hypothesize what effect their testimony may have had on the jury's allocation of fault, even if there was sufficient evidence otherwise for the jury to reach the verdict it did. We conclude, therefore, the judgment against the City must be reversed and the case remanded for a new trial.[3]

¶16 Because we reverse, we address other issues that are likely to arise again on remand. *See Timmons v. City of Tucson*, 171 Ariz. 350, 355, 830 P.2d 871, 876 (App. 1991).

"Other Incident" Testimony

¶17 The City argues the trial court committed reversible error by admitting the testimony of two witnesses who described their observations of other drivers entering the bicycle lane while merging at or near the intersection where the accident took place. It asserts the testimony was "highly prejudicial" and could have been misused by the jury because those incidents occurred under dissimilar circumstances and for unknown reasons. We review the court's admission of evidence for an abuse of discretion. *John C. Lincoln Hosp.*, 208 Ariz. 532, ¶ 33, 96 P.3d at 541.

[3]Although we recognize plaintiffs will be subjected to a new trial based on an error for which they were not responsible, any party aggrieved by a judgment may protect its rights on appeal where it has not invited the reversible error. *See* Ariz. R. Civ. App. P. 1; *Douglas v. Governing Bd. of Window Rock Consol. Sch. Dist. No. 8*, 221 Ariz. 104, ¶ 7, 210 P.3d 1275, 1279 (App. 2009) (party "aggrieved" if (1) interest is direct, substantial, and immediate, (2) interest would be prejudiced by judgment, and (3) legal right or pecuniary interest directly affected); *State v. Armstrong*, 208 Ariz. 345, n.7, 93 P.3d 1061, 1073 n.7 (2004) (invited error doctrine prevents party from injecting error into record and profiting from it on appeal).

¶18 Relevant evidence is that which has any tendency to make the existence of any material fact "more probable or less probable than it would be without the evidence." Ariz. R. Evid. 401. But even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Ariz. R. Evid. 403. Evidence of previous accidents may tend to prove negligence if it is shown that "the previous conditions were substantially similar to the conditions resulting in the accident at issue; it is sufficient if they are similar in general character if not precisely the same."[4] *Burgbacher v. Mellor*, 112 Ariz. 481, 483, 543 P.2d 1110, 1112 (1975).

¶19 The trial court found the testimony was "directly relevant on the issue of . . . how the merging process works given the present configuration and striping." To the extent the testimony should be analyzed as evidence of "previous accidents," there was sufficient similarity between the condition of the road as observed by the witnesses and the road as it was when Jose Jr. was struck to satisfy *Burgbacher*. The court found "the road was [in] exactly the same" condition when the witnesses observed it as it was when this collision occurred, and the City does not dispute that the configuration or striping of the intersection had not changed.

[4]The City relies on *U.S. Aviation Underwriters, Inc. v. Pilatus Business Aircraft, Ltd.*, 582 F.3d 1131 (10th Cir. 2009), to argue the evidence was required to have a "high degree of similarity." However, *U.S. Aviation* was a product liability case that imposed this more stringent requirement where the dangerousness of a product was "the ultimate issue to be decided by the jury." *Id.* at 1148.

¶20 The City notes the road conditions at the time the witnesses observed them were not identical to those when Jose Jr. was struck because he was struck at night when there were bicyclists with reflectors riding in the bicycle lane. However, the City offers nothing to compel the conclusion that conditions during the witnesses' observations were so much more likely to induce drivers to enter the bicycle lane that the testimony would mislead the jury. The jury was "entitled to use its good judgment . . . to evaluate the differences between the [incidents]." *See Burgbacher*, 112 Ariz. at 483, 543 P.2d at 1112 (court properly admitted evidence of prior slip-and-fall where circumstances differed but where accidents sufficiently close in time and character). Although evidence of similar accidents may be prejudicial where those accidents did not occur for "similar reasons," *see id.*, the City offers no authority to support its contention that the express intent of a driver is the only way to prove incidents occurred for similar reasons. Therefore, the trial court did not abuse its discretion in concluding the probative value of these witnesses' testimony was not substantially outweighed by the danger of misleading the jury. *See* Ariz. R. Evid. 403.

Damages Instruction

¶21 The City argues the trial court abused its discretion in denying its motion for a new trial, and should have granted the motion pursuant to Rule 59(a), Ariz. R. Civ. P. In addition to the alleged errors already discussed, the City contends the court erred by instructing the jury to award damages for the Rincóns' loss of "care, protection and

guidance."[5] Because this issue is likely to arise again on remand, we address it. *See Timmons*, 171 Ariz. at 355, 830 P.2d at 876. We review for an abuse of discretion a court's denial of a motion for a new trial. *White v. Greater Ariz. Bicycling Ass'n*, 216 Ariz. 133, ¶ 6, 163 P.3d 1083, 1085 (App. 2007). Over the City's objection, the trial court instructed the jury to "decide the full amount of money that [would] reasonably and fairly compensate plaintiffs" for, inter alia, "[t]he loss of love, affection, companionship, care, protection and guidance since [Jose Jr.'s] death and in the future." The City contends that, because there was no evidence that Jose Jr. "cared for, protected or guided" his parents before his death, the instruction invited improper speculation from the jury, was "misleading and prejudicial," and constitutes reversible error.

¶22 Section 12-613, A.R.S., provides that a jury "shall give such damages as it deems fair and just" to surviving parties in a wrongful death action. *See also White*, 216 Ariz. 133, ¶ 28, 163 P.3d at 1091 (plaintiff not required to meet particular evidentiary threshold under § 12-613). A "trial court has substantial discretion in determining how to instruct the jury." *Smyser v. City of Peoria*, 215 Ariz. 428, ¶ 33, 160 P.3d 1186, 1197 (App. 2007). "'Whether such error is prejudicial depends on a review of the instructions as a whole . . . . The test is whether the jury would be misled as to the proper rule of law . . . .'" *Taylor v. DiRico*, 124 Ariz. 513, 517, 606 P.2d 3, 7 (1980), *quoting Coyner Crop Dusters v. Marsh*, 91 Ariz. 371, 376, 372 P.2d 708, 711 (1962); *see also Dawson v.*

[5]The City also alleges misconduct by Rumsey's counsel and that the verdict was "the result of passion and prejudice." Because a determination of these issues is not necessary for purposes of remand, we do not reach them.

Withycombe, 216 Ariz. 84, ¶ 63, 163 P.3d 1034, 1055 (App. 2007) (reviewing court will not overturn verdict unless substantial doubt exists whether jury properly guided). Although a court may not instruct a jury on a theory not supported by the evidence, *Gonzalez*, 193 Ariz. 18, ¶ 7, 969 P.2d at 185, where a condition is by its nature somewhat speculative, "[a] jury must infer from all the circumstances" whether there is reason to believe it exists, *Spur Feeding Co. v. Fernandez*, 106 Ariz. 143, 148, 472 P.2d 12, 17 (1970).

¶23 Considering the difficulty of identifying a surviving parent's losses, the trial court did not abuse its discretion in determining there was evidence to support the inference that Jose Jr. "would have grown into adulthood and, as an adult, could certainly have provided [Jose and Adriana] with care, protection and guidance in the future." The Rincóns testified at trial regarding Jose Jr.'s life, his future plans, their relationship with him, and the loss they suffered as a result of his death. Additionally, Jose Jr.'s sister, the Rincóns' counselor, a family friend, and Adriana's brother-in-law testified about Jose Jr. and the impact of his loss on Jose and Adriana.

¶24 Moreover, the instructions, considered as a whole, do not give rise to a substantial doubt that the jury was guided properly in arriving at its decision. *See Dawson*, 216 Ariz. 84, ¶ 63, 163 P.3d at 1055. The jury was instructed to "fairly compensate" Jose and Adriana for each element of damages "proved by the evidence to have resulted from the death of [Jose Jr.]." The jury was provided sufficient evidence of Jose Jr.'s life, future plans, and the impact of his loss to compensate Jose and Adriana for

their present and future "loss of love, affection, companionship, care, protection and guidance," and was instructed to do so to the extent supported by the evidence. Therefore, the court did not abuse its discretion in denying the City's motion for a new trial based on the damages instruction.

Disposition

¶25 For the foregoing reasons, we reverse and remand the case to the trial court for a new trial.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge