IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

MATTHEW CAVALLO, et al., *Plaintiffs/Appellants*,

v.

PHOENIX HEALTH PLANS, INC., *Defendant/Appellee*.

No. 1 CA-CV 20-0167
FILED 2-23-2021

Appeal from the Superior Court in Maricopa County
No. CV2016-015531
The Honorable Timothy J. Thomason, Judge

AFFIRMED

COUNSEL

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OPINION OF THE COURT

Presiding Judge Paul J. McMurdie delivered the Court's opinion, in which Judge Cynthia J. Bailey and Judge Lawrence F. Winthrop joined.

M c M U R D I E, Judge:

¶1 Matthew and Jocelyn Cavallo (the "Cavallos") appeal from a jury verdict in favor of Phoenix Health Plans, Inc. ("Phoenix Health") on their claim for insurance bad faith. We affirm the judgment and hold that: (1) an insurer sued for bad faith may assert a limited contract-based defense to show that its conduct did not violate its duty of good faith and fair dealing; and (2) when the jury finds a defendant not liable for an alleged tort, a presumably erroneous jury instruction related to damages is not *per se* reversible error.

FACTS AND PROCEDURAL BACKGROUND

¶2 In 2005, Mr. Cavallo was diagnosed with relapsing multiple sclerosis ("MS"), an autoimmune disease that attacks his central nervous system. To manage his condition, Mr. Cavallo regularly received Tysabri infusions, a controversial drug that helps prevent or reduce the number and severity of MS symptom relapse. One of Tysabri's side effects is the risk of relapse if the patient cannot receive another dose within 90 days.

¶3 In late 2015, Mr. Cavallo purchased from Phoenix Health a "Phoenix Choice Silver HMO + Dental/Vision" health plan (the "Plan"). The Plan included Tysabri coverage but required prior authorization from Phoenix Health before it would cover the drug's cost and infusion. The Plan provided no out-of-network benefits, except under certain circumstances, e.g., when an insured could not obtain a medically necessary service in-network. On December 9, 2015, shortly before his new insurance plan became effective, Mr. Cavallo received an infusion of Tysabri.

¶4 On February 19, 2016, 72 days after Mr. Cavallo last received Tysabri, the MS coordinator for his medical provider submitted a prior authorization request to Phoenix Health for Tysabri. She requested the infusion be given at a specific in-network facility certified to administer the drug. But a Phoenix Health representative incorrectly informed the MS coordinator that it was an out-of-network facility. The representative told

her that the policy did not provide for out-of-network benefits and provided her with a list of in-network facilities. None of the facilities on the list was certified to provide Tysabri infusions.

¶5 The parties' stories diverge regarding what happened over the ensuing weeks. It suffices to say that miscommunications and other issues triggered a series of back-and-forth exchanges among Mr. Cavallo, his medical provider, and Phoenix Health. The result of this communication quagmire is not in dispute. Phoenix Health did not approve the Tysabri infusion for Cavallo until March 29, and he did not receive it until April 4, 117 days after his last infusion. During the delay, Mr. Cavallo experienced a significant MS symptom relapse.

¶6 The Cavallos sued Phoenix Health, asserting breach of contract, insurance bad faith, misrepresentation/false advertising, and loss of consortium. For the next several years, the parties engaged in extensive pre-trial litigation. The court eventually granted summary judgment on the Cavallos' misrepresentation/false advertising claim. Shortly before trial, the Cavallos dismissed all remaining claims except Mr. Cavallo's insurance bad-faith claim and Mrs. Cavallo's claim for consortium loss.

¶7 Over 11 days in May and June 2019, the parties presented extensive fact and expert witness testimony and documentary evidence. The Cavallos primarily argued to the jury that Phoenix Health had unreasonably and intentionally denied and delayed Mr. Cavallo's claim for Tysabri from February to late March, even after learning he experienced relapse symptoms. The Cavallos also alleged that Phoenix Health purposefully trained employees to tell providers and insureds that health plans like Mr. Cavallo's did not permit out-of-network benefits without mentioning the exceptions. The Cavallos claimed Phoenix Health designed overly complex systems for processing claims and trained employees to require an insured to identify an in-network facility before reviewing the claim. The Cavallos asserted these processes were designed to avoid paying for covered out-of-network services. Finally, the Cavallos alleged that Phoenix Health incentivized its employees to reduce costs by delaying and denying claims.

¶8 Phoenix Health denied these allegations and alleged that its processing of Mr. Cavallo's claim was reasonable under the circumstances, including that: (1) the representative who initially communicated with Mr. Cavallo's medical provider made a good-faith mistake regarding the requested facility's network status; (2) Mr. Cavallo's medical provider canceled the February 19 prior authorization request a few days after it was

made; and (3) Mr. Cavallo's medical provider failed to provide information necessary to initiate and timely process Mr. Cavallo's claim. It also argued that Mr. Cavallo unreasonably failed to mitigate his damages by declining to accept a low-cost (approximately $150) dose of Tysabri from his medical provider once it obtained approval for Mr. Cavallo to participate in a free-drug program.

¶9 The jury returned a defense verdict, and the court entered final judgment on all claims. The Cavallos moved for a new trial, arguing the superior court's decisions to give two jury instructions and exclude exhibits were erroneous and prejudicial. The court denied the motion, opining that the instructions were neither wrong nor prejudicial and the exhibits were correctly excluded. The Cavallos appealed, and we have jurisdiction under A.R.S. § 12-2101(A)(1) and -2101(A)(5).

DISCUSSION

¶10 On appeal, the Cavallos raise the same arguments they presented in their motion for a new trial.[1] The Cavallos first contend that two instructions the court gave the jury—one concerning "waiver" and the other concerning "mitigation of damages"—misstated the law, misled the jury, and prejudiced their case. Next, the Cavallos assert the court committed reversible error by improperly excluding documentary exhibits from evidence. The Cavallos conclude these alleged errors, whether viewed in isolation or cumulatively, require that we reverse the jury verdict and remand for a new trial.

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[1] The Cavallos also argue that the waiver and mitigation of damages instructions constituted reversible error because they were unsupported by the evidence. Because the Cavallos failed to raise these arguments in their motion for new trial, we cannot address them. *See* A.R.S. § 12-2102(C) (appellate court shall not consider "the sufficiency of the evidence to sustain the verdict or judgment in an action tried before a jury unless a motion for a new trial was made"); *Lewis v. S. Pac. Co.*, 105 Ariz. 582, 583 (1970) (review of refusal to instruct jury on a theory of the case requires a sufficiency of the evidence determination, thus requiring a motion for new trial); *Gabriel v. Murphy*, 4 Ariz. App. 440, 442 (1966) (Under A.R.S. § 12-2102(C), motion for new trial must be made before the "scope of the appeal may be enlarged to include the sufficiency of the evidence," and "[t]hat scope may not be enlarged . . . beyond the matters assigned as error in the motion for new trial").

A. The Objected-to Instructions Did Not Cause Reversible Error.

¶11 The superior court must give a requested jury instruction if (1) "the evidence presented supports the instruction," (2) the instruction correctly states the law, and (3) the instruction pertains to an important issue that is not dealt with by other instructions. *Czarnecki v. Volkswagen of Am.*, 172 Ariz. 408, 411 (App. 1991). "We review a court's decision to give a jury instruction for abuse of discretion," but review *de novo* "whether the given instruction correctly states the law." *State v. Solis*, 236 Ariz. 285, 286, ¶ 6 (App. 2014). We also consider the "jury instructions as a whole to determine whether the jury was properly guided in its deliberations." *Powers v. Taser Int'l, Inc.*, 217 Ariz. 398, 400, ¶ 12 (App. 2007). To determine whether prejudicial error occurred, "we may consider the jury instructions as given, the evidence at trial, the parties' theories, and the parties' arguments to the jury." *State v. Felix*, 237 Ariz. 280, 285, ¶ 16 (App. 2015).

¶12 "An instruction will only warrant reversal if it was both harmful to the complaining party and directly contrary to the rule of law." *Powers*, 217 Ariz. at 400, ¶ 12. "We will not overturn a jury verdict on the basis of an improper instruction 'unless there is substantial doubt whether the jury was properly guided in its deliberations.'" *Id.* (quoting *Barnes v. Outlaw*, 188 Ariz. 401, 405 (App. 1996), *aff'd in part and rev'd in part on other grounds*, 192 Ariz. 283 (1998)). "Prejudice 'will not be presumed but must affirmatively appear from the record.'" *Skydive Ariz., Inc. v. Hogue*, 238 Ariz. 357, 367, ¶ 37 (App. 2015) (quoting *Walters v. First Fed. Sav. & Loan Ass'n of Phoenix*, 131 Ariz. 321, 326 (1982)).

1. The Court Did Not Abuse Its Discretion by Giving the Waiver Instruction Because It Did Not Misstate the Law or Mislead the Jury.

¶13 The superior court gave the jury the following instruction on waiver over the Cavallos' objection:

> A party to a contract may waive the other party's duty to perform. "Performance" refers to what a party agreed to do as his part of the contract. Waiver is either the express, voluntary, and intentional relinquishment of a known right, or it is conduct that is inconsistent with an intent to assert the right. By accepting performance known to be deficient, a party has waived the right to reject the contract on the basis of that performance. If Mr. Cavallo has waived a promised performance, then [Phoenix Health] is no longer bound to

> perform on that promise and Mr. Cavallo is not entitled to damages for that particular non-performance. [Phoenix Health] has the burden of proving waiver.

The instruction correctly described waiver as it is typically invoked to defend a claim for breach of contract. *See United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 283 (App. 1983); *see also* Rev. Ariz. Jury Instr. ("RAJI") (Civil) Contract 13 (6th ed. 2015). However, the Cavallos argue that the instruction served no legitimate purpose here, where the only claim before the jury was a claim for breach of good faith and fair dealing. They maintain that when combined with Phoenix Health's arguments at trial, the instruction implied either: (1) Phoenix Health's entire obligation of good faith and fair dealing could be waived, or (2) waiver could be an absolute defense to their bad-faith claim. The Cavallos further claim that the waiver instruction "improperly collapsed the distinct concepts of reasonableness and waiver, telling the jury it could ignore the unreasonableness of [Phoenix Health's] conduct if it found waiver."

¶14 In response, Phoenix Health contends that contract defenses such as waiver apply in insurance bad-faith cases. It also disputes the Cavallos' contention that its arguments or the instruction misled the jury into believing the covenant of good faith and fair dealing could be waived or that waiver constituted an absolute defense.

¶15 "The tort of bad faith arises when the insurer 'intentionally denies, fails to process or pay a claim without a reasonable basis.'" *Zilisch v. State Farm Mut. Auto. Ins.*, 196 Ariz. 234, 237, ¶ 20 (2000) (quoting *Noble v. Nat'l Am. Life Ins.*, 128 Ariz. 188, 190 (1981)). There are two elements to the tort: (1) "that the insurer acted unreasonably toward its insured"; and (2) "that the insurer acted knowing that it was acting unreasonably or acted with such reckless disregard that such knowledge may be imputed to it." *Trus Joist Corp. v. Safeco Ins. Co. of Am.*, 153 Ariz. 95, 104 (App. 1986) (emphasis omitted). The tort of insurance bad faith arises out of the insurer's duty of good faith and fair dealing, which is implied within the contract and requires "that an insurer treat its insured fairly in evaluating claims." *Deese v. State Farm Mut. Auto. Ins.*, 172 Ariz. 504, 507 (1992). Although the implied covenant of good faith and fair dealing flows from the contractual relationship between insurer and insured, an intentional breach of the implied covenant "permit[s] the damaged party to maintain an action in tort and to recover tort damages." *Rawlings v. Apodaca*, 151 Ariz. 149, 160 (1986).

¶16 At the outset, we agree with the Cavallos that an insurer likely cannot, as a general matter, assert waiver as an absolute defense to a bad-faith claim. "Although the duty of good faith is inherent in any insurance contract, it is not strictly a contractual obligation; rather, it is an obligation imposed by law that governs the insurer in discharging its contractual responsibilities." *Walter v. Simmons*, 169 Ariz. 229, 238 (App. 1991). In line with this principle, our supreme court has held that an insurer may commit insurance bad faith even if it ultimately pays, correctly denies, or has a reasonable basis to contest a claim. The breach of the insurance contract is not an essential element of bad faith. *Rawlings*, 151 Ariz. at 163 (payment not absolute defense); *Zilisch*, 196 Ariz. at 238, ¶ 22 (fair debatability); *Deese*, 172 Ariz. at 509 (absence of breach not fatal).

¶17 Given these authorities, we are skeptical that a contract defense such as waiver could apply as an absolute defense, at least when the bad-faith claim includes allegations that the insurer acted unreasonably in fulfilling its contractual obligations. We are even more skeptical of the idea that the duty of good faith and fair dealing, which is implied by law in every contract regardless of the parties' intent, could be waived. *Cf. In re Sky Harbor Hotel Props., LLC*, 246 Ariz. 531, 534, ¶ 12 (2019) (finding well supported the parties' concession that an operating agreement cannot eliminate the implied covenant of good faith and fair dealing). But we need not squarely resolve these issues in this case.

¶18 As we set forth more fully below, neither the waiver instruction nor Phoenix Health's arguments concerning waiver directly stated or implied that waiver could constitute an absolute defense to the Cavallos' bad-faith claim or that it could apply to the covenant of good faith and fair dealing generally. On this record, we face a narrower question: whether it is proper to allow the jury to consider a contract defense such as a waiver in resolving an issue that informs, but does not decide, its determination concerning the elements of an insurance bad-faith claim. We conclude that it is.

¶19 We have found no authority in Arizona directly addressing this point. But the propriety of a *limited* defense arising from an insurer's compliance with or application of the insurance contract is supported by the very same decisions that reject using the conduct as an absolute defense. In *Zilisch*, for example, our supreme court acknowledged the importance of a "fair debatability" defense while simultaneously rejecting its use as a complete defense. 196 Ariz. at 238, ¶ 22 ("[W]hile fair debatability is a necessary condition to avoid a claim of bad faith, it is not always a sufficient condition."). Looking beyond Arizona's borders, several other states have

specifically endorsed the use of contract defenses to undermine the plaintiff's showing of bad-faith elements. In *Kransco v. Am. Empire Surplus Lines Ins.*, 2 P.3d 1, 13–16 (Cal. 2000), the California Supreme Court rejected a so-called "comparative bad faith" defense under which the *insured's* breach of the implied covenant of good faith and fair dealing could reduce the insured's recovery for the insurer's breach of that same covenant. But the court opined:

> We again emphasize that a liability insurer is not without redress for an insured's litigation misconduct, be it negligent or intentional. Evidence of the insured's misconduct or breach of its express obligations under the terms of the insurance policy (i.e., breach of the cooperation clause) may support a number of contract defenses to a bad faith action, by voiding coverage, *factually disproving the insurer's bad faith by showing the insurer acted reasonably under the circumstances*, or forming the basis for a separate contract claim, and an insured's intentionally fraudulent conduct may give rise to tort damages.

Id. at 410–11 (emphasis added). The Oklahoma Supreme Court has held that an insurer may assert an "as far as it goes," or *pro tanto*, contract-based defense to show the portion of "the total loss which was due to the insured's misperformance." *First Bank of Turley v. Fid. and Deposit Ins. Co. of Md.*, 928 P.2d 298, 308 (Okla. 1996); *see also* Ellen Smith Pryor, *Comparative Fault and Insurance Bad Faith*, 72 Tex. L. Rev. 1505, 1522–25, 1522, n.55 (1994) (comparing contract defenses to comparative fault and describing the differing application of contract defenses in bad-faith law).

¶20 We find this authority, coupled with the principles outlined in cases like *Zilisch*, persuasive. When it comes to the jury's assessment of the reasonableness of the insurer's conduct, we see no reason to distinguish among a contract defense based on misconduct, breach, or lack of notice and one based on a waiver. It naturally follows that, where an insurer asserts a contract defense to demonstrate that it acted reasonably under the circumstances, the superior court may instruct the jury to guide its deliberations concerning whether the defense should apply.

¶21 Critically, these defenses—and the instructions given to the jury concerning them—do not subvert or alter the ultimate question that the jury must decide, which is whether the insurer acted reasonably under the circumstances. *Cf. First Bank*, 928 P.2d at 309 ("defense based on the insured's claimed failure timely to supplement its initial notice" requires

the trier of fact to "measure the extent of the impact, if any, the insured's alleged misperformance . . . may have had on the main issue in the case-the good or bad faith of the insurer's decision not to defend the action against the insured"). Instead, such instructions aid and supplement the jury's assessment of the insurer's reasonableness by providing it with standards to evaluate the parties' conduct.

¶22 We turn now to the given instruction and the Cavallos' particular arguments. Depending on the circumstances, a given instruction's language or the party's arguments could mislead the jury into erroneously applying the defense as an absolute bar to a bad-faith claim. But that did not happen here. The waiver instruction was not as broad as the Cavallos contend. The instruction specifically stated that waiver of performance would remove Cavallo's right to damages only "for that particular non-performance." It did not convey to the jury, either implicitly or explicitly, that if it found waiver, it must find for the defense on the Cavallos' claim for breach of the duty of good faith.

¶23 Phoenix Health likewise never argued that the covenant of good faith and fair dealing could be waived or that waiver was an absolute defense to the bad-faith claim. It merely asserted that its processing of Mr. Cavallo's claim was not unreasonable, *in part*, because Mr. Cavallo's medical provider canceled its initial request for preauthorization. It is speculation to say that the jury jumped to applying the waiver instruction as an absolute defense without prompting from either the instruction or Phoenix Health. We conclude the superior court did not abuse its discretion by giving the waiver instruction in this case because it was not contrary to the law applicable to an insurance bad-faith claim and did not mislead the jury.

2. Even Assuming the "Mitigation of Damages" Instruction Was Erroneous, It Caused No Prejudice.

¶24 Over the Cavallos' objection, the court gave the following instruction on the mitigation of damages:

> [Phoenix Health] claims that Mr. Cavallo did not make reasonable efforts to prevent or reduce damages. Mr. Cavallo may not recover for any damages that could have been avoided without undue risk, burden or humiliation. [Phoenix Health] must prove:
>
> A. Mr. Cavallo did not make reasonable efforts to prevent or reduce damages;
>
> B. If Mr. Cavallo had acted reasonably, Mr. Cavallo could have prevented or reduced damages; and
>
> C. The amount of [Mr. Cavallo's] damages that could have been prevented or reduced through reasonable efforts.

The Cavallos argue this instruction, commonly known as the doctrine of avoidable consequences, misstated the law and misled the jury by erroneously introducing comparative-fault principles into the litigation. The Cavallos assert comparative fault cannot be applied to the intentional tort of bad faith under Arizona law. Acknowledging the issue appeared to be one of first impression in Arizona, the superior court declined to offer any specific comparative-fault instruction during the trial.

¶25 The Cavallos also claim the court further erred by denying their request to modify the mitigation instruction to note that the duty to mitigate could not apply if the jury found Phoenix Health's conduct was intentional. Phoenix Health maintains the instruction was correct and that it could not have caused the Cavallos prejudice even if it was erroneous because the jury never reached the issue of damages.

¶26 We need not address whether the mitigation instruction was contrary to the law because even assuming it was erroneous, it caused the Cavallos no prejudice.[2] The jury returned a defense verdict, finding Phoenix Health not liable for bad faith. The plain language of the mitigation instruction states that it applies only to the jury's calculation of damages,

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[2] The Cavallos and several past decisions of this court quote the following language from the Uniform Contribution Among Tortfeasors Act ("UCATA"), A.R.S. §§ 12-2501 to -509, to support the contention that a defendant accused of an intentional tort cannot assert comparative fault: "There is no right to comparative negligence in favor of any claimant who has intentionally, wilfully or wantonly caused or contributed to the injury or wrongful death." A.R.S. § 12-2505(A); *see, e.g.*, *Strawberry Water Co. v. Paulson*, 220 Ariz. 401, 410, ¶ 24, n.15 (App. 2008); *Preciado v. Young Am. Ins.*, 1 CA-CV 16-0082, 2017 WL 2805631 at *6, ¶ 29 (Ariz. App. June 29, 2017) (mem. decision). But this provision only applies to a "claimant," i.e., one seeking damages and not merely defending against a claim. *Wareing v. Falk*, 182 Ariz. 495, 499–500 (App. 1995).

At common law, a defendant accused of an intentional tort could not assert the defense of contributory negligence to bar the plaintiff's recovery. Restatement (Second) of Torts § 481 (1965). "Traditional legal principles prohibited comparing negligent and intentional conduct on the premise that the two were 'different in kind.'" *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 54, ¶ 18 (1998), *overruled on other grounds by State v. Fischer*, 242 Ariz. 44, 50, ¶ 18 (2017). But the purpose of UCATA, and specifically A.R.S. § 12-2506, was to establish "a system of several liability making each tortfeasor responsible for paying for his or her percentage of fault and *no more*." *Dietz v. General Elec. Co.*, 169 Ariz. 505, 510 (1991) (emphasis in original). In keeping with this goal, the statute defines fault in extremely broad terms, and our supreme court has held the definition includes intentional conduct. *Hutcherson*, 192 Ariz. at 54–55, ¶¶ 17, 19–20. Moreover, this court and our supreme court have concluded that the legislature intended UCATA to abolish several common law defenses to contributory negligence in favor of comparative fault. *Falk*, 182 Ariz. at 498–501; *Dykeman ex rel. Dykeman v. Engelbrecht*, 166 Ariz. 398, 400–01 (App. 1990). Thus, it appears UCATA may permit a defendant's intentional conduct to be compared to a plaintiff's negligence. These issues merit further discussion and resolution in the proper case.

not to any issue related to liability. Thus, the jury did not consider the mitigation instruction when determining Phoenix Health's liability.

¶27 The other instructions the court gave reinforce our conclusion that the jury did not consider the mitigation instruction. The instruction on the elements of bad faith directed the jury to consider: (1) whether "[Phoenix Health] breached the duty of good faith and fair dealing"; (2) whether "[Phoenix Health's] breach was a cause of Mr. Cavallo's damages; and (3) "[t]he amount of . . . Mr. Cavallo's damages." The instruction concerning the measure of damages further provided that "[i]f you find that the defendants are *liable* to [Mr. Cavallo] on the bad faith claim, you must then decide the full amount of money that will reasonably and fairly compensate [Mr. Cavallo.]" (Emphasis added.) Taken together with the mitigation instruction, the instructions told the jury first to determine liability. Only if it found Phoenix Health liable was it then to consider the Cavallos' damages, including the amount of damages "that could have been prevented or reduced through [Mr. Cavallo's] reasonable efforts."

¶28 The Cavallos' arguments for prejudice do not persuade us otherwise. The Cavallos make much of Phoenix Health's statement in its closing argument that "[t]he law says that, if you find that Mr. Cavallo did not act reasonably to prevent or mitigate his damages, you're going to have to rule with the defendant, or at least reduce the damages accordingly." We agree the statement did not accurately state the law, but the fact remains that it was still confined to a discussion of damages, not liability. A single erroneous statement within a lengthy closing argument generally will not overcome the presumption that the jury followed the court's instructions. *See Wendland v. AdobeAir, Inc.*, 223 Ariz. 199, 207, ¶ 28 (App. 2009). Nor do we find the Cavallos' reliance on our supreme court's decision in *Estate of Reinen v. N. Ariz. Orthopedics, Ltd.*, 198 Ariz. 283, 290, ¶¶ 22–26 (2000), dispositive here.

¶29 In *Reinen*, our supreme court concluded that an erroneous assumption-of-risk instruction prejudiced the plaintiff even though the jury returned a defense verdict on negligence and "assumption of the risk theoretically should not have become an issue until a determination of negligence was made." 198 Ariz. at 291, ¶ 26. *Reinen* turned upon the unique nature of an assumption-of-risk defense, and the jury had been given an explicit peremptory instruction on the facts underlying that defense. The decision did not create a general principle that an erroneous instruction related to damages is always *per se* prejudicial, even in the face of a defense verdict. *See, e.g.*, *Hogue*, 238 Ariz. at 367, ¶ 37 ("The instruction's

plain language indicates that it was limited to the issue of damages, and the jurors could consider damages only after they found that [the plaintiff] proved its prima facie case.").

¶30 Accordingly, the Cavallos have shown no prejudicial error in the instructions given.

B. The Superior Court Did Not Abuse Its Discretion in Making Evidentiary Rulings.

¶31 We review evidentiary rulings for an abuse of discretion. *State v. Griffith*, 247 Ariz. 361, 363, ¶ 4 (App. 2019). "In determining relevancy and admissibility of evidence, the trial judge has considerable discretion." *State v. Smith*, 136 Ariz. 273, 276 (1983).

1. The Superior Court Did Not Abuse Its Discretion by Excluding the Call Log.

¶32 The Cavallos argue the superior court abused its discretion and committed reversible error by excluding different versions of a call log that contained records of numerous phone calls made between the Cavallos, Mr. Cavallo's medical provider, other entities, and Phoenix Health.

¶33 While questioning trial witness Esmeralda Hernandez, a customer service representative supervisor for Phoenix Health during 2016, the Cavallos attempted to admit two versions of the call log. The first version showed calls between Mr. Cavallo's medical provider and Phoenix Health, and the second reflected calls involving several individuals and entities. Phoenix Health objected on foundational grounds. After hearing extensive arguments from the parties, the court stated that it was "probably going to sustain the objections because I don't think [Hernandez is] going to be able to lay the foundation for [the call log]." Nevertheless, the court permitted the Cavallos to attempt to lay sufficient foundation through Hernandez. After eliciting testimony from Hernandez identifying Mr. Cavallo's and Phoenix Health's names and calls to and from Phoenix Health on the document, the Cavallos moved to admit the second version of the call log into evidence. Phoenix Health objected on relevance and foundational grounds, and the court sustained the objections.

¶34 During Mr. Cavallo's testimony, the Cavallos sought to admit a third version of the call log. This version contained only records of calls between the Cavallos, Mr. Cavallo's medical provider, and Phoenix Health. The court sustained Phoenix Health's foundational objection, opining that

it thought it had to "sustain the objection for lack of foundation because I don't think [Mr. Cavallo] can lay it."

¶35 On appeal, the Cavallos assert the superior court erred by refusing to admit any version of the call log. Acknowledging that the foundational objections to each version of the call log included issues of both authentication under Arizona Rule of Evidence 901(a) and relevance, the Cavallos argue: (1) Phoenix Health conceded during the argument on the objections that the call log was authentic; and (2) Hernandez's, Mr. Cavallo's, and another witness's testimony established the call log's relevance. Phoenix Health responds that it conceded only that the call log was an authentic document it had produced during discovery, and this concession did not extend to the call log's contents. It also contends the call log correctly was excluded on foundational and relevance grounds.

¶36 As an initial matter, we agree that the superior court's characterization of the issue as whether Hernandez and Mr. Cavallo could "lay the foundation" for admission of each version of the call log referred both to authentication and relevance. As aptly summarized by the Utah Supreme Court:

> [F]oundation is simply a loose term for preliminary questions designed to establish that evidence is admissible. While courts often speak of laying the foundation in the singular, in truth the proponent may have to lay multiple foundations.

Wilson v. IHC Hosps., Inc., 289 P.3d 369, 397 (Utah 2012) (alteration in original) (quotations and citations omitted); *see also State v. Lavers*, 168 Ariz. 376, 386 (1991) ("Authentication and identification are aspects of relevancy that are a condition precedent to admissibility."); Ariz. Prac. § 17:22 *Procedure for Offering Documents Into Evidence*, Westlaw (database updated Sept. 2020) (step in the admission of documentary evidence is to "complete the foundation, by asking the witness questions that will establish relevance, authentication, compliance with the best evidence rule, and, if needed, an exception to the hearsay rule"); 32A C.J.S. *Evidence* § 1066, Westlaw (database updated Dec. 2020) (admissibility of a document or writing requires meeting "a number of foundational requirements" including authentication and relevancy).

¶37 Authentication questions aside, the court correctly excluded the call log because the Cavallos did not lay an adequate foundation, meaning they did not establish the predicate facts necessary to establish relevance for the admission of any of the three versions of the call log. Ariz.

R. Evid. 104(b) ("When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist."). The Cavallos argued both at trial and on appeal that each version of the call log was relevant because it allegedly showed the respective levels of effort by Mr. Cavallo, his provider, and Phoenix Health concerning his claim's processing. The Cavallos, however, elicited no testimony from either Mr. Cavallo or Hernandez indicating their knowledge of the numerous phone calls contained in the call log, including, in particular, the calls made between Phoenix Health and Mr. Cavallo's medical provider. As applicable here, "[a] witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Ariz. R. Evid. 602. To be sure, Mr. Cavallo and Hernandez might have been able to identify, based on their memories or the listed telephone numbers, the phone calls on the log in which they participated. But neither witness could establish whether the phone calls documented in the call log concerned Mr. Cavallo's claim, a necessary factual predicate to the Cavallos' asserted basis for relevance.

¶38 The Cavallos contend the MS coordinator's testimony provided the facts necessary to establish the relevance of any calls Mr. Cavallo's health provider made to Phoenix Health and vice versa. But this employee testified that Mr. Cavallo's health provider had some clients other than Mr. Cavallo with Phoenix Health policies, albeit not many, and could not recall whether she had any conversations with Phoenix Health concerning other clients. The Cavallos also did not bring the MS coordinator's testimony to the superior court's attention when seeking to admit each call log version. Accordingly, the superior court did not abuse its discretion by excluding each version of the call log.

2. The Superior Court Did Not Abuse Its Discretion by Excluding the Account Resource Guide.

¶39 The Cavallos also assert the court erroneously excluded an excerpt of an Account Resource Guide ("ARG"). As established at the trial, an ARG is a reference tool utilized by insurance employees responsible for processing and adjudicating an insured's claims. The ARG applicable to each plan offered by Phoenix Health contained information on "what [the plan's] networks [we]re, what their prescription plan is, [and] who the [p]lan contacts are." During the trial, the Cavallos sought to admit a screenshot excerpt from an ARG that stated in a red box, "NO OON Benefits." Phoenix Health objected on relevance grounds, arguing the excerpt: (1) concerned a different plan than the Cavallos' plan; and

(2) applied to the year 2017, not the year 2016. The superior court sustained the objection.

¶40 The Cavallos contend the excerpt from the ARG "cut[] to the core of [Phoenix Health's] bad faith" by revealing that Phoenix Health's "refusal to adjudicate out-of-network claims was not just practice, but written policy." As a result, the Cavallos argue the superior court abused its discretion by finding the excerpt irrelevant and excluding it.

¶41 We conclude the superior court appropriately excluded admission of the excerpt from the ARG. "The test for relevance is whether the offered evidence tends to make the existence of any fact in issue more or less probable." *State v. Fulminate*, 193 Ariz. 485, 502, ¶ 57 (1999); Ariz. R. Evid. 401. Here, the excerpt concerned a different plan type than the one at issue in the case and was dated almost a year after the timeframe relevant to the Cavallos' bad-faith claim. Thus, it did not tend to make the existence of Phoenix Health's written policies in 2016 and its treatment of Mr. Cavallo's insurance plan any more or less probable.

¶42 The Cavallos nevertheless contend that it would be unfair to affirm the court's ruling because Phoenix Health produced the excerpt in response to a specific discovery request for the relevant ARG. But the superior court must prevent the admission of irrelevant evidence, *Logerquist v. McVey*, 196 Ariz. 470, 488, ¶ 52 (2000), and the Cavallos cite no authority to support the proposition that otherwise inadmissible evidence becomes relevant merely because it was produced during discovery, *cf. Zimmerman v. Shakman*, 204 Ariz. 231, 235, ¶ 13 (App. 2003) (Arizona's disclosure rules are "designed to provide parties 'a reasonable opportunity to prepare for trial or settlement—nothing more, nothing less.'") (quoting *Bryan v. Riddel*, 178 Ariz. 472, 477 (1994)). Based on these circumstances, we cannot say the

court abused its discretion by finding the excerpt irrelevant and excluding it.[3]

¶43 Moreover, even assuming the excerpt had some minimal probative value, the Cavallos cannot establish prejudice because the evidence was cumulative of other evidence presented at trial. *State ex rel. La Sota v. Ariz. Licensed Beverage Ass'n, Inc.*, 128 Ariz. 515, 523 (1981) ("The exclusion of repetitious or cumulative evidence does not require reversal by an appellate court."); Ariz. R. Evid. 403. Uncontroverted witness testimony from two nurses employed to review and process insureds' claims established that the ARG relevant to the Cavallos' insurance plan stated that no out-of-network benefits were available. Citing *Bartlett v. Superior Court*, 150 Ariz. 178, 184 (App. 1986), the Cavallos counter that oral testimony is not an adequate substitute for a pictorial representation. But they do not persuasively explain how a visual representation of a document that could establish a provision of Phoenix Health's written policies offered distinct or additional evidentiary value beyond that provided by *undisputed* testimony.

ATTORNEY'S FEES AND COSTS

¶44 Phoenix Health requests an award of attorney's fees under A.R.S. § 12-341.01. In the exercise of our discretion, we deny the request. However, as the successful party on appeal, Phoenix Health is entitled to its costs upon compliance with Arizona Rule of Civil Appellate Procedure 21. A.R.S. § 12-341.

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[3] For the first time in their reply brief on appeal, the Cavallos assert they were entitled to introduce the ARG excerpt under the rule addressed in *Circle K Corp. v. Rosenthal*, 118 Ariz. 63, 67 (App. 1977), which states that "evidence of the existence of a particular fact before or after an act in question may be shown to indicate the existence of that same condition at the time of the accident." The Cavallos did not raise this issue in the superior court, nor did they cite to *Circle K* in their opening brief (and Phoenix Health did not raise it in its answering brief). "We will not address arguments raised for the first time in the reply brief." *Ariz. Dep't of Revenue v. Ormond Builders, Inc.*, 216 Ariz. 379, 385, ¶ 24, n.7 (App. 2007).

CONCLUSION

¶45 We affirm the superior court's judgment.

AMY M. WOOD • Clerk of the Court
FILED: AA