DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

POLLY CASANOVA, an individual; LUIS ARAGON; ISAIAH ARAGON; MICAELA ARAGON; and ALEX ARAGON, through their mother and next best friend, NAOMI MARRUFFO, Plaintiffs/Appellants, v. THOMAS P. NIMS and JANE DOE NIMS, husband and wife, Defendants/Appellees.	No. 1 CA-CV 11-0623 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-031809

The Honorable Jeanne M. Garcia, Judge

AFFIRMED

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T H U M M A, Judge

¶1 Plaintiffs Polly Casanova and her minor grandchildren Luis, Isaiah, Micaela and Alex Aragon appeal from a jury verdict and judgment in favor of defendant Thomas P. Nims on plaintiffs' claims arising out of a car accident. Plaintiffs argue the superior court erroneously allowed the jury to consider evidence of Casanova's eyesight, her driving speed and the Aragons' seatbelt use and that insufficient evidence supported the jury's verdict for Nims. Because the superior court did not abuse its discretion and because there was sufficient evidence supporting the verdict, the judgment is affirmed.

FACTS AND PROCEDURAL HISTORY[1]

¶2 At about 4:00 p.m. on an April afternoon, vehicles driven by Casanova and Nims collided in the intersection of 59th and Northern Avenues in Glendale. Nims was driving a pickup south on 59th, preparing to turn east onto Northern. Nims entered the intersection in the left turn lane on a green light, then stopped to wait for traffic to clear so he could complete the turn. While waiting, Nims heard an approaching siren and, as he attempted to locate the emergency vehicle, the traffic light

[1] Although the testimony at trial was disputed, we view the evidence in the light most favorable to upholding the jury's verdict. *S Dev. Co. v. Pima Capital Mgmt. Co.*, 201 Ariz. 10, 18, ¶ 16, 31 P.3d 123, 131 (App. 2001).

changed to yellow then red. Facing a red light, Nims checked for oncoming traffic in the northbound lanes and, seeing northbound traffic stopped at the light, began his left turn.

¶3 At this same time, Casanova was driving a car with the Aragons as passengers northbound on 59th in the left-most (or fast) lane of through-traffic. As Casanova approached the intersection at Northern, she noticed an emergency vehicle with lights and sirens activated driving southbound on 59th toward the intersection. After the emergency vehicle passed, Casanova accelerated, passed cars stopped in the other northbound lanes and was driving at about 40 miles per hour when she entered the intersection. Casanova's car and Nims' truck collided near the center of the intersection. The Aragons were treated for injuries and released within the next two days; Casanova was hospitalized for several days and then transferred to a treatment facility for another month.

¶4 Casanova and the Aragons sued Nims alleging he had negligently or recklessly failed to yield to oncoming traffic while making the left turn, thereby causing the accident. Pretrial, plaintiffs unsuccessfully moved in limine to preclude evidence related to Casanova's eyesight and the Aragons' use of seatbelts. At trial, plaintiffs unsuccessfully moved to strike Nims' expert eyesight witness. After the close of plaintiffs'

case in chief, plaintiffs moved for judgment as a matter of law[2] on the seatbelt and negligent supervision issues, which the court denied. After the close of evidence, plaintiffs moved for judgment as a matter of law on the issues of car speed and eyesight, which the court also denied. Plaintiffs did not make a pre-verdict motion for judgment as a matter of law on the sufficiency of the evidence.

¶5 After deliberating for parts of two days, the jury returned a unanimous verdict in favor of Nims and against all plaintiffs. Plaintiffs then filed motions for judgment as a matter of law and for new trial, alleging the verdict was unjustified by the evidence and the court's rulings regarding eyesight, seatbelt use and speed were erroneous and warranted a new trial. The court denied the motions and entered judgment on the jury's verdict.

¶6 Plaintiffs timely appealed. This Court has jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) section 12-2101(A)(1).[3]

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[2] Although the record refers to motions for "directed verdict," that term has been replaced with "judgment as a matter of law." *See* Ariz. R. Civ. P. 50; *Warner v. Southwest Desert Images, LLC*, 218 Ariz. 121, 127 n.4, ¶ 8, 180 P.3d 986, 992 n.4 (App. 2008).

[3] Absent material revisions after the relevant dates, statutes cited refer to the current version unless otherwise indicated.

DISCUSSION

I. Evidentiary Issues

¶7 Plaintiffs argue the superior court erred by allowing evidence of Casanova's eyesight, the speed she was driving and the Aragons' seatbelt use. This court reviews the superior court's rulings on evidentiary issues for an abuse of discretion and will reverse only for a clear abuse or legal error resulting in prejudice. *Ryan v. S.F. Peaks Trucking Co.*, 228 Ariz. 42, 46, ¶ 12, 262 P.3d 863, 867 (App. 2011).

A. Casanova's Eyesight

¶8 Plaintiffs claim the superior court erred in denying their motion in limine and allowing testimony offered by Nims from Dr. Clive Sell about Casanova's eyesight. Dr. Sell conducted an independent medical examination of Casanova, including testing her eyesight, approximately 20 months after the accident. At trial, Dr. Sell testified that, as of the date of the accident, Casanova's uncorrected vision would have been no better than 20/200 in her right eye and 20/30 in her left. Dr. Sell did not testify as to what Casanova could see on the day of the accident or whether her vision contributed to the accident. Plaintiffs argue Dr. Sell's testimony failed to show how Casanova's eyesight caused or contributed to the accident and was irrelevant, temporally remote and unfairly prejudicial.

¶9 Evidence on how the accident occurred was disputed at trial. Plaintiffs presented evidence that Casanova slowed or stopped to wait for the emergency vehicle to pass, then entered the intersection while her light remained green. Nims presented evidence that Casanova entered the intersection at 40 miles per hour against a red light. Dr. Sell's testimony was relevant to Casanova's ability to observe what happened before and during the accident, including the color of the traffic signal. *See* Ariz. R. Evid. 401 (Definition of "Relevant Evidence"). Accordingly, Dr. Sell did not have to address causation for his testimony to be admissible.

¶10 It is true that Dr. Sell appears to have relied on Casanova's medical records from 17 months before the accident and his own independent medical examination of Casanova 20 months after the accident. Although now pressing a "too remote" argument, the record on appeal contains no showing that plaintiffs raised this issue with the superior court. Accordingly, plaintiffs cannot now raise the issue on appeal. *See State v. Lujan*, 136 Ariz. 326, 328, 666 P.2d 71, 73 (1983) (motion in limine preserves for appeal only objection actually raised); *Airfreight Express Ltd. v. Evergreen Air Ctr., Inc.*, 215 Ariz. 103, 109–10, ¶ 17, 158 P.3d 232, 238–39 (App. 2007) (failure to present legal theory before superior court constitutes waiver on appeal). Even if they had raised the issue

before the superior court, the objection goes to the weight of Dr. Sell's testimony, not whether the testimony was admissible. *See Bullard v. Stonebraker*, 101 Ariz. 584, 585, 422 P.2d 700, 701 (1967). For these same reasons, Dr. Sell's testimony was not unfairly prejudicial. *See* Ariz. R. Evid. 403. Accordingly, the superior court did not err by admitting Dr. Sell's testimony.

B. Casanova's Speed

¶11 Plaintiffs argue the superior court erroneously allowed evidence that Casanova was speeding when there was no evidence she was exceeding the posted speed limit. It is not clear from the record that plaintiffs raised this issue with the superior court.[4] Even if they had, the testimony plaintiffs challenge on appeal is lay opinion that Casanova was driving 40 to 45 miles per hour when the accident occurred in the middle of the intersection. The applicable speed limit apparently was 40 miles per hour.

¶12 Nims' argument at trial was not that Casanova was exceeding the posted speed limit but, rather, given the surrounding circumstances, Casanova's speed was "greater than [was] reasonable and prudent under the circumstances, conditions

[4] Although plaintiffs suggest the speed evidence "should have been excluded at the motion in limine stage as requested by appellants," the record includes no pretrial motion seeking to preclude evidence of Casanova's speed and the transcripts designated on appeal contain no objection to this evidence when offered at trial.

and actual and potential hazards then existing." A.R.S. § 28-701(A). Taking into account the presence of an emergency vehicle, the traffic fully stopped in the other northbound lanes and the red light, the evidence was relevant to whether Casanova's speed was reasonable under these circumstances, even if within the posted speed limit. Accordingly, the superior court did not err in allowing evidence of Casanova's speed.

C. The Aragons' Seatbelt Use

¶13 Plaintiffs next argue the superior court erroneously "allowed the seatbelt defense to be submitted to the jury." In allowing the jury to hear evidence regarding seatbelt use, plaintiffs allege the superior court erred because there was no competent evidence to suggest any of the Aragons were not wearing seatbelts and because Nims offered no expert testimony to connect seatbelt nonuse to plaintiffs' injuries as required by *Law v. Superior Court*, 157 Ariz. 147, 157, 755 P.2d 1135, 1145 (1988).

¶14 It is not genuinely disputed that three of the five plaintiffs (including Casanova) were wearing seatbelts. There was conflicting evidence whether Micaela and Alex were wearing

seatbelts at the time of the accident.[5] At the time of the accident, Micaela was seven years old and Alex was nine years old; Casanova's car was manufactured in 2005.

¶15 The superior court did not give the jury the well-recognized, *Law*-based "seatbelt defense" instruction. Instead, the superior court instructed the jury that "Casanova had a duty to reasonably supervise her grandchildren . . . . [which] include[d] requiring her grandchildren to wear their seat belts." Given Casanova's relationship to the Aragons, the age of the children and the age of the car, this appears to have been an accurate statement of the law. *See* A.R.S. § 28-909(B). Given this statutory duty, which did not exist when *Law* was decided and addresses responsibility (and fault) in a different context, Nims may have complied with *Law*, failed to comply with *Law* or may have been attempting to make an argument not governed by *Law.* On the appellate record, however, this Court need not (and indeed cannot) decide that issue.

¶16 First, the appellate record does not include the transcript of arguments on jury instructions. Second, and even more critically, the appellate record does not include the

[5] Plaintiffs argue statements regarding seatbelt use contained in medical records they offered at trial lacked foundation and were hearsay. Pretrial, plaintiffs waived any foundation objections to these exhibits. Moreover, the superior court did not err by failing to exclude such evidence on hearsay grounds. *See, e.g.*, Ariz. R. Evid. 803(4); 803(6).

transcript of closing arguments to the jury. The court cannot assume that such arguments and the court's resulting decisions ran afoul of applicable law. *State ex rel. Dep't of Econ. Sec. v. Burton*, 205 Ariz. 27, 30, ¶ 16, 66 P.3d 70, 73 (App. 2003).

¶17 Apart from these critical gaps in the record on appeal, the jury instructions and verdicts cast additional light on the seatbelt issue. No *Law*-based jury instruction on the seatbelt defense was given. The only mention of seatbelts in the jury instructions was in the context of Casanova's supervision of the Aragons' seatbelt usage. This instruction did not address Nims' liability, but rather would only have applied in apportioning fault if Nims had been found liable.

¶18 The jury returned a defense verdict in favor of Nims and against all plaintiffs, including the three plaintiffs who the parties agree were wearing seatbelts. In doing so, the jury found Nims was not liable, obviating any apportionment issue. Stated differently, the jury returned a verdict of no liability on the part of Nims, not one finding Nims liable but then apportioning fault; the *Law* seatbelt defense is not implicated by such a verdict.

¶19 On the appellate record, plaintiffs have shown no error in the superior court's treatment of the seatbelt issue and have shown no resulting prejudice. *See* Ariz. Const. art. 6, § 27 (no reversal for technical error); *Gemstar Ltd. v. Ernst &*

Young, 185 Ariz. 493, 506, 917 P.2d 222, 235 (1996) (erroneous evidentiary rulings reversible only if prejudice results). Accordingly, plaintiffs have failed to show any reversible error on appeal.

II. Sufficiency of the Evidence.

¶20 Plaintiffs argue the jury lacked sufficient evidence to find no liability on the part of Nims. More specifically, plaintiffs claim undisputed evidence established Nims was negligent per se for violating his duty under A.R.S. § 28-772 to yield to oncoming traffic, so the only issue remaining for the jury was to address comparative fault and damages. Plaintiffs argue the superior court therefore erred by denying their post-verdict motion for judgment as a matter of law (JMOL). *See* Ariz. R. Civ. P. 50(b).

¶21 Assuming (without deciding) that a JMOL can be based on a claim that evidence was so overwhelming (as opposed to so lacking) that judgment must be entered in favor of one party, plaintiffs waived their opportunity to press such a motion. A pre-verdict motion for JMOL under Arizona Rule of Civil Procedure 50(a) is a prerequisite for a post-verdict Rule 50(b) motion for JMOL. *E.g.*, *County of La Paz v. Yakima Compost Co.*, 224 Ariz. 590, 607, ¶ 51, 233 P.3d 1169, 1186 (App. 2010). Here, although plaintiffs sought pre-verdict Rule 50(a) relief on the issues of eyesight, speed and seatbelts, they did not make a

pre-verdict JMOL motion on the issue of sufficiency of the evidence and thus are precluded from raising that issue in a post-verdict Rule 50(b) motion. *See Dawson v. Withycombe*, 216 Ariz. 84, 99 & n.10, ¶ 38, 163 P.3d 1034, 1049 & n.10 (App. 2007).

¶22 Even on the merits, A.R.S. § 28-772 requires a driver intending to turn left at an intersection to yield to oncoming traffic "that is within the intersection or so close to the intersection as to constitute an immediate hazard." As applied, the jury could have found Casanova's car did not constitute an immediate hazard triggering the statutory duty to yield. There was evidence at trial that Nims looked for oncoming traffic before beginning his turn but did not see Casanova's car approaching. At the time Nims began his turn, northbound traffic was stopped at a red light and cars were fully stopped in two of the three lanes. There was further testimony that, at that point, Casanova's car was at least a few car-lengths away from the intersection, but continued into the intersection at around 40 miles per hour instead of stopping for the red light. The jury could have concluded that, given the stopped northbound traffic and red light, Casanova's car was far enough away not to constitute an immediate hazard as Nims began his turn. The evidence supporting the jury's verdict amply demonstrates that,

even absent the waiver, denial of a post-verdict JMOL was proper.[6]

III. Motion for New Trial.

¶23 Plaintiffs argue the superior court erred by denying their motion for new trial on all of the grounds discussed above. The denial of a motion for new trial is reviewed for an abuse of discretion, viewing the evidence in the light most favorable to the non-moving party, and will be reversed only if there exists "no probative evidence in the record to support the ultimate verdict." *Dawson*, 216 Ariz. at 95, ¶ 25, 163 P.3d at 1045; *see also Pullen v. Pullen*, 223 Ariz. 293, 296, ¶ 10, 222 P.3d 909, 912 (App. 2009); *Smith v. Johnson*, 183 Ariz. 38, 40-41, 899 P.2d 199, 201-02 (App. 1995). Substantial deference is particularly appropriate given the superior court, having observed the witnesses and the evidence firsthand, sits as the "ninth juror" and can assess "whether the jury verdict is so 'manifestly unfair, unreasonable and outrageous as to shock the conscience.'" *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 55, 57, ¶¶ 23, 36, 961 P.2d 449, 453, 455 (1998) (citation omitted).

[6] Given this resolution, we need not address (and expressly do not address) whether plaintiffs' argument fails given Article 18, Section 5 of the Arizona Constitution, which directs that contributory negligence "at all times" is a question for the jury.

¶24 To the extent plaintiff's new trial request is based on claims of erroneous admission of evidence regarding Casanova's eyesight or speed, or plaintiffs' seatbelt use, for the reasons set forth above, no error has been shown. To the extent plaintiff's new trial request is based on insufficiency of the evidence, although disputed, there was ample evidence supporting the jury's verdict as discussed above in addressing the merits of plaintiff's JMOL challenge. Accordingly, the superior court did not err in denying plaintiff's motion for new trial. *Pullen*, 223 Ariz. at 296, ¶ 10, 222 P.3d at 912.

CONCLUSION

¶25 Because the superior court did not abuse its discretion in admitting evidence challenged on appeal or in denying plaintiff's motion for new trial, and because there was sufficient evidence supporting the verdict, the judgment is affirmed. As the prevailing party on appeal, Nims is entitled to recover costs upon compliance with Arizona Rule of Civil Appellate Procedure 21. A.R.S. § 12-341.

/S/
SAMUEL A. THUMMA, Judge

CONCURRING:

/S/
PHILIP HALL, Presiding Judge

/S/
PETER B. SWANN, Judge