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Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 07/03/2012  
RUTH A. WILLINGHAM,  
CLERK  
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IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

DAVID ARENDT and DIANA ARENDT, a ) No. 1 CA-CV 11-0734  
married couple, )  
 ) DEPARTMENT B  
Plaintiffs/ Appellants, )  
 ) **MEMORANDUM DECISION**  
v. )  
 ) (Not for Publication -  
MELVIN STIMSON, a married man; ) Rule 28, Arizona Rules  
CITY OF FLAGSTAFF, a municipal ) of Civil Appellate  
entity, ) Procedure  
 )  
Defendants/Appellees. )  
 )

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Appeal from the Superior Court in Coconino County

Cause No. S0300CV20080965

The Honorable Dan R. Slayton, Judge

**AFFIRMED**

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By Lee M. Nation  
Attorneys for Plaintiffs/Appellants

Prescott

Mangum, Wall, Stoops & Warden, PLLC  
By Kenneth H. Brendel  
Attorneys for Defendants/Appellees

Flagstaff

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**J O H N S E N**, Judge

¶1 David and Diana Arendt appeal the judgment entered against them on their tort claims against Melvin Stimson and the City of Flagstaff. For the reasons that follow, we affirm.

#### **FACTS AND PROCEDURAL HISTORY**

¶2 David Arendt was injured in a traffic accident and sued the City and Stimson, a City employee. The City accepted responsibility but disputed the severity of injuries Arendt suffered in the accident.

¶3 The City retained Kerry Knapp, Ph.D., as an expert to testify about Arendt's injuries. After Knapp's deposition, the Arendts moved to preclude Knapp from testifying, contending he was not qualified as an expert and had not been honest concerning his education. The Arendts argued that while Knapp claims he holds a master's degree in biomechanics and a doctorate in forensic biomechanics, in fact his master's is in physical education and his doctorate is in interdisciplinary studies. The City responded that any question about the veracity of Knapp's testimony should be taken up on cross-examination. Asked at oral argument whether Northern Arizona University, which issued Knapp's master's degree, actually had a degree program in biomechanics, the City's counsel conceded that "[o]ther than through the physical education, I have not been able to determine there was a Master's in biomechanics, rather it was through the physical education program."

¶14 The court denied the motion, holding Knapp qualified as an expert under Arizona Rule of Evidence 702 on the basis of his knowledge, training or education. The court ruled, however, that Knapp could not testify to having an academic degree that does not exist: “[T]he degree and the exhibit that [counsel] presented indicated he has a Master of Arts in physical education. . . . unless there is some sort of independent proof or evidence that NAU offered a Master of Arts degree in biomechanics, I am not going to allow him to make that statement.”

¶15 At trial, Knapp testified the accident did not cause Arendt’s injuries. On cross-examination, counsel for the Arendts grilled Knapp about his prior characterizations of his educational degrees. The jury returned a verdict in favor of Stimson and the City, from which the Arendts timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes (“A.R.S.”) section 12-2101(A)(1) (West 2012).<sup>1</sup>

#### **DISCUSSION**

##### **A. The Court Did Not Err by Denying the Motion to Preclude.**

¶16 The Arendts first argue the superior court erred by not precluding Knapp’s testimony because “expert witnesses who

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<sup>1</sup> Absent material revisions after the relevant date, we cite a statute’s current version.

are untruthful concerning their qualifications, should simply not be permitted to testify in our system.” The Arendts contend that because Knapp was untruthful in his deposition regarding his education, he could not qualify as an expert witness under Arizona Rule of Evidence 702.

¶7 Arizona Rule of Evidence 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Ariz. R. Evid. 702.<sup>2</sup> Whether a witness is qualified to testify as an expert is a matter primarily for the superior court, and we review such determinations for an abuse of discretion. *Englehart v. Jeep Corp.*, 122 Ariz. 256, 258, 594 P.2d 510, 512 (1979).

¶8 The Arendts offer no support for their contention that under Rule 702, prior dishonesty by an expert witness about his education bars him from testifying. The language of Rule 702 does not support their argument that “untruthfulness of an expert witness as to his qualifications should preclude his

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<sup>2</sup> Arizona Rule of Evidence 702 was revised after the trial in this matter. See Order Amending the Arizona Rules of Evidence and Rule 17.4(f), Arizona Rules of Criminal Procedure, Ariz. Sup. Ct. No. R-10-0035, at 64 (Sept. 7, 2011). We refer to the version of the rule in effect at the time of the trial.

testimony." To the contrary, "cross-examination is the appropriate tool for probing the truthfulness of a witness's statements" and is the appropriate means of testing a qualified expert witness regarding his or her educational degrees. *State v. Rivera*, 210 Ariz. 188, 190, ¶ 11, 109 P.3d 83, 85 (2005); see also *Lohmeier v. Hammer*, 214 Ariz. 57, 65, ¶ 29, 148 P.3d 101, 109 (App. 2006) (after concluding an expert was qualified to testify, this court noted that "the [opposing parties] had the opportunity to cross-examine [the doctor] about his lack of a medical degree").

¶19 Nor did the superior court err by finding Knapp was qualified under Rule 702 to testify as an expert witness regarding medical causation. Knapp was hired to perform biomechanical analyses and present an opinion as to whether the accident caused Arendt's injuries. After hearing oral argument, the superior court concluded:

The issue is the initial determination as to Dr. Knapp's knowledge, skill, experience, training, or education. The Court believes that the Trier of Fact is the best protection that our system has in determining the credibility and the weight to be provided to any witness' testimony, expert or factual. That the issue regarding a degree is an issue which may raise questions of conduct, but in looking at the transcripts and what was provided, the Court finds that Dr. Knapp qualifies on the basis of the transcript's knowledge, training or education.

¶10 Before allowing an expert witness to testify, the court must determine that the expert's testimony will assist the trier of fact on a particular issue. *Lohmeier*, 214 Ariz. at 64, ¶ 27, 148 P.3d at 108. "It is not necessary that the expert have the highest possible qualifications or highest degree of skill or knowledge . . . to testify"; an expert may qualify based on his or her actual experience or study. *Lay v. City of Mesa*, 168 Ariz. 552, 554, 815 P.2d 921, 923 (App. 1991) (alteration in original) (quotations omitted). The strength of the expert's qualifications goes to the weight the jury may give to the expert's testimony, not its admissibility. *State v. Davolt*, 207 Ariz. 191, 210, ¶ 70, 84 P.3d 456, 475 (2004).

¶11 Although Knapp's postgraduate degrees did not bear the titles he claimed (his master's of arts was not issued in biomechanics and his doctorate was not issued in forensic biomechanics), it is undisputed that he had earned a master's of arts in physical education that included coursework in biomechanics and a doctorate in interdisciplinary studies with an area of concentration identified as forensic biomechanics. On direct examination, Knapp explained the science and practice of biomechanics and how he came to work in the field. He listed the courses he took in his master's program at NAU, including biomechanics, neuroscience, kinesiology, anatomy and other independent study work in biomechanics. He stated that over 16

years, he had testified in Arizona, California and Louisiana and that of the 1,000 or so cases he had worked on, about 700 were motor vehicle accidents. Given his knowledge, training, education and experience, the superior court did not err in finding Knapp qualified as an expert witness in biomechanical causation.

**B. The Court Did Not Fail to Properly Enforce Its Pretrial Ruling at Trial.**

¶12 The Arendts next argue the superior court erred by not enforcing its pretrial ruling that Knapp could not testify falsely about what degrees he held. Prior to trial, the court ruled that it was "not going to allow [Knapp] to testify as to a degree that does not exist." The Arendts contend that nevertheless, during his trial testimony, "Dr. Knapp would never actually and clearly state what his degrees were in despite numerous questions in cross examination." They assert they were prejudiced because they were not prepared to cross-examine Knapp on these issues, having "anticipated at trial that the court would enter into this clarification of Dr. Knapp's qualifications."

¶13 On direct examination during trial, Knapp was asked about his educational background. He responded, "What is my degree in? In my view my degree is in -," whereupon the Arendts' counsel objected, and a bench conference ensued.

Consistent with the court's direction after the bench conference, the City's lawyer then asked Knapp, "The Master's degree you received from NAU in 1995, was from the Department of Physical Education, is that right?" To this, Knapp responded, "That is correct." Shortly after, still during the direct examination, the following exchange occurred:

Q: And your Ph.D. that you received from Union Institute University, you received that in interdisciplinary studies?

A: No. It is through the -

At this point, the Arendts' counsel interrupted with another objection, and another bench conference ensued. After the conference, Knapp was not questioned again during direct examination about the academic field in which his doctorate degree was awarded.

¶14 On cross-examination, the Arendts' counsel pursued the matter at some length:

Q: Go ahead and tell us what you think your degree is in.

A: There is nothing either on my degree or in my transcript that says that the degree is in anything. My transcript clearly identifies that the degree is through the Department of Physical Education, located in the College of Health Professions at Northern Arizona University.

\* \* \*

Q: Now, let's go to Union Institute and University, what is your degree in there?



A: I have a Ph.D., the program was disciplinary studies, the characterization of my work is forensic biomechanics.

On appeal, the Arendts assert that Knapp testified "he had a Ph.D. in forensic biomechanics." The only statement Knapp made to that effect, however, came at a later point during cross-examination, when the Arendts' counsel asked him, "That is true, you have a Ph.D. in forensic biomechanics?", and Knapp responded, "Not to quarrel with your semantics again, but yes, that is the way that I would characterize the work and the way that the education is documented on the transcript."

¶15 We conclude the superior court did not abuse its discretion. At the bench conference following the exchange on direct examination about Union Institute and University, the Arendts' counsel did not ask the court for a curative jury instruction; nor did he ask the court to make any ruling on the record then or following the later exchange during cross-examination. On cross-examination, moreover, Knapp testified accurately that his degrees were in physical education and interdisciplinary studies, respectively.

¶16 Moreover, the Arendts' counsel vigorously cross-examined Knapp about statements he had made during his deposition about his educational background. A trial witness can be impeached "by a showing that he has previously made

statements inconsistent with his present testimony." *State v. Caldwell*, 117 Ariz. 464, 473, 573 P.2d 864, 873 (1977). While the Arendts may have been frustrated by Knapp's trial testimony, at no time did Knapp violate the superior court's order forbidding him from testifying he possessed degrees that he did not.

¶17 On the record presented, the court did not fail to properly enforce its pretrial ruling.

**CONCLUSION**

¶18 For the reasons set forth above, we affirm the superior court's judgment. The City requests we award sanctions pursuant to Arizona Rule of Civil Procedure 68. We award the City its costs on appeal, conditioned on compliance with Arizona Rule of Civil Appellate Procedure 21. The City may apply to the superior court for any appropriate Rule 68 sanctions.

/s/  
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DIANE M. JOHNSEN, Judge

CONCURRING:

/s/  
\_\_\_\_\_  
JON W. THOMPSON, Acting Presiding Judge

/s/  
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SAMUEL A. THUMMA, Judge