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

RAYMOND R GREENWOOD; TASHA GREENWOOD; MARITA GREENWOOD and ARIZONA GREENWOOD, natural children of Raymond Greenwood and Tasha Greenwood, by and through Raymond Greenwood and Tasha Greenwood, Plaintiffs/Appellants, v. MEPAMSA, a foreign corporation; CAMPING WORLD, INC., a foreign corporation, Defendants/Appellees.	No. 1 CA-CV 11-0782 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Apache County

Cause No. S0100CV2008087

The Honorable Donna J. Grimsley, Judge

REVERSED AND REMANDED

Baird, Williams & Greer, LLP — Phoenix
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S W A N N, Judge

¶1 Raymond Greenwood, Tasha Greenwood, and their two minor children were injured in a flash fire that occurred when Raymond attempted to turn on the catalytic heater that the family used to heat their trailer home. The Greenwoods brought a product liability action against Mepamsa, the heater's original equipment manufacturer; Camco Manufacturing, Inc., the domestic manufacturer and distributor; and Camping World, Inc., the retailer. They also sued AmeriGas Propane Limited Partnership, the company that connected the heater to its propane tank, on a negligence theory. Before trial, Camco, AmeriGas, and third-party defendant U.S. Catalytic Corporation settled. The jury returned a verdict in favor of Mepamsa and Camping World on the remaining strict liability claims.

¶2 The Greenwoods timely appeal and raise multiple claims of error. Our review reveals several grounds for reversal. We conclude that the superior court abused its discretion by excluding certain expert testimony, by admitting certain evidence concerning the heater's safety history, by admitting evidence of Raymond's history of domestic violence, and by

instructing the jury that it could draw an adverse inference against the Greenwoods based on spoliation of evidence. Accordingly, we reverse and remand for a new trial.

FACTS AND PROCEDURAL HISTORY

¶3 In early 2006, Raymond and Tasha Greenwood moved into a trailer near Concho, Arizona. That fall, Tasha's parents purchased an "Olympian Wave 8" catalytic heater from a Camping World store and gave it to the Greenwoods as a gift. Mepamsa, a Spanish company, was the original equipment manufacturer for the heater. The heater was manufactured and distributed domestically by either Camco or its predecessor, U.S. Catalytic.

¶4 The Greenwoods used the heater to heat the trailer during the winter of 2006. The next year, they hired AmeriGas to connect the heater to a new propane tank. An AmeriGas representative connected the heater as well as a stove to an outdoor tank in December 2007, and also installed a pressure regulator on the tank.

¶5 A few hours after AmeriGas completed that work, the Greenwoods and their two young children left the trailer for an out-of-town trip. Upon returning to the trailer two nights later, the family started the heater, found it to be working normally, and went to sleep. Later, Raymond awoke to a cold trailer and a heater that was not operating. When he attempted to turn the heater on, he heard a loud "whoosh," and the trailer

filled with flames. He and his wife were seriously burned, and their children also suffered injuries.

¶6 The Greenwoods brought an action against Mepamsa, Camping World, and Camco for strict liability, and against AmeriGas for negligence. U.S. Catalytic was later joined as a third-party defendant. Before trial, the Greenwoods settled first with Camco and U.S. Catalytic, and then with AmeriGas. The matter proceeded to a jury trial on the strict liability claim against Mepamsa and Camping World. After a ten-day trial, the jury returned a verdict in favor of Mepamsa and Camping World. The Greenwoods' motion for a new trial was denied, and they timely appeal. We have jurisdiction under A.R.S. § 12-2101.

DISCUSSION

¶7 The Greenwoods contend that the superior court erred by excluding expert witness testimony; by admitting evidence regarding the AmeriGas settlement, the heater's safety history, and Raymond's history of domestic violence; and by issuing jury instructions regarding spoliation of evidence and the AmeriGas settlement. We address each issue in turn. We conclude that several of these issues provide independent grounds for reversal, and we discuss each of them for purposes of future proceedings on remand.

I. EXCLUSION OF EXPERT WITNESS TESTIMONY

¶8 Before trial, the court ruled that the Greenwoods could call two causation experts but limited the scope of each expert's testimony to separate theories. At trial, the first expert's testimony included a brief, unsolicited statement that was relevant to the theory reserved for the second expert. Several days later, on the defendants' motion, the court ruled that because of this testimony, the second expert could no longer testify. The Greenwoods contend that this ruling was an abuse of discretion warranting reversal. We agree.

A. Background

¶9 After settling with AmeriGas shortly before trial, the Greenwoods disclosed that they intended to call not only the causation expert that they had retained, David Komm, but also the causation expert that AmeriGas had retained, Jay Freeman. Mepamsa and Camping World moved in limine to preclude Freeman as a witness, arguing that the Greenwoods' use of Freeman was untimely disclosed and his testimony would violate the one-expert-per-issue presumption of Ariz. R. Civ. P. 26(b)(4)(D). The Greenwoods responded that Freeman had been timely disclosed by AmeriGas and would opine about a different theory of causation than Komm -- Komm would testify about the Greenwoods' theory of causation, and Freeman would counter the causation theory put forth by Mepamsa and Camping World's expert, Richard

Roby. The Greenwoods explained that Komm would opine that the heater's lack of an internal "inlet screen" allowed debris to enter the heater's safety valve and hold it open so that propane escaped and was ignited when Raymond attempted to turn on the heater. Then, Freeman would describe his testing of and disagreement with Roby's opinion, which was that the position in which AmeriGas installed the regulator allowed rainwater to enter it, freeze, and cause overpressure that resulted in the overrelease and ignition of propane when Raymond attempted to turn on the heater. After considering the parties' arguments, the court ruled that the Greenwoods could call both Komm and Freeman, but limited the scope of Komm's testimony to the inlet screen theory and the scope of Freeman's testimony to the regulator theory.

¶10 Komm testified on the second and third days of trial. On direct examination, Komm described how he had considered various hypotheses before concluding that the fire was caused by the heater's lack of an internal inlet screen. He explained that his initial hypotheses included "regulator failure" and "regulator freezeup or some other weather-related phenomena," and stated that he had tested the regulator two times and found it to be working normally both times. He also described the regulator's vent system and the weather conditions the night of the fire.

¶11 The Greenwoods did not ask Komm whether he agreed with Roby's opinion that the regulator was the cause of the fire. But Komm volunteered his opinion on that issue in response to a different question:

> Q. I would like to get back to the hypothesis that you talked about. Did you come up with some hypotheses; did you look at more than one hypothesis?
>
> A. Yes.
>
> Q. Please tell us what they were.
>
> A. Well, we reevaluated is it possible there was a leak. No evidence to support that at all. We checked every line and tube and looked for anyplace that fugitive propane could have came out. So that hypothesis we reevaluated again and discarded that.
>
> Q. By leak, do you mean on ongoing leak?
>
> A. A flaw in the line, a flaw in the fitting, a flaw in a crimp. We had tested that very thoroughly, but we go through that process again to make sure. It's like, okay, did we miss anything. We had tested the regulator. We mentioned that before. It seemed to operate fine. By seemed to operate fine, when we did the group inspection in March, we operated it at various pressures and it operated completely as expected, right to the specifications. *Is it possible the regulator failed? Well, when regulators fail, they tend to fail like catastrophically and so they don't fix themselves; a spring breaks or a connection inside breaks. They're very robust devices, very solid, very rare to see a failure. Is it possible the regulator failed? No. I mentioned it was freezing. There was weather that day that was at or near freezing and some traces of rain. Is it possible that that had anything to do with it? Unlikely. Regulators are designed to operate out in these conditions, as this regulator was. It was the only component that was outside. All the others were inside and protected. So, no, it's unlikely that would have caused anything.*

> [Defense counsel]: Can we proceed in a question-and-answer basis?

(Emphasis added.)

¶12 Mepamsa and Camping World did not object to or otherwise comment on Komm's soliloquy and did not cross-examine Komm about his opinion that it was unlikely the regulator had failed.[1] It was not until the sixth day of trial, during a discussion about witness scheduling, that Mepamsa and Camping World argued that the Greenwoods could no longer call Freeman because Komm had made statements about the theory reserved for Freeman. Mepamsa and Camping World read Komm's testimony aloud and, without clarifying that the opinion was in the form of a soliloquy with an internal question-and-answer style, characterized the opinion as a "response to [the Greenwoods'] questions" asked "on direct." The court expressed concern that the "questions were very specific about the regulator" and

[1] Without any citation to the record, Mepamsa and Camping World assert on appeal that they "were required to cross-examine [Komm] about" his opinion that the regulator had not failed. Our review of the transcript reveals that the focus of the cross-examination was the inlet screen theory of causation, not the regulator theory. The relatively few questions concerning the regulator were limited to factual inquiries about whether the regulator was installed according to code, and hypothetical inquiries about whether ice in a regulator may cause overpressure and whether a regulator that once had ice in it could later function normally *if* it were assumed that the ice caused no damage.

"asked for [Komm's] ultimate conclusion on the regulator." It then ruled that Freeman could no longer testify.

¶13 The Greenwoods promptly moved for reconsideration, arguing that Komm's brief, generalized opinion concerning the regulator theory was very different from the specific testimony they had expected to present through Freeman. In response, Mepamsa and Camping World again read Komm's opinion testimony to the court (this time distinguishing between counsel's questions and Komm's responses), and also read portions of his factual testimony concerning the regulator. The court denied the motion for reconsideration but ruled that the Greenwoods could again call Komm on rebuttal to testify about the regulator theory, upon making an offer of proof of how his rebuttal testimony would differ from his original testimony. The Greenwoods never made that offer of proof, and Komm did not testify in rebuttal.

B. The Preclusion of Freeman's Testimony Was an Abuse of Discretion.

¶14 The court appropriately exercised its discretion to allow both Komm and Freeman to testify, and appropriately exercised its discretion to limit the scope of their testimony. *See* Ariz. R. Civ. P. 26(b)(4)(D) (one-expert-per-issue presumption may be rebutted for good cause); *Felder v. Physiotherapy Assocs.*, 215 Ariz. 154, 167, ¶ 69, 158 P.3d 877, 890 (App. 2007) (court has broad discretion in defining scope of

"issue" for purposes of one-expert-per-issue presumption); *Baroldy v. Ortho Pharmaceutical Corp.*, 157 Ariz. 574, 589, 760 P.2d 574, 589 (App. 1988) (court has discretion regarding whether to admit or limit experts' testimony). But the court reversed that ruling mid-trial based on Komm's unsolicited testimony, leaving the Greenwoods with no expert witness to testify on a subject critical to their case. This mid-trial reversal was unwarranted, highly prejudicial and constituted an abuse of discretion.

¶15 The majority of Komm's short regulator-related statement was purely factual, describing how he inspected and tested the regulator while using a scientific process of exclusion to come to the conclusion that the fire was caused by the heater's lack of an inlet screen. The portion of Komm's testimony that presented an opinion about the regulator's role in the fire was unsolicited, brief and incomplete. It was also very general. He opined in passing that the regulator had not failed because a damaged regulator will not later work normally and regulators are made to withstand bad weather. He offered no further details and was not asked to elaborate by either side -- presumably because both sides expected Freeman to address the subject later. Notably, Komm omitted any analysis of a key factor of both Roby's and Freeman's opinions -- namely, the angle at which the regulator was installed.

¶16 In context, Komm's statements may be fairly described as a brief account of a disproved hypothesis -- a predicate explanation for his ultimate conclusion. This brief and unsolicited reference did not warrant the exclusion of Freeman's testimony. *Cf. Pipher v. Loo*, 221 Ariz. 399, 403, ¶ 15, 212 P.3d 91, 95 (App. 2009) (causation expert's opinion that defendant did not meet the standard of care was admissible as a predicate to his opinion that the violation of the standard of care caused plaintiff's injury). Further, Komm's testimony was not cumulative of Freeman's. According to the Greenwoods' proffer, if allowed to testify, Freeman would have testified in detail about how he disproved Roby's theory by testing whether the position of the Greenwoods' regulator would have allowed water to enter, whether ice in the regulator would cause significant overpressure, whether a regulator with blocked vents would malfunction, and whether overpressure coupled with an attempt to turn on the heater would cause a fire. Komm's testimony simply did not meaningfully address these topics. Freeman's testimony therefore was not cumulative under Ariz. R. Evid. 403 or Ariz. R. Civ. P. 26(b)(4)(D). *See Sanchez v. Old Pueblo Anesthesia, P.C.*, 218 Ariz. 317, 322, ¶ 18, 183 P.3d 1285, 1290 (App. 2008) (purpose of Rule 26(b)(4)(D) is to limit cumulative evidence). To the extent there was any overlap, the overlap did not justify excluding Freeman. *Cf. Perguson v.*

Tamis, 188 Ariz. 425, 937 P.2d 347 (App. 1997) (holding that when the plaintiff's first-disclosed expert on standard of care and causation proved unable to provide an opinion on causation at deposition, the total preclusion of plaintiff's second-disclosed expert, who was able to provide an opinion on causation, was an abuse of discretion under Rule 1(D)(4) of the Uniform Rules of Practice for Medical Malpractice Cases, despite that rule's "one expert per issue" presumption).

¶17 The exclusion of Freeman based on an objection raised days after Komm's allegedly improper testimony was also prejudicial error in itself. Had Mepamsa and Camping World raised the objection while Komm was still available to testify, the Greenwoods might have been able to mitigate the effect of the ruling. Because the objection came days later, however, the Greenwoods were unable to meaningfully address in their case-in-chief the defense's theory of causation, and the remedial measure offered by the court -- the opportunity to recall Komm on rebuttal -- was inadequate to cure that prejudice.

II. ADMISSION OF EVIDENCE REGARDING THE GREENWOODS' PRIOR CLAIMS AGAINST A SETTLING PARTY

¶18 The Greenwoods contend that evidence of their pretrial settlement with AmeriGas was improperly admitted at trial, in

the form of Raymond's cross-examination and a jury instruction.[2] We will not reverse an evidentiary ruling absent a clear abuse of discretion resulting in prejudice. *Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 506, 917 P.2d 222, 235 (1996). We conclude that the trial court's order permitting inquiry into the settlement with AmeriGas was error and, because we remand on other grounds, address the issue to prevent a similar error at the new trial.

A. Background

¶19 After settling with Camco and U.S. Catalytic, the Greenwoods moved in limine to preclude evidence of the settlement and their previous claims against those parties. After settling with AmeriGas, the Greenwoods expanded the motion to include the settlement with and claims against AmeriGas as well.

¶20 Before trial, the court ruled that the Greenwoods' complaint, which included allegations against each of the settling parties, could be read at trial "as is." During the trial, the court explained its ruling regarding the admissibility of the fact of settlement as follows:

> [T]he plaintiffs are trying to get as much money out of these defendants as possible, and if the jury is led to believe that these defendants are the only

[2] We consider only the cross-examination in this Section II; we consider the jury instruction in Section VI below.

> people that they can collect from and that they didn't receive anything at all from AmeriGas and won't, which is where we are right now, then I think -- I mean I just think they're being dishonest. I think it's an issue of dishonesty, and it supports -- their bias is against these defendants. Their bias -- and that's -- maybe I'm not articulating it very well.

The court ultimately ruled that the Greenwoods could be cross-examined about the fact of settlement.

¶21 Despite the court's ruling, Mepamsa and Camping World did not cross-examine the Greenwoods about the fact of settlement. Instead, Mepamsa and Camping World asked Raymond to confirm that AmeriGas had questioned Raymond at his deposition but was no longer involved in the case:

> Q. Sir, let's go back to the page before [in your deposition transcript]. The questions were being asked there by the lawyer for AmeriGas; is that right, [it was] Mr. Wilson?
>
> A. Yes.
>
> Q. AmeriGas isn't in this courtroom right now, is it, sir?
>
> A. I don't know if AmeriGas is here or not.
>
> . . . .
>
> Q. Sir, you sued AmeriGas, did you not?
>
> A. Yes, I did.
>
> Q. And counsel for AmeriGas was asking you questions at that deposition; isn't that true?
>
> A. Yes, he was.
>
> . . . .

Q. But to the best of your knowledge, AmeriGas is not still in this lawsuit, is it, sir?

A. To the best of my knowledge --

Q. Answer that yes --

A. No.

Q. No, they're not, right?

A. No.

Next, Mepamsa and Camping World read aloud the allegations of the Greenwoods' complaint that related to their claims against AmeriGas, and Raymond acknowledged that the reading was accurate. Mepamsa and Camping World then asked Raymond if he had heard one of the Greenwoods' expert witnesses testify that he believed the fire was AmeriGas's fault, and Raymond responded that he was unsure.

B. Evidence of the Fact of Settlement Was Inadmissible, and Evidence of the Plaintiffs' Earlier Allegations Carried a High Risk of Prejudice and Little Probative Value.

¶22 The Greenwoods contend that Mepamsa and Camping World's cross-examination of Raymond violated Ariz. R. Evid. 408. We agree and note that the trial court would have abused its discretion under Rule 403 even if it had not been limited by Rule 408. Rule 408 provides that evidence of "furnishing, promising, or offering -- or accepting, promising to accept, or offering to accept -- a valuable consideration in compromising or attempting to compromise a claim" and evidence of "conduct or

a statement made during compromise negotiations about the claim" is inadmissible to prove or disprove the validity or amount of the claim or to impeach by a prior inconsistent statement or contradiction. Ariz. R. Evid. 408(a). Such evidence is admissible only if offered for another purpose, such as proving witness bias or prejudice. Ariz. R. Evid. 408(b).

¶23 Here, the Rule 408 error lies not in the manner in which Mepamsa and Camping World cross-examined Raymond, but in the court's invitation to introduce evidence about the fact of his settlement with AmeriGas. The court's stated reason for allowing testimony concerning settlement was to expose the Greenwoods' "dishonesty" in seeking to recover from the defendants at trial after they had settled with AmeriGas. We find no "dishonesty" inherent in the relatively common situation when a plaintiff in a multi-defendant case settles with some defendants and proceeds to trial against other defendants. By statute, Arizona law is structured to prevent duplicate or overlapping recoveries in cases involving multiple alleged tortfeasors. When, as here, a defendant settles and is designated a non-party at fault, the jury is instructed to reduce the plaintiff's recovery by the percentage of fault attributed to the settling defendants. A.R.S. § 12-2506. The integrity of the Arizona comparative fault system is compromised when the court allows evidence that invites the jury to

speculate that it is being duped into facilitating multiplicitous recoveries. The role of the trial court when a settling defendant becomes an "empty chair" is to take steps to *prevent* the prejudice that might flow from jury speculation. The court's ruling here invited the opposite result: to ensure that the jury would view the Greenwoods less favorably by inferring that AmeriGas had paid them to be absent from the trial. Accordingly, on this record, the Greenwoods' motion in limine should have been granted.

¶24 We note that defense counsel treaded relatively lightly on the issue, especially in view of the scope of the license that the trial court afforded. None of the testimony elicited during Raymond's cross-examination was direct evidence of an offer to compromise, acceptance of an offer to compromise, or conduct or statements made during compromise negotiations. *See* 23 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5311 ("Courts must not confuse the use of evidence of compromise as a prior inconsistent statement with the use of a prior claim for that purpose. . . . Rule 408 only bars evidence of compromise, it does not bar evidence of claims."). And while the Greenwoods' earlier allegations against AmeriGas may be evidentiary admissions and non-hearsay under Rule 801, *Henry v. HealthPartners of S. Ariz.*, 203 Ariz. 393, 396, ¶¶ 9-10, 55 P.3d 87, 90 (App. 2003), we note that on

this record the probative value of the prior allegations was minimal and the risk of prejudice substantial.

III. ADMISSION OF EVIDENCE REGARDING THE HEATER'S SAFETY HISTORY

¶25 Mepamsa and Camping World introduced evidence at trial that there was an absence of prior similar accidents with the Greenwoods' model of heater. The Greenwoods contend that this was error. We review for an abuse of discretion, *see Isbell v. State*, 198 Ariz. 291, 293, ¶ 9, 9 P.3d 322, 324 (2000), and conclude that the evidence was erroneously admitted on this record.

A. Background

¶26 In their opening statement, Mepamsa and Camping World asserted that "[t]here's no evidence of other accidents with this heater" and "there is no other accident like this[.]" Two trial days later, the Greenwoods moved that the jury be instructed to disregard those statements and that Mepamsa and Camping World be precluded from introducing evidence regarding the absence of prior similar accidents. The Greenwoods argued that the preclusion of this type of evidence was required because Mepamsa and Camping World had not disclosed or established the foundation prescribed by *Jones v. Pak-Mor Mfg. Co.*, 145 Ariz. 121, 700 P.2d 819 (1985). The court declined to strike these portions of the opening statement and explained that it would postpone its ruling on the evidentiary issue until

such time as Mepamsa and Camping World could provide the appropriate foundation.

¶27 Later that day, Mepamsa and Camping World presented the videotaped deposition testimony of Robert Mancari, a Camco employee. Citing *Pak-Mor*, the Greenwoods objected to a portion of the testimony in which Mancari stated that, to his knowledge, Camco had never reported problems with the heater to consumers, retailers or the federal consumer product safety commission, because it did not believe any problems existed. Mepamsa and Camping World responded to the Greenwoods' objection by arguing that the testimony was a relevant follow-up to Mancari's description of Camco's warranty repairs and testing. The court agreed with Mepamsa and Camping World, overruled the Greenwoods' objection, and allowed the testimony to be presented.

¶28 The next day, Mepamsa and Camping World called former Mepamsa employee Carlos Ibañez to testify. Ibañez testified that he had worked in export servicing for Mepamsa for approximately 20 years, ending in 2004 or 2005 (one or two years before the purchase of the heater at issue in this case). He then testified that he had been in a position to know about any complaints about the heater:

> Q. Yes, and were you -- if there were complaints about the Wave 8 Olympian heater, would you receive those complaints; would you become aware of them?

> A. Yes, sure, because I was the only contact, direct contact with the distributors. So all the product that -- the product definitions were done in cooperation with the distributor, the different international distributors and myself; and the same for reporting of the heater, reporting of problems also was done directly with the commercial department. So yes, I was involved in the knowledge of whatever problems may happen in the market.

The Greenwoods did not object to this testimony. But they did object when Mepamsa and Camping World followed up by asking whether Ibañez had known about any complaints of a problem like that described by the Greenwoods' theory of causation:

> Q. Sir, did you ever hear, one time, about somebody having a problem with foreign debris getting caught in an inlet valve?
>
> . . . .
>
> [Plaintiffs' counsel]: Two serious objections. One is, Mr. Ibañez was not disclosed for testifying about any of this stuff about problems.
>
> . . . .
>
> [Plaintiffs' counsel]: Secondly, the questioning so far has been tremendously misleading. When he talks about 80,000 heaters a year, or whatever it is, those are not Wave 8 heaters that were distributed only in the U.S. through Camco. So there are other types of heaters and it's dissimilar, and it's really not fair to let him talk about other kinds of heaters.

The court ruled that Mepamsa and Camping World would have to provide additional foundation about what type of heater the question concerned, and they did so. Mepamsa and Camping World then re-asked the question without objection, and Ibañez answered:

> Q. Let me come back to now that question I asked you before. Did you ever hear, in connection with any of those heaters that had safety control valves of the type that's involved in the product at issue, that debris was ever caught in the control valve and prevented it from closing completely?
>
> A. I would like to -- yes. The answer is no. Yeah.

B. The Admission of Evidence Regarding the Heater's Safety History Was an Abuse of Discretion.

¶29 In *Pak-Mor*, the supreme court held that in design defect cases, the proponent of evidence concerning the absence of prior similar accidents faces a significant foundational burden. 145 Ariz. at 128, 700 P.2d at 826. The court explained that "the problems of prejudice, inability of the opposing party to meet the evidence, and the danger of misleading the jury are substantial." *Id.* at 126, 700 P.2d at 824. A "defendant's 'lack of notice' of injury does not establish the fact that no injuries had occurred, and . . . a 'long history of good fortune' may not preclude the conclusion that the product was defective and unreasonably dangerous." *Id.*

¶30 Under *Pak-Mor*, the court must consider the difficulty of rebutting an allegation of no prior accidents, the plain nature of the danger, the similarity of use and length of exposure to the danger, and the extent of the product experience sought to be proved. *Id.* at 126-27, 700 P.2d at 824-25. These considerations enable a court to determine whether there is

foundation for the proposition that "if there had been prior accidents, the witness probably would have known about them." *Id.* at 127, 700 P.2d at 825. *Pak-Mor* explained that the burden to meet this evidentiary predicate is "formidable," and must be met by evidence of some method by which the defendant probably would have been made aware of accidents or near-accidents resulting from the product's use. *Id.* Such methods may include the use of safety departments that determine whether accidents occur; customer surveys to determine whether particular uses of the product have produced particular types of injuries; systems that encourage the reporting of accidents, and that then provide for investigation and data compilation; and government data compilations. *Id.* If the evidence is "no more than testimony that no lawsuits have been filed, no claims have been made, or 'we have never heard of any accidents,' the trial judge generally should refuse the offered evidence since it has very little probative value and carries much danger of prejudice." *Id.*

¶31 In *Boy v. I.T.T. Grinnell Corp.*, we applied the *Pak-Mor* test and concluded that the required "heavy burden" had not been met. 150 Ariz. 526, 530, 532, 724 P.2d 612, 616, 618 (App. 1986). In *Boy*, the superior court allowed one of the defendant's engineers to testify that over the 50 years the defendant's product had been on the market, the defendant had

received no complaints that the product caused injury or property damage. *Id.* at 529, 724 P.2d at 615. The foundational evidence offered to support this testimony was that the engineer was a product development manager, made trips to the field to observe installations of the product, was responsible for responding to customer complaints, and would have known if the defendant had received reports of the product defect alleged by the plaintiff. *Id.* at 531-32, 724 P.2d at 617-18. We concluded that this vague evidence "suffer[ed] the very shortcoming that *Pak-Mor* cautioned about: it failed to show that if there was information available about accidents, that [the engineer] would have known of such information." *Id.* at 532, 724 P.2d at 618. We also observed that a record of no consumer complaints is of limited value where a product is inexpensive, because a consumer might simply take the loss on a defective unit rather than expend time and money to report the problem. *Id.* We reversed and remanded because "it [wa]s entirely possible that the verdict might have been in favor of [the plaintiff] had the safety history not been admitted." *Id.*

¶32 On the other hand, we concluded that the *Pak-Mor* test had been met in *Jimenez v. Sears, Roebuck & Co.*, 180 Ariz. 432, 435, 885 P.2d 120, 123 (App. 1994), *vacated in part on other grounds*, 183 Ariz. 399, 904 P.2d 861 (1995). In *Jimenez*, the defendant's offer of proof showed that the defendant maintained

myriad systems designed to collect information about accidents: its service center impounded all tools brought in for service when an accident or defect was alleged; it retained a news clipping service that clipped relevant articles from domestic and foreign newspapers; it retained a nationwide claims investigation and management service; it trained its sales force to question retail customers about accidents and product performance, and demonstrate the product and teach product safety to end users; it provided all end users with product-performance survey cards; it maintained a toll-free telephone number for customer calls; and it received relevant reports from two federal government agencies. *Id.* at 435, 885 P.2d at 123. Based on this detailed offer of proof, we held that the superior court's preclusion of the safety-history evidence was reversible error. *Id.*

¶33 Here, the Greenwoods contend that the evidentiary predicate required by *Pak-Mor* was lacking. On appeal, they do not raise this challenge with respect to the admission of Mancari's testimony. They have therefore waived the issue. *Schabel v. Deer Valley Unified Sch. Dist. No. 97*, 186 Ariz. 161, 167, 920 P.2d 41, 47 (App. 1996). Nonetheless, because this case must be retried, we note that Mancari's testimony lacked sufficient foundation on this record to satisfy the requirements of *Pak-Mor*.

¶34 With this background, we turn to the question whether Ibañez's testimony *w*as inadmissible under *Pak-Mor*.[3] The evidence showed that Ibañez worked for Mepamsa and received consumer complaints from product distributors. Ibañez testified that each heater was assigned a serial number and came with a warranty card that consumers could return -- and did, in "a very good amount" -- to U.S. Catalytic and Camco. He also testified that he attended annual meetings at which distributors would report problems to Mepamsa, and they received annual reports from the distributors regarding under-warranty parts substitutions on consumer returns.

¶35 The type of system that Ibañez described falls short of the vigorous and diversified efforts shown in *Jimenez*, but nonetheless could, if supported by sufficient evidence, potentially satisfy the minimum required by *Pak-Mor*. *See Pak-*

[3] Mepamsa and Camping World contend that the Greenwoods waived this issue on appeal because they did not specifically object to Ibañez's testimony on *Pak-Mor* grounds, and they also elicited testimony about customer complaints. When a motion in limine is decided, the objections therein are preserved for appeal even if not specifically renewed at trial. *State v. Burton*, 144 Ariz. 248, 250, 697 P.2d 331, 333 (1985). But when the motion has not yet been ruled on and both parties have elicited relevant testimony, the failure specifically to object at trial may constitute waiver. *Golonka v. General Motors Corp.*, 204 Ariz. 575, 586, ¶ 34, 65 P.3d 956, 967 (App. 2003). Here, we conclude that when the court allowed Mancari to testify about Camco's accident reporting, it effectively ruled on the Greenwood's motion in limine. We therefore find no waiver with respect to Ibañez's testimony.

Mor, 145 Ariz. at 127, 700 P.2d at 825 (Methods that may ensure probable knowledge of accidents include "a system with [the defendant's] insurers, distributors, or retailers whereby retail customers are encouraged to report accidents, accidents are investigated, and data is compiled."); *Jimenez*, 183 Ariz. at 435, 904 P.2d at 123 (detailing the many efforts the defendant made to keep itself apprised of problems with its product). But here, as in *Boy*, the evidence was insufficient. No evidence was provided to show that Ibañez, who left Mepamsa's employ well before the heater's purchase, the fire, and the trial, had up-to-date knowledge of the heater's safety history. Further, as in *Boy*, the evidence concerning the state of Ibañez's knowledge during his employment was vague. Ibañez was unable to explain how problems presented at annual meetings and in warranty reports were documented or investigated. In short, the evidence was insufficient to show that procedures were in place to ensure that Ibañez would probably have been made aware of all accident information. Finally, though Mepamsa and Camping World argue on appeal that other evidence introduced at trial suggested that government and nonprofit organizations may collect data on heater accidents, there is no evidence that Mepamsa ever received or used such data.

¶36 The foundational evidence presented at trial fell short of the rigorous *Pak-Mor* standard. The superior court

therefore abused its discretion by allowing Ibañez to testify that there were no prior similar accidents. Our holding does not preclude Mepamsa and Camping World from offering additional foundational evidence from properly disclosed sources on remand.

IV. ADMISSION OF EVIDENCE RELATED TO RAYMOND'S HISTORY OF DOMESTIC VIOLENCE

¶37 There is a significant history of domestic violence in the relationship between Raymond and Tasha. Raymond was also convicted for shooting his former wife. The trial court permitted introduction of evidence concerning this history in numerous forms -- both to impeach credibility and to undercut the Greenwoods' various loss of consortium claims. We review for a clear abuse of discretion, and will not reverse unless an evidentiary error caused prejudice. *Gemstar*, 185 Ariz. at 506, 917 P.2d at 235. We conclude that though some portions of the evidence were properly admissible, the court permitted significant inquiry into areas that were substantially more prejudicial than probative, with palpable prejudicial effect. We discuss each area of inquiry in turn.

A. Background

1. Motion in Limine

¶38 At his deposition, Raymond acknowledged that he had a criminal record, but professed an inability to provide details. Mepamsa and Camping World later disclosed court records, police

reports, and correspondence showing that Raymond has a criminal history related to domestic violence, and the Greenwoods moved in limine for an order precluding Mepamsa and Camping World from using that information at trial. Mepamsa and Camping World responded that the records were relevant and admissible to impeach Raymond and to show that the Greenwoods' psychological harm and loss of consortium were the product of domestic violence, not the accident. After hearing oral argument, the court ruled: "Defense may bring up the criminal issues denied in deposition, upon cross examination, not during direct. As to the extent regarding those prior acts, the Court will not exclude them."

2. Evidence Admitted at Trial

¶39 At trial, Mepamsa and Camping World introduced evidence of Raymond's domestic violence through their cross-examination of three witnesses: the Greenwoods' life-care planner, Raymond, and Tasha.

a. Cross-examination of the Life-care Planner

¶40 The life-care planner testified first, describing the lifetime care she believed Raymond, Tasha, and their older child would require. Specifying that her recommendations were based only on the injuries and aftermath from the fire, the planner testified that she believed the child's needs included

neuropsychological evaluations and tutoring to address behavioral and learning problems.

¶41 On cross-examination, Mepamsa and Camping World sought to question the planner about whether she took the family's domestic violence issues into account when making her recommendations for the child's care. Over the Greenwoods' objection, the court ruled that the proposed cross-examination was permissible because the jury was entitled to know that trauma other than the fire could have contributed to or caused the child's psychological problems. Accordingly, Mepamsa and Camping World then asked the planner whether she was "aware of the issues concerning domestic violence between Raymond and Tasha," and the planner responded that she "was told about some problems with that" before her deposition. Mepamsa and Camping World then asked the planner whether she had taken "the issues of domestic violence" into consideration when making her recommendations for the child's treatment, and the planner reiterated that her recommendations were based on the family's burn injuries only.

b. Cross-examination of Tasha

¶42 Tasha Greenwood later testified. On direct examination, she offered no testimony concerning her family's psychological health or interfamilial relationships. On cross-examination, Mepamsa and Camping World questioned Tasha about

several topics related to Raymond's history of domestic violence.

¶43 First, over objection, Mepamsa and Camping World questioned Tasha about a misleading letter she had written in October 2009 to a criminal-court judge in connection with her husband's court-ordered domestic violence treatment. Tasha acknowledged that she had authored the October 2009 letter and acknowledged that she had represented in the letter that Raymond had completed certain domestic violence education. She further acknowledged that she had printed the letter on the letterhead of her former employer, a women-only domestic violence facility, and had signed the letter using her maiden name. The letter was admitted into evidence, as was a follow-up letter from Tasha's former coworker in which the coworker identified Tasha's married name and explained that the facility on the letterhead of Tasha's letter did not offer treatment to men.

¶44 Next, over objection, Mepamsa and Camping World questioned Tasha at length about the graphic details of the domestic violence perpetrated by her husband. Tasha was not only asked whether her husband had been convicted of domestic violence offenses, but was also asked to admit or deny the details of four domestic violence incidents (one of which postdated the fire, and another of which related to violence perpetrated on Tasha's sister in Tasha's presence), which were

related in portions of police-report narratives that defense counsel read to the jury. In response to these questions, Tasha disputed the accuracy of many of the reports' assertions of fact and denied having told the police some of the statements attributed to her. Over objection, the court then admitted into evidence two of the reports, as well as a letter to a criminal-court judge in which Tasha recanted her accusations with respect to Raymond's latest prosecution.

c. Cross-examination of Raymond

¶45 Raymond Greenwood testified after his wife. On cross-examination, Mepamsa and Camping World confronted Raymond with his deposition testimony, and Raymond responded that he had been taking painkillers at the time of the deposition and had become confused by the questions. He asserted that he still did not remember what he was arrested for or where his criminal records could be found.

¶46 Mepamsa and Camping World then proceeded to question Raymond about his domestic violence history. Mepamsa and Camping World first asked Raymond whether he had a bad temper, which he denied, and then asked whether had been convicted in 1998 of shooting his first wife. The Greenwoods objected and moved for a mistrial, but the court overruled the objection and denied the motion on the theory that Raymond's anger issues were relevant to his claim for psychological damages. Accordingly,

Camping World and Mepamsa proceeded to ask Raymond about the shooting incident, the sentence he received, and the gang involvement that led to his possession of the gun. Camping World and Mepamsa then asked Raymond to admit or deny details about the same domestic violence incidents about which they had queried Tasha. These questions focused exclusively on the factual details of the incidents and arrests -- Mepamsa and Camping World did not ask Raymond whether the incidents had led to convictions and did not offer any evidence of convictions.

B. The Evidence of Domestic Violence Has Little, If Any, Relevance to the Child's Claims for Psychological Damages and Loss of Consortium.

¶47 The Greenwoods do not challenge the court's determination that the life-care planner's testimony about domestic violence was relevant to the issue of the child's damages, and indeed affirmatively assert their belief that no prejudice resulted from the testimony. Accordingly, the issue has been waived. *Schabel*, 186 Ariz. at 167, 920 P.2d at 47. Because the case must be retried, we simply note that evidence of domestic violence always carries a high risk of prejudice, and the evidence here was of minimal probative value to the child's claims for damages and loss of consortium.

¶48 At trial, the Greenwoods presented evidence that the child had had behavioral and learning problems since the fire. There was no evidence that the child had behavioral or learning

problems before the fire, or that she would have experienced such problems if the fire had never happened. Further, even if her parents' pre-fire domestic violence made her more susceptible to psychological harm as a result of the fire, evidence of such preexisting sensitivity is irrelevant for purposes of tort damages. *City of Scottsdale v. Kokaska*, 17 Ariz. App. 120, 128, 495 P.2d 1327, 1335 (1972) ("It is of course a general principle that the defendants must take the Plaintiff as they find her at the time of the accident . . . ."); *see also* Rev. Ariz. Jury Instr. (Civil), Personal Injury Damages 2: Pre-Existing Condition, Unusually Susceptible Plaintiff, at 109 (4th ed. 2005).

¶49 Evidence of Raymond and Tasha's domestic violence issues also has little, if any, probative value with respect to the child's claim for loss of consortium. A child may recover for loss of parental consortium when "the parent suffers a serious, permanent, disabling injury rendering the parent unable to provide love, care, companionship, and guidance to the child," and "the parent-child relationship is destroyed or nearly destroyed." *Villareal v. State Dept. of Transp.*, 160 Ariz. 474, 480, 774 P.2d 213, 219 (1989). The nature and extent of a child's relationship with the parent may be relevant to show the value of the alleged loss -- and to that point, evidence of the parent's abuse of another family member may be

relevant in some cases. On this record, however, the relevance of Raymond and Tasha's domestic violence issues to the child's loss of consortium claim is not apparent. On remand, domestic violence evidence should not be admitted for purposes of challenging the child's claim for loss of consortium absent a foundation demonstrating a connection between the intra-marital domestic violence and the child.

C. Cross-examination of Tasha Concerning Her October 2009 Letter Was Proper, but There Was No Ground for the Admission of Extrinsic Evidence.

¶50 The Greenwoods suggest that Mepamsa and Camping World should not have been allowed to cross-examine Tasha about her October 2009 letter. We conclude that cross-examination was proper, but it was error to admit extrinsic evidence.

¶51 Under Ariz. R. Evid. 608(b), a witness may be cross-examined about specific instances of conduct that are probative of her character for untruthfulness. By using the domestic violence facility's letterhead and her maiden name for the letter, Tasha created the false impression that she was a disinterested third party representing that Raymond had received services from the facility. The letter was therefore probative of Tasha's character for truthfulness, and she was appropriately subjected to cross-examination about it. But because Rule 608(b) does not generally permit the admission of extrinsic evidence, neither Tasha's letter nor her coworker's letter

should have been admitted into evidence. Ariz. R. Evid. 608(b) ("Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness.")[4]; *Henson v. Triumph Trucking, Inc.*, 180 Ariz. 305, 307, 884 P.2d 191, 193 (App. 1984) ("In no circumstances would extrinsic evidence have been permitted to prove the conduct.").

D. The Evidence Introduced Concerning Raymond's History of Domestic Violence and Other Crimes Exceeded the Limits of the Court's Discretion Under Rules 609, 403 and 404(b).

¶52 On cross-examination of both Tasha and Raymond, Mepamsa and Camping World elicited detailed testimony about specific instances of domestic violence perpetrated by Raymond against Tasha and others. The Greenwoods contend that this was reversible error. We agree.

¶53 Though some evidence of domestic violence may have been relevant to the issue of damages on the Greenwoods' loss of consortium claim, we cannot conceive that the extensive exploration of this evidence was not unduly prejudicial in a single trial that combined liability and damages. We are mindful of the standard of review, and it is rare that we

[4] Rules 608 and 609 were amended after the trial in this case, but, as applicable here, the changes were stylistic only. Ariz. R. Evid. 608 cmt. to 2012 Amendment; Ariz. R. Evid. 609 cmt. to 2012 Amendment. We cite the current version of the rules.

disturb a trial court's application of the balancing test imposed by rule 403. In our view, however, the testimony presented greatly exceeded that necessary to inform the jury of the value of the Greenwoods' loss of consortium claim. Instead, the extensive testimony served to paint the Greenwoods as persons of a character unworthy of tort recovery -- the very definition of prejudice.

1. The Court Erred by Admitting Evidence of the Conviction for the 1998 Shooting.

¶54 Rule 609 provides that evidence of a witness's felony conviction is always admissible for impeachment purposes (subject to Rule 403 balancing) if fewer than ten years have passed since the later of the conviction or release from confinement. Ariz. R. Evid. 609(a)(1)(A) and (b). (Trial courts frequently exercise their discretion, however, to "sanitize" such convictions when the sole purpose of their admission is impeachment.) If more than ten years have passed, evidence of the conviction is admissible only if "its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect" and the adverse party is given reasonable written notice of the intent to use the conviction. Ariz. R. Evid. 609(b).

¶55 Though Mepamsa and Camping World asked Raymond about the details of the domestic violence incidents involving Tasha

and her sister, they did not ask whether any of the incidents resulted in felony convictions and provided no proof of such convictions. The only evidence of a felony conviction that Mepamsa and Camping World pursued concerned Raymond's conviction for shooting his former wife in 1998. Accordingly, we evaluate only this conviction for purposes of Rule 609.

¶56 At the time of trial, more than ten years had passed since Raymond's release from confinement for the offense. Convictions more than ten years old should be admitted "very rarely and only in exceptional circumstances." *State v. Green*, 200 Ariz. 496, 499, ¶ 11, 29 P.3d 271, 274 (2001) (citation omitted). Factors relevant to the inquiry include the remoteness of the conviction, the nature of the felony, the length of the imprisonment, the age of the defendant, his history since the conviction, and the centrality of the credibility issue. *Id.* at ¶ 12. Here, the record does not show that the court considered the higher standard required for the admission of the conviction. There was no showing of exceptional circumstances, and the facts underlying the commission of the felony appear to have little bearing on Raymond's credibility. The admission of the shooting conviction was therefore an abuse of discretion. On remand, the court should consider the heightened standard applicable under Rule 609 for older convictions when considering whether to admit it,

and it should also conduct a balancing test to determine the scope of inquiry, if any, that it will permit.

2. The Extent of the Admission of Evidence of the Domestic Violence Incidents Was Error.

¶57 Under Rule 404(b), evidence of "other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith[,]" but may be admissible for other purposes. In *Lee v. Hodge*, the supreme court adopted a four-part test for analyzing the admissibility of prior bad-act evidence under Rule 404(b):

> [E]vidence of other crimes, wrongs, or acts is admissible if: (1) the evidence is related to a material fact, (2) the evidence tends to make the existence of a material fact more or less probable than without the evidence, (3) the material fact that is more or less probable is something other than a party's character and the person's propensity to act in accordance with that character, and (4) the probative value of the evidence substantially outweighs the danger of unfair prejudice.

180 Ariz. 97, 101, 882 P.2d 408, 412 (1994).

¶58 Here, Mepamsa and Camping World contend that the evidence of Raymond's domestic violence was admissible to show that the trauma of the fire was not the only possible cause of the Greenwoods' emotional damages. We have no difficulty concluding that such evidence could, properly limited, be probative of a fact material to the defense on the issue of damages for the Greenwoods' loss of consortium claims. Such claims necessarily require the jury to weigh the value of the

loss, and the nature of the relationship is an important component of that valuation.

¶59 But evidence of domestic violence always carries a significant danger of unfair prejudice, and here, the evidence was lengthy, extensive and detailed. The record simply does not support a finding that the evidence satisfied the *Lee* test. The far-ranging, unbridled inquiry into the details of the parties' history of domestic violence was unquestionably more prejudicial than probative. On remand, should the Greenwoods maintain their loss of consortium claims, the court may consider means of controlling the examination to mitigate the prejudicial effect. Such means could include, for example, restricting the length and detail of the examination or bifurcating the trial to limit the jury's exposure to such evidence to the damages phase.

V. ADVERSE-INFERENCE JURY INSTRUCTION FOR SPOLIATION OF EVIDENCE

¶60 The jury instructions included an instruction allowing the jurors to draw an inference against the Greenwoods with respect to destroyed evidence. The Greenwoods contend that this instruction, which was based on the manner in which the heater was initially tested after the fire, was reversible error. We agree.

A. Background

¶61 Shortly after the fire, the Greenwoods retained David Smith, a fire investigator, to confirm the fire's point of

origin. In early January 2008, Smith inspected and photographed the trailer's exterior and interior. Based on the burn patterns, he concluded that the fire had been a flash fire and the heater had provided the source of fuel. Smith testified that he attempted to photograph the back of the heater but did not move the heater from where it leaned against a dresser. Though it is undisputed that the back of the heater displays a sticker that identifies Mepamsa as a manufacturer, the record does not reveal whether Smith was able to see or read the sticker.

¶62 In March 2008, Smith visited the trailer again. This time, he was accompanied by the Greenwoods' causation expert, Komm, and several representatives from AmeriGas, including AmeriGas's causation expert, Freeman. Counsel avowed that Camco was also given notice of the inspection but did not appear, and this assertion appears uncontested in the record.

¶63 At this group inspection, the participants examined the inside of the trailer as well as the outdoor propane tank and regulator. To test the regulator's pressure flow and look for propane leaks, they operated the heater on high, medium, and low. They then ran the heater on low for some time with the trailer door closed to determine whether propane could be smelled when the door was opened.

¶64 After performing additional tests, Komm ultimately concluded and testified at trial that the heater's lack of an inlet screen allowed debris to enter the heater's safety valve and hold it open, so that propane escaped and was ignited when Raymond attempted to turn on the heater. Komm admitted at trial that he did not find any debris when he examined the heater, but he explained that the debris would have been small and would have burned up when the heater was turned on for testing.

¶65 Based on Komm's testimony, Mepamsa and Camping World moved for a jury instruction allowing an adverse inference for the spoliation of evidence. They argued that because any debris was destroyed by the March 2008 testing, of which they had no notice, they were deprived of the opportunity to inspect the heater in its original condition and thereby conclusively disprove Komm's theory. The Greenwoods opposed the motion, arguing that any spoliation was not intentional and that Mepamsa and Camping World's interests had been represented at the March 2008 testing by the AmeriGas representatives.

¶66 After considering the parties' arguments, the court granted Mepamsa and Camping World's motion and instructed the jury: "If you find that Plaintiff's [sic] wrongfully lost, destroyed or failed to preserve evidence [t]o the prejudice and detriment of Defendants, you may draw the . . . inference

against Plaintiffs concerning what the evidence would have shown."

B. The Adverse-inference Instruction Was Unsupported by the Evidence.

¶67 When a party breaches its duty to preserve evidence that it knows or reasonably should know may be relevant, the court has discretion to impose sanctions. *Souza v. Fred Carries Contracts, Inc.*, 191 Ariz. 247, 250, 955 P.2d 3, 6 (App. 1997). One potential sanction is a jury instruction allowing an adverse inference to be drawn regarding what the destroyed evidence would have shown. *See Lips v. Scottsdale Healthcare Corp.*, 224 Ariz. 266, 267, ¶ 8, 229 P.3d 1008, 1009 (2010). We review the court's decision to impose a sanction for the spoliation of evidence for an abuse of discretion. *See Souza*, 191 Ariz. at 250, 955 P.2d at 6 (court has discretion to impose spoliation sanctions); *Strawberry Water Co. v. Paulsen*, 220 Ariz. 401, 411, ¶ 30, 207 P.3d 654, 664 (App. 2009) (court's refusal to impose adverse-instruction sanction was not abuse of discretion). "When the trial court instructs the jury on a theory that is not supported by facts in evidence, . . . we must reverse because the trial court has invited the jury to speculate about possible nonexistent circumstances." *See City of Phoenix v. Clauss*, 177 Ariz. 566, 569, 869 P.2d 1219, 1222 (App. 1994).

¶68 As an initial matter, we agree with Mepamsa and Camping World that Arizona law does not limit the availability of the adverse-inference instruction to circumstances where the evidence was destroyed in bad faith. In *Souza*, we specifically rejected the notion of a bright-line rule for determining the propriety of spoliation sanctions, and held that "issues concerning destruction of evidence and appropriate sanctions therefor should be decided on a case-by-case basis, considering all relevant factors." 191 Ariz. at 250, 955 P.2d at 6. We further held that the "[d]estruction of potentially relevant evidence obviously occurs along a continuum of fault," and "[t]he resulting penalties vary accordingly." *Id.* (citation omitted). But contrary to the Greenwoods' suggestion, our decision in *Smyser v. City of Peoria* did not impose a specific scienter requirement for the adverse-inference penalty. Though we observed in *Smyser* that other courts have required intentional or bad-faith destruction to support an adverse-inference instruction, we did not adopt that rule. 215 Ariz. 428, 440, ¶ 37, 160 P.3d 1186, 1198 (App. 2007). We held only that the plaintiff's negligence did not mandate the instruction and the court's refusal to give it was not reversible error; we did not suggest that giving the instruction would have been reversible error. *Id.* at ¶ 38.

¶69 Intentional or bad-faith conduct is therefore merely one factor that informs a superior court's determination of whether an adverse-inference instruction is appropriate. Another important factor is prejudice. *See Strawberry Water Co.*, 220 Ariz. at 411, ¶ 30, 207 P.3d at 664 (affirming refusal to give instruction when plaintiff tested and discarded a portion of pipe but additional pipe remained for defendants' testing); *Smyser*, 215 Ariz. at 440, ¶ 38, 160 P.3d at 1198 (affirming refusal to give instruction when destruction was negligent and plaintiff had other means to establish what evidence likely would have been revealed).

¶70 Here, it is undisputed that Mepamsa and Camping World were not invited to the March 2008 testing. On this record, however, there is no suggestion or allegation that their exclusion was intentional. The nature and extent of counsel's efforts to identify and contact all interested parties before the testing is not clear from the record. At worst, the failure to invite Mepamsa and Camping World to the testing was the product of negligent research regarding the heater's origin. At best, it was a reasonable omission based on the information reasonably available to the Greenwoods at the time.

¶71 This was not a situation in which a plaintiff performed a destructive test in private with no participation by any potential defendant. It was not a situation in which one

litigant took possession of evidence to secure advantage by altering or destroying it. To the contrary, the Greenwoods invited both Camco and AmeriGas to the testing, AmeriGas's expert attended, and the participants agreed on and executed a testing protocol. In these circumstances -- where experts for adverse parties collaborated on a testing protocol -- there is no basis for any inference of wrongdoing based on the fact that the experts, in trying to understand the cause of the fire, turned on the heater without first inspecting its valves and lines for debris. Further, on this record there is no basis for any inference of prejudice. The trailer was the site of a serious fire. Mepamsa and Camping World made no showing that particles in the heater's valves and lines could have survived the fire only to be burned at the testing months later.

¶72 No evidence supported a sanction for spoliation of evidence related to the March 2008 testing. The adverse-inference instruction, therefore, improperly suggested to the jury that it could penalize the Greenwoods for conduct unsupported by the evidence. Accordingly, we conclude that the court's decision to give the instruction was error. *See Clauss*, 177 Ariz. at 569, 869 P.2d at 1222.

VI. JURY INSTRUCTION REGARDING SETTLEMENT

¶73 At the close of evidence, the superior court gave the following oral instruction to the jury: "Ladies and Gentlemen,

AmeriGas is no longer a party to this lawsuit. The issues regarding AmeriGas have been resolved." The Greenwoods contend that the instruction violated Ariz. R. Evid. 408.

¶74 As an initial matter, we reject Mepamsa and Camping World's contention that the court's use of the word "resolved" removed the instruction from the purview of Rule 408. Evidence need not be labeled as evidence of "furnishing, promising, or offering -- or accepting, promising to accept, or offering to accept -- a valuable consideration in compromising or attempting to compromise a claim" or "conduct or a statement made during compromise negotiations about the claim" to qualify under Rule 408. We conclude that Rule 408 applied to the instruction. *See Kennon v. Slipstreamer, Inc.*, 794 F.2d 1067, 1071 (5th Cir. 1986) (applying analogous federal Rule 408 to jury instruction).

¶75 Under Rule 408, evidence of settlement is admissible when offered for a purpose other than proving or disproving the validity or amount of the claim or impeaching by a prior inconsistent statement or contradiction. The list of proper purposes provided in Rule 408(b) is nonexclusive, and we agree with other courts, construing the analogous federal rule, that preventing jury confusion, in multi-defendant cases where some defendants settle, may warrant an instruction on the fact of settlement. *E.g., Kennon*, 794 F.2d at 1070; *Pioneer Hi-Bred Int'l, Inc. v. Ottawa Plant Food, Inc.*, 219 F.R.D. 135, 144

(N.D. Iowa 2003). The instruction should, however, ordinarily include a clear statement that the jury must disregard the settlement when determining liability and damages with respect to the remaining defendants. *Pioneer Hi-Bred*, 219 F.R.D. at 144. Here, this component was lacking. But because the Greenwoods did not request a limiting instruction under Ariz. R. Evid. 105, we cannot say that the court abused its discretion by phrasing the instruction as it did.

CONCLUSION

¶76 For the reasons set forth above, we reverse and remand for a new trial.

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
PHILIP HALL, Presiding Judge

/s/
_____
SAMUEL A. THUMMA, Judge