NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

VERONICA MONGE, *Plaintiff/Appellant*,

v.

SUN VALLEY MASONRY, INC., an Arizona corporation; FELIPE DUARTE, *Defendants/Appellees*.

No. 1 CA-CV 14-0856
FILED 6-9-2016

Appeal from the Superior Court in Maricopa County
No. CV2010-081037
The Honorable David M. Talamante, Judge

AFFIRMED

COUNSEL

Veronica Monge, Phoenix
Plaintiff/Appellant

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MEMORANDUM DECISION

Presiding Judge Samuel A. Thumma delivered the decision of the Court, in which Judge Maurice Portley and Judge John C. Gemmill joined.

T H U M M A, Judge:

¶1 Veronica Monge (Appellant) appeals from the superior court's order denying her motion for new trial after a jury returned a verdict for defendants Sun Valley Masonry, Inc. and Felipe Duarte (Defendants) in this wrongful death action. Because Appellant has shown no error, the order is affirmed.

FACTS[1] AND PROCEDURAL HISTORY

¶2 In January 2010, Appellant's husband Samuel Monge was killed at a jobsite by a forklift that Duarte was driving. On her own behalf and on behalf of her three children, Appellant filed this wrongful death action against Duarte, his employer, Sun Valley Masonry, and Phoenix Children's Hospital (PCH), the owner of the jobsite. The court granted summary judgment in favor of PCH. The remaining parties proceeded to a 10-day trial, where the jury found for Defendants. After entry of judgment, Appellant unsuccessfully moved for new trial and to amend the motion for new trial (collectively referred to as the motion for new trial). Appellant, who was represented by counsel at trial but is now self-represented, timely appealed from the denial of the motion for new trial.

DISCUSSION

I. Appellate Jurisdiction Is Limited To The Issues Raised In The Motion For New Trial.

¶3 Defendants argue this court lacks appellate jurisdiction over the purported challenge to the grant of summary judgment in favor of PCH, the grant of a motion for judgment as a matter of law on a four-year-old plaintiff's loss of consortium claim and the denial of Appellants' motion to

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[1] This court views the evidence in the light most favorable to upholding the jury's verdict. *Powers v. Taser Int'l Inc.*, 217 Ariz. 398, 399 n.1 ¶ 4 (App. 2007).

seal certain records.[2] Defendants claim the orders granting summary judgment and judgment as a matter of law were appealable judgments that Appellant did not timely appeal. Not so. Neither order resolved all claims as to all parties and neither was certified as a final judgment. Accordingly, to have been appealable, the superior court would have had to find that there was no just reason for delay and expressly direct entry of a partial final judgment in appealable form. *See* Ariz. R. Civ. P. 54(b) (2016).[3] Because that did not happen, those interlocutory orders could not have been appealed when entered.

¶4 Defendants also argue that Appellant's notice of appeal does not challenge those orders. Appellant's notice of appeal, as amended, provides that Appellant is appealing from the signed order denying her motion for new trial. The notice of appeal does not purport to challenge the prior rulings or the judgment. "Because [Appellant] did not appeal separately the underlying judgment, [this court] must limit [its] review to issues raised in the" motion for new trial. *Sandretto v. Payson Healthcare Management, Inc.*, 234 Ariz. 351, 355 ¶ 7 (App. 2014); *see also Wendling v. Sw. Sav. & Loan Ass'n*, 143 Ariz. 599, 601-02 (App. 1984); Ariz. R. Civ. App. P. 8(c)(3). Accordingly, given the notice of appeal, appellate jurisdiction is limited to those issues raised in the motion for new trial. *See* Ariz. Const. Art. 6 § 9; Ariz. Rev. Stat. (A.R.S.) §§ 12-120.21(A)(1) and -2101(A)(5)(a).

II. The Superior Court Did Not Err By Denying Appellant's Motion For New Trial.

¶5 This court reviews the denial of a motion for new trial for an abuse of discretion. *See Matos v. City of Phoenix*, 176 Ariz. 125, 130 (App. 1993). The superior court has "substantial latitude in deciding whether to upset the verdict" because it "sees the witnesses, hears the testimony, and has a special perspective of the relationship between the evidence and the verdict which cannot be recreated by a reviewing court from the printed

[2] Defendants argue this court should find Appellant waived her arguments because her opening brief is defective. *See* Ariz. R. Civ. App. P. 13(a). Conceding that argument has force, this court, in its discretion, will address this appeal on its merits as set forth herein. *See Clemens v. Clark*, 101 Ariz. 413, 414 (1966) (noting court is "inclined to decide cases on their merits").

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

record." *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 53 ¶ 12 (1998) (citations omitted).

A. Sufficiency Of The Evidence.

¶6 Appellant argues the verdict "was not justified by the evidence," there was insufficient evidence for the defense theory of causation and comparative fault and the jury awarded insufficient damages. The superior court may order a new trial if the verdict "is not justified by the evidence or is contrary to law." Ariz. R. Civ. P. 59(a)(8). In considering the sufficiency of the evidence, this court "look[s] to the broad scope of the trial and do[es] not attempt to reweigh the facts." *Hutcherson,* 192 Ariz. at 56 ¶ 27. This deference is particularly applicable when the claim is that the jury could not have issued a defense verdict, as opposed to a claim that an essential element is not supported by the evidence.

¶7 The record shows that genuine issues of material fact were properly resolved by the jury. Although the jury could have returned a different verdict, when viewed in the light most favorable to upholding the verdict, *Powers v. Taser Int'l Inc.*, 217 Ariz. 398, 399 n.1 ¶ 4 (App. 2007), there is sufficient evidence in the trial record justifying the defense verdict.

¶8 Evidence at trial suggested that Samuel was working alone on a road and was not using safety measures required by his employer, Kitchell Construction Company (not a party to the action), including a safety vest, a barricade or a spotter. Duarte was operating a forklift that did not allow him to see obstructions on the right side. At the time of the accident, Samuel was on his hands and knees to the front and right of Duarte's forklift. Duarte did not see Samuel and accidently ran him over. Multiple witnesses testified that Kitchell was in charge of the jobsite. And Defendants' expert on occupational safety testified that Defendants met the applicable standard of care but that Samuel and Kitchell did not. Other evidence showed that Samuel had been warned shortly before the accident to comply with safety requirements, but he did not follow those requirements. In addition, trial testimony showed Samuel was told to leave the area and obtain a spotter before performing more work in the area, but he responded that he "did not need anyone."

¶9 This and other trial evidence would allow, but not compel, the jury to conclude that Defendants did not breach a duty of care owed to Samuel. Accordingly, Appellant has not shown that the superior court abused its discretion in rejecting her argument that the verdict "was not justified by the evidence." Once the jury found that Defendants did not

breach a duty of care, the jury was not required to address causation, comparative fault and damages. Indeed, the superior court instructed the jury:

> If you find that [Defendants] were not at fault, then your verdict must be for [Defendants]. If you find that [Defendants] were at fault, then [Defendants] are liable to [Appellant] and decedent's children . . . and your verdict must be for [Appellant] and decedent's children. You should then determine the full amount of [Appellant] and decedent's children's damages and enter that amount on the verdict form.

Accord Rev. Ariz. Jury Instr. ("RAJI") (Civil) Fault 8 (5th ed. 2013). Consequently, the superior court did not abuse its discretion by denying Appellant's motion for new trial based on the sufficiency of the evidence.

B. Newly Discovered Evidence.

¶10 Appellant argues that newly discovered evidence, namely additional witnesses and exhibits to be offered at a new trial, justified her request for a new trial. A new trial motion alleging newly discovered evidence is proper if "the evidence (1) is material, (2) existed at the time of trial, (3) could not have been discovered before trial by the exercise of due diligence, and (4) would probably change the result at a new trial." *Waltner v. JPMorgan Chase Bank, N.A.*, 231 Ariz. 484, 490 ¶ 24 (App. 2013). Appellant's argument on appeal centers on a report from economist Dr. David Orlowski that would help show economic loss. However, because the jury found for Defendants on liability, additional evidence on damages would not "probably change the result at a new trial." *See id*. Nor has Appellant shown how the evidence meets the other requirements of newly discovered evidence warranting a new trial. *See id.* Accordingly, the superior court did not err by rejecting Appellant's newly discovery evidence argument.

C. Remaining Issues.

¶11 The opening brief also mentions, but does not present argument, about other issues raised with the superior court in Appellant's

motion for new trial.[4] Because Appellant has not presented argument on appeal on these additional issues, they were waived. *See* Ariz. R. Civ. App. P. 13. Moreover, even on the merits, they provide no basis for relief.

¶12 First, Appellant states there was "[e]rror in [j]ury [i]nstruction: causation and comparative fault." As noted above, because the jury did not find liability, it was not required to address causation and comparative fault. Additionally, the superior court used standard RAJI instructions, and Appellant has not shown how those RAJI instructions are misstatements of the law. Appellant also did not object to the instructions at trial. Accordingly, even absent waiver, Appellant has not shown the superior court erred when instructing the jury on causation and comparative fault.

¶13 Second, Appellant states there was "[j]uror [b]ias: and the case at hand should be transferred to another County." This statement appears to be based on a purported representation by "the Trial Court" outside of the presence of the jury that the jury was "not going to give a favorable award" to Appellant based on demographic issues. The statement, however, is nowhere in the record on appeal. Nor is there any evidence in the record that the jurors were exposed to improper information or were biased. Instead, the record shows that Appellant had a full and fair opportunity to voir dire prospective jurors, make challenges for cause and exercised her peremptory challenges. The record does not indicate that Appellant pressed any jury bias claim with the superior court at any time during trial. Finally, Appellant did not timely move for a change of venue. *See* A.R.S. § 12-406. Even absent waiver, there is no evidence of juror bias or that the venue was not proper.

¶14 Third, Appellant states there was "[i]nappropriate and or [m]isconduct of [u]ndue [i]nfluence by [d]efendant and or staff." From the context, the statement appears to refer to conduct or influence of the jury. The only incident of purported misconduct during the jury's presence occurred when Defendants asked the mother of one of Samuel's children whether the child knew Samuel was his father. Appellant did not timely object, meaning the issue was waived before the superior court. Similarly, Appellant waived the issue by failing to properly present it on appeal. Even absent these waivers, however, Appellant has failed to show the question

[4] To the extent Appellant makes new arguments in her reply brief, those arguments were not properly raised, and this court will not address them. *See State v. Guytan*, 192 Ariz. 514, 520 ¶ 15 (App. 1998).

was improper. S*ee* A.R.S. §§ 12-611-613; *Vasquez v. State*, 220 Ariz. 304, 310 ¶ 16 (App. 2008) ("Allowable items of injury for which damages may be claimed and recovered are loss of love, affection, companionship, consortium, personal anguish and suffering.") (citations omitted). Appellant has not shown the question was misconduct requiring a new trial. *See* Ariz. R. Civ. P. 59(a)(2). Nor has Appellant shown that a question from a juror about whether one of Samuel's children was receiving, or did receive, child support from him required a new trial.

¶15 Finally, Appellant repeatedly cites language from Ariz. R. Civ. P. 59(b) to assert the superior court erred. That rule, however, applies only to bench trials, and this case was tried to a jury. Accordingly, the superior court did not err by failing to "open the judgment . . . , take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment." Ariz. R. Civ. P. 59(b) ("On a motion for a new trial in an action tried without a jury . . .").

CONCLUSION

¶16 Because Appellant has shown no error in the superior court's denial of the motion for new trial, the order is affirmed.

Ruth A. Willingham · Clerk of the Court
FILED: AA