IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

ROBERT DENNIS JOHNS, JR., et al., *Plaintiffs/Appellees*,

v.

CASEY ANTHONY STANGE, a single man, *Defendant/Appellant*.

No. 1 CA-CV 15-0822
FILED 10-12-2017

Appeal from the Superior Court in Yuma County
No. S1400CV201200096
The Honorable David M. Haws, Judge

AFFIRMED

COUNSEL

The Smith Fila Law Firm, Yuma
By Frank A. Fila
Counsel for Plaintiffs/Appellees

Schneider & Onofry, P.C., Phoenix
By Timothy B. O'Connor
Counsel for Defendant/Appellant

MEMORANDUM DECISION

Presiding Judge James P. Beene delivered the decision of the Court, in which Judge Randall M. Howe and Judge Kent E. Cattani joined.

B E E N E, Judge:

¶1 Defendant Casey Anthony Stange ("Stange") appeals several superior court rulings in this wrongful death action Plaintiffs Robert Dennis Johns, Jr. and Susan Johns (collectively the "Johns") initiated against him. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 The Johns are the parents of decedent Bryan Johns ("Bryan"). In the early morning hours of March 4, 2011, Bryan was a passenger in a car driven by Stange. Stange, who admitted to being intoxicated at the time and travelling over 100 mph, lost control of his car, went off the road, and struck a berm, killing Bryan. Bryan was the Johns's only child.

¶3 Bryan and Stange were friends from high school and remained friends in the years that followed. At approximately 11:00 p.m. on the night of March 3, 2011, Stange and Bryan met up at a nightclub in Mexico. Stange, Bryan, and their friends drank alcohol at the nightclub for approximately four hours that evening. After the nightclub closed, Bryan and three other friends asked Stange for a ride home. The group walked to the border, waited in line for a few hours, then crossed into Arizona, and walked to Stange's car. Initially they discussed calling a cab, but eventually Stange decided to drive. Stange does not remember the accident itself or how fast he was driving.

¶4 In March 2012, Stange pled guilty to manslaughter for Bryan's death and was sentenced to 6.75 years in prison. In January 2012, the Johns brought this wrongful death action.

¶5 After a four-day jury trial, the jury awarded the Johns a total of $1,720,000 in compensatory damages, $860,000 to each parent, and assigned fault at 70% to Stange and 30% to Bryan. Final judgment was entered, awarding the Johns $1,204,000, plus taxable costs and interest.

Stange unsuccessfully moved for a new trial or, in the alternative, for remittitur.

¶6 Stange timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A).

DISCUSSION

¶7 Stange argues the superior court erred in: (1) denying his motion for a new trial because the jury verdict was excessive and the result of passion and prejudice; (2) not ordering a remittitur of the jury verdict; (3) precluding the admission of evidence of Bryan's blood alcohol concentration ("BAC"); (4) denying his request for an assumption of the risk jury instruction; (5) granting summary judgment in the Johns's favor as to the comparative negligence of the other passengers in his car; and (6) allowing questioning and argument based on the police estimate of his driving speed at the time of the accident.

¶8 Except for the grant of summary judgment, our review here is limited to whether the superior court abused its discretion in its rulings. *See Desert Palm Surgical Grp., P.L.C. v. Petta*, 236 Ariz. 568, 581, ¶ 37 (App. 2015) (appellate review of trial court's denial of motion for new trial or remittitur); *Larsen v. Decker*, 196 Ariz. 239, 241, ¶ 6 (App. 2000) (appellate review of trial court's ruling on evidence); *Strawberry Water Co. v. Paulsen*, 220 Ariz. 401, 409, ¶ 21 (App. 2008) (appellate review of trial court's denial of requested jury instruction). A court abuses its discretion when it commits an error of law or fails to consider evidence in reaching a discretionary conclusion or if upon review, "the record fails to provide substantial evidence to support the trial court's finding." *Flying Diamond Airpark, LLC. v. Meinberg*, 215 Ariz. 44, 50, ¶ 27 (App. 2007) (citation omitted).

¶9 Entry of summary judgment is proper "if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). We determine *de novo* whether any genuine issue of material fact exists and whether the trial court erred in applying the law, and will uphold the court's ruling if correct for any reason. *Logerquist v. Danforth*, 188 Ariz. 16, 18 (App. 1996). We construe the evidence and reasonable inferences in the light most favorable to the non-moving party. *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Tr. Fund*, 201 Ariz. 474, 482, ¶ 13 (2002).

I. Jury Verdict was Not Excessive and Court Did Not Err in Not Ordering Remittitur

¶10 Stange contends the jury verdict of $1,720,000 was excessive, and the result of passion and prejudice. He also argues that Johns's attorney made statements during trial that were punitive in nature and because punitive damages were not before the jury, such statements were improper. Thus, the court should have ordered a remittitur or a new trial.

¶11 "It is well settled in Arizona that the amount of an award for damages is a question peculiarly within the province of the jury, and such award will not be overturned or tampered with unless the verdict was the result of passion and prejudice." *In re Estate of Hanscome*, 227 Ariz. 158, 162, ¶ 12 (App. 2011) (internal quotations and citation omitted). Viewing the evidence in the light most favorable to sustaining the verdict, "[t]he test for whether the jury award is the result of passion or prejudice is whether the amount of the jury verdict is so unreasonable and outrageous as to shock the conscience." *Mammo v. State*, 138 Ariz. 528, 532 (App. 1983). But "[v]erdict size alone does not signal passion or prejudice." *Sandretto v. Payson Healthcare Mgmt., Inc.*, 234 Ariz. 351, 363, ¶ 52 (App. 2014). If the court determines that the award was the result of passion or prejudice, the proper remedy is a new trial. *Hanscome*, 227 Ariz. at 162, ¶¶ 12–13. If a verdict instead reflects "an exaggerated measurement of damages" in an area in which reasonable persons may differ, the court should not lightly conclude that it is tainted. *Id.* at 162, ¶ 13; *Stallcup v. Rathbun*, 76 Ariz. 63, 65-66 (1953). In those instances, the trial court has discretion to order remittitur, *Soto v. Sacco*, 242 Ariz. 474, ___, ¶ 9 (2017), but "only for the most cogent reasons, such as lack of evidence to support the damages awarded or a clear indication that the jury misapplied the principles governing damages." *Hanscome*, 227 Ariz. at 162, ¶ 14 (internal citations omitted).

¶12 Stange asserts that such a large verdict to parents of a deceased adult child is "manifestly unfair, unreasonable and outrageous so as to shock the conscience" because Bryan was 20 years old, worked at a grocery store, lived at home, and his only economic contribution was household chores. Stange contends he was prejudiced when, during cross-examination, he was asked about injuries the other passengers sustained in the accident and about his effort to get his car fixed "despite the fact that you had a dead passenger." He also alleges prejudice from Johns's attorney's statements during closing argument that (1) Stange acted with "an element of conscious disregard" and was a "very selfish individual who is concerned about nothing other than his own materials things"; (2) Stange will be out of prison in a few years but the Johns have been "sentenced for

life"; and (3) the jury should "bring back a substantial verdict and tell this community what we think about drunken drivers and speed, and speed kills."

¶13 The superior court did not abuse its discretion by finding that the verdict awarded to the Johns was neither a result of passion or prejudice nor an exaggerated measurement of damages. The evidence here supports the amount of damages awarded and nothing indicates that the jury misapplied the principles governing damages.

¶14 Robert Johns, Bryan's father, testified about his son. He stated that Bryan was honest, hard-working, and patient. He also stated that they enjoyed outdoor activities together and he and Bryan engaged in these activities most of Bryan's life. At the time of his death, Bryan worked at a grocery store, but was in the process of enlisting in the Navy. Mr. Johns also said the loss of Bryan has affected his mother deeply; she is in a lot of pain and cries almost daily. Mr. Johns misses Bryan every day.

¶15 Susan Johns, Bryan's Mother, also testified about her son. Mrs. Johns stated that being Bryan's mother was one of the best things that ever happened to her. She said Bryan was a great child, always happy and pleasant to be around. Mrs. Johns and Bryan were very close. Bryan and his parents spent a lot of time together as a family and Bryan helped with household chores. Mrs. Johns testified that holidays are especially difficult.

¶16 In pertinent part, the jury was instructed:

> You must not speculate or guess about any fact. You must not be influenced by sympathy or prejudice.
>
> * * * *
>
> [S]tatements or arguments made by the lawyers in the case are not evidence.
>
> * * * *
>
> [Stange] is at fault for the death of [Bryan] as a result of his manslaughter conviction. Manslaughter is committed by recklessly causing the death of another person. "Recklessly" means that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur.
>
> * * * *

> [Stange] also claims that [Bryan] is at fault. . . . fault is negligence that was a cause of [Bryan's] death. Negligence is the failure to use reasonable care.
>
> [Stange] is at fault for the death of [Bryan] as a result of his manslaughter conviction. Because [Stange] is at fault for [Bryan's] death, [the Johns] must only prove their damages.
>
> * * * *
>
> [Stange] must prove that [Bryan] was at fault.
>
> * * * *
>
> Damages for wrongful death of a child. . . . you must decide the full amount of money that will reasonably and fairly compensate [the Johns] separately for each of the following . . .
>
> One, the loss of love, affection, companionship, care, protection, and guidance since the death and in the future.
>
> Two, the pain, grief, sorrow, anguish, stress, shock, and mental suffering already experienced and reasonably probable to be experienced in the future.
>
> Three, the services that have already been lost as a result of the death and that are reasonably probable to be lost in the future.
>
> Four, the reasonable expenses of funeral and burial.
>
> Five, the loss of enjoyment of life, that is, the participation in life's activities to the quality and extent normally enjoyed before the death.

¶17 After the jury's verdict, Stange moved for a new trial or, in the alternative, for remittitur. In denying Stange's motion, the superior court found "that the jury's award of damages was supported by the evidence and not the result of passion or prejudice . . . was not excessive and does not shock the conscience." As for the Johns's counsel asking the jury to "bring back a substantial verdict and tell this community what we think about drunken drivers and speed, and speed kills," the court found:

> [T]his argument was not proper, however [the court] notes that no objection was made to the argument at trial . . . this argument did not inflame the passion of the jury and did not actually influence the jury . . . there was evidence to support a jury finding that [the Johns] have suffered and continue to suffer feelings of substantial grief and sorrow at the loss of their only child.

¶18 We agree. Stange does not take issue with the manner in which the jury was instructed, and the instructions properly focused the jury's deliberations. Viewing the evidence in this case in the light most favorable to sustaining the verdict, the superior court did not abuse its discretion in denying Stange's motion for a new trial or for remittitur. *See Creamer v. Troiano*, 108 Ariz. 573, 576 (1972) (if "case has been submitted on correct rulings and instructions, and the verdict is within the range of credible evidence," verdict was not the result of passion or prejudice and should be affirmed); *Ogden v. J.M. Steel Erecting, Inc.*, 201 Ariz. 32, 36, ¶ 15 (App. 2001) (court should uphold verdict "[i]f any substantial evidence could lead reasonable persons to find the ultimate facts to support" it); *see also Hyatt Regency Phoenix Hotel Co. v. Winston & Strawn*, 184 Ariz. 120, 140 (App. 1995) ("We must assume on review that the jury followed the instructions of the trial court.").

¶19 As to Stange's argument that the Johns's counsel made improper statements/arguments that were punitive in nature, the superior court was in the best position to determine if such conduct influenced the verdict. *See Taylor v. DiRico*, 124 Ariz. 513, 518 (1980). The court found that, although the Johns's attorney's statements were improper, they did not influence the jury. Thus, the court did not abuse its discretion in denying Stange's motion for a new trial based upon counsel's alleged misconduct. *See Styles v. Ceranski*, 185 Ariz. 448, 450 (App. 1996) (denial of a motion for new trial "will be reversed only if it reflects a manifest abuse of discretion given the record and circumstances of the case.").

II. Preclusion of Bryan's BAC Level

¶20 Stange argues the superior court erred in precluding evidence of Bryan's BAC level because evidence of an individual's BAC level does not need to be explained by expert testimony. Thus, Stange contends he was deprived of asserting a contributory negligence defense and corresponding jury instruction.

¶21 Under a contributory negligence defense, if the jury found Bryan was "under the influence of an intoxicating liquor or a drug and as a result . . . was at least fifty per cent responsible for the accident," the Johns could be barred from recovering. A.R.S. § 12-711. Stange sought to introduce Bryan's BAC level for this purpose. The Johns moved to preclude, arguing that expert testimony was necessary to explain the significance of Bryan's BAC level and Stange failed to identify an expert witness to testify as such. Specifically, the Johns argued expert testimony was necessary to show how alcohol affects people differently, depending upon, among other things, the frequency and amount of consumption, and the type of alcohol consumed. After oral argument, the court excluded any testimony as to the BAC level of either Bryan or Stange as "expert testimony is necessary to give any significance to a BAC."

¶22 Stange cites to *State v. Salazar*, 173 Ariz. 399, 407-08 (1992), wherein our supreme court held "that the effect of alcohol intoxication is an area within the common knowledge and experience of the jury, and therefore, no expert testimony is needed to assist the trier of fact." *Id*. at 407-08 (citation omitted). Expert testimony is not required if it is offered for "the general effects of alcohol on the human body, what it does physiologically in terms of whether or not it can affect a person's ability to reason." *Id*. at 407. Stange sought to offer evidence of Bryan's specific BAC level, which is something that may not be within the common understanding of jurors. Thus, the court properly precluded that evidence. The court did not, however, preclude evidence regarding the general effects of alcohol on a person. Stange was permitted to testify about, and offer evidence of, Bryan's alcohol consumption and signs of intoxication or impairment that night. He testified that they all were drinking that night, including Bryan.

¶23 The court did not abuse its discretion in precluding evidence of Bryan's BAC level, while allowing evidence that Bryan was probably intoxicated.

III. Assumption of Risk Jury Instruction

¶24 Stange argues the superior court erred in denying his request for a jury instruction that Bryan assumed the risk of injury because sufficient evidence showed Bryan knew Stange had been drinking for several hours and voluntarily got into the car knowing Stange would be driving.

¶25 The touchstone of assumption of the risk is consent — consent exhibited by one's actions "after he has been informed of the nature and magnitude of the specific danger involved." *Hilderbrand v. Minyard*, 16 Ariz. App. 583, 585 (1972). Contributory negligence in contrast "arises when the plaintiff fails to exercise due care." *Id*. "The failure to fully appreciate and comprehend the consequences of one's acts is not properly a matter of assumption of risk but, rather, a matter of contributory negligence." *Id*. at 586.

¶26 Stange argues that because Bryan voluntarily got into Stange's car, knowing Stange had been drinking, he assumed the risk of an accident, injury, or death. Contrary to Stange's assertion, "general knowledge of a danger is not sufficient, but rather plaintiff must have actual knowledge of the specific risk which injured him and appreciate its magnitude." *Garcia v. City of S. Tucson*, 131 Ariz. 315, 319 (App. 1981) (internal quotations omitted). Based on this record, no evidence indicated that Bryan had actual knowledge of the specific risk and that he appreciated the magnitude of driving that night with Stange. Rather, Bryan merely failed to use due care and failed to appreciate and understand the consequences of in getting into the car with Stange driving.

¶27 The court did not abuse its discretion in denying an assumption of the risk jury instruction.

IV. Comparative Negligence of Other Passengers

¶28 Stange argues the superior court erred in precluding him from presenting evidence that the other three passengers in Stange's car were comparatively negligent because they had all been drinking and knew Stange was drinking. Thus, he contends that whether the non-party passengers were also at fault for Bryan's death is a fact question for the jury and summary judgment was improper.

¶29 The Johns filed a pretrial motion for partial summary judgment arguing, in relevant part, that Stange should be precluded from asserting an affirmative defense that the three other passengers were at fault for Bryan's death. After full briefing and oral argument,[1] the court

[1] Stange did not provide us with the oral argument transcript on the Johns's summary judgment motion. Accordingly, we presume the transcript supports the superior court's ruling. *See* ARCAP 11(C) (imposing duty on appellant to ensure record contains all documents deemed

granted the Johns's motion, finding "the passengers in the car did not owe a duty of care to [Bryan]. Arizona law does not ordinarily impose a duty upon a passenger in a vehicle. The Court finds that the circumstances that are present in this case are not sufficient to create such a duty for any of the passengers." We agree.

¶30 Automobile passengers owe no duty of care to third parties for the negligent conduct of the driver. *West v. Soto*, 85 Ariz. 255, 259 (1959). Here, the three passengers owed no legal duty of care to Bryan for the conduct of Stange. Thus, the passengers could not be held liable for Bryan's death. *See id*. at 261 ("There must be a duty owed and a breach of that duty before one may be charged with the negligent violation of that duty."). Moreover, Stange admitted during deposition that he was solely responsible for the accident and Bryan's death; he did not blame the other passengers for anything, including Bryan's death.

¶31 Nonetheless, Stange cites to the Restatement (Second) of Torts, § 495, (Failure to Control Negligent Third Person) Comment c for the proposition that the passengers were also at fault for Bryan's death because Stange was travelling at more than 100 mph and they had a duty to act. In pertinent part, § 495 states:

> A plaintiff is barred from recovery if the negligence of a third person is a legally contributing cause of his harm, and the plaintiff has been negligent in failing to control the conduct of such person.
>
> * * * *
>
> Comment c. Save under such exceptional circumstances, a plaintiff is entitled to trust the vigilance and skill of his driver unless he knows from past experience, or from the manner in which the car is being driven on the particular trip, that the driver is likely to be inattentive or careless. So too, the plaintiff is not required to keep his eyes constantly on the speedometer to see whether the driver is exceeding the legal speed limit, but he is required to call the attention of the driver

---

necessary for proper consideration of issues on appeal); *see also Kline v. Kline*, 221 Ariz. 564, 572, ¶ 33 (App. 2009) ("When no transcript is provided on appeal, the reviewing court assumes that the record supports the trial court's decision.") (citation omitted).

> to his excessive speed only when the speed is so great that a reasonable man would realize its excessive character.

Section 495 and Comment c apply in instances where the plaintiff (Bryan), was negligent in failing to control the conduct of a third person (the passengers), or if Bryan (not the passengers), failed to call the excessive driving speed to Stange's attention. That is not the case here. Stange is not arguing that the passengers legally contributed to Bryan's death because Bryan failed to control the passengers' negligent conduct. Nor is he arguing that Bryan failed to alert Stange to his excessive driving speed. Rather, Stange is arguing that the passengers (third persons) were at fault for Bryan's death for failing to control Stange's driving speed. Section 495 and Comment c are inapplicable and Stange's reliance is misplaced.

¶32 Viewing the evidence and reasonable inferences in the light most favorable to Stange, we conclude that the court did not err in granting summary judgment in favor of the Johns regarding Stange's claim that the jury should be allowed to consider the other passengers' alleged fault.[2]

V. Estimate of Speed at Time of Accident

¶33 Stange argues the superior court abused its discretion in permitting questioning during trial about the estimate of Stange's driving speed at the time of the accident. Specifically, Stange asserts that his speed at more than 100 mph was not admitted into evidence, the investigating detective did not testify about the speed of Stange's car, and because the jury submitted questions regarding the source of the estimate, the jury was improperly influenced by evidence of his estimated speed.

¶34 At the beginning of trial, Johns's counsel read Stange's deposition testimony into evidence without objection. During Stange's deposition, he was asked if he had read the presentence report before the sentencing hearing in his criminal case. Stange admitted he read the report and had an opportunity to dispute its findings. Stange acknowledged that one of those findings estimated his speed at the time of the accident at a

---

[2] In his reply brief, Stange argues the three passengers owed a duty of care to Bryan because of the relationship they shared with Bryan and Arizona's public policy against drunk driving. Because Stange failed to raise these arguments in his opening brief, however, we deem them waived. *See Nelson v. Rice*, 198 Ariz. 563, 567 n.3, ¶ 11 (App. 2000) (stating that a party waives an argument by failing to raise it in the opening brief on appeal).

minimum of 100 mph. Stange agreed that he did not dispute that finding at the time of his sentencing, nor did he dispute it at the time of his deposition.

¶35 During cross-examination, Stange was asked if he disputed that he was driving over 100 mph at the time of the accident. Stange stated that he did not dispute the report's findings that he was driving over 100 mph at the time of the accident. The jury was instructed, "You also heard portions of sworn deposition testimony of the defendant. This deposition testimony is evidence that you may consider just as any other evidence."

¶36 Because Stange's deposition testimony about the 100-mph estimate was admitted into evidence and we presume the jury followed the superior court's instruction in considering it, *see Hyatt Regency*, 184 Ariz. at 140, we find the court did not abuse its discretion in permitting such questioning during trial.

CONCLUSION

¶37 For the foregoing reasons, we affirm the superior court's judgment. Also, in the exercise of our discretion, we deny both parties' requests for costs incurred on appeal.

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