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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

DAWN NAZOS, *Plaintiff/Appellant*,

v.

CITY OF PHOENIX, et al., *Defendants/Appellees*.

No. 1 CA-CV 16-0511
FILED 10-3-2017

Appeal from the Superior Court in Maricopa County
No. CV2014-009187
The Honorable Jo Lynn Gentry, Judge

AFFIRMED

COUNSEL

Breyer Law Offices, Phoenix
By Mark P. Breyer
Counsel for Plaintiff/Appellant

Udall Shumway, PLC, Mesa
By Bradley D. Gardner, David R. Schwartz
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Presiding Judge Paul J. McMurdie delivered the decision of the Court, in which Justice Rebecca White Berch¹ and Judge Peter B. Swann joined.

M c M U R D I E, Judge:

¶1 Dawn Nazos (“Plaintiff”) appeals from the superior court’s denial of her motion for new trial or, in the alternative, judgment as a matter of law, following a judgment entered on a jury verdict in favor of the City of Phoenix and Jesus Ambrocio (collectively “Defendants”). For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Plaintiff’s husband, Jason Nazos, was riding his Ducati Monster 1100 motorcycle southbound on Cave Creek Road in the early morning of November 8, 2013. At the same time, Ambrocio was driving a City of Phoenix garbage truck, turning left from 16th Place to travel north on Cave Creek Road. Nazos’ motorcycle collided with the left side of the garbage truck, and he sustained fatal injuries.

¶3 Plaintiff sued Defendants for wrongful death arising from the accident. *See* Ariz. Rev. Stat. (“A.R.S.”) § 12-611 to -613. Plaintiff theorized that Ambrocio ran the stop sign on 16th Place and failed to yield to oncoming traffic. Defendants argued that the motorcycle’s excessive speed caused the accident.

¶4 Following an eight-day trial, the jury entered a unanimous verdict in favor of Defendants. Plaintiff filed a motion for new trial or, in the alternative, for judgment as a matter of law, which the superior court

¹ The Honorable Rebecca White Berch, retired Justice of the Arizona Supreme Court, has been authorized to sit in this matter pursuant to Article VI, Section 3, of the Arizona Constitution.

NAZOS v. PHOENIX, et al.
Decision of the Court

denied. Plaintiff timely appealed, and we have jurisdiction pursuant to A.R.S. § 12-2101(A)(5)(a).²

DISCUSSION

A. Expert Testimony.

¶5 Plaintiff first argues the superior court “committed reversible error by admitting the testimony of multiple independently retained experts[,]” violating Arizona Rule of Civil Procedure (“Rule”) 26(b)(4)(D). The superior court has broad discretion to determine the admissibility of expert testimony, and we will affirm its determination absent an abuse of discretion. *See Felipe v. Theme Tech Corp.*, 235 Ariz. 520, 524, ¶ 10 (App. 2014). We review *de novo* a court’s interpretation of a rule of procedure. *See id.*

¶6 Rule 26(b)(4)(D) provides that “each side shall presumptively be entitled to only one independent expert on an issue, except upon a showing of good cause.” Ariz. R. Civ. P. 26(b)(4)(D) (2016).³ The purpose of Rule 26(b)(4)(D) is “to discourage the unnecessary retention of multiple independent expert witnesses and the discovery costs associated with listing multiple cumulative independent experts as witnesses.” Committee Comment to 1991 Amendment. This court has previously defined “independent expert” as a “person who is retained for the purpose of offering expert opinion testimony.” *Felipe*, 235 Ariz. at 526, ¶ 19.

² Plaintiff’s notice of appeal referenced only the minute entry and signed order denying her motion for new trial. Therefore, this appeal “is limited to the [superior] court’s determination to deny the post-judgment motion.” *See Sun Lodge, Inc. v. Ramada Dev. Co.*, 124 Ariz. 540, 543 (App. 1979) (“The scope of appeal from an order denying a motion for new trial may not be enlarged beyond the matters assigned as errors in the motion.”). That motion, however, challenged the rulings on both issues raised on appeal.

³ Rule 26(b)(4)(D) was amended effective January 1, 2017, and now provides:

Unless the parties agree or the court orders otherwise for good cause, each side is presumptively entitled to call only one retained or specially employed expert to testify on an issue.

Ariz. R. Civ. P. 26(b)(4)(D)(i) (2017).

NAZOS v. PHOENIX, et al.
Decision of the Court

¶7 In *Felipe*, this court applied Rule 26(b)(4)(D) to a wrongful death and personal injury case arising from an automobile accident. *See id.* at 522, ¶ 1. As part of plaintiffs' case in chief, a police officer testified and opined on the speed of the vehicles based on his reconstruction of the accident. *See id.* at 523, ¶¶ 5, 6. Thereafter, the superior court limited the scope of plaintiffs' retained expert's testimony, reasoning that "any further expert opinion testimony on the same issues would violate the limitation of Rule 26(b)(4)(D) to one independent expert per issue." *Id.* at 523, ¶ 7. This court reversed, holding that a police officer is not an independent expert for purposes of Rule 26(b)(4)(D):

Because [the police officer] was not **retained by Plaintiffs, he was not Plaintiffs' independent, retained expert** on the speeds of the vehicles. By precluding [plaintiffs' retained expert] from testifying about the vehicles' respective speeds, the trial court erred in its application of Rule 26(b)(4)(D).

Id. at 526, ¶ 19 (emphasis added).

In this case, Plaintiff supported her theory of the case with testimony from her expert accident reconstructionist, Timothy Leggett. Leggett based his opinion of the garbage truck's speed on "skid marks" that he observed in photographs of the accident. Using the length of the skid marks, Leggett calculated that the garbage truck was travelling 22.3 miles per hour at the time of collision and, given that speed, could not possibly have stopped at the stop sign.

¶8 Plaintiff retained a second expert, Phil Smith, to read the garbage truck's black box and perform a vehicle inspection.⁴ Defendants deposed Smith and questioned him regarding the alleged skid marks that informed Leggett's opinion. Smith, who had experience with accident reconstruction, expressed his opinion that the marks were not skid marks, but ordinary tire prints. Smith's assessment of the marks contradicted the opinion of Plaintiff's other expert, Leggett, and supported the opinion of Defendants' expert who also opined that the marks were tire prints, not skid marks.

⁴ Smith was retained to "attempt an ECM, electronic control module, download and a vehicle inspection." He was not retained as an accident reconstructionist.

NAZOS v. PHOENIX, et al.
Decision of the Court

¶9 Before trial, Plaintiff filed a motion in limine seeking to preclude Defendants from eliciting testimony from Smith regarding whether the photographs depicted skid marks or tire prints. Plaintiff argued that Defendants' use of Smith's testimony would violate the one-independent-expert rule set forth in Rule 26(b)(4)(D). The superior court denied Plaintiff's motion.

¶10 At trial, Plaintiff's counsel preemptively read excerpts from Smith's deposition into the record as part of her case in chief, explaining "we are only reading any of Phil Smith's deposition because the Court overruled our motion in limine to preclude part of it." *See* Ariz. R. Civ. P. 32 (authorizing the use of depositions at trial). The excerpts included Smith's opinion that the marks were "ordinary tire marks." In moving for a new trial, Plaintiff argued that a "new trial is required due to the admission of the testimony of multiple independently retained experts in violation of [Rule] 26(b)(4)(D)."

¶11 Rule 26(b)(4)(D) creates a presumption that each party is entitled to only one independent expert per issue. *See* Ariz. R. Civ. P. 26(b)(4)(D). As explained in *Felipe*, however, if an expert is not retained "by plaintiffs," then he is not "[p]laintiffs' independent retained expert." *Felipe*, 235 Ariz. at 526, ¶ 19. Rule 26(b)(4)(D) rule does not prevent a party from eliciting testimony from an expert retained by the opposing party. *See* Ariz. R. Evid. 611(b) ("A witness may be cross-examined on any relevant matter."); *State v. Mincey*, 130 Ariz. 389, 405 (1981) (Arizona follows the English or 'wide open' rule that allows cross-examination to extend to any relevant area).

¶12 When the status of an expert witness does not fit squarely within a rule-based category, the trial court has discretion to regulate the presentation of testimony at trial. *See generally* Ariz. R. Evid. 611. Here, Defendants did not retain Smith as their expert; Plaintiff did. Therefore, Smith was not Defendants' independently retained expert. Accordingly, the superior court did not abuse its discretion under Rule 26(b)(4)(D) in denying Plaintiff's motion for new trial.

B. Negligence Per Se.

¶13 Plaintiff next argues that Ambrocio was negligent per se and, therefore, the defense verdict was contrary to law. In the superior court, Plaintiff raised this issue in her motion for new trial or, in the alternative for judgment as a matter of law. We review the court's denial of Plaintiff's motion for new trial for an abuse of discretion. *See Styles v. Ceranski*, 185

NAZOS v. PHOENIX, et al.
Decision of the Court

Ariz. 448, 450 (App. 1996). We review the court's ruling on plaintiff's motion for judgment as a matter of law *de novo*.⁵ See *Felder v. Physiotherapy Assocs.*, 215 Ariz. 154, 162, ¶ 36 (App. 2007). Judgment as a matter of law is appropriate if "the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Ariz. R. Civ. P. 50(a).

¶14 In arguing that Ambrocio was negligent per se, Plaintiff relies on A.R.S. § 28-773, which provides:

The driver of a vehicle shall stop in obedience to a stop sign as required by § 28-855 and then proceed with caution yielding to vehicles that are not required to stop and that are within the intersection **or are approaching so closely as to constitute an immediate hazard.**

A.R.S. § 28-773 (emphasis added). Plaintiff argues that a breach of § 28-773 "is not merely evidence of negligence, but is negligence per se."

¶15 Plaintiff's argument that Ambrocio was negligent per se fails because a determination of whether Ambrocio violated § 28-773 involves questions of fact including (1) whether Ambrocio stopped at the stop sign and (2) whether the motorcycle was "approaching so closely as to constitute an immediate hazard." The jury, as a fact finder, weighed the evidence and judged the credibility of the witnesses who testified regarding these issues of fact. See *Boudreaux v. Edwards*, 7 Ariz. App. 178, 181 (1968) (whether oncoming traffic presents an immediate hazard is a question of fact to be determined by the jury).

¶16 We have reviewed the record and find sufficient evidence to support the jurors' verdict. Ambrocio testified that he brought the garbage truck to a full stop at the stop sign, and several eyewitnesses confirmed the same. One of the eyewitnesses was a passenger on a southbound bus at the time of the accident. She testified that the motorcycle passed the bus travelling between 60 and 90 miles per hour and that there was no way for Ambrocio to have seen the motorcycle before he pulled onto Cave Creek

⁵ Under either standard of review, we affirm the superior court's denial of Plaintiff's motion.

NAZOS v. PHOENIX, et al.
Decision of the Court

Road.⁶ The bus driver himself stated that the motorcycle swerved in front of the bus and took off “racing toward” the garbage truck. A third eyewitness, who was driving southbound on Cave Creek Road, testified that she observed the truck starting to pull out when “all of a sudden, out of nowhere, a motorcyclist came around” her “like a flash.” She testified that her car, travelling at or slightly above the speed limit, was never in “harm[']s way.” “The credibility of a witness’ testimony and the weight it should be given are issues particularly within the province of the jury.” *Kuhnke v. Textron, Inc.*, 140 Ariz. 587, 591 (App. 1984).

¶17 There is competent evidence to support the conclusion that Ambrocio did not violate § 28-773. We affirm the superior court’s ruling.

CONCLUSION

¶18 For the foregoing reasons, we affirm the superior court’s denial of Plaintiff’s motion for new trial or, in the alternative, motion for judgment as a matter of law. We award costs to Defendants upon compliance with Arizona Rule of Civil Appellate Procedure 21.



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

⁶ The police officer who reconstructed the accident determined that Nazos was travelling, at minimum, 75 miles per hour, 30 miles per hour over the speed limit. Ambrocio was not cited for a traffic violation.