IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

HESHMAT NADEALI DOROSTI, *Plaintiff/Appellee*,

v.

RECOVERY INNOVATIONS OF ARIZONA INC., et al.,
Defendants/Appellants.

No. 1 CA-CV 16-0617
FILED 3-19-2019

Appeal from the Superior Court in Maricopa County
No. CV2013-015770
The Honorable Kerstin G. LeMaire, Judge

AFFIRMED

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MEMORANDUM DECISION

Presiding Judge David D. Weinzweig delivered the decision of the Court, in which Chief Judge Samuel A. Thumma and Judge Kent E. Cattani joined.

W E I N Z W E I G, Judge:

¶1 Defendants Recovery Innovations of Arizona, Inc. and Recovery Innovations, Inc. (collectively, "Recovery") appeal from the superior court's order granting a new trial. At issue is the scope of the new trial, which the court granted on the issue of comparative fault alone. Recovery argues the court should have granted a new trial on "all questions of liability" and comparative fault, but not damages. For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 This is a wrongful death lawsuit. Medhi Najafian suffered from bi-polar disorder; he turned manic when unmedicated. He was behaving erratically in September 2012 when rushed by police to Recovery Innovations, a psychiatric urgent care center. Najafian was violent and agitated. He refused oral medications and received a sedative injection, but his erratic behavior continued. He was admitted and assigned a room. He left the room and walked into the common area, where he disrobed and claimed to be an orangutan. He then grabbed the lead nurse, picked her up and threw her head-first onto a concrete floor. A group of behavioral care technicians then tackled Najafian.

¶3 Najafian remained combative as the technicians held him down. Another sedative was administered. In all, Najafian was restrained for three to four minutes, either face down or on his side. He yelled and cursed at the staff. He also complained he could not breathe. Still

restrained on the floor, Najafian stopped breathing and became unresponsive. An ambulance rushed him to the hospital, where he was later pronounced dead.

¶4 Plaintiff Heshmat Nadeali Dorosti is Najafian's mother. She sued Recovery for wrongful death in November 2013, alleging it negligently caused her son's death. Recovery answered, asserting comparative fault as an affirmative defense. Recovery argued that Najafian bore fault for his own death because (1) he failed to take his psychotic medication, which caused his manic and violent behavior, and (2) his violent behavior precipitated the struggle and his death.

¶5 The jury heard testimony from 24 witnesses over eight trial days. Recovery pressed its comparative fault theory with various expert and lay witnesses, including Plaintiff's forensic pathologist and Recovery's treating psychiatrist. Recovery elicited testimony that Najafian did not like taking his medication; became violent when unmedicated and knew it; had visited Recovery three or four previous times after not taking his medication; and might have skipped his medication before the incident.

¶6 Recovery did not request a comparative fault jury instruction. At trial's end, however, Recovery filed a proposed form of verdict with blank spaces for the jury to attribute any "relative degrees of fault" to and between Recovery and Najafian. Dorosti argued Recovery's verdict form was not proper and proposed a version without the apportionment option, which the court accepted because "[t]here's no basis for comparative fault in this case."

¶7 The jury found in Dorosti's favor and awarded $2,000,000 in damages. Recovery then moved for a mistrial or new trial, arguing, among other things, that the superior court erred by failing to instruct the jury on Najafian's comparative fault. The court denied the motion, explaining that Recovery had received an "ample opportunity to fully and fairly defend," and the "jurors carefully deliberated and reached a verdict that was not disproportionate to the evidence presented."

¶8 Recovery filed a second motion for new trial after entry of the final judgment. This time, the superior court granted the request for a new trial, stating:

> [A]s much as the Court does not wish to force the parties to relitigate this matter and given the dearth of evidence that Mr. Najafian failed to take his medications, the issue of

> [comparative fault] . . . was raised as a defense in Defendant's answer and that issue should have gone to the jury.

¶9 After additional briefing, the court clarified the new trial would be limited to the issue of comparative fault, confirming its error was limited to "not allowing Defendants the opportunity to argue to the jury that fault could be allocated against the decedent for contributing to his own death." The superior court thus envisioned a second trial where it (1) informs the second jury that Recovery was determined to bear an undetermined percentage of fault for Najafian's death in an earlier jury trial, and (2) asks the second jury to determine whether Najafian bears any fault for his own death and, if so, to apportion fault between Najafian and Recovery.[1]

¶10 Recovery timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(5)(a).

DISCUSSION

A. Rule 59(e) and Limited New Trials

¶11 Recovery argues the superior court abused its discretion by granting a limited new trial on comparative fault, divorced from liability. Dorosti counters that a limited trial is appropriate because liability and comparative fault are discrete issues, which can be independently considered and resolved. Dorosti also raises fairness concerns; that Recovery should not have a second chance to litigate the question of liability because the first jury found liability after a full and fair trial on the issue and Recovery does not contest the finding.

¶12 We review the superior court's decision granting a partial new trial for an abuse of discretion, meaning the decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Englert v. Carondelet Health Network*, 199 Ariz. 21, 25, 27, ¶¶ 5, 14 (App. 2000) (quotation omitted). We will affirm the court's decision "[e]ven if we would have acted differently under the same circumstances" as long

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[1] The court also emphasized, however, that Recovery had every chance in the first trial to argue that Najafian bore some fault for his own death: "Defense counsel spent much time cross-examining the decedent's family and care giver regarding his compliance with his medications and treatment regimen and what the outcomes could be if decedent was not in compliance with the same," and the jury "would have factored [that] into their calculation of damages as a whole."

as the court "did not exceed [] the bounds of reason by performing the challenged act." *Id.* at 27, ¶ 14 (quotation omitted).

¶13 A motion for new trial is governed by Arizona Rule of Civil Procedure ("Rule") 59, which commands that a "new trial, if granted, must be limited to the question or questions found to be in error, if separable." Ariz. R. Civ. P. 59(e). Arizona courts have cautioned, however, that partial new trials can spawn confusion and injustice. *Styles v. Ceranski*, 185 Ariz. 448, 451 (App. 1996). For that reason, a partial new trial on one issue is only appropriate when the discrete issue to be retried is "not inextricably intertwined" with other issues determined in the first trial and can be separated without prejudice or injustice to the parties. *Englert*, 199 Ariz. at 27, ¶ 15. And if uncertain, "doubt should be resolved in favor of a trial on all the issues." *Id.*

¶14 We must decide if the discrete question of comparative fault (to be determined at a second trial) is inextricably bound to whether Recovery bears any liability for wrongful death (as determined by the first jury), and whether prejudice would result if the issues are separately tried.

¶15 To determine whether two issues are inextricably intertwined for purposes of Rule 59, courts often examine whether a single error from the first trial affects both issues—if yes, both issues must be retried in a new trial; if no, separate trials are permissible. *See Saide v. Stanton*, 135 Ariz. 76, 80 (1983) ("Where the verdict does not indicate a contamination of the jury finding on liability issues, the damage issue will ordinarily be severable and the new trial may be confined to the question of damages."). Thus, this court rejected a limited new trial on comparative fault in *Styles* because an evidentiary error in the first trial "probably affected" the verdict on *both* liability and damages. 185 Ariz. at 453 (plaintiffs used four standard of care expert witnesses when court limited each party to one such witness in pretrial ruling). By contrast, the court granted a new trial limited to apportionment of fault in another case because the superior court's error was quarantined to apportionment and "the liability and damage verdicts were justified by the evidence and were neither inextricably entwined with nor tainted by the unjustified apportionment of fault." *Hutcherson v. City of Phoenix*, 188 Ariz. 183, 196-97 (App. 1996), *vacated on other grounds*, 192 Ariz. 51 (1998), *as stated in Ogden v. J.M. Steel Erecting, Inc.*, 201 Ariz. 32, 37, ¶ 23 (App. 2001).

¶16 No single error infects both issues here—liability and comparative fault. A limited retrial on comparative fault is thus appropriate. *See Ogden*, 201 Ariz. at 38, ¶ 24 (stating, in dicta, that if the first

trial did not result in reversible error on liability and damages, "a permissible remedy would be to remand for a new trial only on the allocation of fault" where liability and damages were not "inextricably entwined with [or] tainted by the unjustified apportionment of fault") (quotation omitted).

¶17 The sole error in the trial court was the omission of a comparative fault instruction or option. Recovery does not argue this error infected or contaminated the jury's finding of liability in the first trial. In fact, Recovery does not even argue the first jury reached an unsupported or incorrect result on liability. Nor is there reason to assume Recovery would have escaped liability if an instruction had been provided. To that end, Recovery does not claim the new trial on comparative fault will include new or different evidence that absolves it from responsibility and was not presented in the first trial.

¶18 Recovery argues, however, that a new trial must include both liability and comparative fault (although not damages) because the first jury's general verdict did not explain "the particular respect or theory of negligence" for finding Recovery at fault, thus leaving the second jury without critical information upon which to determine and assign relative fault. But the second jury need not know precisely how and why the first jury reached its conclusion, just that it did. The second jury can and will hear the same or similar evidence presented at the first trial to inform its apportionment of fault.

¶19 Recovery also warns of the potential for inconsistent verdicts if the second jury determines that Recovery bears *no fault* for Najafian's death, while the first jury concluded that Recovery was liable. But that has not occurred and may never occur. No such issue would arise if the second jury assigns any amount (even the slightest fraction) of fault to Recovery. And at the new trial, the parties and superior court can craft jury instructions and special interrogatories to account for the issue. Recovery has not shown the theoretical possibility of inconsistent verdicts mandates a finding that the superior court abused its discretion in granting a new trial on allocation of fault alone.

¶20 And last, Recovery argues that its liability and the comparative fault of decedent are inextricably intertwined because the issues turn on common witnesses, testimony and evidence. But common facts do not prevent the limited new trial granted here. The question is not whether two issues are based on the same facts or evidence, but instead whether the issues are *inextricably* intertwined and *incapable* of separate

consideration and treatment. The difference is illustrated in *McGrady v. Wright*, 151 Ariz. 534, 538 (App. 1986). The plaintiff there asserted independent claims for medical malpractice and lack of informed consent and lost on both issues, but the appellate court reversed the ruling on the lack of informed consent claim and remanded for a new trial. *McGrady*, 151 Ariz. at 536, 538. The court held the medical malpractice claim must be retried, too, because the issues were interwoven; the malpractice claim was premised on the lack of informed consent and vice versa. *Id.* at 536-38 (expert witness testified that informed consent was impossible without diagnosis and biopsy, and failure to take biopsy was malpractice). That is not true here. In substance, the first jury determined that Recovery bears an undetermined percentage of fault for Najafian's death; the second jury will determine the percentage. While common evidence will be introduced in both trials, the first and second jury are charged with independent tasks and their ultimate conclusions need not conflict.

¶21 Recovery has not demonstrated prejudice from a limited new trial, either. Recovery received a full and fair trial on liability and damages; indeed, it does not challenge the damages verdict. A second trial on both liability and comparative fault would afford Recovery a second bite at the liability apple. And in any event, on retrial, Recovery will receive a full and fair opportunity to argue that Najafian bears fault for his own death.

¶22 We cannot conclude the superior court abused its discretion in limiting the new trial to comparative fault. *See Martinez v. Schneider Enters., Inc.*, 178 Ariz. 346, 349 (App. 1994) ("An order limiting a new trial to only part of the issues is within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion."). On this record, the issues of comparative fault and liability are not inextricably intertwined and can be separated without prejudice to either party. Recovery was found liable after a full and fair trial and does not contest the finding here. To be sure, one trial typically is preferable on both issues; but here, at least, Recovery has not shown the superior court's order granting a limited new trial was an abuse of discretion.

B. Defendants' Alternative Arguments

¶23 Aside from Rule 59, Recovery separately argues that a new trial limited to comparative fault would deprive it of a supposed "right to have its liability exhaustively decided by a jury deciding all issues," pointing to *Perkins v. Komarnyckyj*, 172 Ariz. 115 (1992).

¶24 *Perkins* is neither relevant nor compels a new trial on both liability and comparative fault. *Perkins* instead requires that all jurors should consider all questions during the course of deliberations. In *Perkins*, the trial judge erroneously instructed the jury that certain questions, including damages, should only be considered by jurors who voted in favor of liability. 172 Ariz. at 118, 120; *Am. Power Prods. v. CSK Auto, Inc.*, 239 Ariz. 151, 155, ¶ 15 (2016). That was error and "inherently prejudicial" because it deprived the defendants of the constitutional right to a trial by the full jury, which "carries with it the right to have every issue tried by the jury that has been empaneled, not by two-thirds of that jury, or three-fourths, or any other fraction. The jurors who have been empaneled are required to consider and decide each of the issues *submitted to them by the court*." *Perkins*, 172 Ariz. at 118-20 (emphasis added) (citation omitted).

¶25 Unlike in *Perkins*, all the empaneled jurors in this case participated in resolving each of the issues submitted to them by the court. Each signed the verdict form finding Recovery liable for wrongful death, which defense counsel confirmed by polling the jurors. Recovery was not deprived "of the opportunity to have [its] liability exhaustively deliberated by a full jury" and "to have all of the jurors participate in deciding all of the issues." *Id.* at 119.

¶26 Recovery also proposes a *per se* rule preventing a separate trial limited to allocating the fault of plaintiff and defendants, but such a rule is not warranted. As explained above, courts use a case-specific inquiry under Rule 59 to determine what issues should be tried in a new trial, examining the link between issues and the potential for prejudice. *Englert*, 199 Ariz. at 27, ¶ 15. On appeal, we defer to the superior court in making its determination absent an abuse of discretion. *Id.* at 28, ¶ 18.

¶27 And last, Recovery contends that Arizona's Uniform Contribution Among Tortfeasors Act ("UCATA") requires a new trial to determine both liability and fault. The statute does not require that liability and comparative fault be determined in one trial, however, only that the determination and apportionment of the *relative degrees* of fault be determined in the same trial. A.R.S. § 12-2506(C) ("The *relative degree* of fault of the claimant, and the *relative degrees* of fault of all defendants and nonparties, shall be determined and apportioned as a whole at one time by the trier of fact.") (emphasis added); *see also Bowen Prods., Inc. v. French*, 231 Ariz. 424, 427, ¶ 10, n.3 (App. 2013) (defendant in a negligence action is liable only for its own portion of fault under UCATA and "the finder of fact is required to determine the relative percentages of fault among all those who contributed to the injury"). Recovery's argument conflates two

distinct functions—the jury first finds duty, breach of duty, and causation; it *then* apportions "fault." *See Cramer v. Starr*, 240 Ariz. 4, 7, ¶ 12 (2016) ("UCATA is thus based on the concept of fault, which necessarily presupposes a duty, breach of duty, and causation.") (citing *Watts v. Medicis Pharm. Corp.*, 239 Ariz. 19, 24, ¶ 22 (2016)).

CONCLUSION

¶28 We affirm.

AMY M. WOOD • Clerk of the Court
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