IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

GREGORY ZUPANCIC, et al., *Plaintiffs/Appellants*,

v.

PAUL PENZONE, *Defendant/Appellee*.

No. 1 CA-CV 20-0288
FILED 6-15-2021

Appeal from the Superior Court in Maricopa County
No. CV2017-015885
The Honorable James D. Smith, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Judge Randall M. Howe delivered the decision of the Court, in which Presiding Judge Jennifer M. Perkins and Judge Maria Elena Cruz joined.

H O W E, Judge:

¶1 Gregory Zupancic appeals the trial court's granting Maricopa County Sheriff Paul Penzone summary judgment on his claim that Penzone was negligent under the theory of respondeat superior because deputy sheriffs at an accident scene did not recall paramedics or arrange alternative transportation for the driver. Zupancic also appeals the jury's verdict that Penzone was not grossly negligent when deputy sheriffs at the accident did not administer a field sobriety test to the driver. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In January 2017, Christina Hornyan was in a minor traffic accident in Queen Creek, Arizona. Paramedics from the fire department and deputy sheriffs from the Maricopa County Sheriff's Office ("MCSO") responded. Hornyan spoke with the deputy sheriffs and the paramedics twice, said that she was not injured, and both deputy sheriffs and the paramedics stated that she did not appear to be impaired. Because the accident was minor, Hornyan was cited for not driving at a reasonable speed to avoid an accident and released from the scene. The responding deputy sheriffs wore body cameras while investigating the accident, but multiple aspects of the investigation were not recorded. For instance, one deputy's body camera abruptly shut off while another deputy issued Hornyan's traffic citation.

¶3 After Hornyan received her citation, she drove away and, about 20 minutes later, crossed over the center line of the roadway and hit Zupancic's car head on, injuring him and his passengers. Deputy sheriffs—some of whom were at the first accident—responded to the second accident. These deputy sheriffs wore body cameras but, like the first accident, some aspects of the investigation were not recorded. Two deputies noted in their accident reports that their body cameras were recording "with interruptions." Hornyan was transported to the hospital and was later diagnosed with and treated for new onset diabetes.

¶4 After the accident, Zupancic made multiple public records requests to the MCSO, requesting body camera footage related to both accidents. The MCSO provided Zupancic with the requested body camera footage. In December 2017, Zupancic sued Penzone for negligent hiring, retention, or supervision and negligence under respondeat superior, alleging that the deputy sheriffs who responded to the first accident negligently permitted Hornyan to leave the scene. Zupancic later amended his complaint to also allege gross negligence. Zupancic alleged that the deputy sheriffs were negligent or grossly negligent by not recalling paramedics to the first accident scene for further assessment, by not arranging alternative transportation for Hornyan, and by not administering a field sobriety test.

¶5 During pretrial discovery, Zupancic requested additional body camera footage, which the MCSO provided, but some body camera footage was unavailable because the deputy sheriffs either did not record certain events or the body cameras shut off. As a result, before trial, Zupancic moved for a spoliation jury instruction, claiming that Penzone allowed certain body camera recordings to be destroyed. Zupancic also moved for the same jury instruction based on Penzone's failure to disclose the personal cell phone records of the deputy sheriffs who responded to the first accident. To counter Zupancic's theory that certain portions of body camera footage were intentionally destroyed, Penzone provided an expert report that analyzed the body camera video files and determined that the recordings matched the originals. The court denied Zupancic's motion, finding that no spoliation instruction was warranted because the deputy sheriffs did not destroy evidence; rather they failed to create the evidence by either not activating or by turning off their body cameras. The court also found that Zupancic was not entitled to the deputy sheriffs' personal cell phone records because the deputies were not parties to the litigation and discovery and public record requests did not include a non-party's personal cell phone records.

¶6 Penzone moved for summary judgment arguing, among other things, that qualified immunity applied to Zupancic's negligence theories and that Zupancic could not prove that paramedics would have discovered Hornyan's diabetic condition had they been recalled. Zupancic argued that qualified immunity did not apply. He attached a report from his law enforcement expert, who opined that under the deputy sheriffs' "community caretaking function," the deputies had an "obligation to safeguard the general public from 'impaired drivers.'" He then argued that the deputy sheriffs breached their "community caretaking function" by failing to keep an impaired driver off the road, not recalling paramedics,

not arranging alternative transportation for an impaired driver, and not administering a field sobriety test.

¶7 The trial court agreed that Zupancic could pursue his "recall the paramedics" and "alternative transportation" theories under an ordinary negligence standard because he did not assert that the deputy sheriffs should have arrested Hornyan under those theories. But the trial court granted Penzone summary judgment on Zupancic's negligence claim because Zupancic did not provide an objective or enforceable standard of care for his "recall the paramedics" theory. The court also found that Zupancic did not provide any expert testimony to show that had paramedics been recalled, they would have discovered Hornyan's diabetic condition. The court found that qualified immunity applied to Zupancic's claim that the deputy sheriffs should have conducted a field sobriety test at the scene of the first accident, and that Zupancic therefore had to prove gross negligence under that theory. The court found that a genuine issue of material fact existed about whether the deputy sheriffs were grossly negligent by not administering a field sobriety test and denied Penzone's summary judgment motion on Zupancic's gross negligence claim.[1]

¶8 A trial was held on Zupancic's gross negligence claim in December 2019. At trial, training materials for "Recognizing Diabetic Emergencies" were disclosed to Zupancic and he moved for reconsideration of the trial court's grant of summary judgment. The trial court found that the training video did not provide an objective standard of care and noted that the training video involved situations in which the diabetics told deputy sheriffs that they were diabetic, which was not the case here. The court therefore denied Zupancic's motion to reconsider, excluding the video from evidence.

¶9 Following trial, the court instructed the jury on gross negligence. The court instructed the jury that

> Plaintiffs must prove that one or more MCSO deputies who responded to first collision scene were grossly negligent. A party is grossly or wantonly negligent if he acts or fails to act when he knows or has reason to know facts that would lead a reasonable person to realize that his conduct not only creates an unreasonable risk of bodily harm to others, but also

[1] The trial court also granted Penzone summary judgment on Zupancic' negligent hiring, retention, or supervision claim, which Zupancic did not appeal.

> involves a high probability that substantial harm will result. A person can be very negligent and still not be grossly negligent.

¶10 The jury found in Penzone's favor on Zupancic's gross negligence claim. Zupancic moved for a new trial and the court denied the motion. Zupancic timely appealed.

DISCUSSION

1. Negligence

¶11 Zupancic argues that the trial court improperly granted Penzone summary judgment on his negligence claim. He contends that his law enforcement expert provided an objective standard of care when the expert opined that under the deputy sheriffs' "community caretaking function," the deputy sheriffs had an "obligation to safeguard the general public from 'impaired drivers.'" He therefore argues that a genuine issue of material fact exists whether the deputy sheriffs from the first accident breached the standard of care by not recalling paramedics to examine Hornyan and by not arranging alternative transportation for her.

¶12 We review the trial court's grant of summary judgment de novo. *Torres v. Jai Dining Services (Phoenix), Inc.*, 250 Ariz. 147, 151 ¶ 17 (App. 2020). A negligence claim requires a plaintiff to prove that the defendant had a legal duty to adhere to a certain standard of care, the defendant breached that standard of care, the defendant caused the plaintiff's injury, and the plaintiff suffered damages. *Id.* at ¶ 18.

¶13 In finding that Zupancic could pursue an ordinary negligence claim against Penzone for the deputy sheriffs' failure to recall paramedics or arrange alternative transportation, the trial court relied on *Sandoval v. City of Tempe*, 1 CA–CV 14–0245, 2015 WL 3916994 (Ariz. Ct. App. June 25, 2015). In that case, two police officers were called to investigate a potential stolen car after two intoxicated men were unable to find their car. *Id.* at *1 ¶ 2. The officers found the car but did not tell the men where the car was because the officers believed that the men were too intoxicated to drive. *Id.* at ¶ 3. Instead, the officers told the men to take a taxi home and return to get the car the next morning. *Id.* at ¶ 4. The two men left and ate at a restaurant and happened to find their car along the way. *Id.* One of the men drove the car and caused an accident, resulting in the death of another driver. *Id.*

¶14 The Court in that case determined that qualified immunity did not apply because the plaintiff did not assert that the police should have arrested the men before they found the car. *Id.* at *3 ¶¶ 10, 12. Instead, the Court determined that under law enforcement's "community caretaking function," the plaintiffs were able to pursue an ordinary negligence claim based on the police officers' duty to protect the public from possible drunk drivers. *Id.* at *4, *6 ¶¶ 16, 19. The Court found, however, that the plaintiffs needed to show an objective standard of care by which the police officer's conduct could be measured. *Id.* at ¶ 20. Because the plaintiffs' expert relied on his own personal experience and could not point to any police policies, the plaintiffs failed to provide evidence of an objective standard of care and the Court affirmed the trial court's grant of summary judgment. *Id.* at *6–7 ¶¶ 21, 23–24.

¶15 Assuming, without deciding, that the deputy sheriffs here had a duty to remove medically impaired drivers from the road as part of their community caretaking function, Zupancic had to provide some objective, articulable standard of care to determine whether the deputy sheriffs had breached that duty. *See id.* at *3 ¶ 10.

¶16 Similar to *Sandoval*, Zupancic did not provide an objective standard of care by which the deputy sheriffs' conduct could be measured and therefore, no genuine issue of material fact existed to support his negligence claim. He points to no MCSO policy or standard requiring the deputy sheriffs to recall paramedics after paramedics had already spoken to a person involved in a traffic accident. Rather, Zupancic's expert relied on his own personal experience to opine that the deputy sheriffs at the first accident should have recalled paramedics. But as the Court noted in *Sandoval*, a subjective standard is insufficient to show that the deputy sheriffs breached the standard of care. *See id.* at *6–7 ¶¶ 21–23.

¶17 Likewise, Zupancic's "alternative transportation" theory is not based on an articulable or objective standard of care. His expert never opined at summary judgment that the deputy sheriffs should have arranged alternative transportation for Hornyan. And while a MCSO policy states that deputy sheriffs should arrange alternative transportation for a mentally or physically impaired driver, that policy is applicable only after the deputy sheriffs have conducted a field sobriety test—thereby requiring Zupancic to proceed under a gross negligence standard. *See Walls v. Ariz. Dep't of Public Safety*, 170 Ariz. 591, 595 (App. 1991) (qualified immunity applies to the "failure to make an investigatory stop which may or may not lead to an arrest"). But Zupancic pursued this theory under ordinary negligence, so he failed to provide an objective standard of care against

which the deputy sheriffs' conduct could be measured. Therefore, no genuine issue of material fact existed that the deputy sheriffs breached an objective standard of care.

¶18 Zupancic argues that he provided an objective, articulable standard of care because his expert and the deputy sheriffs stated that they have an obligation to remove medically impaired drivers from the road. Zupancic's argument, however, conflates duty with the standard of care. Duty is the general obligation that law enforcement owes to the public. *See Muscat by Berman v. Creative Innervisions, LLC*, 244 Ariz. 194, 197 ¶ 8 (App. 2017). Zupancic acknowledged this at summary judgment when he argued that Penzone did not challenge the MCSO's "duty to safeguard the general public from impaired drivers." Likewise, in his supplemental motion about the standard of care, Zupancic's expert opined that the deputy sheriffs "have an obligation to take impaired drivers off the road." Zupancic's "recall the paramedics" and "alternative transportation" theories, however, relate to how the deputy sheriffs breached that duty and must be measured against some objective standard of care, which Zupancic failed to allege. *See Sandoval*, 2015 WL 3916994, at *6 ¶ 20.

¶19 Even if the deputy sheriffs breached the standard of care by not recalling paramedics, Zupancic did not present sufficient evidence to prove causation. Expert testimony is generally required when an issue is not within the knowledge of the average layperson, *see Hackworth v. Indus. Comm'n of Ariz.*, 229 Ariz. 339, 343 ¶ 9 (App. 2012), and the jury cannot rely on mere speculation to determine causation, *Salica v. Tucson Heart Hosp.-Carondelet, L.L.C.*, 224 Ariz. 414, 419 ¶ 16 (App. 2010). Whether a paramedic would have discovered Hornyan's untreated diabetic condition—had one been recalled—is not within the knowledge of the average layperson. Without any expert testimony on that subject, the jury would rely on mere speculation to determine whether paramedics would have discovered Hornyan's diabetic condition had they been recalled. Because Zupancic offered no expert opinion in that regard, he failed to allege a genuine issue of material fact regarding causation. The trial court correctly granted Penzone summary judgment on Zupancic's "recall the paramedics" theory.

¶20 Zupancic argues next that even if he could not pursue his negligence claim, the trial court should have permitted him to raise these theories in pursuit of his gross negligence claim. A deputy sheriff is not liable for failing to make an arrest unless that deputy intended to cause injury or was grossly negligent. A.R.S. § 12–820.02(A)(1). Zupancic argued, and the trial court agreed, that his "recall the paramedics" and "alternative

transportation" theories were not subject to the gross negligence standard because he never alleged that the deputy sheriffs should have arrested Hornyan. When the court found that he did not provide an objective standard of care, he could not then turn around and claim that qualified immunity applied and pursue the claims under the gross negligence standard. Even if the trial court erred by not allowing Zupancic to present his "alternative transportation" theory to the jury, he nevertheless presented evidence at trial that a MCSO policy required deputy sheriffs to arrange alternative transportation only after conducting field sobriety tests and determining that the suspect displayed signs of physical or mental impairment. Moreover, Zupancic concedes that because he failed to prove causation on his "recall the paramedics" theory, the trial court did not err by precluding him from pursuing this theory under his gross negligence claim. The trial court properly granted Penzone summary judgment on Zupancic's negligence claim.

2. Jury Instructions

¶21 Zupancic argues next that the trial court's gross negligence jury instruction improperly included the word "wantonly." He contends that the leading torts treatise distinguishes "wanton" conduct from "grossly negligent" conduct and that our supreme court has rejected "the equation of gross negligence with wanton misconduct."

¶22 The trial court has substantial discretion in determining how to instruct a jury, *Smyser v. City of Peoria*, 215 Ariz. 428, 439 ¶ 33 (App. 2007), and we will not reverse a jury's verdict unless the jury instruction is both erroneous and "prejudicial to the substantial rights of the appealing party," *Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 504 (1996). Prejudice will not be presumed and must affirmatively appear from the record. *Id.*

¶23 The trial court's inclusion of the term "wantonly" in the gross negligence jury instruction was neither erroneous nor prejudicial. "[G]ross negligence and wanton conduct have generally been treated as one and the same," *Williams v. Thude*, 188 Ariz. 257, 259 (1997), and this Court has continued to include the term "wanton" in the definition of "gross negligence," *see Dinsmoor v. City of Phoenix*, 249 Ariz. 192, 196 ¶ 15 (App. 2020) (requiring a showing of gross, willful, or wanton conduct). Moreover, other than stating that including the term "wantonly" in the jury instruction was "not harmless," Zupancic fails to show prejudice.

¶24 Zupancic also argues that the "gross negligence" jury instruction incorrectly stated that "[a] person can be very negligent and still

not be grossly negligent." But this Court has stated that "[a] person can be very negligent and still not be guilty of gross negligence." *Kemp v. Pinal Cty.*, 13 Ariz. App. 121, 124–25 (1970), and Zupancic concedes on appeal that a person can be very negligent without being grossly negligent. Moreover, he does not explain how this instruction prejudiced him. The trial court did not err by including that language in its gross negligence jury instruction.

¶25 Zupancic argues next that the trial court erred by failing to give the jury a spoliation instruction based on the deputy sheriffs' failure to preserve body camera footage. A litigant has a duty to preserve evidence that he knows or reasonably should know is relevant to the action. *McMurtry v. Weatherford Hotel, Inc.*, 231 Ariz. 244, 260 ¶ 51 (App. 2013). When a litigant fails to do so, a trial court has discretion to impose sanctions, such as instructing the jury that it may infer that the evidence would have been unfavorable to the offending party. *Id.* In determining whether to impose that sanction, the court should consider any bad faith or intentional destruction and whether the loss of evidence prejudiced the other party. *Id.*

¶26 Zupancic provides no evidence that the deputy sheriffs destroyed body camera footage after the footage was created. His spoliation motion mainly referred to instances when deputies admitted to not recording certain aspects of the traffic investigation. But these instances are insufficient to warrant a spoliation instruction because spoliation refers to the destruction of evidence, not the failure to create evidence. *See Lips v. Scottsdale Healthcare Corp.*, 224 Ariz. 266, 267 ¶ 1 (2010).

¶27 Zupancic points to one instance when one deputy sheriff's body camera footage abruptly ends at 1:26 p.m. while Hornyan's traffic citation was issued. But Zupancic assumes, without evidence, that the footage was destroyed. Penzone's expert however, determined that this recording stopped "by the event button being pressed and held, the power switch being switched off, the [body camera] shutting down due to low battery, or a disconnect of the cable that connects the DVR and the controller." The custodian of records provided a signed affidavit stating that he provided all the body camera footage available for the accident and did not find that any footage was lost or destroyed. And the system file for that deputy's body camera—which details actions taken once body camera footage is uploaded—does not show that the body camera footage was deleted.

¶28 Zupancic also points to another deputy's body camera footage and claims that the deputy testified that his body camera was on and recorded his initial interaction with Hornyan and that he reviewed it

with the county attorney. He contends that this body camera footage was never disclosed and must have been destroyed. That deputy also testified that he "believed" his body camera was on, that he was not sure what happened to the video, and that the video had a gap in it or the video started in an unexplained spot. But the custodian of records avowed that all body camera footage was disclosed and that the recordings were not lost or destroyed. Likewise, Penzone's expert found that the recordings matched the originals, and the system file shows that none of his body camera videos were deleted. Rather, the body camera videos uploaded to the system show that the videos were marked for preservation.

¶29 Moreover, Zupancic does not provide any evidence that Penzone intended to deprive him of the body camera footage, which was not only one factor for the trial court to consider when deciding whether to give a spoliation instruction, *see McMurtry*, 231 Ariz. at 260 ¶ 51, but a prerequisite to a spoliation instruction based on failure to preserve electronically stored information, *see* Ariz. R. Civ. P. 37(g) (Upon a finding that the party intended to deprive the other party of the electronically stored information, the court "may instruct the jury that it may or must presume the information was unfavorable to the party").

¶30 Zupancic relies on *McMurtry* to argue that the denial of his requested spoliation instruction prejudiced him. In that case, a hotel patron was intoxicated at a hotel bar when she was refused further service and escorted back to her room. *Id.* at 248 ¶ 3. She then climbed out her hotel window and fell to her death. *Id.* McMurtry, the personal representative of her estate, sued the hotel. *Id.* at 247–48 ¶¶ 1, 4. The hotel had video footage recording the hotel patron's movements and created a log describing her movements that night. *Id.* at 259 ¶ 49. The hotel believed that the police had copied the video footage and thereafter the footage was automatically overwritten after 14 days. *Id.* at 259 ¶ 49. McMurtry moved for a spoliation instruction but the trial court denied the motion, finding the deletion of the video footage did not prejudice him because the hotel patron's movements could be reconstructed using the hotel log and McMurtry's expert could opine on the issue of over-service of alcohol. *Id.* at 259 ¶ 50. On appeal, this Court reversed, finding that the available evidence—the hotel log and expert opinion—was not "as helpful as the video footage itself" and that the video was the most reliable and objective evidence of whether the hotel patron was "obviously intoxicated." *Id.* at 260 ¶ 53.

¶31 The lack of spoliation instruction did not prejudice Zupancic. Unlike *McMurtry*, in which the plaintiff had only a written log and an expert's opinion, Zupancic had other body camera footage from which the

jury could have determined that Hornyan was impaired. *See id.* at 260 ¶ 53. Additionally, Zupancic had independent witness testimony, Hornyan's testimony, the paramedic's interactions with Hornyan, and the deputy sheriffs' reports. Zupancic even argued to the jury that the deputy sheriffs' body cameras did not accidently get disconnected and that the deputy sheriffs benefited from the missing footage. This case is therefore distinguishable from *McMurtry* and the trial court did not abuse its discretion by denying Zupancic's request for a spoliation jury instruction.

¶32 Zupancic argues last that he was entitled to a spoliation instruction based on Penzone's failure to produce the personal cell phone records of the deputy sheriffs who responded to the first accident. Assuming, without deciding, that Penzone was required to disclose the responding deputy sheriffs' personal cell phone records, Zupancic does not argue that he was prejudiced. Moreover, because the cell phone records would have shown only the dates, times, and recipients of the phone calls, the information was of limited value and the nondisclosure did not prejudice Zupancic. The trial court did not abuse its discretion by denying Zupancic's request for a spoliation jury instruction.

CONCLUSION

¶33 For the foregoing reasons, we affirm.

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