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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

WESTERN EXPRESS, INC., a foreign) No. 1 CA-CV 09-0120
corporation; TIMOTHY WAYNE BOLTON)
and JANE DOE BOLTON, individually) DEPARTMENT E
and as husband and wife,)
) **MEMORANDUM DECISION**
Plaintiffs/Counter-)
defendants/ Appellees,) (Not for Publication -
) Rule 28, Arizona Rules of
v.) Civil Appellate Procedure)
)
ANTHONY ONTUN WONG and REBECCA Y.)
HUNG WONG, individually and as)
husband and wife,)
)
Defendants/Counter-)
claimants/Appellants.¹)
)

Appeal from the Superior Court in Mohave County

Cause No. CV-2003-7113

The Honorable Randolph A. Bartlett, Judge

AFFIRMED AND REMANDED

Law Offices of Keith S. Knochel, P.C.
By Keith S. Knochel
John K. McClung
Attorneys for Appellants

Bullhead City

¹ The caption in this matter has been amended to properly reflect the parties' designations. The amended caption is to be used on all future filings.

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By Robert E. Schmitt
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Prescott

J O H N S E N, Judge

¶1 Anthony Ontung Wong and Rebecca Y. Hung Wong ("Appellants") appeal from the superior court's grant of a motion for new trial filed by Western Express, Inc. and Timothy Wayne Bolton ("Appellees"). For the following reasons, we affirm and remand.

FACTUAL AND PROCEDURAL HISTORY

¶2 At approximately 5:45 a.m. one morning in 2002, a semi-truck and trailer owned by Werner Enterprises, Inc. and driven by Anthony Wong, its employee, was re-entering Interstate 40 from a location on the shoulder of the road east of Kingman. Timothy Bolton, driving a semi-truck and trailer owned by his employer, Western Express, Inc., was heading in the same direction and rear-ended Wong's truck. At impact, Wong's truck was travelling at 18.5 miles per hour; Bolton's truck was going 72-73 miles per hour.

¶3 Appellees filed a complaint against Wong and Werner Enterprises; Werner Enterprises, Wong and Wong's wife, who was traveling with him, filed counterclaims. Before trial, Appellees moved to preclude admission of portions of an accident report prepared by Department of Public Safety Officer Michael

Boucher. They sought preclusion of the portion of the report containing the statement of a witness, Randy Hussinger, and of any testimony regarding the statement. Boucher's account of Hussinger's statement, given to Boucher eight days after the accident, read:

According to Hussinger, he was westbound on I-40 in the Flagstaff area when he first saw the Western Express truck. He told me the truck was weaving back and forth as if the driver was tired. Hus[s]inger told me he attempted to make radio communication with the driver to try to keep him awake but he couldn[']t reach him. . . . Hussinger said he passed the truck and went on. Hussinger said he stopped at exit 103 westbound to smoke. He said he stood in front of his truck and was looking westbound. He said he saw a truck sitting on the top of the grade but didn't know if it was in the traffic lane or on the shoulder. He said he saw the Western Express truck drive by and as he watched, he saw the impact. Hus[s]inger said he saw the crash and then he saw flames. He drove to the accident scene at this time. . . .

Appellees also sought to preclude Boucher's conclusions regarding the cause of the accident, shown in the report by Boucher's checking of boxes labeled "FELL ASLEEP/FATIGUED" and "SPEED TOO FAST FOR CONDITIONS." After the superior court denied the motion, the report was admitted in evidence and Boucher was permitted to testify about his conclusions and Hussinger's statement.

¶4 After a five-day trial, the jury awarded Western and Bolton \$55,841.03 and \$351,600.00 in damages, respectively, and Werner and the Wongs \$29,731.71 and \$492,000.00, respectively. The jury found Appellees 67% at fault and Appellants 33% at fault. Appellees moved for a new trial, arguing, among other grounds, that the superior court erred in admitting Hussinger's statement and the conclusions in Boucher's report. The court ruled the admission of Hussinger's statement was prejudicial error and ordered a new trial on all contested issues of liability, fault apportionment and damages. The court also ruled it had erred in admitting Boucher's conclusions, though it did not find the error prejudicial. Appellants timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(F)(1) (2003).

DISCUSSION

A. Standard of Review.

¶5 The superior court has broad discretion in deciding a motion for new trial. *Pullen v. Pullen*, 223 Ariz. 293, 295, ¶ 10, 222 P.3d 909, 911 (App. 2009). "Absent a clear abuse of discretion, we will not disturb a trial court's grant of a motion for new trial, particularly when based on the admission or exclusion of evidence." *Henry ex rel. Estate of Wilson v. HealthPartners of Southern Ariz.*, 203 Ariz. 393, 398, ¶ 16, 55 P.3d 87, 92 (App. 2002). Also, we review the grant of a new

trial more liberally than an order denying one. *State Farm Fire and Cas. Co. v. Brown*, 183 Ariz. 518, 521, 905 P.2d 527, 530 (App. 1995). An abuse of discretion occurs when the superior court commits an error of law in reaching a discretionary decision. *Twin City Fire Ins. Co. v. Burke*, 204 Ariz. 251, 254, ¶ 10, 63 P.3d 282, 285 (2003).

B. Admissibility of the Hussinger Statement.

¶6 Appellants argue the Hussinger statement was admissible under Arizona Rule of Evidence 803(8)(C), or alternatively, if it was inadmissible, it did not materially affect Appellees' rights.

¶7 Hearsay is an out-of-court statement "offered in evidence to prove the truth of the matter asserted," and is inadmissible unless it falls within a recognized exception. Ariz. R. Evid. 801(c), 802; *Ogden v. J.M. Steel Erecting, Inc.*, 201 Ariz. 32, 40, ¶ 36, 31 P.3d 806, 814 (App. 2001). Rule 803(8)(C) establishes an exception to the hearsay rule that allows the admission of "records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . factual findings resulting from an investigation made pursuant to authority granted by law" unless "the sources of information or other circumstances indicate lack of trustworthiness."

¶18 Appellants rely on *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988), for the proposition that Rule 803(8)(C) allows the admission of the opinions and conclusions in Boucher's report, along with the Hussinger statement. In that case, the Supreme Court held "that portions of investigatory reports otherwise admissible under Rule 803(8)(C) are not inadmissible merely because they state a conclusion or opinion. As long as the conclusion is based on a factual investigation and satisfies the Rule's trustworthiness requirement, it should be admissible along with other portions of the report." *Beech Aircraft*, 488 U.S. at 170; see also *State ex rel. Miller v. Tucson Assocs. Ltd. P'ship*, 165 Ariz. 519, 520, 799 P.2d 860, 861 (App. 1990) (adopting *Beech Aircraft's* interpretation of Rule 803(8)(C)).

¶19 At issue in *Beech Aircraft* was a public report containing an investigator's conclusions about the cause of an accident. *Beech Aircraft*, 488 U.S. at 157-58. The decision does not support the admissibility in this case of statements by Hussinger, who was a private-citizen witness, not an investigator. See Rule 803(8)(C) ("factual findings resulting from an investigation made pursuant to authority granted by law"). Thus, the holding of *Beech Aircraft* does not support Appellants' contention that the Hussinger statement is admissible as an exception to the rule against hearsay.

¶10 When a public report otherwise admissible under Rule 803(8)(C) contains a hearsay statement, the hearsay may not be admitted unless it falls within its own exception to the hearsay rule. See Ariz. R. Evid. 805 ("Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules."); see also *State v. Smith*, 215 Ariz. 221, 229, ¶ 28, 159 P.3d 531, 539 (2007) (statements contained in a police report must fall within hearsay exception).

¶11 The Hussinger statement is hearsay; it is an out-of-court statement offered to prove the truth of the matter (at least impliedly) asserted, i.e., that Bolton was tired at the time of the accident. Therefore, even though Boucher's report may be admissible under Rule 803(8)(C), the statement it contains from Hussinger is inadmissible unless it, too, falls within a hearsay exception. Ariz. R. Evid. 805. We do not find, nor do Appellants suggest, any hearsay exception applicable to the Hussinger statement. Thus, because the Hussinger statement is hearsay, the superior court correctly determined in ruling on the new trial motion that the portion of Boucher's report relating the statement should have been excluded.

¶12 The superior court may order a new trial when an error in the admission of evidence materially affects a party's rights. Ariz. R. Civ. P. 59(a)(6). Appellants argue that admission of the Hussinger statement, even if erroneous, did not materially affect Appellees' rights because it was cumulative of other evidence that Bolton was tired. They cite other evidence of Bolton's fatigue, including Boucher's checking of the "FELL ASLEEP/FATIGUED" box in his investigative report; Bolton's logs, which indicated he may have been driving approximately 23 hours without a break at the time of the collision; and inferences from Bolton's testimony that he ate candy when he was tired and was reaching for a bag of candy immediately before the accident, as well as his lack of evasive action preceding the crash.

¶13 "The greatest possible discretion is given the trial court with respect to . . . the granting or denial of a new trial, because, like the jury, it has had the opportunity to hear the evidence and observe the demeanor of witnesses." *Mammo v. State*, 138 Ariz. 528, 533-34, 675 P.2d 1347, 1352-53 (App. 1983). Given the conflicting evidence about whether Bolton was fatigued in the moments preceding the accident, we cannot hold the superior court abused its discretion in concluding the erroneous admission of the Hussinger statement prejudiced Appellees. First, Boucher's conclusion as to the cause of the accident was based not on direct evidence of fatigue, but

instead was the officer's attempt to make sense of the crash given the circumstances. Also, though Bolton's log indicates he may not have taken a break for almost 24 hours, he testified he had taken a break during that period. Similarly, although Bolton said he sometimes ate candy when tired and that he was reaching for candy when his truck struck Wong's, he also testified he did not eat candy only when tired and that he was not tired the morning of the accident.

¶14 Moreover, Appellants relied heavily on Hussinger's statement and Bolton's alleged sleepiness in their closing argument. Appellants' counsel told the jury, "Mr. Hussinger says: That's the [truck] that I saw. That's the one that caused me concern." Counsel also argued that "[w]hat [Bolton] did [was] borderline reckless. He was sleeping. He was over hours. He was not paying attention."

¶15 In sum, we cannot conclude the superior court abused its discretion when it ordered a new trial based on the erroneous admission of the Hussinger statement.

C. The Court's Decision to Grant a New Trial on All Issues.

¶16 Appellants next argue the superior court abused its discretion when it ordered a new trial on all issues of liability, fault apportionment and damages. According to Appellants, the new trial should be limited to liability.

¶17 We review the superior court's decision for an abuse of discretion. *Styles v. Ceranski*, 185 Ariz. 448, 451, 916 P.2d 1164, 1167 (App. 1996). A superior court should grant a retrial "on both liability and damages when the issues are interwoven and cannot be separated without injustice to the opposing party." *Id.* (internal quotation omitted); see also *Saide v. Stanton*, 135 Ariz. 76, 79-80, 659 P.2d 35, 38-39 (1983). The court should resolve any doubt by granting a new trial on all of the issues. *Englert v. Carondelet Health Network*, 199 Ariz. 21, 27, ¶ 15, 13 P.3d 763, 769 (App. 2000). Moreover, when, as here, "there is conflicting evidence on liability, a new trial on all issues is desirable. . . . [I]n comparative fault cases there is an interrelationship between fault and damages apparent on the face of the instructions." *Id.* at ¶ 17 (quoting *Courtney v. City of Kansas City*, 775 S.W.2d 269, 273 (Mo. App. 1989)).

¶18 On this record, we cannot conclude the superior court abused its discretion in granting a new trial on all issues. To cite one example, the jury heard evidence that Wong's account of how the accident occurred was not credible. (He told authorities he was going 35-45 miles per hour at the time of the crash; electronic data from his truck, however, revealed he was going only 18.5 miles per hour.) To the extent that the Hussinger statement tended to support Wong's account of the accident, it may have influenced the jury's assessment of Wong's

testimony about the injuries he contends he suffered in the accident. Because any doubt should be resolved in favor of a new trial on all issues, *id.* at ¶ 15, we cannot conclude the superior court erred.

D. Admissibility of Conclusions in Boucher's Report.

¶19 The superior court also ruled it had erred in admitting the portion of Boucher's report containing his conclusions that Bolton fell asleep or was fatigued or was driving too fast for conditions. The court concluded, however, that the error was not prejudicial and so did not warrant a new trial. On appeal, Appellants argue Boucher's conclusions are admissible and the court erred in deciding otherwise. We will discuss the issue because it is likely to arise on remand.

¶20 Factual conclusions and opinions in an investigatory report otherwise admissible under Rule 803(8)(C) are admissible if they are based on factual investigation and "satisfy the Rule's trustworthiness requirement." *Beech Aircraft*, 488 U.S. at 170. The trustworthiness requirement allows admission of "factual findings resulting from an investigation made pursuant to authority granted by law," "[u]nless the sources of information or other circumstances indicate lack of trustworthiness." Ariz. R. Evid. 803(8)(C) (emphasis added). Accordingly, a trial court must exclude factual findings it deems untrustworthy. *Beech Aircraft*, 488 U.S. at 167. Factors

the court may consider in making this determination include, but are not limited to, "(1) the timeliness of the investigation; (2) the investigator's skill or experience; (3) whether a hearing was held; and (4) possible bias when reports are prepared with a view to possible litigation." *Id.* at 167 n.11; see also *Larsen v. Decker*, 196 Ariz. 239, 243, ¶ 17, 995 P.2d 281, 285 (App. 2000) (affirming exclusion of Social Security Administration report when party seeking admission was only source of information).

¶21 Boucher testified he had been trained extensively in how to investigate traffic accidents, but admitted he was not an accident reconstructionist. On direct examination, when asked why he concluded Bolton fell asleep or was fatigued, Boucher answered that he interviewed Bolton at the scene and:

[Bolton's] response to me about what happened was that he did not see that other vehicle and he was reaching back behind the seat to try and find a bag of candy in the vehicle so he struck the vehicle.

Well, I wasn't absolutely sure because I didn't have anything showing me that there was even a bag of candy. I couldn't find a bag of candy in the truck. Whether it was there or not, we didn't find it.

So it was my decision at that time. I was looking at everything involved and I thought, you know, this guy hits his commercial vehicle, rear-ends another one, on cruise control. I thought maybe he went to sleep or maybe he was just fatigued somehow, and that's why I selected that.

Asked on cross-examination about his conclusion, however, the officer agreed he had no "personal knowledge of whether or not [Bolton] was asleep or fatigued" and that he "got the information from Mr. Hussinger." Further, Boucher testified that he based his conclusion that Bolton was driving "too fast for conditions" on Bolton's admission that he was "looking behind, trying to find his bag of candy." Though Boucher admitted he had no reason to believe Bolton was driving more than 73 miles per hour where the speed limit was 75 miles per hour, Boucher testified "it was speed too fast for conditions when you're not watching where you're going."

¶122 As stated, the officer's conclusions may be admitted "[u]nless the sources of information or other circumstances indicate lack of trustworthiness." Ariz. R. Evid. 803(8)(C). Because resolution of this issue on remand will depend in large part on evidence offered during the retrial, we decline to rule based on the record before us. On remand, the superior court shall determine whether Boucher's factual conclusions meet Rule 803(8)(C)'s trustworthiness requirement. If the conclusions fail to meet that requirement, they shall be excluded. See *Beech Aircraft*, 488 U.S. at 167.²

² For their part, Appellees assert the court correctly concluded it had erred in admitting the officer's conclusions but argue the error was so prejudicial that the court abused its

CONCLUSION

¶23 For the foregoing reasons, we affirm the superior court's grant of a new trial on all contested issues of liability, fault apportionment and damages and remand for proceedings consistent with this decision. We grant Appellees their costs of appeal, conditioned on their compliance with Arizona Rule of Civil Appellate Procedure 21.

/s/ _____
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/ _____
PHILIP HALL, Judge

/s/ _____
LAWRENCE F. WINTHROP, Judge

discretion by failing to grant a new trial on that ground. Because we affirm the grant of new trial on other grounds, we need not decide whether admission of the conclusions was prejudicial error requiring a new trial. Nor need we address the other grounds Appellees argue support the new trial order.