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

MARY CAMERON, a single woman, individually, for her personal injury, and individually, for the benefit of the children of MARTIN CAMERON, for the wrongful death of MARTIN CAMERON, deceased, Plaintiff/Appellant, v. KATHRYN KAY WESTBROOK and JOHN DOE WESTBROOK; PAUL HORTA, JR. and JANE DOE HORTA; JOHN CHRISTNER TRUCKING; ROYAL EXPRESS INCORPORATED, Defendants/Appellees.	No. 1 CA-CV 10-0398 DEPARTMENT D **MEMORANDUM DECISION** Not for Publication (Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2006-011915

The Honorable Robert A. Budoff, Judge

AFFIRMED

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G E M M I L L, Judge

¶1 Mary Cameron ("Cameron") appeals from an adverse jury verdict and the trial court's denial of her motion for new trial. After a six-day jury trial, the jury found in favor of defendants Kathryn Westbrook, John Christner Trucking, Paul Horta, Jr., and Royal Express Incorporated (collectively, "Defendants") in this personal injury and wrongful death action. Cameron contends the trial court erred by giving a jury instruction on the sudden emergency doctrine, excluding Cameron's expert from testifying about the standards governing commercial truck drivers, restricting Cameron's cross-examination of an expert witness, and precluding reference to a Federal Motor Carrier Safety Regulation. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 "We view the facts and the reasonable inferences therefrom in the light most favorable to upholding the jury's [verdict]." *Crackel v. Allstate Ins. Co.*, 208 Ariz. 252, 255, ¶

3, 92 P.3d 882, 885 (App. 2004); *Galindo v. TMT Transport, Inc.*, 152 Ariz. 434, 435, 733 P.2d 631, 632 (App. 1986).

¶3 On August 11, 2004, at approximately 6:00 p.m., a multi-vehicle accident occurred on Interstate 10 outside Tonopah amid a severe dust storm. Westbrook was driving a John Christner tractor trailer westbound on Interstate 10 when she encountered the dust storm. She slowed down and stopped in the right travel lane behind a van that was stopped in front of her.

¶4 Cameron was a passenger in the car her husband Martin Cameron was driving, which was also headed westbound on Interstate 10. When they entered the dust storm, the Cameron vehicle struck the rear of the Westbrook vehicle. Cameron quickly exited the vehicle in accordance with Martin's instruction. Exactly what happened next is not entirely clear and various expert reconstructions of the events have reached differing conclusions. The Cameron vehicle was hit by one or more trucks. A Swift Transportation tractor trailer, an Atlas Forklift Rental flatbed truck, and the Royal Express tractor trailer driven by Horta were involved in various impacts that may have been significant to the Camerons. A number of other vehicles entered the scene, ultimately resulting in a fifteen vehicle collision. The Cameron vehicle wound up facing eastbound, wedged between the right side of the Westbrook vehicle and the left side of the Horta vehicle. Martin died as

a result of these collisions and Cameron sustained physical injuries.

¶5 Cameron filed a lawsuit against Defendants[1] alleging that Westbrook and Horta were negligent in causing her personal injuries and Martin's death and that their trucking companies, John Christner and Royal Express, were liable under the doctrine of respondeat superior.[2] After a six-day jury trial, the jury returned a verdict in favor of Defendants. The court denied Cameron's motion for new trial. This appeal followed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1),(4) (Supp. 2011).[3]

DISCUSSION

Sudden Emergency Doctrine

¶6 First, Cameron argues the trial court erred by giving a jury instruction on the sudden emergency doctrine. "When a jury instruction is challenged, we must view the evidence in a light most favorable to the party who requested the

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[1] Cameron named several other defendants in the lawsuit, all of whom were dismissed prior to trial.

[2] Under the doctrine of respondeat superior, an employer is vicariously liable for an employee's tort committed in the course and scope of employment. *Smith v. Am. Express Travel Related Servs. Co.,* 179 Ariz. 131, 135, 876 P.2d 1166, 1170 (App. 1994).

[3] Unless otherwise specified, we cite the current versions of statutes when no material revisions have been enacted since the events in question.

instruction." *Jones v. Munn,* 140 Ariz. 216, 218, 681 P.2d 368, 370 (1984). "A trial court must give a requested instruction if: 1) the evidence supports the instruction, 2) the instruction is appropriate under the law, and 3) the instruction pertains to an important issue and was not adequately covered by another instruction." *State ex rel. Miller v. Wells Fargo Bank of Ariz., N.A.,* 194 Ariz. 126, 132, ¶ 39, 978 P.2d 103, 109 (App. 1998). If the court instructs the jury on a theory not supported by the evidence, we will reverse. *Pima County v. Gonzalez,* 193 Ariz. 18, 20, ¶ 7, 969 P.2d 183, 185 (App. 1998).

¶7 Pursuant to Defendants' request and over Cameron's objection, the court instructed the jury as follows:

> In determining whether a person acted with reasonable care under the circumstances, you may consider whether such conduct was affected by an emergency.
>
> An "emergency" is defined as a sudden and unexpected encounter with a danger, which is either real or reasonably seems to be real. If a person, without negligence on his or her part, encountered such an emergency and acted reasonably to avoid harm to self or others, you may find that the person was not negligent. This is so even though, in hindsight, you feel that under normal conditions some other or better course of conduct could and should have been followed.
>
> The existence of a sudden emergency and a person's reaction to it are only some of the factors you should consider in determining what is reasonable conduct under the circumstances.

Cameron contends the evidence did not warrant the instruction.

¶8 The evidence must allow the potential finding by the jury of three prerequisites for giving the sudden emergency instruction: 1) "a sudden or unexpected confrontation with imminent peril"; 2) the emergency was not caused by the person seeking the instruction; and 3) the person seeking the instruction had at least two alternative courses of conduct available. *Tansy v. Morgan,* 124 Ariz. 362, 364, 604 P.2d 626, 628 (1979). Cameron asserts the first two requirements were not satisfied. We disagree.

¶9 The jury heard testimony from several witnesses that the dust storm was sudden and not something you could see coming. Cameron testified the dust storm came up fast and unexpectedly. The witnesses and experts agreed it was a massive dust storm resulting in zero visibility. Horta testified he was approximately 100 to 150 feet behind the Atlas truck that "disappeared in front" of him and he immediately started braking. When he entered the dust storm, Horta testified that "all of a sudden" there was no visibility.[4]

¶10 Westbrook testified she geared down when she saw

[4] There is testimony that just before entering the dust storm, Horta heard on his CB radio that there was zero visibility.

lightning and knew she was going into a bad storm.[5] Despite her knowledge of an impending storm, there is no indication Westbrook anticipated a blinding dust storm, as opposed to another type of storm. *Cf. Myhaver v. Knutson*, 189 Ariz. 286, 291, 942 P.2d 445, 450 (1997) (The sudden emergency doctrine should be limited to cases in which "the emergency . . . arises from events the driver could not be expected to anticipate."). Indeed, Westbrook stated there was no visibility "the instant [the dust storm] hit" and she was "totally blind . . . the moment it hit". Thus, a jury could conclude that although she prepared for a hazardous condition by slowing down, she did not anticipate the hazard she ultimately faced. We conclude that there is sufficient evidence to allow a reasonable jury to find that Westbrook and Horta were confronted with a sudden or unexpected imminent peril. *See Jones,* 140 Ariz. at 218, 681 P.2d at 370 (appellate court must view the evidence in the light most favorable to the party who requested the instruction); *Anderson v. Nissei ASB Mach. Co., Ltd.*, 197 Ariz. 168, 178, 3 P.3d 1088, 1098 (App. 1999) (same); *Giles v. Smith,* 435 S.E.2d 832, 834 (N.C. Ct. App. 1993) (noting that severe weather has

[5] Westbrook attached to her answering brief portions of her deposition which were read to the court and jury during trial. Because Cameron does not object to this document and the deposition portions were read into evidence at trial, we treat its inclusion in Westbrook's appendix as a request to supplement the record, which we grant.

been found to create sudden emergencies).

¶11 Cameron further argues Defendants caused an emergency making the sudden emergency instruction inapplicable. *See Petefish ex rel. Clancy v. Dawe,* 137 Ariz. 570, 572, 672 P.2d 914, 916 (1983) ("[A]n actor is not entitled to the benefit of the emergency doctrine when his own negligence has been a cause of the emergency."). A claim for negligence requires a plaintiff to prove a duty to conform to a standard of care, breach of the standard of care, causation, and damages. *Gipson v. Kasey,* 214 Ariz. 141, 143, ¶ 9, 150 P.3d 228, 230 (2007). "[E]very driver on the public highways owes to all other users of the highways a duty to drive carefully so as not to subject them to unreasonable risks of harm." *Rudolph v. Ariz. B.A.S.S. Fed'n*, 182 Ariz. 622, 625, 898 P.2d 1000, 1003 (App. 1995). When antecedent negligence is a question of fact, it is within the jury's province to resolve the issue. *Petefish,* 137 Ariz. at 572, 672 P.2d at 916.

¶12 Defendants did not create the dust storm. Whether Defendants created ancillary emergencies by, for example, not slowing down more quickly or not pulling off the road, are questions of fact. Cameron asserts Horta was driving too fast for the weather conditions, rendering him unable to stop when there was little visibility. Horta testified he was driving approximately 65 miles per hour in the right lane and

immediately started braking when the truck ahead of him disappeared into a dust cloud. When he noticed lights from a truck that was not moving, he veered toward the shoulder to get out of the travel lanes. This evidence is sufficient to establish a question of fact about whether Horta was negligent.[6]

¶13 Cameron contends Westbrook was aware of the dust storm before she entered it and was negligent in stopping on the road instead of the shoulder.[7] The evidence shows Westbrook was traveling in the right lane at approximately 67 miles per hour and when she noticed lightning, she geared down and lowered her speed. She stopped her vehicle when there was no visibility, in part because she knew there was a vehicle approximately three feet ahead of her. Seconds later, the Cameron vehicle hit Westbrook's vehicle. Whether Westbrook created an emergency or was negligent by stopping on the road was a question of fact.

¶14 This case is distinguishable from *Tansy*. There, the court determined a sudden emergency instruction was erroneous because prior to crashing into the plaintiff's car, the

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[6] Additionally, the evidence was conflicting as to whether it was the Swift vehicle or Horta's vehicle that impacted the Cameron vehicle causing Martin's death.

[7] The evidence was conflicting on whether she should have slowed more quickly and pulled over onto the shoulder. For example, one expert testified that under the circumstances Westbrook did not have the maneuvering room or the time to get her vehicle off the road.

defendant saw the car, but did not realize it was stopped until he was about 100 feet away. *Tansy,* 124 Ariz. at 363-64, 604 P.2d at 627-28. The court noted "[t]he only aspect of the situation that was 'sudden' was defendant's realization that plaintiff's car was stopped and that he was then too close to avoid collision." *Id.* at 364, 604 P.2d at 628.

¶15 Unlike *Tansy,* where the plaintiff's car was "in plain view, in broad daylight, under favorable weather conditions," the weather conditions here contributed to a sudden emergency. *Id.* Westbrook's awareness that a vehicle was ahead of her and her sudden inability to see caused her to stop on the road. Likewise, the Atlas truck's disappearance ahead of Horta caused him to brake, and Horta's sudden reduction in visibility and awareness of a truck that was not moving caused him to veer toward the shoulder.

¶16 Similarly, *Hollern v. Verhovsek,* 287 A.2d 145 (Pa. Super. Ct. 1971) is distinguishable. There, the court refused to apply the sudden emergency doctrine to excuse the plaintiff driver's contributory negligence in violating the "assured clear distance rule" under Pennsylvania law when the plaintiff saw a fog or dust cloud approximately 200 to 250 feet in front of him and proceeded into it at 50 miles per hour without slowing down. 287 A.2d at 146-48. *Hollern* does not address the appropriateness of giving a sudden emergency instruction to the

jury in a case involving disputed facts. Here, if the jury chose to believe the testimony of Westbrook and Horta regarding what they could see and could not see in the moments before the accident, the jury could find that the drivers were faced with a sudden emergency not of their making. Westbrook claimed to have slowed down and ultimately stopped when there was no visibility, and Horta claimed to have begun braking immediately upon seeing the dust storm and then veered toward the shoulder upon entering the storm.[8]

¶17 We have considered the sudden emergency instruction that was given in this case. The instruction appropriately noted that the existence of a sudden emergency and a person's reaction to it are "only some of the factors you should consider

[8] In her reply brief, Cameron argues *Arnold v. Frigid Food Express Co.,* 9 Ariz. App. 472, 453 P.2d 983 (App. 1969) is similar to the present case. Although *Arnold* also involved a multi-vehicle accident in a severe dust storm, the pertinent issue in that case concerned an "act of God" jury instruction, not a sudden emergency instruction. *Arnold,* 9 Ariz. App. at 474, 453 P.2d at 985. Cameron's other cited cases are also distinguishable. *See Rosen v. Knaub,* 175 Ariz. 329, 330-32, 857 P.2d 381, 382-84 (1993) (disapproving the sudden appearance instruction in part due to an incorrect statement of law and the unusual event instruction due to the erroneous suggestion that a person never has a duty to anticipate unusual or unlikely events); *Ledford v. R.G. Foster & Co.,* 167 S.E.2d 575, 581 (S.C. 1969) (driver guilty of contributory recklessness and willfulness when, after observing a dust cloud one-tenth of a mile away, he failed to apply the brakes and instead proceeded into the dust cloud, subsequently colliding with a sweeper); and *Giles v. St. John,* 124 S.E.2d 10, 12 (Va. 1962) (evidence did not support sudden emergency instruction when driver already passed a vehicle which emitted a cloud of dust).

in determining what is reasonable conduct under the circumstances." The instruction also explained that "[i]f a person, *without negligence on his or her part*, encountered such an emergency and acted reasonably to avoid harm to self or others, you may find that the person was not negligent." (Emphasis added.) The court also gave standard negligence, fault, and causation instructions. Whether a sudden emergency existed, whether the drivers encountered the emergency without negligence on their parts, and the reasonableness of their reactions were all questions of fact for the jury here. On this record, we conclude that the trial court did not abuse its discretion by giving the sudden emergency instruction.

Federal Motor Carrier Safety Regulation Issues

¶18 Cameron makes several interrelated arguments pertaining to Federal Motor Carrier Safety Regulation § 392.14 (hereinafter the "FMCSR"), which provides:

> Extreme caution in the operation of a commercial motor vehicle shall be exercised when hazardous conditions, such as those caused by snow, ice, sleet, fog, mist, rain, dust, or smoke, adversely affect visibility or traction. Speed shall be reduced when such conditions exist. If conditions become sufficiently dangerous, the operation of the commercial motor vehicle shall be discontinued and shall not be resumed until the commercial motor vehicle can be safely operated. Whenever compliance with the foregoing provisions of this rule increases hazard to passengers, the commercial motor vehicle may be operated to the nearest point

> at which the safety of passengers is assured.

49 C.F.R. § 392.14 (1995). Cameron argues that the trial court erred by preventing Cameron's reconstruction expert from testifying about the FMCSR and standards governing commercial truck drivers; by restricting Cameron's cross-examination of Horta's expert reconstructionist regarding the FMCSR; and by precluding reference to the FMCSR and refusing to instruct the jury regarding the FMCSR. We will address each of these arguments.

Scope of Dr. Peles' Testimony

¶19 Over eight months after discovery closed, Cameron first mentioned the FMCSR and disclosed a commercial trucking expert to testify about industry driving standards and whether Defendants complied with the FMCSR. Defendants objected that this new witness was disclosed too late; they also objected to the FMCSR on the basis that the "elevated responsibility" language created a higher standard of care that would be unduly prejudicial to Defendants. Although the court denied Defendants' motions to strike the expert, Cameron ultimately withdrew this trucking expert, causing the court to preclude discovery relating to that expert's opinion. Cameron then attempted to supplement the scope of the testimony of Dr. Joseph Peles, her accident reconstruction expert, to include the

standard of care for commercial truck drivers. Further, Cameron sought to attribute an "elevated" standard of care to Westbrook and Horta through Dr. Peles. After briefing on the scope of Dr. Peles' testimony, the court precluded Dr. Peles from testifying whether any individual violated a drivers' or commercial truckers' standard of care.

¶20 Cameron contends the court erred by precluding Dr. Peles from testifying about the standards governing commercial truck drivers and, specifically, the FMCSR. We review the trial court's decision to preclude or limit expert testimony under an abuse of discretion standard. *See Baroldy v. Ortho Pharm. Corp.,* 157 Ariz. 574, 589, 760 P.2d 574, 589 (App. 1988).

¶21 As previously noted, Cameron withdrew her commercial trucking expert and subsequently sought to have Dr. Peles testify on the standard of care. In his deposition, however, Dr. Peles had stated he was not testifying about the standard of care. At trial, Dr. Peles testified he was retained to reconstruct the accident, determine the sequence of events concerning the Cameron vehicle, ascertain how Martin was killed and Cameron was injured, and determine how the accident would have differed if various drivers had taken different actions. Cameron's disclosure statement lists Dr. Peles as an expert to testify about his reconstruction of the accident.

¶22 In the briefing concerning the scope of Dr. Peles'

testimony, Defendants asserted that based on the deposition testimony, Dr. Peles was not qualified to offer an opinion on the standard of care for commercial truck drivers. Cameron responded that Dr. Peles could testify regarding negligence or fault of Defendants, but he "could not define a biomechanical engineering standard of care for these drivers" and "[t]heir negligent driving is subject to ordinary negligence princip[le]s, not a biomechanical expert opinion or engineering standard of care." After considering the parties' arguments, the court ruled Dr. Peles would not be permitted to testify about the standard of care for the truck drivers.

¶23 There was no abuse of discretion in precluding Dr. Peles from testifying about the commercial trucking standard of care. Dr. Peles does not appear from this record to be a professional truck driver or a commercial truck driving expert. Nor does he appear to have professional truck driving experience. Instead, he is an accident reconstructionist with extensive bioengineering education and training.

¶24 Cameron's out-of-state cases are inapposite because there is no evidence in either case that the particular witness was not qualified to testify on the subject matter or that the subject matter was untimely disclosed. *See Vintila v. Drassen*, 52 S.W.3d 28, 38-39 (Mo. Ct. App. 2001) (accident reconstructionist testified about purposes of certain

regulations where the relevant issue was the purpose of the regulations); *Sosa ex rel. Grant v. Koshy,* 961 S.W.2d 420, 428-29 (Tex. Ct. App. 1997) (officer testified about traffic statute where the pertinent issue was the relevancy of the statute).

Cross-Examination of Horta's Expert

¶25 Cameron also argues the court erred by restricting her cross-examination of Horta's accident reconstruction expert, Timothy Leggett, by precluding questions on the reasonableness of Horta's and Westbrook's driving. We review the trial court's ruling limiting cross-examination for an abuse of discretion. *State v. Ellison,* 213 Ariz. 116, 132, ¶ 52, 140 P.3d 899, 915 (2006). We will only reverse if the trial judge unreasonably limited cross-examination. *State v. Riley,* 141 Ariz. 15, 20, 684 P.2d 896, 901 (App. 1984). Generally, a witness may be cross-examined on matters within the scope of direct examination or any matter material to the case. *Podol v. Jacobs*, 65 Ariz. 50, 58-59, 173 P.2d 758, 763- 64 (1946).

¶26 Like Dr. Peles, Leggett is an accident reconstruction expert. On direct examination, Leggett testified about his reconstruction of the accident, the sequence of events, and which impact caused Cameron's injuries and Martin's death. Cameron attempted to expand the questions beyond accident reconstruction on cross-examination. Leggett explained he is not "a safety guy" so he could not testify about what a person

"should or shouldn't do." *See Webb v. Omni Block, Inc.*, 216 Ariz. 349, 352, ¶ 8, 166 P.3d 140, 143 (App. 2007) (an expert witness must have expertise applicable to the subject he testifies about). The court sustained objections to certain questions during Cameron's cross-examination on grounds that Leggett's role was to testify about how the accident and injuries occurred, not about reasonableness or standard of care or the FMCSR. Given Mr. Leggett's acknowledgment that he is not a safety expert and the absence of any significant foundation establishing otherwise, we find no abuse of discretion by the trial court in limiting a portion of Cameron's cross-examination of Leggett.

¶27 Cameron cites *Payne v. Cornhusker Motor Lines, Inc.,* 177 S.W.3d 820 (Mo. Ct. App. 2005), but this case is distinguishable. There, the plaintiff submitted deposition testimony of a corporate defendant's representative on matters concerning the FMCSRs and whether the defendant violated any of those regulations. *Payne,* 177 S.W.3d at 837. The testimony was allowed as admissions of a party opponent, not as expert testimony. *Id.* at 838. Further, pursuant to the deposition notice, the defendant was required to present an agent who consented to testify about safety rules and policies. *Id.* at 839.

¶28 Accordingly, the trial court did not abuse its

discretion by limiting Cameron's cross-examination of Leggett.

Cameron's argument that the trial court precluded reference to the FMCSR and refused to instruct the jury regarding the FMCSR

¶29 We review the trial court's ruling on the exclusion of evidence for an abuse of discretion. *Wendland v. AdobeAir, Inc.,* 223 Ariz. 199, 202, ¶ 12, 221 P.3d 390, 393 (App. 2009). Likewise, we review a trial court's decision not to give a requested jury instruction for an abuse of discretion. *State v. Johnson,* 212 Ariz. 425, 431, ¶ 15, 133 P.3d 735, 741 (2006). Cameron contends the regulation is relevant as evidence of Defendants' negligence because it helps explain the standard of care that Horta and Westbrook, as commercial truck drivers, should have followed.

¶30 Our review of the record suggests that during the trial, the parties and the court may have believed that all references to the FMCSR and standards of care for commercial truck drivers were precluded. The parties have not referenced, and we have not found, a ruling in the record actually precluding Cameron from all possible reference to the FMCSR. Instead, the court in its rulings precluded Dr. Peles from testifying about the standard of care governing commercial truck drivers, *see supra* ¶¶ 19-24, prevented Cameron from cross-examining Horta's reconstruction expert about the FMCSR, *see supra* ¶¶ 25-28, and declined to instruct the jury on the FMCSR.

See infra ¶¶ 33-35.

¶31 From Cameron's opening brief on appeal, we perceive that she may have believed that she had been precluded by the court from asking about the FMCSR during cross-examination of the defendant drivers, Westbrook and Horta. But, as just noted, we do not find any explicit ruling by the court precluding Cameron from attempting to establish foundation for the FMCSR from the drivers and to cross-examine the drivers on the FMCSR. Westbrook did not appear at trial in person and portions of her deposition testimony were read into evidence. These portions of deposition testimony contain no questions regarding the FMCSR.

¶32 Horta did testify at some length during trial, both during Cameron's case in chief and during Horta's own case. Our review of the transcript of Horta's testimony reveals that Cameron may have been intending and desiring to ask Horta specifically about the FMCSR but ultimately she did not do so. If there was some confusion or misunderstanding about the scope and extent of the trial court's rulings regarding the FMCSR, it was incumbent upon Cameron to seek clarification, re-urge her position, and make an offer of proof of what she intended to prove through Horta regarding the FMCSR. *See State v. Mays*, 96 Ariz. 366, 371, 395 P.2d 719, 723 (1964) (explaining that "if counsel was uncertain as to the court's ruling, it was incumbent upon him to request that it be clarified"); *see also U.S. v.*

Alejandro, 118 F.3d 1518, 1520 (11th Cir. 1997) (noting it was "incumbent on the appellant to seek a clarification from the court" of an ambiguous ruling); *Hall v. Nat'l Freight, Inc.*, 636 N.E.2d 791, 797-798 (Ill. App. Ct. 1994) (finding issue not preserved on appeal because defendant failed to call a witness, to ask the court to clarify its ruling, or to make an offer of proof). Without more in the record, we are unable to discover an abuse of discretion on the part of the trial court with regard to the cross-examination of Horta.

¶33 We next turn to Cameron's argument that the trial court erred in declining to instruct the jury on the FMCSR. Because we do not find in the record any specific written instruction incorporating the FMCSR, we presume that Cameron was requesting that the FMCSR be included in the standard negligence per se instructions, to be given to the jury in the same manner as the pertinent Arizona statutes were given. In order to justify instructing the jury on the FMCSR, some testimony or other evidence would be needed as foundation to explain or describe the FMCSR and place it in context. Presumably the expert witness Cameron voluntarily withdrew before trial could have provided such testimony and an instruction on the FMCSR may have then been appropriate.

¶34 No evidence was presented and no testimony was provided that explained origin, context, and application of the

FMCSR. On this record, we do not discern an abuse of discretion on the part of the trial court in declining to instruct on the FMCSR as constituting negligence per se. *See Kauffman v. Schroeder*, 116 Ariz. 104, 106, 568 P.2d 411, 413 (1977) (jury instruction improper if not supported by evidence).

¶35 Two additional aspects of this issue should be addressed. First, prior to closing arguments and final instructions to the jury on the fifth day of trial, January 26, 2010, the parties were presenting several legal arguments and confirming on the record certain rulings of the court. Cameron confirmed that she was requesting the court to instruct on the FMCSR, and the trial judge confirmed that he was denying the request. In the course of that dialogue, counsel for Cameron mentioned "judicial notice."[9] We have not found in the

[9] The transcript records the following exchange from page 707:

> [COUNSEL FOR CAMERON]: And, secondly, Your Honor, I don't know if it was on the record, but at the beginning of this case we asked for the federal statute to be submitted to the jury. The Court, I thought, acknowledged at that point you were considering it. We have asked that as a matter of law. It is a judicial notice.
>
> Secondly, this is an interstate highway. We heard how these truckers go off all through here. One had a California license. One had a Colorado license. I think as a matter of law, even though it is a state court here, that the jury should be informed what

transcript (after an electronic word search) any earlier mention of judicial notice, nor is it clear to us that the court at that point understood Cameron to be requesting that judicial notice be taken of the FMCSR, as distinct from the request for a jury instruction. To the extent Cameron is arguing on appeal that the trial court erred in not taking judicial notice of the FMCSR, this record is insufficient to demonstrate an abuse of discretion by the court on that issue.

¶36 Second, to the extent Cameron is arguing in the alternative that the FMCSR preempts the Arizona standard of care and establishes a heightened standard of care, this argument was made for the first time in her reply brief on appeal. Because the issue was not presented to the trial court or in the opening brief, we decline to address it. *See Romero v. Sw. Ambulance*, 211 Ariz. 200, 204 n.3, 119 P.3d 467, 471 n.3 (App. 2005) ("[W]e are not required to address issues raised for the first time in

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> the federal law when on an interstate highway actually would be under these circumstances. I would just for the matter of the record make clear that we had not abandoned that federal statute and had requested it be a jury instruction.
>
> THE COURT: The minutes should reflect, the record should reflect that Mr. Charles' reurged request that federal driving standards be submitted to the jury as an instruction is denied.

a reply brief."); *Wasserman v. Low*, 143 Ariz. 4, 9 n.4, 691 P.2d 716, 721 n.4 (App. 1984) ("An issue first raised in a reply brief will not be considered on appeal.").

¶37 We also note that the court gave a negligence per se instruction pertaining to A.R.S. §§ 28-701(A) (Supp. 2011) and 28-871(A) (2004). These statutes, coupled with the reasonable care instructions, sufficiently covered the applicable standard of care. For instance, Cameron asserted Horta was driving too fast under the conditions. Section 28-701(A) provides that "[a] person shall not drive a vehicle on a highway at a speed greater than is reasonable and prudent under the circumstances, conditions and actual potential hazards then existing." Section 28-871(A) provides in part, "a person shall not stop, park or leave standing a vehicle, whether attended or unattended, on the paved or main traveled part of the highway if it is practicable to stop, park or leave the vehicle off that part of the highway." Based on these Arizona statutes and the negligence instructions, Cameron's theories of negligence against the Defendants were presented to the jury by the court and through Cameron's closing arguments.

¶38 For these reasons, we find no abuse of discretion and no reversible error in regard to the court's rulings regarding the FMCSR.

CONCLUSION

¶39 We affirm the superior court's judgment and the order denying Cameron's motion for new trial. As the prevailing parties, we award Defendants their taxable costs on appeal. A.R.S. § 12-341 (2003).

____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

___/s/_____
PATRICIA K. NORRIS, Presiding Judge

___/s/_____
PATRICIA A. OROZCO, Judge