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



DIVISION ONE  
FILED: 12/22/2011  
RUTH A. WILLINGHAM,  
CLERK  
BY: DLL

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

ROBERT JOHN BATTISTELLO, a ) 1 CA-CV 10-0739  
single man, )  
)  
Plaintiff/Appellant, ) DEPARTMENT D  
)  
) **MEMORANDUM DECISION**  
v. )  
) (Not for Publication -  
THE TILTED KILT OF ARIZONA, ) Rule 28, Arizona Rules of  
L.L.C., an Arizona corporation, ) Civil Appellate Procedure)  
)  
Defendant/Appellee. )  
)  
)

Appeal from the Superior Court in Maricopa County

Cause No. CV2007-021244

The Honorable George H. Foster, Jr., Judge

**AFFIRMED**

Robert John Battistello  
Appellant *In Propria Persona*

Tempe

Schneider & Onofry, P.C.  
By Jon D. Schneider  
Luane Rosen  
Attorneys for Defendant/Appellee

Phoenix

**P O R T L E Y**, Judge

¶1 Plaintiff/Appellant Robert John Battistello appeals from the jury verdict in favor of Defendant/Appellee The Tilted Kilt of Arizona, L.L.C. (the "Tilted Kilt"), and the court's

denial of his motion for new trial. For the following reasons, we affirm.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

¶2 Joel Jacobs was drinking at a Tilted Kilt restaurant on March 20, 2006. After he left the restaurant, he failed to control his car and crashed into the back of a city bus driven by Battistello. Battistello subsequently sued Jacobs, and also sued the Tilted Kilt alleging that it was liable because it negligently over-served alcohol to Jacobs.

¶3 Battistello and Jacobs entered into a stipulated settlement. Battistello then moved for summary judgment against the Tilted Kilt. The superior court denied the motion because it found that there was a genuine material fact whether Jacobs was visibly impaired before he left the restaurant.

¶4 The case proceeded to trial and the jury returned a defense verdict. Battistello filed a motion for new trial and argued that the verdict was not supported by the evidence or was contrary to law. The superior court entered judgment on the jury verdict and denied the motion for new trial.<sup>1</sup> Battistello appealed, and we have jurisdiction pursuant to Arizona Revised

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<sup>1</sup> The superior court denied the motion for new trial in an unsigned minute entry. After we suspended the appeal to allow Battistello to secure a signed order, the court entered a signed minute entry denying the motion on November 18, 2010.

Statutes ("A.R.S.") section 12-2101(A)(1) and (5)(a) (West 2011).

### ISSUES

¶15 Battistello contends that the superior court (1) erred in denying his motion for summary judgment on the issue of liability; (2) made erroneous evidentiary rulings at trial; (3) improperly conducted the trial; and (4) erred in denying his motion for new trial.<sup>2</sup>

### DISCUSSION

#### A. Denial of Battistello's Motion for Summary Judgment

¶16 Battistello first challenges the denial of his motion for summary judgment that the Tilted Kilt was liable as a matter of law. An order denying summary judgment is not appealable or subject to review on appeal after a trial on the merits and a final judgment. *Grain Dealers Mut. Ins. Co. v. James*, 118 Ariz. 116, 117 n.1, 575 P.2d 315, 316 n.1 (1978) (citation omitted); *Taser Int'l, Inc. v. Ward*, 224 Ariz. 389, 394 n.8, ¶ 14, 231

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<sup>2</sup> Battistello also asserts that the superior court improperly instructed the jury. Because he does not identify the specific instructions which he contends were erroneous and does not provide any substantive argument, the issue is waived and we do not consider it. *MT Builders, L.L.C. v. Fisher Roofing, Inc.*, 219 Ariz. 297, 304 n.7, ¶ 19, 197 P.3d 758, 765 n.7 (App. 2008) (citation omitted) (arguments not developed on appeal are deemed waived).

P.3d 921, 926 n.8 (App. 2010) (citation omitted).<sup>3</sup> Nevertheless, even if we could review the order, we find no error.

¶17 A court may grant summary judgment when “there is no genuine issue as to any material fact and [] the moving party is entitled to judgment as a matter of law.” Ariz. R. Civ. P. 56(c). “The determination of whether a genuine issue of material fact exists is based on the record made in the trial court.” *Taser Int’l*, 224 Ariz. at 393, ¶ 12, 231 P.3d at 925. If the evidence would allow a jury “to resolve a material issue in favor of either party, summary judgment is improper.” *United Bank of Ariz. v. Allyn*, 167 Ariz. 191, 195, 805 P.2d 1012, 1016 (App. 1990) (citations omitted).

¶18 In his motion, Battistello argued that the evidence showed that the Tilted Kilt breached its duty to act with reasonable care because alcohol was served to Jacobs after he was visibly intoxicated. He cited the affidavit of his expert witness Richard Watkins, who opined that based upon Jacobs’s blood alcohol level after the collision, he would have been showing obvious signs of intoxication before he left the bar. He also cited the affidavit of expert Randy Durnal, who maintained that the Tilted Kilt breached the standard of care by

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<sup>3</sup> A narrow exception, not applicable here, arises when the denial was based strictly on a point of law. *Hauskins v. McGillicuddy*, 175 Ariz. 42, 49, 852 P.2d 1226, 1233 (App. 1992) (citation omitted).

over-serving alcohol to Jacobs and continuing to serve him despite his obvious intoxication, and the statement of the restaurant's former manager Paul Powell that allowing a patron to reach a blood alcohol level equal to that of Jacobs after the collision would have been a failure of the Tilted Kilt's responsibilities. Additionally, Battistello relied on Jacobs's testimony that he was "probably" showing signs of intoxication when he left the restaurant, including slurred speech and impaired motor skills.

¶19 In response to the motion, the Tilted Kilt argued that the sworn statement of Brad Best, who was with Jacobs at the restaurant on the night of the collision, created a genuine issue of material fact that precluded summary judgment.<sup>4</sup> Best averred that Jacobs did not appear intoxicated and he did not observe him stagger, pass out, fumble his keys, or slur his speech.

¶10 Best's sworn statements directly contradicted Battistello's evidence and created genuine issues of material fact about whether Jacobs was visibly intoxicated and whether the Tilted Kilt employees over-served Jacobs. Moreover, although, as Battistello points out, Best's observations might

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<sup>4</sup> The Tilted Kilt also argued that the jury could reject the opinions of Battistello's witnesses because they did not observe Jacobs on the night of the collision and their opinions were based on multiple assumptions.

be considered unreliable because he had been drinking with Jacobs at the restaurant, the reliability of Best's statements, as well as his credibility, was a determination for the jury, not the court. *Orme Sch. v. Reeves*, 166 Ariz. 301, 309-10, 802 P.2d 1000, 1008-09 (1990) (citation omitted) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of the judge . . . . The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor."); *Taser Int'l*, 224 Ariz. at 393, ¶ 12, 231 P.3d at 925 (citations omitted). Consequently, the superior court properly determined that a material question of fact precluded summary judgment for Battistello.

#### **B. Evidentiary Rulings**

¶11 Battistello challenges several evidentiary trial rulings. Generally, we review challenges to the court's admission or exclusion of evidence for an abuse of discretion. *Yauch v. S. Pac. Transp. Co.*, 198 Ariz. 394, 399, ¶ 10, 10 P.3d 1181, 1186 (App. 2000) (citations omitted). If the evidentiary ruling is predicated on a question of law, however, we review that ruling de novo. *Id.*

##### **1. Plaintiff's Motion in Limine No. 2**

¶12 Prior to trial, Battistello moved in limine to exclude evidence that he had entered a stipulated judgment with Jacobs.

The superior court granted the motion in part, and ruled that the stipulated judgment could be presented, but could not be used for impeachment. At trial, the Tilted Kilt showed Jacobs the stipulated judgment, but did not offer it into evidence.

¶13 Battistello contends that he was prejudiced by the ruling because the Titled Kilt was able to introduce the amount Jacobs agreed to pay to settle the claim without informing the jury that Battistello did not receive all of those monies. The record on appeal, however, does not reflect any testimony regarding the amount of the settlement. To the extent testimony was elicited during trial, Battistello did not include a transcript on appeal and we are unable to determine that any error occurred or that there was any resulting prejudice. See Ariz. R. Civ. App. P. 11(b)(1) (requiring an appellant to provide a certified copy of any transcript necessary to resolution of appeal). “[I]n the absence of the pertinent trial transcripts . . . we are unable to determine what evidence was presented at trial, whether [Battistello] objected to the evidence at trial, how it was used, and how it might have prejudiced [him].” *Romero v. Sw. Ambulance*, 211 Ariz. 200, 203, ¶ 4, 119 P.3d 467, 470 (App. 2005) (rejecting appellant’s arguments that the trial court abused its discretion by denying her motions in limine); see also *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995) (citations omitted) (stating

appellate court will assume necessary transcripts and other items not included by appellant in the record on appeal would support the trial court's findings and conclusions). Accordingly, we find no error.

### **2. Plaintiff's Motion in Limine No. 3**

¶14 Battistello also moved in limine to exclude evidence of his employment and union files. The court reserved its ruling on the motion pending the testimony at trial.

¶15 Battistello argues that the court erred by allowing the Tilted Kilt to question him about a work-related incident in which he was attacked by a co-worker. The record on appeal does not reflect that testimony. Again, to the extent any such testimony was elicited during trial, without the relevant transcript on appeal we are unable to determine that any error occurred or that prejudice resulted. *Romero*, 211 Ariz. at 203, ¶ 4, 119 P.3d at 470; *Baker*, 183 Ariz. at 73, 900 P.2d at 767 (citation omitted). Accordingly, we find no error.

### **3. Plaintiff's Motion in Limine No. 5**

¶16 Battistello also moved in limine to exclude evidence that the Tilted Kilt sold the restaurant after the collision. The court denied the motion without prejudice to reconsideration at trial.

¶17 Battistello contends the denial of his motion in limine was error because introducing evidence of the sale



allowed counsel to mislead the jury to believe that any judgment against the Tilted Kilt would not be satisfied. Because the record on appeal does not include any such argument by the Tilted Kilt's counsel, we are unable to determine what argument was made, whether Battistello objected to it, or how it might have prejudiced him. *Id.* We assume that the record would support the trial court's ruling, *Baker*, 183 Ariz. at 73, 900 P.2d at 767, and find no error.

#### **4. Defendant's Motion in Limine No. 1**

¶18 The Tilted Kilt moved prior to trial to preclude Battistello from introducing at trial certain portions of witness Paul Powell's deposition testimony: (1) the signs and symptoms of intoxication at a blood alcohol content of .22; (2) his opinion that serving a patron to a blood alcohol content of .22 amounts to over-service; and (3) serving a patron to a blood alcohol content of .22 is "grossly over the legal limit." The Tilted Kilt also asked the court to preclude Powell from testifying that the standard of care applicable to the Tilted Kilt is based on statutes prohibiting driving under the influence or based on values of blood alcohol content. The court granted the motion in part and precluded the use of Powell's deposition testimony, but allowed Battistello to examine Powell about his knowledge and training concerning

alcohol service. Battistello argues that the superior court erred by not denying the motion in its entirety.

¶119 At trial, the court overruled the Tilted Kilt's objections and allowed Battistello to question Powell about his prior deposition testimony. The ruling during trial, in effect, denied the Tilted Kilt's entire motion and allowed the jury to hear the evidence it sought to preclude. As a result, Battistello has no reason to complain about the pretrial ruling which was reversed during the trial.

#### **5. Defendant's Motion in Limine No. 2**

¶120 The Tilted Kilt also moved in limine to exclude certain statements contained in the traffic accident report prepared by the Tempe police on the night of the collision. Specifically, the motion wanted to preclude the statements that Jacobs's estimated speed was sixty to sixty-five miles-per-hour and that he exhibited signs and symptoms of alcohol impairment. The motion also asked the court to exclude any witness statements attached to the report as inadmissible hearsay. The court reserved its ruling on the motion pending the testimony at trial.

¶121 Although Battistello argues that the court ultimately granted the Tilted Kilt's motion, the record on appeal shows that the parties stipulated to the admission of the police report into evidence. Accordingly, we find no error because the

stipulation gave the jury access to the accident report for its consideration.

#### **6. Defendant's Motion in Limine No. 4**

¶22 The Tilted Kilt also moved in limine to preclude evidence of two prior lawsuits against it and a fire marshal citation on the grounds that they were irrelevant and prejudicial. Battistello opposed the motion and claimed that the use of the evidence would not cause a mistrial. After he indicated that he did not foresee using the information, he asked the court to deny the motion in case his standard of care expert wanted to use them as a basis for his opinions. The court granted the motion. Battistello argues that the ruling was erroneous because the evidence of the prior incidents was relevant.

¶23 It is undisputed that one of the prior lawsuits involved an altercation between two restaurant patrons and the other related to a vendor contract. The fire marshal citation concerned improper exit signage. The evidence was not relevant to Battistello's claims. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ariz. R. Evid. 401.

¶124 Further, even if the three incidents were relevant to Battistello's claim, Arizona Rule of Evidence 403 allows the trial court to exclude relevant evidence if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. The balancing of these factors is a function of trial, not appellate, courts. *Yauch*, 198 Ariz. at 403, ¶ 26, 10 P.3d at 1190 (citation omitted). Battistello did not demonstrate that the prior incidents were sufficiently similar to the facts alleged in this case to be more probative than prejudicial. *Burgbacher v. Mellor*, 112 Ariz. 481, 483, 543 P.2d 1110, 1112 (1975) (citations omitted) ("Without a foundational showing that other accidents occurred under similar conditions and for similar reasons, such evidence is prejudicial to the defendant . . . . It must be shown . . . that the previous conditions were substantially similar to the conditions resulting in the accident at issue; it is sufficient if they are similar in general character if not precisely the same."); *Cotterhill v. Bafile*, 177 Ariz. 76, 80, 865 P.2d 120, 124 (App. 1993) (finding no abuse of discretion in trial court's grant of a new trial based on its conclusion that it had improperly admitted prior incidents not substantially similar to the one in which plaintiff was injured). As a result, we find no error by the exclusion of the two lawsuits and the fire marshal's citation.

#### **7. Defendant's Motion in Limine No. 5**

¶25 The Tilted Kilt also moved in limine to exclude documents Battistello intended to use to impeach its expert witness, Zoran Maric, M.D. The court reserved its ruling pending Maric's testimony at trial. Because the record on appeal does not include Maric's testimony, we are unable to determine what evidence Battistello offered or how the court's ruling might have prejudiced him. *Romero*, 211 Ariz. at 203, ¶ 4, 119 P.3d at 470. We therefore assume the record would support the trial court's ruling and find no error. *Baker*, 183 Ariz. at 73, 900 P.2d at 767 (citation omitted).

#### **8. Defendant's Motion in Limine No. 8**

¶26 The Tilted Kilt also moved in limine to preclude the opinions of Battistello's expert witness, Randy Durnal, that the Tilted Kilt (1) served alcohol to Jacobs after he was obviously intoxicated, (2) fell below the standard of care, (3) over-served Jacobs, and (4) showed a gross disregard to the health and safety of the public. The court reserved its ruling pending Durnal's testimony at trial.

¶27 Durnal testified on each of the four issues, and the court admitted his affidavit into evidence. The court's trial rulings, in effect, denied the Tilted Kilt's entire motion and admitted the evidence for the jury's consideration. As a result, the superior court did not err.

## 9. Defendant's Motion in Limine No. 9

¶128 The Tilted Kilt moved in limine to preclude the admission of a videotape of the collision and exclude testimony from witness Steve Sisson regarding the abbreviations "SG" and "FG" contained on the videotape. The Tilted Kilt argued that the prejudicial effect of the videotape outweighed its probative value and Battistello had not disclosed any information that Sisson had any education, training or experience that rendered him competent to testify regarding the forces of the collision. The court denied the motion insofar as it concerned the videotape, but granted it with respect to Sisson's testimony about "G" forces.

¶129 Battistello argues that the exclusion of testimony regarding the "G" forces of the collision was error because he (Battistello) was qualified and prepared to explain the significance of the forces to the jury. There is no indication in the record on appeal that Battistello ever attempted to testify about the "G" forces or the court's ruling. As a result, we find no error. See *Romero*, 211 Ariz. at 203, ¶ 4, 119 P.3d at 470; *Baker*, 183 Ariz. at 73, 900 P.2d at 767 (citation omitted).

### C. Trial Conduct

¶130 Battistello complains generally about the trial proceedings and asserts that the trial judge was unprepared,

inattentive, and indecisive, and that he prejudiced Battistello's case by requiring the jury to return after a weekend. The trial court has discretion over the control and management of trial. *Hales v. Pittman*, 118 Ariz. 305, 313, 576 P.2d 493, 501 (1978) (citation omitted). "We will not interfere in matters within [the trial court's] discretion unless we are persuaded that the exercise of such discretion resulted in a miscarriage of justice or deprived one of the litigants of a fair trial." *Christy A. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 299, 308, ¶ 31, 173 P.3d 463, 472 (App. 2007) (citation omitted). Our review of the limited record on appeal reveals no suggestion of judicial impropriety or prejudice to Battistello.

¶31 We also find no support in the record for Battistello's assertion that defense counsel acted improperly during the trial by attempting to confuse and mislead the jury. See *Ritchie v. Krasner*, 221 Ariz. 288, 303, ¶ 52, 211 P.3d 1272, 1287 (App. 2009) (citations omitted) (stating appellate court will grant a new trial because of attorney misconduct only in the most serious cases in order to prevent a miscarriage of justice and recognizing that the trial judge is in the best position to determine whether alleged misconduct materially affected a party's rights). Accordingly, we reject Battistello's assignments of error, and deny his request for an

award of attorneys' fees and sanctions relating to defense counsel's conduct at trial.

**D. Motion for New Trial**

¶32 Finally, Battistello contends that the superior court erred when it denied his motion for new trial because the verdict was not supported by the evidence and was contrary to law.<sup>5</sup> We review the court's denial of a motion for new trial for an abuse of discretion, recognizing that the trial judge has "substantial latitude in deciding whether to upset the verdict." *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 53, ¶ 12, 961 P.2d 449, 451 (1998) (citations omitted). We will affirm the judgment if any substantial evidence exists to support the verdict. *Id.* at ¶ 13 (citation omitted).

¶33 Battistello moved for new trial on the grounds that the verdict was not justified by the evidence and/or was contrary to law. In the absence of a complete transcript, we cannot determine whether the motion had any merit and presume that the record before the trial court supported its decision. Ariz. R. Civ. App. P. 11(b)(1); *Baker*, 183 Ariz. at 73, 900 P.2d at 767 (citation omitted); *In re Prop. at 6757 S. Burcham Ave.*,

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<sup>5</sup> In his opening brief, Battistello identified the court's denial of his motion for new trial as an issue on appeal but failed to present any argument. Generally, issues not argued on appeal are deemed waived. See *MT Builders*, 219 Ariz. at 304 n.7, ¶ 19, 197 P.3d at 765 n.7. In the exercise of our discretion, however, we will address it.



204 Ariz. 401, 404-05, ¶¶ 11-12, 64 P.3d 843, 846-47 (App. 2003) (citations omitted) (finding no abuse of discretion in trial court's denial of motion for new trial where appellant failed to provide transcript on appeal). Accordingly, the trial court did not abuse its discretion when it denied Battistello's motion for new trial.<sup>6</sup>

#### CONCLUSION

¶34 For the foregoing reasons, we affirm. We grant the Tilted Kilt's request for costs on appeal, upon its compliance with Arizona Rule of Civil Appellate Procedure 21.

/s/

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MAURICE PORTLEY, Judge

CONCURRING:

/s/

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JON W. THOMPSON, Presiding Judge

/s/

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JOHN C. GEMMILL, Judge

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<sup>6</sup> Battistello also complains that the court failed to have oral argument before ruling on the motion. The superior court has discretion to determine when oral argument is appropriate, and we find no error. Ariz. R. Civ. P. 7.1(c)(2); *Cristall v. Cristall*, 225 Ariz. 591, 597, ¶ 29, 242 P.3d 1060, 1066 (App. 2010) (trial court's decision not to grant oral argument was well within its discretion).