NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
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

RENE R. LOPEZ and STEPHANIE LOPEZ, husband and wife, Plaintiffs/Appellees, and STATE OF ARIZONA, a governmental entity, Defendant/Appellee, v. CITY OF TEMPE, a municipal corporation, Defendant/Appellant.	1 CA-CV 10-0811 DEPARTMENT A **MEMORANDUM DECISION** Not for Publication – (Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2007-052754

The Honorable Stephen Kupiszewski, Judge *Pro Tempore*

AFFIRMED IN PART, REVERSED IN PART AND REMANDED WITH INSTRUCTIONS

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T I M M E R, Presiding Judge

¶1 Defendant/Appellant City of Tempe ("City") appeals from a jury verdict in favor of Plaintiff/Appellee Rene R. Lopez. For the following reasons, we reverse the portion of the judgment awarding damages to Rene's wife, Plaintiff/Appellee Stephanie Lopez, and remand with directions that the superior court modify the judgment to reflect no award of damages, sanctions, or costs to her. We further direct the court to award the City sanctions against Stephanie pursuant to Arizona Rule of Civil Procedure ("Rule") 68. We affirm the remainder of the judgment and the court's order denying the City's motion for new trial.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Rene, a firefighter employed by the City of Phoenix, was injured while riding his bicycle to work when the front wheel of the bicycle dropped into a gap in a storm grate. At the time of the accident, Rene was riding on Priest Drive and the Priest Drive Bridge, both of which are located in Tempe.

¶3 Rene and Stephanie filed this personal injury action against the City and the State of Arizona.[1] They alleged the City and State failed to act with reasonable care in designing, installing, and/or maintaining the storm grate and proximately caused them damage.

¶4 Prior to trial, the State asked the court to rule as a matter of law that because it was acting as the City's agent, the City was vicariously liable for any negligence by the State in inspecting the bridge. The Lopezes joined in the motion. The court granted the motion, subject to any claim by the City for contribution.

¶5 The Lopezes proceeded to trial against the City and State. After an eleven-day trial, the jury returned a verdict "in favor of Plaintiffs and against the Defendants City of Tempe and State of Arizona," finding Rene suffered damages of $2.5 million and allocating zero damages to Stephanie for her loss of consortium claim. In response to a special interrogatory posed by the court, the jury allocated 100% of the fault to the City and none to the State. Over the City's objection, the court entered judgment for the Lopezes in the amount of $2.5 million,

[1] The Lopezes also asserted claims against Maricopa County and the Arizona Department of Transportation. The court dismissed those claims, and they are not at issue in this appeal.

plus taxable costs, and awarded them sanctions against the City pursuant to Rule 68.

¶6 The City filed a motion for new trial on the grounds that the court had erroneously granted the State's motion concerning vicarious liability, improperly and prejudicially conducted the trial, and the verdict was against the weight of the evidence and a result of passion and prejudice. The City also challenged the court's award of Rule 68 sanctions to the Lopezes. The court denied the motion. This timely appeal followed.

DISCUSSION

A. The superior court properly ruled the City was vicariously liable for any negligence of the State in inspecting the bridge

¶7 The City argues the superior court erred in ruling as a matter of law that it would be vicariously liable for any negligence by the State when it inspected the bridge.[2] We review legal rulings de novo. *Midtown Med. Group, Inc. v. State Farm*

[2] Although the jury did not allocate any fault to the State and thereby eliminated the City's vicarious liability obligation, the City's argument is not moot, as the Lopezes contended at oral argument before this court. The City asserts that but for the superior court's vicarious liability ruling, the City would have employed a trial strategy designed to place more blame on the State. In light of the ruling, the City refrained from doing so as it was responsible to pay the Lopezes any amounts awarded against the State.

Mut. Auto. Ins. Co., 220 Ariz. 341, 343, ¶ 7, 206 P.3d 790, 792 (App. 2008).

¶8 The State offered evidence that the City owned the Priest Drive Bridge and contracted with the State for a federally required biennial inspection. The Lopezes alleged the State negligently failed to follow the relevant standards when it inspected the bridge. The State argued that as the owner of the bridge, the City had a non-delegable duty to inspect and maintain the storm grate and was therefore vicariously liable for any negligence by the State in the performance of the inspection.[3]

¶9 Although generally the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the independent contractor, *Ft. Lowell-NSS Ltd. Partnership v. Kelly*, 166 Ariz. 96, 101, 800 P.2d 962, 967 (1990); Restatement (Second) of Torts ("Restatement") § 409 cmt. b (1965), Arizona courts recognize an exception to this rule when the employer delegates performance of a special, "non-delegable," duty. *Ft. Lowell*, 166 Ariz. at 101, 800 P.2d at 967 ("If the employer delegates performance of a special duty to an independent contractor and the latter is negligent, the employer will remain liable for any resulting injury to the protected

[3] The State styled its motion as one for summary judgment but did not request summary adjudication of any claim.

class of persons, as if the negligence had been his own."); Restatement §§ 410-429 (1965). In particular, the Arizona Supreme Court has adopted the Restatement § 418, which provides, in relevant part as follows:

> (1) One who is under a duty to construct or maintain a highway in reasonably safe condition for the use of the public, and who entrusts its construction, maintenance, or repair to an independent contractor, is subject to the same liability for physical harm to persons using the highway while it is held open for travel during such work, caused by the negligent failure of the contractor to make it reasonably safe for travel, as though the employer had retained the work in his own hands.

Wiggs v. City of Phoenix ("Wiggs II"), 198 Ariz. 367, 370, ¶ 8, 10 P.3d 625, 628 (2000).

¶10 The court applied § 418 in *Wiggs II* to hold that a municipality may be vicariously liable to the public for injuries that occur as the result of its independent contractor's negligence. *Wiggs II*, 198 Ariz. at 370, ¶ 8, 10 P.3d at 628. In that case, a pedestrian was killed when she was struck by a vehicle while crossing a Phoenix street at dusk. *Id*. at 368, ¶ 2, 10 P.3d at 626. The city acknowledged it had a non-delegable duty to maintain its streets in a reasonably safe condition but nevertheless named Arizona Public Service ("APS"), with which it contracted for operation and maintenance of the streetlights, as a non-party at fault. *Id*. at ¶ 3. At trial,

the plaintiff asked the court to instruct the jury that the city was subject to the same liability for harm caused by APS' failure to make the street reasonably safe as if the city had retained the work in its own hands. *Id*. at 368-69, ¶ 4, 10 P.3d at 626-27. The trial court refused to give the requested instruction, but after the jury returned a verdict for the city, it acknowledged its error and granted the plaintiff's motion for a new trial. *Id*. at ¶¶ 4-5.

¶11 The Arizona Supreme Court ruled that the trial court correctly ordered a new trial because the city was vicariously liable for the negligence of APS in maintaining the streetlight. *Id*. at 627-30, ¶¶ 8, 17, 10 P.3d at 369-72. It noted that the city conceded it had a non-delegable duty to maintain its streets in a reasonably safe condition and expressly adopted Restatement § 418 to hold that the city would be liable for any negligence of its contractor, APS. *Id*. at 627-28, ¶ 8, 10 P.3d at 369-70. Applying *Wiggs II* to this case, the superior court correctly ruled that the City would be held vicariously liable for the negligence of its contractor, the State, if the Lopezes showed that the State's negligent bridge inspection caused Rene's injuries.[4]

[4] The City attempts to distinguish *Wiggs II* on the basis that Restatement § 418 does not apply in this case because the storm grate at issue was not being constructed, maintained, or repaired at the time of Lopez's injury. The Arizona Supreme

¶12 The City admits it had a non-delegable duty to keep its streets, including Priest Drive, reasonably safe for travel. It argues, however, that it did not know about the hazard presented by the gap in the storm grate because the State either did not discover it or did not report it to the City, and that the City should not be held responsible for the State's failure. In order to keep its streets reasonably safe for the traveling public, the City needed to inspect them for hazards. With respect to the bridge, the City did not assume this task itself, but contracted with the State for bridge inspection.[5] The City's decision to employ the State to fulfill its obligation did not relieve the City of its responsibility, and if the State negligently failed to discover a hazard, the City was responsible because it had a non-delegable duty. *Ft. Lowell*, 166 Ariz. at 104, 800 P.2d at 970 (holding possessor of land was vicariously liable for his invitee's injuries even though they were caused by the negligence of an independent contractor in installing a security system); *Wiggs II*, 198 Ariz. at 370, ¶ 10, 10 P.3d at 628 ("Where there is a non-delegable duty, the

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Court's ruling in *Wiggs II*, however, applied the non-delegable duty rule even though the plaintiff's injury did not occur while APS was in the act of constructing, maintaining, or repairing the streetlight. *Id*. at 368, ¶ 2, 10 P.3d at 626.

[5] The State disputed that the storm grate was within its area of inspection.

principal is 'held liable for the negligence of his agent, whether his agent was an employee, or an independent contractor.'") (citations omitted).

¶13 The City maintains the superior court's ruling was erroneous because it immunized the State from its own negligent acts, a result the City alleges is inconsistent with our holding in *Nelson v. Grayhawk Properties, L.L.C.*, 209 Ariz. 437, 104 P.3d 168 (App. 2004). In *Nelson*, a plaintiff who was injured in a collision allegedly caused by sight-obscuring median landscaping sued Grayhawk, the contractor responsible for installing and maintaining the landscaping. *Id*. at 438, ¶¶ 4-5, 104 P.3d at 169. Grayhawk argued it was entitled to judgment as a matter of law because Scottsdale's non-delegable duty to keep the roadway safe made the city solely responsible for the plaintiff's injury. *Id*. at 439, ¶ 5, 104 P.3d at 170. This court rejected Grayhawk's argument and held that both it and the city could be liable to the plaintiff. *Id*. at 440, ¶ 14, 104 P.3d at 171. We reasoned that because the non-delegable duty doctrine as applied in *Wiggs II* did not impose an exclusive duty upon a municipality, both the municipality and the independent contractor had a duty of reasonable care and could be held liable by the plaintiff. *Id.* at 440-41, ¶ 14, 104 P.3d at 171-72. The city's non-delegable duty did not "immunize or negate" Grayhawk's alleged liability. *Id.*

¶14 Here, the court did not rule that the State would not be liable to the Lopezes for its own negligent acts; it ruled only that the City would be vicariously liable for the State's negligence. Indeed, our holding in *Nelson* precluded the court from entering judgment for the State on the Lopezes' claims merely because the City would be vicariously liable for any judgment. As the Lopezes asserted at oral argument, they were entitled to pursue the State to a potential damages judgment and collection even though they could elect to collect all awarded damages from the City. The superior court did not err in its ruling.

B. The superior court did not err by allowing the State to participate at trial

¶15 The City next argues the superior court erred as a matter of law by allowing the State to participate at trial once it determined the City could be held vicariously liable for the State's negligence. It asserts that after that ruling, the State no longer had a stake in the litigation and its presence at trial: (1) prejudiced the City because it was unable to control the litigation, (2) led to improper jury instructions and verdict forms, and (3) resulted in the court entering an incorrect form of judgment and improperly awarding the Lopezes Rule 68 sanctions against the City. We review questions of law

de novo. *Defenders of Wildlife v. Hull*, 199 Ariz. 411, 417, ¶ 9, 18 P.3d 722, 728 (App. 2001).

1. Control of defense

¶16 The City argues the State's presence at trial prejudiced it because it did not have an effective choice regarding the legal theories and proof advanced and was required to share peremptory strikes and presentation time with the State. As discussed, *see supra* ¶¶ 13-14, the State remained a proper party in this action after the vicarious liability ruling and therefore had the right to attend trial and defend itself against the Lopezes' claims. *See Rosenberg v. Ariz. Bd. of Regents*, 118 Ariz. 489, 492, 578 P.2d 168, 171 (1978) ("Due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right through the judicial process must be given a meaningful opportunity to be heard.") (citations omitted). Additionally, the State was at risk for a contribution claim by the City. As our supreme court has recognized, a party vicariously liable for the negligence of an independent contractor "may seek . . . contribution against [the] independent contractor in cases in which the employer has some degree of independent liability." *Wiggs II*, 198 Ariz. at 371, ¶ 14, 10 P.3d at 629. Under Arizona law, actions for contribution "shall be adjudicated and determined by the same

trier of fact that adjudicates and determines the action for the plaintiff's injury or death." Ariz. Rev. Stat. ("A.R.S.") § 12-2506(E) (2003). Consequently, because the jury was asked to allocate fault among the defendants if the Lopezes prevailed in their claim, the State had an additional reason for defending itself at trial.[6]

2. Jury instructions / verdict forms

¶17 The City asserts that the State's presence at trial led to errors in the jury instructions and verdict forms and confused the jury. In particular, it maintains the court erred by using a form of verdict that allowed the jury to jointly allocate liability to the City and State because: (1) the court had instructed the jury that the City was responsible for the actions of its contractor, the State, and (2) the court asked the jury to answer an interrogatory allocating fault between the City and State. Because the City did not object to either the verdict forms or the court's instruction that the City was responsible for the actions of the State, and jointly requested the special interrogatory, it waived any objection. *Data Sales*

[6] Section 12-2506 is silent whether a cross-claim for contribution must be filed by a tortfeasor which is vicariously liable for another defendant's negligence to obtain a judgment for contribution against that defendant. The City did not file a cross-claim against the State. Assuming a second action would have been needed to obtain such a judgment, had the jury found the State bore a portion of fault, the jury's allocation would have bound the parties, nevertheless.

Co. v. Diamond Z Mfg., 205 Ariz. 594, 601, ¶ 32, 74 P.3d 268, 275 (App. 2003) (ruling a defendant that did not object to the court's verdict form waived its right to assert error). Moreover, we find no error with the challenged verdict form. When read together with the interrogatory, it is clear the jury found for Rene and allocated 100% of fault to the City.[7]

3. Judgment / Rule 68 sanctions

¶18 The City complains the State's presence at trial led to several defects in the judgment.

¶19 First, it argues the court erred by treating the State as a prevailing party in the action and awarding it taxable costs. The Lopezes pursued two theories of liability against the City: (1) that it was vicariously liable for the negligence of its agent, the State, in failing to discover the hazardous condition of the storm grate; and (2) that it was liable for its own negligence in failing to discover and remedy the hazardous condition of the storm grate. The State argued and presented

[7] To the extent the City contends the jury simply answered the special interrogatory consistent with the court's instruction that the City was responsible for the State's actions rather than truly assessing the fault between them, it waived that argument by not raising it before the court released the jurors. *Trustmark Ins. Co. v. Bank One, Ariz., NA*, 202 Ariz. 535, 543, ¶ 39, 48 P.3d 485, 493 (App. 2002) (holding Arizona Rule of Civil Procedure 49(c) requires a party to object to a jury verdict that it believes is inconsistent, defective, or nonresponsive before the jury is excused so the trial court may call the jury's attention to the inconsistency and send it to further deliberate).

evidence at trial that the scope of its bridge inspection did not include the storm grate. The jury's response to the court's interrogatory indicates the jury determined the State was not negligent.[8] Thus, the jury necessarily determined that the City's liability stemmed from its own negligence in failing to keep its streets reasonably safe for the traveling public. *See Standard Chartered PLC v. Price Waterhouse*, 190 Ariz. 6, 39, 945 P.2d 317, 350 (App. 1996) (recognizing a reviewing court "must search for a reasonable way to read the verdicts as expressing a coherent view of the case, and must exhaust this effort before it is free to disregard the jury's verdicts and remand the case for a new trial" (citation omitted)). Accordingly, the court properly entered judgment against only the City and found that the State was a prevailing party.

¶20 The City next argues the court erred by awarding sanctions to the Lopezes and against the City pursuant to Arizona Rule of Civil Procedure 68. Rule 68(a) provides: "At

[8] The City cites *Mineer v. Atlas Tire Co.*, 167 Ariz. 315, 317 n.1, 806 P.2d 904, 906 n.1 (App. 1990), in support of its contention that the jury's response to the interrogatory was only advisory and did not change the nature of its general verdict against both the City and State. We do not find *Mineer* controlling, as the defendants in that case presented a joint defense, whereas the City and State presented separate defenses, and the special interrogatory in *Mineer* was only submitted to the jury after it rendered its verdict. *Id*. Further, although the City now claims the interrogatory was merely advisory, it jointly requested it, and the court did not limit its purpose.

any time more than 30 days before the trial begins, any party may serve upon any other party an offer to allow judgment to be entered in the action." Ariz. R. Civ. P. 68(a). If the offer to allow judgment is not accepted, and the offeree "does not later obtain a more favorable judgment . . . the offeree must pay, as a sanction, reasonable expert witness fees and double the taxable costs, as defined in A.R.S. § 12-332, incurred by the offeror after making the offer." Ariz. R. Civ. P. 68(g).

¶21 Prior to trial, the Lopezes offered to allow judgment on their claim against the City in exchange for payment of $2 million and on their claim against the State for payment of $2 million.[9] The City did not accept the Lopezes' offer but made a joint offer with the State to Stephanie for $10,000. The trial court awarded the Lopezes their post-offer costs and expert witness fees because the jury verdict was not more favorable to the City than the Rule 68 offer of judgment.

¶22 The City challenges the court's award of Rule 68 sanctions to the Lopezes on the grounds that the verdict did not exceed the Lopezes' offer of judgment. It reasons that because the superior court ruled the City was vicariously liable for the State's negligence, it would have been required to accept the

[9] Rule 68 expressly allows multiple parties to make a joint unapportioned offer to a single offeree. Ariz. R. Civ. P. 68(e).

Lopezes' offers against both it and the State, totaling $4 million, in order to settle this case. The City then contends that because the verdict was less than $4 million, the final judgment did not exceed the Lopezes' offer and the court improperly awarded Rule 68 sanctions.

¶23 The City is incorrect that it was required to accept both offers to extinguish its liability. If the City had accepted the Lopezes' offer to settle their claims against it for $2 million, the Lopezes would have taken judgment against it for $2 million and would not have been able to obtain a second judgment against the City for any additional amount based on liability found against the State. The Lopezes' offer of judgment to the City was for $2 million. As the verdict exceeded the offer of judgment, the superior court was required to award Rule 68 sanctions. *Levy v. Alfaro*, 215 Ariz. 443, 444-45, ¶ 8, 160 P.3d 1201, 1202-03 (App. 2007). We find no error.

¶24 Finally, the City asserts the court improperly granted judgment for Stephanie because the jury did not award her any damages, making an award of Rule 68 sanctions against Stephanie mandatory. We agree the superior court erred by entering judgment jointly for Rene and Stephanie in the amount of $2.5 million because the jury awarded Stephanie zero dollars.[10] In

[10] The City claims the court erred in treating Stephanie as a prevailing party even though the jury awarded her no damages.

addition, the court had no discretion to deny the City's request for an award of sanctions against Stephanie pursuant to Rule 68 because she did not obtain a judgment more favorable than the City's $10,000 offer to settle her claim before trial. Ariz. R. Civ. P. 68(g); *Levy*, 215 Ariz. at 444-45, ¶ 8, 160 P.3d at 1202-03. Accordingly, we vacate that portion of the judgment, remand this matter to the superior court, and direct it to modify the judgment to eliminate the award of damages to Stephanie and to award the City sanctions against her pursuant to Rule 68.

C. Evidentiary rulings

¶25 The City challenges several of the trial court's evidentiary 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). If the evidentiary ruling is predicated on a question of law, we review that ruling de novo. *Id*.

The jury returned the verdict form indicating that it found in favor of "Plaintiffs" and did not use the verdict form in favor of defendants. As discussed, the City waived any error in the verdict forms or any inconsistency arising out of the jury's failure to award damages to Stephanie. *Data Sales Co.*, 205 Ariz. at 601, ¶ 32, 74 P.3d at 275; *Trustmark Ins. Co.*, 202 Ariz. at 543, ¶ 39, 48 P.3d at 493.

1. Workers' compensation evidence

¶26 The City argues the superior court erroneously excluded evidence concerning Rene's workers' compensation case. As part of Rene's workers' compensation case, he underwent multiple independent medical examinations ("IMEs"). The physicians who conducted these examinations prepared reports that contained their findings and expressed their opinions regarding Rene's condition. Each of the doctors opined that Rene was malingering or not putting forth a full effort on the tests.

¶27 The Lopezes moved in limine to preclude the City and State from introducing or referring to the IME reports and the opinions contained therein for the reasons that they were inadmissible hearsay and contained opinions that were highly prejudicial and duplicative. The court denied the motion as moot because the City agreed the opinions of the IME physicians would be duplicative and therefore not admissible at trial.

¶28 The City then sought to introduce evidence at trial to show that the workers' compensation case, including surveillance of Rene conducted by the carrier, had caused stress to the Lopezes. Although the Lopezes were not seeking damages for stress, the City wanted to argue that the emotional and mental problems they attributed to Rene's brain injury were in fact caused by stress associated with his workers' compensation case.

The court prohibited the City from identifying workers' compensation as the source of Rene's additional medical evaluations and surveillance, *see Warner v. Sw. Desert Images, LLC*, 218 Ariz. 121, 133, ¶¶ 34-35, 180 P.3d 986, 998 (App. 2008) (stating collateral source rule requires that payments made to or benefits conferred on an injured party from other sources may not be credited against the tortfeasor's liability), but stated it would allow the City to question Rene about whether the evaluations and surveillance caused him additional stress.

¶29 The City argues the court improperly excluded this evidence because it was not seeking to introduce it to show a collateral source of payment, but to show that Rene's condition was exacerbated by stress resulting from the workers' compensation investigation. *See Ritchie v. Krasner*, 221 Ariz. 288, 302-03, ¶ 49, 211 P.3d 1272, 1286-87 (App. 2009) (holding trial court did not abuse its discretion by admitting evidence of plaintiff's financial condition for the limited purpose of addressing an issue concerning the continuity of his care). The trial court did not abuse its discretion by prohibiting the City from introducing evidence of Rene's workers' compensation coverage. *See Warner*, 218 Ariz. at 133, ¶¶ 34-35, 180 P.3d at 998 (finding no support for contention that the collateral source rule does not apply to workers' compensation benefits). The court allowed the City to establish that Rene had other

stressors in his life that negatively affected his emotional and mental performance without advising the jury that the source of that stress was a workers' compensation case.

¶30 The City notes that, although the court initially indicated it would allow the City to establish that neither the City nor the State ordered the multiple IMEs and surveillance, it later precluded such argument. The City's counsel told the jury during her opening statement that the City was not the source of the surveillance and questioned one witness to establish that some of the stress Rene suffered was due to the surveillance. The court then ruled it would not allow the City to discuss the source of the IMEs and surveillance, stating that argument would "create[] more dilemma and more problems than it solves" and specifically finding no prejudice to the City.[11] The City contends the timing of the ruling was prejudicial because it would not have elicited testimony that the IMEs and surveillance caused Rene stress if it had known it could not explain that it was not the source of the IMEs and surveillance. We find no abuse of discretion. The City's counsel made one reference to the source of the surveillance during her opening statement and asked one question regarding it before the court's

[11] The City noted in its opening brief that the parties' argument on this issue is not contained in the transcript on appeal and stated it would order a transcript of the digital audio recording. This court never received the transcript.

ruling. These limited references did not render the court's later ruling prejudicial to the City. And, if the court had allowed the City to argue it was not the source of the IMEs or surveillance, it would have raised the issue of insurance for the jury. *Id.*

¶31 In addition, the City argues the court erred by excluding the evidence because it was relevant to the City's impeachment of the Lopezes' medical and psychological witnesses. Specifically, the City contends it should have been allowed to question those witnesses regarding whether they considered how Rene's recovery might have been impacted by secondary gain issues such as a desire to avoid work or achieve financial compensation. The court ruled that the City could explore the bases for the Lopezes' medical and psychological witnesses' opinions and question them regarding whether they took into account the IME physicians' opinions, but could not introduce those opinions as part of that questioning. We find no error. Ariz. R. Civ. P. 26(b)(4)(D) (prohibiting the use of more than one expert opinion regarding each issue); *Sharman v. Skaggs Cos.*, 124 Ariz. 165, 167, 602 P.2d 833, 835 (App. 1979) (holding trial court committed reversible error by allowing the report of defendant's medical expert, whose testimony had been suppressed because it was not timely disclosed, to be placed before the jury during cross-examination of plaintiff's medical expert).

¶32 The City further argues that the court's ruling prevented it from introducing evidence that Rene had informed his treating physicians that his workers' compensation case had been closed, but did not tell them about his lawsuit against the City and State. It argues this omission was relevant to whether Rene misled his physicians regarding his condition and whether their opinions were reliable because they did not consider the possibility his recovery was negatively impacted by the potential for financial compensation in the lawsuit. The court's ruling, however, did not prevent the City from impeaching those witnesses by establishing that Rene had not told them about the lawsuit and examining them regarding whether that information would have changed their diagnosis or treatment.

¶33 We find no abuse of discretion in the trial court's rulings concerning Rene's workers' compensation case.

2. Dr. Klonoff's opinions

¶34 As part of their motion in limine to preclude the City and State from introducing or referring to the workers' compensation IME reports and the opinions contained therein, the Lopezes sought to exclude the report and opinions of Dr. Pamela Klonoff, a neuropsychologist who they claimed conducted an IME of Rene as part of his workers' compensation case. The court

denied the motion as moot because the City agreed the opinions of the IME physicians would be duplicative.

¶35 At the final pretrial conference, however, the City argued that its expert neuropsychologist, Dr. Lidia Artiola, could testify about Dr. Klonoff's opinions.[12] The City admitted Dr. Klonoff was not Rene's treating physician but argued that because she conducted her IME in a collateral litigation (the workers' compensation case), her opinions would not violate the prohibition contained in Arizona Rule of Civil Procedure 26(b)(4)(D) against more than one expert per side testifying about any issue. The court rejected the City's argument and precluded Dr. Klonoff's opinions.

¶36 The City moved for reconsideration of that ruling, contending Dr. Klonoff was, in fact, Rene's treating physician and it could therefore introduce her opinions regarding Rene's brain injury. It claimed Dr. Klonoff evaluated Rene at the request of his treating physician, Dr. Christina Kwasnica, for admission to Dr. Klonoff's program at the Center for Transitional Neuro Rehabilitation. In response, the Lopezes offered evidence that Dr. Klonoff formed her opinions in her capacity as a workers' compensation IME physician, including

[12] It was undisputed that Dr. Artiola could review and opine about the raw data Dr. Klonoff collected during her examination of Rene.

billing statements that reflected she was paid by the workers' compensation carrier. The court denied the motion for reconsideration.

¶37 The City argues the superior court erred as a matter of law by excluding the opinions of Dr. Klonoff on the grounds that such evidence would violate the prohibition contained in Rule 26(b)(4)(D). It contends the court's ruling was based on the Lopezes' false representation that Dr. Klonoff was a workers' compensation doctor hired to conduct an IME and cites Dr. Kwasnica's testimony that she referred Rene to Dr. Klonoff for the purpose of medical treatment.[13] Despite that testimony, the record shows that Dr. Klonoff was retained by Rene's workers' compensation carrier and that she provided her report to the carrier. We find no error in the superior court's exclusion of Dr. Klonoff's opinions.[14]

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[13] The City states in its opening brief that the Lopezes falsely represented to the trial court that Dr. Klonoff was hired by the City of *Tempe* to conduct an IME of Rene. This appears to be a typographical error, as the Lopezes informed the court that Dr. Klonoff was hired by the workers' compensation carrier for the City of *Phoenix*, and there is no indication in the record that Rene was involved in a workers' compensation matter with the City of Tempe.

[14] The City cites, without discussion, *In re Commitment of Frankovitch*, 211 Ariz. 370, 373, ¶ 9, 121 P.3d 1240, 1243 (App. 2005), in which we held that a physician employed by the Arizona Department of Corrections to screen prison inmates scheduled for imminent release to determine whether they were sexually violent was not an independent expert, as the term is used in Rule 26(b)(4)(D), in proceedings concerning a former inmate's

D. The superior court did not err by striking prospective juror 20 for cause

¶38 The City argues the superior court improperly and prejudicially struck a prospective juror for cause, thereby allowing the Lopezes an additional peremptory challenge in violation of Arizona Rule of Civil Procedure 47(e) and prejudicing the City as a matter of law. *See Moran v. Jones*, 75 Ariz. 175, 181, 253 P.2d 891, 895 (1953) (holding jury was not lawfully constituted because the trial court granted defendants twice the number of challenges allowed by law; error was prejudicial as a matter of law because it denied the plaintiff a substantial right).

¶39 The City contends the superior court erred in striking prospective juror 20 for cause after it had already found that juror to be qualified for service. Arizona Rule of Civil Procedure 47(c)(5) provides that a juror may be challenged for cause on the grounds that he or she holds a "state of mind evincing enmity or bias for or against either party." Whether a challenge for cause "shall be denied or allowed is largely within the discretion of the trial court, and [its] discretion

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commitment to the department of health services as a sexually violent person pursuant to A.R.S. § 36-3707 (2009). Unlike Dr. Klonoff, the expert witness in *Frankovitch* had not been retained for testimonial purposes and his opinion was not cumulative of other evidence. *Id*. at 374, ¶¶ 12-13, 121 P.3d at 1244. Accordingly, that case does not compel us to determine that the trial court erred by excluding Dr. Klonoff's opinions.

thereon will not be disturbed in the absence of an abuse thereof." *J. & B. Motors, Inc. v. Margolis*, 75 Ariz. 392, 395, 257 P.2d 588, 590 (1953). We note, however, that the trial court abuses its discretion if it refuses to excuse a prospective juror who indicates bias. *Lindley v. Nw. Hosp. & Med. Ctr.*, 164 Ariz. 133, 135, 791 P.2d 659, 661 (App. 1990).

¶40 During voir dire, prospective jurors 16 and 20 expressed views that it is wrong for a person to bring a claim against a government entity but stated they could base a verdict on the evidence and law presented in court. The Lopezes moved to strike jurors 16 and 20 for cause. The court initially ruled it would not strike those jurors, but almost immediately reconsidered its decision with respect to juror 20. The judge stated he was not convinced juror 20 could set aside his prejudice.

¶41 Prospective juror 20 stated he had a bias and thought it was wrong to bring a claim against a government entity because "[i]t all comes out of our own pocketbook when you sue the cities." He further explained that if he was the plaintiff in this case he would prefer not to have himself as a member of the jury. Given this testimony, the court did not abuse its discretion in deciding to excuse juror 20 for cause.[15]

[15] We therefore do not reach the City's claim that the ruling prejudiced it as a matter of law.

E. Trial management

¶42 The City asserts it was entitled to a new trial because the superior court improperly managed the trial proceedings and, in effect, surrendered control of the pretrial process and trial schedule to the Lopezes. 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). "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).

1. Joint pretrial process

¶43 The City argues it was prejudiced because the trial court did not require the Lopezes to abide by the pretrial deadlines contained in Arizona Rule of Civil Procedure 16 and its December 5, 2008 trial-setting order. The court ordered the parties to submit a joint pretrial statement on April 21, 2010 in preparation for the final pretrial management conference on April 28. The Lopezes were required to provide their portion of the joint pretrial statement to the City and State no later than April 1, *see* Ariz. R. Civ. P. 16(d)(1), but did not do so until April 5. The City then obtained an emergency hearing to discuss

the joint pretrial statement, asserting that the Lopezes had not complied with Rule 16(d)(2)(D)-(F) because they did not identify the specific witnesses, exhibits, or deposition designations they intended to present at trial. The court ordered the Lopezes to identify the witnesses they intended to call at trial and provide the City with their exhibits and deposition designations by April 16. It indicated it would allow the parties additional time to finalize the joint pretrial statement if necessary.

¶44 On May 5, the City moved to continue the trial on the grounds that because of the disorganized preparation of the joint pretrial statement, it had been unable to prepare properly for trial. For example, it asserted that once it received the Lopezes' exhibit list, it discovered many of the documents had been redacted, but it was unable to discern what information had been redacted and therefore could not stipulate to their admissibility. The City also complained the Lopezes had identified a large number of witnesses and deposition designations for which the trial time was inadequate and that they had not identified a witness schedule. After conducting a hearing, the court denied the motion and affirmed the trial date.

¶45 Under these circumstances, we find no abuse of the court's discretion. *McDowell Mountain Ranch Land Coal. v.*

Vizcaino, 190 Ariz. 1, 5, 945 P.2d 312, 316 (1997) ("[T]he decision to grant or deny a continuance is in the sound discretion of the trial court."). The court had previously continued the trial for seven months, it was scheduled for eight to ten days, and the City did not establish that it was unable to prepare and present its case.[16]

2. Trial time management

¶46 The City alleges the court surrendered control of the presentation of evidence to the Lopezes and allowed them a disproportionate amount of time to present their case. The trial court may impose reasonable time limits on trial proceedings. Ariz. R. Civ. P. 16(h) ("The court may impose reasonable time limits on the trial proceedings or portions thereof."); *Brown v. U.S. Fid. & Guar. Co.*, 194 Ariz. 85, 90-91, ¶ 29, 977 P.2d 807, 812-13 (App. 1998); Ariz. R. Evid. 611(a) (stating court shall exercise reasonable control over trial proceedings and may impose reasonable time limits). We review the imposition of such limits only for an abuse of discretion. *Brown*, 194 Ariz. at 91, ¶ 30, 977 P.2d at 813.

[16] Although the City offers two examples of confusion relating to the exhibits at trial, it argues only that it was prejudiced by the court's management of the joint pretrial process because it was obliged to spend time during trial breaks reviewing the Lopezes' exhibits.

¶47 The trial court originally scheduled this matter for eight trial days, but added two additional days one month prior to trial. The parties anticipated the Lopezes would present their case during the first five days of trial, and the City's presentation would begin at the end of the first week or beginning of the second week of trial. Trial commenced on May 10, 2010 and was scheduled to end on May 21. On Thursday, May 20, after conferring with counsel, the court informed the jury that the case would not conclude until Monday, May 24. The Lopezes rested their case on May 20, after the City had called two witnesses out of order on May 18. The City continued its presentation on May 20 and 21 and concluded on May 24.[17] The jury began deliberations on May 24 and returned its verdict on May 25.

¶48 The City complains the court allowed the Lopezes to use a disproportionate amount of trial time, which prevented the City from making a full presentation of its defense. The City did not, however, request additional time to present evidence or otherwise object to the trial court's management of the trial schedule. *See Trantor v. Fredrikson*, 179 Ariz. 299, 300-01, 878 P.2d 657, 658-59 (1994) ("Because a trial court and opposing counsel should be afforded the opportunity to correct any

[17] The State presented its defense through three witnesses on May 21.

asserted defects before error may be raised on appeal, absent extraordinary circumstances, errors not raised in the trial court cannot be raised on appeal."). Further, although the City argues it shortened or waived cross-examination in order to make time for its own presentation of evidence, it did not make an offer of proof regarding the evidence it alleges it could not present because of time considerations. *Cf.* Ariz. R. Evid. 103(a)(2) (stating that in order to establish error in the exclusion of evidence a party must show that its substance was made known to the trial judge). Accordingly, we find no abuse of the court's discretion.[18]

3. Deposition designations

¶49 The City contends the Lopezes improperly read deposition testimony at trial, resulting in prejudice to the City. The Lopezes' liability expert, traffic-safety engineer Robert Bleyl, relied, in part, on the deposition testimony of City employees Winkle, Sammons, and Brewer to formulate his

[18] The City speculates jurors felt rushed to conclude their service and therefore may have disregarded the court's instructions and awarded damages for both Rene and Stephanie in their verdict. There is nothing in the record to indicate that the jury acted in this manner, and we must presume it followed the court's instructions. *Hyatt Regency Phx. Hotel Co. v. Winston & Strawn*, 184 Ariz. 120, 140, 907 P.2d 506, 526 (App. 1995) ("We must assume on review that the jury followed the instructions of the trial court."). Moreover, the City did not object to the court's management of the trial time or raise this issue before the court released the jury. *Cf. Trustmark Ins. Co.*, 202 Ariz. at 543, ¶¶ 39-40, 48 P.3d at 493.

opinions. Prior to trial, the Lopezes designated specific pages of those depositions to be read at trial and the City made cross-designations. During Bleyl's testimony, the Lopezes' counsel read portions of the designated deposition testimony and questioned Bleyl about them. The Lopezes' counsel used the same procedure to question the City's public works director about Brewer's testimony and the City police officer who responded to the scene of the accident about the testimony of Rene's battalion chief, Kent Ofstie.

¶50 Although the City objected to some of the questioning on other grounds and once suggested to the court, "maybe we could read them as deposition designations," it did not object on the grounds that the Lopezes were improperly introducing deposition testimony in a manner that would prejudice it. The court addressed the City's objections and advised the Lopezes' counsel not to simply read the deposition testimony to the jury without ending with a question for the witness.

¶51 The City complains that the Lopezes' failure to properly introduce the deposition testimony deprived it of an opportunity to read its own designated portions of the deposition transcripts into the record.[19] The City never asked

[19] The City also claims it was unable to read its deposition designations during its case presentation because the court mismanaged the trial schedule. As discussed, we find no error

the court to allow it to do so, *see Trantor*, 179 Ariz. at 300-01, 878 P.2d at 658-59, and offers no argument regarding how it was purportedly prejudiced by its failure to introduce such evidence. *See Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 506, 917 P.2d 222, 235 (1996) (stating appellate court will not disturb the trial court's evidentiary decision unless it finds a clear abuse of discretion and resulting prejudice).

F. The superior court did not err in denying the City's motion for new trial

¶52 Finally, the City contends the superior court erred in denying its motion for new trial because the verdict was not supported by the evidence and was contrary to law. We view the evidence and evidentiary inferences in the light most favorable to upholding the jury's verdict and will affirm if there is substantial evidence to support it. *Romero v. Sw. Ambulance*, 211 Ariz. 200, 202, ¶ 2, 119 P.3d 467, 469 (App. 2005); *Flanders v. Maricopa County*, 203 Ariz. 368, 371, ¶ 5, 54 P.3d 837, 840 (App. 2002). We will only reverse the trial court's denial of a motion for new trial on the grounds that the verdict is against the weight of the evidence if it reflects a manifest abuse of discretion. *Styles v. Ceranski*, 185 Ariz. 448, 450, 916 P.2d 1164, 1166 (App. 1996).

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in the court's management of the trial schedule and therefore reject this argument.

¶53 The parties stipulated prior to trial that Rene's bicycle tire falling into the gap in the storm grate on Priest Drive caused his fall. The storm grate was located on Priest Drive, just north of the Priest Drive Bridge. Upon completion of the storm drain in the 1980s, the City was responsible for the maintenance of the bridge and contracted with the State for a federally required biennial inspection of the bridge. During its inspection in 1995, the State identified collision damages on the approach slab to the bridge and recommended that the City repair it. In 1995, the City contracted with Maricopa County for repairs to the bridge and the adjacent roadway, including the storm grate at issue in this case.

¶54 Although the City admitted it was obliged to keep its streets reasonably safe for the traveling public, including bicyclists, the evidence showed it did not specifically inspect the drainage grates in its jurisdiction or train its employees concerning grate safety. It conducted no inspections or maintenance of the relevant storm grate after 1995, and, in fact, did not know that the grate was in its jurisdiction until several months after Rene's accident. The State admitted it did not inspect the storm grate that injured Rene, but presented evidence that it was not required to inspect the grate because the grate was not located within the boundaries of the bridge. From this evidence, the jury could have reasonably concluded the

City breached its duty of care by failing to properly maintain its streets and caused injury to Rene.

¶55 We also reject the City's argument that the jury's award of damages was excessive, outrageous, and not supported by the evidence. The Lopezes presented evidence at trial that Rene suffered lost wages of between $523,791 and $1,388,224, he had incurred medical expenses of $251,645.57, and his estimated future medical expenses were $458,427. In addition, he testified he suffered on-going physical pain, emotional distress, and mental impairment as a result of the accident. Although the City disputed this evidence, the jury was entitled to accept it, *Felder v. Physiotherapy Assocs.*, 215 Ariz. 154, 162-63, ¶ 40, 158 P.3d 877, 885-86 (App. 2007) (noting "a central task for juries is resolving disputes over difficult and conflicting evidence"), and its award of $2.5 million was not outrageous or excessive. *See Mammo v. State*, 138 Ariz. 528, 532, 675 P.2d 1347, 1351 (App. 1983) ("The test for whether the jury award is the result of passion or prejudice is whether the amount of the jury verdict is so unreasonable and outrageous as to shock the conscience.").[20]

[20] The jury's decision to not assign any fault to Rene despite his choice to bicycle in the traffic lane rather than the separated path adjacent to the street does not signify that its verdict was necessarily the result of passion and prejudice. The jury heard evidence that it was legal for Rene to ride in the traffic lane and that it was safer than the walkway because

¶56 The City also contends the Lopezes impermissibly inflamed the passions of the jury because their counsel referred to Rene's work as a firefighter, he wore his uniform in court, and their witnesses referred to him as "Captain Lopez." In addition, the City contends counsel appealed to the passions of the jury in her closing argument when she stated, "This man has dedicated his life for the last 20 years to take care of the public in times of need and stress. And you heard all of that. Heart attacks. Gunshot wounds. Delivering children. And now he needs us to help him." Because the City failed to raise these objections at trial, it waived them absent fundamental error, which we find sparingly in civil cases. *Williams v. Thude*, 188 Ariz. 257, 260, 934 P.2d 1349, 1352 (1997).

¶57 We do not discern fundamental error stemming from references to Rene's employment as a firefighter. The nature of Rene's work, and his inability to continue it after the accident, were central issues in the trial and the jury was well aware that Rene was a firefighter who had been promoted to the rank of captain. Counsel's appeal to the jury to "help" Rene in light of his prior service as a firefighter was improper. *See Standard Chartered*, 190 Ariz. at 48, 945 P.2d at 359 (concluding closing argument should not steer jury away from issues by

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he would have been more visible to cross-traffic and avoided potential collisions with pedestrians.

"drawing irrelevant and inflammatory conclusions which have a decided tendency to prejudice the jury against the defendant" (citation omitted)). But we do not find the error was fundamental because we cannot say that this single reference so inflamed the jury's passions the City was deprived of a fair trial.[21] *See Bradshaw v. State Farm Mut. Auto. Ins. Co.,* 157 Ariz. 411, 420, 758 P.2d 1313, 1322 (1988) ("The doctrine of fundamental error is sparingly applied in civil cases and may be limited to situations [that] deprive[] a party of a constitutional right.").

¶58 The trial court did not abuse its discretion by denying the City's motion for new trial.

[21] We also see nothing untoward in the Lopezes' counsel's reference to three years of litigation, by which the City imagines she intended to communicate to the jury that the damage award must be sufficiently large to encompass attorneys' fees. The jury heard evidence during the trial that Rene's accident occurred on October 10, 2006 and that he filed a notice of claim with the City on April 6, 2007.

CONCLUSION

¶59 For the foregoing reasons, we reverse the portion of the judgment awarding Stephanie damages in the amount of $2.5 million and remand with instructions that the trial court award the City sanctions against Stephanie pursuant to Rule 68. We affirm the remainder of the judgment and the court's order denying the City's motion for new trial.

/s/
Ann A. Scott Timmer
Presiding Judge

CONCURRING:

/s/
Patrick Irvine, Judge

/s/
Daniel A. Barker, Judge