IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

ABERDEEN THOMPSON,
Plaintiff/Appellant,

v.

COREY L. PICKENS AND DOMINO'S PIZZA, LLC,
Defendants/Appellees.

No. 2 CA-CV 2015-0031
Filed September 29, 2015

Appeal from the Superior Court in Pima County
No. C20124614
The Honorable Stephen C. Villarreal, Judge

AFFIRMED

COUNSEL

Doug Zanes & Associates, PLLC
By James E. Abraham, Tucson
Counsel for Plaintiff/Appellant

Brisbois, Bisgaard & Smith LLP
Michael B. Smith, Tucson
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Miller and Chief Judge Eckerstrom concurred.

E S P I N O S A, Judge:

¶1 In this appeal from a judgment in a motor vehicle tort action, appellant Aberdeen Thompson seeks a new trial, contending the trial court abused its discretion by refusing her requested negligence per se jury instruction. For the following reasons, we affirm.

Factual and Procedural Background

¶2 "In determining whether a jury instruction should be given, this court views the evidence in the light most favorable to the requesting party." *Cotterhill v. Bafile*, 177 Ariz. 76, 79, 865 P.2d 120, 123 (App. 1993). On April 11, 2012, Thompson was driving her green Hyundai Accent west on Golf Links Road in Tucson. At the time of the collision, she was in the middle lane of three westbound lanes approaching Pantano Parkway. The posted speed limit on that section of road was forty miles per hour, and Thompson was traveling thirty-five miles per hour. Thompson testified:

> [B]efore I approach[ed] the Domino's [Pizza] parking lot area where [appellee Corey Pickens's vehicle] c[a]me out of, I was headed straight and I'm looking straight ahead of myself. The light was green and the next thing I know is like boom. Something hit me right in the side there by the passenger side . . . fender.

¶3 Just before the collision, Pickens was leaving the restaurant of his employer, appellee Domino's Pizza, to make deliveries. The restaurant is on the north side of Golf Links. Pickens planned to travel west on Golf Links "intend[ing] . . . to get into the

. . . farthest left westbound lane of traffic, before [he] made it to the bridge" in order to turn left "to head south on Camino Seco." He "pulled up to the drive of Domino's," "stopped," and "looked to the east [and] saw two vehicles coming"—a "white Ford Taurus in the middle lane that was closer to [him]" and a "green Hyundai Accent in the left-most lane that was slightly farther back." He "pulled out, slower than usual," into "the right-most lane, the one closest to the northbound turn lane, and waited for the white vehicle to pass [him]." "The white vehicle had passed [him], then [he] checked [his] mirror to make sure the middle lane was clear, and, then, [he] began to merge into the middle lane." His intention, he said, "was to wait for the green Hyundai to pass on that farthest left lane, and then tuck in behind it . . . [, but o]nce [he] got about halfway in the middle lane . . . the collision occurred."

¶4 Before trial, Thompson requested a negligence per se instruction based on A.R.S. § 28-774, which stated:

> Highway access from private road or driveway
>
> The driver of a vehicle about to enter or cross a highway from a private road or driveway shall yield the right-of-way to all closely approaching vehicles on the highway.

On the second day of trial, the trial court and counsel conferred regarding final jury instructions and the court informed counsel they would later have an opportunity to make a record. On the third and final day of trial, Thompson's counsel "note[d] for the record his position as to a jury instruction regarding a person entering the highway" and the court "note[d its] refusal to give the instructions for the reasons as stated on the record."[1]

[1]We have not been provided with this portion of the record from the third day of trial. "When no transcript is provided on appeal, the reviewing court assumes that the record supports the

¶5 Following deliberations, the jury found Thompson proved $15,000 in damages but apportioned fault seventy-five percent against Pickens and twenty-five percent against Thompson, resulting in a net damage award of $11,250 for Thompson.[2] The trial court entered judgment in accordance with the jury's verdict. We have jurisdiction over Thompson's appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 12–2101(A)(1).

Discussion

¶6 "'A trial court must give a requested [jury] instruction if: (1) the evidence presented supports the instruction, (2) the instruction is proper under the law, and (3) the instruction pertains to an important issue, and the gist of the instruction is not given in any other instructions.'" *Brethauer v. Gen. Motors Corp.*, 221 Ariz. 192, ¶ 24, 211 P.3d 1176, 1182 (App. 2009), *quoting DeMontiney v. Desert Manor Convalescent Ctr. Inc.*, 144 Ariz. 6, 10, 695 P.2d 255, 259 (1985) (alteration in *Brethauer*). We review a trial court's denial of a requested jury instruction for an abuse of discretion, *Ritchie v. Krasner*, 221 Ariz. 288, ¶ 30, 211 P.3d 1272, 1283 (App. 2009), but will not reverse on this basis absent resulting prejudice, *Brethauer*, 221 Ariz. 192, ¶ 24, 211 P.3d at 1182; *see also Smyser v. City of Peoria*, 215 Ariz. 428, ¶ 33, 160 P.3d 1186, 1197 (App. 2007) (appellate court will not overturn verdict unless substantial doubt about whether jury properly guided). Prejudice will not be presumed but "must appear affirmatively in the record." *City of Phx. v. Clauss*, 177 Ariz. 566, 568-69, 869 P.2d 1219, 1221-22 (App. 1994).

¶7 The instruction requested by Thompson and based on § 28-774, advised that a driver "about to enter or cross a highway" from a private road or driveway is required to yield the right-of-way to closely approaching vehicles on the highway. The evidence here,

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trial court's decision." *Johnson v. Elson*, 192 Ariz. 486, ¶ 11, 967 P.2d 1022, 1025 (App. 1998).

[2] In both her opening and reply briefs, Thompson states, incorrectly, that fault was apportioned fifty percent against her and fifty percent against Pickens.

however, does not indicate Pickens was entering or crossing Golf Links when the collision occurred. Only Thompson and Pickens provided evidence about the collision, and Thompson testified she was "looking straight ahead" and "didn't see [Pickens's vehicle] until [it] hit [her]." Pickens testified he had "pulled into the right-most lane" and drove slowly while waiting for a white vehicle to pass him on the left. After it passed, he began to "merge into the middle lane," and was halfway into that lane when the collision occurred. Because the evidence at trial did not support the conclusion that Pickens was entering or crossing Golf Links at the time of the collision, we cannot say the court erred by refusing to instruct the jury on § 28-774. *See Czarnecki v. Volkswagen of Am.*, 172 Ariz. 408, 411, 837 P.2d 1143, 1146 (App. 1991) (improper to instruct jury on issue not supported by evidence).

¶8 Further, Thompson has not shown prejudice. *See Clauss*, 177 Ariz. at 568-69, 869 P.2d at 1221-22. She does not dispute that the jury found Pickens negligent despite not being instructed on Thompson's negligence per se theory. She contends, however, that her requested instruction might have resulted in a different apportionment of fault. When comparative negligence is at issue, she asserts, juries weigh all "factual and legal points that favor or disfavor a party" and an instruction "that Pickens had a specific and statutorily-required duty to yield the right of way . . . while entering Golf Links" "would have tipped the scales heavily in [her] favor." She further maintains that had the jury been told Pickens "had a legal duty under state law to wait for [her] to go by," she "could have argued that [his] failure to obey the state law was the first step of the causal chain of events that led to the collision."

¶9 As Pickens and Domino's point out, however, the jury found Pickens negligent, and whether his negligence was simple or per se does not change whether the facts showed Thompson to have been contributorily negligent. The defense of contributory negligence is a question of fact. Ariz. Const. art. XVIII, § 5 ("defense of contributory negligence . . . shall, in all cases whatsoever, be a question of fact"). Here, the jury was instructed that if Pickens was at fault, it "must decide whether [he] has proved that . . . Thompson was at fault and, under all the circumstances of this case, whether

any such fault should reduce . . . Thompson's full damages." Having found Pickens negligent, the jury also found Pickens had proved Thompson too was at fault. Because the addition of a negligence per se instruction would not have affected or diminished Thompson's own fault under the particular facts of this case, she could not have been prejudiced by the court's refusal to provide the instruction.

Attorney Fees

¶10 Pickens requests his attorney fees pursuant to A.R.S. § 12-349(A)(1) on the basis the appeal was "without substantial justification." "'[W]ithout substantial justification' means that the claim or defense is groundless and is not made in good faith." § 12-349(F). The elements "must be proven by a preponderance of the evidence and 'the absence of even one element render[s] the statute inapplicable.'" *Cypress on Sunland Homeowners Ass'n v. Orlandini*, 227 Ariz. 288, ¶ 49, 257 P.3d 1168, 1181 (App. 2011), *quoting Johnson v. Mohave Cty.*, 206 Ariz. 330, ¶ 16, 78 P.3d 1051, 1055 (App. 2003) (alteration in *Orlandini*). We do not find the elements of § 12–349(A)(1) established and therefore deny Pickens's fee request.

Disposition

¶11 For the foregoing reasons, the judgment is affirmed.