IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

RICHARD MAHL,
Plaintiff/Appellant,

v.

JAZMINE JOY BURNETTE AND A & N SERVICES, LLC,
Defendants/Appellees.

No. 2 CA-CV 2019-0165
Filed January 6, 2021

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Gila County
No. CV201600062
The Honorable Timothy M. Wright, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Presiding Judge Eppich authored the decision of the Court, in which Chief Judge Vásquez and Judge Brearcliffe concurred.

E P P I C H, Presiding Judge:

¶1 In this negligence action, Richard Mahl appeals from the trial court's judgment in favor of Jazmine Burnette and A & N Services, LLC (collectively "the Carrier")[1] following a jury trial. Mahl seeks a new trial, arguing the trial court erred in precluding three opinions of his standard of care expert and his res ipsa loquitur theory of liability. For the following reasons, we affirm.

Factual and Procedural Background

¶2 "We view the evidence and all reasonable inferences in the light most favorable to upholding the jury's verdict." *Romero v. Sw. Ambulance*, 211 Ariz. 200, ¶ 2 (App. 2005). In April 2014, Burnette, the driver of a non-emergency medical transport ("NEMT") van, transported Mahl for a medical appointment. Following his appointment, Mahl entered the van unassisted and sat in the seat directly behind Burnette. Mahl buckled his own seatbelt and felt it click before Burnette pulled away. Burnette similarly heard the seatbelt click and checked to ensure it was on. Mahl and Burnette were the only two people in the van.

¶3 During the trip Mahl fell asleep. He next recalled waking up on the floor behind Burnette's seat with his head bleeding. Mahl had hit his head on a metal housing behind the driver's seat. Burnette had stated that another car had cut her off, prompting her to brake. Burnette pulled over to the side of the road. At Mahl's request, Burnette transported him home and Mahl subsequently went to the hospital. He had sustained injuries to his head, eye, nose, and shoulder and as a result, sued the Carrier.

[1]A & N Services, LLC ("A & N") was the operator of the van Burnette had been driving. In addition to A & N, Mahl initially sued various other entities under a theory of respondeat superior, but when the case was submitted to the jury, Burnette and A & N were the only remaining defendants.

¶4 In June 2019, the jury returned a verdict in favor of the Carrier, determining Burnette was not negligent in her operation of the van and that any purported negligence was not a cause of Mahl's injuries. Mahl filed this appeal of the final judgment and we have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).[2]

Preclusion of Expert Testimony

¶5 On appeal, Mahl argues the trial court erred in precluding testimony of his standard of care expert, Joseph Rubino, about three opinions in Rubino's report: (1) his opinion on the applicable standard of care and breach of that standard ("opinion one"); (2) his opinion on NEMT industry standards and A & N company policies ("opinion two"); and (3) his opinion on whether Burnette breached her contract in her transport of Mahl ("opinion three").

¶6 Expert testimony is governed by Rule 702, Ariz. R. Evid., and requires the trial court to serve as a gatekeeper for relevant and reliable evidence. Ariz. R. Evid. 702 cmt. to 2012 amend.; *see Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993). In relevant part, the rule provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue . . . .

Rule 702, Ariz. R. Evid. Mahl contends the trial court's preclusion of his expert's opinions was improper under Rule 702(a), arguing Rubino's testimony was helpful because it "advance[d] the trier of fact's understanding to any degree." *United States v. Archuleta*, 737 F.3d 1287,

[2]The day the Carrier filed its answering brief in this court, its counsel also sought a stay in the trial court pursuant to Rule 7(c), Ariz. R. Civ. App. P. The trial court granted the stay and we subsequently issued an order noting that "[t]he trial court [had] no jurisdiction to stay proceedings currently pending in this court." The Carrier's counsel filed a notice of insolvency with this court, but never sought a stay in this court, and therefore the case is properly before us.

1297 (10th Cir. 2013) (quoting 29 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure Evidence* § 6265 (2d ed. 1997)). We review a court's exclusion of expert testimony for an abuse of discretion, *Sandretto v. Payson Healthcare Mgmt., Inc.*, 234 Ariz. 351, ¶ 11 (App. 2014), and conclude no such abuse occurred here.

Opinion One

¶7 At trial, Mahl attempted to introduce Rubino's "opinion one" that "[The Carrier] failed in [its] obligation[] to place Mr. Mahl's safety as [its] highest priority" showing "wanton disregard for [Mahl's] safety." He argued this testimony would be helpful to the jury in determining "the duties and the standards and the breaches thereof." The Carrier objected to the testimony arguing "[t]he opinion itself [was] improper, because it quote[d] the wrong standard" and gave "a heightened standard of care to this jury." The trial court precluded opinion one because it stated the wrong standard of care. The court further found that, even if it stated the correct standard of care, the opinion did not help the jury understand the evidence or determine a fact in issue in the case, but rather improperly embraced an ultimate decision.

¶8 On appeal, Mahl reasserts that opinion one did not improperly state the standard of care and that it was helpful to the jury. He further argues the trial court erred in determining that an expert cannot opine on the ultimate issue in the case and that the preclusion of this opinion "usurped the adversary system altogether and robbed [him] of the opportunity to prove his case to the jury."

¶9 To establish a negligence claim, a plaintiff must prove four elements: "(1) a duty requiring the defendant to conform to a certain standard of care; (2) a breach by the defendant of that standard; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) actual damages." *Gipson v. Kasey*, 214 Ariz. 141, ¶ 9 (2007). Duty is a question of law for the trial court to decide. *Id.* The standard of care is "[w]hat the defendant must do, or must not do . . . to satisfy [that] duty," and whether the standard of care has been breached is a question for the jury. *See id.* ¶¶ 9-10 (quoting *Coburn v. City of Tucson,* 143 Ariz. 50, 52 (1984)).

¶10 It is undisputed that a special relationship existed between Mahl and Burnette, creating a duty. The parties also agree that Burnette was a common carrier and therefore the applicable standard of care was that of a reasonable person under the circumstances and not a heightened standard. *See Nunez v. Prof'l Transit Mgmt. of Tucson, Inc.*, 229 Ariz. 117, ¶ 23

(2012). Despite this agreement, Mahl argues that Rubino should have been able to testify to opinion one because "'highest' did not heighten the standard but simply emphasized that in the industry, passenger safety should be a priority for the driver."

¶11 The trial court did not abuse its discretion in precluding testimony that Burnette had an obligation to place Mahl's safety as the "highest priority." First, we agree with the court that this opinion stated the incorrect standard of care. *See Nunez*, 229 Ariz. 117, ¶ 14 ("[t]echnically the 'high degree' instruction is incorrect") (quoting *Block v. Meyer*, 144 Ariz. 230, 236 (App. 1985)). While the standard of care is "flexible and fluid" depending on the facts of the case—reasonable care is clearly not the "highest degree" of care. *Smethers v. Campion*, 210 Ariz. 167, ¶¶ 13-14 (App. 2005). Providing the "highest degree of care" and making safety the "highest priority" may be aspirational customer service goals, but neither is the applicable legal duty here.

¶12 Even if we were compelled by Mahl's argument that "highest priority" and "reasonable care" are coextensive, expert testimony must "help the trier of fact to understand the evidence or to determine a fact in issue." Ariz. R. Evid. 702(a). The trial court was within its discretion to preclude the testimony on these grounds because Rubino's opinion one "[was] riddled with the prospect of confusion."[3] *See Lowrey v. Montgomery Kone, Inc.*, 202 Ariz. 190, ¶ 23 (App. 2002) ("To hold that a carrier must exert *more than reasonable* care under the circumstances not only serves no useful purpose; it is a hard concept to make sense of and one very likely to be misunderstood.").

¶13 Mahl argues opinion one could have been remedied by the trial court precluding use of the word "highest" thus allowing Rubino's opinion on breach to stand. The remainder of opinion one is that the Carrier "failed in [its] obligations" and acted with "wanton disregard" for Mahl.[4]

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[3]For this same reason Mahl's argument that *Nunez* is distinct because it involved a jury instruction, *Nunez*, 229 Ariz. 117, ¶ 4, rather than expert testimony, is unavailing because both misstate a higher degree of care than the one required.

[4]Mahl argues that Rubino's opinion that the Carrier acted with "wanton disregard" for Mahl's safety was significant to the question of breach. However, this was not helpful to the jury and could have similarly led to confusion. *See Hall v. Motorists Ins. Corp.*, 109 Ariz. 334, 337 (1973)

While Mahl is correct that it is his burden to prove the standard of care and any breach of that standard, he was not prevented from doing so as to reasonable care. The trial court did not abuse its discretion in precluding the expert from testifying about breach when his opinion was premised on an incorrect standard of care.[5] Further, although Rule 704(a), Ariz. R. Evid., supports Mahl's argument that "an expert's opinion is not objectionable because it embraces the ultimate issue," the testimony has to be otherwise admissible.[6] *State v. Sosnowicz*, 229 Ariz. 90, ¶ 18 (App. 2012). For these reasons, the testimony was not otherwise admissible, and the court properly precluded opinion one on Rule 702(a) grounds.

Opinion Two

¶14 Rubino's "opinion two" concluded that "A & [N] services did not meet industry standards[, d]id not meet the contractual requirements of its broker . . . and violated [its] own company policies." The opinion was based on three parts of the company policies: policy ten, regarding "[u]nscheduled and unauthorized stops"; policy fourteen, regarding "procedure[s] a driver must use in case of an emergency"; and policy twelve, requiring drivers ensure "riders are seated with seat belts properly secured."[7] The trial court ruled all of opinion two inadmissible on Rule 702(a) grounds. As explained below, we conclude the court did not abuse its discretion.

("wanton disregard" is greater than "mere negligence"). Therefore, the court did not abuse its discretion in precluding it. *See* Ariz. R. Evid. 702(a).

[5]Although the testimony above was precluded, Rubino was still able to testify about the responsibilities a NEMT driver has to a passenger. Rather than characterize the obligation as reasonable care under the circumstances, he referred to it as the "mother test."

[6]"Some opinions on ultimate issues will be rejected as failing to meet the requirement that they assist the trier of fact to understand the evidence or to determine a fact in issue." Ariz. R. Evid. 704(a) cmt. to 1977 Rule.

[7]The policies appear to be from an A & N policy manual, but Rubino testified that he believed it was a different entity's manual that A & N had to comply with.

Policy ten and policy fourteen

¶15 At trial, Mahl argued Rubino should be able to testify to policy ten regarding unauthorized stops during a NEMT trip[8] and policy fourteen which regulated the steps drivers were required to follow in the case of an emergency.[9] Mahl contended that Burnette violated these policies because she pulled over to the side of the road and did not contact a dispatcher.

¶16 On the first day of trial the parties stipulated that Mahl's injuries were not exacerbated by Burnette taking him home instead of to the hospital. Based on this stipulation, the trial court questioned the relevancy of policies ten and fourteen as to the elements of negligence and how the testimony would assist the jury in understanding the evidence or determine a fact in issue. Mahl argued that he was "trying to elicit" a "pattern of behavior . . . wanton disregard for passenger safety." Mahl suspected that had Burnette pulled over and called the dispatcher, "she would have been told to call 911 . . . or take [Mahl] to the hospital if there [was] one nearby." The court ruled Mahl was precluded from eliciting testimony about the policies because "everybody agrees that his injuries were not exacerbated by not going to [the hospital]."

¶17 On appeal Mahl argues this ruling was in error because the issue was not whether Burnette took any steps, but whether she took adequate steps. He argues that Rubino's opinion based on the policies "demonstrated a pattern of failure to put passenger safety first, as required by the standard of care," and that the trial court "undertook the role of trier of fact and concluded that the driver need not comply with every technical requirement of her company's policies."[10]

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[8]The policy states: "Unscheduled and unauthorized stops are not allowed during rider transport, unless necessary for the safety of a member or the driver. If a driver needs to make an unscheduled stop, driver shall notify dispatcher of the stop, the reason for the stop, and whether the stop will affect the driver's schedule."

[9] The procedures required a driver to first determine if anyone needed first aid and then "[i]f the vehicle can be safely driven to the side of the road, do so, but do not leave the scene of the accident." Additionally the driver was to contact 9-1-1 and to notify A & N of the event.

[10]This argument mischaracterizes the record. The trial court was not making a conclusory statement that "the driver need not comply" but

¶18 "Irrelevant evidence is not admissible," Rule 402, Ariz. R. Evid., and therefore a trial court does not abuse its discretion in excluding irrelevant expert testimony. *State v. Nash*, 143 Ariz. 392, 400 (1985). Evidence is relevant if it (1) "has any tendency to make a fact more or less probable than it would be without the evidence" and (2) "the fact is of consequence in determining the action." Ariz. R. Evid. 401.

¶19 We are not persuaded that testimony as to whether Burnette complied with company policy when she pulled over was relevant to establish a breach of the standard of care by demonstrating a "pattern." As explained above, the standard of care is that of a reasonable person under the circumstances, *Nunez*, 229 Ariz. 117, ¶ 23, not a violation of internal policy. *See Gilbert Tuscany Lender, LLC v. Wells Fargo Bank*, 232 Ariz. 598, ¶ 22 (App. 2013). Further, a violation of an internal policy "does not create actionable negligence unless plaintiff (1) suffers the type of harm sought to be prevented by the rule and (2) is a member of the class of people for whose protection the rule was promulgated." *Id.* (quoting *Software Design & Application, Ltd. v. Hoefer & Arnett, Inc.*, 56 Cal. Rptr. 2d 756, 762 (Ct. App. 1996)).

¶20 Here, Mahl could not have "suffer[ed] the type of harm to be prevented by the [policy]," *id.*, because the parties agreed that Mahl's harm was not sustained or exacerbated by Burnette pulling over. For the same reason, Burnette's action was not a "fact . . . of consequence," Rule 401(b), Ariz. R. Evid., or "fact in issue," Rule 702(a), Ariz. R. Evid. Accordingly, the trial court did not abuse its discretion in precluding testimony on policies ten and fourteen.

Policy twelve

¶21 Policy twelve requires that "[d]rivers shall instruct each rider to use the seatbelt [and] [b]efore pulling away from a stop, drivers shall make sure that riders are seated with seat belts properly secured." After Rubino testified that "it's not the driver's responsibility to put the seatbelt on, it's the driver's responsibility to make sure the seatbelt is secured," the Carrier objected to Mahl asking Rubino "how" a driver ensures a seatbelt is secured. The trial court initially ruled that Rubino could testify as to whether the policies were followed or not, but could not "testify as to his opinion as to what he thinks [the policy] requires."

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rather asked Mahl whether he "just [did not] think [Burnette] complied with every technical requirement of the policy."

¶22 After a recess, the Carrier argued that "any opinion of a violation . . . would be premised and based on the state of mind interpretation of the policy." The trial court then expressed that it was "not sure how [Rubino's] specialized knowledge help[ed] to determine whether [Mahl] was secured or not . . . either [he was] or [he was not]." Mahl argued Rubino's opinion was helpful to the jury because he would testify to the distinction between buckled versus secured. The court concluded that "under Rule 702(a) [Rubino] would not have any specialized, scientific, technological, or other knowledge that would assist the trier of fact in understanding the evidence or would assist to determine a fact in issue" and precluded the testimony.

¶23 On appeal, Mahl argues the trial court erred because it "misunderstood the issues that it concluded were within the realm of the knowledge of the general population" evidenced by its own "incorrect[] and improper[]" use of the terms "buckled" and "secured" interchangeably throughout trial. Mahl contends that this is a factual issue that fell "squarely within the purview of a qualified expert like Mr. Rubino" and that the testimony would have helped the trier of fact in understanding the standard of care required to properly ensure a passenger was secured.

¶24 Similarly to the ruling on policies ten and fourteen above, the trial court precluded the testimony under Rule 702(a). However the ruling on policy twelve is distinguishable because the court focused on Rubino's lack of "specialized knowledge." Rule 702 permits "general, educative testimony to help the trier of fact understand evidence or resolve fact issues." *State v. Salazar-Mercado*, 234 Ariz. 590, ¶ 6 (2014). But if an expert witness is in "no better position to determine [a fact in issue] than [is] the jury" the testimony is not admissible. *Sosnowicz*, 229 Ariz. 90, ¶¶ 20-21 (medical examiner's classification of homicide versus accident inadmissible because witness did not "rel[y] on any 'specialized knowledge'").

¶25 We initially note that there were conflicting representations of whether the meaning of "secured" was even a fact in issue,[11] but regardless, the record does not support that the trial court abused its discretion in determining Rubino lacked the requisite knowledge to help the jury understand that fact. An average juror knows from experience what it means to buckle a seatbelt and understands that the risk of injury may be

[11]Mahl told the trial court he "[did not] intend to" put on evidence that he was not "secured." He later stated that he "never said that [he] agreed that he was secured . . . he said he was buckled up."

higher if a seatbelt is not properly secured during an accident.[12] *Cf. Pincock v. Dupnik*, 146 Ariz. 91, 96 (App. 1985) (average jurors understand increased risks in high-speed police pursuits).

¶26 Further, while Rubino owns his own transit consulting business and was "personally involved in the creation of the first [NEMT] service" in the country, the court observed that he had never worked for or consulted with the companies at issue in this case and, as far as the court knew, did not participate in drafting of their policies. Accordingly, Rubino was not in a better position than the jury to determine whether Mahl was "secured" per the policy manual than the jury, and the trial court did not err. *See Sosnowicz*, 229 Ariz. 90, ¶¶ 20-21.

Opinion Three

¶27 At trial, Mahl also proposed that Rubino would testify that a co-defendant had admitted that "contract requirements were violated, and standards were not met regarding the incident in which Mr. Mahl was injured." He additionally stated Rubino would testify that the Carrier was responsible for Mahl's injuries "whether his seat belt was attached or . . . not."

¶28 The trial court initially noted that it was unsure of the relevance of a contract violation, and that even if it were relevant, how an expert testifying would help the jury determine a contract violation. It also expressed that an opinion that the Carrier was liable regardless of whether Mahl was belted incorrectly opined on a strict liability standard.

¶29 Mahl contended he was not arguing strict liability but rather that the company did not follow its own rules, and that the jury needed assistance in determining whether there was a contract violation. The trial court responded Mahl should "show [the jury] the policy . . . and . . . then [it would] direct them to make a determination, if it's even relevant," noting it did not see why the jury needed Rubino's assistance. Thereafter, it precluded any testimony on opinion three.

[12]Because there was evidence that Mahl was experienced in, and capable of, buckling the seatbelt himself and that the seatbelt was not defective—a juror could reasonably conclude that once the seatbelt was buckled, a reasonable NEMT driver under the circumstances could consider it secured.

¶30 Similarly to opinion two, on appeal, Mahl argues opinion three was relevant to the standard of care and breach because Burnette failed to follow company policy and ensure Mahl was properly secured, regardless of whether Mahl's seatbelt was attached or not. Mahl also argues that this issue was "not as simple as whether the policy was violated but rather how that fact fit into the critical issue of breach," and that in order to carry his burden of proof, he had to present Rubino's opinion. The Carrier counters that "there was no specialized knowledge that was required for the jury to determine whether policies were violated."[13]

¶31 For the reasons explained above with respect to policy twelve with opinion two, the trial court did not abuse its discretion in precluding testimony from Rubino about whether the company's contract requirements were met because he possessed no "specialized knowledge" of the company's internal policies. *See* Ariz. R. Evid. 702(a); *see also Sosnowicz*, 229 Ariz. 90, ¶¶ 20-21 (if expert witness in "no better position to determine [a fact in issue] than was the jury" testimony not admissible).

¶32 Mahl further argues that Rubino's testimony that the Carrier was responsible for Mahl's injuries "whether his seat belt was attached or . . . not," did not opine on a strict liability standard, but showed that Burnette breached the standard of care by failing to follow company policies and taking the proper steps to ensure he was secured. Assuming, without deciding, that Mahl's argument is correct and that this testimony solely shows noncompliance with the policy and does not attempt to introduce an improper theory of negligence, we fail to see how this argument is distinguishable from that offered as to policy twelve, which we have rejected. Accordingly, the trial court did not err by precluding opinion three.

Res Ipsa Loquitur

¶33 Before trial, the Carrier moved in limine to preclude evidence of Mahl's negligence theory of res ipsa loquitur. Mahl responded that the Carrier's motion was "a motion for summary judgment disguised as a motion in limine" because it "attack[ed] a legal theory, not the introduction of evidence." Mahl further argued the dispute was not about evidence, but

[13] The Carrier also argues opinion three was properly precluded because while Rule 704 permits testimony that embraces ultimate issues, it "does not permit expert testimony on how the jury should decide the case." Because we affirm on other grounds, we need not reach this argument. *See Monroe v. Basis School, Inc.*, 234 Ariz. 155, n.1 (App. 2014).

about a jury instruction, and stated that "at the close of evidence, [he would] ask for a jury instruction on res ipsa loquitur." He argued that "[i]f the evidence does not support the instruction, [the Carrier] can raise this issue at that time[, h]owever, it is not an appropriate motion in limine, and should be denied accordingly."

¶34 The trial court treated the motion as a motion in limine and granted it. It expressed doubt whether the elements of res ipsa loquitur could be met, but told Mahl that he could "ask for the jury instruction later." At the close of evidence, Mahl did not request an instruction.

¶35 Exclusion of evidence from trial, by motion in limine or otherwise, is permissible on the grounds of evidentiary objection or effectively as a sanction for discovery or disclosure violations. *Zimmerman v. Shakman*, 204 Ariz. 231, ¶ 12 (App. 2003); *B & R Materials, Inc. v. U.S. Fid. & Guar. Co.*, 132 Ariz. 122, 124 (App. 1982). We review the grant of a motion in limine for an abuse of discretion. *Warner v. Sw. Designs Images, LLC*, 218 Ariz. 121, ¶ 33 (App. 2008).

¶36 On appeal, Mahl argues that "as a result of the trial court's granting of the motion in limine, there was no way that there could be evidence in the record regarding [res ipsa loquitur]" but subsequently argues there was enough evidence produced at trial to support a jury instruction on the theory. Even assuming, without deciding, that the grant of the motion in limine was in error, Mahl fails to demonstrate how the grant of the motion prejudiced him because he argues he was able to present sufficient evidence for this theory despite the ruling on the motion. We will not reverse absent a showing of prejudice. *See Ott v. Samaritan Health Serv.*, 127 Ariz. 485, 489 (App. 1980) ("To justify a reversal, the trial court's error must have been prejudicial to the substantial rights of the appellant.").

¶37 It appears Mahl's main contention both at trial and on appeal is that no jury instruction was given on the theory of res ipsa loquitur. The Carrier contends Mahl waived review of the jury instruction on appeal because he failed to request the instruction at the close of evidence despite his assertions that he would and the trial court's invitation to do so. In his reply brief, Mahl does not address why he did not request the jury instruction at the close of evidence; he only argues that he brought it up when objecting to the motion in limine.

¶38 A party may file a written request for jury instructions before trial, or as the court permits, during trial. Ariz. R. Civ. P. 51(a)(1). Subject

to the limitations of the rule, a party may also request jury instructions at the close of evidence. Ariz. R. Civ. P. 51(a)(2). "A party who objects to . . . the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds for the objection." Ariz. R. Civ. P. 51(c)(1).

¶39 Here, Mahl did not request a jury instruction on res ipsa loquitur, instead only alluding that a request was forthcoming in his response to the Carrier's motion in limine. And, when given the opportunity pursuant to Rule 51(b)(3)(C), he did not object when the trial court did not include a jury instruction on the theory. Therefore, Mahl has waived this issue on appeal.[14]

Disposition

¶40 For the foregoing reasons, we affirm.

[14]"Absent fundamental error, failure to object to a jury instruction waives the issue of error in the instruction." *Data Sales Co. v. Diamond Z Mfg.*, 205 Ariz. 594, ¶ 31 (App. 2003). Mahl does not argue fundamental error on appeal, except for a general assertion in his reply brief, that he was "not given the opportunity for a fair trial." We are not required to address arguments raised for the first time in a reply brief. *See Romero*, 211 Ariz. 200, n.3 (waiving fundamental error argument raised for first time in reply). "Moreover, the doctrine of fundamental error 'should be used sparingly, if at all, in civil cases.'" *Id.* (quoting *Williams v. Thude*, 188 Ariz. 257, 260 (1997)).