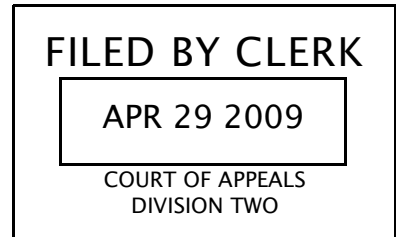


**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**

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



IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

JOANN AGUILAR, surviving parent of	)	
AARON ANAYA, JR., decedent,	)	
	)	2 CA-CV 2008-0091
Plaintiff/Appellee,	)	DEPARTMENT B
	)	
v.	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
R. W. STRUNK EXCAVATING, INC.,	)	Rule 28, Rules of Civil
an Arizona corporation,	)	Appellate Procedure
	)	
Defendant/Appellant.	)	
	)	

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APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C-20063147

Honorable John F. Kelly, Judge

AFFIRMED

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Hollingsworth Law Firm, P.C.	
By Louis Hollingsworth	Tucson
and	
Van Amburg Law Firm, P.L.L.C.	
By Noah J. Van Amburg	Tucson
	Attorneys for Plaintiff/Appellee
Ehmann DeCiancio, PLLC	
By Joel DeCiancio and Christopher Robbins	Tempe
	Attorneys for Defendant/Appellant

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V Á S Q U E Z, Judge.

¶1 In this wrongful death action, JoAnn Aguilar and Aaron Anaya (collectively Aguilar) sued Gregory Artz and his employer R.W. Strunk Excavating, Inc. (Strunk) for damages arising from the death of their son in a motor vehicle accident. The jury returned a verdict against Artz awarding Aguilar compensatory and punitive damages, but found Strunk was not vicariously liable. The trial court granted Aguilar’s motion for new trial after finding Strunk had violated an order in limine during its closing argument to the jury. Strunk appeals from the court’s order granting a new trial, contending it did not violate the order in limine or, in the alternative, that Aguilar failed to establish that any prejudice resulted from the violation. For the reasons stated below, we find the trial court did not abuse its discretion in granting Aguilar a new trial and affirm.

### **Facts and Procedure**

¶2 This lawsuit arises from an accident during which the pickup truck Gregory Artz was driving collided with the motorcycle Aaron Anaya, Jr. (Aaron) was riding. Aaron died as a result of the accident.<sup>1</sup> Artz’s blood alcohol content was .398 at the time of the

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<sup>1</sup>Strunk’s opening brief is devoid of a statement of facts; it merely states, “The material facts are undisputed.” Rule 13(a)(4), Ariz. R. Civ. App. P., expressly requires a “statement of facts relevant to the issues presented for review, with appropriate references to the record.” And an appellant’s failure to include such facts is generally “regarded by this court as sufficient cause for dismissal.” *Clemens v. Clark*, 101 Ariz. 413, 414, 420 P.2d 284, 285 (1966) (insufficient statement of facts “of no value whatsoever in aiding this Court in understanding the . . . assignments of error . . . and . . . require[s] this Court to assume the

accident, almost five times the legal level that gives rise to a presumption of impairment. *See* A.R.S. § 28-1381(A)(2). Aguilar sued Artz for Aaron’s wrongful death, alleging Artz had been intoxicated and had recklessly caused the accident. Aguilar later filed an amended complaint, adding Strunk as a defendant and alleging it was vicariously liable for Artz’s actions because Artz had been acting in the course and scope of his employment with Strunk at the time of the accident. Aguilar also alleged Strunk was independently liable for negligently hiring Artz. After discovery, the court granted Strunk’s motion for summary judgment on the negligent hiring claim but denied it on the claim of vicarious liability.

¶3 Before trial, Aguilar filed a motion in limine to preclude the defendants from making “statements or inferences in their arguments that [Strunk] . . . will have to pay any judgment or award of damages personally.” Artz and Strunk did not oppose the motion, and the trial court granted it. At trial, the main issue was whether Artz had been acting in the course and scope of his employment at the time of the accident. During his closing argument, Strunk’s counsel stated:

[W]hat you’re being asked to decide with respect to my clients, Bucky and Betty and . . . Strunk[, Inc.], is whether they should be held responsible for Greg Artz’ hand; responsible for the \$3,000,000; responsible for whatever you award for punitive damages, because they will be responsible for that if you hold them liable.

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duties of an advocate by searching a voluminous record and examining many exhibits in order to determine if there is merit to the appeal”). However, because we are not inclined to “punish litigants because of the inaction of their counsel,” we will decide the issues on their merits. *Id.*

....

[W]hat you're being asked to do now is you're being asked to hold one person responsible for the actions of another; not because they did anything wrong, but because they're in the course and scope [of employment] So they're asking you to hold . . . Strunk[, Inc.] responsible for the actions of Gregory Artz. . . . [T]hey're asking you to hold someone responsible who didn't consume alcohol, who didn't get behind the wheel intoxicated, and who didn't commit manslaughter. So they're asking you to hold that person responsible for the compensatory damages of [\$]3,000,000 and whatever you decide, if any, punitive damages apply. And that's what they want you to do, is hold Bucky and Betty and . . . Strunk[, Inc.] responsible for that.

....

Well, if this isn't about money, then why did [Aguilar and Anaya] sue my client? Why did they sue . . . Strunk[, Inc.] when he didn't consume alcohol, didn't commit manslaughter, didn't get behind the wheel? They didn't do anything in this case, and there's no claim in this case they did something wrong; yet they're asking you to hold them responsible for millions of dollars. Millions of dollars.

¶4 After closing arguments, Aguilar's counsel objected to portions of Strunk's closing argument, contending Strunk had violated the order in limine. Counsel requested a curative jury instruction that there was no evidence Bucky and Betty Strunk, the principal shareholders of Strunk, would have to pay the award personally, as Strunk's counsel had suggested. The court denied the request. The jury concluded Artz had not been acting within the course and scope of his employment at the time of the accident and therefore found

Strunk was not vicariously liable. However, the jury did find Artz personally liable and awarded Aguilar \$200,000 in compensatory damages and \$50,000 in punitive damages.

¶5 After trial, Aguilar filed a motion for new trial pursuant to Rule 59, Ariz. R. Civ. P., arguing Strunk had concealed evidence relevant to the independent negligence claim against it and had violated the court’s order in limine by suggesting during closing argument that Bucky and Betty Strunk and Strunk, the corporation, would personally have to pay any judgment entered against Strunk. The court granted the motion, finding defense counsel’s comments violated the order and prejudiced Aguilar. The court also ordered that Aguilar would be permitted to conduct additional discovery with leave to file a motion for reconsideration on the independent negligence claim against Strunk if warranted by such discovery. This timely appeal followed.<sup>2</sup>

### **Standard of Review**

¶6 The sole issue in this appeal is the propriety of the trial court’s grant of a motion for new trial. A trial court has broad discretion in ruling on a motion for new trial. *State Farm Fire & Cas. Co. v. Brown*, 183 Ariz. 518, 521, 905 P.2d 527, 530 (App. 1995). And, we review an order granting a new trial “under a more liberal standard than an order denying one.” *Id.*; *see also Englert v. Carondelet Health Network*, 199 Ariz. 21, ¶ 5, 13 P.3d 763, 767 (App. 2000). Thus, “we will not interfere with the trial court’s decision to grant a

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<sup>2</sup>Anaya Sr. apparently settled with the defendants and is not a party to this appeal.

new trial” absent an abuse of the court’s discretion. *Englert*, 199 Ariz. 21, ¶ 5, 13 P.3d at 767.

### **Discussion**

¶7 On appeal, Strunk first contends the trial court abused its discretion in granting a new trial because it had already ruled on this issue before the jury received its instructions and “nothing changed between that ruling and the motion for new trial.” However, nothing in Rule 59 precludes the filing of a motion for new trial when the issue was raised earlier in the proceedings; indeed, in the context of improper argument by counsel during trial, the failure to object prior to filing a motion for new trial generally constitutes waiver. *See Watson Constr. Co. v. Amfac Mortgage Corp.*, 124 Ariz. 570, 582, 606 P.2d 421, 433 (App. 1979). Thus, the trial court properly considered the motion.

¶8 Strunk next argues, “To the extent that [Aguilar] objected to references to Bucky and Betty Strunk, which was the primary focus of their motion for new trial, [Aguilar] waived that issue” by failing to timely object because Bucky and Betty had been referred to individually throughout the trial by both parties. Strunk misunderstands Aguilar’s objection. Aguilar objected on the basis the comments were improper because they strongly implied, if not explicitly stated, that by holding Strunk liable, the jury would thereby make Bucky and Betty Strunk, non-parties to the litigation, “responsible” for paying the judgment. And contrary to Strunk’s argument, Aguilar objected as soon as closing arguments had concluded.

Aguilar thus has not waived the argument by failing to object on this basis before filing her motion for new trial.

¶9 Strunk also contends the trial court erred in concluding its counsel violated the court’s order in limine. It argues the comments concerning “responsibility” were directed at a jury instruction, which told the jury that “under certain circumstances, [Strunk] could be held responsible for the conduct of Artz,” and, in any event, it did not violate the order because it did not use the words “pay personally,” which it asserts are not synonymous with “responsible.”

¶10 The trial court’s order in limine precluded “any inference that [Strunk] ‘must pay’ any judgment or award of damages in this case.” Here, defense counsel stated three separate times during closing argument that Aguilar was asking the jury to hold Strunk “responsible” for \$3,000,000 in compensatory damages and any punitive damages that the jury awarded. In this context, counsel plainly intended the jury to infer from these comments that Strunk would be required to pay that amount itself. Although counsel used the word “responsible” rather than “pay,” his meaning was obvious; and, contrary to Strunk’s argument, it was the implication that it would have to pay, not simply use of the phrase “must pay,” which had been precluded by the court’s order. Thus, the trial court did not abuse its discretion in ruling Strunk violated the order in limine.<sup>3</sup>

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<sup>3</sup>We do not comment upon whether, absent such an order in limine, it is improper for a defendant to argue it will “be responsible for” a judgment when the defendant knows an

¶11 Having found the trial court did not abuse its discretion in determining counsel’s argument was improper, we must now determine whether the court erred in finding Aguilar was prejudiced by that argument.<sup>4</sup> “Reversal will be required only when it appears probable that the misconduct ‘actually influenced the verdict.’” *Leavy v. Parsell*, 188 Ariz. 69, 72, 932 P.2d 1340, 1343 (1997), quoting *Grant v. Ariz. Pub. Serv. Co.*, 133 Ariz. 434, 454, 652 P.2d 507, 527 (1982). Strunk contends this argument only would have affected the amount of damages, not the jury’s determination on whether Strunk was liable for Artz’s acts. It also argues that, in any event, Aguilar has failed to demonstrate the comments could have affected the verdict because of “the overwhelming weight of the evidence . . . [that] Artz was not in the course and scope of employment at the time of the accident.”<sup>5</sup>

¶12 Contrary to Strunk’s claim, the impact of counsel’s improper argument was not confined to the issue of damages. During his closing argument, counsel did not merely argue the defendant corporation would have to pay the judgment; he told the jury Bucky and Betty

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insurance policy will cover the damages. Here, the plaintiffs filed a motion in limine that Strunk did not oppose, and it was bound by the terms of the trial court’s order.

<sup>4</sup>Were counsel’s improper comments limited to Strunk, a named defendant, we might conclude that, in context, they were, at most, harmless error. *Leavy v. Parsell*, 188 Ariz. 69, 72, 932 P.2d 1340, 1343 (1997) (applying harmless error review to error in context of motion for new trial). But, as we explain below, counsel’s improper argument went far beyond violating the express terms of the trial court’s order in limine.

<sup>5</sup>Strunk has failed to direct this court to where in the record this “overwhelming . . . evidence” can be found. See Ariz. R. Civ. App. P. 13(a)(6) (appellant’s brief shall contain “contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to . . . parts of the record relied on”).



Strunk “will be responsible for [compensatory and punitive damages] if you hold them liable.” He further stated that the plaintiffs were asking the jury to hold Bucky and Betty “responsible for millions of dollars. Millions of dollars.” Moreover, Strunk’s counsel told the jury that Bucky and Betty were also his clients.

¶13 Although Bucky and Betty Strunk were the principal shareholders of Strunk, only the corporation was named as a defendant in this lawsuit and, thus, potentially liable for Artz’s actions. *See* A.R.S. § 10-622(B)(“A shareholder of a corporation is not personally liable for the acts or debts of the corporation.”). Therefore, under the circumstances, it was reasonable for the trial court to conclude counsel’s argument had prejudiced Aguilar, because counsel intended to appeal to the jury’s emotions so that it would not find Strunk liable, by stating, essentially, that a finding of liability against Strunk would require Bucky and Betty Strunk to personally pay a multi-million dollar judgment. Consequently, counsel’s argument that holding the corporation liable was tantamount to holding Bucky and Betty Strunk liable and personally responsible for paying damages was wholly without basis and inappropriate.

¶14 Furthermore, the evidence concerning whether Artz had been acting in the course and scope of his employment at the time of the accident was conflicting. The record establishes the evidence Artz was not acting in the course and scope of employment at the time of the accident consisted of his testimony that he had been rushing to take his taxes to a tax preparer he had never used before and with whom he had not made an appointment, as well as evidence that Strunk did not pay its employees for time spent driving to job sites.

But, Artz’s testimony was contradicted by a letter he had written to the trial court in his criminal case in which he had stated he “w[o]ke up late for work” on the day of the accident and his statement to a police officer within thirty minutes after the accident occurred that he had been on his way to work. Additionally, during trial, Betty Strunk stated for the first time that Strunk paid its employees to drive to out-of-town job sites when it was not paying for local accommodations. This conflicted with Strunk’s earlier disclosure and raised an issue as to whether the job site Artz had been driving to was considered an out-of-town job site. As a result of Betty’s testimony, the trial court has permitted Aguilar to conduct additional discovery prior to retrial on whether Artz had been acting in the scope of his employment with Strunk when the accident occurred.

¶15 The trial court concluded that, given the evidence presented, counsel’s comments had been significant enough to prejudice Aguilar and warrant a new trial. “The [trial court] sees the witnesses, hears the testimony, and has a special perspective of the relationship between the evidence and the verdict which cannot be recreated by a reviewing court from the printed record. For this reason [it] is accorded broad discretion in granting a new trial.” *Reeves v. Markle*, 119 Ariz. 159, 163, 579 P.2d 1382, 1386 (1978). Thus, on this record, we cannot say the court abused its discretion in granting the new trial motion.

¶16 Finally, in their answering and reply briefs, Aguilar and Strunk dispute whether the jury’s determination of damages in this case is final or was vacated along with the jury’s

verdict.<sup>6</sup> Aguilar’s motion for new trial asked that the jury’s verdict and “Judgment entered by the Court reflecting that verdict” be vacated. When the court granted the motion, it made no explicit determination about the scope of the new trial. However, by granting the motion without qualification, the court implicitly granted the full relief requested, which was a new trial on both liability and damages.

¶17 Generally, in wrongful death cases issues of liability and damages are distinct, but whether a new trial should include both damages and liability depends on the particular facts of each case and whether the issues are “inextricably intertwined.” *Englert*, 199 Ariz. 21, ¶¶ 15-16, 13 P.3d at 769. However, “[p]artial new trials are not recommended because they create much opportunity for confusion and injustice.” *Styles v. Ceranski*, 185 Ariz. 448, 451, 916 P.2d 1164, 1166 (App. 1996). We review the court’s ruling as to the scope of a new trial for an abuse of discretion. *Id.*

¶18 Here, in addition to granting a new trial, the trial court reopened discovery granting Aguilar leave to file a motion for reconsideration on the independent negligence claim against Strunk if warranted by the additional discovery. Depending on the outcome of that discovery and the potential claim of independent negligence, additional evidence may

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<sup>6</sup>Aguilar contends Strunk waived this issue by not raising it in its opening brief. However, we believe Aguilar first raised the issue in her answering brief, as a response to a factual assertion in Strunk’s brief. We thus decline to find the issue waived. *See Mitchell v. Gamble*, 207 Ariz. 364, ¶ 16, 86 P.3d 944, 949-50 (App. 2004) (potential waiver for failure to raise claim in opening brief not jurisdictional and may be addressed on merits, in court’s discretion).

be presented on retrial that will bear on the amount of damages, particularly punitive damages. And, as we noted above, counsel's improper arguments were directed at both liability and the amount of damages, compensatory and punitive, being sought. We thus cannot say the liability and damages issues are not inextricably intertwined, and the trial court therefore did not abuse its discretion in granting a new trial on all issues. *See id.*

**Disposition**

¶19 We affirm for the reasons set forth above.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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J. WILLIAM BRAMMER, JR., Judge