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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MARISOL METZLER, Plaintiff/Appellee/Cross-Appellant, v. BCI COCA-COLA BOTTLING COMPANY, LOS ANGELES, INC., a foreign corporation doing business in Arizona, Defendant/Appellant/Cross-Appellee.	2 CA-CV 2010-0023 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20072433

Honorable Michael O. Miller, Judge

REVERSED IN PART; AFFIRMED IN PART; REMANDED

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H O W A R D, Chief Judge.

¶1 Appellant BCI Coca-Cola Bottling Company of Los Angeles, Inc. ("BCI") challenges the jury verdict in favor of appellee Marisol Metzler in this personal injury action for damages she suffered from a fall at a Fry's grocery store and the trial court's denial of its motion for a new trial on the damages. BCI argues the court should have granted a new trial on damages, rather than liability only, and should have vacated the jury's damages award for being "the product of passion and prejudice." It also requests that we provide the trial court with direction on the elements of Metzler's liability claim, in the event the case is remanded for a new trial. In her cross-appeal, Metzler challenges the court's grant of a new trial on liability, arguing it erred in granting the motion because BCI had waived review of issues regarding product liability and because the court should not have considered the fact that the jury did not assign Fry's any portion of the fault. For the reasons that follow, we reverse the trial court's grant of a new trial on liability and affirm its denial of a new trial on damages.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the jury's verdict. *Styles v. Ceranski*, 185 Ariz. 448, 450, 916 P.2d 1164, 1166 (App. 1996). Metzler slipped and fell in a puddle of water at a Fry's grocery store and was injured. The water came from a leak in a Coca-Cola refrigerator owned and maintained by BCI. She sued Fry's and BCI. Metzler later settled with Fry's, and the parties stipulated to Fry's dismissal. BCI then named Fry's as a nonparty at fault. A jury found BCI to be

completely liable for Metzler's injuries and awarded her damages of $1.5 million. Because BCI had rejected an offer of judgment for less, the trial court also awarded Metzler sanctions totaling $355,398.86. BCI filed several post-trial motions, including two motions for a new trial. The court granted BCI's motion for a new trial as to liability only but denied BCI's other motions. BCI appeals from the verdict and the court's rulings on its motions for a new trial. Metzler cross-appeals from the court's grant of BCI's motion for a new trial on liability.

New Trial on Liability

¶3 We first address the cross-appeal, because the propriety of the trial court's finding of error, which resulted in its grant of a new trial on liability, affects both the appeal and the cross-appeal. Metzler argues the court abused its discretion in granting a new trial on liability because it erred in finding Metzler improperly had argued product liability theories in a negligence action and in considering the fact that the jury had not allocated any portion of fault to Fry's. We will not disturb an order for a new trial if any of the grounds in the order are justified. *Martinez v. Schneider Enters., Inc.*, 178 Ariz. 346, 349, 873 P.2d 684, 687 (App. 1994). "The trial court has considerable discretion in the grant or denial of a motion for new trial, and we will not overturn that decision absent a clear abuse of discretion." *Delbridge v. Salt River Project Agric. Improvement & Power Dist.*, 182 Ariz. 46, 53, 893 P.2d 46, 53 (App. 1994). A court abuses its discretion if it commits an error of law in reaching a discretionary conclusion, if it reaches a discretionary conclusion without considering the evidence, if it makes a substantial error of law combined with misconduct, or if there is not a substantial basis for a discretionary

finding. *Grant v. Ariz. Pub. Serv. Co.*, 133 Ariz. 434, 652 P.2d 507, *supp. op.*, 133 Ariz. 453, 455-56, 652 P.2d 526, 528-29 (1982).

Product Liability Argument

¶4 The trial court granted the new trial on liability pursuant to Rule 59(a)(1) and (a)(2), Ariz. R. Civ. P., based on its finding that Metzler had made improper arguments regarding BCI's liability by referring to product liability and because the jury had not allocated any portion of the fault to Fry's. Metzler contends the court abused its discretion by granting a new trial based on the purportedly improper references to product liability in Metzler's closing argument because BCI waived the objection by failing to object on this basis before the jury rendered its verdict. "An issue raised for the first time after trial is deemed to have been waived." *Medlin v. Medlin*, 194 Ariz. 306, ¶ 6, 981 P.2d 1087, 1089 (App. 1999).

¶5 At trial, BCI objected to only one of the arguments on which the trial court relied in its order granting a new trial on liability. Therefore, on appeal, BCI has waived its challenge on all of the issues except the one it preserved by its objection. *See Medlin*, 194 Ariz. 306, ¶ 6, 981 P.2d at 1089 (argument made for first time in motion for new trial waived). Additionally, the one objection that BCI made was based on use of facts not in evidence rather than improper argument of product liability. The court's mention of product liability does not alter the character of BCI's objection. *Cf. S Dev. Co. v. Pima Capital Mgmt. Co.*, 201 Ariz. 10, ¶ 20, 31 P.3d 123, 132 (App. 2001) ("'[P]urpose of [requirement to specifically object to instructions] is to fully advise the trial court of the basis of a litigant's position so that it may not be led into involuntary error.'"), *quoting*

Edward Greenband Enters. of Ariz. v. Pepper, 112 Ariz. 115, 118, 538 P.2d 389, 392 (1975). And an objection on one ground does not preserve another for appeal. *See Romero v. Sw. Ambulance*, 211 Ariz. 200, ¶ 6, 119 P.3d 467, 470-71 (App. 2005). Therefore, BCI waived all of its arguments on product liability due to lack of proper objection at trial.

¶6 BCI maintains that its motion in limine against appeals to bias and prejudice preserved the product liability objection for appeal. However, BCI never mentioned product liability in the motion and merely "submit[ted] as a guide . . . examples of conduct and argument found improper in Arizona courts." In response, the trial court neither granted nor denied the motion but directed both parties to "refrain from appeals to bias and prejudice." This generalized objection against improper appeals to bias and prejudice did not preserve an objection as to improper product liability argument. *See Maxwell v. Aetna Life Ins. Co.*, 143 Ariz. 205, 212, 693 P.2d 348, 355 (App. 1984) ("General objections are insufficient."). Furthermore, BCI insists we can infer from the court's general comments on the law governing mistrials in its order for a new trial that the court based its ruling on the grounds BCI had asserted in its earlier motion in limine. But the court's ruling never mentions BCI's motion in limine or any alleged violation of a court order. And we will not presume the court decided the motion for a new trial on a basis different than that which it specified. *See State v. Goodwin*, 160 Ariz. 366, 368, 773 P.2d 471, 473 (App. 1989) ("We will assume that the trial court decided as it did for the reasons that it stated on the record."). Therefore, BCI's argument is without merit.

¶7 Relying on *Liberatore v. Thompson*, 157 Ariz. 612, 760 P.2d 612 (App. 1988), BCI contends that, even assuming it did not make this objection until its motion for a new trial and thereby waived it, the trial court nevertheless had the discretion to grant a new trial if it found the misconduct to be exceptionally improper. In *Liberatore*, we noted that even if a party does not object at trial, its argument still may be advanced in a motion for a new trial and on appeal if "'the misconduct was of so serious a nature that no admonition or instructions by the court could undo the damage.'" 157 Ariz. at 619-20, 760 P.2d at 619-20, *quoting Schmerfeld v. Hendry*, 74 Ariz. 159, 161, 245 P.2d 420, 421 (1952), *overruled on other grounds by Rosen v. Knaub*, 175 Ariz. 329, 331, 857 P.2d 381, 383 (1993). But the court here made no such findings, nor did it base its ruling on this ground. Moreover, we find no conduct that can be so characterized.

¶8 Nevertheless, as did the court in *Liberatore*, we note that

> though a party risks forfeiting a potential ground for appeal by withholding prompt objection to an opponent's misconduct, he does not forfeit the right to assert such misconduct as a basis for sustaining the trial court's new trial order if the trial court finds the impropriety sufficient to warrant a new trial despite the absence of a prompt objection.

157 Ariz. at 620, 760 P.2d at 620. Therefore, we review the court's grant of BCI's motion for a new trial based on liability despite BCI's failure to preserve the issue properly at trial.

¶9 We are not persuaded, however, by BCI's contention that the trial court's grant of a new trial on liability was proper. None of the arguments on which the court relied necessarily constituted product liability arguments. Metzler did not argue BCI was

strictly liable due to a defective and unreasonably dangerous product. *See* A.R.S. §§ 12-681 through 12-688; *Brethauer v. Gen. Motors Corp.*, 221 Ariz. 192, ¶ 22, 211 P.3d 1176, 1182 (App. 2009) (defining product liability). Rather, the arguments could be relevant to the elements of Metzler's negligence claim. *See Gomulka v. Yavapai Mach. and Auto Parts, Inc.*, 155 Ariz. 239, 243, 745 P.2d 986, 990 (App. 1987) (elements of strict liability and negligence can intersect: "to proceed on a negligence theory[, plaintiff] would have to prove everything he would need to prove under a strict liability theory plus [defendant's knowledge that product] was unnecessarily dangerous"). If any of the arguments were improper, it was not on this ground. Further, the jury was not instructed on the complicated theory of product liability. In fact, the only reference during trial to product liability came from the judge. Therefore, we conclude the court erred as a matter of law and, thus, abused its discretion in granting BCI's motion for a new trial on liability. *See Grant, supp. op.*, 133 Ariz. at 455-56, 652 P.2d at 528-29.

Allocation of Fault

¶10 Metzler also argues that because BCI bore the burden of proof as to Fry's comparative negligence the trial court abused its discretion in granting a new trial on liability based in part on the fact that the jury did not allocate any portion of the fault to Fry's. Because comparative negligence is an affirmative defense, "the defendant must prove that the non-party is actually at fault [and] must, as a result, offer evidence at trial that the non-party was comparatively negligent." *A Tumbling-T Ranches v. Flood Control Dist. of Maricopa County*, 222 Ariz. 515, ¶ 83, 217 P.3d 1220, 1245 (App. 2009) (citation omitted). Whether a nonparty was at fault and the extent of that fault is a

question of fact for the jury to decide. *Rosner v. Denim & Diamonds, Inc.*, 188 Ariz. 431, 433, 937 P.2d 353, 355 (App. 1996). On appeal, BCI fails to cite to any evidence presented at trial establishing Fry's liability. In fact, the only citation BCI offers to support its contention that it argued Fry's liability at trial is to portions of its closing argument during which it had stated that its comments on Fry's role were made "not so that [the jury was] going to lay some liability on Fry's." Because BCI does not point to any trial evidence establishing it had sustained its burden of proving Fry's liability, the court abused its discretion in granting a new trial based, in part, on the fact that the jury did not allocate any of the fault to Fry's. *See Grant, supp. op.*, 133 Ariz. at 455-56, 652 P.2d at 528-29 (abuse of discretion where conclusion reached without consideration of evidence).

¶11 BCI contends the trial court found Metzler's alleged references to allocation of fault improper. But nothing in the court's order supports this contention. The court stated "it [was] difficult to reconcile the absence of any attribution of fault to Fry's," but it did not find misconduct or irregularity by any party or by the jury as to allocation of fault so as to support a decision to grant a new trial pursuant to Rule 59(a)(1) or (a)(2). Moreover, BCI did not object to any of the allegedly improper arguments to which it now cites. Thus, this argument is waived. *See Medlin*, 194 Ariz. 306, ¶ 6, 981 P.2d at 1089. Consequently, the court also abused its discretion by failing to base its order for a new trial on one of the reasons allowed by Rule 59(a). *See Grant, supp. op.*, 133 Ariz. at 455-56, 652 P.2d at 528-29 (abuse of discretion where error of law committed in reaching discretionary conclusion).

¶12 BCI additionally posits that the trial court could have granted a new trial on liability because judicial estoppel prevented Metzler from assuming a different position regarding Fry's liability than she did in her settlement agreement with Fry's. But, BCI provides no evidence that it objected on the basis of judicial estoppel during the trial. This argument therefore is waived. *See Medlin*, 194 Ariz. 306, ¶ 6, 981 P.2d at 1089. Furthermore, the cases on which BCI relies make clear that for judicial estoppel to apply, the parties in both actions must be the same. *See, e.g.*, *Bank of Am. Nat'l Trust & Savings Ass'n v. Maricopa County*, 196 Ariz. 173, ¶ 7, 993 P.2d 1137, 1139 (App. 1999) ("For judicial estoppel to apply, . . . the parties must be the same."). Here, Metzler was suing BCI, rather than Fry's, and was not limited by judicial estoppel.

Corporate Wealth

¶13 BCI further asserts that Metzler's references at trial to corporate wealth and profits support the trial court's grant of a new trial on the basis of improper argument. But, in its motion for a new trial, BCI objected only to Metzler's alleged improper arguments on "corporate malfeasance." It did not object based on wealth or profits in its motion for a new trial, thereby waiving the issue on appeal. *See State v. Davis*, 117 Ariz. 5, 8, 570 P.2d 776, 779 (App. 1977) (failure to raise error in motion for new trial results in waiver). Therefore, because the court erred in relying on waived objections and in failing to consider the evidence, we reverse its order granting a new trial on liability.[1]

[1]Because we reverse the trial court's grant of a new trial, we do not reach BCI's request for instructions on remand.

New Trial on Damages

Alleged Misconduct

¶14 BCI argues the trial court erred by denying its motion for a new trial on damages because the alleged errors warranting reversal on liability also affected the damages determination. We already have held that the court erred by ordering a new trial on liability, that BCI waived its arguments as to allocation of fault, and that the court did not include corporate wealth as a basis for its order for a new trial. Metzler's statements did not erroneously affect the jury's verdict on liability, so they necessarily did not erroneously affect the jury's determination of damages. Therefore, the court did not err by refusing to grant a new trial on damages on these grounds.

Damages Award

¶15 BCI next argues that the trial court erred by denying its motion for a new trial on damages because the jury's verdict was the result of "passion and prejudice," was excessive, and was based on speculation and an improper per diem argument instead of being supported by the evidence. *See* Ariz. R. Civ. P. 59(a)(5), (7), (8). But the trial court did not address these grounds. It decided that a new trial on damages was not warranted under Rule 59(a)(1) or (a)(2), but it did not go on to address whether one was warranted under any of the other asserted grounds. Furthermore, BCI did not subsequently ask the court to address those arguments. Because the court did not resolve whether the circumstances warranted a new trial on these grounds, we do not address them. *See Jett v. City of Tucson*, 180 Ariz. 115, 123-24, 882 P.2d 426, 434-35 (1994) (appellate court does not address issue trial court failed to resolve); *Reid v. Van Winkle*,

31 Ariz. 267, 270, 252 P. 189, 190 (1927) (party deemed to have abandoned issue when trial court did not rule on motion; issue waived on appeal); *see also Simon v. Safeway, Inc.*, 217 Ariz. 330, n.6, 173 P.3d 1031, 1037 n.6 (App. 2007).

Conclusion

¶16 In light of the foregoing, we reverse the trial court's grant of a new trial on liability, affirm its denial of a new trial on damages, and remand this matter to the trial court for the entry of a final judgment.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge