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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

EVA MACIAS, ALMA HUIZAR, and MANNY PEREZ, the children of the deceased IRENE MACIAS, Plaintiffs/Appellants, v. CARONDELET ST. MARY'S, L.L.C., Defendant/Appellee.	2 CA-CV 2008-0122 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C-20062345

Honorable John E. Davis, Judge

AFFIRMED

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E S P I N O S A, Presiding Judge.

¶1 In this medical malpractice and wrongful death action, plaintiffs Eva Macias, Alma Huizar, and Manny Perez (collectively "appellants") appeal from a jury verdict in favor of Carondelet St. Mary's Hospital (the hospital) and the trial court's denial of their posttrial motions,[1] asserting a number of grounds for reversal. Finding no error by the trial court, we affirm.

Facts and Procedural History

¶2 We view the facts in the light most favorable to upholding the verdict. *Gonzales v. City of Phoenix*, 203 Ariz. 152, ¶ 2, 52 P.3d 184, 185 (2002). In February 2005, Irene Macias was admitted to the hospital for severe illness. After undergoing surgery to correct an acute bowel obstruction, she experienced persistent respiratory failure and was placed on a ventilator. After Macias had been on the ventilator for about a month, hospital personnel consulted with her family and then performed a tracheostomy, inserting a tube in her throat to help her breathe.

¶3 Her medical records and the testimony of witnesses reflected that after the tracheostomy, Macias was stable, alert, oriented, and experiencing minimal mucous secretions from her lungs into the tube. Hospital personnel administered breathing

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[1]According to their notice of appeal, appellants purport to appeal from the entry of formal judgment in favor of the hospital and the court's denial of their motions for a new trial and judgment as a matter of law as well as from its denial of their motion for mistrial and their "[r]equest to [c]ommunicate with [j]urors." Their briefs, however, develop arguments addressing only the judgment and the court's denial of their motions for new trial and judgment as a matter of law, and we consider only these claims.

treatments,[2] monitored her progress, and observed no indications of anything obstructing her oxygen supply. On two occasions, family members observed Macias coughing and removed mucus from her mouth, which relieved her coughing.

¶4 On the evening of March 2, 2005, Macias was not in acute distress, and the breathing tube was "clean." Around 8:40 p.m., a respiratory therapist gave her a breathing treatment and noted her breath sounds were "fairly clear," she was not coughing, and there was no need to suction the tube. At 10:30 p.m., Bennett Holz, the nurse caring for Macias that evening, responded to Macias, who had had a bad dream. She stayed in the room and performed "trach care," which involved cleaning the tube, and noted Macias was exhibiting "no [signs of] acute distress." She remained in the room for twenty to thirty minutes, caring for Macias, "jok[ing] around" with her, and keeping her company.

¶5 At 12:40 a.m. on March 3, Macias received an identical breathing treatment, and again there were no indications that her breathing was obstructed. At approximately 2 a.m., Holz checked on Macias and noted she was sleeping and experiencing no apparent distress, and her breathing sounds did not indicate secretions inside the tube. Nearly two hours later, at 3:48 a.m., Holz once again assessed Macias and noted her vital signs were stable and she was in no apparent distress. Twenty-three minutes later, however, Holz passed Macias's room and noticed she had one foot off the bed and was pale and unresponsive.

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[2] A breathing treatment is a five- to seven- minute medical procedure during which a respiratory therapist administers an inhalant medication to dilate a patient's airways and relieve constriction, asthma, and shortness of breath.

Holz immediately called a "code" and began cardiopulmonary resuscitation on Macias, who was resuscitated but had sustained brain injury due to loss of oxygen. She later died when her family decided to discontinue artificial life support. An autopsy confirmed that Macias's initial oxygen deprivation was due to a "mucous plug" entering her tube that prevented her from breathing. Witnesses testified this was a sudden, rare, and unpredictable event.

¶6 In May 2006, appellants, Macias's children, sued the hospital, alleging medical malpractice and wrongful death. Specifically, they alleged "the nursing staff failed to monitor [Macias]'s tracheostomy tube adequately, resulting in her death" and "their negligence and/or errors and omissions fell below the standard of care for their profession." After a jury trial resulted in a verdict in favor of the hospital, appellants filed a number of posttrial motions, all of which the trial court denied. It then entered judgment in favor of the hospital and ordered appellants to pay the hospital's costs and the jury fees incurred. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(B), (F)(1).

Discussion

Jury Instructions

¶7 Appellants' first argument stems from the trial court's delegating to the parties the preparation of jury instructions. On the evening before the final day of trial, the court asked the hospital's counsel to compile the jury instructions the parties had requested, making any necessary modifications to standard jury instructions taken from the Revised

Arizona Jury Instructions (RAJIs). Counsel agreed to do so and to send them to appellants' counsel by facsimile. A member of his staff e-mailed appellants' counsel copies of the standard, unmodified, RAJI instructions, indicating they were the instructions to be submitted. Defense counsel then modified the instructions for the trial solely by inserting Holz's name in several of them and sent those instructions to appellants' counsel by fax.[3]

¶8 The trial court had ordered both parties to appear at 8:30 a.m. to finalize the jury instructions before trial proceedings resumed for the day. Appellants' counsel failed to appear until after 9:00 a.m., attributing the delay to office confusion regarding whether the instructions had been sent to his home or his office telefax machine. The trial court asked if he had any objections to the submitted instructions. Appellants' counsel stated he approved them but requested two additional instructions, one of which the court agreed to give the jury.[4] The court subsequently charged the jury using the form instructions submitted by the hospital.

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[3]To the extent appellants imply defense counsel's actions were devious or underhanded, such accusations are not supported by the record, and therefore not well taken by this court.

[4]Appellants devote a significant portion of their opening brief concerning the modified jury instructions to their claim that the trial court improperly refused to instruct the jury on res ipsa loquitur. However, they fail to cite either the record or a single authority for this argument, relying instead on bald assertions that "in the normal course of events, this death would not have occurred unless the [hospital's] nursing staff was negligent." We therefore do not address this issue. *See* Ariz. R. Civ. App. P. 13(a)(6) (opening briefs must include "[a]n argument which shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on"); *Watahomigie v. Ariz. Bd. of Water Quality Appeals*, 181 Ariz. 20, 26, 887 P.2d 550, 556 (App. 1994) ("[W]e will not consider issues not properly briefed.").

¶9 Appellants concede they did not object to any of the instructions below, which normally waives review. *See* Ariz. R. Civ. P. 51(a) (no error based on giving or failing to give jury instructions unless party objects). They claim, however, that reversal is nonetheless warranted because the trial court committed fundamental error. *See Data Sales Co. v. Diamond Z Mfg*., 205 Ariz. 594, ¶ 31, 74 P.3d 268, 275 (App. 2003) (failure to object does not waive issue on appeal in case of fundamental error). Specifically, appellants contend the trial court fundamentally erred by utilizing jury instructions that included "changes that had been unilaterally made by the appellees without the court making an entry in the record" of these changes. They also claim the instructions were contrary to law and a denial of due process.

¶10 "The doctrine of fundamental error is sparingly applied in civil cases and may be limited to situations where the instruction deprives a party of a constitutional right." *Bradshaw v. State Farm Mut. Auto. Ins. Co.*, 157 Ariz. 411, 420, 758 P.2d 1313, 1322 (1988). Appellants correctly note that instructions given in violation of article XVIII, § 5 of the Arizona Constitution, which makes defenses of contributory negligence and assumption of risk issues for the jury, constitute fundamental, reversible error. *See Salt River Project Agric. Improvement & Power Dist. v. Westinghouse Elec. Corp.*, 176 Ariz. 383, 385-87, 861 P.2d 668, 670-72 (App. 1993); *Spillios v. Green*, 137 Ariz. 443, 446, 671 P.2d 421, 424 (App. 1983). But appellants do not contend the instructions given here violated this provision, nor do they clearly argue the instructions violated any other constitutional rights.

Rather, they generally maintain the instructions violated their due process rights by misstating the law and claim giving them "was clearly prejudicial."[5]

¶11 In any event, a jury instruction does not constitute fundamental error when it provides "the basic outline" of the applicable law. *Hyatt Regency Phoenix Hotel Co. v. Winston & Strawn*, 184 Ariz. 120, 137, 907 P.2d 506, 523 (App. 1995) (not fundamental error when jury instruction omitted language from legal malpractice case law but provided "basic outline" of applicable law.) Appellants point to the following instructions they contend erroneously made Holz's negligence the sole predicate for the hospital's liability:

> Before you can find St. Mary's Hospital at fault, you must find that Bennett Holz was negligent and that negligence was a cause of plaintiffs' injury.
>
> If you find that Bennett Holz was not at fault, then your verdict must be for defendant St. Mary's Hospital.

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[5]Appellants also assert that affidavits attached to their opening brief "clearly indicate the prejudice to [them]." As the hospital correctly points out, such affidavits are inadmissible in civil proceedings under Rule 606(b), Ariz. R. Evid., and we should disregard them. The cases cited in appellants' reply brief do not support their argument that we should nevertheless consider the affidavits. All three cited cases involve the issue of jury misconduct when jurors allegedly relied on information not admitted in evidence. *See Dunn v. Maras*, 182 Ariz. 412, 414, 897 P.2d 714, 716 (App. 1995) (jurors deliberating plaintiffs' claim against defendant doctors informed of settlement between plaintiffs and nonparty hospital); *Hallmark v. Allied Prods. Corp*., 132 Ariz. 434, 441-42, 646 P.2d 319, 326-27 (App. 1982) (alleged misconduct based on conversation between juror and witness); *Kirby v. Rosell*, 133 Ariz. 42, 43, 648 P.2d 1048, 1049 (App. 1982) (jurors consulted business law textbook not in evidence). Here, no jury misconduct is alleged, and no extraneous information reached the jury.

> If you find that Bennett Holz was at fault, then St. Mary's Hospital is liable to plaintiffs and your verdict must be for plaintiffs.
>
> The plaintiffs claim that Bennett Holz, a health care provider, was at fault for medical negligence. . . .
>
> Before you can find Bennett Holz at fault, you must find that Bennett Holz's negligence was a cause of injury to plaintiffs. Negligence causes an injury if it helps produce the injury, and if the injury would not have happened without the negligence.
>
> On the claim of fault for medical negligence, plaintiffs have the burden of proving:
>
> 1. Bennett Holz was negligent;
>
> 2. Bennett Holz's negligence was a cause of injury to plaintiffs; and
>
> 3. Plaintiffs' damages[.]

¶12 Appellants claim "the instructions were improper by basing [the hospital's liability] upon the jury entering a [verdict] against nurse Holz." They argue, "Although much of the evidentiary focus was on Bennett Holz, there was uncontradicted evidence that other nurses in I.C.U. and third floor [sic] failed to respond to the nurse's call button on March 1, 2005, . . . and a variety of unidentified hospital personnel failed to respond . . . on March 2, 2005, ..." Appellants contend that, because the expert witnesses for both sides agreed that failing to respond to a nurse's call button would violate the standard of care and thus constitute negligence, the jury could have found liability based on the actions of the entire nursing staff and not just Holz. But the record demonstrates appellants did not present any

evidence that the alleged negligence of any other hospital personnel caused or contributed to Macias's death. As a matter of law, a plaintiff cannot recover unless the defendant's negligence was the proximate cause of an injury. *See Ritchie v. Krasner*, 221 Ariz. 288, ¶ 23, 11 P.3d 1272, 1282 (App. 2009) (plaintiff must present sufficient evidence for jury to infer defendant's negligence more likely than not was substantial factor in bringing about result).

¶13 Appellant's theory at trial was that, absent negligence, the fatal mucous plug would have been discovered and removed before it blocked the tracheostomy tube and cut off Macias's oxygen supply. Even assuming other nurses previously had been negligent in not timely responding to Macias's call button on two separate occasions, appellants have failed to show either at trial or on appeal, how the alleged delay in responding to Macias's call button caused the fatal mucous plug to go undiscovered and untreated. The record reflects that, when nurses arrived on both of these occasions, Macias was breathing normally, and there was no indication the tube was blocked. The alleged negligence of other hospital employees at other times, unrelated to the development of the mucous plug that occluded Macias's breathing, would have been an improper basis on which to award damages against the hospital. *See Gregg v. Nat'l Med. Health Care Servs., Inc.*, 145 Ariz. 51, 54, 699 P.2d 925, 928 (App. 1985) (summary judgment appropriate when testimony indicated delay in transmitting x-ray and EKG results violated standard of care, but plaintiff could not show earlier transmission would have changed doctor's actions); *see also* Ariz. R. Evid. 404(b) (evidence of other negligent acts inadmissible to show negligent action on specific occasion).

Therefore, it was not improper for the jury instructions to name only Holz. Because the instructions correctly stated the law and properly limited the jury's focus to the relevant facts, we cannot say the trial court committed any error, much less fundamental error, when it instructed the jury.

Holz's Presence in the Courtroom

¶14 Appellants next argue the trial court erred in denying their motion pursuant to Rule 615, Ariz. R. Evid., to exclude Holz from the courtroom except when she was testifying. The hospital had named Holz as its party representative at trial, and the court, in denying appellant's motion, pointed out that Rule 615 specifically allows the presence of "an officer or employee of a party which is not a natural person designated as its representative by its attorney."

¶15 Appellants claim, without citing authority, that the exception should not apply to Holz because, at the time of Macias's death, "she was not an administrative employee, but only a traveling nurse who was temporarily working at [the hospital]."[6] In lieu of legal arguments, appellants assert they were prejudiced by Holz's constant presence because "the jury was reluctant to find against the hospital because they were concerned about the welfare of this poor nurse," and they contend her presence was a "ploy" by the hospital. They also

[6]As the hospital pointed out below and reiterates on appeal, the record reflects Holz was a full-time employee of the hospital at the time of trial.

allege Holz adapted her testimony in response to other evidence and the testimony of other witnesses.

¶16 Given the clear language of Rule 615, appellants' argument is plainly without merit. Moreover, even were the issue debatable, we would not address this claim because of appellants' failure to advance any meaningful legal arguments to support their position. *See* Ariz. R. Civ. App. P. 13(a)(6) (opening briefs must present "[a]n argument which shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on"); *Watahomigie v. Ariz. Bd. of Water Quality Appeals*, 181 Ariz. 20, 26, 887 P.2d 550, 556 (App. 1994) ("[W]e will not consider issues not properly briefed.").

Preclusion of Dr. Coaker

¶17 Appellants also claim the trial court erred by precluding a videotaped deposition of Dr. Coaker, one of Macias's treating physicians. Appellants had failed to include Coaker's name in a joint pretrial statement and did not designate any of his deposition testimony for admission in evidence until the morning of trial. On the hospital's motion, the trial court precluded its admission. *See* Ariz. R. Civ. P. 16(d)(2)(D)-(F) (authorizing trial court to preclude witnesses, evidence, and deposition testimony not listed in joint pretrial statement).

¶18 Trial courts have broad discretion in ruling on the preclusion of witness testimony, and we do not disturb their rulings absent an abuse of discretion. *Zuern ex rel.*

Zuern v. Ford Motor Co., 188 Ariz. 486, 489, 937 P.2d 676, 679 (App. 1996) (precluding expert's deposition for untimely disclosure). Pursuant to Rule 16(d)(2)(F), Ariz. R. Civ. P., "[e]xcept for good cause shown, no deposition testimony shall be used at trial other than that designated [in the joint pretrial statement]." A trial court may properly preclude testimony when a party untimely discloses a witness and there is both demonstrable prejudice to the opposing party and an absence of good cause. *See Acosta v. Superior Court*, 146 Ariz. 437, 438, 706 P.2d 763, 764 (App. 1985).

¶19 Citing Rule 32(a), Ariz. R. Civ. P., and *Sheppard v. Crow-Barker-Paul No. 1 Ltd. P'ship*, 192 Ariz. 539, 968 P.2d 612 (App. 1998), appellants maintain the hospital's objection to the admission of Coaker's testimony was "[g]amesmanship" and the trial court's ruling was "contrary to case and statutory law and clearly an abuse of discretion." But neither authority advances appellants' position. Rule 32(a) simply allows the admission of deposition testimony without proof of the deponent's unavailability. The issue here is not whether Coaker was unavailable, but whether the trial court abused its discretion when it precluded his testimony based on appellants' failure to designate his deposition testimony timely or otherwise disclose him as a witness.

¶20 *Sheppard* is also inapposite. There, the trial court allowed a party to amend a pretrial statement to add a witness whose name had not initially been included. 192 Ariz. 539, ¶¶ 38-39, 968 P.2d at 620. The witness then testified solely to provide an evidentiary foundation for photographs of which both parties had been aware for several years. *Id*. The

holding of *Sheppard* was that the trial court had not abused its discretion when it allowed the amendment where the opponents' apparent trial strategy was to object to the foundation of every exhibit to "force one's adversary to 'do it the hard way.'" *Id*. ¶¶ 39-40. Nothing in *Sheppard* indicates a trial court commits an abuse by precluding substantive, videotaped deposition testimony that was not disclosed until the commencement of trial.

¶21 Appellants' only explanation for failing to disclose Coaker in the pretrial statement was counsel's argument that it was an office "mix-up," his "paralegal didn't get it in," and they "somehow . . . lost [it]." And their explanation for the delay in designating the videotaped testimony was that the tape was not ready until the Saturday before trial and counsel "didn't know how to reach [counsel for the hospital] over the weekend." The hospital argued that it was surprised by the addition of Coaker as a witness and would be prejudiced by not knowing, before making opening statements, what portions of his deposition appellants planned to play for the jury. The trial court found there was "no good reason advanced for the failure to include [him]" as well as "demonstrable prejudice to [the hospital in] not being able to review the deposition [excerpts] and plan" its case accordingly. Although appellants claimed the hospital knew what information Coaker would provide because its counsel had been present at the deposition, appellants sought to introduce an edited videotape, and the trial court could credit the hospital's claim that it could not reasonably have anticipated which portions would and would not have been included. On

these facts, we cannot say the trial court abused its discretion in precluding the evidence after finding prejudice and the absence of good cause.

Voir Dire

¶22 Finally, and again without citing authority, appellants argue it was "reversible error for the trial court to excuse potential jurors for cause by separating those who indicated they may have difficulty being fair without disclosing the facts of the case." Appellants contend the court employed "a Star Chamber approach to jury selection not permitted by law" when it called to the bench potential jurors who had had prior contacts with the hospital and allowed the attorneys to question them outside the hearing of the other potential jurors. Additionally, citing Rule 47(c)(4), Ariz. R. Civ. P., appellants assert a juror cannot be disqualified for cause if "he or she can fairly and impartially render a verdict in accordance with the law." This appears to be a separate, though related, issue.[7]

¶23 Initially, we note appellants, without objecting, participated in the examination of potential jurors at the bench. Appellants' failure to object, *see Moran v. Jones*, 75 Ariz. 175, 180, 253 P.2d 891, 894 (1953) (objection required to preserve argument about jury selection process), and further failure on appeal to cite any legal authority or make any

[7]Because appellants have raised no separate challenge to the disqualification of jurors for cause, their invocation of Rule 47 in the context of this argument is perplexing and apparently irrelevant. It is noteworthy that the potential jurors excused for cause over appellants' objection affirmatively indicated they could not be impartial.

substantive argument waives this issue, and we will not consider it.[8] *See* Ariz. R. Civ. App. P. 13(a)(6); *Watahomigie*, 181 Ariz. at 26, 887 P.2d at 556.[9]

Attorney Fees

¶24 Asserting this appeal is frivolous, the hospital requests its attorneys fees on appeal. Where an appeal is frivolous or a party has been guilty of an "unreasonable infraction" of the Rules of Civil Appellate Procedure, *see* Ariz. R. Civ. App. P. 25, we have discretion to award attorney fees, *see Arizona Dep't of Revenue v. Gen. Motors Acceptance Corp.*, 188 Ariz. 441, 446, 937 P.2d 363, 368 (App. 1996).

¶25 As the hospital points out, appellants' briefs are deficient, lacking citations to the record and to the applicable law in support of many of their arguments. *See Jhagroo v. City of Phoenix*, 143 Ariz. 595, 598, 694 P.2d 1209, 1212 (App. 1984) (failure to cite record justified imposition of Rule 25 sanctions). Moreover, in lieu of analysis, appellants often resort to accusations and attacks on the integrity of the hospital, the trial court, and witnesses. *See Ashton-Blair v. Merrill*, 187 Ariz. 315, 316, 928 P.2d 1244, 1245 (App. 1996) (sanctions

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[8]Although we do not address this issue, it would appear expedient and prudent to question at the bench potential jurors who might divulge information or anecdotes concerning one of the parties that could taint an entire jury panel. *See, e.g.*, *Mach v. Stewart*, 137 F.3d 630, 633-34 (9th Cir. 1997) (potential juror's prejudicial statement made during voir dire constituted structural error requiring reversal of criminal conviction).

[9]Appellants' opening brief contains additional arguments that, to the extent we understand them, appear to assert they were entitled to judgment as a matter of law and a new trial. These claims are predicated on arguments regarding the jury instructions, the giving of which we have already determined was not erroneous, as well as on vague allusions to the "[c]ourt's release of potential jurors for cause." Therefore, we disregard these arguments.

warranted where parties submit accusations and assert irrelevant facts unsupported by the record rather than making legal arguments). Given the substandard quality of appellants' arguments and their failure to conform to the Rules of Civil Appellate Procedure, we would be justified in granting the hospital its reasonable attorney fees on appeal, *see* Ariz. R. Civ. App. P. 25. However, because we have imposed such sanctions in cases where the level of appellate advocacy was more deficient than in this case, in our discretion, we decline to do so.

Disposition

¶26 For the foregoing reasons, the judgment in favor of Carondelet St. Mary's Hospital is affirmed.

PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

J. WILLIAM BRAMMER, JR., Judge

H O W A R D, Chief Judge, dissenting in part.

¶27 I dissent only from my colleagues' decision not to award attorney fees on appeal. I concur in every other respect.

JOSEPH W. HOWARD, Chief Judge