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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MELINDA PRESTON, Plaintiff/Appellant/Cross-Appellee, v. CITY OF TUCSON, an Arizona municipal corporation, Defendant/Appellee/Cross-Appellant.	2 CA-CV 2009-0090 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20042292

Honorable Stephen C. Villarreal, Judge

AFFIRMED

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and

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E S P I N O S A, Judge.

¶1 In this wrongful death case, plaintiff/appellant Melinda Preston appeals from the judgment entered after a jury verdict in favor of defendant/appellee City of Tucson (City). Preston contends the trial court committed reversible error in deciding the admissibility of certain evidence and by giving the jury an "open and obvious" instruction. Finding no error, we affirm.[1]

Factual Background and Procedural History

¶2 "[W]e view the evidence in the light most favorable to sustaining the [jury's] verdict." *Gonzales v. City of Phoenix*, 203 Ariz. 152, ¶ 2, 52 P.3d 184, 185 (2002). On October 3, 2001, Matthew Preston, a graduate student at the University of Arizona, was riding his bicycle northbound on the west sidewalk of Tucson Boulevard. He approached a cross street where a truck, which had been stopped at a stop sign for at least twenty seconds, was beginning to turn south onto Tucson Boulevard, directly in front of Matthew. Although Matthew applied his brakes, he was unable to avoid the truck and was run over and killed by its rear wheels. Melinda Preston, Matthew's mother, filed this wrongful death action against the City.[2] At trial, Preston presented evidence that the City had failed to adequately design and maintain the sidewalk,

[1]Because we affirm the judgment in favor of the City, we do not address the City's cross-appeal.

[2]The driver of the truck was also named as a defendant, but by the time of trial, only the City remained in the litigation.

intersection, and bicycle lane. After the jury verdict and judgment in favor of the City, Preston filed this appeal. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(B).

Discussion

Cellular Telephone Records

¶3 Preston contends the trial court abused its discretion by admitting Matthew's cellular telephone records. She argues they were not relevant and that the City had not timely disclosed its theory that Matthew's use of his telephone near the time of the accident had caused or contributed to his death. "This court 'will affirm a trial court's admission or exclusion of evidence absent a clear abuse of discretion or legal error and resulting prejudice.'" *Belliard v. Becker*, 216 Ariz. 356, ¶ 13, 166 P.3d 911, 913 (App. 2007), *quoting Yauch v. S. Pac. Transp. Co.*, 198 Ariz. 394, ¶ 10, 10 P.3d 1181, 1186 (App. 2000).

¶4 Preston asserts the records were irrelevant because "at most[, they] support a conclusion that Matthew had completed a call thousands of feet before the intersection . . . and thus ha[ve] no conceivable bearing on the accident." "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." Ariz. R. Evid. 401. Evidence adduced at trial showed that before the accident, Matthew had been riding between fourteen and eighteen miles per hour, had an unobstructed view of the area ahead of him, presumably including the truck stopped at the cross street, and yet delayed slowing his bicycle until he was very close to the

intersection. The telephone records showed Matthew had made a call at 4:02 which ended at 4:04 p.m. Following the accident, the driver of the truck called 9-1-1 at 4:06 p.m. Accordingly, the records had "any tendency to make the existence of any fact that is of consequence . . . more probable or less probable," *id.*, because they indicated Matthew might have been distracted by his telephone before the accident. Even if Matthew was no longer talking on the telephone immediately before the accident, the jury could have concluded he was in the process of putting it away or otherwise was distracted by it.[3] *See Acuna v. Kroak*, 212 Ariz. 104, ¶ 19, 128 P.3d 221, 226 (App. 2006) (evidence relevant when "material and probative" to factual issue); *Yauch*, 198 Ariz. 394, ¶ 22, 10 P.3d at 1189 (evidence relevant where appellant's arguments to exclude it did "not affect the admissibility of the evidence but, rather, its weight, which is a question for the jury"); *Anderson v. Nissei ASB Mach. Co.*, 197 Ariz. 168, ¶ 36, 3 P.3d 1088, 1098 (App. 1999) ("In Arizona, the relevance standard is very broad; relevant evidence need only tend to make the existence of any material fact more or less probable.").

¶5 In addition, contrary to Preston's argument that the records could not be relevant without the City first demonstrating the truck driver had delayed in calling 9-1-1, there was evidence of at least some delay between the accident and that call. The driver testified that after he drove over what he thought was a speed bump, his passenger got out

[3]Accordingly, we reject Preston's argument that the records "would only be relevant if there was evidence that it took [the driver] at least two minutes from the impact to call 911" as well as her contention in her reply brief that the records were not relevant because "*no one* saw [Matthew] using a cell phone when the collision happened."

of the truck, looked underneath it, gave the driver a "panicked" look, and motioned for him to pull forward. After doing so, the driver got out of the truck and saw Matthew under it. The driver then telephoned 9-1-1. Thus, even assuming the City was required to show there had been some delay between the time of the accident and the 9-1-1 call in order to establish the records were relevant, such evidence was presented. Accordingly, the trial court did not abuse its discretion in determining Matthew's telephone call was relevant under Rule 401.[4]

¶6 Preston also contends the telephone records should not have been admitted because the City failed to timely disclose its factual theory concerning them, namely, that Matthew's use of his telephone could have been a cause of the accident. Preston, however, fails to offer any authority to support her assertion that the trial court's overruling her objection on this basis was error, let alone reversible error, and thus has waived this argument on appeal. *See* Ariz. R. Civ. App. P. 13(a)(6); *see also FIA Card Servs., N.A. v. Levy*, 219 Ariz. 523, n.1, 200 P.3d 1020, 1021 n.1 (App. 2008) (failure to develop argument constitutes abandonment). In any event, it is undisputed that Preston's

[4]Preston also argues the records should have been excluded because the City "failed to produce a foundation for their admission or any witness who testified about them." This contention appears to be related to her relevance argument, but if it is a separate claim that a custodian of records was required to testify, Preston has failed to develop this argument or cite any authority in support of it. Moreover, she expressly conceded below that the City was not required to have a custodian of records testify. Therefore, to the extent Preston may be making this argument, we do not consider it. *See* Ariz. R. Civ. App. P. 13(a)(6) (brief on appeal must contain argument with citations to relevant authority); *Westin Tucson Hotel Co. v. State Dep't of Rev.*, 188 Ariz. 360, 364, 936 P.2d 183, 187 (App. 1997) (issues not raised below will not be considered on appeal).

attorney produced these records to the City several years before trial and that the City subsequently listed them as exhibits in the Joint Pretrial Statement. Moreover, the City alleged in its answer that Matthew had been comparatively negligent and stated in its initial disclosure that the accident had been due to his "fail[ure] to maintain reasonable and proper attention." Therefore, Preston has demonstrated no error on this basis either.[5]

Expert Testimony

¶7 Preston next argues the trial court abused its discretion by allowing the City to present expert testimony regarding the condition of the bicycle paths on Tucson Boulevard and whether Matthew had been acting as a reasonable, prudent rider when he rode on the sidewalk.[6] She contends these topics "were not proper subjects for expert testimony" because they concerned "factual issues within the knowledge and experience of ordinary lay people." She also maintains that the expert's testimony that a cyclist must obey traffic laws was "an ultimate conclusion on a crucial issue in the case."

¶8 If specialized knowledge will aid the trier of fact in determining a fact at issue, a witness who is "qualified as an expert by knowledge, skill, experience, training,

[5]Because we affirm the trial court's ruling on this and the other issues raised by Preston, we need not address the City's argument based on *Picaso v. Tucson Unified School District*, 217 Ariz. 178, 171 P.3d 1219 (2007), that there is no need to review issues dealing with Matthew's comparative fault due to the jury's verdict in favor of the City. We also reject Preston's assertion, made at oral argument, that the verdict may have been based on the jury's belief the City was not liable due to Matthew's use of his cell phone. The jury was instructed it should only consider the City's claim that Preston was at fault if it had already found the City at fault for Matthew's death, and we presume the jury followed its instructions. *See Wedland v. Adobeair, Inc.*, 223 Ariz. 199, ¶ 28, 221 P.3d 390, 398 (App. 2009).

[6]Preston attempted to exclude this testimony with a motion in limine and again with an oral motion at trial, both of which the trial court denied.

or education, may testify thereto in the form of an opinion or otherwise." Ariz. R. Evid. 702. "The admissibility of expert testimony is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion." *Webb v. Omni Block, Inc.*, 216 Ariz. 349, ¶ 6, 166 P.3d 140, 143 (App. 2007).

¶9 As the City points out, Preston presented her own expert to testify both as to the condition of the bicycle lane as well as Matthew's reasonableness in riding on the sidewalk. This undercuts her argument on appeal that the City should have been barred from presenting expert testimony on these same subjects. *See* Ariz. R. Civ. P. 26(b)(4)(D) (each side presumptively entitled to one expert per issue). The City further argues that its expert, unlike Preston's, "was a bike safety expert with extensive experience riding bikes and first[-]hand experience riding bikes on Tucson [Boulevard]" who "rebutted [Preston]'s arguments and evidence that Matthew was justified in riding his bike on the safer sidewalk instead of the unsafe roadway." We agree with the City that the trial court did not abuse its discretion in admitting this testimony, especially in light of Preston's own expert's testimony on the same subjects.[7] *Cf. State v. Dann*, 220

[7]In her reply brief, Preston argues the City should have used an expert engineer to rebut Preston's expert engineer's testimony that the bicycle lane was in poor condition and that it was reasonable for Matthew to ride on the sidewalk. Not only did she fail to raise this argument in her opening brief, but she also fails to provide any authority for her proposition that an expert's testimony may be rebutted only by an expert from the identical field. *See* Ariz. R. Civ. App. P. 13(a)(6); *Romero v. Sw. Ambulance*, 211 Ariz. 200, n.3, 119 P.3d 467, 471 n.3 (App. 2005) (arguments raised for first time in reply brief waived). In this case, it was reasonable for the City's expert, an experienced cyclist who was familiar with the bike lane at issue, to rebut Preston's expert engineer's testimony regarding the condition of the bike lane and the reasonableness of riding on the sidewalk, subjects that did not necessarily require the expertise of an engineer.

Ariz. 351, ¶ 92, 207 P.3d 604, 621 (2009) (defendant's presentation of expert opinion opened door to state's presentation of rebuttal expert testimony on same subject).

¶10 Furthermore, contrary to Preston's assertion, the City's expert did not testify improperly as to "an ultimate conclusion on a crucial issue in the case." Rather, he stated that bicycles are considered vehicles and therefore must follow the same laws as vehicles, not only because it is illegal not to do so but also because "that's what's expected. So if you're going against the flow of traffic, say, on the wrong side of the road, in addition to not obeying the law[,] you're creating a situation that oncoming motorists" would not expect. We agree that this testimony was properly admitted in response to Preston's argument that Matthew's riding on the sidewalk in the opposite direction of traffic was reasonable and safer than riding in the bicycle lane.[8] Accordingly, Preston has failed to demonstrate that the trial court abused its discretion by admitting this evidence.

Evidence as to Ordinance Enforcement

¶11 Preston next argues the trial court erred in granting the City's motion in limine that sought to preclude Preston from presenting evidence that the City does not

[8]Even assuming this testimony reached an ultimate issue, it does not necessarily demonstrate error. Expert testimony "that encompasses an ultimate issue is generally admissible when it alludes to an inference that the trier or fact should make" or "when helpful to the jury under Rule 702[, Ariz. R. Evid.]." *Webb*, 216 Ariz. 349, ¶ 13, 166 P.3d at 144. Moreover, another witness at trial, a police officer, also testified about the illegality of riding bicycles on the sidewalk.

enforce its ordinance prohibiting bicycle riding on the sidewalk.[9] She claims this evidence would have "support[ed] an inference that riding on sidewalks was permitted because of the poor condition of the bicycle paths" and that it was related to the "foreseeability of bicycle traffic on the sidewalks, which is an important factor in gauging the acceptability of the sidewalk design." We review the court's exclusion of evidence for an abuse of discretion. *See Belliard*, 216 Ariz. 356, ¶ 13, 166 P.3d at 913.

¶12 The City responds that Preston's argument "is based on the entirely false premise that there [wa]s actual testimony City Police did not cite persons that rode a bicycle on the sidewalk." The City points out that the only proffered testimony was that of the Tucson Police Department traffic accident reconstructionist who had investigated Preston's accident and had testified in his deposition that he did not recall personally having issued a citation to a bicyclist for riding on the sidewalk. He had, however, been involved in cases where it had been done.

¶13 We must again agree with the City that the evidence Preston had proffered on this issue, which was the investigator's deposition testimony, failed to demonstrate that the Tucson Police Department has or had a policy of not enforcing the sidewalk ordinance. Thus, Preston's argument that "community standards on bicycle riding, as reflected in a police non-enforcement policy, is information that would have helped the jury," is unsupported by her corresponding offer of proof. *See Molloy v. Molloy*, 158

[9]The relevant portion of the ordinance states, "It shall be unlawful to ride a bicycle on any public sidewalks . . . unless signs are posted specifically permitting bicycling." Tucson City Code § 5-2(a).

Ariz. 64, 68, 761 P.2d 138, 142 (App. 1988) ("Offers of proof serve the dual function of enabling the trial court to appreciate the context and consequences of an evidentiary ruling and enabling the appellate court to determine whether any error was harmful."); *State v. O'Brien*, 123 Ariz. 578, 585, 601 P.2d 341, 348 (App. 1979) (finding no reversible error where defendant's offers of proof "do not support [defendant]'s claim that relevant evidence . . . was improperly excluded"). We conclude Preston has failed to demonstrate the trial court abused its discretion in excluding this evidence.[10]

Jury Instruction

¶14 Over Preston's objection, the trial court instructed the jury as follows:

> The City of Tucson claims that the silt, sand, and dirt condition on the sidewalk which Plaintiff alleges caused harm to Matthew Preston was open and obvious.
>
> Normally, a person need not safeguard or warn of a condition which is sufficiently open and obvious, that it may reasonably be expected that the person will see and avoid it. Nevertheless, if under all of the circumstances it should reasonably have been anticipated that the condition would cause harm, then a person must use reasonable care to correct, safeguard or warn of that condition, even if the condition was open and obvious.

¶15 Preston contends this instruction should not have been given because even though the sand and gravel on the sidewalk might have been obvious, "the danger of the condition [wa]s latent" due to the "relationship of that condition to a moving bicycle that was required to come to a quick stop." "The trial court has substantial discretion in

[10]Although the trial court granted the City's motion in limine on different grounds, we may affirm its ruling if correct for any reason. *See Minjares v. State*, 223 Ariz. 54, ¶ 28, 219 P.3d 264, 270 (App. 2009).

determining how to instruct the jury." *Smyser v. City of Peoria*, 215 Ariz. 428, ¶ 33, 160 P.3d 1186, 1197 (App. 2007). An instruction will warrant reversal only if it was both harmful to the complaining party and directly contrary to the rule of law. *AMERCO v. Shoen*, 184 Ariz. 150, 159, 907 P.2d 536, 545 (App. 1995).

¶16 The City responds that Matthew's knowledge of the condition can be inferred by evidence presented at trial, including testimony that Matthew's typical route included this portion of sidewalk, the sand on the sidewalk likely had been there long enough for Matthew to have noticed it, as well as Preston's own expert's testimony that Matthew likely perceived the hazard. The City also contends Matthew's actual knowledge of the hazard is irrelevant because the instruction bears on the City's liability, which involves an inquiry into whether the condition was sufficiently open and obvious such that Matthew could be expected to see and avoid it and thus obviate the City's need to safeguard or warn of it.

¶17 Based on the evidence presented at trial, the trial court did not err in instructing the jury. There was evidence not only that Matthew likely knew of the sand on the sidewalk because it was on his daily route, but also that the condition was such that a jury reasonably could conclude that Matthew could be expected to see and avoid it. "[W]hether the condition 'was dangerous, open and obvious or whether [owners of premises] should have anticipated the harm if open and obvious are issues to be decided by a jury.'" *McLeod ex. rel. Smith v. Newcomer*, 163 Ariz. 6, 10, 785 P.2d 575, 579 (App. 1989), *quoting Tribe v. Shell Oil Co.*, 133 Ariz. 517, 519, 652 P.2d 1040, 1042 (1982); *see also Andrews ex. rel. Kime v. Casagrande*, 167 Ariz. 71, 75, 804 P.2d 800,

804 (App. 1990) ("[W]hether a condition is open and obvious is generally a question for the trier of fact to resolve."); *see, e.g.*, *Smedberg v. Simons*, 129 Ariz. 375, 377-78, 631 P.2d 530, 532-33 (1981) (trial evidence supported jury instruction on open and obvious condition). In addition, Preston does not cite any authority to support her theory that the instruction is not warranted if the danger of an obvious condition might be latent, *see* Ariz. R. Civ. App. P. 13(a)(6), nor does she identify any legal error in the instruction itself, *see, e.g.*, *Hicks v. Superstition Mountain Post No. 9399*, 123 Ariz. 518, 521, 601 P.2d 281, 284 (1979) (affirming judgment because open and obvious jury instruction "correctly charged the jury as to the liability of [defendant]"). Accordingly, Preston has failed to demonstrate the trial court erred in instructing the jury.

Disposition

¶18 For the reasons set forth above, the judgment in favor of the City of Tucson is affirmed.

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

CONCURRING:

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

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge