

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

FILED BY CLERK  
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COURT OF APPEALS  
DIVISION TWO

JOSE GALLEGOS,	)	
	)	
Plaintiff/Appellant,	)	2 CA-CV 2006-0208
	)	DEPARTMENT A
v.	)	
	)	<u>MEMORANDUM DECISION</u>
YURI TALALAEV, M.D.,	)	Not for Publication
	)	Rule 28, Rules of Civil
Defendant/Appellee.	)	Appellate Procedure
_____	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20035516

Honorable Michael D. Alfred, Judge

AFFIRMED

Andrea E. Watters Law Office, P.C.  
By Andrea E. Watters

Tucson  
Attorney for Plaintiff/Appellant

Chandler & Udall, LLP  
By D.B. Udall

Tucson  
Attorneys for Defendant/Appellee

V Á S Q U E Z, Judge.

¶1 In this medical malpractice action, appellant Jose Gallegos appeals from the jury verdict and judgment entered in favor of appellee Yuri Talalaev, M.D., and from the trial court's denial of his new trial motion. For the reasons given below, we affirm.

### **Background**

¶2 The facts are undisputed. On November 27, 2001, Gallegos went to the emergency room of St. Mary's Hospital in Tucson complaining of hip pain after falling the night before. After he was examined by Peter Brown, M.D., and later evaluated by Talalaev, Gallegos was admitted to the hospital. On December 6, another doctor wrote an order for Gallegos to be evaluated for physical therapy. Apparently without conducting an evaluation, the physical therapist noted that Gallegos did not need skilled physical therapy, but that if anything else was needed, a new order should be written. In mid-December, following another order for evaluation, the physical therapist evaluated Gallegos and determined he should receive a three-visit trial of therapy.

¶3 Gallegos was discharged from the hospital on January 16, 2002, with what he characterizes as "permanent 90 degree leg contractures leaving him confined to a wheelchair." The hospital discharge summary noted that Gallegos had been "working physical therapy and occupational therapy" and that he could "extend his left leg to approximately 90 degrees and his right leg to approximately 110 degrees." Medical records also showed that Gallegos had leg contractures in October 2001 that were caused by osteoarthritis and that he had a preexisting spinal cord injury that contributed to his leg contractures.

¶4 In October 2002, Gallegos filed this medical malpractice action against Carondelet Health Network, doing business as St. Mary’s Hospital (“the hospital”), Brown, and Talalaev. Gallegos alleged that, had he received “appropriate physical therapy,” his injuries would not have been as severe. He further alleged that the hospital’s physical therapists had “ignored doctors’ orders and either failed or refused to provide treatment”; that the hospital had negligently failed to properly hire, train, or supervise skilled providers; that Brown had negligently failed to properly diagnose and treat him; and that Talalaev had negligently failed to properly treat him and supervise his treatment and had failed “to follow up on physical therapy orders.”

¶5 The parties stipulated to dismissal of Gallegos’s claim against Brown; they also stipulated that Talalaev “shall not name Peter Brown, M.D. as a non-party at fault.” The parties then stipulated to dismiss Gallegos’s claim against the hospital after reaching a settlement agreement. After an eight-day trial, the jury rendered a verdict in favor of Talalaev, the only remaining defendant. Gallegos filed a motion for a new trial on some of the same grounds he now raises on appeal, which the trial court denied. This appeal followed.

### **Standard of Review**

¶6 We review a trial court’s decision on a motion for new trial for an abuse of discretion. *Hutcherson v. City of Phoenix*, 192 Ariz. 51, ¶ 12, 961 P.2d 449, 451 (1998); *Styles v. Ceranski*, 185 Ariz. 448, 450, 916 P.2d 1164, 1166 (App. 1996). “In reviewing a jury verdict, we view the evidence in a light most favorable to sustaining the verdict, and

if any substantial evidence could lead reasonable persons to find the ultimate facts sufficient to support the verdict, we will affirm the judgment.” *Styles*, 185 Ariz. at 450, 916 P.2d at 1166.

## Discussion

### A. Jury instruction

¶7 Gallegos first argues the trial court erroneously instructed the jury on the allocation of fault. “In determining whether the instructions given were correct, the test is whether, considering the instructions as a whole, the jury was properly guided in arriving at a correct decision.” *Pima County v. Gonzalez*, 193 Ariz. 18, ¶7, 969 P.2d 183, 185 (App. 1998). Talalaev asserts the record does not reflect that Gallegos objected to any instruction, and he has thus waived the issue on appeal. Although the trial court’s minute entry shows Gallegos objected to one of the jury instructions, Gallegos did not timely include in the record on appeal a transcript of the settling of jury instructions.<sup>1</sup> Thus, we cannot infer from the record before us that the basis for Gallegos’s objection below was the same as the issue he raises on appeal. But even assuming Gallegos did not waive this issue, we reject his argument.

¶8 The trial court instructed the jury in pertinent part as follows:

Plaintiff claims that Dr. Talalaev was at fault for failing to properly monitor and/or supervise St. Mary’s

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<sup>1</sup>Gallegos filed a motion for leave to include this transcript in the record on appeal, to which Talalaev objected. We denied the motion, filed over one month after Talalaev filed his answering brief, as untimely. *See* Ariz. R. Civ. App. P. 11(b), 17B A.R.S. (setting time limits for ordering transcript and designating it in record on appeal).

Hospital/Carondelet physical therapists. Before you can consider whether Dr. Talalaev was at fault, you must find that one or more of the St. Mary's/Carondelet physical therapists were at fault.

If you find that St. Mary's/Carondelet physical therapists were not at fault, then your verdict must be for, or in favor of[,] Dr. Talalaev.

¶9 Gallegos asserts that this instruction was erroneous because it “did not properly frame the issue” in his case. He argues the jury could have found from the evidence presented at trial not only that Talalaev’s conduct had fallen below the standard of care in failing to supervise the hospital’s physical therapists (the theory encompassed by the instruction), but also in failing to ensure that Gallegos had received the care and therapy he needed and that it was effective, a duty independent from Talalaev’s duty to supervise the physical therapists. Gallegos contends Talalaev could have breached his independent duty even if the physical therapists had not breached their duty. Gallegos also asserts that only Talalaev knew that Gallegos had required special care because of his preexisting condition and that Talalaev’s failure “to ensure that [Gallegos] got the correct treatment for his legs” was a breach of his independent duty.

¶10 Talalaev contends Gallegos never presented a theory of independent liability at trial and that no expert testimony supported such a theory in any event. Gallegos asserted in the parties’ joint pretrial statement as contested issues whether he had been harmed by Talalaev’s failure to properly monitor his care and whether Talalaev had had a responsibility to ensure that Gallegos “received the physical therapy needed to prevent his leg contractures or to prevent his leg contractures from increasing in severity.” *See Murcott v. Best W. Int’l*,

*Inc.*, 198 Ariz. 349, ¶ 47, 9 P.3d 1088, 1097 (App. 2000) (“A joint pre-trial statement controls the subsequent course of litigation and may amend the pleadings.”). Thus, we do not agree that Gallegos raises an entirely new theory of liability on appeal. However, the record does not contain transcripts of the opening statements and closing arguments of counsel or of the testimony of Gallegos’s standard-of-care expert, upon which Gallegos relies, and which would be necessary for us to determine which theories of liability were argued, developed, and supported by the evidence adduced at trial.

¶11 Under Rule 11(b), Ariz. R. Civ. App. P., 17B A.R.S., it was Gallegos’s responsibility to ensure that the record on appeal contains the transcripts necessary for us to resolve the issues he raises on appeal.<sup>2</sup> *See In re 6757 S. Burcham Ave.*, 204 Ariz. 401, ¶ 11, 64 P.3d 843, 846-47 (App. 2003). “When a party fails to include necessary items [in the record], we assume they would support the court’s findings and conclusions.” *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995). Thus, in the absence of what we deem necessary items for our review, we presume that the missing portions of the record support the trial court’s decision to give this instruction.

¶12 In a related argument, Gallegos argues the jury instruction “cannot be reconciled with the law on comparative fault and the comparative fault verdict form.” “In

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<sup>2</sup>Although Gallegos attached a portion of the expert’s testimony as an appendix to his opening brief, and Talalaev attached a transcript of the expert’s entire testimony as an appendix to his answering brief, the transcript is not part of the record on appeal. *See* Ariz. R. Civ. App. P. 11. Because we may only consider matters in the record before us, we do not consider the transcript. *See 6757 S. Burcham Ave.*, 204 Ariz. 401, ¶ 11, 64 P.3d at 846-47.

assessing percentages of fault the trier of fact shall consider the fault of all persons who contributed to the alleged injury, death or damage to property, regardless of whether the person was, or could have been, named as a party to the suit.” A.R.S. § 12-2506(B). Gallegos asserts that the instruction undermined the jury’s role of deciding the percentage of fault to attribute to each party as between Talalaev and the physical therapists. However, as noted above, in the absence of transcripts, we must assume that the trial court’s instruction was supported by the evidence. *See Baker*, 183 Ariz. at 73, 900 P.2d at 767. Therefore, we must assume that: 1) Gallegos’s only theory of liability at trial was that Talalaev had breached his duty to supervise the physical therapists, and the physical therapists were negligent in their treatment of Gallegos, and 2) the evidence adduced at trial supported only that theory.

¶13 And, although the physical therapists were not Talalaev’s employees, we find this situation analogous to other cases in which negligence arising from a duty to supervise was held to be contingent on a threshold finding of negligence by the person being supervised. *See, e.g., Kuehn v. Stanley*, 208 Ariz. 124, ¶ 21, 91 P.3d 346, 352 (App. 2004); *Mulhern v. City of Scottsdale*, 165 Ariz. 395, 398, 799 P.2d 15, 18 (App. 1990). *Kuehn* and *Mulhern* involved claims that employers had negligently hired, retained, or supervised employees. 208 Ariz. 124, ¶ 21, 91 P.3d at 352; 165 Ariz. at 398, 799 P.2d at 18. In each case, we concluded that the employer’s negligence was contingent on the employee’s underlying negligence. 208 Ariz. 124, ¶ 22, 91 P.3d at 352; 165 Ariz. at 398, 799 P.2d at 18. An employer cannot be negligent as a matter of law for supervising an employee in the

absence of negligence by the employee. *Kuehn*, 208 Ariz. 124, ¶ 21, 91 P.3d at 352. Similarly, in *Boomer v. Frank*, 196 Ariz. 55, ¶¶ 1, 21, 993 P.2d 456, 457, 461 (App. 1999), the court noted that a licensed driver who accompanies a driver with a learner’s permit has a duty to supervise the permittee and to exercise reasonable care to prevent negligence on the part of the permittee. However, the licensed driver cannot be found negligent unless the permittee has also been found negligent. *Id.* ¶ 21.

¶14 We believe the same reasoning applies to Gallegos’s theory that Talalaev had been negligent in failing to supervise the physical therapists who provided treatment to Gallegos. Talalaev’s negligence, if any, is contingent on the negligence, if any, of the physical therapists. If the physical therapists were not negligent in treating Gallegos, then Talalaev was not negligent for failing to supervise them. Thus, it would be inappropriate and unnecessary to compare the relative fault of Talalaev and the physical therapists. Accordingly, the trial court did not err in giving this instruction on that basis.

¶15 Gallegos next asserts the instruction confused the jury. He contends the “only evidence” before the jury was that “at least one physical therapist was at fault,” and the verdict in favor of Talalaev “proves the prejudicial error in the instruction.” He asserts that Debra Walter, M.D., one of Talalaev’s expert witnesses, testified at her deposition that the first physical therapist’s conduct fell below the standard of care because she did not evaluate Gallegos on December 6. But Walter’s deposition testimony is not part of the record on appeal.

¶16 However, according to Walter’s trial testimony, which is part of the record, she agreed that the “better practice” would have been for the physical therapist to have evaluated Gallegos on that date and that “the physical therapist met the standard of care with the exception of failing to chart a full exam and evaluation on December 6th.” But Walter also said “[n]o” when asked if she believed there would have been a “different outcome” had the physical therapist evaluated Gallegos at that time. To establish fault in a medical malpractice case, the plaintiff must establish both that the defendant’s conduct fell below the standard of care and that such failure was a cause of the plaintiff’s injury. A.R.S. § 12-563; *McGrady v. Wright*, 151 Ariz. 534, 537, 729 P.2d 338, 341 (App. 1986). Thus, based on the record before us, we are not persuaded by Gallegos’s argument that “the only evidence before the jury was that ‘one or more of the physical therapists were at fault.’”

#### B. References to Brown

¶17 Gallegos next argues the trial court erred in allowing Talalaev to refer to Brown “throughout the trial” when the parties had agreed not to name him as a nonparty at fault. We will “affirm a trial court’s admission or exclusion of evidence absent a clear abuse or legal error and resulting prejudice.” *John C. Lincoln Hosp. & Health Corp. v. Maricopa County*, 208 Ariz. 532, ¶ 33, 96 P.3d 530, 541 (App. 2004). In stipulating to dismiss Brown from the lawsuit, the parties also agreed that Talalaev would not name Brown as a nonparty at fault. A nonparty at fault is “a person or entity not a party to the action [who allegedly] was wholly or partially at fault in causing any person injury . . . for which damages are

sought in the action.” Ariz. R. Civ. P. 26(b)(5), 16 A.R.S., Pt. 1.<sup>3</sup> Naming a nonparty at fault allows a defendant “to argue that the jury should attribute all or some percentage of fault to [the nonparty], thereby reducing Defendant[’s] percentage of fault and consequent liability.” *Dietz v. Gen. Elec. Co.*, 169 Ariz. 505, 507, 821 P.2d 166, 168 (1991).

¶18 Gallegos asserts Talalaev’s standard-of-care expert, Allan Rogers, M.D., improperly testified that, although Gallegos had originally claimed that Brown had negligently treated him in the emergency room, Gallegos had abandoned that claim. Gallegos also asserts Rogers further improperly testified that Brown had done nothing wrong in treating Gallegos. Although Gallegos included in the appendix to his opening brief what appears to be an excerpt from the transcript of Rogers’s testimony, none of his testimony was designated as part of the appeal record. Thus, as noted above, “we presume that the record before the trial court supported its decision.” *6757 S. Burcham Ave.*, 204 Ariz. 401, ¶ 11, 64 P.3d at 847, *quoting Ashton-Blair v. Merrill*, 187 Ariz. 315, 317, 928 P.2d 1244, 1246 (App. 1996). However, even assuming Rogers testified as Gallegos contends, we find no error.

¶19 Gallegos contends Rogers’s comments were “improper,” “irrelevant,” and “highly prejudicial.” However, Gallegos has not explained how he was prejudiced by Rogers’s remarks. Indeed, Rogers did not, in fact, refer to Brown as a nonparty at fault. He referred to Brown as someone Gallegos had initially alleged was to blame but who was no

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<sup>3</sup>In a personal injury action, the “trier of fact shall consider the fault of all persons who contributed to the alleged injury,” including anyone designated as a nonparty at fault. A.R.S. § 12-2506(B).

longer involved in the action and who, in Rogers's opinion, had not been at fault. In other words, Rogers essentially referred to Brown as a nonparty *not* at fault. Gallegos has not cited any authority to support his argument that Rogers's testimony was "highly prejudicial," and we are aware of none.

¶20 Gallegos also appears to argue the trial court erred in ruling that Talalaev could read Gallegos's complaint to the jury. Gallegos had filed a motion in limine to preclude this, but the trial court denied his motion. However, the minute entry of the seventh day of trial notes that Talalaev's attorney stated he did not intend to read the complaint to the jury. We do not have a transcript of Talalaev's attorney's closing argument so we are unable to definitively determine whether he did do so, and Gallegos does not point to a specific instance during trial when Talalaev read the complaint. Thus, we need not determine the propriety of the trial court's ruling. *See 6757 S. Burcham Ave.*, 204 Ariz. 401, ¶ 11, 64 P.3d at 846-47 (appellate court only considers matters in record before it).

¶21 Next, Gallegos argues the trial court erred in allowing Talalaev's attorney to read Brown's deposition testimony to the jury over Gallegos's objection, asserting he was then unable to respond to that testimony or address it in his opening statement and suffered "a loss of credibility." "Depositions may be used at trial under Rule 32(a), [Ariz. R. Civ. P., 16 A.R.S., Pt. 1,] but only 'so far as admissible under the rules of evidence applied as though the witness were then present and testifying.'" *Cervantes v. Rijlaarsdam*, 190 Ariz. 396, 401, 949 P.2d 56, 61 (App. 1997), *quoting* Ariz. R. Civ. P. 32(b).

¶22 We do not have a transcript of the objection to the reading of Brown’s deposition testimony, but the relevant minute entry shows Gallegos’s attorney objected and argued the evidence was “irrelevant” and violated procedural rules. Because there is no record that Gallegos objected on the specific ground he now urges, the argument is waived on appeal. *See* Ariz. R. Evid. 103(a)(1), 17A A.R.S.; *Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 496, 733 P.2d 1073, 1079 (1987) (to preserve claim of error in admission of evidence, party must make specific objection below).

¶23 Gallegos’s final argument on this issue is that Talalaev’s references to Brown at trial were “confusing and misleading” to the jury because Brown was not named a nonparty at fault on the verdict form. Gallegos argues the “only thing” the jury could do was to “improperly reduce the award to [him] based on the hypothetical fault of a dismissed Defendant.” Gallegos has cited no authority to support his argument that the jury was confused or misled. In any event, given that Brown was referred to only as someone who was not at fault for Gallegos’s injury, it seems unlikely the jury assigned some fault to Brown but was confused by the absence of his name on the verdict form. We find no error.

#### C. Expert opinions on causation

¶24 Lastly, Gallegos asserts the trial court improperly permitted Talalaev to elicit two expert opinions on medical causation in violation of Rule 26(b)(4)(D), Ariz. R. Civ. P. That rule provides: “In all cases[,] including medical malpractice cases[,] each side shall presumptively be entitled to only one independent expert on an issue, except upon a showing of good cause.” In a pretrial motion, Gallegos noted that, according to Rogers’s

deposition, he would render opinions on both standard of care and causation for Talalaev. Therefore, Gallegos moved to preclude Talalaev “from offering other opinions as to standard of care and causation.” In response, Talalaev stated that Rogers would be his standard-of-care expert and Walter would be his expert on causation. The trial court’s minute entry of the hearing on the motion states that, after discussion, Talalaev “clarifie[d] his intentions” with respect to the expert testimony by Rogers, and Gallegos raised no objection. The record does not show that the trial court made any actual ruling on the motion.

¶25 At trial, Walter testified it was probable that Gallegos’s preexisting medical conditions would have caused him to eventually be confined to a wheelchair regardless of whether he had received any physical therapy while in the hospital after being admitted in November 2001. Gallegos contends Rogers later also opined that Gallegos’s leg problems resulted from his preexisting conditions and that the lack of physical therapy while in the hospital was immaterial. Again, we note that Rogers’s testimony is not part of the record. Without citation to any authority other than Rule 26, Ariz. R. Civ. P., Gallegos contends that Rogers’s testimony caused him prejudice warranting a new trial.

¶26 Gallegos has not shown that he objected to the testimony he now asserts was so prejudicial. Talalaev asserts in his answering brief that Gallegos objected at an earlier point in Rogers’s testimony on the ground he was testifying about causation when he was asked: “[D]o you have an impression as to when it was in time Mr. Gallegos’s contractures worsened in the hospital setting?” Talalaev also asserts in his answering brief that the trial court overruled that objection after Talalaev argued Rogers’s answer involved only his

review of the records and was necessary to lay the foundation for his testimony about the standard of care.

¶27 However, because Gallegos did not include the transcript of Rogers’s testimony in the record on appeal, there is no record that Gallegos objected when Rogers testified that Gallegos’s preexisting conditions would have inevitably led to his worsened leg problems regardless of whether he had received physical therapy while in the hospital. A party must make a timely, specific objection in the trial court to the admission of testimony in order to complain about the evidence on appeal. Ariz. R. Evid. 103(a), 17A A.R.S.; *DeForest v. DeForest*, 143 Ariz. 627, 632, 694 P.2d 1241, 1246 (App. 1985); *James v. Cox*, 130 Ariz. 152, 155, 634 P.2d 964, 967 (App. 1981).<sup>4</sup> In any event, Gallegos has cited no authority to support his contention that Rogers’s testimony, if it violated Rule 26, Ariz. R. Civ. P., was so prejudicial that it requires a new trial. *See Mohave Elec. Coop., Inc. v. Byers*, 189 Ariz. 292, 301, 942 P.2d 451, 460 (App. 1997) (courts do not consider issue on appeal not supported by authority).

¶28 Finally, without citation to authority or development of the argument, Gallegos asserts that the “cumulative effect” of errors at trial denied him his right to a fair trial. But, we have found no error, much less cumulative error.

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<sup>4</sup>Gallegos’s pretrial motion was not sufficient to preserve this issue because he did not seek to preclude Rogers’s testimony and because the trial court did not rule on the motion; rather, Talalaev merely clarified which witness he intended to call to testify on each issue. *Cf. Lopez v. Safeway Stores, Inc.*, 212 Ariz. 198, ¶7, 129 P.3d 487, 489 (App. 2006); *State v. Burton*, 144 Ariz. 248, 250, 697 P.2d 331, 333 (1985) (“[W]here a motion in limine is made and ruled upon, the objection raised in that motion is preserved for appeal, despite the absence of a specific objection at trial.”).



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Affirmed.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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JOSEPH W. HOWARD, Presiding Judge