IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

RONNIE ANTHONY MCDANIEL, CONSERVATOR OF THE
ESTATE OF DALLAS R. HAUGHT; AND
ROY G. HAUGHT AND MARIE HAUGHT,
NATURAL PARENTS OF DALLAS R. HAUGHT,
Plaintiffs/Appellants/Cross-Appellees,

v.

PAYSON HEALTHCARE MANAGEMENT, INC., AN ARIZONA CORPORATION,
DBA PAYSON REGIONAL BONE & JOINT;
4C MEDICAL GROUP, P.L.C., AN ARIZONA CORPORATION;
AND AMAR PARKASH SHARMA, M.D.,
Defendants/Appellees/Cross-Appellants.

No. 2 CA-CV 2019-0150
Filed October 30, 2020

Appeal from the Superior Court in Gila County
No. CV201300157
The Honorable Bryan B. Chambers, Judge

REVERSED AND REMANDED

COUNSEL

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and

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OPINION

Chief Judge Vásquez authored the opinion of the Court, in which Presiding Judge Staring concurred and Judge Brearcliffe concurred in part and dissented in part.

V Á S Q U E Z, Chief Judge:

¶1 In this medical malpractice action, Dallas Haught, through his conservator, appeals from the trial court's judgment and denial of his motion for new trial entered after a jury verdict in favor of 4C Medical Group P.L.C. and Dr. Amar Sharma (collectively, 4C Medical Group) and Payson Healthcare Management Inc. (PHM). On appeal, Haught argues the court erred by admitting expert testimony from several treating physicians about the standard of care and opinions from testifying experts that had not been disclosed before trial. Further, Haught contends the court erroneously failed to grant a new trial or evidentiary hearing on his claims that the jury considered extraneous information. In its cross-appeal, PHM contends the court erred by granting a co-defendant summary judgment on a basis not raised in the motion and therefore erroneously denying its request to list the dismissed defendant as a non-party at fault. 4C Medical Group also cross-appeals, arguing the court improperly denied its request

for costs as the prevailing party. For the following reasons, we reverse and remand for a new trial and dismiss both cross-appeals.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the verdict. *See Stafford v. Burns*, 241 Ariz. 474, n.2 (App. 2017). On July 17, 2011, Haught fell from a dirt bike and lacerated his right knee. He received treatment at the Payson Regional Medical Center's emergency room and was discharged the same day. Haught then returned around 1:00 a.m. with "severe pain." The hospital discharged him again, with directions to see his primary care physician, which he did the following day, along with an orthopedic surgeon, Dr. Michael Darnell. The physicians ordered laboratory tests, but Darnell incorrectly recorded the result of a C-Reactive Protein (CRP) test as 45 milligrams per deciliter in his notes when the lab had actually reported 138.79 mg/dL—an abnormally high level.[1] The following day, Darnell "drain[ed] and debride[d] the wound" and ordered Haught to be transferred to Scottsdale Shea Medical Center (Shea MC) via "Air Ambulance," which was later changed to "ground ambulance" due to weather.

¶3 At Shea MC, Dr. Sharma, an owner of 4C Medical Corporation and hospitalist, and Dr. John Cory, an orthopedic surgeon, initially treated Haught. Sharma collected and organized Haught's medical records and test results for the other physicians. He apparently saw the incorrect CRP result of 45, not 138.79, and ultimately, he entirely omitted the CRP results from his report. Dr. John Burge, an infectious disease physician, saw Haught on July 22. The following day, Dr. David Friedman, an infectious disease physician, and a different hospitalist assumed responsibility for Haught's care in place of Burge and Sharma, respectively. That day, Cory operated on Haught to "deal[] with increased compartment pressures." Later, he performed a second operation to drain Haught's knee.

¶4 On July 26, Dr. Timothy Schaub, a plastic surgeon, examined Haught and, in his consultation report, expressed concerns regarding potential necrotizing fasciitis. The following day, in consultation with Dr. Cory, Schaub confirmed necrotizing fasciitis and performed a "[r]adical debridement" on Haught's right leg, in which he removed affected skin and soft tissue, including "scant muscle tissue." Haught was then transferred to Arizona Burn Center for additional treatment and rehabilitation. Over

[1]CRP is a marker for inflammation, which can indicate infection or other medical conditions.

the next ten weeks, several additional procedures were performed. The burn center discharged Haught in early October.

¶5 Haught and his parents filed a complaint alleging medical negligence against some of the physicians and their associated hospitals and business entities, including Dr. Cory, PHM, and 4C Medical Group.[2] In opposing summary judgment, Haught argued that the defendants had "failed to timely manage, investigate, diagnose or treat both his life threatening infection (necrotizing fasciitis) and his worsening compartment syndrome," which resulted in all of the skin on his entire right leg having to be surgically removed. The trial court granted Cory's motion for summary judgment and denied PHM's request to list Cory as a non-party at fault. In 2018, after a sixteen-day trial, the jury returned a verdict in favor of PHM and 4C Medical Group. The court entered final judgment against Haught and in favor of 4C Medical Group and PHM and denied 4C Medical Group's request for costs. Haught timely filed a motion for new trial, which the court denied.

¶6 Haught's appeal and cross-appeals by PHM and 4C Medical Group followed. We have jurisdiction over Haught's appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1), (5)(a).

Treating Physicians

¶7 Haught argues he was prejudiced by the testimony provided by Drs. Friedman, Schaub, Burge, and Cory, all treating physicians, who provided expert testimony, violating the one-expert-per-side rule set forth in Rule 26(b)(4)(F), Ariz. R. Civ. P. The parties disagree over the appropriate standard of review.

¶8 We review legal questions and interpretations of the Arizona Rules of Civil Procedure de novo. *Stafford*, 241 Ariz. 474, ¶¶ 25, 35; *see also McNamara v. Citizens Protecting Tax Payers*, 236 Ariz. 192, ¶ 5 (App. 2014) (legal questions). Whether testimony is expert in nature and admitted in violation of the one-expert-per-side rule is likewise reviewed de novo. *See Stafford*, 241 Ariz. 474, ¶ 25 (examining former one-expert-per-side rule). We defer, however, to the trial court's factual findings. *See W. Valley View, Inc. v. Maricopa Cty. Sheriff's Office*, 216 Ariz. 225, ¶ 7 (App. 2007). We will

[2]Payson Emergency Physicians PC, Scottsdale Healthcare Hospitals, and Scottsdale Healthcare Corp. were dismissed by stipulation.

only reverse and remand if an error is prejudicial. *See Felipe v. Theme Tech. Corp.*, 235 Ariz. 520, ¶ 24 (App. 2014).

¶9 While "a bright-line rule for determining when a treating physician crosses the line from fact witness to expert witness" is impossible to create, this court has provided some guidelines. *State ex rel. Montgomery v. Whitten*, 228 Ariz. 17, ¶ 12 (App. 2011). Generally, when treating physicians answer "who, what, when, where, and why" questions regarding their patient treatment and their own records, the resulting answers comprise fact testimony. *Id.* ¶ 15. But "when the treating physician goes beyond the observations and opinions obtained by treating the individual and expresses opinions acquired or developed in anticipation of trial, then the treating physician steps into the shoes of an expert," *Sanchez v. Gama*, 233 Ariz. 125, ¶ 12 (App. 2013) (quoting *Indem. Ins. Co. of N. Am. v. Am. Eurocopter LLC*, 227 F.R.D. 421, 423-24 (M.D.N.C. 2005)), because "[g]enerally speaking, a witness asked to form an opinion for purposes of testifying is providing expert testimony," *Whitten*, 228 Ariz. 17, ¶ 17. "[Q]uestions that require a physician . . . to opine regarding the standard of care or treatment given by another provider are generally inconsistent with the role of treating physician as fact witness." *Id.* ¶ 16; *see also Solimeno v. Yonan*, 224 Ariz. 74, ¶¶ 10-12 (App. 2010) (concluding defendant's testimony about whether treatment of patient complied with standard of care was expert testimony); *cf. W.A. Krueger Co. v. Indus. Comm'n*, 150 Ariz. 66, 68 (1986) (describing treating physicians' testimony regarding "their belief that respondent had no permanent impairment" as expert testimony).

¶10 Rule 26(b)(4)(F) presumptively limits each side to one expert to testify on a particular issue. However, the rule permits a defendant in a medical malpractice case to "testify on the issue of that defendant's standard of care" in addition to defendant's standard-of-care expert witness. Ariz. R. Civ. P. 26(b)(4)(F)(ii). We interpret rules under the same principles as statutes, looking first to the plain language and then to the rule as a whole, giving "meaningful application to all its provisions." *See Devenir v. City of Phoenix*, 169 Ariz. 500, 503 (1991). The one-expert-per-side rule is intended to limit cumulative evidence. *See Sanchez v. Old Pueblo Anesthesia, P.C.*, 218 Ariz. 317, ¶ 18 (App. 2008) (citing Ariz. R. Civ. P. 26 cmt. to 1991 amend.), *disapproved of on other grounds by Rasor v. Nw. Hosp., LLC*, 243 Ariz. 160 (2017). Accordingly, if an expert witness and a non-defendant, treating physician present expert opinions on the same issue for the same side in a medical malpractice case, the testimony is cumulative and presumptively limited by Rule 26(b)(4)(F). *Cf. Stafford*, 241 Ariz. 474, ¶ 25 (determining if defendant physician violated one-expert-per-side rule by offering expert causation testimony).

¶11 Dr. Schaub, the plastic surgeon, testified regarding the CRP results, which had not been in his chart and he had not seen.[3] Specifically, on direct examination, 4C Medical Group asked him, "[CRP] doesn't really tell you much, other than the fact that there's an inflammatory process going on," to which he responded, "No, it's not specific." Additionally, he testified that he did not "think at that time it would have pushed [him] one way or another" to know the abnormally high CRP result. Then on redirect, over Haught's objection, 4C Medical Group read portions of Schaub's deposition regarding CRP's importance, or lack thereof, in diagnosing necrotizing fasciitis. Because Schaub, a percipient witness, did not see Haught's CRP results at the time of treatment, there was no reason to elicit such testimony other than to obtain an expert opinion—in this instance, from the plastic surgeon who ultimately confirmed Haught was suffering from necrotizing fasciitis—diminishing the significance of CRP.

¶12 On direct examination by PHM, and over Haught's objection, Dr. Friedman, an infectious disease physician, testified that the CRP was "not at all" diagnostic for any particular disorder or disease. He was then questioned regarding his general practices regarding CRP. And, again over objection, PHM elicited from Friedman the opinion that among all of Haught's treating physicians with whom he had interacted, he and Dr. Schaub had the most experience diagnosing necrotizing fasciitis.[4] Further, on redirect examination of Friedman, PHM clearly sought expert opinion testimony concerning CRP:

> Q. It's just not relevant for purposes of diagnosing necrotizing fasciitis?

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[3]Haught's standard-of-care expert, Dr. Thomas DeBerardino, opined that the defendants' failure to act on the "grossly abnormal labs," including "one with a CRP of 138.7 48 hours after the initial trauma" amounted to medical negligence and caused Haught's injuries.

[4]At oral argument in this court, 4C Medical Group argued Schaub and Friedman could not be considered as giving expert opinions because there were no plastic surgeons or infectious disease physicians named as defendants. *See* A.R.S. § 12-2604(A) (expert witness qualifications in medical negligence cases). This fact only serves to illuminate the incongruity of appellees' position; there was no reason to elicit such testimony other than to obtain expert opinions, after portraying the two physicians as the most experienced concerning the diagnosis of necrotizing fasciitis.

> A. Not in my opinion, no.
>
> Q. And that's after being an infectious disease specialist for 20 years?
>
> A. That's correct.

In addition, deposition testimony from Dr. Burge was read to the jury, again over Haught's objection, regarding the standard of care in his role as an infectious disease physician. Then, Dr. Cory's deposition testimony, including a hypothetical regarding standard of care, was read to the jury, once again over Haught's objection. Additionally, Dr. Sharma, Dr. Darnell, and experts from both PHM and 4C Medical Group provided opinions on standard of care or discussed CRP's importance, or lack thereof.

¶13 Both 4C Medical Group and PHM highlighted the importance of the treating physicians' testimony during their closing arguments. PHM stated, "Ten physicians testified that CRP is not a significant or important item for the diagnosis of necrotizing fasciitis." 4C Medical Group told the jury, "With very limited exception, every doctor who's been on that stand, has told you the CRP doesn't matter, in a diagnos[tic] situation like this."

¶14 Haught maintains that Drs. Friedman, Schaub, Burge, and Cory testified as experts about the standard of care in favor of 4C Medical Group and PHM and therefore violated the one-expert-per-side rule. He further maintains that the trial court's error in admitting the testimony prejudiced him. We agree.

¶15 First, PHM and 4C Medical Group respond that Haught waived this issue below. The trial court discussed the one-expert-per-side rule with the parties and agreed to "take up objections at trial." Then, Haught filed a motion in limine objecting to potential expert testimony from the listed treating physicians. He also objected during the testimony of each of the contested treating physicians. The court had sufficient notice of the issue; it therefore is not waived. *See Blankinship v. Duarte*, 137 Ariz. 217, 221 (App. 1983); *see also Starkins v. Bateman*, 150 Ariz. 537, 544 (App. 1986).

¶16 Second, PHM and 4C Medical Group both maintain the treating physicians' testimony was factual in nature and was not prejudicial to Haught. But the challenged testimony from the treating physicians served as expert opinion testimony, as it was in response to hypotheticals and questions on the appropriate standard of care. *See Sanchez*, 233 Ariz. 125, ¶¶ 12, 19; *Whitten*, 228 Ariz. 17, ¶¶ 15-17. As both 4C Medical Group

and PHM had experts testify as to CRP's importance, or lack thereof, relating to the standard of care, the treating physicians' testimony violated the one-expert-per-side rule. *See* Ariz. R. Civ. P. 26(b)(4)(F). Haught was prejudiced by the very thing the rule is designed to protect against, cumulative expert evidence—in this instance on a question going to the very crux of the case, the alleged failure to diagnose necrotizing fasciitis. *See Old Pueblo Anesthesia, P.C.*, 218 Ariz. 317, ¶ 18. Indeed, PHM and 4C Medical Group provided the jury with multiple standard-of-care expert opinions and even accentuated the cumulative nature of the expert testimony by highlighting in their closing arguments the number of physicians who had provided such opinions. Accordingly, the error was prejudicial to Haught, and this matter must be remanded for a new trial.[5] *See Felipe*, 235 Ariz. 520, ¶ 24.

Undisclosed Expert Testimony

¶17 Haught additionally argues that both 4C Medical Group and PHM failed to disclose changes in the opinions of two experts, Dr. Gerald Treiman and Dr. Scott Slagis, and that the trial court erred by not excluding the undisclosed expert opinions. We review de novo the court's determination of whether there is a disclosure obligation, *see Solimeno*, 224 Ariz. 74, ¶ 9, and review for abuse of discretion the court's determination of whether there has been a disclosure violation and the court's sanction, *see Sandretto v. Payson Healthcare Mgmt., Inc.*, 234 Ariz. 351, ¶ 34 (App. 2014). "Generally, a court abuses its discretion where the record fails to provide substantial support for its decision or the court commits an error of law in reaching the decision." *Files v. Bernal*, 200 Ariz. 64, ¶ 2 (App. 2001). We will not overturn a court's ruling admitting or excluding evidence absent prejudice. *See Hardt ex rel. Nevens v. AZHH, LLC (In re Conservatorship for Hardt)*, 242 Ariz. 449, ¶ 9 (App. 2017).

¶18 Under Rule 26.1, Ariz. R. Civ. P., parties have a continuing duty to disclose "the anticipated subject areas of expert testimony," including "the substance of the facts and opinions to which the expert is expected to testify." *See Sandretto*, 234 Ariz. 351, ¶ 34; *Jimenez v. Wal-Mart Stores, Inc.*, 206 Ariz. 424, ¶ 4 (App. 2003). The purpose of these rules is to

[5]Nor are we persuaded by 4C Medical Group's assertion at oral argument that finding reversible error would "hamstr[i]ng" defendants in medical negligence cases from mounting effective defenses. If multiple expert opinions on a given subject are necessary to an effective defense, Rule 26(b)(4)(F) permits variance from the one-expert-per-side limitation when good cause is shown.

allow the parties a "'reasonable opportunity' to prepare, 'nothing more, nothing less.'" *Waddell v. Titan Ins. Co.*, 207 Ariz. 529, ¶ 33 (App. 2004) (quoting *Bryan v. Riddel*, 178 Ariz. 472, 476 n.5 (1994)). Failure to comply or timely disclose in accordance with Rule 26.1 results in exclusion of the opinion or information absent good cause or lack of prejudice. Ariz. R. Civ. P. 37(c)(1); *see Marquez v. Ortega*, 231 Ariz. 437, ¶¶ 16, 23 (App. 2013).

¶19 Before trial, 4C Medical Group disclosed that Dr. Treiman would testify that the Laboratory Results Indicative of Necrotizing Fasciitis (LRINEC) "did not establish the diagnosis of necrotizing fasciitis" before July 26 and that Haught's CRP result was "unlikely to have changed" the LRINEC. PHM disclosed that Dr. Slagis would similarly testify "regarding the LRINEC Scoring System used by providers to assist in diagnosing necrotizing fasciitis" and that "[b]ased upon this scoring system and his clinical condition, Haught did not have necrotizing fasciitis" before his transfer to Shea MC. During his deposition, Slagis stated that he employed the LRINEC when there was "clinical suspicion of necrotizing fasciitis." He also described the article titled "Review Article, Necrotizing Fasciitis" as "helpful" and "authoritative." And he did not disagree when Haught's attorney identified the four authors of the article as "physicians."

¶20 During the trial, both 4C Medical Group and PHM agreed that their experts would not "introduce any new opinions based upon a transcript that they [may] have seen," which contained the opinion of another doctor. Later, Dr. Treiman testified, over Haught's objection, that "predictive values based on labs" or the LRINEC could not identify "whether or not . . . Haught had necrotizing fasciitis" and that because the end results were known, the predictive value was "meaningless." Treiman then continued to discount the LRINEC and the study that created it, including stating on redirect that "the article was developed in a third world country that doesn't have the scanners" that are available in the United States. Treiman acknowledged he had miscalculated the LRINEC because the CRP result was in milligrams per deciliter instead of milligrams per liter, as required for the risk assessment, therefore instead of the zero points he had originally given, four points should have been added for the CRP. With this correct score the LRINEC provided "a greater than 50 percent predictability that [Haught had] necrotizing fasciitis in Payson."

¶21 Just before Dr. Slagis testified, Haught alerted the trial court to his suspicion that Slagis might also attempt to "back pedal[]" from his disclosed reliance on the LRINEC. Indeed, Slagis testified he had never used LRINEC in his practice, he did not "really understand this positive predictive value and negative predictive value," and the scale was

"meaningless in terms of the prediction" and "may be illegitimate." Additionally, he testified that the article he had previously described as "helpful," "authoritative," and written by "physicians" was not authoritative and was authored by "[d]octors in training."

¶22 Haught contends that the opinions of Dr. Treiman and Dr. Slagis provided at trial were different than those disclosed during discovery and that the changes had not been disclosed. Both 4C Medical Group and PHM assert that Haught waived the issue as to Treiman's testimony on redirect by opening the door to the purportedly undisclosed testimony during cross-examination. They also argue that Haught's argument fails because he did not object during Slagis's testimony, thereby waiving the argument for Slagis. Additionally, they contend that neither expert provided undisclosed opinions at trial and that Haught's thorough cross-examinations rendered any error harmless.

¶23 First, opponents do not open the door by drawing the sting of evidence once an adverse ruling admitting the evidence has been made. *See Davis v. Cessna Aircraft Corp.*, 182 Ariz. 26, 36 (App. 1994); *see also State v. Hicks*, 133 Ariz. 64, 69 (1982) (objecting party must do their best "to minimize any harm that might flow from the erroneous admission of unfavorable evidence"). Haught's overruled objections on lack-of-disclosure grounds during direct examination of Dr. Treiman were sufficient to preserve that issue, permitting him to question Treiman about the changed opinions during cross-examination without waiving the issue. In sum, Haught did not open the door during his cross-examination of Treiman to further discount the LRINEC and the study that created it.

¶24 Second, Haught did not waive his argument regarding Dr. Slagis's testimony. The disclosure issues were presented to the trial court on multiple occasions without success and there had been an agreement that no new opinions would be presented. *See State v. Christensen*, 129 Ariz. 32, 36 (1981) ("[W]here an objection to a certain class of evidence is distinctly made and overruled, the objection need not be repeated to the same class of evidence subsequently received, although the evidence is given by or question asked of another witness." (quoting *Tucker v. Reil*, 51 Ariz. 357, 368 (1938))); *State v. Briggs*, 112 Ariz. 379, 382 (1975) ("The essential question is whether or not the objectionable matter is brought to the attention of the trial court in a manner sufficient to advise the court that the error was not waived."). Therefore, Haught did not waive his arguments regarding Dr. Slagis and Dr. Treiman.

¶25 As to the merits, during their testimony both Dr. Treiman and Dr. Slagis discounted and undermined the validity and application of the LRINEC and accompanying articles, contradicting their reliance on them in pretrial disclosure. Neither 4C Medical Group nor PHM have presented good cause for having failed to disclose the opinions of the doctors as they provided them at trial; they instead have maintained that the experts' opinions did not change. But this position is not supported by the record before us. Despite the disclosure detailed above that the doctors would testify based at least in part on the LRINEC, at trial Treiman dismissed the diagnostic value of the LRINEC, including by describing Singapore as a "third world country" without the medical "scanners" available in the United States, and Slagis testified that the LRINEC "may be illegitimate."

¶26 The doctors' change in testimony at trial prevented Haught from effectively preparing for the attacks on the LRINEC. *See Waddell*, 207 Ariz. 529, ¶ 33 ("disclosure rules are designed to allow the parties a 'reasonable opportunity' to prepare" (quoting *Bryan*, 178 Ariz. at 476 n.5)). He was therefore prejudiced when the adverse testimony was given at trial without disclosure. *See* Ariz. R. Civ. P. 37 cmt. to 1996 & 1997 amend. ("Prejudice at this point [disclosure during trial] is inevitable."); *Allstate Ins. Co. v. O'Toole*, 182 Ariz. 284, 288 (1995) (suggesting that prejudice can increase as trial approaches). The change in the experts' opinions should have been disclosed, *see Sandretto*, 234 Ariz. 351, ¶ 34; *Jimenez*, 206 Ariz. 424, ¶ 4, and the undisclosed opinions should have been precluded because Haught was prejudiced, *see* Ariz. R. Civ. P. 37(c)(1); *Marquez*, 231 Ariz. 437, ¶¶ 16, 23. Accordingly, the trial court abused its discretion in permitting the undisclosed opinions into evidence. *See Sandretto*, 234 Ariz. 351, ¶ 34; *Files*, 200 Ariz. 64, ¶ 2.

Juror Misconduct

¶27 Haught argues the trial court erred by not ordering a new trial or holding an evidentiary hearing regarding the jury's potentially having considered extraneous information. We need not address this issue as we have already determined that a new trial is necessary and it is unlikely to occur on remand.

4C Medical Group's Cross-Appeal

¶28 4C Medical Group argues in its cross-appeal that the trial court erroneously denied its costs. In light of our decision discussed in detail above, 4C Medical Group is not entitled to its costs as it is no longer the prevailing party. *See* A.R.S. § 12-341; *cf. Bell-Kilbourn v. Bell-Kilbourn*,

216 Ariz. 521, ¶ 13 (App. 2007) (prevailing party entitled to costs upon compliance with Rule 21, Ariz. R. Civ. App. P.).

PHM's Cross-Appeal

¶29 In its cross-appeal, PHM challenges the trial court's order denying its motion to name Dr. Cory as a non-party at fault. PHM argues that the court erred in "granting summary judgment on a basis not raised in . . . Cory's motion for summary judgment," which subsequently led to the "court's erroneous denial of [PHM]'s request" to list Cory as a non-party at fault.

Jurisdiction

¶30 We first address Haught's argument that we lack jurisdiction to review the matter because PHM failed to "provide[] notice of this cross-appeal" to Dr. Cory, an "indispensable party" and "[v]acating the judgment . . . [would] alter[his] substantial right." We have an independent duty to determine whether we have jurisdiction to consider an appeal. *See Sorensen v. Farmers Ins. Co. of Ariz.*, 191 Ariz. 464, 465 (App. 1997). If jurisdiction is lacking, we must dismiss. *See Davis v. Cessna Aircraft Corp.*, 168 Ariz. 301, 304 (App. 1991).

¶31 Before trial, Dr. Cory moved for summary judgment "on causation due to Plaintiffs' failure to show that any alleged breach of the standard of care by Dr. Cory caused and/or contributed to any of . . . Haught's actual injuries." PHM filed a motion to join Cory's motion for summary judgment. In his response, Haught stated he would not oppose Cory's motion, reasoning that Cory had not breached "the standard of care in his unique role as a consulting surgeon" and "his performance in that role did not . . . cause the delays or failures to act by others." Haught explained further that the lack of "evidence or assertion by others faulting Cory for causing a negligent delay," coupled with the other defendants' "non-opposition" was "sufficient for Cory to be dismissed." However, Haught opposed dismissal of the parties who joined Cory's motion, including PHM, as "their role, duties, acts, and omissions" differed from Cory's. The trial court granted Cory's motion for summary judgment, but denied PHM's motion to join in that motion. The court also denied PHM's subsequent motion to name Cory as a non-party at fault. As noted above, PHM challenges that decision on cross-appeal.

¶32 A cross-appeal may be dismissed for lack of jurisdiction if the cross-appellant fails to include an indispensable party. *See Burrows v. Taylor*, 129 Ariz. 212, 213 (App. 1981) ("[A]ll parties to an action whose

interest will be affected by the result of the appeal must be made parties to the appellate proceedings or the appeal must be dismissed."). Whether a party is indispensable on appeal "depends upon whether he has an interest in opposing the object sought to be accomplished by the appeal." *Marriott Corp. v. Indus. Comm'n*, 147 Ariz. 116, 118 (1985) (quoting *Dunn v. Law Offices of Ramon R. Alvarez*, 119 Ariz. 437, 440 (App. 1978)). Yet, failure to explicitly name an indispensable party in an appeal "is not always fatal," *see id.* at 119, as long as "the judgment being appealed is sufficiently identified and sufficient notice is given so that the putative appellee is neither misled nor prejudiced," *see Hopper v. Indus. Comm'n*, 27 Ariz. App. 732, 737 (1976); *see also* Ariz. R. Civ. App. P. 8(d) (absent failing to timely file a notice of cross-appeal, any notice deficiencies will "not affect the appellate court's jurisdiction, but . . . may be grounds for other appropriate appellate court action, including dismissal of the . . . cross-appeal"). For instance, omitting a party's name in the caption will not deprive the appellate court of jurisdiction if the party was otherwise sufficiently notified. *See Hopper*, 27 Ariz. App. at 737 (party sufficiently notified of appeal when it received subsequent petition of new injury claim within original claim number). In contrast, when a party's name is omitted from the caption coupled with a lack of sufficient notice, we cannot exercise jurisdiction to review the cross-appeal and must dismiss. *See Marriott*, 147 Ariz. at 119.

¶33 Despite PHM's claim that it only seeks to appeal the trial court's order denying leave to name Dr. Cory as a non-party at fault, challenging that order inherently challenges the court's summary judgment ruling because PHM relied entirely on the standard-of-care and causation evidence developed by Haught for its non-party at fault designation. This is what distinguishes this case from others. "A defendant may name a non-party at fault even if the plaintiff is precluded from recovering from the non-party." *A Tumbling-T Ranches v. Flood Control Dist.*, 222 Ariz. 515, ¶ 83 (App. 2009). "As an affirmative defense, however, the defendant must prove that the non-party is actually at fault." *Id.* In a medical malpractice case, this means the defendant asserting non-party fault must file a preliminary expert opinion affidavit and ultimately must prove the non-party healthcare provider deviated from the standard of care and such deviation "proximately caused the claimed injury." *Ryan v. San Francisco Peaks Trucking Co.*, 228 Ariz. 42, ¶¶ 23-24 (App. 2011).

¶34 In *Ryan*, this court held "that a defendant may rely on a plaintiff's preliminary expert opinion affidavit to establish prima facie proof of fault by a nonparty, provided that the affidavit is admissible under the rules of evidence and satisfies the elements of a medical malpractice claim." *Id.* ¶ 30. In this case, the trial court granted Dr. Cory's motion for

summary judgment, which argued that Haught could not prove Cory was at fault as a matter of law. Thus, as Haught correctly points out, PHM can obtain the relief it seeks only if the judgment in favor of Cory is vacated. Cory therefore would have had an interest in opposing PHM's position to review the court's denial and underlying summary judgment ruling on appeal, *see Marriott*, 147 Ariz. at 118, and failing to permit Cory to be heard on the matter would prejudice him, *see Hopper*, 27 Ariz. App. at 737.[6]

¶35 In sum, we conclude that Dr. Cory is an indispensable party and should have been included as a party to the appeal. Because PHM did not provide Cory with notice of the appeal, *see id.*, we must dismiss its cross-appeal for lack of jurisdiction, *see Marriott*, 147 Ariz. at 119; *Burrows*, 129 Ariz. at 213.

Attorney Fees and Costs

¶36 Haught requests his costs on appeal pursuant to Rule 21, Ariz. R. Civ. App. P. He also requests his attorney fees pursuant to Rule 25, Ariz. R. Civ. App. P., arguing that PHM's cross-appeal "lacks jurisdiction, encourages inconsistent judgments, and seeks to vacate a judgment in favor of a co-defendant not provided notice of or made a party to this cross-appeal" as well as "casts allegations of serious professional misconduct amounting to fraud on the court against Haught and Dr. Cory's counsel." In our discretion, we deny Haught's request for attorney fees because PHM's cross-appeal is not frivolous. *See* Ariz. R. Civ. App. P. 25; *In re Levine*, 174 Ariz. 146, 153 (1993) (sanctions pursuant to Rule 25 apply to "claims 'for which there is no justification'" (quoting *Johnson v. Brimlow*, 164 Ariz. 218, 222 (App. 1990))); *City of Phoenix v. Bellamy*, 153 Ariz. 363, 367-68 (App. 1987) (appeal not frivolous if reasonable people may differ on legal questions presented). Because Haught is the prevailing party on cross-appeal, he is entitled to his costs. *See Braillard v. Maricopa County*, 224 Ariz. 481, ¶ 60 (App. 2010).

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[6]Notably, in his response to Cory's motion for summary judgment, Haught alleged that "[d]ismissal by summary judgment prevents (as a matter of law) any remaining party from designating [Cory] as a 'non party at fault,'" citing *Rigney v. Superior Court*, 17 Ariz. App. 546 (1972), and *Fleitz v. Van Westrienen*, 114 Ariz. 246 (App. 1977). PHM then filed a Request to Withdraw Dismissal of Cory, which Cory opposed, and the trial court denied.

Disposition

¶37 For the reasons stated above, we reverse and remand for a new trial.

B R E A R C L I F F E, Judge, concurring in part and dissenting in part:

¶38 I concur in the decision as to Haught's appeal and the remand for a new trial, but dissent in part with regard to the dismissal of Appellee Payson Healthcare Management Inc.'s (PHM) cross-appeal on jurisdictional grounds. Because the majority fails to support its determination that we lack jurisdiction over the cross-appeal, I would address PHM's cross-appeal and reverse the trial court's refusal to permit PHM to name Dr. Cory as a non-party at fault.

¶39 The ability to name a non-party at fault is part of Arizona's overall statutory scheme of comparative fault. Under A.R.S. § 12-2506(A), in a case such as this,

> the liability of each defendant for damages is several only and is not joint, except as otherwise provided in this section. Each defendant is liable only for the amount of damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be entered against the defendant for that amount. To determine the amount of judgment to be entered against each defendant, the trier of fact shall multiply the total amount of damages recoverable by the plaintiff by the percentage of each defendant's fault, and that amount is the maximum recoverable against the defendant.

A defendant is entitled to have a jury consider the fault of another whether or not the plaintiff has sued that person or entity, and even if that party is not joinable as a co-defendant:

> In 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.

§ 12-2506(B); *Cramer v. Starr*, 240 Ariz. 4, ¶ 13 (2016). To that end, procedurally, before trial, a defendant in a wrongful death or personal injury case must formally identify a non-party alleged to be completely or partially at fault and the factual basis for the claim. Ariz. R. Civ. P. 26(b)(5). The defendant then carries the burden at trial to demonstrate such non-party liability and may urge an apportionment of fault to that non-party by the jury. *See Cramer*, 240 Ariz. 4, ¶ 18.

¶40 Here, the majority concludes, regardless of whether PHM properly disclosed Dr. Cory as a non-party at fault, that PHM failed to properly join Cory as an indispensable party to this appeal depriving us of jurisdiction over PHM's cross-appeal. The majority asserts that Cory was an indispensable party on appeal because PHM "can obtain the relief it seeks only if the judgment in favor of Cory is vacated" and "failing to permit Cory to be heard on the matter would prejudice him." As a consequence of failing to address the cross-appeal, this decision leaves undisturbed the trial court's ruling on PHM's notice of a non-party at fault. Nowhere, however, does the majority identify legal support for its conclusion that the court's underlying summary judgment ruling would need to be vacated to permit the cross-appeal. Indeed, the stated statutory effect of § 12-2506 tells us that the opposite is true—neither Cory nor any non-party at fault is prejudiced by being so named:

> Assessments of percentages of fault for nonparties are used only as a vehicle for accurately determining the fault of the named parties. ***Assessment of fault against nonparties does not subject any nonparty to liability in this or any other action*** . . . .

§ 12-2506(B) (emphasis added).

¶41 Because a non-party at fault designation does not expose a non-party to liability, even if a plaintiff has settled with a tortfeasor and released all claims against him, a defendant may name that released party for purposes of shifting liability: "Negligence or fault of a nonparty may be considered if the plaintiff entered into a settlement agreement with the nonparty or if the defending party gives notice before trial, in accordance with requirements established by court rule, that a nonparty was wholly or partially at fault." § 12-2506(A). A defendant may name another as a non-party at fault even where that non-party is otherwise immune from suit. *Dietz v. Gen. Elec. Co.*, 169 Ariz. 505, 511 (1991). And further, as relevant here, our supreme court, in *Sanchez v. City of Tucson*, has suggested that

even where a co-defendant has been dismissed after summary judgment, a remaining defendant may still properly name the dismissed party as a non-party at fault:

> the State can name nonparties at fault and have the trier of fact apportion liability among them, thus reducing the amount recoverable from the State. *See* A.R.S. § 12–2506(A). In fact, after the trial court in this case granted the City's motion for summary judgment, the State named the City a nonparty at fault pursuant to Rule 26(b)(5) of the Arizona Rules of Civil Procedure and A.R.S. § 12–2506(B).

191 Ariz. 128, ¶ 25 (1998).

¶42 The defendant's right to name another as a non-party at fault and to reduce its own liability is a substantive right. *See State v. Mahoney*, 246 Ariz. 493, ¶ 12 (App. 2019). There is nothing about PHM's assertion of that right that requires Dr. Cory to be made a party to this appeal. Certainly, there is nothing requiring that the dismissal of Haught's claims against Cory below be reconsidered or reversed. Allowing PHM to exercise its substantive right to name a non-party at fault at trial and reduce its exposure to liability, imposes no burden or prejudice on Cory but rather serves fully the purposes of Arizona's comparative fault regime. In my view, the trial court abused its discretion and erred in denying PHM leave to name Cory as a non-party at fault in the matter, and this court mistakenly avoids the question on jurisdictional grounds.

¶43 For the foregoing reasons, although I concur otherwise and concur in the result of the appeal, I respectfully dissent in part as to the cross-appeal.