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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

PATRICIA BRUINS, Personal Representative of the Estate of Elvis Kigel Henry, Plaintiff/Appellant, v. DESERT VILLA ADULT CARE, INC., an Arizona entity licensed to operate DESERT VILLA, an assisted living facility; and DESERT VILLA HOMES, INC., an Arizona corporation, Defendants/Appellees.	2 CA-CV 2012-0015 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20100444

Honorable Jan E. Kearney, Judge

AFFIRMED

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K E L L Y, Judge.

¶1 This action arose from the injury and death of appellant Patricia Bruins's father while a resident at an assisted living facility. On appeal from summary judgment entered in favor of appellees Desert Villa Adult Care, Inc. and Desert Villa Homes, Inc. (collectively "Desert Villa"), Bruins claims the trial court erred by finding her expert witness was not qualified to testify under A.R.S. § 12-2604. Consequently, we must determine whether an occupational therapist qualifies as an expert in a medical malpractice action against an assisted living facility and its caregivers. For the reasons that follow, we affirm.

Background

¶2 The relevant facts are undisputed. While under the care of Desert Villa, an assisted living facility, Bruins's father, Elvis K. Henry, suffered a fall that led to his death. As the personal representative of her father's estate, Bruins sued Desert Villa, alleging, inter alia, "nursing malpractice," negligent hiring and supervision, and violation of the Adult Protective Services Act (APSA). A licensed assisted living facility manager and a certified caregiver were responsible for Henry's day-to-day care. Bruins disclosed an occupational therapist, Linda Schlenker, as an expert to testify to the standard of care Desert Villa and its staff owed to Henry. Desert Villa filed a motion for summary judgment in which it asserted Schlenker was not qualified to testify and, therefore, insufficient evidence supported Bruins's claims. The trial court granted the motion,[1] and Bruins moved for reconsideration, which the court denied. This appeal followed.

[1]In granting summary judgment to Desert Villa, the trial court expressly found that medical malpractice was the basis of Bruins's APSA claim and, impliedly, each of her

Discussion

¶3 Bruins first argues the trial court erred by finding that her disclosed expert witness was not qualified to give expert testimony under § 12-2604 and, therefore, summary judgment in favor of Desert Villa was not appropriate. A trial court properly grants summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(c); *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). "On appeal from summary judgment, we must determine de novo whether there are any genuine issues of material fact and whether the trial court erred in applying the law." *Bothell v. Two Point Acres, Inc.*, 192 Ariz. 313, ¶ 8, 965 P.2d 47, 50 (App. 1998). Additionally, questions regarding the interpretation and application of a statute are questions of law that we review de novo. *Nordstrom v. Cruikshank*, 213 Ariz. 434, ¶ 9, 142 P.3d 1247, 1251 (App. 2006). When interpreting a statute, our primary goal is to give effect to the legislature's intent in enacting it. *State v. Hinden*, 224 Ariz. 508, ¶ 9, 233 P.3d 621, 623 (App. 2010). And, "[t]he best indication of legislative intent is the plain language of the statute." *Bither v.*

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remaining claims. The court concluded that this is "an action against health care professional[s] . . . to which the medical malpractice standards apply," and, therefore, expert testimony is required to survive summary judgment on all of the claims. On appeal, Bruins does not challenge the conclusion that the medical malpractice standards apply to her APSA claim. We note, however, that our supreme court has decided that medical malpractice claims and APSA claims are not mutually exclusive. *In re McGill v. Albrecht*, 203 Ariz. 525, ¶¶ 19, 22, 57 P.3d 384, 389-90 (2002). Indeed, the court held that "acts of medical negligence . . . may provide a basis for an APSA action" and suggests the medical malpractice statutes would not apply to all APSA claims. *Id.* ¶¶ 19, 21-22. Nevertheless, because Bruins does not challenge the dismissal of her separate APSA claim on the ground that medical malpractice standards should not apply to it, we do not address the dismissal of this claim.

Country Mut. Ins. Co., 226 Ariz. 198, ¶ 8, 245 P.3d 883, 885 (App. 2010). When, as here, the language of the statute is clear and unambiguous, we need not employ other principles of statutory construction in determining the meaning of the statute. *See Sierra Tucson, Inc. v. Lee*, 637 Ariz. Adv. Rep. 27, ¶ 9 (Ct. App. June 28, 2012).

¶4 In a medical malpractice case, a plaintiff ordinarily is required to present expert testimony of the required standard of care and its breach.[2] *Barrett v. Harris*, 207 Ariz. 374, ¶ 20, 86 P.3d 954, 960 (App. 2004). Section 12-2604(A)(2) requires that an expert be a licensed health professional who, "[d]uring the year immediately preceding the occurrence giving rise to the lawsuit, devoted a majority of [her] professional time to either or both" (1) the "active clinical practice of the same health profession as the defendant" or (2) the instruction in an accredited program in the same profession as defendant.

¶5 Although the trial court found Schlenker is a licensed health professional, it noted that she has

> worked in the past in assisted living facilities "on contract," but has never been on staff at such a facility, has not worked full time at such a facility, either recently or for more than six to nine months, and has not been a supervisor or administrator of such a facility. During the pertinent time period she has spent about 40% of her time working with patients in assisted

[2]Bruins alternatively asserts this is one of the rare medical malpractice cases where expert testimony is not required. *See Riedisser v. Nelson*, 111 Ariz. 542, 544, 534 P.2d 1052, 1054 (1975) (expert testimony required "unless the negligence is so grossly apparent that a layman would have no difficulty in recognizing it"). But this case is in no way similar to the example in *Riedisser*, in which a rag was left in a patient's abdomen for two years. *See id.* We agree with the trial court's conclusion that this case does not fall within the limited exception to the requirement of expert testimony.

> living facilities and 60% serving patients in their private homes.

Bruins has not disputed these findings. Instead, she contends that because Schlenker has extensive experience in conducting fall assessments, Schlenker meets the requirements of a specialist pursuant to § 12-2604(A)(1) and, therefore, is qualified to testify as an expert. But the requirements relating to specialists in § 12-2604(A)(1) would be applicable only if Desert Villa or its employees claimed a specialty recognized by the American Board of Medical Specialties.[3] *See Baker v. Univ. Physicians Healthcare*, 228 Ariz. 587, ¶¶ 7-8, 269 P.3d 1211, 1214 (App. 2012); *see also* § 12-2604(A)(1), (B).

¶6 Bruins further maintains that Schlenker qualified as an expert because she "is in the active clinical practice of doing fall risk assessments and implementing fall risk prevention protocols for the safety of geriatric patients." But, despite Bruins's apparent contention to the contrary, the statute does not require expert testimony based upon the type of injury sustained; it instead focuses on the profession of the health professional involved, requiring that the expert and the defendant be involved in the same health profession. *See* § 12-2604(A)(2). Schlenker is an occupational therapist, not a certified caregiver or a licensed manager of an assisted living facility. Because Schlenker was not

[3]Bruins also makes an argument based on definitions of the terms "specialist" and "specialty" as used in § 12-2604(A)(1). But she did not raise these issues in the trial court, and they are not otherwise relevant to our determination of Schlenker's qualifications under the law. Therefore, this argument has been waived. *See Dillon-Malik, Inc. v. Wactor*, 151 Ariz. 452, 454, 728 P.2d 671, 673 (App. 1986) ("An argument or a theory not urged at the trial court level cannot be asserted for the first time on appeal to reverse the granting of a summary judgment."). Moreover, this court recently concluded that the term "specialty" in § 12-2604(A)(1) refers to one of the twenty-four boards established by the American Board of Medical Specialties. *Baker v. Univ. Physicians Healthcare*, 228 Ariz. 587, ¶¶ 7-8, 269 P.3d 1211, 1214 (App. 2012).

engaged in the same health profession as the defendant, the trial court was correct when it concluded that she may "be qualified to testify concerning practice standards applicable to individual occupational therapists working at [Desert Villa], but not as to the standards at issue in this case." Consequently, the court did not err by concluding that Schlenker could not testify as an expert against Desert Villa.

¶7 At oral argument, Bruins argued that § 12-2604 "doesn't have an application in this particular case," where a vulnerable adult's injury resulted from a fall, and should not apply because the legislature did not contemplate its application to such institutions.[4] But she provided no legal authority to support this assertion. And because assisted living facilities are subject to medical malpractice claims, *see* A.R.S. § 12-561(1)(a), (2), to which § 12-2604 applies, in the absence of any authority to the contrary, we decline to disregard the statutes in this manner.

¶8 Alternatively, Bruins appears to assert that even without expert testimony, there was sufficient evidence to present a genuine issue of material fact as to whether Desert Villa had breached the applicable standard of care. But she does not develop this argument in her brief. Accordingly, this argument is waived. *See* Ariz. R. Civ. App. P. 13(a)(6) ("An argument . . . 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."); *Polanco v. Indus. Comm'n*, 214 Ariz. 489, n.2, 154

[4]She based this argument, at least in part, on the fact that a certified caregiver, whose conduct is at the very core of this case, is not "licensed" as would be required by § 12-2604. But she concedes that the facility manager is licensed as an assisted living facility manager and that someone in a similar position could testify as to the standard of care.

P.3d 391, 393-94 n.2 (App. 2007) (appellant's failure to develop and support argument waives issue on appeal). And to the extent that Bruins raises new issues in her reply brief, these issues also are waived. *See Phelps v. Firebird Raceway, Inc.*, 210 Ariz. 403, n.1, 111 P.3d 1003, 1004 n.1 (2005) (we do not address arguments raised for first time in reply brief).

Disposition

¶9 The trial court's grant of summary judgment is affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

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

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