IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

LEONARD BERNARDO,
Plaintiff/Appellee,

v.

WINDSOR PALM VALLEY LLC, et al.,
Defendants/Appellants.

No. 1 CA-CV 19-0197
FILED 1-28-2020

Appeal from the Superior Court in Maricopa County
No. CV2016-015458
The Honorable Daniel G. Martin, Judge

AFFIRMED

COUNSEL

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Counsel for Plaintiff/Appellee

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By Anthony J. Fernandez, Rita J. Bustos
Counsel for Defendants/Appellants

MEMORANDUM DECISION

Judge David D. Weinzweig delivered the decision of the Court, in which Presiding Judge Randall M. Howe and Judge David B. Gass joined.

W E I N Z W E I G, Judge:

¶1 Windsor Palm Valley, LLC, dba Palm Valley Rehabilitation and Care Center ("Palm Valley"), appeals the superior court's denial of its motion to compel arbitration. We affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Anna Bernardo ("Mother") was admitted in January 2013 to Palm Valley's nursing home. She suffered from various cognitive and physical ailments, including dementia, psychosis, Parkinson's disease, functional quadriplegia, heart disease and chronic kidney disease.

¶3 Her son, Michael, signed the forms for her admission as the "Responsible Party," including the Admissions Agreement, because Mother "did not know what she was signing." The Admissions Agreement included an arbitration clause for "any dispute as to medical malpractice," defined as a disagreement over "whether any medical service rendered under the contract [was] necessary or unauthorized or [was] improperly, negligent or incompetently rendered."

¶4 Mother fell from her wheelchair in March 2016 while returning to her room from breakfast in the dining room. A certified nursing assistant was pushing the wheelchair when Mother's foot became entangled in a loose mattress cord, catapulting Mother head-first onto the floor and breaking her neck. Mother died five days later from her injuries.

¶5 Leonard Bernardo sued Palm Valley as personal representative of Mother's estate and on behalf of her statutory beneficiaries ("Plaintiffs"), claiming wrongful death, negligence and violation of the Adult Protective Services Act ("APSA"). Plaintiffs certified that expert opinion testimony might be needed under A.R.S. § 12-2603 yet recognized that "nursing homes appear not to be healthcare professionals."

¶6 Palm Valley moved to compel arbitration of the negligence and APSA claims, while conceding that Plaintiffs could not be compelled to arbitrate the wrongful death claim "under the presently known facts and current Arizona precedent." Plaintiffs opposed the motion, arguing that Michael lacked authority to bind Mother. After briefing and oral argument, the superior court denied the motion, reasoning that Plaintiffs' negligence and APSA claims did not present a "medical malpractice" dispute under the arbitration clause:

> The Court finds from the uncontested facts that the injury in this case resulted from a caregiver, a certified nursing assistant, performing a routine task of transporting a disabled elderly patient in a wheelchair, catching a cord, and ejecting the patient from the wheelchair, resulting in a broken cervical spine and, ultimately, death. The Court further finds the failure to properly perform the routine act of pushing a wheelchair did not arise from medical malpractice within the meaning of the Agreement.

¶7 The court also found that Michael had "no express or apparent authority" to bind Mother "for the purpose of entering in the [arbitration] [a]greement." The court invited Palm Valley, however, to conduct more discovery into Michael's authority and move for reconsideration after six months.

¶8 Almost 15 months later, Palm Valley moved to reconsider, arguing the superior court must compel arbitration of the negligence and APSA claims because "it has become clear" through discovery that Plaintiffs "have brought a medical negligence case against [d]efendants" and new evidence has surfaced that proves Michael could and did bind Mother. The court again refused to compel arbitration because Plaintiffs had not asserted "a medical malpractice claim within the meaning of the arbitration clause," leaving no reason to examine Michael's authority.

¶9 The superior court entered a signed judgment denying the motion to compel arbitration and motion to reconsider. Palm Valley timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101.01(A)(1).

DISCUSSION

¶10 Palm Valley argues the superior court erroneously found that Plaintiffs' APSA and negligence claims were not "medical malpractice"

claims under the arbitration clause. Plaintiffs counter that the superior court correctly refused to compel arbitration because Plaintiffs did not sue for medical malpractice. We review the interpretation of an arbitration clause de novo, *Estate of Decamacho ex rel. Guthrie v. La Solana Care & Rehab, Inc.*, 234 Ariz. 18, 20, ¶ 9 (App. 2014), and the denial of a motion to compel arbitration de novo, *Nat'l Bank of Ariz. v. Schwartz*, 230 Ariz. 310, 311, ¶ 4 (App. 2012).[1]

¶11 The fundamental prerequisite to compel arbitration is an actual agreement to arbitrate. *See S. Cal. Edison Co. v. Peabody W. Coal Co.*, 194 Ariz. 47, 51, ¶ 11 (1999). We interpret an arbitration clause and determine its scope under basic contract interpretation principles. *Chang v. Siu*, 234 Ariz. 442, 447, ¶ 19 (App. 2014). Our purpose is to determine and honor the parties' intent, which is best reflected by the language of the arbitration clause itself. *Id.* Thus, where the intent "is expressed in clear and unambiguous language, there is no need or room for construction or interpretation." *Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, 593, ¶ 9 (App. 2009).

¶12 The arbitration clause at issue is captured in 90 words:

> I understand that any dispute as to medical malpractice (that is, whether any medical service rendered under the contract were necessary or unauthorized or were improperly, negligent or incompetently rendered), will be determined by submission to arbitration as provided by Arizona law, and not by lawsuit or court process, except as Arizona law provides for judicial review of arbitration proceedings. Both parties to this agreement give up their right to have any such dispute decided in a court of law before a jury, and instead accept the use [of] arbitration.

¶13 Although Palm Valley insists we should look elsewhere, the arbitration clause at issue defines the term "medical malpractice" as a

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[1] Plaintiffs raise more arguments on appeal, including that (1) Palm Valley waived its arbitration rights by proceeding with litigation rather than pursuing an interlocutory appeal to compel arbitration; (2) Michael lacked authority to sign the Admissions Agreement on Mother's behalf; and (3) the arbitration clause was invalid and unenforceable for lack of consideration and unconscionability. Given our interpretation of the arbitration clause, we need not address the other arguments.

dispute about "whether any *medical service* rendered under the contract were necessary or unauthorized or were improperly, negligent or incompetently rendered." Given that definition, the issue is whether Palm Valley's nursing assistant was performing "medical services" when returning a wheelchair-bound resident from the dining room.

¶14 We agree with the superior court. Plaintiffs' claims are not for "medical malpractice" under the arbitration agreement because pushing a wheelchair from breakfast is not a "medical service" under the ordinary meaning of that term. *Chandler Med. Bldg. Partners v. Chandler Dental Group*, 175 Ariz. 273, 277 (App. 1993) ("The controlling rule of contract interpretation requires that the ordinary meaning of language be given to words where circumstances do not show a different meaning is applicable.").[2]

¶15 The dictionary definition of "medical" is "of, relating to, or concerned with physicians or the practice of medicine," Webster's Ninth New Collegiate Dictionary 737 (1988), and "services" are defined as a "duty or labor to be rendered by one person to another," *Services*, Black's Law Dictionary (6th ed. 1990). Plaintiffs do not allege misconduct related to physicians or the practice of medicine; the accident is not attributed to a physician-patient relationship or the practice of medicine. Mother was injured in the normal course of an ordinary day at Palm Valley—returning from breakfast in the dining room. She was not returning from a doctor's appointment or waiting in a hospital recovery room after surgery. *Putnam County Hosp. v. Sells*, 619 N.E.2d 968, 969 (Ind. App. 1993) (holding that lawsuit was for medical malpractice where hospital patient fell from bed in post-operative recovery room because the guardrails were not raised).

¶16 The legislature also generally defines "medical services" as "services that pertain to medical care and that are performed at the direction of a physician on behalf of patients by physicians, dentists, nurses and other professional and technical personnel." A.R.S. § 36-401(31) (health

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[2] We note that Palm Valley chose the arbitration clause used in the Admissions Agreement and could have used broader language to expand the scope of arbitration. *See, e.g.*, *Ruesga v. Kindred Nursing Centers, LLC*, 215 Ariz. 589, 591, ¶ 3 (App. 2007) (nursing home admissions agreement required arbitration for "[a]ny and all claims or controversies arising out of or in any way relating to this Agreement or the Resident[']s stay at the Facility") (alteration in original).

care institutions chapter). At a minimum, the record on appeal includes no evidence that a physician directed the wheelchair be pushed, and the service did not pertain to medical care.

¶17 We are not persuaded that Plaintiffs have sued for "medical malpractice" simply because nursing homes are healthcare providers and their decisions always affect patient treatment. A slip-and-fall lawsuit does not morph into a medical malpractice action when the fall happens at a nursing home rather than a supermarket. *See Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386, 404, ¶ 80 (App. 2005) ("[A] hospital may be found negligent for a patient's slip and fall in a hospital hallway. These are negligent acts that have nothing to do with the rendering of medical or health care-related services."). Plaintiffs' claims arise from negligent maintenance and environmental failures—a loose cord caused Mother's fall, and standard maintenance would have solved the problem. Palm Valley's staff and investigators uniformly ascribed the accident to environmental factors—defining the "root cause" as a loose cord and proposing simple zip ties as the solution. A claim for ordinary negligence does not transform into an action for medical malpractice just because the defendant is a health care provider. *Id.*; *cf. Munson v. Lakewood Quarters Ltd. P'ship*, 965 So. 2d 448, 454 (La. App. 2007) (finding that wrongful death lawsuit was not a medical malpractice action where nursing home resident "fell from her wheelchair when an employee of defendants, attempting to transport [the resident] from her room to the dining area, failed to adequately secure her in her wheelchair").

¶18 Palm Valley next insists this lawsuit is a "medical malpractice action" as defined under the Medical Malpractice Act, A.R.S. § 12-561(2) and case law interpreting the statute. But the arbitration clause at issue defines "medical malpractice," and the agreed-upon definition is narrower than the statute. *Compare* A.R.S. § 12-561(2) (defining a "medical malpractice action" as an "action for injury or death against a licensed health care provider" for conduct "in the rendering of health care, medical services, nursing services or other health-related services or for the rendering of such health care, medical services, nursing services or other health-related services."), *with* Admissions Agreement, ¶ 8 ("[W]hether any

medical service rendered under the contract were necessary or unauthorized or were improperly, negligent or incompetently rendered.").[3]

¶19 Palm Valley also argues this is a "medical malpractice" lawsuit because Plaintiffs have taken discovery on and allege "systemic health care facility issues," including previous falls, inadequate supervision, poor training, underfunding and understaffing. But those allegations track Plaintiffs' ordinary negligence claim, as does a systematic narrative of failures. The systemic nature of issues does not transform an ordinary tort into medical malpractice.

¶20 Palm Valley likewise stresses that Plaintiffs disclosed an expert witness to testify about the nursing standard of care. But Plaintiffs required no expert witnesses under A.R.S. § 12-2603 to establish a professional standard of care for a routine, non-medical negligence claim; indeed, professional skills are not required to push a wheelchair. Arizona courts have long recognized that expert testimony is not required in ordinary negligence cases to establish a general duty of due care or breach of that duty because the factfinder "can rely on its own experience in determining whether the defendant acted with reasonable care under the circumstances." *Bell v. Maricopa Med. Ctr.*, 157 Ariz. 192, 194 (App. 1988). Nor does Plaintiffs' decision to offer gratuitous expert testimony transform the nature of Plaintiffs' claims.

CONCLUSION

¶21 Because we must honor the plain words of the arbitration clause, we affirm the superior court's denial of Palm Valley's motion to compel arbitration.

AMY M. WOOD • Clerk of the Court
FILED: AA

[3] Palm Valley offers no evidence or argument that the parties intended to incorporate the statute's definition of "medical malpractice" into the arbitration clause. Neither the Admissions Agreement nor arbitration clause even reference, much less incorporate, the statute.