DIVISION ONE
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PHILIP G. URRY, CLERK
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**IN THE COURT OF APPEALS**
**STATE OF ARIZONA**
**DIVISION ONE**

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| LAS CORRIENTES, L.L.C., an Arizona limited liability company dba Bear Creek Golf Course,<br><br>Plaintiff/Appellant,<br><br>v.<br><br>THE SUNDT COMPANIES, INC., an Arizona corporation; SUNDT CONSTRUCTION, INC., an Arizona corporation,<br><br>Defendants/Appellees. | No. 1 CA-CV 09-0374<br><br>DEPARTMENT B<br><br>**MEMORANDUM DECISION**<br>(Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure) |

Appeal from the Superior Court in Maricopa County

Cause No. CV 2007-012052

The Honorable Mark F. Aceto, Judge

**AFFIRMED**

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Paul M. Rybarsyk PC — Scottsdale
By Paul M. Rybarsyk
Attorney for Plaintiff/Appellant

The Doyle Firm PC — Phoenix
By William H. Doyle
And D. Andrew Bell
Attorneys for Defendants/Appellees

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**S W A N N**, Judge

**¶1** Las Corrientes, L.L.C., d/b/a Bear Creek Golf Course ("Plaintiff"), appeals from the superior court's grant of summary judgment for The Sundt Companies, Inc. and Sundt Construction, Inc. ("Defendants"), and from the court's subsequent denial of a motion for new trial in this negligence action. For the reasons set forth below, we affirm.

**FACTS AND PROCEDURAL HISTORY**

**¶2** Because we are reviewing a decision granting summary judgment in favor of Defendants, we view the facts in the light most favorable to the non-moving party, Plaintiff. *Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003).

**¶3** In September 2004, the City of Chandler contracted with Defendants to perform construction on a portion of a city road adjacent to Plaintiff's golf course. Defendants commenced the road construction project in November 2004.

**¶4** In May or June 2005, Defendants removed the pavement from the portion of the city road that abuts Plaintiff's property line and the golf course's entry- and exit-way. From that time until September 2005, the area was in various stages of construction that involved sand, twelve-inch-high dirt mounds, gravel, and ultimately pavement.

**¶5** During the construction period, Daniel Strand, one of the golf course owners, "observed vehicles trying with great

difficulty to access the golf course." On one occasion, Strand saw an employee's vehicle become stuck in sand. On another occasion, he witnessed customers and employees unable to leave the golf course because the construction prevented their exit. Employees informed Strand that customers had made complaints and statements that indicated they would not return to the golf course until the construction was completed.

**¶6** Plaintiff sued Defendants for negligence, alleging that Defendants' construction activities had blocked ingress to and egress from the golf course and had caused Plaintiffs to suffer revenue losses and reputational harm. The court granted summary judgment for Defendants on the ground that Plaintiff did not present expert testimony regarding the standard of care applicable to road construction projects. It also denied Plaintiff's motion for a new trial.

**¶7** Plaintiff timely appeals. We have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

**DISCUSSION**

**¶8** Our review of a grant of summary judgment is *de novo*. *Andrews*, 205 Ariz. at 240, ¶ 12, 69 P.3d at 11. We will affirm if the superior court's ruling is correct for any reason. *Glaze v. Marcus*, 151 Ariz. 538, 540, 729 P.2d 342, 344 (App. 1986). Here, although the superior court granted summary judgment for Defendants on standard of care grounds, we need not reach the

question whether an expert was required because the record reveals that Plaintiff did not provide competent evidence of a causal connection between Defendants' conduct and Plaintiff's alleged damages.

**¶9** Summary judgment may be granted when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). A motion for summary judgment should be granted "if the facts produced in support of the claim . . . have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). Consequently, the mere existence of a "scintilla" of evidence that creates the "slightest doubt" is insufficient to withstand a motion for summary judgment. *Id.*

**¶10** To establish a negligence claim, a plaintiff must prove four elements: (1) a duty requiring the defendant to conform to a certain standard of care; (2) the defendant's failure to conform to that standard; (3) a reasonably close causal connection between the defendant's conduct and the plaintiff's resulting injury; and (4) actual damages. *Ontiveros v. Borak*, 136 Ariz. 500, 504, 667 P.2d 200, 204 (1983). To survive a motion for summary judgment, a plaintiff must produce

admissible evidence from which a reasonable jury could find in his favor on each element. *See Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, 116-17, ¶¶ 20-22, 180 P.3d 977, 981-82 (App. 2008). In their motion for summary judgment, Defendants argued, *inter alia*, that Plaintiff's claim for damages was based on "speculation and conjecture." We agree.

**¶11** A plaintiff must prove both causation-in-fact and proximate causation. *See Rogers ex rel. Standley v. Retrum*, 170 Ariz. 399, 401, 825 P.2d 20, 22 (App. 1991). Causation-in-fact exists when the defendant's conduct contributed, even if only to a small degree, to the plaintiff's harm and the harm would not have occurred but for the defendant's conduct. *Ontiveros*, 136 Ariz. at 505, 667 P.2d at 205. Whether causation-in-fact exists is usually a question for the jury; however, summary judgment may be appropriate when there exists no evidence from which reasonable people could find causation. *See Gipson v. Kasey*, 214 Ariz. 141, 143, ¶ 9 & n.1, 150 P.3d 228, 230 & n.1 (2007) (addressing summary judgment based on insufficient evidence of proximate cause); *Ontiveros*, 136 Ariz. at 505, 667 P.2d at 205 (acknowledging that in some cases the absence of cause-in-fact may be recognized as a matter of law).

**¶12** In response to the motion for summary judgment, Plaintiff produced only Strand's affidavit, the contract, contact information for complaining customers, and accounting

exhibits. In his affidavit, Strand stated that he saw vehicles experience "great difficulty" accessing the golf course. The affidavit did not identify the frequency with which vehicles had difficulty entering the golf course, nor did Strand assert personal knowledge that a vehicle ever abandoned attempts to access the golf course. Indeed, the affidavit cites only two incidents: one in which an employee's car became stuck in sand while trying to enter the golf course, and one in which several patrons were "stranded" on the golf course for an unspecified time because of Defendants' construction activities.

**¶13** Evidence not based on a witness's personal knowledge may not be considered for purposes of summary judgment. *Aranda v. Cardenas*, 215 Ariz. 210, 219, ¶¶ 33-34, 159 P.3d 76, 85 (App. 2007). Strand acknowledged at his deposition that he had seen only one vehicle become stuck in the construction area – and that vehicle belonged to an employee of the golf course, not a customer. At his deposition, Strand further admitted that he had no first-hand knowledge of other incidents or customer complaints. He also admitted that he could not identify any customers whose patronage he lost as a result of the construction. The entirety of the evidence concerning access problems, therefore, consists of Strand's observations of two incidents –- one of which did not involve any customers at all. Though Plaintiff had the opportunity to present evidence from

others who may have had first-hand knowledge of lost customers, it did not do so.

**¶14** Though road construction can surely cause inconvenience to the patrons of an affected business, the gravamen of Plaintiff's complaint is that the allegedly negligent construction caused him to lose business for a period of months. Even assuming that Defendants were somehow negligent in the construction of the improvements, the record is devoid of evidence of a link between Defendants' conduct and Plaintiff's lost business. Strand lacked any personal knowledge that the access problems he observed caused lost business. Though he referred to a list of complaining customers, and stated that those customers would testify about their access problems, he presented no admissible evidence that customers were unable or unwilling to visit the golf course because of the access problems.[1] Plaintiff further presented no evidence of the alleged "reputational harm."

**¶15** In addition to the absence of testimony concerning lost customers, the financial documents that Plaintiff provided likewise do not imply a causal connection between the period of

[1] We note also that Strand did not personally compile the list of names, and there is no evidence that he received any complaints.

construction and a decline in business.[2] In opposing Defendants' motion for summary judgment, Plaintiff did not provide a complete record of the data underlying Strand's calculation of damages. Plaintiff did, however, provide a record of monthly greens fees revenue –- which Strand testified represented the bulk of the alleged lost revenue –- for 2004, 2005 (the construction year), and 2006. These records reveal that the decline in business during the months of construction followed the same general seasonal revenue trends as Plaintiff's revenue in other years. A reasonable jury could not infer from the financial data alone that Defendants' construction activities were linked to revenue losses that would not otherwise have been sustained.

**¶16** We conclude, therefore, that Plaintiff did not provide evidence from which reasonable people could find causation-in-fact to support its claim for damages. Accordingly, summary judgment in favor of Defendants was appropriate.

[2] In a letter to Defendants, Strand estimated that the golf course lost $70,614 in revenue in August and September 2005. He did not provide an estimate of losses for the other construction months.

## CONCLUSION

**¶17** For the reasons set forth above, we affirm the grant of summary judgment in favor of Defendants.

/s/
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PETER B. SWANN, Judge

CONCURRING:

/s/
_____
PATRICIA K. NORRIS, Presiding Judge

/s/
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DANIEL A. BARKER, Judge