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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 12/07/2010  
RUTH WILLINGHAM,  
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IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STEVEN HARDY and MARY LOUISE ) 1 CA-CV 09-0790  
HARDY, husband and wife, )  
) DEPARTMENT A  
Plaintiffs/Appellants, )  
) **MEMORANDUM DECISION**  
v. )  
)  
CATHOLIC HEALTHCARE WEST, a ) Not for Publication -  
California non-profit ) (Rule 28, Arizona Rules  
corporation dba ST JOSEPH'S ) of Civil Appellate Procedure)  
HOSPITAL AND MEDICAL CENTER, )  
)  
Defendant/Appellee. )  
)

Appeal from the Superior Court in Maricopa County

Cause No. CV2007-011312

The Honorable Bethany G. Hicks, Judge

**AFFIRMED**

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And  
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**K E S S L E R**, Judge

¶1 Plaintiffs/Appellants Steven and Mary Louise Hardy appeal the superior court's summary judgment in favor of Defendant/Appellee Catholic Healthcare West d/b/a St. Joseph's Hospital and Medical Center ("St. Joe's") on their claims for medical malpractice. For the following reasons, we affirm.

**FACTUAL AND PROCEDURAL BACKGROUND**

¶2 Steven Hardy is a quadriplegic who received in-patient treatment at St. Joe's for pressure sores in November 2005 and January 2006. Steven also received out-patient care from Banner Health d/b/a Banner Good Samaritan Medical Center at the Banner Good Samaritan Medical Center Wound Clinic between January 2005 and March 2006. During this time, Dr. Marc Gottlieb, a plastic surgeon, treated Steven's pressure sores with surgical and non-surgical methods.

¶3 In June 2007, the Hardys filed a complaint in which they alleged St. Joe's, Banner Health, and Dr. Gottlieb negligently provided medical care to Steven. In particular, the Hardys alleged St. Joe's failed to provide appropriate pre- and post-operative care to Steven and failed to properly instruct the Hardys regarding at-home wound care, nutrition, and positioning.

¶4 St. Joe's asserted, pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2603(D) (Supp. 2009), that the Hardys would need expert witness testimony to prove the applicable standard of care, St. Joe's breach thereof, and causation, and asked the court to order the Hardys to provide a preliminary expert opinion affidavit. Thereafter, the Hardys produced the preliminary expert opinion affidavits of Dr. Carol Hollan, a plastic surgeon, and Donna G. Lockhart, a registered nurse and certified wound ostomy and continence nurse. Dr. Hollan and Nurse Lockhart opined that defendants had breached the standard of care in their treatment of Steven and that these breaches caused Steven's injuries.

¶5 After the deadline for expert witness disclosures, St. Joe's moved for summary judgment on the Hardys' claims on the grounds that Dr. Hollan and Nurse Lockhart did not meet the requirements of A.R.S. § 12-2603 because Dr. Hollan was not a wound care specialist, as required by A.R.S. § 12-2603(A)(1), and Nurse Lockhart had not devoted the majority of her professional time in the year immediately preceding Steven's injuries to active clinical practice or the instruction of students, as required by A.R.S. § 12-2603(A)(2). St. Joe's also asserted it was entitled to summary judgment because Dr. Hollan's and Nurse Lockhart's opinions did not establish a violation of the standard of care or causation. In support of

its motion, St. Joe's cited Dr. Hollan's and Nurse Lockhart's preliminary expert opinion affidavits, supplemental expert reports, and deposition testimony.

¶6 In response to the motion, the Hardys offered supplemental affidavits from Dr. Hollan and Nurse Lockhart, created after the discovery deadline and after St. Joe's filed its motion for summary judgment, to clarify their professional activities and opinions regarding Steven's care. St. Joe's asked the court to disregard the supplemental affidavits on the grounds that they were untimely and contained new representations that contradicted Dr. Hollan's and Nurse Lockhart's sworn prior testimony. It also argued that Dr. Hollan's and Nurse Lockhart's supplemental affidavits did not cure the deficiencies raised in its motion, provided only a scintilla of evidence or "slight doubt" regarding the merits of the Hardys' claims, and therefore were insufficient to defeat summary judgment.

¶7 The court entered summary judgment for St. Joe's and included a determination of finality pursuant to Rule 54(b), Arizona Rules of Civil Procedure.<sup>1</sup> The Hardys timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

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<sup>1</sup> Although the Hardys did not include a certified transcript of the oral argument on the motion in the record on appeal, as required by Arizona Rule of Civil Appellate Procedure 11(b)(1), St. Joe's submitted a copy of the transcript to this Court as an

## DISCUSSION

¶8 The Hardys contend the superior court erroneously granted summary judgment to St. Joe's. A court may grant summary judgment when "there is no genuine issue as to any material fact and [] the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). Summary judgment should be granted "if the facts produced in support of the claim or defense 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 or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). Consequently, a "scintilla" of evidence or evidence creating the "slightest doubt" about the facts may still be insufficient to withstand a motion for summary judgment. *Id.* For a claim or defense to withstand a motion for summary judgment and be presented to a jury, the proponent of the claim or defense must present evidence from which a reasonable jury could find, directly or by inference, that the probabilities favor the proponent. *Id.* at 310, 802 P.2d at 1009. If the evidence would allow a jury to resolve a material issue in favor of either party, summary judgment is improper.

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exhibit to its answering brief. The Hardys did not object. We therefore consider this transcript as part of the record on appeal. See ARCAP 3 (stating Court may suspend the requirements of the Arizona Rules of Civil Appellate Procedure in a particular case in the furtherance of justice).

*United Bank of Ariz. v. Allyn*, 167 Ariz. 191, 195, 805 P.2d 1012, 1016 (App. 1990). We view the evidence in the light most favorable to the Hardys, against whom judgment was entered, and determine de novo whether there are genuine issues of material fact and whether the trial court erred in its application of the law. *Unique Equip. Co. v. TRW Vehicle Safety Sys., Inc.*, 197 Ariz. 50, 52, ¶ 5, 3 P.3d 970, 972 (App. 1999) (citation omitted).

¶9 The superior court may require a plaintiff who asserts a claim against a health care professional in a civil action to support his or her claim with expert opinion testimony regarding the health care professional's standard of care. A.R.S. § 12-2603(A),(D) (Supp. 2009). The expert must be licensed as a health care professional in Arizona or another state, and in the year immediately preceding the occurrence giving rise to the lawsuit, must have devoted a majority of his or her "professional time" to either: (1) active clinical practice of the same health care profession as the defendant; or (2) the instruction of students in an accredited health care professional school or accredited residency or clinical research program in the same health care profession as the defendant.

A.R.S. § 12-2604(A)(2) (Supp. 2009).<sup>2</sup> When the defendant is a health care institution that employs a health care professional against whom testimony is offered, these same provisions apply as if the health care professional were the defendant. A.R.S. § 12-2604(B).

¶10 St. Joe's asserts Dr. Hollan and Nurse Lockhart were not qualified to offer standard of care opinions against St. Joe's nurses because they did not devote a majority of their professional time to either the practice or instruction of the type of medical care St. Joe's provided to Steven, i.e., wound care nursing.

**1. Dr. Hollan**

¶11 Dr. Hollan testified at her deposition that, for the preceding five years, treating patients with pressure wounds was not a substantial part of her practice and that the last time she provided primary care in a hospital or rehabilitation setting for a pressure wound patient was more than ten years earlier. She admitted it had been more than twelve years since she had worked with nursing staff regarding nutrition, rehabilitation, occupational therapy, and physical therapy.

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<sup>2</sup> If the defendant claims to be a specialist, the plaintiff's expert must practice or instruct in the same specialty. A.R.S. § 12-2604(A)(1).

Citing this testimony, St. Joe's argued Dr. Hollan did not satisfy the requirements of A.R.S. § 12-2604.

¶12 In response to St. Joe's motion for summary judgment, the Hardys produced a letter from Dr. Hollan describing her experience with sixteen wound patients over the preceding ten to twelve years and stating that during the first half of her practice, she treated "a great many" patients with wounds and "served as the plastic surgeon for Sharp Rehab Wound Clinic and saw patients there once or twice a month. . . ." <sup>3</sup> Dr. Hollan also avowed in her supplemental affidavit that she was currently treating a patient with wounds. Neither Dr. Hollan's letter nor her supplemental affidavit contained the dates during which she performed this work, and she did not claim that she spent the majority of her professional time treating pressure wounds.

¶13 The Hardys offered no evidence that Dr. Hollan was in active clinical practice or providing instruction regarding wound care in the year preceding Steven's injuries, as required by A.R.S. § 12-2604. Although Dr. Hollan stated in her supplemental affidavit that she was currently treating a wound

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<sup>3</sup> Although Dr. Hollan's unverified letter was created after the discovery deadline and after St. Joe's filed its motion, St. Joe's did not object to or move to strike the letter and therefore waived any objection. *Airfreight Exp. Ltd. v. Evergreen Air Center, Inc.*, 215 Ariz. 103, 112, ¶ 26, 158 P.3d 232, 241 (App. 2007) (stating a party waives on appeal any objection to evidence proffered in summary judgment proceeding by failing to object or move to strike).



patient, she did not avow that she treated any wound patients, let alone devoted the majority of her professional time to such practice, in the year preceding St. Joe's care for Steven, as required by A.R.S. § 12-2604(A)(2)(a). Accordingly, Dr. Hollan was not qualified under Arizona law to offer standard of care testimony against St. Joe's in this matter.<sup>4</sup>

## 2. Nurse Lockhart

¶14 During her deposition, Nurse Lockhart testified that for the preceding two years her practice had not been direct patient care, but consulting once per week at a long-term care facility for two to four hours per week. Her supplemental affidavit further described her professional experience during 2004-2005, the years relevant to the Hardys' claims against St. Joe's. She averred that during 2004 and 2005 she: (1) consulted with patients regarding wound assessment and care and performed wound debridement an average of 4.5 hours per week; and (2) gave clinical instruction in wound care to physicians, nurses, and therapists an average of forty hours per month.

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<sup>4</sup> Because we determine the Hardys did not present any evidence that Dr. Hollan actively practiced wound care or instructed about that topic during the relevant time, we do not consider St. Joe's alternative argument that Dr. Hollan was not qualified to opine regarding the standard of care applicable to St. Joe's nurses because she was not in the same specialty, i.e., she was not a wound care nurse.

¶15 Nurse Lockhart's experience did not satisfy the requirements of A.R.S. § 12-2604(A)(2) because she did not devote the majority of her professional time to active clinical practice and/or the instruction of students in an accredited health professional school or accredited residency or clinical research program. Nurse Lockhart's supplemental affidavit indicates she worked an average of fifty-eight hours per month during 2004 and 2005. She spent only eighteen of those fifty-eight hours engaged in active clinical practice. Although Nurse Lockhart spent the remaining forty hours per month instructing physicians, nurses, and therapists in wound care, there is no evidence that she did so as part of an accredited health care professional school or accredited residency or clinical research program. Thus, as a matter of law, Nurse Lockhart was not a qualified expert under A.R.S. § 12-2604.

¶16 As neither Dr. Hollan nor Nurse Lockhart satisfied the statutory requirements for an expert in a medical malpractice case, the Hardys were unable to establish that St. Joe's

breached the applicable standard of care, and the superior court properly granted the motion for summary judgment.<sup>5</sup>

**CONCLUSION**

¶17 For the foregoing reasons, we affirm.

/S/  
DONN KESSLER, Presiding Judge

CONCURRING:

/S/  
DANIEL A. BARKER, Judge

/S/  
JON W. THOMPSON, Judge

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<sup>5</sup> We therefore do not address St. Joe's arguments that (1) the trial court erred in considering Dr. Hollan's and Nurse Lockhart's supplemental affidavits, and (2) the Hardys failed to establish a material question of fact on the issue of causation.