DIVISION ONE
FILED: 01/25/2011
RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In the Matter of the Estate of: MARILYNN WALTER, Deceased.	No. 1 CA-CV 10-0101 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)
HOPE YOUNG, Personal Representative of the Estate of MARILYNN WALTER, on behalf of the ESTATE OF MARILYNN WALTER, and HOPE YOUNG, individually and on behalf of MARILYNN WALTER'S statutory beneficiaries pursuant to A.R.S. § 12-262(a), Plaintiff/Appellant, v. AVALON HEALTH CARE, INC.; AVALON HEALTH CARE OF ARIZONA, L.L.C.; AVALON HEALTH CARE CENTERS, L.L.C.; HERITAGE MANAGEMENT, INC. nka AVALON HEALTH CARE MANAGEMENT, INC.; AVALON CARE CENTER - SCOTTSDALE, L.L.C. dba AVALON CARE CENTER SHADOW MOUNTAIN; AVALON HEALTH CARE MANAGEMENT OF ARIZONA, L.L.C.; PATRICK KINNEY, Administrator; and HARALD ACKERMAN, Administrator, Defendants/Appellees.	

Appeal from the Superior Court in Maricopa County

Cause No. CV 2007-014941

The Honorable Robert H. Oberbillig, Judge

AFFIRMED

Law Office of Scott E. Boehm P.C. By Scott E. Boehm	Phoenix
Wilkes & McHugh, P.A. By Melanie L. Bossie Co-counsel for Plaintiff/Appellant	Phoenix
Bowman and Brooke L.L.P. By Jill S. Goldsmith Courtney A. Parecki Attorneys for Defendants/Appellees	Phoenix

D O W N I E, Judge

¶1 Plaintiff/appellant Hope Young, personal representative of the estate of Marilynn Walter, appeals from the superior court's grant of summary judgment in favor of defendants/appellees, Avalon Health Care, Avalon Health Care of Arizona, Avalon Health Care Centers, Heritage Management, Avalon Health Care Management, Avalon Care Center Scottsdale, Avalon Care Center Shadow Mountain, Avalon Health Care Management of Arizona, and Patrick Kinney (collectively, "defendants"). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Marilynn Walter resided at the facility now known as Avalon Care Center Shadow Mountain from September 8, 1998 to October 8, 2006.[1] At the time of her admission, Walter was

[1] At the time of Walter's admission, the facility was under different ownership and was called Beverly Healthcare Scottsdale. Avalon assumed ownership in December 2003. Claims

seventy-eight years old. She suffered from a number of ailments, including dementia and paralysis on her left side. She was dependent on others for transfers and locomotion.

¶3 On September 20, 2006, Walter was diagnosed with an acute hip fracture. She was transferred to hospice care and died on October 17, 2006.

¶4 In August 2007, Young filed this action, alleging negligence, abuse and neglect under the Adult Protective Services Act ("APSA"), Arizona Revised Statutes ("A.R.S.") section 46-455, and wrongful death. Young contends that Walter's broken hip was caused by defendants' negligence and that it led to her death.

¶5 Defendants filed several motions for summary judgment. They sought judgment as a matter of law regarding negligence *per se* and punitive damages. Defendants also filed a "Motion for Summary Judgment Based on Lack of Standard of Care Expert and Alternative Motion for Summary Judgment Re: Plaintiff's Allegations" and a motion for summary judgment as to defendants Kinney and Ackerman. Young agreed that summary judgment was appropriate as to Ackerman but opposed summary judgment on the other grounds.[2] After a hearing, the superior court granted all

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against Beverly Healthcare and related entities were settled and are not at issue in this appeal.

[2] Young has avowed that she is not alleging negligence *per se*.

of the motions for summary judgment and denied Young's requests for reconsideration. Young timely appealed.

DISCUSSION

¶6 We review the grant of summary judgment *de novo*. *L. Harvey Concrete, Inc. v. Agro Constr. & Supply Co.*, 189 Ariz. 178, 180, 939 P.2d 811, 813 (App. 1997). We view the facts in the light most favorable to Young, against whom judgment was entered. *Riley, Hoggatt & Suagee, P.C. v. English*, 177 Ariz. 10, 12, 864 P.2d 1042, 1044-45 (1993).

¶7 Summary judgment is appropriate "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 School v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). The existence of a "scintilla" of evidence or evidence creating the "slightest doubt" about the facts is insufficient. *Id.* at 309, 311, 802 P.2d at 1008, 1010. We will affirm the entry of summary judgment if it is correct for any reason. *Hawkins v. State*, 183 Ariz. 100, 103, 900 P.2d 1236, 1239 (App. 1995).

¶8 Plaintiff's claims sound in negligence.[3] Negligence requires proof of "a duty owed to the plaintiff, a breach

[3] Pursuant to A.R.S. § 46-455(B), a vulnerable adult "whose life or health is being or has been endangered or injured by

thereof and an injury proximately caused by the breach." *Ballesteros v. State*, 161 Ariz. 625, 627, 780 P.2d 458, 460 (App. 1989).

¶9 The superior court ruled that Young failed to present admissible evidence establishing either a breach of the standard of care or causation. Because we agree as to causation, we need not separately consider the standard of care question.[4]

¶10 "Merely because an accident occurred which results in an injury does not, in and of itself, permit even an inference of negligence, let alone proof of its existence." *First Nat. Bank of Ariz. v. Dupree*, 136 Ariz. 296, 298, 665 P.2d 1018, 1020 (App. 1983). To establish causation, a plaintiff must prove "cause-in-fact;" that is, that the injury would not have occurred but for the defendants' act(s). *Ontiveros v. Borak,* 136 Ariz. 500, 505, 667 P.2d 200, 205 (1983). A plaintiff must also prove "proximate cause," which is defined as "that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces an injury, and without which the injury would not have occurred." *Saucedo ex rel. Sinaloa v. Salvation Army,* 200 Ariz. 179, 183, ¶ 15, 24 P.3d 1274, 1278

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neglect, abuse or exploitation may file an action in superior court." Abuse is defined as "[i]njury caused by negligent acts or omissions." A.R.S. § 46-451(A)(1)(b).

[4] We also do not separately address plaintiff's request for punitive damages or the claims against defendant Kinney; the lack of causation evidence is fatal to these claims as well.

(App. 2001) (citation omitted). A plaintiff must present "probable facts from which the causal relationship reasonably may be inferred." *Robertson v. Sixpence Inns of Am., Inc.*, 163 Ariz. 539, 546, 789 P.2d 1040, 1047 (1990).

¶11 Causation is generally a question of fact for the jury to resolve. *Fehribach v. Smith*, 200 Ariz. 69, 73, ¶ 16, 22 P.3d 508, 512 (App. 2001). However, when a plaintiff proffers insufficient causal evidence, leaving would-be jurors to speculate about the cause of an injury, summary judgment is proper. *Robertson*, 163 Ariz. at 546, 789 P.2d at 1047.[5]

¶12 In the case at bar, the superior court correctly ruled that plaintiff failed to present competent evidence that defendants' negligence caused Walter's hip fracture. Plaintiff's counsel acknowledged below that, "it appears we have a causation problem with regards to the wrongful death claim and the negligence claim," though he apparently believed the APSA claim was on stronger footing.

[5] *Robertson* addresses a motion for directed verdict, not a motion for summary judgment. "Although the two motions occur at different times during the trial process, they share the underlying theory that there is no issue of fact and that the movant is entitled to judgment as a matter of law. Logically, then, the same standards should apply in determining whether to grant either motion." *Orme School*, 166 Ariz. at 309, 802 P.2d at 1008.

¶13 To establish causation, Young relies heavily on statements attributed to Walter. She did not, however, establish the admissibility of those statements. According to nursing notes, Walter told staff members that nursing aide Earl Broadway "dropped her on the floor and she hit her head on the chair." Other staffing notes, however, state that when asked what had happened, Walter responded, "nothing." When the inquiring nurse followed up, asking if she had fallen, Walter replied, "no." Another staff member's note states:

> I asked [Walter] if anything happened [and] she said yes during the [night] she was standing [and] Earl caught her. She told me Earl said she would have fallen flat on her face.

¶14 The statements attributed to Walter are hearsay. Even if a hearsay exception existed, Young's counsel conceded below that Walter suffered from serious mental incapacity that would have rendered her an incompetent witness. The record supports this concession. Young's expert, Dr. Richard Dupee, testified that Walter had a "chronic dementing illness" that was "complicated at times by delusions."

¶15 The only alleged witness to Walter's injury, Earl Broadway, testified he did not drop Walters and that when he entered her room, she was sitting in her wheelchair and said that she hurt. Broadway consoled her, but continued preparing

her for a shower. When he began lifting Walter, she "let out with a big yell."

¶16 Plaintiff's own causation expert conceded it was "impossible to know what happened," though Dr. Dupee opined that Walter had fallen and that "substantial" force was required to cause her hip fracture. After offering that opinion, though, the following colloquy ensued at Dr. Dupee's deposition:

> Q. And do you have any testing, literature, or anything else to support that opinion?
>
> A. You know, I have not reviewed the literature on the force impact on hips. I have reviewed on vertebral spines. So I'm not familiar enough to offer an opinion right now.

¶17 Dr. Dupee acknowledged he could not identify any act or omission by defendants that caused Walter's purported fall, and he also said he would defer to an orthopedic surgeon about whether Walter suffered a "pathologic fracture" or some other type of break.[6] Avalon's expert, board certified orthopedic surgeon Brett Smith, opined that Walter's broken hip was indeed a pathologic fracture, which can be either traumatic or "atraumatic." Dr. Smith compared Walter's bones to eggshells, stating they could easily fracture with any type of simple

[6] Dr. Dupee testified that a pathologic fracture "is a spontaneous fracture occurring as a result of a focus of extreme weakness in the bone." Because Walter's bone density was not tested, he stated that the severity of her osteoporosis was not known.

movement, which could include a properly-executed lift transfer. Indeed, plaintiff Young had advised nursing staff that her mother's osteoporosis was so severe that "it wouldn't take much to break something, even just turning [Walter] side to side."

¶18 The superior court was clearly concerned about the lack of causation evidence. It spent considerable time at oral argument discussing this issue, including the following exchange with plaintiff's counsel:

> THE COURT: So what is your admissible evidence that [Walter] fell?
>
> MR. McCOWAN: I'm afraid I'm not going to be able to tell you where this is in here, but their own investigation revealed evidence that *there was possibly a fall*, which our theory is that they covered up the fall.[7] (Emphasis added.)

¶19 "A party may prove proximate causation by presenting facts from which a causal relationship may be inferred, but the party cannot leave causation to the jury's speculation." *Salica v. Tucson Heart Hospital-Carondelet,* 224 Ariz. 414, 419, ¶ 16, 231 P.3d 946, 951 (App. 2010). Plaintiff's only arguably competent causation evidence comes from Dr. Dupee. Yet Dr. Dupee, a geriatric internist, so qualified his opinions that they lack the necessary causal link. Even assuming *arguendo*

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[7] Counsel was apparently referring, at least in part, to a note written by defendant Kinney that reads:

> ? Fall or drop – most likely during a transfer

that the standard of care required two staff members to transfer Walter, as Young's expert opined, there is no evidence that Walter fractured her hip during a transfer or that a second person present for a hypothetical transfer would have prevented the injury. The superior court focused on the lack of evidence in this area, prompting the following exchange with plaintiff's counsel:

> THE COURT: I'm just trying to get the understanding of what your theory is. What are you going to tell this jury? [The hip] fractured how? So they can understand how the something they did was a connection to that event.
>
> MR. McCOWAN: The fracture was the result of a fall which is the result of improper use of the Hoyer Lift.
>
> THE COURT: How? How did they improperly use it? And she fell out of the lift; is that what you are saying?
>
> MR. McCOWAN: That unfortunately we don't know.

Later, plaintiff's counsel attempted to connect a transfer of Walter to the broken hip, stating: "So towards that end, we also have the history of falls, all occasioned with transfers, which we think tips the scales towards *the possibility that this was the result of a fall yet again.*" (Emphasis added.)

¶20 We recognize that weighing conflicting expert opinions falls within the jury's province. Here, however, Dr. Dupee could not identify any negligent conduct by defendants, and he

deferred to the expertise of an orthopedic surgeon. Dr. Smith opined that the nature of Walter's break did not establish that her hip fracture was the result of force from a fall or negligent conduct by defendants. Based on the evidence that plaintiff proffered, jurors would be forced to speculate about whether defendants' negligence was the cause of Walter's broken hip.

¶21 Finally, we disagree with plaintiff's reliance on *Thompson v. Sun City Community Hospital*, 141 Ariz. 597, 688 P.2d 605 (1984). In *Thompson*, a private hospital transferred plaintiff's son to the county hospital for financial reasons, despite the fact he required emergency care that included surgery to repair a transected artery. *Id.* at 604, 688 P.2d at 612. Plaintiff's experts testified that there "would have been a 'substantially better chance' of full recovery had surgery been performed at once." *Id.* at 607, 688 P.2d at 615.

¶22 Our supreme court adopted a form of the "loss of chance" doctrine, whereby a plaintiff need only prove that the defendant's acts or omissions "increased the risk of harm" in order to reach a jury on the question of causation. *Id.* at 605-08, 688 P.2d at 613-16. The court stressed, however, that its holding affected "the limited class of cases in which defendant undertook to protect plaintiff from a particular harm and negligently interrupted the chain of events, thus increasing

the risk of that harm." *Id.* at 608, 688 P.2d at 616. In ordinary negligence cases, the "traditional rule prevails." *Id.*

¶23 This is the "ordinary" negligence case referred to in *Thompson*. Young alleges that defendants' negligence was the actual cause of her mother's injuries, not that defendants negligently interrupted a chain of events, thereby increasing the risk of harm and depriving Walter of a "loss of chance" of a better outcome.

CONCLUSION

¶24 We affirm the superior court's grant of summary judgment to defendants.

/s/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
DANIEL A. BARKER, Presiding Judge

/s/
MICHAEL J. BROWN, Judge