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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

PAMELA CHAVEZ, individually and on behalf of the surviving heirs of and the Estate of ADOLFO CHAVEZ, Plaintiff/Appellant, v. AVALON CARE CENTER TUCSON, L.L.C., a Utah limited liability company, dba LA COLINA CARE CENTER; AVALON HEALTH CARE OF ARIZONA, L.L.C., a Utah limited liability company; AVALON HEALTH CARE MANAGEMENT OF ARIZONA, L.L.C., a Utah limited liability company; HERITAGE MANAGEMENT II, INC., a Utah corporation; and AVALON HEALTH CARE INC., a Utah corporation, Defendants/Appellees.	2 CA-CV 2008-0018 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. C20050715 and C20052969 (Consolidated)

Honorable John F. Kelly, Judge

REVERSED AND REMANDED

Law Office of Scott E. Boehm
By Scott E. Boehm — Phoenix

and

Wilkes & McHugh, P.A.
By Melanie L. Bossie and Brad H. Astrowsky — Phoenix
Attorneys for Plaintiff/Appellant

Bowman and Brooke, LLP
By Jill S. Goldsmith and Abram N. Bowman — Phoenix
Attorneys for Defendants/Appellees

P E L A N D E R, Chief Judge.

¶1 Appellant Pamela Chavez, personal representative of the estate of Adolfo Chavez, appeals from the trial court's grant of summary judgment in favor of appellees, Avalon Care Center Tucson, Avalon Health Care of Arizona, Avalon Health Care Management of Arizona, Heritage Management II, Inc., and Avalon Health Care Inc. (collectively Avalon). The court based its ruling on the finding that Chavez had not provided a qualified standard-of-care expert pursuant to A.R.S. § 12-2604. Our supreme court, however, recently held that § 12-2604 does not apply retroactively to cases such as this. *Seisinger v. Siebel*, ___ Ariz. ___, ¶ 44, 203 P.3d 483, 494 (2009). Therefore, and because we find no other proper basis on which to affirm the trial court's summary judgment, we reverse and remand the case for further proceedings.

Background

¶2 On appeal from a summary judgment, we view the evidence and all reasonable inferences therefrom in the light most favorable to the party against whom summary judgment was granted. *See Walk v. Ring*, 202 Ariz. 310, ¶ 3, 44 P.3d 990, 992 (2002). With the exception of a four-day hospital stay in July 2003, from May 2003 through February 2004, Adolfo resided at Avalon's La Colina Health Care Center (La Colina). When he was admitted, Adolfo was fifty-seven years old and suffered from Alzheimer's disease and dementia. He was entirely dependent on others for bathing, oral hygiene, grooming, dressing, eating, and mobility.

¶3 Initially, Beverly Enterprises owned, managed, and controlled La Colina.[1] During his stay there, Adolfo developed several "pressure sores" and lost a significant amount of weight. In December 2003, Avalon assumed ownership of the facility. In February 2004, Adolfo was taken to a hospital for the surgical replacement of his feeding tube.[2] The doctors failed to correctly place the tube in his stomach. When he was returned to La Colina, a nurse fed him, but because the tube was misplaced, the food went into his "peritoneal cavity" instead of his stomach. Adolfo was hospitalized and died about a month later, in March 2004, of pneumonia.

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[1]Beverly and Paul Eaton, the administrator of La Colina, are not parties to this appeal because Chavez settled with them.

[2]The feeding tube was technically referred to as a percutaneous endoscopic gastrostomy tube, or "PEG" tube.

¶4 In May 2005, Chavez filed this action alleging negligence, negligence per se, abuse and neglect under A.R.S. § 46-455, and wrongful death. After Chavez disclosed two expert witnesses, Cheryl Ciechomski, R.N., and Leonard Williams, M.D., Avalon moved to strike Ciechomski under Rule 26(b)(4)(D), Ariz. R. Civ. P., as duplicative.[3] The trial court allowed both to remain listed as witnesses but specified that Ciechomski could testify "as to the standard of care" and Dr. Williams could testify "as to causation."

¶5 A few weeks later, Avalon moved for summary judgment, asserting that Ciechomski was "not qualified to render standard of care opinions . . . pursuant to . . . § 12-2604." After a hearing, the trial court agreed, "based on the fact that she did not devote a majority of her professional time to the clinical practice of nursing . . . during the year immediately preceding the occurrence giving rise to this lawsuit." The court continued the matter and permitted the parties to file supplemental briefs on whether Dr. Williams was qualified to testify on the nursing standard of care.

¶6 Avalon then moved to preclude Williams from testifying, and Chavez moved to substitute an expert or allow Williams to testify instead of Ciechomski. In September 2007, the trial court ruled that Williams did not qualify as an expert on the nursing standard of care and that Chavez could not substitute an expert so close to the originally scheduled

[3] Rule 26(b)(4)(D), Ariz. R. Civ. P., provides in relevant part: "In all cases including medical malpractice cases, each side shall presumptively be entitled to only one independent expert on an issue."

trial date. The court later granted Avalon's motion for summary judgment, and Chavez appealed.

Discussion

¶7 Summary judgment is appropriate 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); *see also Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). "On appeal from a 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). A trial court should grant a motion for summary judgment only "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.*, 166 Ariz. at 309, 802 P.2d at 1008.

¶8 The trial court granted summary judgment in favor of Avalon based on its findings that § 12-2604 applied to Chavez's claims and that she had failed to provide a qualified standard-of-care expert. Section 12-2604(A)(2) requires such an expert in a medical malpractice action to have "devoted a majority of the person's professional time to either . . . [t]he active clinical practice of the same health profession as the defendant . . . [or t]he instruction of students in an accredited health professional school."

¶9 Chavez maintains that § 12-2604 does not apply because it was not in effect when she filed this action and because her claims are based on the Adult Protective Services Act (APSA), A.R.S. §§ 46-451 through 46-459, not a liability theory of medical malpractice. Avalon counters that the trial court violated no retroactivity principles by applying § 12-2604 to this case and that the statute applies to all of Chavez's claims, including those based on the APSA.

¶10 After Chavez filed her opening brief, Division One of this court found § 12-2604 unconstitutional. *Seisinger v. Siebel*, 219 Ariz. 163, ¶ 1, 195 P.3d 200, 201-02 (App. 2008). Thereafter, our supreme court granted review, and we stayed this appeal pending the decision of that court, which recently vacated the court of appeals' opinion and held "§ 12-2604(A) does not violate the constitutional separation of powers doctrine." *Seisinger*, ___ Ariz. ___, ¶ 44, 203 P.3d at 494. The court also ruled, however, that the statute, enacted in 2005, "does not apply retroactively" and, therefore, had no effect on that case, filed in 2004 and concerning conduct that occurred in 2002. *Id.* ¶¶ 44, 42.

¶11 This action was filed in May 2005, before § 12-2604 took effect in August of that year. 2005 Ariz. Sess. Laws, ch. 183, § 1. And the conduct at issue in this case occurred in 2003 and 2004. Therefore, as in *Seisinger*, § 12-2604 does not apply retroactively to this case and, hence, cannot support the trial court's summary judgment. Avalon urges us to affirm the court's judgment nonetheless on two alternative grounds: the nursing expert was not qualified under Rule 702, Ariz. R. Evid., or Chavez failed to raise a genuine issue of fact

on whether Avalon caused Adolfo's injuries or death. *See Zuck v. State*, 159 Ariz. 37, 42, 764 P.2d 772, 777 (App. 1988) (we can affirm the grant of summary judgment if correct for any reason). Accordingly, we address those arguments in turn.

I. Rule 702, Arizona Rules of Evidence

¶12 Avalon urges us to affirm the summary judgment on the alternative ground that "Ciechomski is not qualified to testify under Rule 702[, Ariz. R. Evid]." Rule 702 states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." An expert witness in a medical malpractice case does not need to be in the same medical speciality as the defendant, but the expert's proffered testimony must be based on his or her "'education, experience, observation or association with that specialty.'" *Barrett v. Samaritan Health Servs., Inc.*, 153 Ariz. 138, 141, 735 P.2d 460, 463 (App. 1987), *quoting Taylor v. Dirico*, 124 Ariz. 513, 518, 606 P.2d 3, 8 (1980). A "trial court has broad discretion in determining an expert's competency and . . . its determination should be reversed only upon clear abuse of discretion or error of law." *McGuire v. DeFrancesco*, 168 Ariz. 88, 92, 811 P.2d 340, 344 (App. 1990); *see also Ulibarri v. Gerstenberger*, 178 Ariz. 151, 161, 871 P.2d 698, 708 (App. 1993).

¶13 Ciechomski was a registered nurse in Maine with a masters degree who taught classes at a university for the past thirteen to fourteen years. She also consulted with nursing

facilities on legal matters. Ciechomski averred below in her affidavit that she had "experience in the standards of nursing care in long-term care facilities and . . . in supervising registered nurses, licensed practical nurses and certified nursing assistants." Although the trial court did not specifically rule on the issue, it did state: "I'm not going to throw her testimony out under 702, maybe as to the PEG tube, but not the other things." Thus, the court implicitly ruled that Ciechomski had sufficient knowledge of and experience in the nursing profession to render an opinion on the standard of care. *See Gaston v. Hunter*, 121 Ariz. 33, 53, 588 P.2d 326, 346 (App. 1978) (scope of witness's knowledge governs threshold question of admissibility). And we certainly cannot infer from the granting of Avalon's motion based on § 12-2604 that the court also found Ciechomski unqualified under Rule 702, particularly when the statute imposes additional criteria for expert testimony and directly conflicts with the rule. *See Seisinger*, ___ Ariz. ___, ¶¶ 18, 19, 203 P.3d at 488.

¶14 Avalon argues Ciechomski should have been disqualified as an expert because she "did not currently provide direct patient care, was not actively involved in clinical practice, and had not provided direct care or been involved in active clinical practice since 1997." But an expert's lack of first-hand experience goes to the weight of her testimony rather than its admissibility. *See McGuire*, 168 Ariz. at 92, 811 P.2d at 344; *see also Seisinger*, ___ Ariz. ___, ¶ 16, 203 P.3d at 488 (degree of expert's qualification goes to weight, not admissibility, of testimony; and test of whether person qualifies as expert is whether jury can receive help on particular subject from witness); *Logerquist v. McVey*, 196

Ariz. 470, ¶ 23, 1 P.3d 113, 120-21 (2000) (same); *Pipher v. Loo*, 551 Ariz. Adv. Rep. 27, ¶ 17 (Ct. App. Mar. 10, 2009) (jury determines accuracy, weight, and credibility of expert's testimony). Therefore, we cannot say as a matter of law, nor did the trial court rule, Ciechomski was not qualified for purpose of Rule 702. *See Estate of Reinen v. N. Ariz. Orthopedics, Ltd.*, 198 Ariz. 283, ¶ 12, 9 P.3d 314, 318 (2000) (weight of witness testimony is jury question).

¶15 Relying on selective portions of Ciechomski's deposition in this case, Avalon further contends she is incompetent to testify on "the standard of care for checking PEG tube placement." Therefore, Avalon argues, we should affirm partial summary judgment in its favor on Chavez's claims relating to that topic. As Avalon points out, Ciechomski testified that, because in the past ten years she had not had her "skills refreshed on how to check for [feeding] tube placement," she "would need to be competency checked" before performing that procedure now and could not say "what the standard of care is for checking PEG tube placement." But Ciechomski immediately qualified that latter statement by noting that "the tube wasn't in [Adolfo's] stomach." And Avalon disregards the context of that particular testimony and overlooks other opinions Ciechomski expressed.

¶16 For example, earlier in her deposition, Ciechomski testified she had checked feeding-tube placement "many times in the past." And shortly after her isolated standard-of-care statement on which Avalon relies, Ciechomski said she could testify that Avalon's "nursing home staff did not meet the standard of care" on checking PEG tube placement,

based on Avalon's own policies and procedures and its Director of Nursing's testimony. We may affirm summary judgment on any ground supported by the record and the law. *Logerquist v. Danforth*, 188 Ariz. 16, 18, 932 P.2d 281, 283 (App. 1996). But viewing Ciechomski's deposition testimony and all reasonable inferences therefrom in the light most favorable to Chavez, *Walk*, 202 Ariz. 310, ¶ 3, 44 P.3d at 992, we cannot say she is clearly incompetent under Rule 702 to address issues concerning checking of the PEG tube placement.[4]

II. Causation

¶17 Avalon also asks us to affirm because "Dr. Williams' causation opinions fail to support [Chavez's] claims against Avalon." Avalon contends Chavez failed to demonstrate breach of the standard of care or causation because Adolfo's physical condition had declined before Avalon assumed ownership of La Colina. Because the hospital doctors misplaced the feeding tube, Avalon also argues, any alleged acts or omissions by Avalon's staff did not cause Chavez's death. We are unable to sustain the summary judgment ruling on those grounds.

[4]We of course do not limit the trial court's authority on remand to limit, if necessary and appropriate, the particular subject matters on which Ciechomski or any other expert witness may testify. And by the same token, Avalon is not precluded on remand from reurging entry of partial summary judgment on certain discrete aspects of Chavez's claim, based on the alleged incompetency or insufficiency of Chavez's expert testimony in those particular areas.

¶18 Pursuant to A.R.S. § 46-455(B), a vulnerable adult "whose life or health is being or has been endangered or injured by neglect, abuse or exploitation may file an action in superior court." "Abuse" is defined, inter alia, as "[i]njury caused by negligent acts or omissions." A.R.S. § 46-451(A)(1)(b). Negligence requires a showing of "a duty owed to the plaintiff, a breach thereof and an injury proximately caused by the breach." *Ballesteros v. State*, 161 Ariz. 625, 627, 780 P.2d 458, 460 (App. 1989); *see also Seisinger*, ___ Ariz. ___, ¶ 32, 203 P.3d at 492, *citing Smethers v. Campion*, 210 Ariz. 167, ¶ 12, 108 P.3d 946, 949 (App. 2005).

¶19 Proximate cause is defined as "a natural and continuous sequence of events stemming from the defendant's act or omission, unbroken by any efficient intervening cause, that produces an injury, in whole or in part, and without which the injury would not have occurred." *Barrett v. Harris*, 207 Ariz. 374, ¶ 11, 86 P.3d 954, 958 (App. 2004). Generally, breach and causation issues are "questions of fact for the jury to resolve." *Fehribach v. Smith*, 200 Ariz. 69, ¶ 16, 22 P.3d 508, 512 (App. 2001). On this record, we cannot say there is so little probative value to Chavez's negligence claim that reasonable people could not find Avalon's alleged acts or omissions played some causal role in Adolfo's injury and death. *See Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008; *see also Barrett*, 207 Ariz. 374, ¶ 11, 86 P.3d at 958 (defendant's act proximate cause if it produces injury in whole or in part).

¶20 It is undisputed that Avalon owned La Colina from December 2003 on and managed Adolfo's care until he was hospitalized in February 2004. Dr. Williams testified

at his deposition that, during that time, Adolfo's injuries included weight loss, "the misplacement of the feeding tube which led to peritonitis and sepsis, and the failure [to provide] appropriate pain relief." Regarding Adolfo's weight loss, the record shows that he lost most of his weight before Avalon assumed ownership of La Colina. But Williams opined that Adolfo's weight loss between December 12, 2003, and January 4, 2004, resulted not only from his progressive dementia, but also because his Avalon caregivers were "not giving him enough feeding." And Williams opined that Adolfo's seven-pound weight loss while Avalon owned La Colina "[a]bsolutely" contributed to his injuries. Additionally, Williams addressed the causation issue regarding Adolfo's pain, noting that La Colina's staff failed to adequately monitor and provide Adolfo with medication to help relieve his pain in January 2004.

¶21 It is undisputed that Avalon owned and managed La Colina in February 2004, when Adolfo received a feeding tube replacement. One of Avalon's nurses, Ms. Sweet, was responsible for feeding Adolfo after he returned from that surgery. The record reflects a factual question on whether she breached her duty of care by not accurately checking for the tube placement before feeding Adolfo. During her deposition, Sweet testified she had checked the placement of the tube before feeding him by "[a]usculat[ing]" and aspirating for "stomach contents," but her written notes do not reflect that she did both of those things. Avalon's expert claimed that the hospital doctor, rather than Avalon's nurse, should have verified the placement because aspirating was "imprecise" and "an inexact science." But

Williams maintained that the nurse had a duty to check the placement of the tube before feeding Chavez. Thus, a genuine issue of disputed fact exists as to whether Avalon's nurse breached the standard of care.

¶22 In support of its argument that the hospital doctors, not Avalon, caused Adolfo's injuries or death, Avalon points to Williams's statements that the doctors' misplacement of the feeding tube caused the peritonitis. But Williams also stated the care center's feeding of Adolfo "when the tube was in the wrong place" contributed to the development of his peritonitis. Avalon's expert agreed, stating that the doctor's misplacement was the "primary" injury, but acknowledging that "the tube feeds didn't help" because the feeding caused "foreign material" to mix with the "spilled gastric acid fluid." Adolfo died about a month later after contracting pneumonia. Williams stated the peritonitis caused Adolfo to be "even weaker at that point, having had to go through that serious infection." Viewed in the light most favorable to Chavez, as we must, the record contains evidence from which a jury could conclude Avalon was responsible, even if only in part, for Adolfo's injuries and death. *See Barrett*, 207 Ariz. 374, ¶ 11, 86 P.3d at 958.

¶23 Avalon maintains that when it assumed ownership of La Colina, Adolfo had entered the terminal stage of his life and would have died within six months regardless of care. Although Williams did testify that, as of December 2003, Adolfo only had about six months to live, we are reluctant to conclude, as Avalon contends, that the evidence indisputably establishes a "causation gap" between Avalon's care and Adolfo's injuries or

his ultimate death. This is not a situation such as that presented in *Gregg v. National Medical Health Care Services, Inc.*, 145 Ariz. 51, 54, 699 P.2d 925, 928 (App. 1985), on which Avalon relies and in which the expert failed to "state anywhere in his affidavit that the failure of the hospital to adopt [certain] rules, regulations and protocols was the proximate cause of Gregg's death."

¶24 Here, Williams stated Adolfo's weight loss and "malnutrition" caused by lack of feeding contributed to his contracting of pneumonia, as well as having had the peritonitis after being fed when the tube was misplaced. Although it is undisputed Adolfo ultimately died of pneumonia, Williams opined the pneumonia was caused in part by Adolfo's malnutrition, which "significantly weakened his immune system." Again, we must view all facts of record and reasonable inferences therefrom in the light most favorable to Chavez. *Walk*, 202 Ariz. 310, ¶ 3, 44 P.3d at 992. Because issues of breach and causation are typically for a jury to decide, *see Fehribach*, 200 Ariz. 69, ¶ 16, 22 P.3d at 512, and because the record reflects expert testimony from which a reasonable jury could find that Avalon breached its duty and that such breach was a proximate cause of Adolfo's injuries, *Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008, we cannot affirm summary judgment on the alternative grounds Avalon urges.

Disposition

¶25 The judgment is reversed and the case is remanded to the trial court for further proceedings consistent with this decision. The parties' requests for an award of attorney fees

on appeal, pursuant to A.R.S. § 46-455(H)(4), are denied without prejudice. A discretionary award of fees under that statute is permissible "[a]fter a determination of liability," *id*., which has not yet occurred in this case. *See In re Estate of Friedman*, 217 Ariz. 548, ¶ 39, 177 P.3d 290, 300 (App. 2008).

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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PHILIP G. ESPINOSA, Judge