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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 William Russell Roberts,
10 Plaintiff,

No. CV-21-08255-PCT-DJH

ORDER

11 v.

12 Lee Anne Gallagher, Volkswagen Group of
13 America Incorporated, and Northern
14 Arizona Healthcare Corporation,

15 Defendants.

16 Defendant Lee Anne Gallagher (“Ms. Gallagher”), Defendant Volkswagen Group
17 of America Incorporated (“VW”), and Defendant Northern Arizona Healthcare
18 Corporation (“NAHC”) have each filed separate Motions for Summary Judgment on *pro se*
19 Plaintiff William Russell Roberts’ (“Plaintiff”) negligence, products liability, and
20 “professional negligence” claims. (Docs. 175; 176; 190). Each Motion is fully briefed.¹

21 **I. Background²**

22 This case arises from a car accident where Plaintiff was struck head on by
23 Ms. Gallagher while traveling on State Route 64 (“SR-64”) in Coconino County, Arizona.
24 (Doc. 1 at 6). At the time of the accident, Plaintiff was driving a Volkswagen Jetta his
25 brother rented from non-party Enterprise Rental Company. (*Id.*) After the accident, local

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27 ¹ (Docs. 186 (Plaintiff’s Response to Ms. Gallagher); 187 (Plaintiff’s Response to VW);
28 195 (Plaintiff’s Response to NAHC); 188 (Ms. Gallagher’s Reply); 189 (VW’s Reply);
196 (NAHC’s Reply)).

² The facts stated in this section are undisputed, unless otherwise noted.

1 law enforcement responded to the scene and prepared a Vehicle Incident Report (“VIR”).
2 The VIR states that “Vehicle ‘X’ failed to yield” when leaving a Texico gas station off of
3 SR-64 and that Ms. Gallagher swerved into the oncoming lane of traffic to avoid Vehicle
4 “X.” (Doc. 175-1 at 7). When she swerved, Ms. Gallagher collided with Plaintiff head on.
5 (*Id.*)

6 Following the accident, Plaintiff, Ms. Gallagher, and their passengers were all
7 transported to Flagstaff Medical Center, operated by NAHC. (Doc. 1-1 at 7). They were
8 all treated and released with minor injuries. (*Id.*) Eleven months after the accident,
9 Plaintiff suffered a cardiac arrest which required him to have open heart surgery. (Doc. 1
10 at 6). Plaintiff states his cardiac arrest was due to his left anterior descending artery being
11 100% blocked. (*Id.*) Plaintiff alleges the airbag that went off during the accident
12 contributed to his cardiac arrest, and that NAHC should have caught that his blood pressure
13 was elevated during his treatment in Flagstaff. (*Id.* at 7). Plaintiff’s medical records show
14 that NAHC treated him for acute chest pain, a pulmonary contusion, and hypertension and
15 that he was told upon discharge to return to the emergency department immediately with
16 new or worsening symptoms. (Doc. 190 at 3; Doc. 190-4 at 1, 3, 5). Plaintiff’s treatments
17 records also show that he demanded to be discharged while in the ICU so that he could
18 have a cigarette, left against medical advice, and that he later returned because smoking
19 caused pain and tightness in his ribs and chest. (Doc. 190-4 at 1). Plaintiff was given a
20 chest x-ray, CT scan, and his blood pressure was checked at the time he was treated.
21 (*Id.* at 3–5). Based on these tests, the emergency room doctors found that Plaintiff did not
22 have any acute abnormalities and that his blood pressure had improved during his stay.
23 (*Id.* at 4). When Plaintiff was discharged, he was given instructions to follow up with his
24 primary care provider and given return precautions. (*Id.* at 5).

25 Plaintiff filed a negligence claim against Ms. Gallagher for allegedly causing the
26 accident, claims of products liability and negligence against VW for allegedly causing his
27 cardiac arrest, and a claim against NAHC for “professional negligence”³ as a result of the

28 _____
³ The Court will construe this claim as a claim for medical malpractice.

1 alleged inadequate care he received from NAHC. (Doc. 1 at 7). Each Defendant now
2 separately seeks summary judgment on Plaintiff's respective claims against
3 them. (Docs. 175; 176; 190).

4 **II. Legal Standard**

5 A court will grant summary judgment if the movant shows there is no genuine
6 dispute of material fact and the movant is entitled to judgment as a matter of law. Fed. R.
7 Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). A fact is “material”
8 if it might affect the outcome of a suit, as determined by the governing substantive law.
9 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual dispute is “genuine”
10 when a reasonable jury could return a verdict for the nonmoving party. *Id.* In judging
11 evidence at the summary judgment stage, the court does not make credibility
12 determinations or weigh conflicting evidence. Rather, it draws all inferences in the light
13 most favorable to the nonmoving party. *See T.W. Electric Service, Inc. v. Pacific Electric*
14 *Contractors Ass’n*, 809 F.2d 626, 630-31 (9th Cir. 1987).

15 A principal purpose of summary judgment is “to isolate and dispose of factually
16 unsupported claims.” *Celotex*, 477 U.S. at 323-24. Summary judgment is appropriate
17 against a party who “fails to make a showing sufficient to establish the existence of an
18 element essential to that party’s case, and on which that party will bear the burden of proof
19 at trial.” *Id.* at 322. The moving party bears the initial burden of identifying portions of the
20 record, including pleadings, depositions, answers to interrogatories, admissions, and
21 affidavits, that show there is no genuine factual dispute. *Celotex*, 477 U.S. at 323. Once
22 shown, the burden shifts to the non-moving party, which must sufficiently establish the
23 existence of a genuine dispute as to any material fact. *See Matsushita Elec. Indus. Co. v.*
24 *Zenith Radio Corp.*, 475 U.S. 574, 585–86 (1986). Where the moving party will have the
25 burden of proof on an issue at trial, the movant must “affirmatively demonstrate that no
26 reasonable trier of fact could find other than for the moving party.” *Soremekun v. Thrifty*
27 *Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). On an issue as to which the nonmoving
28 party will have the burden of proof, however, the movant can prevail “merely by pointing

1 out that there is an absence of evidence to support the nonmoving party’s case.” *Id.* (citing
2 *Celotex Corp.*, 477 U.S. at 323). If the moving party meets its initial burden, the
3 nonmoving party must set forth, by affidavit or otherwise as provided in Rule 56, “specific
4 facts showing that there is a genuine issue for trial.” *Anderson*, 477 U.S. at 250; Fed. R.
5 Civ. P. 56(c).

6 “The mere existence of a scintilla of evidence in support of the non-moving party’s
7 position is not sufficient[]” to defeat summary judgment. *Triton Energy Corp. v. Square*
8 *D Co.*, 68 F.3d 1216, 122 (9th Cir. 1995). In addition, it is the nonmoving party’s
9 responsibility to “identify with reasonable particularity the evidence that precludes
10 summary judgment.” *Keenan v. Allan*, 91 F.3d 1275, 127 (9th Cir. 1996) (quoted source
11 omitted). The Court need not “scour the record in search of a genuine issue of triable fact.”
12 *Id.* (quoted source omitted); *see also* Fed. R. Civ. P. 56(c)(3) (“The court need consider
13 only the cited materials, but it may consider other materials in the record.”).

14 **III. Discussion**

15 Ms. Gallagher moves for summary judgment on Plaintiff’s negligence claim against
16 her, arguing the undisputed evidence shows she was not negligent in turning into Plaintiff
17 because her actions were in response to the sudden emergency caused by the vehicle that
18 turned in front of her. (Doc. 175 at 5). Alternatively, Ms. Gallagher seeks partial summary
19 judgment related to Plaintiff’s alleged entitlement to compensatory damages related to his
20 cardiac arrest, lost wage damages, property damages, and punitive damages. (*Id.* at 3).
21 VW seeks summary judgment on Plaintiff’s products liability and negligence claims and
22 argues that Plaintiff has not provided any evidence to establish the existence of a defect in
23 the Jetta or that any alleged defect caused his injuries. (Doc. 176 at 6, 10). NAHC seeks
24 summary judgment on Plaintiff’s medical malpractice claim, arguing that Plaintiff cannot
25 substantiate his claims without an expert under Arizona law and that Plaintiff never
26 retained an expert or certified that one was not needed, as required by A.R.S. § 12-2603.
27 (Doc. 190 at 1–2). The Court will address each Motion in turn.

28

1 **A. Ms. Gallagher’s Motion for Summary Judgment (Doc. 175)**

2 Ms. Gallagher argues that the Court should grant summary judgment on Plaintiff’s
3 claims for negligence as he has failed to produce any evidence that she was negligent and
4 that the “sudden emergency doctrine” lowered Ms. Gallagher’s duty to that “which an
5 ordinarily prudent person would exercise in the same situation.” (Doc. 175 at 5–6 (quoting
6 *Sheehy v. Murphy*, 380 P.2d 152, 154 (Ariz. 1963)). Ms. Gallagher specifically argues that
7 she drove reasonably under the circumstances given a car had swerved in front of her.
8 (*Id.* at 6). Alternatively, Ms. Gallagher argues that the Court should grant her summary
9 judgment on Plaintiff’s claims related to his cardiac arrest, loss of future earnings, property
10 damage, and punitive damages. (*Id.* at 1). Plaintiff argues that the Court should deny Ms.
11 Gallagher’s request for summary judgment as genuine disputes of material fact are present,
12 including: his deposition testimony that “there was no Phantom ‘x’ Vehicle” and that Ms.
13 Gallagher “never applied her brakes and she failed to drive her vehicle and was negligent
14 when she let go of the steering wheel.” (Doc. 186 at 2).

15 **1. The Sudden Emergency Doctrine and Negligence**

16 The sudden emergency doctrine warrants a jury instruction when the actor has
17 reacted to an emergency, even though that reactive conduct might be quite impulsive and
18 negligent absent such an emergency. *See Petefish By & Through Clancy v. Dawe*, 672
19 P.2d 914, 917 (Ariz. 1983). “Consideration of a sudden emergency is, of course, not a
20 separate doctrine but only a part of the determination of what is reasonable care under the
21 circumstances.” *Myhaver v. Knutson*, 942 P.2d 445, 447 (Ariz. 1997).

22 As the movant, Ms. Gallagher can prevail on summary judgment by arguing that
23 there is “an absence of evidence to support the nonmoving party’s case.” *Soremekun*, 509
24 F.3d at 984 (citing *Celotex Corp.*, 477 U.S. at 323). To establish a *prima facie* claim of
25 negligence, a plaintiff must prove (1) the existence of a duty of the defendant to the
26 plaintiff, (2) a breach of that duty, and (3) an injury proximately caused by the breach. *See*
27 *Brookover v. Roberts Enterprises, Inc.*, 156 P.3d 1157, 1160 (Ariz. Ct. App. 2007).
28 Summary judgment on a negligence claim is appropriate if the complaining party fails to

1 establish one of the elements of negligence. *See Creel v. Loy*, 524 F. Supp. 3d 1090, 1094
2 (D. Mont. 2021) (internal citations omitted). Ms. Gallagher can also prevail on summary
3 judgment where “no reasonable juror could conclude that the standard of care was breached
4 or that the damages were proximately caused by the defendant’s conduct.” *Gleason v.*
5 *Garda CL W. Inc.*, 2019 WL 8226385, at *2 (D. Ariz. Dec. 6, 2019). Negligence is a
6 question that ought to be reserved for the jury “when there is reasonable doubt as to the
7 facts, or as to the inferences to be drawn from them.” *Id.* “Furthermore, negligence is a
8 mixed question of law and fact because breach and causation are ‘factual issues usually
9 decided by the jury.’” *Id.* (citing *Gipson v. Kasey*, 150 P.3d 228, 230 (Ariz. 2007)).

10 The undisputed facts are that Ms. Gallagher hit Plaintiff head-on while driving on
11 SR-64. (Docs. 175 at 2; 1 at 7). The parties dispute whether there was a third-party vehicle
12 that prompted the accident, however. (Doc. 186 at 2). Ms. Gallagher states that another
13 vehicle pulled out in front of her and caused her to swerve into the oncoming lane of traffic,
14 hitting Plaintiff. (Doc. 175 at 2). Ms. Gallagher also notes that a witness, Mr. Mike
15 O’Brien, “confirms” the existence of this third-party vehicle. (*Id.* at 3).

16 On the other hand, Plaintiff testified at his deposition that he did not see any third-
17 party vehicle that turned out in front of Ms. Gallagher and that Gallagher “never applied
18 her brakes and she failed to drive her vehicle and was negligent when she let go of the
19 steering wheel.” (Docs. 186 at 2; 171-1 at 31). The VIR states that Plaintiff told law
20 enforcement about the third-party vehicle, but Plaintiff disputed this admission in his
21 deposition. (Doc. 171-1 at 9, 33). Plaintiff also stated in his deposition that any purported
22 mention of the third-party vehicle in his statement to law enforcement is a “flat-out lie”
23 because he told the officer that he never saw the other vehicle since he was so focused on
24 Ms. Gallagher coming right at him. (*Id.* at 33).

25 To find for Ms. Gallagher, the Court would necessarily have to make credibility
26 determinations and weigh conflicting evidence—which the Court cannot do at the
27 summary judgment stage. *See T.W. Electric Service, Inc.*, 809 F.2d at 630–31. The
28 reasonableness of Ms. Gallagher’s care, and whether or not she experienced a sudden

1 emergency, are questions that should be left for the fact-finder to decide. *See Celotex*
2 *Corp.*, 477 U.S. at 322–23; *see also Body By Cook v. Ingersoll-Rand Co.*, 39 F. Supp. 3d
3 827, 838 (E.D. La. 2014) (“Generally, questions of reasonableness are questions of fact for
4 the jury.”).

5 Having settled that summary judgment is not proper on Plaintiff’s negligence claim
6 against Ms. Gallagher due to disputes of fact, the Court will proceed to Ms. Gallagher’s
7 alternative arguments.

8 **2. Ms. Gallagher’s Alternative Arguments**

9 **a. Plaintiff’s Cardiac Arrest and Lost Wages**

10 Ms. Gallagher seeks partial summary judgment on Plaintiff’s claim for lost future
11 wages. (Doc. 175 at 8). She first asks the Court to find that Plaintiff’s cardiac arrest is
12 unrelated to the accident. (*Id.* at 7). She argues Plaintiff has failed to certify whether or
13 not expert opinion testimony is necessary and failed to retain an expert as required by
14 A.R.S. § 12-2603 and thus cannot establish the necessary causation to assert these damages.
15 (Doc. 175 at 7). As discussed *infra* Section III.D, Plaintiff’s failure to retain an expert for
16 his medical malpractice claim against NAHC warrants summary judgment in favor of
17 NAHC on that claim. Unable to advance this claim, the Court agrees that Plaintiff also
18 cannot establish he is entitled to damages from Ms. Gallagher for loss of future earnings
19 related to the cardiac arrest. *See infra* Section III.D; *see also Gorney v. Meaney*, 150 P.3d
20 799, 804–05 (Ariz. Ct. App. 2007) (affirming the trial court’s grant of summary judgment
21 in favor of the defendant based on the plaintiff’s failure to comply with A.R.S. § 12-
22 2603(B)).

23 Ms. Gallagher further argues that Plaintiff should be precluded from asserting any
24 damages for lost wages (whether related to his cardiac arrest or otherwise) because he has
25 failed to produce any documents to support such a claim. (Doc. 175 at 8). The Court
26 agrees that Plaintiff has not come forward with competent evidence that shows his loss of
27 future earning capacity. *Esparza v. Allstate Fire & Cas. Ins. Co.*, 2021 WL 4893429, at
28 *4 (W.D. Wash. Oct. 19, 2021) (“To be competent, the evidence or proof of damages must

1 be established by a reasonable basis and it must not subject the trier of fact to mere
2 speculation or conjecture.”) (internal citations omitted). From the record before the Court,
3 it is unclear what Plaintiff did or currently does for a living, or how the accident has caused
4 Plaintiff’s inability to continue at his prior occupation—which is the bare minimum
5 evidence that Plaintiff should have produced by now. *See Nunsuch ex rel. Nunsuch v.*
6 *United States*, 221 F. Supp. 2d 1027, 1035 (D. Ariz. 2001) (“Loss of earnings is an item of
7 special damage and must be specially pleaded and proved.”) (internal citations omitted);
8 *see also Esparza*, 2021 WL 4893429, at *3 (“In order to put the question of lost earning
9 capacity before a jury, the evidence must show with reasonable certainty that the injured
10 party has suffered an impairment in his ability to make a living . . . [T]he showing that must
11 be made is that the injury suffered by the plaintiff is an injury that, in fact, has diminished
12 the ability of the plaintiff to earn money.”) (internal citations omitted). Plaintiff, having
13 failed to produce any documentation or evidence supporting this claim, the Court finds Ms.
14 Gallagher is entitled to summary judgment on Plaintiff’s loss of future earnings claim. *See*
15 *Anderson*, 477 U.S. at 250; Fed. R. Civ. P. 56(e).

16 **b. Property Damages**

17 Ms. Gallagher next asks the Court to find that Plaintiff cannot recover property
18 damages for the damage done to the rented VW Jetta he was driving. (Doc. 175 at 8). Ms.
19 Gallagher argues that, under *Childress Buick Co. v. O’Connell*, Plaintiff cannot recover
20 property damages for property he did not own. 11 P.3d 413, 418–19 (Ariz. Ct. App. 2000).
21 In *Childress*, the plaintiff, a Buick dealership, agreed to sell a used 1995 Buick Skylark to
22 a prospective buyer, who took possession of the vehicle before his financing was approved.
23 11 P.3d at 414. His financing was not approved and, while still in possession of the Buick,
24 the prospective buyer was rear-ended by the defendant. *Id.* The defendant was insured by
25 Nationwide Mutual Insurance Company, who paid the prospective buyer the amount
26 necessary to repair the Buick. *Id.* The prospective buyer instead kept the money and
27 returned the unrepaired Buick to the plaintiff dealership. *Id.* The plaintiff then sued the
28 defendant for reimbursement. *Id.* The trial court awarded plaintiff damages on summary

1 judgment. In doing so, it determined that ownership had not passed to the prospective
2 buyer, and therefore, the defendant still owed the plaintiff for the vehicle damage. *Id.* The
3 appellate court affirmed the trial court’s ruling, holding that ownership had not passed from
4 the plaintiff to the prospective buyer, therefore, the prospective buyer was not entitled to
5 damages from the defendant. *Id.* at 418–19. The *Childress* court reasoned that while the
6 prospective buyer was allowed to take possession of the Buick and drive it away from the
7 lot, his right to possession had not yet vested as he was merely a permissive user. *Id.* at 417.

8 Here, Plaintiff seeks \$11,282.39 in property damages for the damage done to the
9 Jetta rented by his brother. (Doc. 1 at 7). Plaintiff substantiates his damages by including
10 an invoice from Enterprise related to the damages to the rented Jetta; he does not include
11 the original rental policy, however, which may or may not have helped ascertain whether
12 Plaintiff could recover for damages to the car. (Doc. 1-1 at 10–11). The Enterprise invoice
13 states that the responsibility for the damages falls on Plaintiff’s brother: Mr. Joseph
14 Roberts, as the renter. (*Id.*) Plaintiff is not mentioned on the Enterprise invoice. (*Id.*)

15 On these facts, it is unclear whether Plaintiff is legally entitled to recover property
16 damages related to the Jetta—which he did not own or have a “right” to possess. *See*
17 *Childress*, 11 P.3d at 459–60; *see also Kaufman v. Jesser*, 884 F. Supp. 2d 943, 959 (D.
18 Ariz. 2012) (“In Arizona, [a]s a general rule, a plaintiff in a tort action is entitled to recover
19 such sums as will reasonably compensate him for all damages *sustained by him* as the
20 direct, natural and proximate result of [the defendant’s] negligence, provided they are
21 established with reasonable certainty.”) (internal citations omitted) (emphasis added).
22 Moreover, Plaintiff’s claim for property damages is factually unsupported without the
23 original rental agreement from Enterprise or any insurance policy documents. *See Celotex*,
24 477 U.S. at 323-24. Thus, the Court will grant summary judgment in favor of Ms.
25 Gallagher on Plaintiff’s property damage claim.

26 **c. Punitive Damages**

27 Finally, Ms. Gallagher asks the Court to find that punitive damages should be
28 precluded here. (Doc. 175 at 8–9). Ms. Gallagher argues that Plaintiff has not shown that

1 her conduct was outrageous, oppressive or intolerable; or that it created a substantial risk
2 of tremendous harm, as Plaintiff is required to show. (*Id.* (citing *Swift Transportation Co.*
3 *of Arizona L.L.C. v. Carman in & for Cnty. of Yavapai*, 515 P.3d 685, 692–93 (Ariz. 2022)).

4 Because Plaintiff’s negligence claim is still outstanding, this issue is more
5 appropriately decided by the fact-finder since a claim for punitive damages necessarily
6 depends on the underlying tort claim. See *Miller v. I-Flow Corp.*, 2011 WL 13092973, at
7 *3 (D. Ariz. July 6, 2011) (“[T]he availability of punitive damages ultimately depends on
8 the viability of Plaintiff’s underlying tort claims.”) (internal citations omitted). The Court
9 thus denies Ms. Gallagher’s request for summary judgment on Plaintiff’s claim for punitive
10 damages. See *Celotex*, 477 U.S. at 322–23.

11 In sum, only Plaintiff’s claims for negligence and punitive damages will remain
12 against Ms. Gallagher.

13 C. VW’s Motion for Summary Judgment (Doc. 176)

14 VW seeks summary judgment on Plaintiff’s strict liability claim, arguing Plaintiff
15 has produced no direct or circumstantial evidence showing that it is more probable than
16 not that the Jetta’s airbag was defective or that a causal link exists between the accident
17 and his cardiac arrest. (Doc. 176 at 6). VW also seeks summary judgment on Plaintiff’s
18 negligence claim, arguing that Plaintiff has produced no evidence to show that it is more
19 probable than not that VW’s airbag caused his cardiac arrest. (*Id.* at 10). Finally, VW
20 argues that Plaintiff’s claim for punitive damages should be dismissed as there is no
21 evidence that it acted with egregious or malicious intent. (*Id.* at 12).

22 Plaintiff argues that he can and has substantiated his claims. He argues that “Mr.
23 Khouzam will be an expert cardiologist and damages caused to heart by airbags, *still to be*
24 *determine* as to what his testimony will be, until after he peruses all the records.”⁴
25 (Doc. 187 at 2).

26 1. The Products Liability Claim

27
28 ⁴ Plaintiff never provided a “full and complete” expert disclosure as required by Federal
Rule of Civil Procedure 26(a)(2) and the Court’s Scheduling Order (Doc. 131 at 2). The
time to do so has passed.

1 “A manufacturer is strictly liable for injuries caused by use of any product that was
2 in a ‘defective condition unreasonably dangerous.’” *Golonka v. GM Corp.*, 65 P.3d 956,
3 962 (Ariz. Ct. App.2003) (quoting *Dart v. Wiebe Mfg., Inc.*, 709 P.2d 876, 878
4 (Ariz. 1985)). In Arizona, to establish a *prima facie* case of strict products liability, the
5 plaintiff must show that: (1) the product is defective and unreasonably dangerous; (2) the
6 defective condition existed at the time it left defendant’s control; and (3) the defective
7 condition is the proximate cause of the plaintiff’s injuries and property loss. *Dietz v.*
8 *Waller*, 685 P.2d 744, 747 (Ariz. 1984); *Bonar v. General Motors Corp.*, 2009 WL 44872,
9 * 4 (Ariz. Ct. App. 2009).

10 Under the first element, three types of defects can result in an unreasonably
11 dangerous product: (1) manufacturer’s defects, (2) design defects, and (3) informational
12 defects. *Dillon v. Zeneca Corp.*, 42 P.3d 598, 603 (Ariz. Ct. App. 2002). A manufacturer’s
13 defect is “flawed as a result of something that went wrong during the manufacturing
14 process.” *St. Clair v. Nellcor Puritan Bennett LLC*, 2011 WL 5331674, at *4 (D. Ariz.
15 Nov. 7, 2011) (quoting *Gomulka v. Yavapai Mach. & Auto Parts, Inc.*, 745 P.2d 986, 988–
16 89 (Ariz. Ct. App. 1987)). A defectively designed product is “one that is made as the
17 manufacturer intended it to be but that is unreasonably dangerous.” *Id.* A defectively
18 informed product is a product where a missing warning made the product defective and
19 unreasonably dangerous. *See Walsh v. LG Chem Am.*, 2021 WL 5177864, at *5 (D. Ariz.
20 Nov. 8, 2021) (quotation omitted).

21 Plaintiff’s specific legal theory is not readily cognizable from the record before the
22 Court. Nonetheless, the Court construes Plaintiff’s claim as a design defect claim based
23 on his allegations that “the airbag deploy[ed] violently” and VW should have known there
24 was a problem with their airbags. (Doc. 1 at 6–7).

25 A design defect claim “begins with the assertion that a manufacturer produced a
26 product that fails to meet the purpose for which it is designed.” *Jones v. Medtronic Inc.*,
27 411 F. Supp. 3d 521, 531 (D. Ariz. 2019) (citing *Stilwell v. Smith & Nephew, Inc.*, 482 F.3d
28 1187, 1194 (9th Cir. 2007)). A negligent design case focuses on “whether the defendant’s

1 conduct was reasonable in view of a foreseeable risk at the time of design of the product.”
2 *Id.* (citing *St. Clair*, 2011 WL 5331674, at *5). “No expert testimony is necessary to
3 establish a design defect [claim] because the test ‘focuses on the safety expectations of an
4 ordinary consumer rather than those of an expert.’” *Long v. TRW Vehicle Safety Systems,*
5 *Inc.*, 796 F.Supp.2d 1005, 1010 (D. Ariz. June 20, 2011); *see also Martinez v. Terex Corp.*,
6 241 F.R.D. 631, 641 (D. Ariz. 2007) (“[T]here is no requirement under Arizona law that
7 expert testimony be given in a products liability action.”).

8 The issues before the Court are whether Plaintiff has offered sufficient evidence
9 showing the airbag was defective and whether its deployment caused his
10 injuries. He has not.

11 A non-moving party’s burden on summary judgment is not onerous. However, the
12 non-moving party must go beyond the pleadings and by its own evidence “set forth specific
13 facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e); *Anderson*, 477
14 U.S. at 250; *see also Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996) (noting that the
15 non-moving party must “identify with reasonable particularity the evidence that precludes
16 summary judgment”). If the non-moving party fails to make this showing, the moving
17 party is entitled to judgment as a matter of law. *See Celotex*, 477 U.S. at 323.

18 Plaintiff has failed to meet his burden to produce or identify evidence that precludes
19 summary judgment. First, Plaintiff has not responded to any of VW’s written discovery,
20 including its Requests for Admissions. (Doc. 176 at 9). As VW points out, the result of
21 Plaintiff’s failure to respond dictates that VW’s First Set of Requests for Admissions are
22 now deemed “admitted” under Federal Rule of Civil Procedure 36(a)(3). (*Id.*) These
23 admissions include that Plaintiff has (1) “no evidence that a defect in the subject vehicle
24 caused his injuries,” (2) “no evidence that a defect of any kind existed in the subject vehicle
25 at the time it left the possession, custody, and control of [VW],” and (3) no evidence that
26 VW was negligent in the design or manufacture of the subject vehicle—among other
27 admissions fatal to Plaintiff’s case. (Doc. 176-1 at 82).

28 Moreover, the entirety of Plaintiff’s disclosure appears to be the documents he

1 produced with his initial disclosure statement, which only included the Arizona Crash
2 Report, four photographs of the crash scene and a repair estimate for the subject vehicle’s
3 damages. (Doc. 176-1 at 107). Importantly, Plaintiff has not produced any evidence thus
4 far to substantiate his injuries—much less evidence showing there is a genuine issue for
5 trial. *See Anderson*, 477 U.S. at 250. Without evidence to support his claims, and applying
6 Rule 36(a)(3), Plaintiff cannot meet his burden of proving that an unreasonably dangerous
7 defect existed in the VW as “[m]ere allegation and speculation are not sufficient to create
8 a factual dispute for purposes of summary judgment.” *Whitaker v. Pima County*, 640 F.
9 Supp. 2d 1095, 1100 (D. Ariz. 2009).

10 Lastly, Plaintiff has not discussed this case with Dr. Khouzam, his purported expert,
11 has not provided Dr. Khouzam with his medical records, nor has Plaintiff retained Dr.
12 Khouzam as an expert. (Doc. 189 at 2; Doc. 176-1 at 109). Indeed, Plaintiff admitted in
13 his deposition that he never talked to Dr. Khouzam—much less retained him as an expert.
14 (Doc. 176-1 at 93). Plaintiff also admitted in his deposition that when he sought treatment
15 at the VA hospital after returning to Wisconsin that he was told by his doctors that the
16 airbag deployment did not cause his heart issues and that his injuries from the airbags were
17 “superficial.” (Doc. 176-1 at 91). Plaintiff does not dispute his concessions and does not
18 produce any diagnosis, opinion, report, or other documentation—from Dr. Khouzam, or
19 anyone else—to supports his allegations that the airbag was defective or in any other way
20 caused his injuries. Importantly, the time to do so has passed. (Doc. 131 at 2–3). While
21 expert testimony may not be necessary to establish a design defect, *see Long*, 796
22 F. Supp. 2d at 1010, Plaintiff has not set forth any evidence, by affidavit or otherwise, to
23 show the airbag is defective or that there is a genuine issue for trial as to a causal link
24 between the airbag deployment and his alleged injuries. *See Anderson*, 477 U.S. at 250;
25 *see also* Fed. R. Civ. P. 56(e).

26 From the above, the Court finds VW has shown there is an absence of evidence to
27 support Plaintiff’s claim that a design defect in VW’s airbag caused him injuries, and
28 Plaintiff has failed to rebut this argument. Thus, the Court must grant summary judgment

1 in VWs favor on Plaintiff's products liability claim. *Soremekun*, 509 F.3d at 984 (citing
2 *Celotex Corp.*, 477 U.S. at 323).

3 **2. The Negligence Claim**

4 VW also argues that Plaintiff's claim for negligence should be dismissed because
5 he has not produced any evidence that VW breached a duty or caused Plaintiff's injuries.
6 (Doc. 176 at 11). Again, as the movant, VW can prevail on summary judgment by arguing
7 that there is "an absence of evidence to support the nonmoving party's case."
8 *Soremekun*, 509 F.3d at 984 (citing *Celotex Corp.*, 477 U.S. at 323). To establish a *prima*
9 *facie* claim of negligence, a plaintiff must prove (1) the existence of a duty of the defendant
10 to the plaintiff, (2) a breach of that duty, and (3) an injury proximately caused by the breach.
11 *See Brookover*, 156 P.3d at 1160. Summary judgment on a negligence claim is appropriate
12 if the complaining party fails to establish one of the elements of negligence.
13 *See Creel*, 524 F. Supp. 3d at 1094.

14 As with his products liability claim, Plaintiff has not set forth any evidence, by
15 affidavit or otherwise as provided in Rule 56, to show there is a genuine issue for trial on
16 his negligence claim—specifically, the issue of causation. *See Anderson*, 477 U.S. at 250;
17 *see also* Fed. R. Civ. P. 56(e). Thus, the Court will also dismiss Plaintiff's negligence
18 claim against VW due to his failure to provide any evidence to establish causation between
19 VW's alleged negligence and Plaintiff's injuries. *See Creel*, 524 F. Supp. 3d at 1094
20 (stating that summary judgment on a negligence claim is appropriate if the plaintiff fails to
21 establish one of the elements of negligence); *see also Keenan*, 91 F.3d at 1279 (stating that
22 it is the nonmoving party's responsibility to "identify with reasonable particularity the
23 evidence that precludes summary judgment.").

24 **3. Claim for Punitive Damages**

25 VW finally argues that Plaintiff's claim for punitive damages fails as well because
26 Plaintiff has failed to set forth evidence that VW "acted with egregious and malicious intent
27 to bring about [Plaintiff's] injuries" as required under Arizona law. (Doc. 176 at 12). The
28 Court agrees. Moreover, the Court must dismiss Plaintiff's punitive damages claim against

1 VW as “the availability of punitive damages ultimately depends on the viability of
2 Plaintiff’s underlying tort claims” and Plaintiff’s underlying claims have been dismissed.
3 *Miller*, 2011 WL 13092973, at *3 (D. Ariz. July 6, 2011) (internal citations omitted).

4 **D. NAHC’s Motion for Summary Judgment (Doc. 190)**

5 NAHC argues it is entitled to summary judgment on Plaintiff’s medical malpractice
6 claim because Plaintiff has failed to comply with A.R.S. § 12-2603, which mandates that
7 a plaintiff certify in a written statement that is filed and served with their claim “whether
8 or not expert opinion testimony is necessary to prove the health care professional’s standard
9 of care or liability for the claim.” *Id.* § 12-2603(A). (Doc. 190 at 7). NAHC also argues
10 that Plaintiff has failed to set forth any evidence to establish a *prima facie* claim for medical
11 malpractice. (*Id.* at 9). In response, Plaintiff argues that he has followed the requirements
12 of A.R.S. § 12-2603 and has also set forth sufficient evidence to support his medical
13 malpractice claim. (Doc. 195 at 6, 9). Apart from stating so, Plaintiff does not support
14 these arguments with any evidence outside of his pleadings. (*Id.* at 1–13).

15 To assert a medical malpractice action in Arizona, a plaintiff must establish that
16 “[t]he health care provider failed to exercise that degree of care, skill and learning expected
17 of a reasonable, prudent health care provider in the profession or class to which he belongs
18 within the state acting in the same or similar circumstances” and that “[s]uch failure was a
19 proximate cause of the [plaintiff’s] injury.” A.R.S. § 12-563. Demonstrating proximate
20 cause generally requires expert testimony. *Schirmer v. Avalon Health Care Inc.*, 2017 WL
21 1927914, at *4 (D. Ariz. May 10, 2017). As NAHC correctly points out, under Arizona
22 law, a medical malpractice claimant must “certify in a written statement that is filed and
23 served with the claim or the designation of nonparty at fault whether or not expert opinion
24 testimony is necessary to prove the health care professional’s standard of care or liability
25 for the claim.” A.R.S. § 12-2603(A). If such a certification is necessary, then “the claimant
26 shall serve a preliminary expert opinion affidavit with the initial disclosures that are
27 required by rule 26.1, Arizona rules of civil procedure.” *Id.* § 12-2603(B). The affidavit
28 must contain:

- 1 1. The expert’s qualifications to express an opinion on the health care
2 professional’s standard of care or liability for the claim.
- 3 2. The factual basis for each claim against a health care professional.
- 4 3. The health care professional’s acts, errors or omissions that the expert
5 considers to be a violation of the applicable standard of care resulting
6 in liability.
- 7 4. The manner in which the health care professional’s acts, errors or
8 omissions caused or contributed to the damages or other relief sought
 by the claimant.

9 *Id.* However, if the claimant certifies that an expert opinion is not necessary, Section 12-
10 2603(D) allows the defending health care professional an opportunity to dispute the
11 certification. *Id.* § 12-2603(D). If the claimant fails to comply with the preliminary expert
12 opinion certification requirement set out in Section 12-2603, their malpractice claim can
13 be dismissed at the summary judgment phase. *See Schirmer*, 2017 WL 1927914 at *4;
14 *see also Gorney*, 150 P.3d at 804–05 (affirming the trial court’s grant of summary
15 judgment in favor of the defendant based on the plaintiff’s failure to comply with
16 A.R.S. § 12-2603(B)).

17 Plaintiff has failed to comply with the preliminary expert opinion certification
18 requirement in Section 12-2603. Plaintiff did not certify in a written statement whether or
19 not expert opinion testimony is necessary, much less provide a preliminary expert opinion.
20 *See* A.R.S. § 12-2603(A–B). Plaintiff’s failure to comply with A.R.S. § 12-2603 warrants
21 summary judgment in favor of NAHC on Plaintiff’s sole claim for professional negligence.
22 *See Schirmer*, 2017 WL 1927914 at *4; *Gorney*, 150 P.3d at 804–05.

23 **IV. Conclusion**

24 For the reasons stated above, Plaintiff’s claims against VW and NAHC are
25 dismissed, but Plaintiff’s negligence claim and claim for punitive damages against Ms.
26 Gallagher remain. Partial summary judgment is granted in favor of Ms. Gallagher on
27 Plaintiff’s claims for lost wages and property damage.

28 Accordingly,

