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MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JUL 28 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

KENNETH RYAN IRBY, a single man,)	2 CA-CV 2011-0002
)	DEPARTMENT A
Plaintiff/Appellant,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 28, Rules of Civil
THE STATE OF ARIZONA; THE)	Appellate Procedure
ARIZONA STATE BOARD OF)	
REGENTS, a political subdivision of the)	
State of Arizona; THE UNIVERSITY OF)	
ARIZONA, a political subdivision of the)	
State of Arizona; and UNIVERSITY)	
PHYSICIANS HEALTHCARE, an)	
Arizona corporation,)	
)	
Defendants/Appellees.)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20082820

Honorable Paul E. Tang, Judge

AFFIRMED

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H O W A R D, Chief Judge.

¶1 Kenneth Irby appeals from the trial court’s grant of partial summary judgment in favor of appellees, the State of Arizona, the Arizona State Board of Regents, The University of Arizona, and University Physicians Healthcare, as well as the judgment following a jury verdict in favor of appellees. Irby argues the court erred in finding no issue of material fact as to the claim of medical malpractice against one of the doctors and, therefore, granting partial summary judgment. He also contends that, during trial on the claim of malpractice as to another doctor’s actions, the court erred by admitting evidence of Irby’s intoxication during his car accident and by giving a jury instruction on informed consent. Because the court did not err, we affirm.

Factual and Procedural Background

¶2 The relevant underlying facts are undisputed. Irby was taken to a hospital’s emergency room, intoxicated, after being in a single vehicle rollover accident. While he was there, Irby complained of testicular pain. An ultrasound, revealed a mass “consistent with malignancy.” Irby left the emergency room against medical advice.

¶3 A week later, Irby saw Dr. Jonathan Walker at the hospital’s urology clinic. Walker noted a mass in Irby’s right testicle. A second ultrasound, read by Dr. William Berger, again confirmed the mass. Walker surgically removed the testicle in a procedure called an orchiectomy and later pathological tests showed the mass to be a hematoma, rather than cancer.

¶4 Irby brought a medical malpractice action against appellees for the actions of Berger and Walker. The trial court granted appellees' motion for summary judgment on the claim involving Berger. After trial, the jury found in favor of appellees, and this appeal followed.

Summary Judgment

¶5 Irby first argues the trial court erred in granting appellees partial summary judgment as to his claim Berger was negligent, because: 1) Irby's expert opined that Berger would have fallen below the standard of care if he knew about Irby's car accident and did not consider the alternate diagnosis of a resolving hematoma, and; 2) a genuine issue of material fact exists as to whether Berger knew about the car accident. We review de novo a grant of summary judgment, *Valder Law Offices v. Keenan Law Firm*, 212 Ariz. 244, ¶ 14, 129 P.3d 966, 971 (App. 2006), viewing the facts and reasonable inferences from those facts in the light most favorable to the party against whom summary judgment was granted, *Andrews v. Blake*, 205 Ariz. 236, ¶ 12, 69 P.3d 7, 11 (2003).

¶6 Summary judgment is required where there is "no genuine issue as to any material fact." Ariz. R. Civ. P. 56(c)(1). Our supreme court has interpreted this rule to mean that, "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," summary judgment should be granted. *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). Evidence to support a genuine issue of material fact "must be

based on personal knowledge and must be admissible at trial.” *Portonova v. Wilkinson*, 128 Ariz. 501, 502, 627 P.2d 232, 233 (1981). And testimony is only admissible at trial if a witness has personal knowledge of the matter. Ariz. R. Evid. 602.

¶7 Irby’s expert witness concluded that Berger’s conduct would have fallen below the standard of care if he had been aware that Irby had been in a car accident when he read the ultrasound and did not include the alternative diagnosis of a hematoma. In his deposition, Berger stated that he could not remember whether he knew that Irby had been in a car accident. Irby deposed Dr. Evan Glazer, a general surgery resident, regarding his interaction with Berger prior to Irby’s surgery, asking:

Q. And did you talk—talk to [Berger] about the fact that he’d been in a car accident?

A. He was well aware of it.

Q. How do you know that?

A. He and I spoke about it, and he was very familiar with the case and the patient.

Q. And so he was aware that Ryan Irby had been involved in a high-level trauma motor vehicle accident?

A. I can’t speak to exactly what he was involved in; but I spoke with him prior to surgery, and he was aware of the case.

Q. The accident and the subsequent—

A. Exactly what he knew, when he knew it I cannot speak to.

Q. Well, you testified that before the surgery he knew about the accident; and you talked to him about that.

A. I spoke to him about the patient. My impression was that he was familiar with the patient and the patient’s history.

Q. Including the accident?

A. I did not specifically ask him if he was aware that the patient was in a motor vehicle accident that was the trauma prior to—you know, whatever timeline it was.

Q. So do you know right now, as you sit here today—did Dr. Berger—was he aware that Ryan Irby had been involved in a motor vehicle accident some 11 or 12 days prior to the surgery?

A. I'm not exactly sure of that.
Q. Well, since you were talking to him, did you think it might be important to mention that to him—
[Defense counsel] Form.
Q. – if he's looking at films?
[Defense counsel] Form.
A. My impression was that he was aware of the patient history. During the—the initial ultrasound report mentioned a differential that could be hematoma, which would be related to the trauma. It could be cancer. And so that was—but I did not explicitly ask him the detailed question that you're –
Q. So even from that report you can deduct that he would have been familiar with the fact that he had trauma?
A. I can't exactly say that. In hindsight, I do not know exactly what he was familiar with or not familiar with.

Appellees filed a motion for summary judgment, asserting in part that Glazer's deposition amounted to "mere conjecture and speculation."

¶8 After oral argument, the trial court requested the parties depose Glazer again to determine "how he came to believe or his impressions of how he thought Dr. Berger knew [about Irby's accident]." The parties agreed. In his second deposition, Glazer stated that he never had discussed the accident with Berger and had no other information indicating Berger was aware of it. He testified he had assumed Berger was aware of the accident. The court granted the motion for partial summary judgment, finding there was no genuine issue of material fact because there was insufficient foundation to support the admission of Glazer's statements.

¶9 Glazer specified in both depositions that he had not told Berger about the car accident. He stated that his belief that Berger knew about the accident was based on his own assumptions and impressions. Glazer's second deposition further clarified that he had no personal knowledge of Berger's awareness of the car accident. Thus, Glazer's

testimony would be inadmissible at trial under Rule 602 and is insufficient to show a genuine issue of material fact. *See Portonova*, 128 Ariz. at 502, 627 P.2d at 233. “Mere speculation . . . as to the facts will not suffice [to defeat a motion for summary judgment.]” *United Bank of Ariz. v. Allyn*, 167 Ariz. 191, 195, 805 P.2d 1012, 1016 (App. 1990). Moreover, evidence that is inadmissible at trial or internally inconsistent may provide a “scintilla” or slightest doubt, but does not withstand summary judgment. *See Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008. Irby did not sustain his burden of opposing the motion for summary judgment. *See* Ariz. R. Civ. P. 56(c)(1).

¶10 Irby argues the trial court erred in considering the foundation for Glazer’s statements because appellees waived any foundation objection by failing to object to those statements on that basis during the deposition as required by Rule 32(d)(3)(B), Ariz. R. Civ. P. That rule applies to “errors of any kind which might be obviated, removed, or cured if promptly presented.” Ariz. R. Civ. P. 32(d)(3)(B). *See Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1160 (11th Cir. 2005) (objection waived if error “could have been cured at the taking of the deposition”). The lack of foundation for Glazer’s testimony could not be cured. Additionally, in their reply in support of the motion for summary judgment, appellees adequately attacked Glazer’s testimony as “mere conjecture and speculation about what Dr. Berger knew or did not know.”

¶11 Irby also asserts proper foundation supported Glazer’s initial statements that Berger knew about the car accident history. But reasonable people could not have concluded, based on the entirety of Glazer’s testimony, that Berger knew about the accident. *See Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008; *Wragg v. Village of*

Thornton, 604 F.3d 464, 470 (2010) (ambiguous and speculative deposition testimony as to what actor knew insufficient to defeat summary judgment). And Glazer’s clarifications in the second deposition did not create a genuine issue of material fact. *Cf. Allstate Indem. Co. v. Ridgely*, 214 Ariz. 440, ¶ 10, 153 P.3d 1069, 1071-72 (2007) (exception to sham affidavit rule if affiant confused and affidavit clarifies); *Slowiak v. Land O’Lakes, Inc.*, 987 F.2d 1293, 1297 (7th Cir. 1993) (“subsequent affidavit may be used to clarify ambiguous or confusing deposition testimony”). The statement “he was very familiar with the case and the patient” actually highlights Glazer’s assumption that Berger had known about the car accident.

¶12 Irby further contends that Glazer’s statement was admissible even without personal knowledge as an admission by a party opponent under Rule 801(d)(2)(D), Ariz. R. Evid. However, Irby did not raise this argument in the trial court and, thus, has waived it on appeal. *See City of Tempe v. Fleming*, 168 Ariz. 454, 456, 815 P.2d 1, 3 (App. 1991) (“arguments not made at the trial court cannot be asserted on appeal”).

Admission of Intoxication Evidence

¶13 Irby argues that, in the trial on the claim of medical malpractice regarding Walker’s actions, the trial court erred by admitting evidence Irby was intoxicated when he was admitted to the emergency room. He contends that, because the court’s decision on the motion in limine on this issue relied on defense counsel’s avowal that Walker considered Irby’s intoxication in deciding on a medical approach and Walker did not testify to that at trial, evidence of his intoxication was not relevant under Rule 401, Ariz. R. Evid., or more prejudicial than probative under Rule 403, Ariz. R. Evid. We review

the trial court's decision on a motion in limine and in admitting evidence at trial for an abuse of discretion. See *Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 506, 917 P.2d 222, 235 (1996) (admission of evidence); *Warner v. Sw. Desert Images*, 218 Ariz. 121, ¶ 33, 180 P.3d 986, 998 (App. 2008) (motion in limine).

¶14 In his motion in limine and during oral argument on that motion, Irby argued that evidence of his intoxication was not relevant or was unduly prejudicial in light of the evidence in the case. The appellees responded that the intoxication evidence was relevant to Irby's reliability as a patient, which affected Walker's approach to medical decisions about Irby. However, on appeal, Irby claims "Walker's trial testimony differed significantly from counsel's avowal" and that Walker did not testify Irby's intoxication affected his approach. He claims, therefore, that his intoxication was irrelevant and should not have been admitted.

¶15 But Irby did not object to the admission of the intoxication evidence at trial. The purpose of requiring a party to make a specific objection in the trial court is to give the court an opportunity to rule on the matter before an appellant may claim it is error in this court. *Trantor v. Fredrikson*, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994). Consequently, "arguments not made at the trial court cannot be asserted on appeal." *City of Tempe v. Fleming*, 168 Ariz. 454, 456, 815 P.2d 1, 3 (App. 1991). The argument that the intoxication evidence was not relevant based on Walker's trial testimony is waived. See *Trantor*, 179 Ariz. at 300, 878 P.2d at 658; cf. *Kelly v. City of Oakland*, 198 F.3d 779, 786 (9th Cir. 1999) (no error in denying motion for new trial based on violation of motion in limine where objection to violation not contemporaneous with violation).

¶16 Nevertheless, Irby filed a motion in limine to preclude this evidence before trial. But when the trial court ruled on that motion, it did so based on appellees' avowal the evidence was relevant to Walker's handling of the case. Irby does not claim now that the trial court erred in so concluding based on appellees' avowal. Therefore, any such claim is waived. *See Dawson v. Withycombe*, 216 Ariz. 84, ¶ 91, 163 P.3d 1034, 1061 (App. 2007) (argument not made in opening brief waived).

Jury Instruction

¶17 Finally, Irby argues the trial court erred by instructing the jury on the elements of informed consent. But he then states his "malpractice claim was founded on Dr. Walker's failure to adequately explain both the nature of his condition and the procedure to be performed." And below, he asked his medical expert how Walker "fell below the standard of care with respect to the informed consent issue" and argued Walker had not obtained Irby's informed consent.

¶18 Irby cites to the general standard of review for jury instructions and to the medical malpractice statutes, which describe, inter alia, negligence liability for medical services rendered "without express or implied consent." A.R.S. § 12-561(2). He cites to no authority supporting the proposition that the trial court erred by giving the informed consent instruction in this type of case and has waived this argument on appeal. *See Ariz. R. Civ. App. P. 13(a)(6)* ("An argument . . . shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on."); *Polanco v. Indus. Comm'n*, 214

Ariz. 489, n.2, 154 P.3d 391, 393-94 n.2 (App. 2007) (appellant's failure to develop and support argument waives issue on appeal).

Conclusion

¶19 In light of the foregoing, we affirm the trial court's grant of summary judgment and the jury's verdict, both in favor of appellees.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge