ESTATE OF ARLENE PORTANOVA,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:	
	:	
vs.	:	NO. 04-00,859
	:	
	:	
	:	
JERSEY SHORE AREA JOINT WATER	:	
AUTHORITY, and CALVIN L.	:	
WHITTON, Executor of the ESTATE OF	:	
HELEN M. WHITTON,	:	
HELEN WHITTON	:	
	:	
Defendants	:	MOTION FOR SUMMARY JUDGMENT

Date: December 9, 2005

OPINION and ORDER

Before the court for determination is the Motion for Summary Judgment of Defendant Jersey Shore Area Joint Water Authority (hereafter "the Water Authority") filed October 11, 2005. The motion is denied. The Estate of Arlene Portanova has produced evidence that could establish a causal link between the water in Portanova's yard and her fall on September 4, 2003.

I. BACKGROUND

A. Facts

As a preliminary note, Arlene Portanova passed away during the pendency of this litigation. Her estate was subsequently substituted as plaintiff. Defendant Helen Whitton also passed away during the pendency of this litigation. Her son, Calvin Whitton, the executor of

her estate, was substituted as a party. In this opinion, the court will identify the Estate as the plaintiff for ease of reference.

This case arises out of an incident that occurred on September 4, 2003. At that time, Arlene Portanova (hereafter "Portanova") resided at 767 Railroad Street, Jersey Shore, Pennsylvania. Portanova's property is located on the southern side of Railroad Street, and is accessed by descending a set of stairs from street level. A platform is located at the bottom of the stairs. A series of concrete pavers follows from this platform. The pavers form a walkway up to Portanova's residence. Grass is located on either side of the pavers.

The Estate has alleged that on September 4, 2003 running water covered a significant portion of Portanova's property. The Estate has alleged that the water was from a leak and/or break in the water main owned, possessed, and controlled by the Water Authority.[1] The Estate has alleged that on September 4, 2003 Portanova left her residence to meet a taxi on Railroad Street, and while *en route*, she slipped on the excessive water and fell to the ground. The Estate alleges that Portanova suffered injuries in the form of fractures to her wrists and various scrapes, bumps, bruises, and contusions as a result of the fall.

Portanova was observed lying on the ground and emergency medical personnel were summoned. She was soon thereafter transported to the Jersey Shore Hospital for treatment. In a number of medical records, there a several statements attributable to Portanova regarding the circumstances of her fall on September 4, 2003. A Jersey Shore Hospital ER physician record dated September 4, 2003 states, "71 yr old walking out to go for MD appt – slipped on wet area

[1] The Estate also alleged that the water originated from a leak and/or break in Defendant Helen Whitton's water pipes. Whitton's Estate filed a motion for summary judgment on August 31, 2005. On November 22, 2003, the court granted the motion and entered judgment in favor of Calvin Whitton as executor of the estate of Helen Whitton.

and fell forward on both writs." Plaintiff's Response to Defendant Jersey Shore Area Joint Water Authority's Motion for Summary Judgment, Exhibit A. A September 4, 2003 consultation note by Cynthia Recinto, M.D. states, "This 71-year-old white female was walking out from her house to go to her doctor's appointment, slipped while walking on the grass and fell landing on both arms and face." Ibid. A discharge summary by Steven Davis, M.D. dated September 4, 2003 states, "She [(Portanova)] was on the way to see Dr. Recinto and slipped while walking on the grass landing on both arms and her face." Ibid. A Jersey Shore Hospital occupational therapy initial evaluation dated September 5, 2003 states, "'I slipped on the wet grass and fell.'" Ibid. A Jersey Shore Hospital history and physical exam note from September 2003 states, "71 yo WF walking out to MD appointment, slipped on the wet grass, fell, landing on both arms and her face." Ibid. A Jersey Shore Hospital history and physical exam note from October 7, 2003 states, "71 yo WF walking out to MD appointment, slipped on the wet grass, fell, landing on both arms and her face." Ibid.

B. <u>Causes of Action Alleged</u>

The Estate has alleged two causes of action against the Water Authority regarding its conduct with respect to the water main leak/break. Count I of the complaint is a negligence cause of action. Count II is a vicarious liability cause of action.

C. <u>Water Authority's Argument for Summary Judgment</u>

The Water Authority asserts that it is entitled to summary judgment because the Estate has failed to produce evidence necessary to make out a prima facie case for negligence. The Water Authority asserts that the Estate has not produced evidence which establishes that the alleged accumulated water caused Portanova's fall. The Water Authority asserts that there is

no admissible or competent evidence that establishes that what happened at the time of the fall. The Water Authority asserts that there were no witnesses to the fall and Portanova passed away before her deposition could be taken. With regard to the statements Portanova made to individuals involved with her medical treatment following her fall concerning the circumstances of that fall, the Water Authority argues that the statements are hearsay and inadmissible. Without any direct testimony concerning the fall, the Water Authority argues that a jury would be left to speculate as to the possible causes, e.g. Did Portanova catch her foot between the pavers? Did Portanova lose her balance? In this regard, the Water Authority argues that the Estate has failed to meet its burden of establishing a prima facie case of negligence.

II. ISSUE

Whether the Estate has produced sufficient evidence to establish a causal link between the alleged accumulated water in Portanova's yard and her fall on September 4, 2003?

III. DISCUSSION

The opinion's discussion will be divided into four sections. The first section will set forth the standard of review that will guide the determination of the motion for summary judgment. The second section will set forth the elements of a negligence cause of action and a definition of causation so that there is a framework within which to evaluate the Estate's evidence. The Estate's evidence will be key in determining the motion for summary judgment. The focus of the court's inquiry will be the admissibility of the statements Portanova made to individuals involved with her medical treatment following her fall. The court must determine whether the statements Portanova made to these individuals concerning her fall are admissible

as substantive evidence. This decision will be made in accordance with Pa.R.E. §104. Section 104 permits a court to make a preliminary determination as to the admissibility of evidence. Section three of the discussion will set forth why these statements are admissible. Finally, section four will set forth why the Estate has produced evidence that could establish a causal link between the water in Portanova's yard and her September 4, 2003 fall.

A. Standard of Review

A party may move for summary judgment after the pleadings are closed. Pa.R.C.P. 1035.2. Summary judgment may be properly granted "… when the uncontraverted allegations in the pleadings, depositions, answers to interrogatories, admissions of record, and submitted affidavits demonstrate that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law." ***Rauch v. Mike-Mayer***, 783 A.2d 815, 821 (Pa. Super. 2001); ***Godlewski v. Pars Mfg. Co.***, 597 A.2d 106, 107 (Pa. Super. 1991). The movant has the burden of proving that there are no genuine issues of material fact. ***Rauch***, 783 A.2d at 821. In determining a motion for summary judgment, the court must examine the record " '… in the light most favorable to the non-moving party, accepting as true all well pleaded facts in its pleading and giving that party the benefit of all reasonable inferences ….'" ***Godlewski***, 597 A.2d at 107 (quoting ***Banker v. Valley Forge Ins. Co.***, 585 A.2d 504, 507 (Pa. Super. 1991)). Summary judgment will only be entered in cases that are free and clear from doubt and any doubt must be resolved against the moving party. ***Garcia v. Savage***, 586 A.2d 1375, 1377 (Pa. Super. 1991).

Summary judgment may be properly entered if the evidentiary record "… either (1) shows that the material facts are undisputed or (2) contains insufficient evidence of facts to

make out a *prima facie* cause of action or defense." ***Rauch***, 783 A.2d at 823-24; *see also*, Pa.R.C.P. 1035.2. If the defendant is the moving party under Pa.R.C.P. 1035.2(2), then "… he may make the showing necessary to support the entrance of summary judgment by pointing to material which indicates that the plaintiff is unable to satisfy an element of his cause of action." ***Rauch***, 783 A.2d at 824. "Conversely, the [plaintiff] must adduce sufficient evidence on an issue essential to [his] case and on which [he] bears the burden of proof such that a jury could return a verdict favorable to the [plaintiff]." ***Ibid***. If the plaintiff fails to establish a prima facie case, then summary judgment is proper as a matter of law. ***Ack. v. Carrol Township***, 661 A.2d 514, 516 (Pa. Cmwlth. 1995).

B. Elements of a Negligence Cause of Action and Causation Definition

1. Elements of a Negligence Cause of Action

A plaintiff must prove four elements to make out a negligence cause of action. A plaintiff must establish: (1) the existence of a duty or obligation recognized by law, requiring the actor to conform to a certain standard of conduct; (2) a failure on the part of the defendant to conform to that duty, or breach thereof; (3) a causal connection between the defendant's breach and the resulting injury; and (4) actual loss or damage suffered by the complainant. ***Atcovitz v. Gulph Mills Tennis Club***, 812 A.2d 1218, 1222 (Pa. 2002); ***Peters v. Sidorov***, 855 A.2d 894, 898 n.8 (Pa. Super. 2004); ***Rabutino v. Freedom State Realty Co.***, 809 A.2d 933, 938 (Pa. Super. 2002).

2. Causation Definition

In order to establish legal causation, a plaintiff must establish that the defendant's negligent act was a proximate cause in producing the injury he suffered. *See*, ***Feeney v.***

Dissten Manor Pers. Care Home, Inc., 849 A.2d 590, 594-95 (Pa. Super. 2004), *app. denied*, 864 A.2d 529 (Pa. 2004). Proximate cause is a term of art used to describe legal causation. *See*, ***Jones v. Montefiore Hosp.***, 431 A.2d 920, 923 (Pa. 1981). Proximate cause is established if the defendant's negligent act was a substantial factor in brining about the injury suffered. ***Ibid***.; ***Gutteridge v. A.P. Green Servs., Inc.***, 804 A.2d 643, 654 (Pa. Super. 2002), *app. denied*, 829 A.2d 1158 (Pa. 2003).

A cause is substantial if it is significant or recognizable; it does not have to be quantified as considerable or large. ***Jeter v. Owens-Corning Fiberglass Corp***., 716 A.2d 633, 636 (Pa. Super. 1998). A defendant's conduct is not a substantial factor if it is an insignificant cause or a negligible cause. ***Id***. at 637. A cause is not a substantial factor if the harm would have been sustained even if the defendant had been negligent. ***Ibid***. A substantial factor is "'conduct [that] has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using the word in the popular sense ….'" ***Id***. at 636 (quoting Restatement (Second) of Torts, §431, cmt a.) (change in original).

Pennsylvania law does not require that the substantial factor be the only factor in producing the injury. ***Jones***, 431 A.2d at 923; ***Jeter***, 716 A.2d at 637. "A plaintiff need not exclude every possible explanation, and 'the fact that some other cause concurs with the negligence of the defendant in producing an injury does not relieve defendant from liability unless he can show that such other cause would have produced the injury independently of his negligence.'" ***Jones***, 431 A.2d at 637 (quoting ***Majors v. Brodhead Hotel***, 205 A.2d 873, 878 (Pa. 1965)). "Two or more causes may contribute to and thus be the legal and proximate cause of an injury." ***Fenney***, 849 A.2d at 595.

C. Portanova's Statements to Individuals Involved with her Medical Treatment

1. Hearsay and the Medical Treatment Exception

Generally, hearsay is not admissible. ***Commonwealth v. Smith***, 681 A.2d 1288, 1290 (Pa. 1996); *see also*, Pa.R.E. 802. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Pa.R.E. 801(c). Hearsay is generally inadmissibly because "'… such evidence lacks guarantees of trustworthiness fundamental to the Anglo-American system of jurisprudence.'" ***Commonwealth v. D.J.A.***, 800 A.2d 965, 975 (Pa. Super. 2002), *app. denied*, 857 A.2d 677 (Pa. 2004) (quoting ***Commonwealth v. Vining***, 744 A.2d 310, 317 (Pa. Super. 2000)).

However, there are exceptions to the prohibition against hearsay. The proponent of the hearsay evidence bears the burden of convincing the court of its admissibility under one of the exceptions. ***Smith***, 681 A.2d at 1291. One of the exceptions to the hearsay prohibition is the medical treatment exception. ***D.J.A.***, 800 A.2d at 976.

The medical treatment exception provides that "[a] statement made for the purposes of medical treatment, or medical diagnosis in contemplation of treatment, and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to treatment, or diagnosis in contemplation of treatment" is admissible. Pa.R.E 803(4). Under the exception, a two part test must be satisfied before a statement may be admitted into evidence. First, the declarant must have made the statement for the purpose of receiving medical treatment, and second, the statement must have been necessary and proper for diagnosis and treatment. ***Smith***, 681 A.2d at 1291; ***Estate of Swift v. Northeastern Hosp. of Philadelphia***, 690 A.2d 719, 721

(Pa. Super. 1997), *app. denied*, 701 A.2d 577 (Pa. 1997). Statements made concerning the cause of the injury are admissible, so long as the two part test is satisfied. *See*, ***Smith***, 681 A.2d at 1291. But, statements identifying the individual at fault are not admissible under the medical testimony exception. *See*, ***Id***. at 1292; ***D.J.A.***, 800 A.2d at 976-77.

2. <u>Portanova's Statements to Individuals Involved with her Medical Treatment are Admissible</u>

The statements Portanova made to individuals involved with her medical treatment concerning her fall on September 4, 2003 are admissible as substantive evidence under the medical treatment exception. In summary, the statements attribute the cause of Portanova's fall to slipping on wet grass. They do not establish or assert who was at fault.

Portanova's statements to individuals involved with her medical treatment regarding the cause of her fall meet the two part ***Smith*** test and are admissible as substantive evidence. The statements Portanova made regarding the cause of her fall were made for the purpose of receiving medical treatment. The statements were made to individuals involved with her medical care and were made within a short period of time following the fall. Also, there is no indication that any of the individuals associated with the above referenced medical records were being contacted for any other purpose beside medical treatment, i.e. as an expert witness or as an independent medical examiner.

Portanova's statements to individuals involved with her medical treatment regarding the cause of her fall were necessary and proper for diagnosis and treatment. Portanova was a 71 year old white female with a history of hypertension and diabetes. Plaintiff's Response to Defendant Jersey Shore Area Joint Water Authority's Motion for Summary Judgment, Exhibit A (September 4, 2003 consultation note of Cynthia Recinto, M.D.). Portanova had also

suffered a mild stroke in early 2003. Deposition of Michael Portanova, 26 (6/28/05). The cause of Portanova's fall is of particular relevance because of the conditions and ailments in her medical history.

The Estate attached as Exhibit A to its Supplemental Brief in Opposition to Defendant Jersey Shore Area Joint Water Authority's Motion for Summary Judgment an affidavit of Cristy Harding, R.N. In the affidavit, Harding states that knowing the cause of Portanova's fall would be necessary for her medical treatment. This is because knowledge regarding the cause of the fall could be used by the medical staff as a diagnostic tool. Harding states that Portanova's medical history shows that she was suffering from a multitude of medical problems, many of which could have caused the fall. Harding states that, in order to properly determine the course of treatment, possible causes would have to be ruled out because a particular cause would require a particular course of treatment. As such, Harding states that knowing the cause of Portanova's fall was necessary for her medical treatment.[2]

The court is satisfied that the individuals involved with Portanova's medical treatment would need to determine whether a condition or ailment associated with her medical history (another stroke) or something else (slipping on wet grass) was the cause of her fall. This determination would then dictate what course of treatment Portanova would receive. This court also believes that it is common knowledge that when elderly individuals fall it is prudent

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[2] In a November 22, 2005 order, the court permitted the parties to submit additional argument and authority regarding the admissibility of Portanova's statements to individuals involved with her medical treatment following her fall. This was done to better enable the court to determine whether the statements are admissible under Pa.R.E. 803(4). The order noted that the submission of additional argument and authority was optional.

The Estate submitted the above referenced brief and attached affidavit on December 5, 2005. The Water Authority also submitted a supplemental brief on December 5, 2005. The court is consulting the Harding affidavit

for those involved to check to see if there are signs of a stroke, regardless of prior medical history. The medical care professionals in this county have actively publicized the need for this inquiry. They have stated that even non-medical persons should inquire as to the mental orientation of the fall victim and determine if she responds coherently and rationally. Accordingly, Portanova's statements regarding the cause of her fall were necessary and proper for her diagnosis and treatment.

This conclusion is supported by controlling Pennsylvania case law. In ***Estate of Swift v. Northeastern Hospital of Philadelphia***, Edith Swift injured herself when she had fallen off a ladder. 690 A.2d at 721. At the emergency room, she was diagnosed with a compression fracture and myasthenia gravis, a chronic muscular disorder. ***Ibid***. Swift was discharged the same day, but went to the restroom before leaving the hospital. While in the restroom, Swift slipped and fell. ***Ibid***. Swift sustained a fracture of her femur and was readmitted to the hospital. Following surgery, Swift developed sepsis and died three weeks later.

Swift made two statements to physicians regarding the cause of her fall. Her doctor's report stated that she slipped on water. ***Swift***, 690 A.2d at 721. Swift also told her orthopedic surgeon that there was water on the floor where she fell. ***Ibid***. On appeal, the plaintiffs raised the issue of whether these statements were admissible. The Superior Court held that they were.

The Superior Court determined that the statements Swift made to her physicians met the two part test. The Superior Court found that the statements were made for the purpose of medical treatment. ***Swift***, 690 A.2d at 721. The Superior Court also found that Swift's

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as part of its preliminary determination pursuant to Pa.R.E. 104(a) regarding the admissibility of the Portanova statements.

statements regarding the cause of her fall were necessary and proper for diagnosis and treatment. The Superior Court stated that because of Swift's myasthenia gravis diagnosis "[her] statement that her slip was caused by water on the floor was necessary to insure that her slipping was not related to her newly diagnosed disease, but rather, was caused by external circumstances." ***Ibid***.

The same is true in the present case. Just as in ***Swift***, Portanova's statements regarding the cause of her fall were necessary and proper for diagnosis and treatment because knowing the cause of her fall was necessary to insure that it was caused by external circumstances and not conditions that were part of her medical history. Accordingly, Portanova's statements to the individuals involved with her medical treatment regarding the cause of her fall are admissible as substantive evidence under the medical treatment exception.

D. <u>The Estate has Established a Prima Facie Case for Negligence</u>

The Estate has presented sufficient evidence to establish a prima facie case for negligence against the Water Authority because the evidence could allow a fact finder to conclude that the water in Portanova's yard was a substantial factor in bringing about her fall.

The Estate has presented evidence that the water caused the grass in Portanova's yard to bet wet. In her statements to individuals involved with her medical treatment, Portanova stated that the grass was wet. Plaintiff's Response to Defendant Jersey Shore Area Joint Water Authority's Motion for Summary Judgment, Exhibit A (Cynthia Recinto, M.D. September 4, 2003 consultation note; Jersey Shore Hospital occupational therapy initial evaluation note dated September 5, 2005; Jersey Shore Hospital history and physical exam note of September 2003; Jersey Shore Hospital history and physical exam note dated October 7, 2005). Portanova's son,

Michael Portanova also testified as to the condition of the property on September 4, 2003, which circumstantially ties in the accumulation of water on her property as a result of the leak/break in the Water Authority's water main to Portanova's statements

Portanova fell sometime during the morning of September 4, 2003. Michael Portanova went to 767 Railroad Street during the afternoon of September 4, 2003. Michael Portanova Deposition, 28 (6/28/05). Michael testified that he saw water coming up out of the ground and running down the yard toward his mother's residence. Id. at 32. Michael testified that the water covered an area approximately thirty-five feet by thirty-five feet on the flat portion of the property. Id. at 29. The water extended from the platform at the bottom of the stairs to his mother's residence. Ibid. The water made the ground and the pavers wet. Id. at 31. The depth of the water in the yard was four inches in spots and came up to the platform at the bottom of the stairs, which was about a half of an inch above the ground. Id. at 31, 32, 33. With regards to the grass on both sides of the pavers, Michael testified that the water was visible on the right side, but not the left. Id. at 33. He testified that he could not tell that the grass on the left side was wet until he stepped in it. Id. at 34. Therefore, based upon Portanova's statements to the individuals involved with her medical treatment and Michael's testimony, Portanova has produced evidence from which a jury could determine that the grass was wet at the time of Portanova's fall on September 4, 2004.

The Estate has presented evidence which could establish that the wet grass caused Portanova's fall. In statements made to individuals involved with her medical treatment Portanova stated that she slipped on the wet grass. The Estate has presented evidence which could establish that the water in Portanova's yard caused the grass to be wet and that she

slipped on the wet grass. Accordingly, the Estate has produced evidence which could permit a jury to determine that the water in Portanova's yard was a substantial factor in causing her fall on September 4, 2003 and the resultant injuries.

IV. CONCLUSION

The motion for summary judgment is denied.

ORDER

It is hereby ORDERED that the Motion for Summary Judgment of Defendant Jersey Shore Area Joint Water Authority filed October 11, 2005 is DENIED.

BY THE COURT:

William S. Kieser, Judge

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