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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

Court of Appeals of New Mexico
Filed 1/9/2024 10:38 AM

2 **SUZANNE BURNS,**

3 Plaintiff-Appellant,



Mark Reynolds

4 v.

No. A-1-CA-38594

5 **PRESBYTERIAN HEALTHCARE**
6 **SERVICES and NAVJEET KAUR,**
7 **M.D.,**

8 Defendants-Appellees.

9 **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

10 **Joshua A. Allison, District Court Judge**

11 Fine Law Firm
12 Mark Fine
13 Albuquerque, NM

14 for Appellant

15 Hinkle Shanor LLP
16 Kathleen Wilson
17 Hari-Amrit Khalsa
18 Albuquerque, NM

19 for Appellee Presbyterian Healthcare Services

20 Madison, Mroz, Steinman, Kenny & Olexy, P.A.
21 M. Eliza Stewart
22 Jacqueline A. Olexy
23 Albuquerque, NM

24 for Appellee Navjeet Kaur, M.D.

1 **DECISION**

2 **HANISEE, Judge.**

3 {1} Plaintiff Suzanne Burns appeals the district court’s order granting summary
4 judgment in favor of Defendants Presbyterian Health Services and Navjeet Kaur,
5 M.D. Plaintiff alleges that Defendants’ negligence during the immediate post-
6 operative period following a surgery they performed on her caused medical
7 complications resulting in injury. On appeal, Plaintiff sets forth the following
8 arguments: (1) the district court abused its discretion in striking an untimely affidavit
9 (Affidavit) written by her expert on medical causation, Dr. Walid Arnaout, because
10 such a sanction resulted in dismissal of her case via summary judgment; and (2) even
11 in the absence of the Affidavit, the district court improperly granted summary
12 judgment in favor of Defendants. Because the district court acted within its
13 discretion to strike Plaintiff’s tardy expert Affidavit and properly determined
14 Plaintiff produced no expert testimony on medical causation as required by New
15 Mexico case law, we affirm.

16 {2} As an initial matter, in any appeal before this Court, “[i]t is the appellant’s
17 burden to demonstrate, by providing well-supported and clear arguments, that the
18 district court has erred.” *Premier Tr. of Nev., Inc. v. City of Albuquerque*, 2021-
19 NMCA-004, ¶ 10, 482 P.3d 1261. On October 15, 2009, the district court issued a
20 thorough, well-reasoned, and explanatory order granting Defendants’ motions to

1 strike the Affidavit and for summary judgment (the Order). Having carefully
2 reviewed the Order, as well as the briefs of the parties and the record on appeal, we
3 exercise our discretion to adopt the Order for substantially the same reasons as those
4 set forth therein. *See* Rule 12-405(B) NMRA (providing that appellate courts may
5 dispose of a case by nonprecedential order, decision, or memorandum opinion under
6 certain circumstances). We briefly supplement the reasoning expressed by the
7 district court in light of the issues raised on appeal.

8 {3} Plaintiff first claims that the district court failed to permit Plaintiff an
9 opportunity to be heard on the ultimate issue for which her expert Affidavit was
10 struck—that is, its violation of the scheduling order—or properly consider necessary
11 factors before entering a sanction that resulted in dismissal of Plaintiff’s case.
12 Regarding the opportunity to be heard, we note that Plaintiff opposed Defendants’
13 motions to strike both in writing and at a lengthy hearing at which argument was
14 presented regarding Defendant’s then-pending motions to strike. We therefore reject
15 this argument. Moreover, in addition to agreeing with the Order that the belated
16 Affidavit violated the Rule 1-016 NMRA scheduling order in place during the
17 duration of proceedings in district court, we agree that the stricken Affidavit was
18 inconsistent with both Plaintiff’s initial expert disclosure and the expert’s deposition
19 testimony, and that to have permitted the Affidavit would have unduly prejudiced
20 Defendants. We further note that Plaintiff did not suffer a sanction *of* dismissal as a

1 consequence of her violation of the scheduling order; rather, she suffered the lesser
2 sanction of exclusion of the untimely Affidavit. The authority Plaintiff provides on
3 appeal addresses circumstances where the sanction itself is one of dismissal. Plaintiff
4 misconstrues the law regarding such lesser sanctions by arguing that New Mexico
5 law treats them as equal to the sanction of direct dismissal even when summary
6 judgment is otherwise granted on legal grounds relating to admissible evidence.
7 While Plaintiff cites *Freeman v. Fairchild*, 2018-NMSC-023, 416 P.3d 264, for the
8 proposition that “a sanction resulting in dismissal” must be reviewed at a heightened
9 standard, *Fairchild* itself involved a sanction of direct dismissal premised upon an
10 opposing party’s failure to respond to a motion for summary judgment. *Id.* ¶¶ 9-12.
11 We are unwilling to extend *Fairchild*’s rationale in this regard to *any* sanction that
12 is followed by an order of summary judgment. Rather, we view the Order to resolve
13 separate but related issues—the sanction first, and then the propriety of summary
14 judgment—governed by differing legal standards. Plaintiff’s contention that lesser
15 sanctions that are relevant to or lead to summary judgment and dismissal are
16 governed by the same standards as those of direct dismissal (or other dispositive
17 judgment) is incorrect. *See Lewis ex rel. Lewis v. Samson*, 2001-NMSC-035, ¶ 13,
18 131 N.M. 317, 35 P.3d 972 (“[W]hereas we more closely scrutinize, albeit still under
19 an abuse of discretion standard, the severe sanction of dismissal, we entrust sanctions
20 short of dismissal to the sound discretion of the trial court.”). “Excluding a witness,

1 while still a drastic remedy, is one of the lesser sanctions available to the court.” *Id.*
2 (internal quotation marks and citation omitted). We reject Plaintiff’s argument that
3 the district court applied the wrong standard to that aspect of the Order striking the
4 Affidavit of Plaintiff’s expert.

5 {4} Regarding the propriety of the district court’s order of summary judgment, a
6 plaintiff in a medical malpractice suit must adduce evidence that the injury
7 complained of was caused by the defendant’s negligence. *See e.g., Alberts v. Schultz*,
8 1999-NMSC-015, ¶ 29, 126 N.M. 807, 975 P.2d 1279. “[E]xpert testimony is
9 generally required to establish a causal connection.” *Cervantes v. Forbis*, 1964-
10 NMSC-022, ¶ 12, 73 N.M. 445, 389 P.2d 210. Here, the district court determined
11 Plaintiff did not produce any evidence or testimony—apart from that stated in her
12 expert’s belated and stricken Affidavit—that Defendants’ alleged negligence caused
13 her the harm for which she seeks compensation. Citing *Richter v. Presbyterian*
14 *Healthcare Servs.*, 2014-NMCA-056, ¶ 59, 326 P.3d 50 (recognizing that medical
15 causation ordinarily must be supported by expert medical testimony), the district
16 court carefully explained this failure in the Order from which Plaintiff appeals. Our
17 adoption of the Order expresses our agreement with the district court that none of
18 Dr. Arnaout’s admissible testimony, nor even Plaintiff’s expert disclosure,
19 connected Defendants’ alleged negligence to Plaintiff’s injuries. Indeed, in Dr.
20 Arnaout’s deposition he stated that he did not know when Plaintiff’s surgery

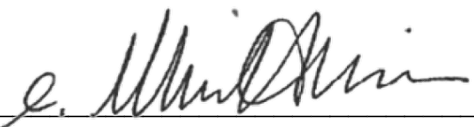
1 complication occurred or when it should have been diagnosed. Dr. Arnaout's only
2 admissible opinions in this case pertained to his belief that Defendants' conduct fell
3 below the standard of care.

4 {5} Having carefully reviewed the district court order at issue, the record before
5 us, arguments of the parties and the authorities cited therein, and pertinent case law,
6 we perceive there to be no error upon which reversal could be premised. *See*
7 *Farmers, Inc., v. Dal Mach. & Fabricating, Inc.*, 1990-NMSC-100, ¶ 8, 111 N.M. 6,
8 800 P.2d 1063 ("The presumption upon review favors the correctness of the [district]
9 court's actions. [An a]ppellant must affirmatively demonstrate its assertion of
10 error.").

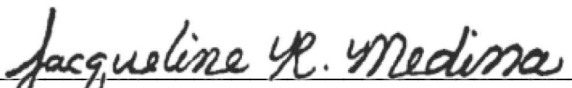
11 **CONCLUSION**

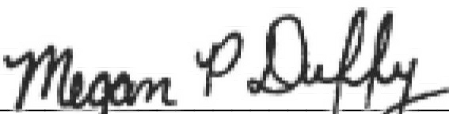
12 {6} Accordingly, we affirm the district court's order granting summary judgment
13 in favor of Defendants.

14 {7} **IT IS SO ORDERED.**

15 
16 **J. MILES HANISEE, Judge**

17 **WE CONCUR:**

18 
19 **JACQUELINE R. MEDINA, Judge**

20 
21 **MEGAN P. DUFFY, Judge**