

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND 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



DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

AMANDA SPANKO,) No. 1 CA-CV 09-0404
)
Plaintiff/Appellant,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
)
GAREY S. SIMMONDS, MD, doing) (Not for Publication -
business as SIMMONDS AESTHETIC) Rule 28, Arizona Rules of
CARE; ARIZONA CRANIOFACIAL AND) Civil Appellate Procedure)
PLASTIC SURGERY CENTER, P.C.,)
)
Defendants/Appellees.)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2008-004834

The Honorable John C. Rea, Judge

AFFIRMED

Amanda Spanko
Plaintiff/Appellant *In Propria Persona*

Roseburg, OR

Holloway Odegard Forrest & Kelly PC
By Vincent J. Montell and J.P. Harrington Bisceglia
Attorneys for Defendants/Appellees

Phoenix

B R O W N, Judge

¶1 Amanda Spanko appeals the court's order dismissing her
action against Dr. Garey Simmonds. For the following reasons,
we affirm.

BACKGROUND

¶2 In March 2008, Spanko filed a complaint alleging that Simmonds negligently performed a rhinoplasty surgery that caused her "serious injury and deformity." Spanko also filed a preliminary certification for expert opinion testimony, pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2602 (2003),¹ stating that expert testimony was necessary to prove the standard of care or liability for her claim. In June 2008, Simmonds filed his answer and a demand for compliance with A.R.S. §§ 12-2603 (Supp. 2009), -2604 (Supp. 2009). Spanko moved for an extension of time to allow compliance with A.R.S. § 12-2603. In support of her motion, Spanko informed the court she had been searching for an expert, but that she had been unable to find one who was willing to prepare an affidavit. The court granted Spanko an extension until October 31, 2008, to comply with the statutory requirements.

¶3 On October 27, 2008, Spanko filed a second motion requesting additional time to provide an expert affidavit. Simmonds contested the motion and requested it be denied due to the extensive amount of time Spanko had already been given to comply with the statute. In December 2008, the court granted the extension, stating that "[i]n the interest of justice the

¹ We cite the current version of the applicable statutes if no revisions material to this decision have since occurred.

[c]ourt will grant a final extension on the deadline to comply with these statutes until **January 31, 2009**. If [Spanko] fails to comply by that date, this matter will be dismissed. No further extensions will be granted." (Emphasis in original.)

¶14 In January 2009, Spanko filed a motion for leave to allow an amendment to the original complaint. An affidavit signed by Dr. James Nachbar was attached to the motion, stating that he had seen Spanko "regarding her consideration for rhinoplasty, and regarding the rhinoplasty ultimately performed by Dr. [] Simmonds." Attached to the affidavit were copies of Nachbar's office notes that "describe[d] [his] findings and opinions" regarding his visits with Spanko.

¶15 In February 2009, Simmonds moved to dismiss the case for failure to comply with court orders and for failure to produce an expert affidavit of merit. Simmonds argued that the affidavit failed to meet the requirements outlined in A.R.S. § 12-2603(B) because it merely reflected the notes of a treating physician. After oral argument was held in May 2009, the court granted Simmonds' motion to dismiss for failure to comply with the requirements of an expert affidavit pursuant to A.R.S. § 12-

2603. As a result of the dismissal, the court found that the other pending motions were moot.² Spanko timely appealed.³

DISCUSSION

¶6 Spanko raises the following issues on appeal: (1) whether A.R.S. § 12-562(B) (Supp. 2009) violates Article 18, Section 6, of the Arizona Constitution;⁴ (2) whether expert testimony is required in a medical battery claim when a physician performs a procedure without the patient's informed consent; (3) whether the court should appoint an expert pursuant

² The remaining two motions before the court were Spanko's motion for leave to allow amendment to the original complaint and motion to compel Dr. Simmonds' drug rehabilitation records.

³ Since the trial court's minute entry order dismissing the case was unsigned, this court suspended the appeal pursuant to *Eaton Fruit Co. v. Cal. Spray-Chemical Corp.*, 102 Ariz. 129, 426 P.2d 397 (1967), to allow Spanko an opportunity to obtain a signed order. The trial court signed the order and filed it on August 24, 2009.

⁴ We note that nothing in the record shows that Spanko has provided notice to the attorney general or the legislature as required by state statute. See A.R.S. § 12-1841 (Supp. 2009) ("In any proceeding in which a state statute, ordinance, franchise or rule is alleged to be unconstitutional, the attorney general and the speaker of the house of representatives and the president of the senate shall be served with a copy of the pleading, motion or document containing the allegation at the same time the other parties in the action are served and shall be entitled to be heard."); see also *DeVries v. State*, 219 Ariz. 314, 322, ¶ 24, 198 P.3d 580, 588 (App. 2008) (holding that a party raising a facial constitutional challenge to a state statute must follow the statutory service requirements). Because we find Spanko waived her constitutional challenge, we need not address the consequences of her failure to comply with this mandatory notice requirement.

to Arizona Rule of Evidence 706; and (4) whether the court should adopt the standards set by the Arizona Medical Board.

¶17 Spanko, however, does not cite to any portion of the record indicating where or when she raised these arguments in the trial court. Nor did Spanko provide us with any transcripts of the proceedings wherein she may have at least alluded to the issues she now asserts on appeal. See *Rancho Pescado, Inc. v. Nw. Mut. Life Ins. Co.*, 140 Ariz. 174, 189, 680 P.2d 1235, 1250 (App. 1984) ("It is, of course, the duty of the appealing party to insure that all necessary transcripts of evidence finds its way to this court."). Our own review of the record reveals that none of the issues were raised below and therefore she has waived them on appeal.⁵ *Englert v. Carondelet Health Network*, 199 Ariz. 21, 26-27, ¶ 13, 13 P.3d 763, 768-69 (App. 2000) (We generally do not "consider issues, even constitutional issues, raised for the first time on appeal.").

¶18 Spanko raises additional arguments in her reply brief, contending that she should have been allowed to amend her

⁵ These issues are also waived because Spanko failed to adequately develop and support her arguments in her opening brief. See ARCAP 13(a)(6) (The appellant's brief should include "[a]n argument which 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."); see also *Polanco v. Indus. Comm'n of Ariz.*, 214 Ariz. 489, 492 n.2, ¶ 6, 154 P.3d 391, 394 n.2 (App. 2007) (failure to develop and support an argument waives it on appeal).

original complaint and that her motion to amend was timely. Because these arguments were not raised in her opening brief, we do not address them. See *Dawson v. Withycombe*, 216 Ariz. 84, 111, ¶ 91, 163 P.3d 1034, 1061 (App. 2007) (“We will not consider arguments made for the first time in a reply brief.”); *Nelson v. Rice*, 198 Ariz. 563, 567 n.3, ¶ 11, 12 P.3d 238, 242 n.3 (App. 2000) (finding an argument waived because it was not raised in the appellant’s opening brief).

CONCLUSION

¶19 For the foregoing reasons, we affirm the trial court’s dismissal of Spanko’s complaint.

/s/

MICHAEL J. BROWN, Presiding Judge

CONCURRING:

/s/

JON W. THOMPSON, Judge

/s/

SHELDON H. WEISBERG, Judge