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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

JUNE FISH, et al., *Plaintiffs/Appellants*,

v.

LIFE TIME FITNESS INC, *Defendant/Appellee*.

No. 1 CA-CV 16-0496
FILED 5-1-2018

Appeal from the Superior Court in Maricopa County
No. CV2013-005046
The Honorable Jo Lynn Gentry, Judge

AFFIRMED

COUNSEL

Law Offices of Richard Langerman, Phoenix
By Richard W. Langerman
Counsel for Plaintiffs/Appellants

Lewis Brisbois Bisgaard & Smith, LLP, Phoenix
By Matthew D. Kleifield, Robert C. Ashley
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Paul J. McMurdie and Judge Patricia A. Orozco[1] joined.

S W A N N, Judge:

¶1 June Fish challenges the superior court's ruling granting summary judgment for Life Time Fitness Inc. ("Life Time") based on her failure to timely disclose expert witness testimony. We affirm for the reasons set forth below.

FACTS AND PROCEDURAL HISTORY

¶2 Fish brought a negligence action against Life Time, alleging that she sustained an electric "shock" while using an improperly grounded treadmill at a Life Time facility. Fish alleged that the shock injured her directly and damaged a transcutaneous electrical nerve stimulation ("TENS") unit implanted in her neck and back.

¶3 The superior court entered a scheduling order that required Fish to disclose the identity and opinions of her expert witnesses by October 24, 2014. The parties later agreed to extend the deadline to January 23, 2015; then, after Fish's original counsel moved to withdraw, the deadline was again extended, to March 31, 2015. On the day of the deadline, Fish moved *in propria persona* for additional time to prepare her case, accusing her counsel of having "done nothing in two years except request paper, and not even the right papers, most of which I had obtained for the case." Fish attached a letter from her prospective new counsel (later retained), who stated that he would represent Fish if the court allowed extra time to complete discovery. The court declined to grant additional time.

¶4 Life Time moved for summary judgment shortly thereafter, contending that Fish could not prevail without expert testimony establishing that the treadmill was capable of delivering an electric shock and whether such a shock could and did damage the TENS unit. Fish

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[1] Pursuant to Article VI, Section 3 of the Arizona Constitution, the Arizona Supreme Court designated the Honorable Patricia A. Orozco, Retired Judge of the Court of Appeals, to sit in this matter.

renewed her request for additional time to complete discovery and obtain expert witnesses, and she separately moved for relief under Ariz. R. Civ. P. ("Rule") 56(f) (now Rule 56(d)). Fish also separately responded to Life Time's summary judgment motion with, among other things, medical records from her treating physician, Dr. Mannie Joel, who had installed the TENS unit and had seen her shortly after the incident. The court granted Fish time to depose Dr. Joel, a corporate representative of treadmill manufacturer Life Fitness (a company separate from Life Time), and two other witnesses, but the court denied Fish's other requests without prejudice.

¶5 After deposing the Life Fitness representative, Fish sought leave to list Scott Baer, an electrical engineer, as an additional witness who would testify about "the design and function of the anti-static line on the subject treadmill." Fish contended that the court should allow Baer to testify because the Life Fitness representative "was unable to answer many of the questions regarding the subjects identified in [Life Time]'s disclosure statement." Life Time opposed the motion, arguing that it was an improper attempt to retroactively extend the expert disclosure deadline because Baer would offer expert testimony.

¶6 While that motion was pending, Fish supplemented her statement of facts with an affidavit from Baer in which he opined that repeated contact between a user's shoes and a moving treadmill belt could create a risk of static shock if the treadmill did not have a "functioning anti-static line." Fish also offered Dr. Joel's deposition testimony that he believed the TENS unit had been damaged by the treadmill incident. Dr. Joel also testified, however, that he wanted to "do a revision of the system" to "look for physical damage to the electrodes," but never did so.

¶7 The court granted summary judgment for Life Time in an unsigned minute entry, finding that Fish had failed to disclose any expert witnesses before the deadline and therefore was "precluded from calling an expert not timely disclosed." The court later granted Fish's motion to add Baer as a witness "[t]o the extent this . . . Motion was not rendered moot by the granting of the Motion for Summary Judgment." The court also denied Fish's still-pending motion for additional time to complete discovery.

¶8 Fish moved for reconsideration under Rule 7.1(e), arguing that the court's grant of her motion to add Baer as a witness obligated the court to consider his testimony. She also contended that the court should have admitted Dr. Joel's opinion testimony because he was her treating physician. The court denied the motion for reconsideration, holding:

> Plaintiffs now argue that the granting of the Motion for Additional Witness will allow them to call Scott Baer, an electrical engineer. The stated purpose of the anticipated testimony was that the absence of an anti-static line on the treadmill could result in a buildup of static electricity that can discharge, causing a painful shock. Even with such testimony, Witness Baer cannot offer testimony that static electrical shock resulted in this case or that any such shock caused the claimed injury and damage to the spinal neuro-stimulator.

The court further concluded that Dr. Joel's opinion testimony "cannot help [Fish] establish that a claimed electrical shock caused her reported injury or damage to the stimulator."

¶9 Fish timely appeals from the entry of judgment in favor of Life Time.

DISCUSSION

¶10 We review a grant of summary judgment de novo to determine whether any genuine issue of material fact exists, viewing the evidence and all reasonable inferences in the non-moving party's favor. *Russell Piccoli P.L.C. v. O'Donnell*, 237 Ariz. 43, 46–47, ¶ 10 (App. 2015). Summary judgment should be granted only "if the facts produced in support of the claim . . . 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." *Orme School v. Reeves*, 166 Ariz. 301, 309 (1990). But the superior court has broad discretion in disclosure matters; we will not disturb its rulings in that arena absent an abuse of discretion. *Marquez v. Ortega*, 231 Ariz. 437, 441, ¶ 14 (App. 2013). And we review the court's denial of reconsideration for an abuse of discretion. *Tilley v. Delci*, 220 Ariz. 233, 238, ¶ 16 (App. 2009).

I. THE SUPERIOR COURT PROPERLY EXCLUDED DR. JOEL'S OPINION TESTIMONY.

¶11 Fish first contends that she timely disclosed Dr. Joel and that the superior court therefore erred by finding she "did not disclose an expert witness within the disclosure time period." The parties do not dispute that Fish timely disclosed Dr. Joel as a *fact* witness. But Fish did not mention Dr. Joel as a potential *expert* witness until oral argument on her Rule 56(f) motion, approximately three months after the expert disclosure deadline.

Even if this oral disclosure satisfied Rule 26.1 — which it did not, *see* Rule 26.1(a)(6) — the disclosure came too late.

¶12 Late-disclosed expert witnesses are subject to exclusion unless the late disclosure is harmless or good cause is shown. Rule 37(c)(1); *see also Jones v. Buchanan*, 177 Ariz. 410, 413 (App. 1993). Fish does not contend that her late disclosure of Dr. Joel's testimony was harmless; she instead repeatedly blamed her former counsel for the lack of timely disclosure. Fish cites no authority suggesting that her former counsel's inaction constitutes good cause for an untimely expert disclosure. And on this record, we find no grounds to so hold. *Cf. Panzino v. City of Phoenix*, 196 Ariz. 442, 447, ¶ 16 (2000) ("Under general rules of agency, which apply to the attorney-client relationship, '[t]he neglect of the attorney is equivalent to the neglect of the client himself when the attorney is acting within the scope of his authority.'" (citation omitted)).

¶13 Fish also contends that the superior court obligated itself to consider Dr. Joel's testimony when it granted Rule 56(f) relief. We disagree. Fish did not say in her Rule 56(f) motion that she intended to elicit expert testimony from Dr. Joel; she instead identified him as one of her "treating physicians." Though the court allowed Fish to depose Dr. Joel, it did not authorize her to belatedly designate him as an expert witness.

¶14 Finally, Fish contends that Dr. Joel only provided fact testimony based on treatment records that should have been admitted, citing *State ex rel. Montgomery v. Whitten*, 228 Ariz. 17 (App. 2011). But *Whitten* merely acknowledged that treating physicians may serve as fact witnesses, and specifically noted that its holding did not affect Rule 26.1 disclosure obligations. *Id.* at 19–20 n.2, ¶ 8. Moreover, the testimony on which Fish relies is not fact testimony, but opinion testimony on causation: Dr. Joel opined that the TENS unit had been somehow damaged by the shock that Fish claimed she suffered. *See Solimeno v. Yonan*, 224 Ariz. 74, 79, ¶ 21 (App. 2010) ("[T]here is a significant difference between a doctor testifying about raw test results that are included in a disclosed medical record . . . and explaining to the jury the significance of those results."); *see also Sanchez v. Gama*, 233 Ariz. 125, 132, ¶ 19 (App. 2013) (holding that content of treating physician's testimony determines whether he or she should be compensated as an expert, and that "where expert testimony is solicited, whether the source of the expert's underlying information is from personal observation or the observations of others, but the testimony is developed for purposes of litigation, the doctors must be compensated accordingly").

¶15 We therefore conclude that the superior court did not err by excluding Dr. Joel's opinion testimony as untimely disclosed.[2]

II. THE SUPERIOR COURT PROPERLY EXCLUDED BAER'S TESTIMONY.

¶16 Fish next contends that the superior court should have considered Baer's testimony as part of the summary judgment record. Fish argues that Baer's testimony was expert testimony required to sustain her case with respect to both the direct-injury and TENS-damage theories, to establish that the treadmill was capable of discharging static electricity into a user's body. We question whether such a proposition requires expert testimony. *See, e.g.*, *Seisinger v. Siebel*, 220 Ariz. 85, 94, ¶ 33 (2009) (recognizing that plaintiff need not present expert testimony on standard of care when it is a matter of common knowledge that injury would not ordinarily have occurred with exercise of due care); *Hunter Contracting Co. v. Superior Court (Grandinetti)*, 190 Ariz. 318, 321 (App. 1997) ("[E]xpert testimony is unnecessary to prove professional negligence 'when the act or omission comes within the realm of common knowledge.'") (citation omitted); *see also State v. Fierro*, 124 Ariz. 182, 185 (1979) (holding, in criminal case, the state need not present expert testimony on cause and fact of death where such is apparent to ordinary layman based on condition of body or nature of wound). But in view of Fish's concession, we need not resolve that issue.

¶17 Fish does not dispute that she failed to timely disclose Baer's testimony; she instead argues good cause based on her contention that the Life Fitness representative "did not have the expertise regarding the design and function of the anti-static line as claimed by [Life Time] in its disclosure statement."

¶18 Fish did not provide a transcript of the Life Fitness representative's deposition; she instead offered her counsel's affidavit in which he stated the representative "was unable to answer a number of the key questions." Assuming without deciding that the representative's

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[2] Fish also argues for the first time in her reply brief that Dr. Joel's testimony was admissible as a "differential diagnosis." Life Time moved to strike the argument as untimely. Though we deny the motion to strike, we typically do not consider arguments raised for the first time in an appellant's reply brief and see no reason to do so here. *See Tripati v. Forwith*, 223 Ariz. 81, 86, ¶ 26 (App. 2009).

testimony was inadequate, Fish could have sought sanctions against Life Fitness under Rule 37(f). She did not do so. She instead asked the court to either order Life Fitness to provide a more knowledgeable witness or allow her to add Baer as a witness. She cited no authority below, and cites none here, that would allow her to replace an inadequate Rule 30(b)(6) deponent with her own expert witness after the disclosure deadline.

¶19 Fish also contends that the superior court's delay in ruling on her motion to add Baer as a witness was unconstitutional under Ariz. Const. art. 6, § 21, which requires the superior court to rule on matters submitted for decision within sixty days. *See also* Ariz. R. Sup. Ct. 91(e). The superior court did not rule on Fish's motion within sixty days, but Fish cites no authority to demonstrate that any violation of the constitutional timeliness requirement gives rise to a remedy that would assist her on the merits of the appeal. The remedy would be to order the court to rule on the pending motion, which it has already done. *See W. Savs. & Loan Ass'n v. Diamond Lazy K Guest Ranch, Inc.*, 18 Ariz. App. 256, 261 (1972).

¶20 Fish argued in the motion for reconsideration that once the court granted her motion to add Baer as a witness, his testimony created issues of material fact. Assuming without deciding that the court's grant of summary judgment did not render the Baer motion moot, Baer merely testified that the absence of an anti-static line created a risk of electric discharge. He did not connect any such discharge to the damage to Fish or the TENS units. The court therefore did not abuse its discretion by finding that Baer's testimony did not create any genuine issue of material fact as to causation.

III. FISH FAILED TO ESTABLISH ANY GENUINE ISSUES OF MATERIAL FACT REGARDING CAUSATION.

¶21 Fish next contends that the superior court ignored several genuine issues of material fact. Her lengthy description of those alleged fact issues lacks citations to any record evidence or testimony, as required by ARCAP 13(a)(5). But moreover, Fish's recitation also appears to exclusively rely on the properly excluded testimony of Dr. Joel and Baer to establish that the treadmill caused Fish to experience her injuries and damage to the TENS unit. Even if we were to accept Fish's contentions that Life Time did not properly maintain the treadmill and that the lack of maintenance led to her being shocked, neither of those contentions is sufficient to demonstrate causation. The superior court correctly concluded that there were no genuine issues of material fact that would have precluded summary judgment.

CONCLUSION

¶22 We affirm the judgment for Life Time. Life Time may recover its costs on appeal upon compliance with ARCAP 21.

AMY M. WOOD • Clerk of the Court
FILED: AA