

NOTICE: NOT FOR OFFICIAL PUBLICATION.  
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  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

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JODI LYNN WALTERS,  
*Plaintiff/Appellant,*

*v.*

BANNER HEALTH, et al.,  
*Defendants/Appellees.*

No. 1 CA-CV 20-0242  
FILED 2-25-2021

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Appeal from the Superior Court in Maricopa County  
No. CV2018-012179  
The Honorable Pamela S. Gates, Judge

**AFFIRMED**

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COUNSEL

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By Joseph T. Stewart  
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By Kathleen M. Rogers  
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*Counsel for Defendants/Appellees Emergency Medicine Physicians of Pinal County, PLLC, Androni Henry, M.D., Naomi Lescano Devine, N.P.*

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**MEMORANDUM DECISION**

Judge Samuel A. Thumma delivered the decision of the Court, in which Vice Chief Judge Kent E. Cattani and Judge Brian Y. Furuya joined.

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**T H U M M A**, Judge:

¶1 Plaintiff Jodi Lynn Walters appeals the superior court's judgment dismissing her medical malpractice and wrongful death claims against defendants Banner Health, Emergency Medicine Physicians of Pinal County, PLLC (EMP), Androni Henry, Naomi Lescano Devine and Imran Kazem for failing to timely serve required preliminary expert opinion affidavits. Because Walters has shown no error, the judgment is affirmed.

**FACTS AND PROCEDURAL HISTORY**

¶2 In September 2018, Walters sued defendants for medical malpractice and wrongful death based on medical treatment provided to her son in 2016. In accordance with Arizona Revised Statutes (A.R.S.) section 12-2603, she certified that expert opinion testimony was necessary to maintain her claims.

¶3 EMP answered the complaint in early November 2018, while Banner Health and Kazem answered in early February 2019. Walters agreed to provide her initial disclosure statement and preliminary expert opinion affidavits by March 22, 2019. The remaining defendants filed answers in early June 2019.

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¶4 Meanwhile, on May 1, 2019, the court notified the parties the case would be dismissed on July 1, 2019 unless before that date, the parties filed a joint report or proposed scheduling order, a comprehensive pretrial conference was set, a final judgment or similar order was entered, or Walters moved for and received an order to continue on the dismissal calendar for good cause. No timely filing of any type was made by July 1, 2019. Instead, on July 19, 2019, Walters moved to extend the dismissal date. The court then extended the dismissal date to September 30, 2019, again specifying necessary criteria to prevent dismissal of the case.

¶5 In August 2019, Kazem moved for dismissal based on Walters's failure to serve preliminary expert opinion affidavits by the agreed-upon March 22, 2019 deadline. The same day Kazem filed the motion to dismiss, Walters served three expert opinion affidavits in support of her claims, each of which was signed and notarized in September 2018, almost a year earlier. In response to the motion to dismiss, Walters did not contest that she agreed to provide the affidavits by March 22, 2019, nor did she contend that the parties had agreed to further extend the deadline to provide the affidavits. Instead, she asserted that the preliminary expert affidavits she provided in August 2019 satisfied the form and content requirements of A.R.S. § 12-2603. In October 2019, Walters again filed an untimely motion to extend the dismissal date.

¶6 In November 2019, the superior court granted the motion to dismiss, finding that although Walters had ultimately served the requisite affidavits, "the affidavits were provided without any justification approximately eleven months after the Complaint was filed, nine months after the first Answer, five months after the revised disclosure deadline, and more than two months after the last Answer." The court also detailed Walters's failure to prosecute the case, including failing to monitor the case, failing to provide a timely initial disclosure statement, failing several times to timely request continuances of the dismissal date, and failing to satisfy conditions set by the court to avoid dismissal. The court denied as moot Walters's motion to extend the dismissal date. After entering final judgment for defendants, the court denied Walters's request to alter or amend the final judgment.

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¶7 This court has jurisdiction over Walter’s timely appeal pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) and -2101(A)(1) (2021).<sup>1</sup>

**DISCUSSION**

¶8 Walters argues dismissal pursuant to A.R.S. § 12-2603 is warranted only when there is a complete failure to provide the affidavit, not when an affidavit is served in an untimely fashion. Dismissal for a failure to serve a preliminary expert opinion affidavit required by A.R.S. § 12-2603 is reviewed de novo. *Boswell v. Fintelmann*, 242 Ariz. 52, 54 ¶ 5 (App. 2017).

¶9 A.R.S. § 12-2603 directs service of preliminary expert opinion affidavits concurrent with service of the initial disclosures. *See* Ariz. R. Civ. P. 26.1; A.R.S. § 12-2603(B). Rule 26.1 requires the plaintiff to serve initial disclosures “no later than 30 days after the filing of the first responsive pleading to the complaint,” unless the parties agree to a different date or the court orders otherwise. Ariz. R. Civ. P. 26.1(f)(1). The superior court has the discretion to extend the Section 12-2603 deadline “on application and good cause shown or by stipulation of the parties to the claim.” A.R.S. § 12-2603(C). On motion, the court is directed to dismiss an action without prejudice for failure to serve a required affidavit. A.R.S. § 12-2603(F); *Rasor v. Nw. Hosp., LLC*, 243 Ariz. 160, 164 ¶ 22 (2017).

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<sup>1</sup> Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated. Although the minute entry granting the motion to dismiss indicates dismissal was without prejudice, the final judgment contains no such limitation. Even so, given the basis of the dismissal, the dismissal is appealable. *Passmore v. McCarver*, 242 Ariz. 288, 291–92 ¶ 8 (App. 2017) (holding dismissal of case for failure to serve a preliminary expert affidavit under A.R.S. § 12-2603 is for lack of prosecution, meaning savings statute provisions in A.R.S. § 12-504 do not apply); *Canyon Ambulatory Surgery Ctr. v. SCF Ariz.*, 225 Ariz. 414, 419 ¶ 14 (App. 2010) (dismissal without prejudice is appealable when the timely filing of another suit is barred by the statute of limitations).

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¶10 Here, the parties agreed to extend the deadline to serve the affidavits to March 22, 2019. On appeal, Walters asserts the parties later agreed to extend the deadline to August 21, 2019, the date on which she served the affidavits, meaning dismissal was not warranted. Defendants dispute this alleged second-extension agreement. Nothing in the record supports Walters’s assertion that the parties agreed to a second extension beyond March 2019. And although the superior court could have again extended the deadline “on application and good cause shown or by stipulation of the parties to the claim,” there is no record evidence that Walters applied to extend the affidavit service deadline pursuant to A.R.S. § 12-2603(C). Nor does the record contain a written agreement, which would be required for there to be a binding agreement between the parties. Ariz. R. Civ. P. 80(a).

¶11 The record also supports the court’s finding that Walters gave no justification for her delay. She did not claim that she timely served the affidavits or that there was a new agreement extending the deadline. The record also supports a conclusion that there was no good cause to extend the deadline. Walters could have served the affidavits at any time, as they had been signed and notarized at about the same time she filed this case. The court did not err by not extending the compliance deadline, even though Walters served the affidavits although in an untimely fashion. Thus, the court properly dismissed the action based on Walters’s failure to timely serve the requisite affidavits pursuant to the mandatory dismissal language set forth in A.R.S. § 12-2603(F). *See also Rasor*, 243 Ariz. at 164 ¶ 22.

¶12 The record also supports the court’s conclusion that Walters failed to prosecute her case by failing to timely serve an initial disclosure statement, request continuances, monitor the case, and satisfy conditions to avoid dismissal. The court has the discretion to dismiss cases not diligently prosecuted. *Passmore v. McCarver*, 242 Ariz. 288, 292 ¶ 9 (App. 2017). Given the record supporting the finding that Walters failed to prosecute, the judgment of the court dismissing the complaint can also be affirmed on that basis. *See State v. Robinson*, 153 Ariz. 191, 199 (1987) (holding an appellate court may affirm for any basis supported by the record).

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**CONCLUSION**

¶13 The judgment is affirmed. Defendants are awarded their taxable costs incurred on appeal upon their compliance with Arizona Rule of Civil Appellate Procedure 21.



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