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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

KELLE MILUS, individually and on behalf of her husband, SEAN MILUS, and on behalf of her minor daughter, TASHA MILUS, Plaintiff/Appellant, v. EL DORADO HOSPITAL, Defendant/Appellee.	2 CA-CV 2008-0096 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C-20066070

Honorable Stephen C. Villarreal, Judge

AFFIRMED

The Redhair Law Group, P.C.
By Michael Redhair and Jack Redhair — Tucson
Attorneys for Plaintiff/Appellant

Mesch, Clark & Rothschild, P.C.
By Richard Davis, Scott H. Gan, and Gary J. Cohen — Tucson
Attorneys for Defendant/Appellee

H O W A R D, Chief Judge.

¶1 Appellant/plaintiff Kelle Milus appeals from the trial court's grant of summary judgment in favor of appellee/defendant El Dorado Hospital and also from the trial court's subsequent order dismissing this action with prejudice. Because the trial court did not err in granting summary judgment or in dismissing the case, we affirm.

Facts

¶2 We view the facts in the light most favorable to the party opposing summary judgment and draw all reasonable inferences arising from the evidence in favor of that party. *Prince v. City of Apache Junction*, 185 Ariz. 43, 45, 912 P.2d 47, 49 (App. 1996).[1] On May 30, 2005, Kelle Milus went to the emergency room at El Dorado Hospital and was subsequently admitted with a "classical presentation of a spinal cord impingement." Codefendant Doctor Muralikrishna Bhat examined Milus and ordered an MRI of the lumbar sacral area of her spine. The MRI results were negative. The next day, May 31, Milus "fired" Bhat. Milus was not examined by another doctor until the following day, June 1. On that same day, Milus became permanently paraplegic as the result of an abscess in the thoracic area of her spine.

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[1]The statement of facts in Milus's opening brief consists of little more than a list of documents and filing dates without "appropriate references to the record." *See* Ariz. R. Civ. App. P. 13(a)(4). We disregard it both because it fails to comply with the rule, *see Flood Control Dist. of Maricopa County v. Conlin*, 148 Ariz. 66, 68, 712 P.2d 979, 981 (App. 1985), and also because it provides us with little assistance in understanding this case. However, we adhere to the requirement that we consider the facts set forth in the record below in the light most favorable to the party opposing summary judgment. *See Prince*, 185 Ariz. at 45, 912 P.2d at 49.

¶3 Milus sued El Dorado Hospital, Bhat, and Hospitalists of Arizona, Inc., the physician group for which Bhat worked. Milus alleged that her paraplegia was a result of the defendants' negligence. In March 2007, the parties filed a joint pretrial memorandum in which they agreed to "disclose their respective standard of care and causation witnesses on or before May 1, 2007." The trial court subsequently ordered the parties to disclose "[a]ll expert witnesses" by that date. Milus filed the affidavit of Dr. Richard Lewan, who stated in his affidavit that he would address the standard of care required of nurses and the hospital.

¶4 El Dorado filed a motion in limine to preclude Lewan's testimony, arguing Lewan was unqualified under A.R.S. § 12-2604 as an expert on the applicable standards of care because he had not practiced in the same field of practice as El Dorado, specifically "nursing, hospital administration or case management," for the year preceding the action. At a hearing on December 3, 2007, the trial court granted El Dorado's motion and precluded Lewan from testifying.

¶5 At a status conference on January 2, 2008, the trial court ordered Milus to "disclose all experts and opinions no later than February 15, 2008." Milus subsequently disclosed Betty Scira as an expert on case managers and Melody Gartell-Sherman as an expert on nurses. In their affidavits, both witnesses presented their opinions on the applicable standards of care and how an El Dorado case manager and nurse had failed to meet those standards. In addition, under a heading that read "Causation," both opined that "[t]imely intervention of a patient with cord compression may minimize deficits and prevent the patient evolving into a paraplegic status."

¶6 On March 31, 2008, El Dorado sought leave from the trial court to file a motion for summary judgment.[2] Milus stipulated to allow the motion for summary judgment "to ensure a just resolution of the matter on the merits." In its motion, El Dorado argued, inter alia, that Scira and Gartell-Sherman were not qualified to render causation testimony and that their proffered opinions on causation were insufficient to show that El Dorado's alleged negligence was the proximate cause of Milus's paralysis. El Dorado argued that, because Milus had not disclosed a qualified expert witness to testify to causation, she had not met the burden of proof necessary to survive summary judgment. Meanwhile, Milus had settled with Bhat and Hospitalists, and the trial court dismissed her claims against them with prejudice.

¶7 In her response to the motion for summary judgment, Milus argued that she intended to rely on testimony by Dr. Lewan; Dr. Zollo, an expert previously disclosed by Milus to testify regarding Bhat's negligence; and Dr. Meislin, an expert previously disclosed by El Dorado to provide an opinion about causation for the defense. Milus also contended that the affidavits of Scira and Gartell-Sherman supplied sufficient causation opinions and that their qualifications to express such opinions would be addressed during depositions. Milus asked the court not to rule on the summary judgment motion until depositions of all witnesses were completed so she could have the opportunity to present all of her evidence.

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[2]El Dorado requested leave to file the motion because less than ninety days before trial remained. *See* Ariz. R. Civ. P. 56(b).

¶8 After a hearing, the trial court found Milus had not timely disclosed Zollo, Lewan, and Meislin as expert witnesses for the plaintiff on causation. The court further found that Scira and Gartell-Sherman were not qualified to render causation opinions and that, in any event, their affidavits failed to state that earlier intervention would have prevented Milus's paraplegia and thus failed to raise a material factual dispute. The court granted summary judgment on the issue of causation[3] and struck Milus's proffered causation witnesses. El Dorado then moved to dismiss Milus's complaint. After a hearing and subsequent pleadings, the trial court dismissed the complaint with prejudice.

Discussion

¶9 On appeal, Milus claims the trial court erred in entering summary judgment and dismissing the action with prejudice.[4] Summary judgment is proper when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). We review de novo whether there are any genuine issues of material fact and whether the trial court applied the law properly. *Brookover v.*

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[3]The court denied summary judgment on El Dorado's assertion that it was Bhat's duty, not El Dorado's, to find another primary care physician for Milus after she had discharged Bhat. The trial court concluded a factual dispute existed on the question of duty. Neither party raises this issue on appeal, and we do not address it.

[4]In the opening brief, Milus fails to state any applicable standards of review for his arguments. *See* Ariz. R. Civ. App. P. 13(a)(6) ("With respect to each contention raised on appeal, the proper standard of review on appeal shall be identified, with citations to relevant authority, at the outset of the discussion of that contention."). In addition, the statement of the case in Milus's brief does not comport with the requirements of the rule in that it fails to convey "the nature of the case, the course of the proceedings and the disposition in the court below." *See* Ariz. R. Civ. App. P. 13(a)(3).

Roberts Enters., Inc., 215 Ariz. 52, ¶ 8, 156 P.3d 1157, 1160 (App. 2007). We review for an abuse of discretion whether the trial court properly precluded the testimony of expert witnesses. *See Pipher v. Loo*, No. CV-08-0143, ¶¶ 6-7, 2009 WL 596653 (Ariz. Ct. App. Mar. 10, 2009).

¶10 Medical malpractice is established by showing a breach of the applicable standard of care and that the breach caused the plaintiff's injuries. *See Seisinger v. Siebel*, 220 Ariz. 85, ¶ 32, 203 P.3d 483, 492 (2009); *see also* A.R.S. § 12-563. "Ordinarily, expert medical testimony is required to establish proximate cause and make out a prima facie case of medical malpractice unless a causal relationship is readily apparent to the trier of fact." *Gregg v. Nat'l Med. Health Care Servs., Inc.*, 145 Ariz. 51, 54, 699 P.2d 925, 928 (App. 1985); *see also Peacock v. Samaritan Health Serv.*, 159 Ariz. 123, 126, 765 P.2d 525, 528 (App. 1988) (exception to general rule requiring expert medical testimony when "'negligence is so grossly apparent that a layman would have no difficulty in recognizing it'"), *quoting Riedisser v. Nelson*, 111 Ariz. 542, 544, 534 P.2d 1052, 1054 (1975).

¶11 Rule 26.1(a)(6), Ariz. R. Civ. P., provides that the parties must timely disclose the identity of each expert witness as well as "the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, [and] the qualifications of the witness." Additionally, the plaintiff must timely disclose a preliminary affidavit from the medical expert that contains, inter alia, the expert's opinion as to the "manner in which the

health care professional's acts, errors or omissions caused or contributed to the damages or other relief sought by the claimant." A.R.S. § 12-2603(B)(4).

¶12 When a party fails to timely disclose "'the substance of the facts and opinions' of each expert's expected testimony," the trial court may preclude the party from using that information at trial. *Englert v. Carondelet Health Network*, 199 Ariz. 21, ¶ 6, 13 P.3d 763, 767 (App. 2000), *quoting* Ariz. R. Civ. P. 26.1(a)(6); *see also* Ariz. R. Civ. P. 37(c)(1). Under some circumstances, the trial court may properly grant summary judgment and dismiss an action when the plaintiff fails to disclose the necessary expert opinion. *Compare Gorney v. Meaney*, 214 Ariz. 226, ¶ 20, 150 P.3d 799, 805 (App. 2007) (summary judgment proper when plaintiff fails to provide expert opinion affidavit necessary to show prima facie case of malpractice), *and Morrell v. St. Luke's Med. Ctr.*, 27 Ariz. App. 486, 489, 556 P.2d 334, 337 (1976) (trial court properly grants summary judgment when plaintiff fails to produce competent medical evidence to substantiate malpractice claim), *with Sanchez v. Old Pueblo Anesthesia, P.C.*, 218 Ariz. 317, ¶ 25, 183 P.3d 1285, 1292 (App. 2008), *and* A.R.S. § 12-2603(F).

¶13 Milus challenges the trial court's grant of summary judgment on various grounds, which we address in turn. We note at the outset that, because the trial court dismissed Milus's case against Bhat with prejudice, any theory of liability against El Dorado must necessarily be independent of Bhat's alleged actions or omissions. *See Law v. Verde Valley Med. Ctr.*, 217 Ariz. 92, ¶¶ 8, 13, 170 P.3d 701, 703, 705 (App. 2007).

Lewan's Preliminary Affidavit

¶14 Apparently in an attempt to argue the court erred in striking Dr. Lewan as a causation expert, Milus first asserts the trial court erred in finding the preliminary affidavit of Dr. Lewan failed to meet the requirements of § 12-2603. But, other than this statute and a tangentially related reference to Rule 26.1, Milus cites no authority in support of her argument. *See* Ariz. R. Civ. App. P. 13(a)(6) (appellant's argument "shall contain the contentions of the appellant . . . with citations to the authorities, statutes, and parts of the record relied on"). Nor does she point to any evidence in the record that Lewan actually met the background requirements of § 12-2603, the absence of which was the basis for the trial court's initial decision precluding his testimony. Accordingly, this issue is deemed waived for insufficient argument. *See FIA Card Servs., N.A. v. Levy*, 219 Ariz. 523, n.1, 200 P.3d 1020, 1021 n.1 (App. 2008) (appellate court treats failure to develop argument as abandonment of argument).

¶15 Moreover, even if this claim were not waived, as the trial court stated in its final order below, the court "did not analyze or decide the motion for summary judgment based upon plaintiffs' failure to provide a preliminary expert affidavit pursuant to . . . § 12-2603 . . . . Instead, the Court ruled that plaintiffs did not timely disclose physician causation witnesses." *See* Ariz. R. Civ. P. 37(c)(1) (trial court may preclude witness not timely disclosed); *Englert*, 199 Ariz. 21, ¶ 6, 13 P.3d at 767 (failure to timely disclose substance of expert's testimony may result in preclusion); *Morrell*, 27 Ariz. App. at 489, 556 P.2d at 337 (summary judgment proper when plaintiff failed to produce competent medical

evidence to substantiate claim of malpractice). Thus, the sufficiency of Lewan's preliminary affidavit to state a standard-of-care opinion for purposes of § 12-2603 is irrelevant to whether the trial court properly precluded Lewan's testimony after Milus belatedly attempted to disclose him as an expert on causation in response to the motion to dismiss.

¶16 Finally, even if the affidavit's sufficiency under § 12-2603 were relevant to the trial court's decision, Milus's only argument is that the affidavit can be reasonably interpreted as expressing Lewan's opinion that an undiagnosed thoracic abscess had caused the paralysis. But Lewan still did not opine about the "manner in which" the hospital's professional "acts, errors or omissions caused or contributed" to the paralysis other than by implying that a general failure to diagnose was the cause. § 12-2603(B)(4); *cf. Gorney*, 214 Ariz. 226, ¶ 16, 150 P.3d at 804-05 (affidavit failed to meet statutory requirements when expert did not state surgery performed without consent "proximately caused" plaintiff's injury). Assuming arguendo that El Dorado breached a standard of care with respect to diagnosing the abscess, Lewan does not explain at what point a proper diagnosis would have prevented the paralysis or even if it could have been prevented.

Opportunity to Cure Deficient Affidavit

¶17 Milus next argues the trial court should have allowed her an opportunity to cure the insufficiency of Lewan's affidavit,[5] citing § 12-2603(F) and *Sanchez v. Old Pueblo*

[5]Milus states that, in the motion for summary judgment, "El Dorado Hospital asserts one argument and only one argument that Dr. Lewan's affidavit does not comply with § 12-2603(B) by stating an opinion how the hospital's negligence caused the paralysis." But El Dorado presented multiple arguments in its motion, including lack of disclosure of any causation expert and objections to the qualifications of Scira and Gartell-Sherman and the

Anesthesia, P.C., 218 Ariz. 317, 183 P.3d 1285 (App. 2008). Milus's claim fails for several reasons.

¶18 First, she did not raise this argument until her motion for reconsideration of the trial court's order granting El Dorado's motion to dismiss. "[T]his court may not consider new arguments . . . presented in a motion for reconsideration in reviewing a trial court's ruling." *Brookover*, 215 Ariz. 52, n.2, 156 P.3d at 1162 n.2. We note that, in *Sanchez*, 218 Ariz. 317, ¶¶ 19, 22, 183 P.3d at 1290-91, this court found a similar argument had been preserved by a one-sentence request in the plaintiff's response to the defendant's motion to dismiss, asking to amend an expert's affidavit. Here, Milus did not make any such request in her response to the motion for summary judgment or in her response to the motion to dismiss. Accordingly, she has waived this argument on appeal.

¶19 Second, even if the argument were not waived, neither § 12-2603(F) nor *Sanchez* applies. When Milus asserted Lewan was a causation witness for the first time in her response to the motion for summary judgment, the trial court had already precluded Lewan from testifying—a ruling Milus does not meaningfully contest here—and the court had subsequently ordered her to disclose "all experts and opinions" no later than February 15. In that subsequent disclosure, Milus did not list Lewan as an expert witness. Rather, she listed only Scira and Gartell-Sherman and attached affidavits that set forth their separate

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adequacy of their purported causation opinions. In its reply to Milus's response to the motion, El Dorado also challenged for various reasons Milus's attempt to rely on Lewan, Zollo, and Meislin as causation experts. Milus's characterization of El Dorado's argument as only challenging the sufficiency of Lewan's affidavit is patently false.

opinions on standards of care as well as identical opinions on causation. Milus simply did not disclose Lewan as a causation expert before the February 15 deadline, despite the trial court's express order that "all experts" be disclosed. As discussed above, the court did not decide the motion for summary judgment based on any failure to comply with § 12-2603. Rather, the court ruled Milus had not timely disclosed a physician causation witness.

¶20 Third, even if the trial court should have allowed Milus the opportunity to file an amended affidavit under *Sanchez*, 218 Ariz. 317, ¶ 26, 183 P.3d at 1292,[6] Milus has never asserted that Lewan's purported causation opinion would consist of anything other than that an undiagnosed abscess caused her paralysis. Even on appeal, Milus merely argues the court erred in not permitting her to amend Lewan's affidavit to state "that the undiagnosed abscess caused Plaintiff's paralysis." Accordingly, by her own account, even if Milus were permitted to file an amended affidavit, it would still not explain what El Dorado should or could have done that would have prevented the paralysis. *See* § 12-2603(B)(4) (affidavit must state "manner in which the health care professional's acts, errors or omissions caused or contributed to the damages or other relief sought by the claimant"); § 12-563(2) (proximate causation necessary element of proof in medical malpractice action).

¶21 For all these reasons, the trial court did not abuse its discretion in precluding Lewan from testifying as a causation expert and in not permitting Milus to file an amended

[6]Besides *Sanchez*, Milus improperly cites what appears to be an unreported memorandum decision. *See* Ariz. R. Civ. App. P. 28(c).

affidavit from Lewan after the motion to dismiss had been granted. *See Pipher*, 2009 WL 596653, ¶ 6 (exclusion of witness reviewed for abuse of discretion).

Prima Facie Case without an Expert Witness

¶22 Milus next argues the trial court erred in concluding she "could not present credi[]ble evidence that [El Dorado's] negligence was the proximate cause of [her] paralysis." She contends that an expert was not required to establish causation and that her factual allegations were sufficient to create a prima facie case of negligence. Milus cites *Harvey v. Kellin*, 115 Ariz. 496, 501, 566 P.2d 297, 302 (1977), and *Morrison v. Acton*, 68 Ariz. 27, 33, 198 P.2d 590, 594 (1948), for the proposition that a plaintiff can prove causation by "present[ing] facts from which negligence and a causal relationship may be reasonably inferred." But this is not a case in which a jury could reasonably infer causation from the factual allegations. *See Gregg*, 145 Ariz. at 54, 699 P.2d at 928 (expert testimony ordinarily needed unless causal relationship is readily apparent).[7] Milus contends only that, based on her factual allegations, she "could easily prove a prima facie case that [her] paralysis was due to the undiagnosed thoracic abscess." But, again, this statement does not explain how El Dorado's actions caused or contributed to the paralysis. What effect a more timely diagnosis would have had and whether Milus's paralysis was a result of El Dorado's alleged errors are not readily apparent. Rather, these issues constitute technical medical questions requiring expert testimony. Thus, the general rule that an expert is necessary to

[7]Milus again improperly cites an unreported case for this proposition. *See* Ariz. R. Civ. App. P. 28(c).

prove causation is applicable here. *See id.* In the absence of such an expert, Milus could not establish a prima facie case of medical negligence against El Dorado. *See Gorney*, 214 Ariz. 226, ¶ 20, 150 P.3d at 805.

Dismissal before Deposition of Meislin

¶23 Milus next contends the trial court erred in dismissing the case after the grant of summary judgment because discovery had not been completed. She argues she intended to rely on one of El Dorado's experts, Dr. Meislin, as a causation expert and that it was therefore error for the trial court to grant a motion to dismiss before she could depose Meislin. Milus stipulated to El Dorado's request to file a motion for summary judgment, despite the fact that the trial date was less than ninety days away, *see* Ariz. R. Civ. P. 56(b), in order "to ensure a just resolution of the matter on the merits." If Milus believed that discovery was incomplete and that she did not have sufficient evidence marshaled to defend the motion for summary judgment, she should not have stipulated to El Dorado's filing of the motion. Furthermore, to defeat a motion for summary judgment based on the need for additional discovery, Milus was required to file an affidavit pursuant to Rule 56(f), alleging reasons she could not yet present "facts essential to justify [her] opposition." *See Grand v. Nacchio*, 214 Ariz. 9, ¶ 72, 147 P.3d 763, 783 (App. 2006). She did not do so.

¶24 Additionally, she did not disclose Meislin as an expert upon whose testimony she would rely before either of the disclosure deadlines imposed by the trial court. Rather, it was in her response to the motion for summary judgment that Milus first asserted she would be relying on Meislin. *See* Ariz. R. Civ. P. 37(c) (trial court may preclude witness not

timely disclosed); *Englert*, 199 Ariz. 21, ¶ 6, 13 P.3d at 767 (failure to timely disclose substance of expert's testimony may result in preclusion). Even if Milus had timely disclosed Meislin, she alleges only that she anticipated "Meislin would testify that Plaintiff's paralysis was caused as a result of an undiagnosed thoracic abscess." Again, this opinion does not explain how El Dorado's alleged errors proximately caused the paralysis or whether a more timely diagnosis could have prevented it. Accordingly, even if Milus had timely disclosed Meislin as an expert, she has not identified anything about his anticipated testimony that suggests he would have rendered an adequate opinion regarding causation. The trial court did not abuse its discretion in precluding Meislin from testifying as an expert witness for Milus on causation. *See Pipher*, 2009 WL 596653, ¶ 6.

Dismissal with Prejudice

¶25 Finally, Milus suggests the trial court erred in dismissing the case with prejudice. Her argument consists of a single sentence, and the sole legal citation is to § 12-2603(F). As provided in Rule 13(a)(6), the appellant's argument "shall contain the contentions of the appellant . . . and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on." Milus's argument does not comply with these requirements, and the issue is therefore waived. *See FIA Card Servs.*, 219 Ariz. 523, n.1, 200 P.3d at 1021 n.1.

Conclusion

¶26 In sum, Milus did not disclose a qualified expert witness on the issue of causation before either of two deadlines imposed by the trial court. Even if she had properly

disclosed the witnesses on whom she later sought to rely, their opinions would not have been adequate to establish causation. Finally, the element of causation is not so readily apparent that Milus could prove her case without expert testimony. Accordingly, she could not have established a prima facie case of negligence against El Dorado, and the trial court did not err in granting summary judgment and ordering the complaint dismissed with prejudice. *See Gorney*, 214 Ariz. 226, ¶ 20, 150 P.3d at 805; *Morrell*, 27 Ariz. App. at 489, 556 P.2d at 337.

¶27 El Dorado requests attorney fees incurred on appeal on the grounds that the appeal is frivolous and that Milus's counsel has unreasonably violated the Rules of Civil Appellate Procedure. *See* Ariz. R. Civ. App. P. 25. Milus did not oppose that request in her reply brief. As noted at various points in this decision, Milus's counsel has indeed failed to comply with the rules in numerous, substantial, and unreasonable ways. In addition, counsel has made an assertion to this court that is patently false. Finally, counsel adheres steadfastly to the argument that a thoracic abscess caused Milus's paraplegia, yet he makes no attempt to connect that argument to a legally sufficient explanation of how El Dorado's action or inaction caused the paraplegia, nor does he even acknowledge that such an explanation is necessary. Accordingly, counsel has failed to raise an issue on appeal that is fairly debatable or supportable under any reasonable legal theory. *See Ariz. Tax Research Ass'n v. Dep't of Revenue*, 163 Ariz. 255, 258, 787 P.2d 1051, 1054 (1989). We therefore conclude Milus's counsel should pay a portion of El Dorado's appellate attorney fees pursuant to Rule 25, as a sanction for bringing a frivolous appeal and for committing unreasonable infractions of the Rules of Civil Appellate Procedure.

¶28 We affirm the trial court's grant of summary judgment and its dismissal of the action with prejudice. We further order Milus's counsel to pay a portion of El Dorado's attorney fees incurred on appeal upon El Dorado's compliance with Rule 21, Ariz. R. Civ. App. P.

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JOSEPH W. HOWARD, Chief Judge

CONCURRING:

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PHILIP G. ESPINOSA, Presiding Judge

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JOHN PELANDER, Judge