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

2 **SHIRLEY HASELBY,**

3 Plaintiff-Appellant,

4 v.

No. 32,943

5 **GREGORY B. RICHARDSON, M.D.,**

6 Defendant-Appellee.

7 **APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY**

8 **Jerry H. Ritter, Jr., District Judge**

9 Law Offices of James P. Lyle, P.C.

10 James P. Lyle

11 Albuquerque, NM

12 for Appellant

13 Miller Stratvert P.A.

14 Lawrence R. White

15 Cody R. Rogers

16 Las Cruces, NM

17 for Appellee

18 **MEMORANDUM OPINION**

19 **ZAMORA, Judge.**

20 {1} Plaintiff Shirley Haselby appeals the judgment as a matter of law entered in
21 favor of Defendant Gregory B. Richardson, M.D., in this medical malpractice case.

1 Because we agree with the district court that Plaintiff failed to present evidence
2 supporting the elements of her claims, we affirm.

3 **BACKGROUND**

4 {2} Plaintiff sought treatment in the emergency room of Gerald Champion Medical
5 Center in Alamogordo, New Mexico, for abdominal pain she had been experiencing
6 for a week. An emergency room physician's written note reported an ultrasound
7 finding of gallstones when, in fact, the ultrasound report did not indicate the presence
8 of gallstones. Based on the emergency room physician's note and on Plaintiff's
9 symptoms and abnormal liver function test results, Defendant decided to remove
10 Plaintiff's gallbladder using a laparoscope. During the surgery, Plaintiff's hepatic
11 duct¹ became torn, and Defendant repaired the tear using a clip. Defendant also saw
12 during the surgery that Plaintiff had diverticulitis.

13 {3} Plaintiff sued Defendant for medical negligence, and the case proceeded to trial.
14 In her case-in-chief, Plaintiff presented her own testimony and the testimony of
15 Defendant, of the hospital's pathologist, and of her expert witness, Dr. Peter Ferrara.
16 When Plaintiff rested, Defendant moved for judgment as a matter of law (also known
17 as "directed verdict") on the ground that Plaintiff had not established that Defendant
18 breached the standard of care to a reasonable degree of medical probability. The

19 ¹The parties also referred to the torn duct as the "bile duct.

1 district court took the matter under advisement and, following the lunch break,
2 announced that it would grant Defendant's motion.

3 {4} The district court explained its rationale. Relying primarily on *Baer v. Regents*
4 *of the University of California*, 1999-NMCA-005, 126 N.M. 508, 972 P.2d 9, the court
5 referred to the two claims in jury instructions tendered by Plaintiff: (1) that Defendant
6 negligently performed the surgery to remove Plaintiff's gallbladder and (2) that
7 Defendant mis-diagnosed Plaintiff with gallstones.

8 {5} Beginning with the first claim, the court framed the issue as whether Plaintiff
9 established to a reasonable degree of medical probability that surgery performed
10 according to the standard of care would *not* have caused the bile duct tear. The court
11 concluded that Plaintiff had not established this with the evidence she presented. The
12 court noted that Dr. Ferrara in his testimony had described the tear as "inadvertent."
13 Dr. Ferrara said that he would have used a suture rather than a clip to repair the tear,
14 but that because he was not there during the surgery, he could not criticize
15 Defendant's use of a clip. The problem with Dr. Ferrara's testimony on this claim,
16 according to the district court, was that he never stated to a reasonable degree of
17 medical probability either that the decision to use the clip rather than a suture caused
18 additional injury to Plaintiff or that the tearing of the bile duct was the result of falling
19 below the standard of care.

1 {6} As for Plaintiff’s second claim—that Defendant mis-diagnosed Plaintiff with
2 gallbladder disease—the district court explained that there can be mis-diagnosis
3 without injury. The court noted that Dr. Ferrara described the claim as relating to
4 Defendant’s operating on Plaintiff without gallbladder disease being present. While
5 there was evidence that the surgery should not have taken place, Plaintiff’s claim, in
6 the court’s view, ultimately boiled down to Dr. Ferrara’s opinion that a CT scan done
7 prior to surgery would have shown diverticulitis and, because diverticulitis is usually
8 treatable without surgery, according to Dr. Ferrara, doing a pre-operative CT scan
9 would have prevented the surgery. Diverticulitis would have been an alternative
10 explanation for Plaintiff’s pain and symptoms and, according to Dr. Ferrara, a doctor
11 acting in accordance with the proper standard of care would not have performed
12 surgery.

13 {7} While Dr. Ferrara opined that the proper standard of care required a pre-
14 operative CT scan, the district court concluded that Plaintiff failed to prove that such
15 a scan would have established that surgery was unnecessary. The testimony
16 established that an “eventual” CT scan showed Plaintiff’s diverticulitis. But the court
17 did not think one could conclude from that testimony that a pre-operative CT scan
18 would have shown the diverticulitis. Even assuming that a pre-operative CT scan
19 would have shown the diverticulitis, Dr. Ferrara did not testify that under a proper

1 standard of care a non-surgical treatment would be required. Nor did he testify that,
2 to a reasonable degree of medical probability, if a pre-operative CT scan showed
3 diverticulitis, a doctor would abandon a diagnosis of gallbladder disease and avoid
4 surgery. The district court therefore granted Defendant judgment as a matter of law.
5 This appeal followed.

6 **DISCUSSION**

7 **1. Standard of Review**

8 {8} In order to grant judgment as a matter of law, a district court must find that “a
9 reasonable jury would not have a legally sufficient evidentiary basis to find for the
10 party on that issue.” Rule 1-050(A)(1) NMRA. “The sufficiency of evidence presented
11 to support a legal claim or defense is a question of law for the [district] court to
12 decide.” *Sunwest Bank of Clovis, N.A. v. Garrett*, 1992-NMSC-002, ¶ 9, 113 N.M.
13 112, 823 P.2d 912. Judgment as a matter of law is generally disfavored. *See Am. Nat'l*
14 *Prop. & Cas. Co. v. Cleveland*, 2013-NMCA-013, ¶ 7, 293 P.3d 954 (“Our Supreme
15 Court has cautioned that judgment as a matter of law is a drastic measure that is
16 generally disfavored inasmuch as it may interfere with the jury function and intrude
17 on a litigant's right to a trial by jury.” (internal quotation marks and citation omitted)).
18 Judgment as a matter of law is proper when there is “no substantial evidence

1 supporting one or more essential elements of the case.” *Klopp v. Wackenhut Corp.*,
2 1992-NMSC-008, ¶ 3, 113 N.M. 153, 824 P.2d 293.

3 {9} “In reviewing whether [judgment as a matter of law] was appropriate, we
4 consider all evidence that has been properly admitted at trial, as well as all reasonable
5 inferences deducible therefrom, resolving any conflicts or contradictions in the
6 evidence in a light most favorable to the party resisting the motion.” *McNeill v. Rice*
7 *Eng’g & Operating, Inc.*, 2003-NMCA-078, ¶ 31, 133 N.M. 804, 70 P.3d 794.
8 Accordingly, the reviewing court “may consider only evidence that has been admitted
9 in the plaintiff’s case-in-chief and any evidence a defendant introduced through
10 cross-examination.” *Id.* Whether sufficient evidence exists as a matter of law to justify
11 judgment in a party’s favor is a question we review de novo. *Id.*

12 **2. Plaintiff’s Arguments**

13 {10} Plaintiff makes two arguments on appeal. First, she broadly contends that Dr.
14 Ferrara’s testimony was sufficient for a reasonable juror to conclude that Defendant
15 failed to act as a reasonably well-qualified physician under the circumstances as
16 required by UJI 13-1102 NMRA. Second, she maintains that the district court usurped
17 the jury’s role by weighing the evidence.

18 **a. Sufficiency of Dr. Ferrara’s Testimony**

1 {11} We are not persuaded by Plaintiff’s first argument, which relies on UJI 13-
2 1102. That uniform jury instruction does nothing more than state the standard of care
3 applicable to a specialist. *See* UJI 13-1102 Use Note (“This is the standard of care
4 instruction applicable to a specialist.”). While Dr. Ferrara recited a litany of ways in
5 which he believed Defendant’s conduct fell below the standard of care, he failed to
6 testify about two of the essential elements of medical negligence—causation with
7 respect to Defendant’s alleged mis-diagnosis of gallbladder disease and breach with
8 respect to the injury to Plaintiff’s bile duct.

9 {12} To prove medical negligence, a plaintiff must show that (1) the defendant owed
10 the plaintiff a duty; (2) the defendant breached the duty by departing from the proper
11 standard of care; and (3) the defendant’s acts or omissions proximately caused the
12 plaintiff’s injuries. *Brown v. Kellogg*, 2015-NMCA-006, ¶ 6, 340 P.3d 1274. The
13 parties do not dispute the existence of duty, and Dr. Ferrara’s testimony made a prima
14 facie showing of breach, at least regarding the claimed mis-diagnosis. But, as the
15 district court concluded, Plaintiff’s evidence did not establish that Defendant’s alleged
16 mis-diagnosis caused injury to Plaintiff or that the injury to Plaintiff’s bile duct was
17 negligent.

18 **(1) Mis-Diagnosis**

1 {13} With respect to Plaintiff's claim that Defendant performed unnecessary surgery
2 due to mis-diagnosed gallbladder disease, Plaintiff's evidence fell short. Dr. Ferrara
3 testified that the applicable standard of care would require Defendant to review the
4 ultrasound report instead of relying on the emergency room doctor's statement that the
5 ultrasound showed gallstones and to perform a pre-operative CT scan to rule out
6 diagnoses other than gallbladder disease. But Dr. Ferrara never stated that if
7 Defendant had reviewed the ultrasound report himself and if he had performed a pre-
8 operative CT scan, surgery would have been ruled out. In fact, evidence presented in
9 Plaintiff's case-in-chief suggested that surgery would have ensued anyway.

10 {14} Plaintiff presented the testimony of Defendant in her case-in-chief, and
11 Defendant testified that a person does not have to have gallstones in order to have
12 gallbladder disease. Indeed, the pathologist testified that he diagnosed Plaintiff's
13 gallbladder as being diseased, and Dr. Ferrara had "no quibble" with that diagnosis.
14 Defendant also testified that he did not need to consider the possibility that Plaintiff
15 had diverticulitis before he performed surgery because the laparoscopic diagnosis of
16 diverticulitis was equally good if not better than a diagnosis based on a CT scan. At
17 the time of this surgery, the CT scan was in transition and was not quite as good as
18 exploratory surgery. He said that surgery was something that needed to be done with
19 or without the presence of gallstones.

1 {15} Dr. Ferrara agreed with Defendant that there are occasions where the
2 gallbladder is diseased without evidence of gallstones. He also noted that the history
3 of Plaintiff's illness indicated that her pain seemed to start in the upper center of her
4 abdomen, and the gallbladder is located in the upper abdomen. And he agreed that the
5 abnormal liver function shown by Plaintiff's pre-operative blood work can be found
6 in gallbladder disease. Again, Dr. Ferrara never testified that, to a reasonable degree
7 of medical probability, surgery would have been ruled out if Defendant had both
8 reviewed the ultrasound report and performed a pre-operative CT scan.

9 **(2) Injury to Bile Duct**

10 {16} Plaintiff's evidence also failed to establish that Defendant's negligence caused
11 injury to Plaintiff's bile duct. *See Richter v. Presbyterian Healthcare Servs.*, 2014-
12 NMCA-056, ¶ 56, 326 P.3d 50 (requiring the plaintiff to present proper evidence
13 regarding the applicable standard of care and whether the physician's conduct fell
14 below that standard). Dr. Ferrara testified that, during the course of the operation, "the
15 bile duct was *inadvertently* injured, cut, or severed in some way." "Inadvertent" means
16 "unintentional," *see* <http://dictionary.reference.com/browse/inadvertent?s=t>. And,
17 while Dr. Ferrara criticized Defendant's use of a clip rather than a suture to repair the
18 injury, he also testified, "I wasn't there, and that's a surgical judgment and . . . so it
19 would be hard for me to comment on that—on the quality of the tissue there. I would

1 say that would be unusual, but if [Defendant] says it's so, I'll accept that." He further
2 testified that it would not automatically be below the standard of care to have an
3 intraoperative injury to the bile duct. As a result, insufficient evidence was presented
4 to establish that the inadvertent nick or injury to the bile duct during surgery resulted
5 in an act of medical negligence by falling below any standard of care for this type of
6 surgery.

7 {17} Given the absence of evidence establishing causation with respect to Plaintiff's
8 claim of mis-diagnosis and the absence of evidence establishing negligence with
9 respect to the claimed injury to the bile duct, the district court's order granting
10 Defendant judgment as a matter of law was proper. Our conclusion is supported by
11 *Baer*, the case the district court relied on. In *Baer*, the plaintiff's decedent was
12 required by his employer to undergo periodic medical examinations. 1999-NMCA-
13 005, ¶ 3. A chest x-ray in 1985 revealed a lesion in his lung that was initially
14 interpreted as being benign, but a physician recommended periodic x-rays for the
15 future. *Id.* In 1989, the decedent was examined by a physician's assistant, who failed
16 to order a chest x-ray and, one year later, the decedent was diagnosed with large cell
17 carcinoma and died shortly thereafter. *Id.* The decedent's widow sued the physician's
18 assistant's employer for failure to order the follow-up x-ray. *Id.* ¶¶ 3-4.

1 {18} The district court granted the defendant’s motion for judgment as a matter of
2 law because the plaintiff failed to show that any medical negligence proximately
3 caused the plaintiff’s injuries. *Id.* ¶ 5. This Court affirmed the district court’s order
4 because the plaintiff “never presented any such evidence from which a jury could have
5 concluded that an x-ray administered in 1989 would likely have revealed the presence
6 of the cancer that was diagnosed too late in 1990.” *Id.* ¶ 20.

7 {19} The present case is similar in that Plaintiff failed to present evidence from
8 which a jury could have concluded that (1) Defendant’s review of the ultrasound
9 report and the ordering of a pre-operative CT scan would have ruled out surgery, or
10 that (2) the tear to Plaintiff’s bile duct was anything other than an inadvertently
11 occurring event that can happen during laparoscopic surgery. Judgment as a matter of
12 law was proper.

13 **b. Alleged Weighing of the Evidence**

14 {20} Plaintiff’s second argument is that the district court usurped the jury’s role by
15 weighing the evidence. Plaintiff does not flesh out this argument. Instead, she broadly
16 states that “Dr. Ferrara established a *prima facie* portrait of classic medical
17 negligence.” We agree that Plaintiff’s evidence established duty and, possibly, breach
18 of duty in connection with Plaintiff’s claim of mis-diagnosis. But we disagree that
19 Plaintiff showed that Defendant’s mis-diagnosis caused any injury to her or that the

1 injury to her bile duct was caused by Defendant's negligence. We discern no weighing
2 of the evidence by the district court.

3 **CONCLUSION**

4 {21} For the foregoing reasons, we affirm the district court's entry of judgment as
5 a matter of law in favor of Defendant.

6 {22} **IT IS SO ORDERED.**

7
8

M. MONICA ZAMORA, Judge

9 **WE CONCUR:**

10
11

CYNTHIA A. FRY, Judge

12
13

TIMOTHY L. GARCIA, Judge