IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

SUZANNE BURNS,

Plaintiff-Petitioner,

v.

PRESBYTERIAN HEALTHCARE SERVICES; and, NAVJEET KAUR, M.D.,

Defendants-Respondents.

No. S-1-SC-40434
Ct. App. No. A-1-CA-38594
D. Ct. No. D-202-CV-2017-04406

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ORAL ARGUMENT IS NOT REQUESTED

TABLE OF CONTENTS

INTRODUCTION 1

SUMMARY OF FACTS AND PROCEEDINGS 2

STANDARD OF REVIEW 17

ARGUMENT 18

I. The District Court Properly Declined to Extend Discovery Deadlines 18

II. No Special Test Applies to the Exclusion of Expert Witness Testimony 19

III. The District Court Should be Affirmed Even Under a Heightened Abuse-of-Discretion Test 22

CONCLUSION 27

TABLE OF AUTHORITIES

Page(s)

NEW MEXICO STATE CASES

Allred v. N.M. DOT,
2017-NMCA-019, 388 P.3d 998 .....17, 21

Buke, LLC v. Cross Country Auto Sales, LLC,
2014-NMSC-078, 331 P.3d 942 17

Kalosha v. Novick,
1967-NMSC-076, 426 P.2d 598 23

Lewis v. Samson,
2001-NMSC-035, 35 P.3d 972 .....17, 21

McCarty v. State,
1988-NMSC-079, 763 P.2d 360 19

Medina v. Foundation Reserve Ins. Co.,
1994-NMSC-016, 870 P.2d 125 22

Newsome v. Farer,
1985-NMSC-096, 708 P.2d 327 23

Sandoval v. Baker Hughes Oilfield Operations, Inc.,
2009-NMCA-095, 215 P.3d 791 .....17, 24

State v. Le Mier,
2017-NMSC-017, 394 P.3d 959 17

State v. Linares,
2017-NMSC-014, 393 P.3d 691 .....17, 24

State v. Moreland,
2008-NMSC-31, 185 P.3d 363 .....17, 18

Valerio v. San Mateo Enters.,
2017-NMCA-059, 400 P.3d 275 18

FEDERAL CASES AND NON-NEW MEXICO STATE CASES

Brinkerhoff v. Fleming,
536 P.3d 156 (Utah App. 2023).....22

Carlson v. Tactical Energetic Entry Sys., LLC,
2014 U.S. Dist. LEXIS 160508 (W.D. Wis. 2014).....24

Harris v. Remington Arms Co., LLC,
997 F.3d 1107 (10th Cir. 2021).....22

Pettiford v. Aggarwal,
2010-Ohio-3237, 934 N.E.2d 913 (Ohio 2010).....20

Vanderberg v. Petco Animal Supplies Stores, Inc.,
906 F.3d 698 (8th Cir. 2018).....22

RULES

Rule 1-016 NMRA.....5, 15, 16, 26

Rule 1-016(B) NMRA.....18, 19

Rule 1-026 NMRA.....26

Rule 1-026(B)(6)(a) NMRA.....4, 5, 21, 23

Rule 11-602 NMRA.....19

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 12-318(G) NMRA, undersigned counsel certifies that this Answer Brief complies with limitations and requirements set forth in Rule 12-318(F)(3) and is printed in Times New Roman, 14-point type, and contains 6,721 words. This brief was prepared, and the word count determined using Microsoft Word 2010.

CITATIONS TO RECORD PROPER, HEARING TRANSCRIPT AND DECISION BELOW

The record proper is cited in this Answer Brief as "RP (page #)." The transcript of the October 1, 2019, district court hearing is cited as "Tr. (page #)." The decision of the Court of Appeals in A-1-CA-38594 is cited as "COA (page #)."

INTRODUCTION

Suzanne Burns (Plaintiff) admits she did not disclose her expert witness's opinions on medical causation in this medical malpractice case until she submitted an affidavit with her response to the motions for summary judgment filed by Presbyterian Healthcare Services (PHS) and Dr. Navjeet Kaur (Dr. Kaur) (together, Defendants). By that time, Plaintiff had not one, not two, not three, but four separate opportunities to disclose those expert opinions: in her answer to PHS's discovery requests on that topic; in her initial expert witness disclosure; in her amended expert witness disclosure; and, finally, during the expert witness's deposition. In fact, Plaintiff was obligated to disclose the expert's opinions at each one of the first three steps and then, during his deposition, Plaintiff's expert witness had the same opportunity but instead repeatedly and unequivocally testified **he did not know** whether and when Defendants caused any harm. Yet, when Defendants moved for summary judgment based on the expert's deposition testimony, Plaintiff presented the aggrieved affidavit. By that time, discovery had closed, and Defendants had prepared their entire case in reliance upon Plaintiff's expert disclosures and the expert's deposition testimony.

The district court properly excluded Plaintiff's expert's affidavit on grounds that it contained new and untimely opinions. It then properly granted Defendants' motions for summary judgment based on the lack of the requisite causation evidence. The Court of Appeals affirmed.

Offering no explanation for her untimely and grossly prejudicial expert disclosure, Plaintiff now seeks reversal. In her effort to avoid the consequences of her conduct, Plaintiff attempts to blame the district court for enforcing its scheduling order and crediting the expert's unequivocal deposition testimony. Plaintiff argues that the exclusion of her expert's affidavit was a discovery sanction functionally equivalent to dismissal, and thus was "permissible only [if] the violation was willful, and only if the district court considered 'meaningful alternatives' and reasonably concluded that they are inadequate." BIC at 1 (quoting *Gonzales v. Surgidev Corp.*, 1995-NMSC-047, ¶ 33, 899 P.2d 594).

The Court should affirm. Plaintiff's repeated, knowing failure to comply with her expert witness discovery obligations was clearly willful. Further, the district court did consider "meaningful alternatives," including having Defendants re-depose Plaintiff's expert witness. Upon doing so, the district court properly rejected this option as ineffective. Viewing the evidence in the light most favorable to the district court's decision, as the Court must, demonstrates the district court did not abuse its discretion.

SUMMARY OF FACTS AND PROCEEDINGS

On June 21, 2017, Plaintiff sued Defendants for medical negligence. RP 2. In her complaint, Plaintiff stated that she underwent cholecystectomy (gallbladder removal) surgery at Presbyterian Hospital in Albuquerque, New Mexico on June 26, 2014. RP 2. Dr. Kaur discharged Plaintiff from the hospital the next day. *Id.*

According to the complaint, Dr. Kaur did so despite Plaintiff having exhibited signs and symptoms of post-surgical complications. *Id.*

Three days after Plaintiff was discharged from the hospital, she returned to the emergency department. RP 157. Plaintiff was diagnosed with and treated for bilateral pulmonary emboli with saddle embolus and pneumonia. *Id.* She was discharged six days later, on July 5, 2014. *Id.* Two days thereafter, on July 7, 2014, Plaintiff returned to the emergency department with abdominal pain. *Id.* At this time, she was diagnosed with a bile leak. *Id.* According to the complaint, the delayed diagnosis of the bile leak caused Plaintiff to spend seven more weeks in the hospital undergoing multiple medical procedures and treatments. RP 2. Plaintiff alleged that Defendants "negligently failed to timely evaluate, diagnose and treat [her] condition," which caused her damages. RP 1-2.

Because Plaintiff's claims were premised on Defendants' alleged delay in diagnosing the bile leak, to establish medical causation, Plaintiff had to prove the bile leak was present and could have been diagnosed sooner, *i.e.*, before Plaintiff's first or second discharge from the hospital. In fact, because Dr. Kaur was only involved during Plaintiff's first hospitalization, Plaintiff's claims against her depended on evidence that the bile leak was present and diagnosable prior to Plaintiff's first discharge. For each one of her claims, Plaintiff was obligated to present expert medical testimony.

A month after Plaintiff sued Defendants for medical negligence, on July 24, 2017, PHS served its First Set of Interrogatories on Plaintiff. RP 16. Interrogatory No. 19 stated:

> Please identify each expert witness you have retained in this case or whom you may call . . . . [P]lease state 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, and provide a summary of the grounds for each such opinion.

RP 327-28. PHS's interrogatory tracked the language of Rule 1-026(B)(6)(a) NMRA. Under that rule, parties may serve interrogatories to "discover the identity of each person the other party may call as an expert witness at trial, the subject matter on which the expert is expected to testify, and the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion."

In August 2017, Plaintiff provided the following answer to PHS's Interrogatory No. 19:

> Dr. Walid Arnaout, who is a general surgeon, will testify that agents of the defendant [PHS] failed to properly diagnose surgical complications and should not have discharged the plaintiff from the hospital in the absence of confirming diagnoses and treatment. His address is 77 Rolling Oaks Dr. Suite 203, Thousand Oaks, CA 91361 (805) 379-9696.

RP 328. Notably, Plaintiff's interrogatory answer did not state Dr. Arnaout would testify that the bile leak was present or diagnosable prior to Plaintiff's first or second discharge from the hospital. *Id.*

On December 13, 2018, the district court entered its Rule 1-016 NMRA Pretrial Scheduling Order. RP 60. Jury trial was scheduled for January 13, 2020. *Id.* Plaintiff's expert witness disclosure was due on April 1, 2019. *Id.* Per the order, the expert "[d]isclosure shall include . . . the disclosures set forth in Rule 1-026(B)(6)(a) NMRA." RP 60-61. Discovery was to be completed by June 28, 2019, and the court stated "[d]iscovery shall not be reopened except by [c]ourt order upon a showing of good cause." *Id.* All dispositive motion packets were due by August 23, 2019. *Id.* The order further provided that it "may be modified only by [c]ourt [o]rder upon a showing of good cause. A motion and order are required for any modification. Motions for modifications shall state a basis therefore, beyond the agreement of counsel." *Id.*

Defendants timely noticed Dr. Arnaout's deposition for March 15, 2019. RP 81. In the intervening nineteen months between Plaintiff's answer to Interrogatory No. 19 and Dr. Arnaout's deposition, Plaintiff did not supplement her answer, nor did she do so at any other time. During Dr. Arnaout's deposition, the following colloquy took place:

> Q. Well, let me start with this just super quick, Doctor, you believe that there was a bile leak that was diagnosable even before she was discharged on the first admission; is that correct?
>
> A. **That's not what I'm saying. I said she had abnormal liver function tests postop. That should have been investigated to determine if there is a bile leak or bile duct obstruction or something else.**

Q. Okay. So when do you believe that she first had a bile leak?

A. I don't know.

Q. Okay. But you definitely — do you believe that she had a bile leak that could have been diagnosed sooner than it was?

A. Well, she had a bile leak. We know it happened. When it happened, I don't know. I can't tell you.

Q. So when do you believe it should have been diagnosed?

A. I can't tell you.

RP 158-59, 170 (emphasis added).

Dr. Arnaout's sworn deposition testimony undermined Plaintiff's claims against Defendants. Not only did Dr. Arnaout not testify that the bile leak was present or diagnosable prior to Plaintiff's first or second discharge from the hospital, but he did unequivocally and repeatedly testify that he did not know and could not tell when the bile leak was present or became diagnosable. *Id.* Plaintiff did not seek to clarify, supplement, or limit Dr. Arnaout's testimony in any way. *Id.*

Two weeks later, on April 1, 2019, Plaintiff filed her formal expert witness disclosure. RP 104. With respect to Dr. Arnaout, Plaintiff again stated:

> Dr. Walid Arnaout, a general surgeon, will testify that agents of the defendant [PHS] failed to properly diagnose surgical complications and should not have discharged the plaintiff from the hospital in the absence of confirming diagnoses and treatment.

Id.

Once again, Plaintiff did not disclose that Dr. Arnaout would testify the bile leak was present or diagnosable prior to Plaintiff's first or second discharge from the

hospital. Indeed, Plaintiff provided an identical disclosure for a second, non-causation expert witness, Dr. Nader Kamangar. *Id.* ("Dr. Nader Kamanger, who is a hospitalist and intensivist, will testify that agents of the defendant [PHS] failed to properly diagnose surgical complications and should not have discharged the plaintiff from the hospital in the absence of confirming diagnoses and treatment."); *see also* RP 163 (given the identical disclosures, Plaintiff's counsel having to clarify, "Dr. Arnaout is really our causation expert."). Plaintiff's bare-bones disclosures stood in stark contrast to Defendants' detailed, compliant expert disclosures. RP 126-129 (Dr. Kaur's disclosure); RP 131-137 (PHS's disclosure).

After discovery closed, PHS and Dr. Kaur moved for summary judgment on Plaintiff's complaint for lack of evidence on causation on July 17, 2019, and on July 18, 2019, respectively. RP 156, 171. Both Defendants argued that, given Dr. Arnaout's deposition testimony, "Plaintiff cannot provide any evidence in this case to support her contention that the bile leak which is alleged to have caused her injuries and damages was actually present and diagnosable during any time during which she alleges negligence." RP 157; *see also* RP 175 ("[I]f the bile leak was not present prior to the hospital discharges at issue, then it could not have been diagnosed sooner.").

Also on July 18, 2019, Plaintiff filed an amended expert witness disclosure. RP 200. It stated:

> Dr. Walid Arnaout, a general surgeon, will testify that agents of Defendant [PHS] failed to properly diagnose surgical complications and should not have discharged the plaintiff from the hospital in the absence of confirming diagnoses and treatment.
>
> More specifically, Dr. Arnaout is expected to testify on liability, causation, and damages in a manner consistent with his March 15, 2019 deposition testimony in which he testified, among other things, that by discharging Plaintiff on June 27, 2014 and July 5, 2014 without following up on the abnormal results of her liver function tests, Defendants breached the standard of care and caused Plaintiff's injuries and damages, including sequelae of a bile leak including sepsis and kidney failure (but not the patient's pulmonary embolism).

RP 200-201.

Once again, Plaintiff did not disclose that Dr. Arnaout would testify that the bile leak was present or diagnosable prior to Plaintiff's first or second discharge from the hospital. (Plaintiff's assertions in the Brief In Chief that this amended disclosure "provided Defendants with information they had been entitled to" and "provided Dr. Arnaout's causation opinions" are inaccurate. BIC 23, 25). Given Dr. Arnaout's unequivocal deposition testimony that he did not know and could not tell when Plaintiff's bile leak was present or became diagnosable, her legally inadequate disclosures are not surprising.

What was surprising was the improper affidavit Plaintiff attached to her omnibus response in opposition to Defendants' motions for summary judgment, which was filed on August 12, 2019 (or, two years after Plaintiff answered Interrogatory No. 19, and four months after her identical expert witness disclosure).

RP 259, 260, 282-84.[1] In this affidavit, Dr. Arnaout for the first time stated: "I believe to a reasonable degree of medical probability that [Plaintiff's bile leak] occurred during or after the June 26, 2014 cholecystectomy and before her June 27, 2014 discharge." RP 283. Also for the first time, Dr. Arnaout stated: "I also believe, to a reasonable degree of medical probability, that any reasonable investigation into the cause of [Plaintiff's] elevated bilirubin level on June 27, 2014 would have revealed the bile leak within a couple of days at most, and in any case well before it was finally diagnosed, on or about July 9, 2014." RP 284.

In addition to being new, Dr. Arnaout's affidavit opinions were directly contrary to his deposition testimony. *See* RP 170 ("Q. Doctor, you believe that there was a bile leak that was diagnosable even before she was discharged on the first admission; is that correct? **A. That's not what I'm saying.** ... Q. So when do you believe that she first had a bile leak? **A. I don't know.** ... Q. [D]o you believe that she had a bile leak that could have been diagnosed sooner than it was? **A. ... I don't know. I can't tell you.** Q. So when do you believe it should have been diagnosed? **A. I can't tell you.**") (emphasis added); *see also* RP 444 ("We are going to talk about this case in particular. ... **You could have done [further workup** prior to Plaintiff's first discharge to find out why Plaintiff's bilirubin level was elevated],

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[1] The Record Proper omits the affidavit that was filed as Exhibit 1 to Plaintiff's omnibus response. *See* RP 264, 265. That response cites to the affidavit at RP 260. A true and correct copy of the affidavit is found at RP 282-284.

and everything looked perfect, and I'm not saying that it wouldn't. It might have.") (emphasis added).

In his effort to explain away the evident contradictions in his testimony, Dr. Arnaout claimed he understood the deposition questions "to be seeking a specific time and, as I testified, I could not pinpoint such a time." RP 283. But, in fact, the deposition questions clearly asked whether he believed the bile leak was present and could have been diagnosed at *any time* prior to Plaintiff's hospital discharges. *See* RP 170. Not only did Dr. Arnaout never opine in his deposition that the bile leak was diagnosable sooner, but he (i) unequivocally testified he did not know when it occurred or could have been diagnosable, and (ii) explicitly acknowledged that it may not have been diagnosable even with additional investigation into Plaintiff's elevated bilirubin level. *See* RP 170, 444.

Given the contradictions in Dr. Arnaout's testimony, both Defendants filed motions to strike his affidavit as a sham. RP 274, 319. Defendants argued that Dr. Arnaout's affidavit contained "new opinions," RP 321, and substantially prejudiced Defendants who "had proceeded in the case based upon Dr. Arnaout's March 15, 2019 deposition testimony." RP 425. Defendants elaborated that, "[d]uring the time that Defendants were relying on Dr. Arnaout's deposition opinions, Defendants have disclosed experts, taken the depositions of Plaintiff's fact witnesses, taken the deposition of Plaintiff's hospitalist expert, and filed dispositive motions[.]" *Id.*; *see*

also RP 423 (stating that Dr. Arnaout's affidavit contained "an entirely new opinion as to when the bile leak began."); RP 437 (stating that Dr. Arnaout's affidavit contained "completely new opinions"). Further, Dr. Arnaout "repeatedly closed the door to [any questions Defendants may have asked him on causation] by stating he did not know." RP 437. As an alternative remedy, Defendants asked to be allowed to "re-depose and cross-examine Dr. Arnaout concerning his new opinions, and when and how they were formed." RP 438.

Defendants also highlighted for the district court that Dr. Arnaout is "a highly experienced expert witness" who "has been retained by Plaintiff's law firm as an expert in approximately six (6) cases . . . and has testified around twenty-five (25) to thirty (30) times. . . . As such, Dr. Arnaout understood that he could clarify anything necessary in order to provide his complete causation opinions during his deposition." RP 323. Yet, Dr. Arnaout made no clarifications either during his deposition or when given the opportunity to submit corrections prior to signing the deposition transcript. *Id.*

During the hearing on Defendants' motions on October 1, 2019, Defendants argued one of the issues was "a late disclosure of this expert's opinion. That's another way to look at it. . . . [T]here is a process . . . of how we learn about the expert opinions of the opposing side. It starts with disclosures and it evolves from there." Tr. 27. The district court specifically questioned Plaintiff's counsel on this

point: "You heard [Defendants] talk about, this is akin to a late disclosure of expert opinions. . . . I went back and looked at plaintiff's expert disclosure, and it is pretty meager." Tr. 42. Plaintiff admitted, "[i]t is totally meager." Tr. 42-43. As the court put it, Defendants were "left fishing, and that gives plaintiffs an advantage to do exactly this. I mean, it really does. That's not what I thought you meant, I thought you meant this, so here's my supplemental, in effect, expert opinion, when it never happened in the first place. That's the problem I see with this particular case." *Id.* at 43-44. All Plaintiff said was, "I don't have a defense for that, for that, disclosure. I agree[.]" *Id.* at 44.

Noting the jury trial was scheduled for January 2020, the district court observed that Defendants "are trying to nail down his opinions and they just keep moving. . . . So that's the big issue that I see when I'm talking about managing a docket. And I don't fault defendants for filing a motion for summary judgment and then saying, well that's not what we thought." *Id.*, 44. While Plaintiff's counsel once again agreed "that the disclosure is very meager[,]" *id.* at 44, he offered no excuse or even explanation for it, nor did he suggest any alternative resolution of the issue. To his credit, counsel admitted, "this is our fault." *Id.*, 45. (Plaintiff's suggestion in the Brief In Chief that he was not given an opportunity to respond because "the court indicated that other parties were waiting to have their matters heard by the court" is not accurate. BIC 10.).

Two weeks later, on October 15, 2019, the district court issued its order striking Dr. Arnaout's affidavit and granting summary judgment in Defendants' favor. RP 478. The court ruled that, pursuant to its scheduling order, by April 1, 2019, "Plaintiff was obligated to provide in her expert witness disclosure the substance of the facts and opinions to which each expert is expected to testify and a summary of the grounds for each opinion, among other things." RP 479. "Plaintiff's expert disclosure did not identify any opinion testimony that would be offered by Plaintiff for the purpose of showing that Defendants' alleged negligence caused Plaintiff any injuries." *Id.* The court made the following observations before granting Defendants' motions:

> For example, the disclosure did not state that Plaintiff's bilirubin levels were elevated, which should have prompted additional investigation of Plaintiff's medical condition. Nor did it state what additional evaluations, tests, or other investigation could have been performed prior to Plaintiff's discharge. Nor did it state that had those evaluations/investigations occurred, Defendants would have diagnosed a bile leak by some specific time. Nor did it state that the failure to diagnose the bile leak caused Plaintiff any injuries. In short, Plaintiff's disclosure did not adhere to the requirements of the Court's December 13, 2018 scheduling order to provide facts supporting the expert opinions offered.

RP 480. The court further noted that, at his deposition, "Dr. Arnaout testified that: (a) he could not identify when Plaintiff first experienced a bile leak following her surgery, and (b) he could not say when the bile leak should have been diagnosed following Plaintiff's surgery." *Id.* Then,

> In response to Defendants' Motion for Summary Judgment, Plaintiff offered an August 9, 2019 affidavit of Dr. Arnaout with the following opinions: (a) he believed the bile leak at issue in this case occurred during Plaintiff's surgery or the day after her surgery, that (b) a reasonable investigation into Plaintiff's medical condition prior to her discharge the day after her surgery would have revealed the bile leak "within a couple of days at most" and that (c) Plaintiff's discharge without further investigation delayed the diagnosis and treatment of her bile leak and caused Plaintiff injury.

RP 480-81. The court correctly observed,

> At no time prior to Dr. Arnaout's August 9, 2019 affidavit testimony had Plaintiff offered opinions, or facts in support of any opinions, that the bile leak at issue in this case (a) occurred prior to Plaintiff's discharge from the hospital, and (b) that it could have been diagnosed within a few days of her discharge following surgery such that the late diagnosis caused Plaintiff injury. These opinions in Dr. Arnaout's August 9, 2019 affidavit were not included in Plaintiff's April 1, 2019 disclosure. In fact, these opinions contradicted Dr. Arnaout's opinion testimony from his March 15, 209 deposition that he did not know when the bile leak occurred or when the bile leak could have been diagnosed. In other words, Dr. Arnaout's August 9, 2019 affidavit offered ***new*** opinion testimony not previously disclosed by Plaintiff.

RP 481 (emphasis in original). The court also noted that the affidavit was not based on any new evidence, that discovery had closed, and that the trial was three months away. RP 481-82. The court additionally found "Defendants would suffer prejudice in re-deposing witnesses, re-filing dispositive motions, and postponing the jury trial if Plaintiff were allowed to supplement her expert opinions with the August 9, 2019 affidavit of Dr. Arnaout." RP 482.

Noting its "broad discretion to enforce its scheduling orders[,]" *id.*, the court found:

> Plaintiff's initial expert disclosure of April 1, 2019 . . . was deficient, and Plaintiff failed to disclose an expert opinion on medical causation. Only after the close of discovery . . . and the filing of Defendants' dispositive motions . . . did Plaintiff attempt to supplement her expert opinions to include the new opinions related to causation . . . . She did so through an August 9, 2019 affidavit of her causation expert Dr. Arnaout. That affidavit contradicted Dr. Arnaout's deposition testimony that he could not identify when Plaintiff first experienced a bile leak and could not say when the bile leak should have been diagnosed. Plaintiff did not seek leave to supplement her expert opinions but, rather, included an affidavit with these two new and contradictory opinions in response to Defendants' two dispositive [m]options. Plaintiff has not shown good cause to modify the scheduling order . . . . Defendants' counsel stated that allowing the August 9, 2019 affidavit of Dr. Arnaout to stand as a supplement to Plaintiff's expert disclosure and Dr. Arnaout's sworn deposition testimony would amount to a late disclosure, which would delay the case and prejudice Defendants. This Court agrees. Trial is set for this matter on the Court's January 13, 2020 trailing docket. Discovery is closed, and the dispositive motions deadline has passed. This is not a case where new information or evidence has caused an expert to change or modify his/her opinions. All the information in the medical records was known to Dr. Arnaout at the time he was deposed. To allow Plaintiff to supplement her expert disclosure at this late stage in the litigation when Dr. Arnaout testified that he reviewed the voluminous medical records and understood that he was being deposed to learn his opinions for trial would cause undue delay and additional expense to Defendants.

RP 482-83. For these reasons, the district court struck Dr. Arnaout's affidavit from the record. RP 483. Because there was no other evidence of medical causation in the record, the district court granted Defendants' motions for summary judgment. RP 484-485.

Plaintiff appealed, arguing that the district court abused its discretion in striking the affidavit "because such a sanction resulted in dismissal of her case via

summary judgment." COA at 2. The Court of Appeals rejected Plaintiff's argument, noting that the district court's order was "thorough, well-reasoned, and explanatory[.]" *Id.* The Court of Appeals then "exercise[ed] [its] discretion to adopt the Order for substantially the same reasons as those set forth therein." *Id.* at 3. The Court of Appeals ultimately agreed "that the belated [a]ffidavit violated the Rule 1-016 NMRA scheduling order in place during the duration of the proceedings in district court, . . . that the stricken [a]ffidavit was inconsistent with both Plaintiff's initial expert disclosure and the expert's deposition testimony, and that to have permitted the [a]ffidavit would have unduly prejudiced Defendants." *Id.*

The Court of Appeals further noted that "Plaintiff did not suffer a sanction of dismissal as a consequence of her violation of the scheduling order; rather, she suffered the lesser sanction of exclusion of the untimely Affidavit." COA at 4. It rejected Plaintiff's arguments that "New Mexico law treats [such lesser sanctions] as equal to the sanction of direct dismissal even when summary judgment is otherwise granted on legal grounds relating to admissible evidence." *Id.*

Plaintiff sought, and this Court granted, certiorari review of the lower courts' decisions. *See* Petition of a Writ of Certiorari, filed May 24, 2024 ("Writ Petition"), at 1; *see also* Order, filed Sept. 10, 2014. The two questions before the Court are:

> (1) What level of scrutiny applies when a nominally lesser sanction that excludes evidence denies the sanctioned party a determination on the merits by compelling dismissal on summary judgment?

> (2) If the Court of Appeals applied insufficient scrutiny to the sanction in this case, did the Court of Appeals err in affirming the district court's exercise of its discretion?

Writ Petition at 1.

STANDARD OF REVIEW

A trial court's decisions whether to amend a scheduling order, exclude expert witness testimony, or impose discovery sanctions are reviewed under an abuse of discretion standard. *See, respectively, Buke, LLC v. Cross Country Auto Sales, LLC*, 2014-NMSC-078, ¶ 19, 331 P.3d 942 (amendment of scheduling order); *Allred v. N.M. DOT*, 2017-NMCA-019, ¶ 51, 388 P.3d 998 (exclusion of expert witness testimony); *Lewis v. Samson*, 2001-NMSC-035, ¶ 13, 35 P.3d 972 (choice of discovery sanction).

"An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case. We cannot say the trial court abused its discretion by its ruling unless we can characterize it as clearly untenable or not justified by reason." *State v. Le Mier*, 2017-NMSC-017, ¶ 22, 394 P.3d 959 (internal quotation marks and citation omitted). When reviewing for abuse of discretion, this Court "view[s] the evidence in the light most favorable to the district court's decision, resolve[s] all conflicts and indulge[s] all permissible inferences to uphold that decision, and disregard[s] all evidence and inferences to the contrary." *State v. Linares*, 2017-NMSC-014, ¶ 24, 393 P.3e 691; *see also, e.g., Sandoval v. Baker Hughes Oilfield Operations, Inc.*, 2009-NMCA-095, ¶ 14, 215 P. 3d 791 ("When

there exist reasons both supporting and detracting from a trial court decision, there is no abuse of discretion." (quoting *State v. Moreland,* 2008-NMSC-31, ¶ 9, 185 P.3d 363)).

ARGUMENT

I. The District Court Properly Declined to Extend Discovery Deadlines

As a threshold matter, contrary to Plaintiff's argument, the district court did not "strik[e] Plaintiff's expert affidavit as a sanction for deficient disclosure[.]" BIC 8. Rather, it declined to extend the expert disclosure deadline contained in its scheduling order because (i) "Plaintiff did not seek leave to supplement her expert opinion[,]" and (ii) "Plaintiff [did] not show[ ] good cause to modify the scheduling order[.]" RP 482-83. Indeed, the record evidence weighs against a finding of "good cause." Specifically, Plaintiff offered no excuse or explanation for failing to disclose Dr. Arnaout's medical causation opinions prior to the presentation of his August 9, 2019 affidavit. Worse yet, those opinions contradicted Dr. Arnaout's sworn deposition testimony. And, Defendants would have been prejudiced by the modification given that discovery had closed, the jury trial was fast approaching, and they had prepared their entire case in reliance on Dr. Arnaout's unequivocal, contrary deposition testimony. *Id.*

"Pursuant to Rule 1-016(B) NMRA, a scheduling order shall not be modified except by order of the court upon a showing of good cause." *Valerio v. San Mateo Enters.*, 2017-NMCA-059, ¶ 47, 400 P.3d 275 (internal citation and quotation marks

omitted). In *Valerio*, the Court of Appeals affirmed the district court's denial of plaintiff's motion to modify the scheduling order to add potentially viable causes of action because "[c]ounsel offered no explanation" for his delay in seeking modification. *Id.* "Given that the district court was offered no cause — good or otherwise — for this delay, we hold that it did not abuse its discretion in refusing to modify its scheduling order only days before trial." *Id.* Similarly here, Plaintiff offered no cause — good or otherwise — for her need to extend the expert disclosure deadline, her failure to seek leave to do so, or for her extreme delay. Reversing the district court's order under the facts of this case would render Rule 1-016(B) aspirational and strip trial judges of their inherent authority to manage their dockets and ensure fairness to all parties.

II. No Special Test Applies to the Exclusion of Expert Witness Testimony

Even if the Court were to treat the district court's order excluding Dr. Armout's medical causation opinion as a discovery sanction, no special test should apply to that decision. Without citing any relevant precedent, Plaintiff argues that "[e]xclusionary discovery sanctions that compel dismissal are subject to the same degree as sanctions of outright dismissal." BIC 19 (bold omitted). If the Court is inclined to adopt this test for witness testimony in civil cases, however, it should limit it to fact witnesses.

Fact witnesses testify from personal knowledge. *See* Rule 11-602 NMRA ("A witness may testify to a matter only if evidence is introduced sufficient to support a

finding that the witness has personal knowledge of the matter."). As such, fact witnesses are generally limited in number and their testimony is unique. A party has no opportunity to generate additional fact witnesses *post factum*, and the exclusion of such testimony necessarily affects the judicial system's truth-seeking function. *See McCarty v. State*, 1988-NMSC-079, ¶ 15, 763 P.2d 360 (stating, in the context of the exclusion of a fact witness, that such exclusion "constitutes a conscious mandatory distortion of the fact-finding process whenever applied."). Thus, heightened scrutiny may be justified where dispositive testimony of fact witnesses is excluded as a sanction.

On the other hand, expert witnesses are "retained and compensated by a party or his or her attorney[.]" *Pettiford v. Aggarwal*, 2010-Ohio-3237, ¶ 30, 934 N.E.2d 913 (Ohio 2010). They do not testify from personal knowledge; instead, they are "engaged to review the facts and offer opinion testimony on the essential, material elements of the claim at issue." *Id.* While expert testimony is thus often, if not always, dispositive, each party is free to engage the experts of her choice and "exercises a significant degree of control of the expert[.]" *Id.* And, each party knows well in advance what each of her experts' opinions will be — after all, those opinions are the basis for the engagement.

Given the substantial control parties exercise over their retained expert witnesses, their unexplained and unexcused failure to timely disclose an expert

witness's opinion does not warrant special protection. This is particularly true where the party is the plaintiff, who is the master of her, his, or its lawsuit. Defendants, on the other hand, are forced to respond to allegations and claims made against them. To secure adequate expert testimony of their own and prepare their defense, they must timely learn *all* of the opinions of the plaintiff's expert witnesses.

In essence, Plaintiff's position is that she should be allowed to remain silent while the judicial system and her alleged tortfeasors are burdened with accommodating her conduct, misconduct, action, inaction, or laziness throughout discovery. No legitimate interest would be served by such a strained approach to litigation. *See, e.g., Lewis*, 2001-NMSC-035, ¶ 15 ("[Tolerating] numerous violations of the rules of discovery with respect to the requirement of timely witness disclosure . . . would frustrate the general principles of discovery and the specific purpose of witness disclosure."). "A failure to make [the disclosure required under Rule 1-026(B)(6)(a)] is sufficient ground to exclude expert witness testimony." *Allred*, 2017-NMCA-019, ¶ 47. The Court should not depart from this principle, especially not under the facts of this case.

Plaintiff boldly cautions the Court that, "[b]ecause the legal sufficiency of every case turns on the presentation of evidence and witnesses, it is always possible to craft exclusionary sanctions that terminate a case as a matter of law." BIC 21. According to Plaintiff, that theoretical possibility "would encourage attorneys to

seek case-ending sanctions that bypass the dismissal framework, leaving that framework to fall into disuse." *Id.*

However, in the context of expert witnesses, avoiding such case-ending sanctions is entirely within the proffering party's control as Defendants have explained. If anything, the material, dispositive nature of expert witness testimony, coupled with the complete control exercised by the retaining party, weigh in favor of lowering the sanctions threshold, not raising it. *See Brinkerhoff v. Fleming*, 536 P.3d 156 (Utah App. 2023) (applying no special abuse-of-discretion standard in affirming the district court's decision to exclude plaintiff's expert witness as a discovery sanction under the rules of civil procedure, despite the exclusion resulting in defendants prevailing on summary judgment); *Harris v. Remington Arms Co., LLC*, 997 F.3d 1107 (10th Cir. 2021) (same under the Federal Rules of Civil Procedure); accord *Vanderberg v. Petco Animal Supplies Stores, Inc.*, 906 F.3d 698 (8th Cir. 2018). Thus, no special test should apply to a trial court's discretionary decision to exclude untimely expert witness testimony.

III. The District Court Should be Affirmed Even Under a Heightened Abuse-of-Discretion Test

According to Plaintiff, the district court "could not exclude [Dr. Arnaout's] affidavit unless it found that Plaintiff's conduct was willful and reasonably concluded that lesser sanctions would have been inadequate to address Plaintiff's violation of the court's order." BIC 23. The Court should reject Plaintiff's

transparent attempt to mask her discovery failures and her witness's unequivocal deposition testimony in "sanctions-plus" clothing. But even if the Court were to adopt Plaintiff's test, it should nevertheless affirm.

Contrary to Plaintiff's position, "substantial evidence did [ ] support the dispositive sanction in this case." *Id.* Plaintiff concedes that a finding of willfulness may be premised on a party's "gross indifference" to comply with its discovery obligations, *Medina v. Foundation Reserve Ins. Co.*, 1994-NMSC-016, ¶ 6, 870 P.2d 125, not just a party's "conscious or intentional" failure to so comply, *Newsome v. Farer*, 1985-NMSC-096, ¶ 28, 708 P.2d 327. "Wrongful intent" is not required. *Kalosha v. Novick*, 1967-NMSC-076, ¶ 19, 426 P.2d 598 ("[A] willful failure [to appear for deposition] does imply a conscious or intentional failure, as distinguished from an accidental or involuntary non-compliance.").

Plaintiff did not claim below, nor does she claim now, that she was unaware of Dr. Arnaout's medical causation opinions. With this knowledge, Plaintiff violated Rule 1-026(B)(6)(a) at least three times — when she answered Interrogatory No. 19, when she submitted her initial expert disclosures, and when she submitted her amended expert disclosures. None of these three documents contained Dr. Arnaout's opinions on medical causation. Plaintiff's repeated, knowing violations constitute, at a minimum, a gross indifference or conscious failure to comply, either of which supports a finding of willfulness.

In addition, when Dr. Arnaout testified at his deposition that he did not know when the bile leak was present or could have been diagnosed, Plaintiff took no steps to correct or clarify his testimony. Again, this knowing failure likewise supports a finding of willfulness.

Plaintiff claims that "nothing in the record shows that Plaintiff was aware of the deficiency in her initial disclosure[.]" BIC 25-26. However, "[u]nless plaintiff's counsel failed even to *read* Rule [1-026(B)(6)(a)] . . . , it is almost impossible to imagine plaintiff could even have thought the disclosure adequate." *Carlson v. Tactical Energetic Entry Sys., LLC*, 2014 U.S. Dist. LEXIS 160508, * 7 (W.D. Wis. 2014). Importantly, Plaintiff did not claim below that she was <u>not</u> aware of that deficiency. Tr. at 44 ("I don't have a defense for that, for that, disclosure. I agree[.]"); *id.* at 45 ("[T]his is our fault."). Critically, when reviewing for abuse of discretion, this Court "view[s] the evidence in the light most favorable to the district court's decision, resolve[s] all conflicts and indulge[s] all permissible inferences to uphold that decision, and disregard[s] all evidence and inferences to the contrary." *Linares*, 2017-NMSC-014, ¶ 24; *Sandoval*, 2009-NMCA-095, ¶ 14 ("When there exist reasons both supporting and detracting from a trial court decision, there is no abuse of discretion.") (internal quotation marks and citation omitted).

Plaintiff further argues that "[t]he district court had a broad array of lesser sanctions at its disposal." BIC 29. According to Plaintiff, these included allowing

Defendants to re-depose Dr. Arnaout at Plaintiff's expense or requiring Plaintiff to pay the costs and attorney's fees incurred in litigating their motions. BIC 29-30. Also according to Plaintiff, "[a]ny or all of those sanctions would have preserved Plaintiff's opportunity for a hearing on the merits." BIC 30.

Under Plaintiff's proposed test, however, the question is whether the district court could have "reasonably concluded that lesser sanctions would have been inadequate to address Plaintiff's violation of the court's order." BIC 23. Here, Plaintiff offered no explanation whatsoever for her conduct. Thus, there is no evidence in the record to support her unsubstantiated, self-serving conclusion that a monetary penalty would be sufficient.

The district court, in the exercise of its discretion, could and did properly find that "Defendants would suffer prejudice in re-deposing witnesses, re-filing dispositive motions, and postponing the jury trial if Plaintiff were allowed to supplement her expert opinions with the August 9, 2019 affidavit of Dr. Arnaout." RP 482. Thus, the district court recognized that a monetary sanction would be inadequate, since it would not address the substantial legal prejudice to Defendants. While Plaintiff asserts "there was no showing that this [Dr. Arnaout's] single retaken deposition would have required a trial that was still three months away to be reset[,]" BIC 27-28, Plaintiff ignores the fact that Dr. Arnaout's deposition was taken early in the litigation (in reliance on her non-compliant answer to Interrogatory No. 19).

By the time his contradictory opinions were disclosed in the affidavit, "Defendants [had] disclosed experts, taken the depositions of Plaintiff's fact witnesses, taken the deposition of Plaintiff's hospitalist expert, and filed dispositive motions." RP 425. All of this work would have had to be reconsidered and redone.

Plaintiff attempts to minimize both her culpability and the prejudice to Defendants by claiming "[t]he opinions set out in Dr. Arnaout's affidavit did not come completely out of the blue." BIC. 26. This assertion is contrary to the court's undisputed (and certainly not illogical) holding that "[t]hese opinions contradicted Dr. Arnaout's opinion testimony from his March 15, 2019 [deposition]." RP 481. As such, the assertion and related arguments should be disregarded.

Lastly, Plaintiff's request for a "remand with instructions for the district court to apply the dispositive sanction analysis in the first instance" is not warranted. BIC 31. Again, the district court did not impose a discovery sanction. Instead, it declined to modify its scheduling order where Plaintiff never filed a motion to that effect and utterly failed to demonstrate "good cause" in accordance with Rule 1-016, Rule 1-026, and decades of jurisprudence applying that standard to the facts and circumstances presented in this case. The record on appeal is clear that Plaintiff knowingly or indifferently failed to disclose crucial expert witness opinions not once, not twice, but three separate times. When Dr. Arnaout provided his unequivocal deposition testimony that undermined Plaintiff's claims, Plaintiff's

counsel knowingly failed to "correct" him via questioning that would have been subject to contemporaneous reexamination by defense counsel. Plaintiff should not be rewarded for providing tardy and inadequate expert disclosures or for presenting an expert witness whose testimony varies from one setting to another. Remanding for another hearing would elevate form over substance and encourage the kind of gamesmanship the rules of civil procedure are meant to avoid.

CONCLUSION

For all the reasons stated, Presbyterian Healthcare Services and Dr. Navjeet Kaur respectfully request that the Court affirm the lower courts' decisions, sustain Defendants' summary judgment award, and award Defendants any other appropriate relief.

Dated: November 11, 2024.

Respectfully,

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CERTIFICATE OF SERVICE

I hereby certify that on November 11, 2024, the foregoing **ANSWER BRIEF** was filed and served via Odyssey File and Serve on the following counsel of record in this appeal:

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