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

Court of Appeals of New Mexico
Filed 9/29/2020 10:49 AM

2 **TAUTRA ROMIG and BRIAN**
3 **HANSEN,**

4 Plaintiffs-Appellants,



Mark Reynolds

5 v.

No. A-1-CA-38735

6 **UNIVERSITY OF NEW MEXICO**
7 **BOARD OF REGENTS d/b/a**
8 **UNIVERSITY OF NEW MEXICO**
9 **HEALTH SCIENCES CENTER,**
10 **UNIVERSITY OF NEW MEXICO**
11 **HOSPITAL; and JOHN AND JANE**
12 **DOE 1, 2, & 3,**

13 Defendants-Appellees.

14 **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**
15 **Joshua A. Allison, District Judge**

16 L. Helen Bennett
17 M. Terrence Revo
18 Albuquerque, NM

19 for Appellants

20 Garcia Law Group, LLC
21 Bryan Christopher Garcia
22 Meghan Suzanne Nicholson
23 Albuquerque, NM

24 for Appellees

1 **MEMORANDUM OPINION**

2 **VARGAS, Judge.**

3 {1} Plaintiffs appeal from the district court’s orders denying their motion to extend
4 the time for finding an expert and granting Defendants’ motion for summary judgment
5 for lack of an expert witness to support Plaintiffs’ claims. Unpersuaded that Plaintiffs
6 demonstrated error, we issued a notice of proposed summary disposition, proposing
7 to affirm. Plaintiffs have responded to our notice with a memorandum in opposition.
8 After due consideration, we remain unpersuaded that Plaintiffs have established error.
9 We affirm.

10 {2} On appeal, Plaintiffs contend that the district court abused its discretion by
11 excluding their expert witness and erred by granting Defendants summary judgment.
12 [DS 7] Our notice explained that Plaintiffs have misstated events in the district court.
13 [CN 2] Namely, the district court did not exclude any witness; it granted summary
14 judgment for Plaintiffs’ failure to name an expert witness to support their claims after
15 the time for doing so, set forth in the scheduling order, had expired. [CN 2; RP 207-
16 10] The district court also denied Plaintiffs’ motion to modify the scheduling order to
17 extend the time for discovery to identify an expert witness for a lack of a showing of
18 good cause. [RP 106-16, 207]

1 {3} Plaintiffs' response to our notice continues to ask this Court to treat summary
2 judgment as an unfairly harsh, and dispositive sanction imposed by the district court
3 for Plaintiffs' failure to timely disclose an expert witness. [MIO 1-4] We are not
4 persuaded. Plaintiffs did not untimely disclose an expert or even present a defined
5 time frame in which they would disclose an expert. Plaintiffs complained that they
6 could not identify an expert witness without deposing Defendants' witnesses. [RP
7 120-21] However, Plaintiffs never supplied an explanation as to why they needed to
8 depose Defendants' witnesses to identify their own experts or why they did not timely
9 depose Defendants' witnesses. [RP 141] Plaintiffs were in possession of all the
10 records identifying all the relevant medical providers since June 1, 2017, and they
11 failed to even request dates to depose any of those essential witnesses until July 3,
12 2019, three months after the date in the scheduling order and two days after the
13 extended deadline set out in the proposed order Defendants' counsel emailed to
14 Plaintiffs' counsel. [RP 48-50, 85, 141] After the time set forth in the scheduling order
15 for completing all discovery had passed, Defendants filed a motion for summary
16 judgment based on Plaintiffs' failure to identify an expert to support their claims. [RP
17 84-105] In response, Plaintiffs did not untimely identify an expert; instead they sought
18 to modify the scheduling order to extend the time for discovery to identify an expert
19 witness. [RP 106-16]

1 {4} Additionally, Defendants did not seek nor were they granted summary
2 judgment on the basis of any violation of a discovery order as contemplated by Rule
3 1-037(B) NMRA. Defendants sought summary judgment on the express grounds that
4 Plaintiffs did not identify any qualified expert to testify that the medical care at issue
5 failed to meet the standard of care or caused the injuries alleged to a reasonable degree
6 of medical probability. [RP 84-88, 155] *See Blauwkamp v. Univ. of N.M. Hosp.*,
7 1992-NMCA-048, ¶ 16, 114 N.M. 228, 836 P.2d 1249 (explaining that in medical
8 malpractice cases where the defendants can show the plaintiffs lack expert testimony
9 to support their claims, “such a showing is sufficient to support a motion for summary
10 judgment on the basis that the [plaintiffs’] evidence is insufficient to establish an
11 essential element of the [plaintiffs’] claim[,]” and the defendants are not required to
12 support their motions for summary judgment with affidavits or depositions of medical
13 experts disproving the plaintiffs’ claims (internal quotation marks and citation
14 omitted)). Under these circumstances, the applicable analysis is not whether the
15 sanction of dismissal was warranted, but whether the district court abused its
16 discretion by denying Plaintiffs’ motion to modify the scheduling order for lack of
17 good cause. [RP 207]

18 {5} We review the district court’s denial of Plaintiffs’ motion to extend the time for
19 discovery to find an expert for abuse of its discretion, “which occurs when the district

1 court's ruling is against the facts, logic, and circumstances of the case or is untenable
2 or unjustified by reason." See *Buke, LLC v. Cross Country Auto Sales, LLC*,
3 2014-NMCA-078, ¶ 62, 331 P.3d 942 (alteration, internal quotation marks, and
4 citation omitted). "A scheduling order shall not be modified except by order of the
5 court upon a showing of good cause." Rule 1-016(B)(8) NMRA. "We will not
6 interfere with the district court's enforcement of pretrial deadlines. Adherence to such
7 scheduling orders is critical in maintaining the integrity of judicial proceedings."
8 *Buke*, 2014-NMCA-078, ¶ 63 (alterations, internal quotation, and citation omitted).

9 {6} To the extent that we might construe Plaintiffs' memorandum in opposition to
10 rely on their lack of bad faith or their attempt to negotiate an extension of time with
11 Defendants as establishing good cause, we are not persuaded. Plaintiffs and
12 Defendants did not arrive at an agreed-upon extension, and there is no indication
13 Plaintiffs followed up with Defendants on their request for an extension and no
14 indication that Plaintiffs had a reason to believe the district court had approved any
15 extension. [RP 142-44]

16 {7} Under the circumstances described herein and in our notice, we cannot say
17 Plaintiffs established that the district court abused in its discretion by denying the
18 extension and modification of the scheduling order based on a lack of a showing of
19 good cause. See Rule 1-016(B)(8); *Buke*, 2014-NMCA-078, ¶¶ 62-63.

1 {8} Because there is no dispute that Plaintiffs require expert testimony to establish
2 their medical malpractice claims, [RP 120, 124] we hold that summary judgment was
3 proper. *See Blauwkamp*, 1992-NMCA-048, ¶ 16. Further, Plaintiffs have not
4 established that summary judgment was improper on grounds that providing
5 additional time was necessary and just as contemplated by Rule 1-056(F) NMRA. As
6 we have stated, Plaintiffs do not explain why they could not retain an expert between
7 the time they filed their suit and the expert disclosure deadline, why they did not take
8 the depositions they claim to need, or how additional discovery might enable them to
9 identify an expert.


10 {9} For the reasons stated in our notice and in this opinion, we affirm the district
11 court's orders denying Plaintiffs' motion to modify the scheduling order and granting
12 Defendants' motion for summary judgment.

13 {10} **IT IS SO ORDERED.**

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15 _____
16 **JULIE J. VARGAS, Judge**

16 **WE CONCUR:**

17 
18 _____
19 **KRISTINA BOGARDUS, Judge**

19 
20 _____
21 **BRIANA H. ZAMORA, Judge**