ORIGINAL

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

ALICIA MONTOYA, as Personal Representative of the ESTATE OF ADRIAN A. ARCHULETA,

Plaintiff-Appellant

v.

Ct. App. No. 35,178

WALGREEN CO.,

Defendant-Appellee.

Appeal from the Second Judicial District
Bernalillo County, New Mexico
The Honorable Valerie A. Huling

ANSWER BRIEF

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Overview

"In a number of cases, . . . the but-for test of cause in fact puts the plaintiff out of court." Dan B. Dobbs, The Law of Torts § 168, at 410 (2000). This case becomes one of them once the dispositive considerations are clarified. In her brief in chief Appellant Alicia Montoya is not forthright about the aspects of the record and the law which demonstrate that the district court correctly granted summary judgment on her negligence claims against Appellee Walgreen Co. ("Walgreens"). After not disputing that Walgreens played no role in dispensing the methadone pills that caused her brother's fatal overdose, Ms. Montoya failed to make a sufficient showing in support of her theory that Walgreens' alleged failure to intervene in his addiction was a cause of his death. Ms. Montoya's improper attempts to bolster her showing on appeal confirm the insufficiency of her showing in the district court.

In this brief Walgreens focuses upon addressing the dispositive causation issue. Walgreens provides a supplemental summary of proceedings which lays a foundation for analysis of the issue. Walgreens restructures portions of Ms. Montoya's arguments to facilitate the analysis. Point A explains why, as a matter of law, the showing that Ms. Montoya made in support of her theory that Walgreens' alleged failure to intervene in Mr. Archuleta's addiction was a cause of his death was insufficient to withstand summary judgment. Point B explains why,

if considered, the legal doctrines raised by Ms. Montoya do not provide the necessary support for the theory. Point C explains why the analytical errors that Ms. Montoya imputes to the district court are baseless.

Supplemental Summary of Proceedings

"The appellate rules are designed . . . to obtain briefs that provide . . . an . . . accurate statement of the material necessary to consider the issues raised on appeal without reference to extraneous matters." See Hartman v. Texaco, Inc., 1997-NMCA-032, ¶ 27; 123 N.M. 220; see also Rule 12-318(A)(3) NMRA. Moreover, "a balanced presentation of the factual record" is required whenever an appellate issue requires consideration of the facts. Hartman, 1997-NMCA-032, ¶¶ 27-28. Ms. Montoya's brief in chief does not comply with those principles of appellate practice. Walgreens therefore provides the following supplemental statement of proceedings. Accord Rule 12-318(B).

The proceedings on Walgreens' second summary judgment motion resulted in the district court's decision to grant summary judgment on Ms. Montoya's negligence claims against Walgreens. (RP 13-15, 16-17; RP 361; RP 479.) Little therefore need be said about the proceedings on Walgreens' first summary judgment motion. (RP 150; RP 219; RP 286; Tr. (4/24/14).) But it is worth noting that toward the end of the hearing on the first motion, the court indicated that the question on its mind was "with regard to causation" and whether or not there was

"enough" for the claims to reach a jury. (Tr. (4/24/14) at 23.) Seeking to ensure that it was not overlooking anything, the court explained that it was not prepared to make a final decision on the issue before Ms. Montoya's experts were deposed and denied the motion. (Id. at 23, 26-27.) Concomitantly, the court left the door open for Walgreens to file a second motion for summary judgment after the depositions. (Id.) In doing so, the court placed Ms. Montoya on notice that, while "causation is usually left to [a] jury," a jury "doesn't just get to guess on causation" and that if her expert testimony on the issue did not suffice in the court's view, her claims would not reach a jury. (See id.)

After the depositions, Walgreens filed its second motion for summary judgment. (RP 361.) In pertinent part, Walgreens argued that Ms. Montoya lacked the evidence necessary to satisfy the causation element of her negligence claims which meant that the claims failed as a matter of law. (RP 365-66.) More specifically, after reiterating the need for expert testimony on the issue (RP 364-65), Walgreens argued that the only evidence demonstrating the cause of Mr. Archuleta's death had no connection to any act or omission by Walgreens (RP 365-66). In that regard, the following facts were undisputed.

Mr. Archuleta died as a result of methadone toxicity. (RP 363, ¶ 1, RP 368; RP 388, ¶ 1.) The Office of the Medical Investigator ("OMI") attributed Mr. Archuleta's death to methadone pills that he had taken from his "recent

prescription." (RP 363, ¶¶ 2-3, RP 370; RP 388, ¶ 1.) The "recent prescription" was one for methadone, written by Dr. Barry Maron which Mr. Archuleta filled at a Pharmacy Plus pharmacy on March 22, 2010, the day before his death. (RP 363, ¶¶ 1-3, RP 373; RP 388, ¶ 1.) The prescription was for a 30-day supply of methadone, consisting of 90 pills, to be taken in daily doses of three pills. (RP 363, ¶ 3, RP 373; RP 388, ¶ 1.) At the time of Mr. Archuleta's death, only 67 of the 90 pills remained, meaning that within 24 hours 23 of the pills were gone. (RP 363, ¶ 4, RP 373; RP 388 ¶ 1.)

At the scene of Mr. Archuleta's death, other prescription medications were found in his possession. (RP 363, ¶ 5, RP 373; RP 388, ¶ 1.) They included prescriptions that Mr. Archuleta filled at Pharmacy Plus and CVS pharmacies. (RP 363, ¶ 5, RP 373; RP 388, ¶ 1.)

The only evidence of a Walgreens prescription was an empty container for a methadone prescription, written by Dr. A. Hayek, which Mr. Archuleta filled at a Walgreens pharmacy on March 11, 2010. (RP 363, ¶ 5, RP 373; RP 388, ¶ 1.) Plaintiff's only expert offering an opinion on the medical causation of Mr. Archuleta's death, Dr. George Glass, agreed with the OMI that Mr. Archuleta had died because in between the time that he obtained them on March 22 and his death on March 23, 2010, Mr. Archuleta took at least 23 methadone pills from a prescription that was filled by Pharmacy Plus, not Walgreens. (RP 364, ¶ 7, RP

377 (Glass Dep. at 49:2-50:8; RP 378 (Glass Dep. at 57:10-13); RP 378-79 (Glass Dep. at 59:14-61:6; RP 380 (Glass Dep. at 66:13-67:2; RP 373; RP 388, ¶ 3.) In conceding that Walgreens had not sold Mr. Archuleta "the particular pills that caused him to stop breathing," Ms. Montoya stated that she "never [would] advance such a theory because it is obviously contrary to the facts." (RP 387.)

Having made such concessions, Ms. Montoya relied on an alternative theory of causation – i.e., that Walgreens' failure to intervene in Mr. Archuleta's addiction to prescription medications when it knew or should have known of his addiction had been a cause of his death. (RP 387, RP 392, RP 394.) Ms. Montoya's evidentiary support for the theory consisted of excerpts from the deposition testimony of Dr. Glass. (RP 392.) In one of the excerpts, after describing Mr. Archuleta as "a drug addict" who had been "working several doctors, if not several pharmacies" (RP 418 (Glass Dep. at 65:14-15)), Dr. Glass testified about what might have happened if Walgreens had "notif[ied] people or cut him off," stating:

> Mr. Archuleta perhaps would have found another pharmacy, he perhaps would have gone to a different doctor. He also may have done what they call in the addiction recovery business hit bottom, where he was out of money and out of supplies and suppliers and might have had to go to treatment.

(RP 392, RP 418 (Glass Dep. at 65:16-23).)

At the end of the hearing on the motion, after considering the parties' arguments in their briefing and during the hearing, the district court decided to grant summary judgment on Ms. Montoya's negligence claims against Walgreens. (See Tr. (9/28/15) at 3, 21-23.) In explaining its decision to do so, the court in pertinent part remarked:

> In causation, I would generally send it to the jury, except when I have the feeling that if it did come back, I'd set it aside, because in this particular case, it is clear what he died of. There's no question about it. He died from taking the 23 pills from a prescription that was not Walgreens' prescription.
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> * * * *
>
> The doctor – I mean, your expert[] [doesn't] come in and say, 'Okay, if Walgreens had taken this action, then . . . he would not have been addicted. He would have no longer been an addict. He would have been on the straight and narrow, and this . . . never would have occurred.' And the reason your expert doesn't say that is because he knows it's not true. He can't possibly say that.

(Tr. (9/28/15) at 22.) Subsequently, the court entered a written order granting Walgreens' second summary judgment motion because Ms. Montoya "could not prove the element of causation[.]" (RP 479.)

In her brief in chief, in challenging the district court's summary judgment decision, Ms. Montoya relies on two principal points. In her first point, Ms. Montoya implicitly challenges the decision by suggesting that she made a showing on her causation theory that was sufficient to survive summary judgment. In her second point, Ms. Montoya explicitly challenges the decision by suggesting that the court did not articulate a valid basis for rejecting her causation theory.

Argument

In analyzing Ms. Montoya's arguments on appeal, it helps to keep the following guidelines in mind. This Court undertakes de novo review of an order granting summary judgment and, in doing so, "step[s] into the shoes of the district court, reviewing the motion, the supporting papers, and the non-movant's response as if [the Court] were ruling on the motion in the first instance." Farmington Police Officers Ass'n v. City of Farmington, 2006-NMCA-077, ¶ 13, 139 N.M. 750. This Court therefore "review[s] the case litigated below, not the case that is fleshed out for the first time on appeal." Spectron Dev. Lab. v. Am. Hollow Boring Co., 1997-NMCA-025, ¶ 32, 123 N.M. 170 (internal quotation marks & citation omitted). Correspondingly, "[t]he rules of preservation are no different for

review of summary judgment than the review of other orders." Nellis v. Farmers Ins. Co., 2012-NMCA-020, ¶ 23, 272 P.3d 143.

A. As a Matter of Law Ms. Montoya Did Not Make a Sufficient Showing on the Essential Element of Causation to Withstand Summary Judgment.

Subliminal suggestions play no small part in Ms. Montoya's attempts to persuade this Court that she made a showing on causation that was sufficient to withstand summary judgment. They start on the first page of her brief where Ms. Montoya labels Walgreens as "the Pharmacy." (BIC at [1].) There, too, Ms. Montoya starts to use the term "proximate cause" (id.) which in general connotes liability for foreseeable harm and a question of fact for a jury; connotations that she develops in her factual portrayal (id. at 2-8) and in her standard of review discussion (id. at 9-11). Parenthetically, she notes that in another summary judgment case the Supreme Court recently reversed this Court and the district court for engaging in an "'overly technical'" evaluation of the plaintiff's expert testimony. (Id. at 10 (quoting Madrid v. Brinker Rest. Corp., 2016-NMSC-003, ¶ 20, 363 P.3d 1197).) In wording the heading to her first point as she does – i.e., "I. Evidence and Inferences Reasonably Supported a Finding that the Pharmacy's Negligence Proximately Caused Mr. Archuleta's Death" (id. at 11) – Ms. Montoya also suggests that she made a sufficient showing on her theory of causation.

But appearances can be deceiving. As Ms. Montoya acknowledges, in the months leading up to his death, Mr. Archuleta was getting prescriptions filled by "six separate pharmacy retailers." (Id. at 2.) The proximate cause connotations upon which she relies do not prove to be dispositive of the analysis in this case. Evaluated under the applicable analytical standards, her expert's testimony on the element of causation clearly was insufficient to withstand summary judgment. Correspondingly, in Point I, Ms. Montoya spends less than two pages arguing about the sufficiency of her causation showing. (Id. at 13-15.)

Having the dispositive substantive and procedural standards in mind facilitates analysis of the argument. Walgreens therefore clarifies the standards before delving into the argument itself.

As this Court has recognized, and cases cited by Ms. Montoya indicate, "[t]he general term 'proximate cause' encompasses both cause in fact and proximate causation[.]" Terrel v. Duke City Lumber Co., 1974-NMCA-041, ¶ 102, 86 N.M. 405 (internal quotation marks & citation omitted); accord Paez v. Burlington N. Santa Fe Ry., 2015-NMCA-112, ¶ 9, 362 P.3d 116; Lujan v. State Dep't of Transp., 2015-NMCA-005, ¶¶ 7, 34-35, 341 P.3d 1. "[E]ven if the[] issues are sometimes called by the same name, they are quite different issues and turn on quite different kinds of analysis[.]" Dobbs, § 167, at 408. "Cause in fact is at least to some extent a concept or mental construct, a perception about the

relationship between two events. Proximate cause . . . is not about causation at all but about . . . the appropriate scope of liability[.]" Id.; see also 57A Am. Jur. 2d Negligence § 436, at 466 (2004) ("Although the language may vary, the cases generally hold or recognize that [the element of causation] in negligence is made up of two components: (1) cause in fact or 'factual causation' and (2) 'proximate cause' or policy considerations, principally foreseeability[.]") (footnotes omitted)). Until and unless a cause-in-fact showing is made, no proximate cause (i.e., foreseeability of harm) analysis takes place. Dobbs § 180, at 443; accord 65 C.J.S. Negligence § 189, at 524 (2000) ("A finding of no cause-in-fact ends the inquiry into liability.").

Ms. Montoya – in adverting to the concept of "a chain of causation" (BIC at 13) – addresses the cause in fact issue. But she does so incompletely. Fully stated, for the element to be met, "there must be a chain of causation initiated by some negligent act or omission of the defendant which . . . [is] the 'but for' cause of the injury . . . without which the injury would not have occurred." Chamberland v. Roswell Osteopathic Clinic, Inc., 2001-NMCA-045, ¶ 18, 130 N.M. 532 (internal quotation marks & citation omitted). In other words, "[u]nder the but-for test, the defendant's conduct is a cause in fact of the . . . harm, if, but-for the defendant's conduct, that harm would not have occurred." Dobbs, § 168, at 409; cf. id. ("The but-for test also implies a negative. If the [party] would have suffered the same

harm had the defendant not acted negligently, the defendant's conduct is not a cause in fact of the harm."). Accord W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 41, at 266 (5th ed. 1984).

Absent the element of causation, "a claim for negligence fails regardless of the presence of the remaining elements of the cause of action." Paez, 2015-NMCA-112, ¶ 12; accord Romero v. Philip Morris, Inc., 2010-NMSC-035, ¶ 16, 148 N.M. 713; see also Fitzgerald v. Valdez, 1967-NMSC-088, ¶ 19, 77 N.M. 769 (causation essential element of common law negligence and negligence per se claims). Faced with a motion that makes a prima facie showing for summary judgment, the non-movant must "demonstrate the existence of specific evidentiary facts which would require a trial on the merits." Romero, 2010-NMSC-035, ¶ 10 (internal quotation marks & citation omitted); accord Paez, 2015-NMCA-112, ¶ 26 ("The purpose of summary judgment is to . . . assay the parties' proof in order to determine whether a trial is actually required." (internal quotation marks & citation omitted)).

To meet the burden, the non-movant must come forward with evidence which demonstrates that a genuine issue of material fact exists on the issue. See Wood v. City of Alamogordo, 2015-NMCA-059, ¶ 6, 350 P.3d 1185. "The evidence adduced must result in reasonable inferences." Madrid, 2016-NMSC-003, ¶ 18 (internal quotation marks & citation omitted). Moreover, "[a]n inference

is not a supposition or a conjecture, but is a logical deduction from facts proved and guess work is not a substitute therefor." Id. (internal quotation marks & citation omitted); accord Wood, 2015-NMCA-059, ¶ 6 ("The non-movant may not rely on . . . speculation[.]" (internal quotation marks & citation omitted)). See also Rivera v. Trujillo, 1999-NMCA-129, ¶ 8, 128 N.M. 106 ("[T]he determination of whether a genuine factual dispute exists is a question of law.").

In this case, the district court ostensibly had the preceding standards in mind during the hearing on Walgreens' second summary judgment motion when it addressed the insufficiency of Ms. Montoya's showing on her failure to intervene theory of causation against Walgreens. As the court, in addressing Ms. Montoya's counsel, observed:

> The doctor – I mean your expert[] [doesn't] come in and say, "Okay, if Walgreens had taken this action, then . . . he would not . . . have been addicted. He would no longer have been an addict. He would have been on the straight and narrow and this would never have occurred." And the reason your expert doesn't say that is that he knows it's not true. He can't possibly say that.

(Tr. (9/28/15) at 22.)

As the district court recognized, based on the summary judgment record before it, Ms. Montoya's only expert on causation, Dr. Glass, had not provided

testimony which affirmatively showed that "but for" Walgreens' alleged failure to intervene Mr. Archuleta would not have died from an overdose and that, having described Mr. Archuleta as "a drug addict" who before his death was "working several doctors, if not several pharmacies," supra p. 5, Dr. Glass was unable to provide testimony from which a jury properly could infer that if Walgreens had intervened Mr. Archuleta would not have died from an overdose.

In seeking to undermine the district court's insights, without directly addressing them, Ms. Montoya argues that her expert testimony "squarely supported" her theory. (BIC at 14.) In doing so, Ms. Montoya states: "Dr. Glass testified that [Walgreens'] failure to intervene in Mr. Archuleta's addiction . . . 'caused' Mr. Archuleta's death [II RP 418:3-8]." (Id.) But review of the deposition testimony that she cites shows that it does not support the statement. Instead, at that point in his deposition, in answering the question of how something Walgreens had done wrong had caused Mr. Archuleta's death (RP 379-80 (Glass Dep. at 64:25-65:2)), Dr. Glass testified: "I thought I answered that earlier, but I'll review it again. I believe that the pattern of Dr. Maron's prescribing excessive amounts of medication, excessive doses and medication which synergistically cause central nervous system depression caused Mr. Archuleta's death." (RP 418 (Glass Dep. at 65:3-8).) That said, Walgreens acknowledges that the additional testimony that Ms. Montoya quotes from Dr. Glass's deposition in her next

statement, does touch upon her theory that, "by failing to intervene, [Walgreens] negligently allowed [Mr. Archuleta] to continue on a course toward overdose death." (BIC at 14; see also RP 419 (Glass Dep. at 66:8-12).)

Notably missing from the statements, however, is any mention of the additional portion of Dr. Glass's deposition testimony upon which Ms. Montoya relied in her summary judgment response (cf. RP 392, RP 394, RP 418 (Glass Dep. at 9-23)), which shows that Dr. Glass's testimony was not as affirmative as she currently suggests. Having described Mr. Archuleta as "a drug addict" who before his death was "working several doctors, if not several pharmacies," in addressing what might have happened if Walgreens had "notif[ied] people or cut him off," Dr. Glass could only testify:

> Mr. Archuleta perhaps would have found another pharmacy, he perhaps would have gone to a different doctor. He also may have done what they call in the addiction recovery business hit bottom, where he was out of money and out of supplies and suppliers and might have had to go to treatment.

(RP 418 (Glass Dep. at 65:14-23).)

Such testimony does not show or support an inference that "but for" Walgreens' alleged failure to intervene in Mr. Archuleta's addiction he would not have died from an overdose. The testimony instead reveals that Dr. Glass could

only speculate about what might have happened if Walgreens had intervened as Ms. Montoya alleged it should have. The speculative nature of Dr. Glass's testimony is made all the clearer by Ms. Montoya's own statement that in the months before his death Mr. Archuleta was getting prescriptions written by "nine different prescribers" and getting them filled at "six separate pharmacy retailers." (BIC at 2.) Because "[t]he presence of a material issue of fact cannot be based on speculation," Dr. Glass's testimony alone was insufficient to withstand summary judgment. Duran v. N.M. Monitored Treatment Program, 2000-NMCA-023, ¶ 28, 128 N.M. 659; accord Wood supra p. 12.

Knowing that, Ms. Montoya asserts that her causation theory had "additional support" from "Dr. Simonson's opinion that Walgreen[s] 'contributed' to Plaintiff's death [Id. at 420:2-8]." (BIC at 14.) In then characterizing "the causation testimony of [her] experts" as being sufficient "in its own right" to defeat summary judgment, Ms. Montoya asserts that the testimony becomes "even more compelling in light of the favorable inferences that must be afforded" to her at the summary judgment stage. (Id.) "Most significantly, it must be inferred that the intervention that Dr. Simonson testified should have occurred prior to or after Dr. Maron's September 1, 2009 note would have succeeded in removing Mr. Archuleta from the course of rampant addiction that lead to his March 23, 2010 overdose." (Id. at 14-15.)

In making such assertions, Ms. Montoya compounds her errors. As already noted, during the proceedings on Walgreens' second summary judgment motion, after not disputing that Dr. Glass was her sole expert on medical causation, supra p. 4, Ms. Montoya relied solely on his deposition testimony in arguing the issue of causation. (Cf. RP 392, RP 394; see also Tr. (9/28/15) at 19-20.) Having lost on her theory in the district court due to the insufficiency of Dr. Glass's testimony, Ms. Montoya cannot pivot to Dr. Simonson for support now. See Maryland Cas. Co. v. Foster, 1966-NMSC-098, ¶ 10, 76 N.M. 310 (A party may not change a position on any matter that it adopted below).

Even if the supplemental or recently provided assertions are considered, they do not provide the necessary evidentiary support. The deposition testimony that Ms. Montoya attributes to Dr. Simonson (BIC at 14) is actually that of Dr. Glass. (Cf. RP 420 (Glass Dep. at 70:2-8).) Worse, Ms. Montoya embellishes Dr. Simonson's deposition testimony to suggest that he gave an opinion on the causation of Mr. Archuleta's death. Supra p. 15. In fact, during his deposition, Dr. Simonson disclaimed his intention to state such an opinion. (Cf. RP 375 (Simonson Dep. at 143:15-17 ("Q: And you're not here to state an opinion as to the cause of Mr. Archuleta's death, are you? A: I am not, no.")); see also RP 391-92 (Another portion of the record shows that Ms. Montoya presented Dr. Simonson's

deposition testimony about the intervention that she alleged should have occurred as relevant to the element of breach).)

As it turns out, then, the favorable inference Ms. Montoya asserts that she must be afforded, is actually a factual assertion of counsel – the content of which was drafted in an obvious attempt to overcome the insufficiency of Dr. Glass's testimony on the cause in fact issue. Cf. supra pp. 12, 14-15. The assertion does not provide Ms. Montoya with the necessary evidence. A "bare" assertion of counsel is "not evidence upon which a . . . court can rely in a summary judgment proceeding." V.P. Clarence Co. v. Colgate, 1993-NMSC-022, ¶¶ 2, 6 n.2, 115 N.M. 471; see also Callahan v. N.M. Fed'n of Teachers-TVI, 2010-NMCA-004, ¶ 11, 147 N.M. 453 ("[T]he non-moving party cannot rely upon . . . argument or contention of counsel to defeat the motion[.]")[1] The statement in Ms. Montoya's brief therefore amounts to an unsupported assertion of counsel which is insufficient to defeat summary judgment.

The evidence needed to defeat summary judgment does not materialize in the remainder of Ms. Montoya's brief. (See BIC Points I.C, II.) That consideration, along with Ms. Montoya's continued acknowledgement that Walgreens "did not sell Mr. Archuleta the actual [methadone] pills that triggered

[1] Notably as well, although she asserts that she is entitled to "favorable inferences," Ms. Montoya makes no attempt to articulate any additional such inferences, including any from Dr. Glass's testimony. (See BIC at 14-15.)

his fatal . . . overdose" (BIC at 4), are fatal to her negligence claims against Walgreens.

B. If Considered, the Legal Doctrines That Ms. Montoya Raises Do Not Provide the Evidentiary Support Needed to Withstand Summary Judgment on the Element of Causation.

Although Ms. Montoya never directly says so in arguing that her failure to intervene theory of causation against Walgreens "was supported by case law" (BIC at 15), the point of her argument seems to be that the theory was valid as a matter of law (id. at 15-19). Be that as it may, the argument does not help her. The dispositive issue in the district court was whether Ms. Montoya had adduced evidence on the cause in fact aspect of the analysis which was sufficient as a matter of law to withstand summary judgment. She did not do so. Supra Point A. Devoid of evidence as it is, the argument does not establish that Ms. Montoya made a sufficient cause in fact showing. (See BIC at 15-19.) There is, then, no need to consider the two legal doctrines that Ms. Montoya raises in the argument.

If the Court considers the doctrines, it will find that they do not help Ms. Montoya overcome the basis for granting summary judgment. Prefatorily, it is worth noting that in responding to Walgreens' second motion for summary judgment Ms. Montoya raised little to none of what she discusses about the doctrines, as her lack of record cites indicates. (Cf. id. with RP 387-94; Tr. (9/28/15) at 12-20).)

In line with that observation, in the district court, Ms. Montoya did not use terms such as "[c]oncurring proximate cause" or "concurrent causation" in articulating her theory of causation against Walgreens as she now does. (Cf. RP 387-94; Tr. (9/28/15) at 12-20 with BIC at 15.) That said, Walgreens acknowledges that she raised the concept that there may be more than one cause of harm (see RP 392, ¶ 22; Tr. (9/28/15) at 19), which Walgreens does not dispute.

But in quoting the statement that she does from Kelly v. Montoya, which alludes to the concept of foreseeable harm, see 1970-NMCA-063, ¶ 28, 81 N.M. 591, Ms. Montoya strays into arguing the issue of proximate cause. See Dobbs, § 180, at 445 ("Several tortfeasors may all be proximate causes of a single harm; the first tortfeasor in a sequence of events as well as the last is often a proximate and responsible cause."; "The test . . . turns on . . . reasonable foreseeability, not on mechanics."). Regardless of the terminology used, the threshold cause in fact requirement remains, as another statement in Kelly indicates. Cf. 2007-NMCA-063, ¶ 26 ("A partial definition of proximate cause is . . . that which . . . produces the injury, and without which the injury would not have occurred[.]") (internal quotation marks & citation omitted)); see also 65 C.J.S. Negligence § 198, at 544, 546-47 ("Concurrent causes"; "The 'but for' test of causation . . . is applicable in all cases except those involving two independent torts, either of which is sufficient in and of itself to cause the injury.").

The additional cases that Ms. Montoya raises (BIC at 16-18) under her "[c]oncurring proximate cause" subheading (id. at 15) are not cases that she raised in the district court during the proceedings on Walgreens' first summary judgment motion (cf. RP 219-224; Tr. (4/24/14) at 9-19, 24-28) or, more pertinently for present purposes, Walgreens' second summary judgment motion (cf. RP 387-94; Tr. (9/28/15) at 12-20, 23-27). While a party's citation to additional legal authority on appeal ordinarily does not implicate a lack of preservation problem, Ms. Montoya's potentially does. It is fair to say that exactly what Ms. Montoya is driving at through her use of the cases is not clear.[2] Had the cases been raised below, when Ms. Montoya had not one, but two, opportunities to address the element of causation, both Walgreens and the district court would have had a chance to clarify and address what Ms. Montoya had in mind. Walgreens now finds itself at a disadvantage in trying to address Ms. Montoya's use of the cases.

Based on the foregoing considerations, Ms. Montoya should not be allowed to make use of the cases in seeking reversal of the district court's grant of summary judgment on her negligence claims against Walgreens. Instead, the Court should

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[2] (See, e.g., BIC at 16 (in portraying Los Alamos Medical Center v. Coe, 1954-NMSC-090, 58 N.M. 686, among other things, Ms. Montoya states that in the case, "[t]he Supreme Court was called upon to review the propriety of jury's verdict . . . which [was] premised on the theory that the defendant-physician's negligence caused Ms. Coe's addiction and, by extension, 'the agonies of her withdrawal.' Id. at ¶ 3."); id. at 17 (In characterizing other cases, Ms. Montoya states: "Other jurisdictions have allowed similar theories of addiction causation.")

disregard the cases. See Headley v. Morgan Mgmt. Co., 2005-NMCA-045, ¶ 15, 137 N.M. 339 ("We will not review unclear arguments, or guess at what [the party's] arguments might be."); see also Hinger v. Parker & Parlsey Petroleum Co., 1995-NMCA-069, ¶ 24, 120 N.M. 430 ("Fairness underlies the rule of preservation of error. Each party to a lawsuit has only one opportunity to present its case and challenge the case of its opponent; that occurs [in the trial court], and not for the first time on appeal."); accord State v. Gonzales, 2001-NMCA-025, ¶ 7, 130 N.M. 341 ("[One of] [t]he purpose[s] of the preservation rule is to [e]nsure that the trial [court] is alerted to [an] issue and has an opportunity to address it."), overruled on other grounds by State v. Rudy B, 2009-NMCA-104, 147 N.M. 45; see also Woolwine v. Furrs, Inc., 1987-NMCA-133, ¶ 20, 106 N.M. 492 ("To preserve an issue for review on appeal, it must appear that appellant fairly invoked a ruling of the trial court on the same grounds argued in the appellate court.").

Even if the Court considers the cases, which are distinguishable on various grounds, none of them helps Ms. Montoya on the dispositive issue in this case. The issue of whether a party has made a sufficient cause in fact showing calls for case-by-case analysis. Supra pp. 10-11 (Chamberland; Dobbs). None of the cases, then, establishes that Ms. Montoya made a cause in fact showing against Walgreens on her failure to intervene theory of causation that was sufficient to withstand summary judgment.

Ms. Montoya's loss of chance argument (BIC at 18-19) is an entirely new one. In the district court Ms. Montoya did not plead or otherwise pursue the theory against Walgreens (see RP 1-18; RP 387-94; Tr. (9/28/15) at 12-20) as she is attempting to do on appeal. (Cf. BIC at 19 ("Here, Plaintiff's evidence that [Walgreens] negligently failed to intervene by speaking to Mr. Archuleta's medical providers about the dangerous quantities of medications and the legitimacy and necessity of such a course of treatment, plainly support an inference that [Walgreens'] negligence deprived Mr. Archuleta of at least a chance to avoid his overdose and death.").) Having not raised a loss of chance theory against Walgreens in the district court, Ms. Montoya cannot do so now. Cordova v. City of Albuquerque, 1974-NMCA-101, ¶ 41, 86 N.M. 697; accord Sanchez v. Church of Scientology, 1993-NMSC-034, ¶7, 115 N.M. 660 (Issue not raised in district court "not properly preserved for review on appeal."); see also State v. Lucero, 2007-NMCA-127, ¶ 15, 142 N.M. 620 ("Preservation plays an important role in the appellate review process. Argument of an issue to the lower court enables the party opposing the position advanced to marshal arguments to convince the court, permits the lower court to decide the issue . . . , and provides the record for an appellate court to review and make an informed decision about the issue.").

Even if the Court considers the argument, it will find that Ms. Montoya misapprehends the law in making statements which suggest that a more relaxed

standard of causation applies under a lost chance theory. (See BIC at 19.) Under the theory, only the injury or loss is redefined; "the standard of causation remains the same" as for any other negligence claim. Baer v. Regents of the University of Cal., 1999-NMCA-005, ¶ 9, 126 N.M. 508; see also id. ¶¶ 14-15 (declining to adopt a more relaxed standard of causation); accord Alberts v. Schultz, 1999-NMSC-015, ¶ 17, 126 N.M. 807 ("The basic test for establishing loss of chance is no different from the elements required . . . in negligence suits in general[.]").

Moreover, "[b]ecause the issues raised in lost-chance actions are, in virtually every case, beyond the province of lay persons, the plaintiff will almost always need to establish the elements through expert testimony." Alberts, 1999-NMSC-015, ¶ 18 (internal quotation marks & citation omitted); accord UJI 13-1635 NMRA (loss of chance jury instruction contemplates presentation of evidence from "a medical expert"); see also UJI 13-1802A NMRA (measure of damages jury instruction contemplates evidence which provides "numbers or verbal descriptions" to help a jury assign a value to the lost chance). Having not raised the theory below, Ms. Montoya has no such evidence.

She relies instead on the previously quoted assertion. Supra p. 22. As her support for the assertion, Ms. Archuleta cites Cross v. City of Clovis, quoting it for the proposition that if the defendants "negligently deprived [the decedent] of a chance to escape harm, they cannot argue that the jury could only speculate as to

whether [he] would have responded successfully to their warnings or directions." (BIC at 19 (quoting 1998-NMSC-045, ¶ 18, 107 N.M. 251).)

Cross does not provide the support that Ms. Montoya suggests. Cross did not involve a loss of chance theory; the issue in the case was whether the trial court had erred in directing a verdict on the plaintiff's claim that, by negligently maintaining a roadblock police officers, had caused the death of his son. 1988-NMSC-045, ¶¶ 1-3; see also Alberts, 1999-NMSC-015, ¶ 9 (identifying Baer, which post-dates Cross, as the seminal case on the theory of loss of chance). The Supreme Court concluded that there was evidence in the record from which a jury reasonably could find that the negligence had proximately caused the harm (i.e., that the decedent was within the foreseeable zone of danger); it was in that context that the Supreme Court uttered the words that Ms. Montoya quotes. See Cross, 1988-NMSC-045, ¶ 18.

Ms. Montoya does not point to anything in the record which shows that she demonstrated the existence of such evidence in this case. (BIC at 20-21.) Instead, besides possibly again straying into arguing the issue of proximate cause through her use of the Cross case, Ms. Montoya is relying on another unsupported assertion of counsel in seeking a favorable inference. Such an assertion is insufficient to give rise to the loss of chance inference that she seeks, supra p. 22. V.P. Clarence Co., 1993-NMSC-022, ¶ 2 ("Arguments of counsel are not evidence upon which a

court may rely in a summary judgment proceeding."); see also Hernandez v. Wells Fargo Bank N.M., N.A., 2006-NMCA-018, ¶ 5, 139 N.M. 68 ("General assertions as to the existence of a triable issue of fact are insufficient."). That consideration is yet another reason why Ms. Montoya's loss of chance argument fails as a matter of law.

C. The District Court Articulated a Valid Basis for Granting Summary Judgment Based on the Record Before It.

In Point II of her brief, Ms. Montoya faults the district court for analytical errors that it did not make in deciding to grant summary judgment. (BIC at 19-21.) Her arguments can be disposed of summarily.

In her initial statements (BIC at 19-20), Ms. Montoya does not "cite to the record, or develop" the point(s) that she is trying to make "in an understandable way." Roark v. Farmers Group, Inc., 2007-NMCA-074, ¶ 39, 142 N.M. 59. That is reason enough to disregard the statements. Supra p. 21 (Headley); see also State v. Murillo, 2015-NMCA-046, ¶ 17, 374 P.3d 284 ("We will not construct [Appellant's] argument on his behalf."). Even if they are considered, the statements address issues that the underlying summary judgment proceedings did not call for the district court to address (e.g., the admissibility of her expert testimony; an independent intervening cause defense). (Cf. RP 361; RP 387; RP 421; Tr. (9/28/15).) Ms. Montoya cites no authority which establishes that the court had to address the non-existent issues for its ruling to be valid. (BIC at 19-

20.) Presumably none exists. Lee v. Lee (In re Adoption of Doe), 1984-NMSC-024, ¶ 2, 100 N.M. 764.

Next, in quoting statements that the district court made in ruling on the summary judgment motion, Ms. Montoya argues that the court's ruling "hinged on an inference made against [her]" – i.e., that "Mr. Archuleta['s] death [was] the result of a singular cause," not attributable to Walgreens. (BIC at 20.) In doing so, Ms. Montoya misconstrues the record. In making the statements, the court was simply making the point that a jury could not properly find that Walgreens had caused Mr. Archuleta's death by dispensing the methadone pills upon which he fatally overdosed. That assessment was correct. From the undisputed facts, it was "clear" that the actual cause of Archuleta's death on March 23 had been his taking of 23 of 90 (or nearly 1/3), of the pills from the methadone prescription filled only the day before by Pharmacy Plus, not Walgreens. Supra pp. 3-5.

In subsequently suggesting that the district court rejected her theory of causation based on a determination that the actual cause of Mr. Archuleta's death "preclude[d] other causes" (BIC at 20), Ms. Montoya does not quote or otherwise acknowledge the portion of the court's ruling which shows that was not so (id. at 20-21). Instead, the court rejected the theory based on its recognition that Ms. Montoya had not adduced evidence from which a jury properly could find or infer

that "but for" Walgreens' alleged failure to intervene in Mr. Archuleta's addiction he would not have died from an overdose. Cf. supra pp. 12, 14.

What the summary judgment record supported was an inference that even if Walgreens had intervened it would not have stopped Mr. Archuleta from getting a doctor to write a prescription for methadone for him and a pharmacy to fill it. As the undisputed facts indicated, Dr. Glass's testimony showed, and Ms. Montoya's own statements affirm, Mr. Archuleta was someone who shopped around for doctors who were willing to write pain control prescriptions for him and changed the pharmacies where he went to get them filled. Supra pp. 3-5, 14-15. Correspondingly, as the district court observed, Dr. Glass had not testified that had Walgreens intervened Mr. Archuleta "'would have no longer been an addict. He would have been on the straight and narrow, and this . . . never would have occurred.'" Supra p. 12.

Instead, Dr. Glass could only speculate as to what might have happened if Walgreens had acted differently. Supra pp. 14-15. As the district court knew, supra pp. 2-3, such speculative testimony was insufficient to withstand summary judgment. Supra pp. 11-12 (Madrid, Wood). As a result, in granting Walgreens' second summary judgment motion on the ground that Ms. Montoya "could not prove the element of causation," the court did articulate a valid basis for granting summary judgment in favor of Walgreens.

Conclusion

For the foregoing reasons, this Court should affirm the district court's grant of summary judgment.

Statement Regarding Oral Argument

Walgreens requests oral argument. Walgreens believes oral argument will assist the Court in understanding the proceedings in this case and in evaluating the positions of the parties on appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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