ORIGINAL

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

ALICIA MONTOYA, as Personal Representative of the Estate of ADRIAN ARCHULETA,

Plaintiff-Appellant,

v.

No. 35,178
Bernalillo County
D-202-CV-2012-05839

WALGREEN CO.,

Defendant-Appellee,

PLAINTIFF-APPELLANT'S BRIEF IN CHIEF

Mark Fine
Fine Law Firm
220 9th St. NW
Albuquerque, New Mexico 87102
Phone: (505) 243-4541
Fax: (505) 242-2716

Attorney for Plaintiff-Appellant

TABLE OF CONTENTS *Page*

TABLE OF AUTHORITIES *Page*

QUESTION PRESENTED

I. Whether the District Court erred in granting summary judgment in favor of Defendant-Appellee, a pharmacy, on the issue of proximate cause, despite expert testimony that the Pharmacy's negligent pattern of selling Plaintiff-Appellant's decedent high quantities of dangerous and addictive medications caused decedent's accidental overdose.

SUMMARY OF PROCEEDINGS

I. NATURE OF THE CASE

Plaintiff-Appellant ("Plaintiff") is the sister of decedent, Adrian Archuleta, and personal representative of his estate. Mr. Archuleta died of methadone toxicity as a result of an accidental overdose on March 23, 2010. Plaintiff claimed that Defendant-Appellee Walgreen Co. ("the Pharmacy") committed the torts of negligence and negligence per se by selling Mr. Archuleta large quantities of a dangerous combination of drugs despite the fact that, through its agents, it knew or should have known that the quantity and combination of drugs posed a high risk of overdose to Mr. Archuleta, whom the Pharmacy also knew or should have known was abusing the medications. The Pharmacy moved for summary judgment, arguing that Plaintiff failed to raise a genuine issue of material fact on any element of her negligence or negligence per se claims. The District Court granted the Pharmacy's motion on the issue of causation only, acknowledging that

Plaintiff had raised genuine issues of material fact on the issues of duty and breach.

II. STATEMENT OF FACTS

After suffering severe neck and back injuries from a motor vehicle accident [II RP 369], Plaintiff's decedent, Adrian Archuleta, began receiving Opioids in January of 2009 [II RP 404]. Over time, Mr. Archuleta exhibited a clear history of abusing his prescription medications [*Id.* at 370]. Between January 9, 2009 and March 22, 2010, Mr. Archuleta received "massive" quantities of Opioids and Benzodiazepines from nine different prescribers and had these prescriptions filled by six separate pharmacy retailers. [*Id.* at 399, 401-05]. Through seven of its Albuquerque locations, the Pharmacy provided the following quantities of narcotics to Mr. Archuleta in the three months between June 30, 2009 and August 31, 2009:

DATE	QUANTITY	MEDICATION	SUPPLY
6/30/09	15	Oxycodone	30 days
7/1/09	15	Zolpidem	10 days
7/1/09	140	Methadone	10 days
7/18/09	90	Roxicodone (Oxycodone)	5 days
7/18/09	15	Zolpidem	10 days
7/18/09	90	Alprazolam	20 days
7/18/09	140	Methadone	10 days
7/25/09	30	Temazepam	30 days
7/25/09	420	Methadone	30 days
7/25/09	60	Oxycodone	30 days
7/25/09	120	Carisoprodol	30 days
8/19/09	120	Carisoprodol	30 days

8/19/09	90	Alprazolam	30 days
8/19/09	30	Temazepam	30 days
8/31/09	50	Lorazepam	16 days

[II RP 402-05].

On September 1, 2009, one of Mr. Archuleta's treating doctors, Dr. Barry Maron, sounded an alarm. He wrote the following note on a return form for the Pharmacy's refill request for Mr. Archuleta: "no further Rx's until cleared by psych. Medication Abuse!" [II RP 299].[1] Nevertheless, without any such mental health clearance, the Pharmacy resumed selling the following medications to Mr. Archuleta:

DATE	QUANTITY	MEDICATION	SUPPLY
9/9/09	10	Diazepam	2 days
9/18/09	120	Lorazepam	30 days
9/24/09	50	Oxycodone	25 days
9/24/09	50	Lorazepam	25 days
2/8/10	10	Lorazepam	3 days
2/8/10	10	Methadone	3 days
2/9/10	30	Zolpidem	30 days
2/9/10	120	Alprazolam	30 days
2/11/10	90	Methadone	30 days

[II RP at 401-02]. Mr. Archuleta survived an accidental prescription medication overdose on February 19, 2010 [II RP 397].

Mr. Archuleta succumbed to another accidental overdose on March 23, 2010 [II RP 368-70]. He died as a result of respiratory depression,

[1] The Pharmacy did not dispute that one of its agents received this note.

secondary to methadone toxicity [*Id.*; I RP 237]. The Opioids (Oxycodone and Methadone) and Benzodiazepines (Lorazepam, Alprazolam, Diazepam, Temazepam) that the Pharmacy sold Mr. Archuleta in the months leading up to his death were addictive and dangerous alone and in combination. Methadone, in particular, is known to cause respiratory depression [II RP 370]. Together, Opioids and Benzodiazepines have a particularly toxic, synergistic interaction [II RP 399] known to aggravate the risk of respiratory depression [*Id.*; I RP 245-46]. It is undisputed that the Pharmacy did not sell Mr. Archuleta the actual pills that triggered his fatal, March 23, 2010 overdose.

In addition to claims against a number of Mr. Archuleta's prescribing doctors, Plaintiff's June 22, 2012 Complaint alleged negligence and negligence per se against the Pharmacy [I RP 13-18].[2] Plaintiff claimed that the Pharmacy knew that "it was selling excessive quantities of dangerous drugs to Mr. Archuleta" and knew that Mr. Archuleta "had a history of misusing prescription medication" [*Id.* at 14, ¶¶ 87-88]. Plaintiff further

[2] Plaintiff filed her Complaint jointly with another set of plaintiffs, the parents and personal representatives of the estate of a young man who had also overdosed on Opioids. In addition to claims against the Pharmacy, the joint Complaint alleged that a number of the decedents' prescribers had recklessly overprescribed Opioids and other medications to them. The claims against the prescribers settled.

alleged that the Pharmacy's failure to take appropriate action in response to this knowledge proximately caused Mr. Archuleta's death [*Id.* at ¶ 90].

A. The Pharmacy's first summary judgment motion.

On November 1, 2013, prior to the expert disclosure deadline, the Pharmacy filed its first motion for summary judgment. The Pharmacy argued that Plaintiff could not prove that it had breached any duty it owed Mr. Archuleta, that Plaintiff could not prove that any of its acts or omissions caused Mr. Archuleta's death, and that Plaintiff could not prove either claim without expert testimony [I RP 152-55].

On the issues of duty and breach, Plaintiff submitted an affidavit by William Simonson, Pharm.D., a widely-published doctor of pharmacy and full-time, tenured professor of pharmacy at Oregon State University [II RP 407-08]. Dr. Simonson identified a number of duties owed by a pharmacist [*Id.* at 409-10], including duties that are triggered when a medication or course of medication poses a danger to the patient:

> When a pharmacist encounters a patient who is "receiving one or more prescriptions or who has ongoing therapy that could be considered atypical or potentially dangerous, it is appropriate for the pharmacist to intervene in a manner that may include communication with the patient and/or the prescriber. When the pharmacist observes a situation that could represent significant danger to the patient, the standard of practice is for that pharmacist to intervene in order to alert the patient and/or the prescriber of the potential for harm . . . Under [the New Mexico Administrative Code] when a pharmacist observes a potential

> problem, including drug abuse or misuse, he or she has a duty to take appropriate steps to avoid or resolve the potential problem, including counseling the patient.

[*Id.* at 409-10 at ¶¶ 13, 16]. Dr. Simonson opined that the Pharmacy had breached these and other duties by: [a] failing to detect that Mr. Archuleta was receiving large quantities of a dangerous combination of medications from the Pharmacy's multiple locations [II RP 413 at 19(a)]; [b] continuing to fill controlled substance prescriptions for Mr. Archuleta despite a warning from one of his prescribers indicating that he was abusing medication and should not receive any further medication until cleared by a "psych" [II RP 414 at ¶ 19(c)]; and [c] failing, once it knew about Mr. Archuleta's drug abuse and the quantities and combinations of drugs being provided to him, to communicate with his prescribers about the legitimacy of, and therapeutic need for, the prescriptions [II RP 413 at ¶ 19(a); 416 at 137:5-138:8]. Finally, on the issue of causation, Dr. Simonson opined that the Pharmacy's "failure to uphold the standard of practice for pharmacists helped enable Mr. Archuleta [to] maintain an ongoing supply of controlled substances which contributed to the continuation of his addiction" [*Id.* at 414 at ¶ 19(d)].

Recognizing that the Court might want additional proof of causation, Plaintiff's counsel submitted a Rule 1-056(f) NMRA 2016 affidavit expressing his expectation that Plaintiff's addictionology expert, George

Glass, M.D., a board-certified psychiatrist, would address the issue of causation prior to the expiration of the expert deadline [1 RP 272]. After an April 24, 2014 hearing on the matter, the District Court issued a May 9, 2014 Order denying Defendants' first summary judgment motion, but allowed the Pharmacy the opportunity to refile [II RP 309]. The Court made it clear that it viewed the Pharmacy's summary judgment motion as hinging on "the causation issue and whether or not there's enough" [I Tr. 23:24-25].

B. The Pharmacy's second summary judgment motion.

The Pharmacy's second summary judgment motion, filed on January 12, 2015, reiterated two out of the three arguments that it made in its first motion, namely that Plaintiff could not prove that the Pharmacy breached any duty owed to Mr. Archuleta [II RP 366-67] and that no action by the Pharmacy caused Mr. Archuleta's death [II RP 365-66]. In response, Plaintiff noted that in the nine months before his death, the Pharmacy sold Mr. Archuleta over a thousand Opioid and Benzodiazepine pills [*Id.* at 389, ¶ 7; citing 401-405; *see also*, Tables, *supra* pp. 2-3], including 100 methodone pills and 140 Benzodiazepines after receiving instruction from one of Mr. Archuleta's prescribers that the Pharmacy should not fill any additional prescriptions until he was "cleared by a psych" [*Id.* at 389, ¶ 10; 401-405, 406; *see also*, Table, *supra*].

On the issue of causation, Plaintiff relied on Dr. Glass' deposition testimony that Mr. Archuleta's death was "caused" in part by the Pharmacy's failure to intervene in his addiction, despite the fact that it was or should have been aware of it [II RP 392 at ¶ 22, 418:3-8]. By continuing to fill Mr. Archuleta's prescriptions "without any question or any comment," the Pharmacy "abetted" Mr. Archuleta's addiction, "enabling him to continue in his addiction until he died" [II RP 392 at ¶ 23, 419:8-12]. Dr. Glass opined that Mr. Archuleta was destined to die of an overdose so long as the doses and quantities of his prescription medications were "continually ramped up without anyone calling a halt or cautionary note to the prescribing practices of the doctor or cautioning the patient." [II RP 392 at ¶ 24, 420:2-8].

At a September 28, 2015 hearing on the second summary judgment motion, the Court ruled from the bench that the Pharmacy did owe a duty and that it did not "have a problem with breach" [II Tr. 21:19-22]. The Court granted the motion, however, on the issue of causation:

> 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 Walgreen's prescription. And to try to say that because he was–there was an addiction, it could have been filled by Walgreens, that this is what caused his death, is just beyond speculation for me. It just is. I mean,

> he died as a result of taking 23 pills from prescriptions from a different provider.
>
> The doctor–I mean, your experts don't come in and say, "Okay, if Walgreens had taken this action, then he would have not–he would have not been addicted. He would have no longer been an addict. He would have been on the straight and narrow, and this would have never occurred." And the reason your expert doesn't say that is because he knows it's not true. He can't possibly say that. So it just–it's just not there. He died because he took so many pills.
>
> And if the expert said he wouldn't have died, there's no problem with any one prescription that was filled by Walgreens, and if he had just taken the prescription, his methadone, if he had taken it properly, he wouldn't have died. The problem was, he took a prescription that was filled by someone else and he took those and he died, and that's the cause of his death.
>
> So the Court is granting summary judgment as to Walgreens.

[II Tr. 21:23 – 23:1]. The Court issued its written Order granting summary judgment on October 19, 2015 [II RP 469], and this appeal followed.

ARGUMENT

The Supreme Court recently described the standard of review that applies when a New Mexico appellate court reviews a lower court's order granting summary judgment:

> We resolve all reasonable inferences in favor of the party opposing summary judgment, and we view the pleadings, affidavits, depositions, answers to interrogatories, and admissions in the light most favorable to a trial on the merits. Our review is conducted in light of our traditional disfavor of summary judgment and our preference for trials on the merits. That disfavor is founded on the principle that summary judgment is a drastic remedy to be used with great caution.

Madrid v. Brinker Rest. Corp., 2016-NMSC-003, ¶ 16, 363 P.3d 1197 (internal quotation marks and citations omitted) (reversing summary judgment where District Court and Court of Appeals had applied "overly technical" evaluation of the plaintiff's expert testimony).

As a general rule, New Mexico appellate courts consider proximate cause an issue of fact that must be resolved by the fact-finder, not by summary judgment. *Andrews v. Saylor*, 2003-NMCA-132, ¶ 14, 134 N.M. 545 ("proximate cause is a question of fact to be determined by factfinder"); *Govich v. North American Systems, Inc.* 1991-NMSC-061, ¶ 24, 112 N.M. 226 (1991) ("questions of proximate cause and independent intervening cause are for the jury, except in rare cases in which reasonable minds cannot differ"). Proximate cause will not be removed from the province of the jury unless "the facts are undisputed and the reasonable inferences from those facts are plain and consistent." *Paez v. Burlington N. Santa Fe Ry.*, 2015-NMCA-112, ¶ 12, 362 P.3d 116 (*citing Lujan,* 2015–NMCA–005, ¶ 35, 341 P.3d 1). To take proximate cause away from the jury, the Court must conclude "no reasonable jury would find that the breach of duty by the defendant legally caused the damages suffered by the plaintiff." *Id.* (*citing Rodriguez v. Del Sol Shopping Ctr. Assocs., L.P.,* 2014–NMSC–014, ¶ 24, 326 P.3d 465); *Rickerson v. State,* 94 N.M. 473, 475, 612 P.2d 703 (Ct. App.

1980) ("If reasonable minds could differ on issues of sole proximate cause, remote cause, intervening cause, or concurring proximate cause, the matter is for the jury").

I. EVIDENCE AND INFERENCES REASONABLY SUPPORTED A FINDING THAT THE PHARMACY'S NEGLIGENCE PROXIMATELY CAUSED MR. ARCHULETA'S DEATH.

Proximate cause encompasses "whether and to what extent the defendant's conduct foreseeably and substantially caused the specific injury that actually occurred." *Paez*, 2015-NMCA-112, ¶ 12 (*citing Lujan,* 2015-NMCA-005, ¶ 35).

> An act or omission is a "cause" of harm if, unbroken by an independent intervening cause, it contributes to bringing about the harm, and if injury would not have occurred without it. It need not be the only explanation for the harm, nor the reason that is nearest in time or place. It is sufficient if it occurs in combination with some other cause to produce the result. To be a "cause", the act or omission, nonetheless, must be reasonably connected as a significant link to the harm.

UJI 13-305 NMRA 2016 (excerpted to apply to the instant case). Here, as set forth below, Plaintiff submitted admissible evidence to the District Court which, alone or in combination with favorable inferences, would support a reasonable jury finding that the Pharmacy's breaches of the standard of care, in combination with other causes, produced Mr. Archuleta's death.

A. Admissible evidence supported a finding that the Pharmacy was negligent.

Plaintiff presented evidence that, in the months leading up to Mr. Archuleta's fatal overdose, the Pharmacy, through multiple Albuquerque locations, provided him with over a thousand Opioid and Benzodiazepine pills [II RP 401-05; Tables, *supra*]. According to Plaintiff's pharmacy expert, Dr. Simonson, the Pharmacy committed three distinct forms of negligence in the course of selling Mr. Archuleta this quantity and combination of drugs. All three of these theories of negligence must be now viewed in a light most favorable to Plaintiff, *Madrid*, 2016-NMSC-003, ¶ 16, and the District Court found this evidence of breach sufficient under the summary judgment standard [II Tr. 21:19-22].

1. Negligent failure to detect Mr. Archuleta's elevated risk of overdose.

Dr. Simonson testified that, if the Pharmacy failed to detect that a number of its stores were providing Mr. Archuleta with "large quantities of a dangerous combination of medications" from multiple prescribers, such a failure was negligent [II RP 413].

2. Negligent defiance of Dr. Maron's warning.

On September 1, 2009, Dr. Maron notified the Pharmacy that Mr. Archuleta was abusing his medication, and instructed the Pharmacy refrain from filling additional prescriptions until he was "cleared by a psych." Dr.

Simonson testified that the Pharmacy's failure to heed this warning constituted negligence [II RP 414 at ¶ 19(c)].

3. Negligent failure to communicate with prescribers about Mr. Archuleta's course of prescriptions.

Finally, Dr. Simonson testified that the Pharmacy negligently failed to alert Mr. Archuleta's prescribers whenever it first learned (and in any case no later than September 1, 2009, when it received Dr. Maron's note) that Mr. Archuleta was abusing medication and was receiving high quantities of a dangerous combination of medications [II RP 413 at ¶ 19(a); 416 at 137:5-138:8].

B. Admissible evidence and favorable inferences supported a finding that one or more of the Pharmacy's breaches proximately caused Mr. Archuleta's overdose and death.

New Mexico has repeatedly recognized that injuries often result not from a singular cause, but from a "chain of causation." *See e.g., Torres v. El Paso Elec. Co.*, 1999-NMSC-029, ¶ 17, 127 N.M. 729, 736, 987 P.2d 386, 393 *overruled on other grounds by Herrera v. Quality Pontiac*, 2003-NMSC-018, 134 N.M. 43; UJI 13-305 NMRA 2016. Here, a chain of causation that began with Mr. Archuleta's addiction to Opioids and his prescribers' willingness to foster and fuel that addiction, ended with Mr. Archuleta's consumption of too many Methadone pills, respiratory depression, and death. At its core, Plaintiff's theory of causation is simply

that, in combination with these other causes, the Pharmacy's negligence in fueling his addiction in the months before his fatal overdose, despite its knowledge of his abuse of medication and the danger associated with the quantities and combination of drugs it was selling him, constituted one of the links in the causative chain.

Plaintiff's expert testimony squarely supported this theory. Dr. Glass testified that the Pharmacy's failure to intervene in Mr. Archuleta's addiction, despite the fact that it was or should have been aware of the addiction, "caused" Mr. Archuleta's death [II RP 418:3-8]. He further testified that the Pharmacy "abetted" and "enabled" Mr. Archuleta's addiction [*Id.* at 419:8-12] and that, by failing to intervene, the Pharmacy negligently allowed him to continue on a course toward overdose death. Plaintiff's causation theory found additional support in Dr. Simonson's opinion that Walgreen "contributed" to Plaintiff's death [*Id.* at 420:2-8].

Although the causation testimony of Plaintiff's experts is sufficient to defeat summary judgment in its own right, it becomes even more compelling in light of the favorable inferences that must be afforded Plaintiff at this stage. 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.

C. Plaintiff's theory of causation was supported by case law.

Plaintiff's theory of causation finds support in two distinct legal doctrines, which are both well-established in New Mexico: [1] concurring proximate cause and [2] loss of chance causation.

1. Concurring proximate cause.

New Mexico recognizes that injuries may occur as a result of multiple "concurring" causes. *See Kelly v. Montoya*, 1970-NMCA-063, ¶¶ 28-29, 81 N.M. 591 (describing concurrent causation and citing, with approval, the principle that "[w]here a person by his own negligence produces a dangerous condition of things, which does not become active for mischief until another person has operated upon it by the commission of another negligent act, which might not unreasonably be foreseen to occur, the original act of negligence is then regarded as the proximate cause of the injury which finally results); UJI 13-305 NMRA 2016 (allowing concurrent causes). As noted above, Plaintiff has always maintained that a confluence of causes, including the Pharmacy's negligence, the unscrupulous prescribing practices of Mr. Archuleta's physicians, and Mr. Archuleta's own addiction and his

decision to take 23 pills on the night of his death, combined to cause his death.

More specifically, New Mexico case law support Plaintiff's argument that Mr. Archuleta's death was caused in part by the Pharmacy's negligence in fueling his addiction. The Supreme Court upheld a similar theory of causation in *Los Alamos Med. Ctr. v. Coe*, 1954-NMSC-090, 58 N.M. 686. In *Coe*, the plaintiffs had alleged that Ms. Coe's physician "negligently administered and prescribed morphine for self-administration without supervision in such amounts and frequency as to cause her addiction." *Id.* at ¶ 1. The Supreme Court was called upon to review the propriety of the jury's verdict, including an award of punitive damages, which were 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. The court upheld the verdict based on evidence that the physician was put on notice that the drugs he prescribed may have caused addiction, but "remained indifferent to the harmful results which followed." *Id.* at ¶ 5.

More recently, in *Silva v. Lovelace Health System, Inc.*, 2014-NMCA-086, 331 P.3d 958, the Court of Appeals questioned whether an independent intervening cause instruction should have been provided to the jury in a case in which a patient had committed suicide after undergoing an allegedly

negligent course of anti-depressant therapy. The Court ultimately determined that the Court should have provided an independent intervening cause instruction based on defense evidence that the patient's suicide was intentional and unforeseeable. *Id.* at ¶ 27. Prior to reaching this conclusion, however, the Court tacitly approved Plaintiff's alternative theory, that the prescriptions and lack of follow-up proximately caused the suicide:

> Starting with Plaintiffs' basic theory that Dr. Lopez-Colberg was negligent in prescribing twelve months' worth of Paxil to Decedent without requiring follow-up appointments, this allegedly negligent act started the chain of causation. Along this continuum of causation, Defendants argued that Decedent was negligent in failing to schedule a follow-up appointment with Dr. Lopez–Colberg when she began to exhibit strange behavior in April 2006 and that this negligence contributed to cause the ultimate suicide.

Id. at ¶ 23. Essentially, the Court held that the question of whether the doctor's alleged negligence did or did not cause the suicide must be left to the jury.

Other jurisdictions have allowed similar theories of addiction causation. *Argus v. Scheppegrell*, 472 So. 2d 573, 575 (La. 1985) (determining that that doctor could be held liable for decedent's overdose death where the record "plainly established that the amount and combination of drugs prescribed by [him] alone could have caused addiction); *United States v. Martinez*, 588 F.3d 301, 321 (6th Cir. 2009) (holding that a rational

jury could have concluded that defendant-anesthesiologist proximately caused victim's overdose death by "perform[ing] unnecessary injections and prescribe[ing] harmful medications despite the presence of the clear 'red flags' of escalating addiction); *Bohrer v. Cty. of San Diego*, 104 Cal. App. 3d 155, 158–59, 163-64, 163 Cal. Rptr. 419 (Ct. App. 1980) (holding that proximate cause was an issue for the jury where decedent committed suicide after defendant continued to prescribed her excessive doses of Sinequan despite being on notice that she was abusing the medication); *see also, Zuchowicz v. United States*, 140 F.3d 381, 391 (2d Cir. 1998) (holding that where the plaintiff alleged that spouse developed fatal lung condition as a result of being prescribed excessive amounts of a drug, "when a negative side effect is demonstrated to be the result of a drug, and the drug was wrongly prescribed in an unapproved and excessive dosage (*i.e.* a strong causal link has been shown), the plaintiff who is injured has generally shown enough to permit the finder of fact to conclude that the excessive dosage was a substantial factor in producing the harm).

2. Loss of chance causation.

Plaintiff's theory of causation also finds support in the loss of chance doctrine. *See Alberts v. Schultz*, 1999-NMSC-015, 126 N.M. 807. Loss of chance is an approach to damages under which a Plaintiff may be

compensated for the lost opportunity to avoid an injury. The concept came about as a "logical extension" of pre-existing causation analysis, *id.* at ¶ 16, and allows a plaintiff to satisfy the causation element by showing "that the defendant's negligence resulted in the lost chance for a better result." *Id.* at ¶ 28 (*citing Hurley v. United States,* 923 F.2d 1091, 1094 (4th Cir.1991)). Here, Plaintiff's evidence that the Pharmacy 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 the Pharmacy's negligence deprived Mr. Archuleta of at least a chance to avoid his overdose and death. *See also*, *Anders*, *Cross v. City of Clovis*, 107 N.M. 251, 254 (1988) (holding that "[i]f the officers 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").

II. THE DISTRICT COURT DID NOT ARTICULATE A VALID LEGAL BASIS FOR REJECTING PLAINTIFF'S EVIDENCE OF CAUSATION.

The District Court did not offer any indication that it viewed Plaintiff's expert direct testimony on causation as inadmissible or otherwise unworthy of consideration on summary judgment. *See Madrid.*, 2016-

NMSC-003, ¶¶ 20-22 (holding that a district court must refrain from "weighing the evidence" at the summary judgment stage). Nor did it hear any argument or make any determination that Plaintiff's overdose constituted an independent intervening cause. Rather, the District Court's ruling hinged on an inference it made against Plaintiff, namely that Mr. Archuleta death the result of a singular cause:

> 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 Walgreen's prescription.

[II Tr. 21:23 – 22:4]. As noted above, Plaintiff has never disputed that Mr. Archuleta's death was caused by his consumption of 23 pills, and she concedes that the Pharmacy did not sell him those particular pills. However, the fact that his consumption of these pills was the toxicological and most immediate cause of his death does not somehow preclude other causes. To the contrary, as noted above, it is well-established that proximate cause need not be "the last act of cause or nearest act to the injury, but such act as actually aided in producing the result as a direct and existing cause. It need not be the sole cause, but it must be a concurring cause." *Valdez v. Gonzales*, 1946-NMSC-044, ¶ 36, 50 N.M. 281. Thus, while Mr. Archuleta's consumption of 23 pills on the night of his death would likely play a role in

a comparative fault analysis or in determining the propriety of an independent intervening cause instruction, the District Court had no basis for determining that this most-immediate cause of death precluded all other causes, including the Pharmacy's negligence.

CONCLUSION

For the reasons stated above, Plaintiff respectfully requests that the Court reverse the District Court's summary judgment ruling, reverse the dismissal of the Pharmacy as a party, and remand the matter to allow Counts IX, XI, and XII of Plaintiff's Complaint to proceed against the Pharmacy. Plaintiff finally requests, respectfully, the opportunity to address these issues at oral argument in order to directly address any questions the Court may have about the facts and legal basis supported Plaintiff's causation theory.

Respectfully Submitted,

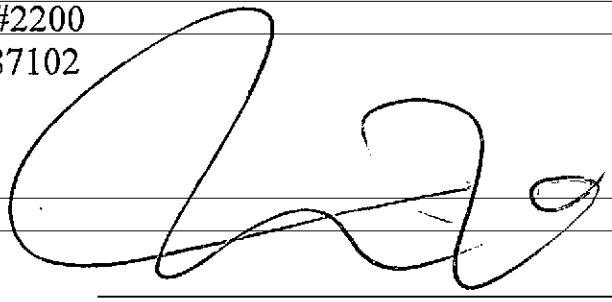
Mark Fine
Fine Law Firm
220 9th St. NW
Albuquerque, New Mexico 87102
Phone: (505) 243-4541
Fax: (505) 242-2716

Counsel for Plaintiff-Appellant

CERTIFICATES OF SERVICE

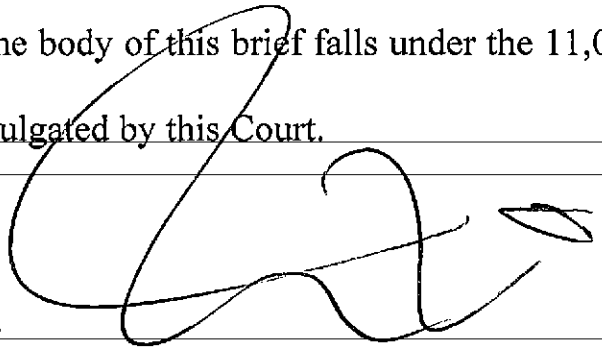
I hereby certify that a true and correct copy of the foregoing was sent by e-mail, this 12th day of December, 2016, to:

Brenda Saiz
Rodey Dickason Sloan Akin & Robb
201 Third St. NW #2200
Albuquerque NM 87102
bsaiz@rodey.com



Mark Fine
Counsel for Plaintiff-Appellant

I further certify that the body of this brief falls under the 11,000 word limit imposed by rules promulgated by this Court.



Mark Fine
Counsel for Plaintiff-Appellant