ORIGINAL

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

No. 35,178

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

Plaintiff-Appellee,

v.

WALGREEN CO.,

Defendant-Appellee.

APPELLANT'S REPLY BRIEF

Oral Argument Requested

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INTRODUCTION

The question presented by this appeal is whether the District Court correctly determined that this is the "rare case" in which reasonable minds cannot differ on the question of proximate cause such that it was appropriate for the District Court, rather than the trier-of-fact, to decide the issue. *Govich v. North American Systems, Inc.* 1991-NMSC-061, ¶ 24, 112 N.M. 226. In arguing that this is that rare case, the Pharmacy casts vexatious aspersions on undersigned counsel,[1] urges the Court to disregard all legal reasoning and case law not explicitly made by Plaintiff in the District Court [AB 18-23], and challenges the credibility of Plaintiff's expert testimony [AB 13-15] despite authority holding that such challenges are inappropriate at the summary judgment stage. *See Madrid v. Brinker Rest. Corp.*, 2016-NMSC-003, 363 P.3d 1197. Ultimately, however, the Pharmacy fails to address the dispositive question: how this Court can at once indulge all inferences in favor of Plaintiff and view such inferences in the light most favorable to the trial on the merits, while at the same disregarding Plaintiff's expert testimony that the

[1] Counsel for the Pharmacy accuses undersigned counsel of "not being forthright" with the Court [AB 1], violating the appellate rules of procedure [AB 2], and using "subliminal suggestions" and "wording" that operate to deceive the Court [AB 8-9]. Counsel for the Pharmacy does not provide a citation to Plaintiff's Brief-in-Chief or further explanation in support of the first two accusations, and the third accusation is equally perplexing notwithstanding the citations to the Brief-in-Chief. Consequently, undersigned counsel is at a loss to respond to these accusations other than to deny them, and to suggest to opposing counsel that it should consider exercising greater restraint–or at least providing better support–before impugning the integrity of a colleague.

Pharmacy "enabled" the addiction that led to Mr. Archuleta's death and "caused" his death. *Id.* at ¶ 20, 23.

ARGUMENT

I. THE PHARMACY'S HYPER-TECHNICAL APPROACH TO PRESERVATION IS NOT SUPPORTED BY LAW.

The Pharmacy expends substantial effort arguing that various points contained in Plaintiffs' Brief-in-Chief should not be considered by this Court because they were not squarely presented to the District Court [AB at 18-23]. In particular, the Pharmacy complains that Plaintiff did not specifically use the term "concurrent causation" in the lower court [*Id.* at 19]; did not cite certain cases below [*Id.* 20-21]; and did not specifically refer to a loss of chance theory of causation [*Id.* at 21-22]. As set forth below, New Mexico law requires an appellant to preserve a claim of error; she need not have raised all legal points in support of that claim of error in order to make them on appeal. Moreover, on appeal from a summary judgment ruling, New Mexico courts "examine the whole record for any evidence that places a genuine issue of material fact in dispute" *Ocana v. Am. Furniture Co.*, 2004-NMSC-018, ¶ 12, 135 N.M. 539, *as corrected* (June 9, 2004) (*citing Handmaker v. Henney,* 1999–NMSC–043, ¶ 18, 128 N.M. 328 and *Rummel v. Lexington Ins. Co.*, 1997–NMSC–041, ¶ 15, 123 N.M. 752).

In determining whether issues were sufficiently preserved, New Mexico courts question whether a claim of error, rather than legal authority in support of that claim, was brought to the attention of the lower court:

> To preserve an issue for appeal, "it must appear that a ruling or decision by the district court was fairly invoked." SCRA 1986, 12-216(A) (Repl.Pamp.1992); *see also* SCRA 1986, 1-046 (Repl.Pamp. 1992) (preserving questions for judicial review). One purpose of the preservation rule is to alert the trial judge to a claim of error and give the judge an opportunity to correct any mistake. A second purpose of the preservation rule is to give the opposing party a fair opportunity to meet the case presented by the objector and show why the court should rule against the objector and in the opposing party's favor.

Garcia ex rel. Garcia v. La Farge, 1995-NMSC-019, ¶ 27, 119 N.M. 532 (internal citations omitted). Here, the District Court was clearly alerted to Plaintiff's claim of error–improper granting of summary judgment on the issue of causation.

The Pharmacy's complaint that it is "disadvantaged" by Plaintiff's reliance on case law that was not cited in the District Court [AB at 20] is silly. New Mexico appellate courts have never required parties to cite only those cases that they cited below. *See Howse v. Roswell Independent School Dist.*, 2008-NMCA-095, ¶ 19, 144 N.M. 502 ("[A]s long as a party has asserted the legal principle upon which their claims are based and developed the facts in the district court, we will consider that party's argument to have been adequately preserved below even if citation to a significant authority was not made to the district court") (internal citations and quotations omitted); *In re Norwest Bank of New Mexico*, 2003-NMCA-128, ¶ 10,

134 N.M. 516 ("Providing the trial court with citation to authority is not a requirement for preservation"). The Pharmacy offers no reason to diverge from this case law here, and fails to explain how it has been "disadvantaged" by being confronted with new jurisprudence on appeal.

Nor does any case or rule of appellate procedure prevent a party from choosing new ways to frame a claim of error or from providing additional support for arguments made below. In the District Court, Plaintiff clearly presented his causation argument by relying on expert testimony that the Pharmacy "abetted" and "enabled" Mr. Archuleta's addiction [II RP 392 at ¶ 23, 419:8-12] and "caused" his death by failing to intervene in his addiction [II RP 392 at ¶ 22, 418:3-8]. In effect, the Pharmacy is asking the Court to hold that Plaintiff "waived" the opportunity to characterize these facts in certain ways by failing to have done so below. Thus, for example, the Pharmacy "acknowledges that Plaintiff raised the concept that there may be more than one cause of harm" but faults Plaintiff for having failed to use the terms "concurrent proximate cause" or "concurrent causation" in the District Court [AB at 19]. Similarly, although the Pharmacy recognizes that "the standard of causation" for loss of chance "remains the same as for any other negligence claim," the Pharmacy argues that Plaintiff's failure to use the term "loss of chance" in the trial court prevents him from doing so now [AB

22-23].[2] The same case that was litigated below is now being litigated on appeal, and no New Mexico case or rule of appellate procedure, including *Spectron Dev. Lab., a Div. of Titan Corp. v. Am. Hollow Boring Co.*, 1997-NMCA-025, 123 N.M. 170, supports the Pharmacy's hyper-technical approach to preservation.

II. IN ANY CASE, PLAINTIFF'S EXPERT TESTIMONY THAT THE PHARMACY'S NEGLIGENCE CAUSED MR. ARCHULETA'S DEATH CREATED A GENUINE ISSUE OF MATERIAL FACT ON THE ISSUE OF CAUSATION.

Even if the Court accepted the Pharmacy's invitation to disregard all of legal citations and reasoning in the Brief-in-Chief that were not offered in the District Court, reversal of summary judgment would still be required. As noted above, Plaintiff's expert testified that the Pharmacy "caused" Mr. Archuleta's death [II RP 392 at ¶ 22, 418:3-8]. He testified that the Pharmacy abetted and enabled the addiction that culminated in his overdose [II RP 392 at ¶ 23, 419:8-12], and that Mr. Archuleta's death was "inevitable" so long as the Pharmacy allowed his prescription medications to be "ramped up" without intervening as required by the standard of care [II RP 392 at ¶ 24, 420:2-8]. Summary judgment cannot be upheld here without disregarding these facts and the favorable inferences springing therefrom.

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[2] The Pharmacy faults Plaintiff for failing to "plead" loss of chance in the trial court [AB at 22], but does not cite any case suggesting that a loss of chance theory must be separately pleaded in order to be advanced at trial. *See Alberts v. Schultz*, 1999-NMSC-015, ¶ 23, 126 N.M. 807 (holding that loss of chance is an injury or claim of damage).

A. The Pharmacy's attack on the foundation of Dr. Glass' causation testimony is not appropriate at the summary judgment stage.

The Pharmacy challenges the strength of Dr. Glass's opinions by pointing to portions of his deposition transcript that it views as contradictory [AB 13] "not as affirmative as [Plaintiff] currently suggests" [AB at 14] and "speculative" [AB at 14-15]. The Supreme Court recently reaffirmed that such technical critiques of the foundation of an expert's causation opinion testimony are inappropriate at the summary judgment stage. *Madrid v. Brinker Rest. Corp.*, 2016-NMSC-003, ¶ 16, 363 P.3d 1197. In *Madrid*, the plaintiff was a passenger on a motorcycle driven by Sanchez, and was severely injured the motorcycle collided with a van that failed to obey a stop sign. *Id.* at ¶¶ 2-3. Defendants, who had served alcohol to Sanchez before the accident, moved for summary judgment on the theory that even if Sanchez had been sober, he would have been unable to avoid the accident which, they argued, was caused exclusively by the van driver's negligent failure to obey the stop sign, and not Sanchez' intake of alcohol. *Id.* at ¶ 4.

The plaintiff adduced testimony from an accident reconstruction expert that the alcohol reduced Sanchez' perception and reaction time and that, without the alcohol, Sanchez could have taken different forms of evasive action that would have resulted in less severe injuries to the plaintiff. *Id.* at ¶ 5. The expert's opinions were "premised on the notion that a sober and experienced driver who was free from distraction and had a clear view of the scene before him, would have taken

some evasive maneuver or avoided the collision." *Id.* at ¶ 21. Neither the District Court nor the Court of Appeals was persuaded by the expert testimony, dismissing it is "mere speculation or guesswork." *Id.* at ¶¶ 18, 21.

The Supreme Court reversed, holding:

> Plaintiff adduced sufficient evidence to establish a genuine dispute as to whether Sanchez's intoxication prevented him from avoiding the accident. We reach this conclusion based on the traditional principles of summary judgment in which (1) all logical inferences are to be resolved in favor of the non-moving party and (2) all inferences must be viewed in a light most favorable to a trial on the merits. In reviewing the evidence presented to establish that a genuine issue of material fact existed, the lower courts were overly technical in their evaluation of the foundation of Mr. Miranda's testimony, and both courts failed to abide by these principles in reaching the conclusion that summary judgment was appropriate.

Id. at ¶ 20 (internal citation omitted). The Supreme Court held that lower courts' skepticism regarding the foundation of the expert's opinions "did not resolve all logical inferences in favor of Plaintiff and did not view the facts in the light most favorable to a trial on the merits." *Id.* at ¶ 23.

In reversing the Court of Appeals, the Supreme Court rejected the very same criticisms of expert causation testimony upon which the Pharmacy now relies. The Court specifically held that it was "improper for the district court to consider whether the statements were contradictory" because such analysis "amounted to weighing the credibility" of the expert opinion. *Id.* at ¶ 22 [*compare* AB at 13]. The Phamacy's assertions that Dr. Glass' opinions are "speculative" or not

sufficiently "affirmative" [AB at 14-15, 27] were also rejected in *Madrid*. ¶¶ 13, 22 (rejecting the Court of Appeals' conclusion that the "[e]xpert's ultimate opinion that alcohol played a significant role in this tragic accident is significantly undermined by speculation and a lack of foundation." Ultimately, *Madrid* reinforced the deferential standard of review under which evidence must be viewed at the summary judgment stage, and applied that deferential standard to expert testimony on causation. The Pharmacy's effort to challenge the strength and credibility of Dr. Glass' opinions at this summary judgment stage is incompatible with *Madrid*.

B. The Pharmacy's emphasis on "but for" causation does not support affirming the District Court's summary judgment ruling.

Given the Pharmacy's effort to narrow Plaintiff's argument on appeal to the exact legal reasoning and citations she submitted to the District Court, it is ironic that it now focuses, for the first time on appeal, on the concept of "but for" causation [AB at 10-11]. Neither of the Pharmacy's summary judgment motions specified that summary judgment was appropriate due to the absence of "but for" causation [I RP 152-55; II RP 365-67]. In any case, Dr. Glass' testimony raised a genuine issue of material fact on the question of whether the Mr. Archuleta's death would have occurred in the absence of the Pharmacy's failure to follow the standard of care in response to clear indications, including an explicit note from the

prescribing doctor [II RP 299], that Mr. Archuleta was abusing the medication that it was providing him in excessive quantities.

As noted above and in Plaintiff's Brief-in-Chief, Dr. Glass testified, among other things, that Mr. Archuleta's death was "caused" 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]. He also testified that by continuing to fill Mr. Archuleta's prescriptions "without any question or any comment," the Pharmacy "enabl[ed] him to continue in his addiction until he died" [II RP 392 at ¶ 23, 419:8-12]. Merriam-Webster defines the term "enable" in a manner that is consistent with the concept of "but for" causation:

> a: to provide with the means or opportunity;
> b: to make possible, practical, or easy;
> c: to cause to operate.

Merriam-Webster Online Dictionary, 2017, htrp://www.merriamwebster .com (visited 13 Mar. 2017). While it may be possible to interpret Dr. Glass' expert opinion that the Pharmacy "enabled" Mr. Archuleta's addiction and "caused" his death as failing to describe "but for" causation, the Court cannot reach such a conclusion without making impermissible inferences against Plaintiff. In particular, the Court would have to infer that, in testifying that the Pharmacy "caused" Mr. Archuleta's death, Dr. Glass did not mean to include the concept of "but for" causation. Similarly, the Court would have to infer that when Dr. Glass

testified that the Pharmacy "enabled" the addiction that caused his death, Dr. Glass was using the term to mean something other than the primary dictionary definitions of the word. Especially after *Madrid, supra*, it is axiomatic that New Mexico courts must indulge all reasonable inferences in favor of a party opposing summary judgment and cannot, as the Pharmacy asks the Court to do here, make such inferences against to the non-moving party.

C. The Pharmacy's reliance on the District Court's legal reasoning highlights the error.

The Pharmacy relies heavily on the following reasoning by the District Court, which it holds up as being informed by the applicable legal standards:

> 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.

[AB 6, 12]. But this reasoning reflects the fundamental error in the District Court's analysis: it places an additional burden on Plaintiff to show that the Pharmacy was the sole cause of Mr. Archuleta's death rather than one of multiple causes. The Pharmacy cites no case law in support of the District Court's determination that Plaintiff's failure to elicit testimony that the Pharmacy's hypothetical compliance with the standard of care would have cured Mr. Archuleta of his addiction was fatal to her causation claim. To survive summary judgment, Plaintiff needed only

to create a genuine issue of fact on the question of whether the Pharmacy's failure to intervene "actually aided in producing the result as a direct and existing cause," *Valdez v. Gonzales*, 1946-NMSC-044, ¶ 36, 50 N.M. 281. This she did by eliciting direct expert testimony that the Pharmacy "enabled" the addition that led to Mr. Archuleta's overdose and "caused" his death.[3]

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.

Respectfully Submitted,

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[3] In her Brief-in-Chief, Plaintiff cited four extra-jurisdictional cases that supported Plaintiff's theory that a defendant's conduct in providing addictive medication to a patient without adequate oversight may, as a matter of law, proximately cause the patient's overdose [BIC at 17-18]. The Pharmacy responded by arguing that the cases must be disregarded because they were not cited in the District Court [AB at 20-21], because Plaintiff's reliance on them was unclear [AB at 21], and because they were "distinguishable" and unhelpful [AB at 21]. The Pharmacy did not explain how these cases were distinguishable or why they were unhelpful [*Id.*].

Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent by e-mail, this 13th day of March, 2017, to:

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