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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

SANDRA L. LEHMAN, *Plaintiff/Appellant*,

v.

BANNER HEALTH, *Defendant/Appellee*.

No. 1 CA-CV 15-0829
FILED 11-3-2016

Appeal from the Superior Court in Maricopa County
No. CV2015-003468
The Honorable Douglas Gerlach, Judge

AFFIRMED

COUNSEL

Sandra L. Lehman, Phoenix
Plaintiff/Appellant

Campbell Yost Clare & Norell, PC, Phoenix
By Sigurds M. Krolls, Jeffrey McLerran
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Presiding Judge Kent E. Cattani delivered the decision of the Court, in which Judge Lawrence F. Winthrop and Judge John C. Gemmill¹ joined.

C A T T A N I, Judge:

¶1 Sandra Lehman appeals from the dismissal of her medical malpractice action against Banner Health (“Banner”) due to her failure to file a sufficient preliminary expert opinion affidavit as required by Arizona Revised Statutes (“A.R.S.”) § 12-2603(B).² For reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND³

¶2 During Lehman’s recovery from a routine outpatient procedure in October 2013, Banner nurses administered piperacillin-tazobactam (“Zosyn”) to her, despite her allergy to closely-related amoxicillin. Lehman suffered an adverse reaction to the drug, and she asserts that the hospital’s pharmacy did not notify her physician of the reaction, exacerbating her injuries.

¶3 In August 2014, Lehman filed a complaint with the Arizona Department of Health Services (“ADHS”) Bureau of Medical Licensing Services, and she initiated a lawsuit against Banner the following March. Lehman submitted a “Certificate of Merit” with her lawsuit complaint that included reports summarizing the findings from ADHS’s investigation of her administrative complaint, along with a letter from ADHS advising

¹ The Honorable John C. Gemmill, Retired Judge of the Court of Appeals, Division One, has been authorized to sit in this matter pursuant to Article VI, Section 3 of the Arizona Constitution.

² Absent material revisions after the relevant date, we cite a statute’s current version.

³ We consider only the facts stated in Lehman’s original complaint. Although Lehman filed an amended complaint alleging additional facts and claims, the superior court struck the amended complaint, and Lehman has not challenged that decision on appeal.

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Lehman that the agency investigation had verified her complaints. According to the ADHS reports, Lehman's physician did not properly record an order to stop the administration of Zosyn, and Banner's nursing staff failed to properly notify the pharmacy of Lehman's adverse reaction.

¶4 Asserting that Lehman could not prove her claims without expert testimony, Banner moved to compel her to file the statutorily-required preliminary expert opinion affidavit. The court granted Banner's motion, stayed the matter, and warned Lehman that the matter would be dismissed unless she filed an expert affidavit within 65 days.

¶5 One day before the deadline, Lehman sought an extension of time to comply with the order. Lehman stated that ADHS had not yet completed its investigation and that she intended to use ADHS's further findings as her expert affidavit. The court denied the extension on the basis that an ADHS investigation report could not serve as an expert affidavit. Because Lehman failed to file the required expert affidavit, the court dismissed the case "as provided by A.R.S. § 12-2603(F)." Lehman timely appealed.

DISCUSSION

I. Jurisdiction.

¶6 Under § 12-2603(F), if a party fails to file a preliminary expert opinion affidavit, the superior court must dismiss the claim against a health care professional without prejudice. Although dismissal without prejudice ordinarily is not appealable, the order is appealable if the statute of limitations has run during the pendency of the case, rendering the dismissal in effect a final judgment. *McMurray v. Dream Catcher USA, Inc.*, 220 Ariz. 71, 74, ¶ 4 (App. 2009); *see also* A.R.S. § 12-2101(A)(3).

¶7 Here, Lehman's action arguably accrued in October 2013 when she knew she had suffered injuries from Banner's allegedly negligent administration of Zosyn. *See Mayer v. Good Samaritan Hosp.*, 14 Ariz. App. 248, 252 (App. 1971). If so, the two-year statute of limitations had run and Lehman's claim was time-barred at the time of dismissal in November 2015, *see* A.R.S. § 12-542(1), and the order is thus appealable under A.R.S. § 12-2101(A)(3).

¶8 Moreover, even assuming Lehman's claim accrued at a later time, we would nevertheless exercise our discretion to treat her appeal as a special action and accept jurisdiction under A.R.S. § 12-120.21(A)(4). *See Danielson v. Evans*, 201 Ariz. 401, 411, ¶ 35 (App. 2001).

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II. Necessity of an Expert Affidavit.

¶9 Lehman contends that the superior court erred by requiring an expert affidavit. We review a determination that an expert affidavit was required for an abuse of discretion. *See Warner v. Sw. Desert Images, LLC*, 218 Ariz. 121, 128, ¶ 14 (App. 2008).

¶10 A plaintiff who brings a malpractice claim against a licensed health care professional must “certify in a written statement . . . whether or not expert opinion testimony is necessary to prove the health care professional’s standard of care.” A.R.S. § 12-2603(A). Expert testimony is generally required to establish a medical professional’s negligence “unless the negligence is so grossly apparent that a layman would have no difficulty in recognizing it.” *Riedisser v. Nelson*, 111 Ariz. 542, 544 (1975). Generally, a court will not excuse the need for expert testimony unless the plaintiff’s injury is completely unrelated to the type of care rendered, *see, e.g., Carranza v. Tucson Med. Ctr.*, 135 Ariz. 490 (App. 1983) (a child received a burn on her leg during heart surgery), or the injury falls far outside the normal risks of receiving medical care, *see, e.g., Tiller v. Von Pohle*, 72 Ariz. 11 (1951) (a surgeon left “a cloth sack of considerable size” in a patient’s abdomen).

¶11 If the plaintiff asserts that expert testimony will be necessary, the plaintiff must supply an expert affidavit prepared by an expert qualified to attest to the standard of care. A.R.S. § 12-2603(B). An expert affidavit states a provisional expert opinion and is “meant to certify that the action against the medical professional is not meritless.” *Jilly v. Rayes*, 221 Ariz. 40, 43, ¶ 6 (App. 2009). The plaintiff must also provide an expert affidavit if the court grants a motion by a defendant to compel one. A.R.S. § 12-2603(D)–(E). If the court orders the plaintiff to produce an expert affidavit, and the plaintiff fails to do so, the court “shall dismiss the claim . . . without prejudice.” A.R.S. § 12-2603(F).

¶12 Lehman contends that most people are familiar with medical allergies, and that a layperson could easily understand that all “-cillin” drugs, such as penicillin, amoxicillin, and Zosyn, are related to one another. But the degree and significance of medical allergies and the management of the allergic reactions is not within the categories of injuries where expert testimony has traditionally been excused. *Compare Carranza*, 135 Ariz. 490; *Tiller*, 72 Ariz. 11. Lehman’s injury was not unrelated to the care provided, and it was not beyond the scope of risks usually associated with receiving medical care, and the alleged negligence in this case was not so apparent

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that a layman could likely recognize it without the assistance of expert testimony.

¶13 Lehman also argues that *res ipsa loquitur* excuses the need for an expert affidavit. *Res ipsa loquitur* allows a plaintiff to present the issue of negligence to a jury when the injury that she alleges would not normally occur in the absence of negligence. *Lowrey v. Montgomery Kone, Inc.*, 202 Ariz. 190, 192, ¶ 7 (App. 2002). But the application of *res ipsa loquitur* does not itself excuse the need for expert testimony as to the proper standard of care. *Sanchez v. Old Pueblo Anesthesia, P.C.*, 218 Ariz. 317, 321, ¶¶ 12-13 (App. 2008). Thus, the superior court did not abuse its discretion by requiring Lehman to submit an expert affidavit.

III. ADHS Reports as a Substitute for an Expert Affidavit.

¶14 Lehman argues that the ADHS reports and the related letter attached to her “Certificate of Merit” satisfied the requirements of § 12-2603. Because this argument raises a question of law, we review it *de novo*. See *Rasor v. Nw. Hosp., LLC*, 239 Ariz. 546, 550, ¶ 9 (App. 2016).

¶15 An expert affidavit must contain the testimony of an expert “who is qualified by knowledge, skill, experience, training or education to express an opinion regarding a licensed health care professional’s standard of care.” A.R.S. § 12-2603(B), (H)(2). Generally, an expert must be a practitioner or educator in the same field as the professional against whom malpractice is alleged. A.R.S. § 12-2604(A); see also *Sanchez*, 218 Ariz. at 320, ¶ 6 (applying the requirements of § 12-2604 to the expert providing an expert affidavit). If, as here, the claim is brought against a health professional’s employer, the expert must be qualified to testify as though the health professional were the defendant. A.R.S. § 12-2604(B).

¶16 Under A.R.S. § 12-2603(B), the affidavit submitted by an expert must contain the following information:

1. The expert’s qualifications to express an opinion on the health care professional’s standard of care or liability for the claim.
2. The factual basis for each claim against a health care professional.
3. The health care professional’s acts, errors or omissions that the expert considers to be a violation of the applicable standard of care resulting in liability.

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4. The manner in which the health care professional's acts, errors or omissions caused or contributed to the damages or other relief sought by the claimant.

¶17 Preliminarily, nothing in § 12-2603 suggests that the Legislature intended to give the word "affidavit" anything other than its normal meaning. *See Special Fund Div. v. Indus. Comm'n*, 240 Ariz. 104, 106, ¶ 9 (App. 2016) ("Statutory language is normally given its ordinary, common meaning unless it appears from the context that a different meaning is intended."). And neither the ADHS reports nor the letter from the head of the Bureau of Medical Licensing Services likely qualifies as an "affidavit" under the statute because they are not "a signed, written statement, made under oath before an officer authorized to administer an oath or affirmation in which the affiant vouches that what is stated is true." *See In re Wetzell*, 143 Ariz. 35, 43 (1984).

¶18 Moreover, even assuming that the ADHS reports and accompanying letter could qualify as "affidavits," they do not comply with the content requirements of § 12-2603(B) because the documents do not adequately address the proper standard of care. *See Gorney v. Meaney*, 214 Ariz. 226, 231, ¶ 12 (App. 2007) (holding that an expert affidavit "must apply the facts of the particular case at hand to the applicable standard of care and issue an opinion as to whether the defendant's specific actions met or fell short of that standard"). While the ADHS reports confirm that hospital staff did not follow certain documentation and notification procedures, neither the reports nor the letter indicate how reasonable health professionals should have acted under these circumstances.

¶19 And even more significantly, the ADHS documents do not speak to causation. A.R.S. § 12-2603(B)(4); *see also Gorney*, 214 Ariz. at 231, ¶ 16. None of the ADHS documents indicate whether Lehman's injuries would have been avoided or alleviated if Banner's staff had properly documented her reaction, or eliminate other possible causes of her injuries. Accordingly, the ADHS documents offered by Lehman do not provide the content required under § 12-2603(B).

¶20 Finally, the superior court did not err by denying Lehman's motion to extend. Although she claimed that ADHS was producing further reports similar to those she had already provided, Lehman's motion did not explain how these reports would satisfy the § 12-2603(B) requirements, including establishing causation. Moreover, the anticipated reports allegedly would have addressed allegations specific to Lehman's amended complaint, which the court had already stricken. Thus, because the future

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reports would not have addressed the claims in Lehman's original complaint, they could not have satisfied the expert affidavit requirement.

¶21 In sum, the ADHS documents did not establish that Lehman suffered potentially compensable injuries due to Banner staff's negligence. The court correctly applied § 12-2603 and dismissed the case due to Lehman's failure to submit an expert affidavit.

CONCLUSION

¶22 For the foregoing reasons, we affirm the superior court's dismissal of Lehman's claims against Banner.



AMY M. WOOD • Clerk of the Court
FILED: AA