IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JULIA L. MUSALL,
Appellant,
vs.
ROBERT BALKENBUSH; AND THORNDAL, ARMSTRONG, DELK, BALKENBUSH & EISINGER, A PROFESSIONAL CORPORATION,
Respondents.

No. 73873

FILED

OCT 25 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Julia L. Musall appeals from a district court summary judgment in a legal malpractice action. Fifth Judicial District Court, Nye County; Kimberly A. Wanker, Judge.

Musall sued respondents Robert Balkenbush and Thorndal, Armstrong, Delk, Balkenbush & Eisinger (collectively Balkenbush), asserting claims for, as relevant here, legal malpractice, negligence, breach of fiduciary duty, and breach of contract. For support, Musall alleged that Balkenbush represented her in a separate tort proceeding, that he failed to take various actions during the proceeding, and that she had to accept an inadequate settlement as a result. Musall later attempted to designate a legal malpractice expert one month after her time for doing so expired. At the same time, Musall named the attorney that replaced Balkenbush in the separate tort action, Sean K. Claggett, as a lay witness. Balkenbush, in turn, moved to strike Musall's expert disclosure as untimely and to preclude Claggett from offering a standard-of-care opinion because Musall did not disclose him as an expert in accordance with NRCP 16.1(a)(2). Balkenbush also moved for summary judgment, arguing, as relevant here, that Musall's claims were all effectively legal malpractice claims and that she would not

be able to establish the breach-of-duty element of legal malpractice given her failure to disclose a legal malpractice expert. *See Allyn v. McDonald*, 112 Nev. 68, 72, 910 P.2d 263, 266 (1996) (setting forth the elements of a legal malpractice claim).

Musall opposed each of Balkenbush's motions and moved for an extension of time to designate expert witnesses, although her efforts in this regard were not always timely. *See* DCR 13(3) (setting forth the period for opposing motions). At a subsequent hearing on the matter, the district court orally granted Balkenbush's motions to strike Musall's expert disclosure and to preclude Claggett from offering a standard-of-care opinion. Thereafter, the district court entered a written order that memorialized those oral rulings and that granted Balkenbush's motion for summary judgment. In particular, the district court reasoned that, given Musall's failure to properly designate a legal malpractice expert, summary judgment was warranted because the court could not determine, as a matter of law, whether Balkenbush breached his duty of care. Musall then sought reconsideration, which the district court denied. This appeal followed.

On appeal, Musall does not dispute that her negligence, breach of fiduciary duty, and breach of contract claims were encompassed within her legal malpractice claim. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that arguments not raised on appeal are deemed waived). Instead, Musall focuses on whether the district court erred by granting summary judgment as to her legal malpractice claim based on her failure to properly designate a legal malpractice expert. *See Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (reviewing a district court order granting summary judgment de novo). In this regard, Musall initially contends that a legal

malpractice expert was unnecessary because the district court could determine whether Balkenbush breached his duty of care as a matter of law. But while Musall is correct that the supreme court has recognized an exception to the general rule that expert evidence is required to establish an attorney's breach of duty in a legal malpractice action, that exception only applies, as relevant here, "where the breach of care or lack thereof is so obvious that it may be determined by the court as a matter of law." *See Allyn*, 112 Nev. at 71, 910 P.2d at 266. And the issues presented here, which largely turn on the propriety of Balkenbush's strategic decisions, are not so obvious as to be appropriate for resolution by the district court as a matter of law. *See id.* at 72, 910 P.2d at 266 (providing that expert evidence generally is not needed to demonstrate that an attorney was negligent in failing to file a claim before the expiration of the relevant statute of limitations, but explaining that such testimony may be required if significant questions arose as to whether the claim was actually time barred).

In the alternative, Musall contends that Claggett should have been permitted to offer an expert opinion as to Balkenbush's standard of care for various reasons. But when a party fails to timely disclose an expert witness in accordance with the procedure set forth in NRCP 16.1(a)(2), the district court is authorized to preclude the party from using that expert. *See, e.g.*, NRCP 16.1(e)(3)(b) (authorizing the district court to prohibit a party from using an expert witness if the party did not comply with NRCP 16.1(a)(2)'s procedural requirements in disclosing the expert witness). And although Musall named Claggett as a potential expert witness in an initial disclosure, she does not dispute that she later failed to designate him as an

expert in accordance with NRCP 16.1(a)(2). *See Powell*, 127 Nev. at 161 n.3, 252 P.3d at 672 n.3.

Musall also presents various arguments as to why she believes the district court should have granted her motion for an extension of time to designate expert witnesses and, based on that extension, denied Balkenbush's motion to strike her untimely disclosure of a legal malpractice expert. But while Musall's various arguments include an assertion that Balkenbush was not prejudiced by her delayed filing of that motion, she does not address whether good cause existed for an extension of time, *see* NRCP 16(b)(5) (prohibiting the parties from amending a scheduling order absent leave from the district court or discovery commissioner based upon a showing of good cause), and in that way, Musall failed to provide cogent argument as to this issue. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (declining to consider issues that are not supported by cogent argument). Consequently, we conclude that Musall failed to demonstrate that the district court abused its discretion in striking her expert disclosure or precluding Claggett from offering a standard-of-care opinion.[1] *See Foster v. Dingwall*, 126 Nev. 56,

[1]Insofar as Musall challenges whether these decisions were effective when the district court orally rendered them, *see Div. of Child & Family Servs. v. Eighth Judicial Dist. Court*, 120 Nev. 445, 454, 92 P.3d 1239, 1245 (2004) (discussing when a district court's decision must be written, signed, and filed before becoming effective), her challenge is moot, as the district court reduced its oral rulings on these matters to writing in its summary judgment order. *See Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010) (explaining that appellate courts generally will not consider moot issues).

65, 227 P.3d 1042, 1048 (2010) (explaining that the district court's imposition of discovery sanctions is reviewed for an abuse of discretion).

Thus, given the foregoing, Musall failed to demonstrate that the district court erred in granting Balkenbush's motion for summary judgment based on her failure to properly disclose a legal malpractice expert. *See Wood*, 121 Nev. at 729, 121 P.3d at 1029. While Musall also presents arguments with regard to the district court's order denying her motion for reconsideration, to the extent that those arguments relate to the district court's decisions to strike her expert disclosure and preclude Claggett from offering a standard-of-care opinion, we discern no abuse of discretion for the reasons discussed above. *See AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 584-85, 589, 245 P.3d 1190, 1194, 1197 (2010) (recognizing that the denial of a timely motion for reconsideration of a final judgment can be reviewed, in the context of an appeal from that judgment, under an abuse of discretion standard). Accordingly, we

ORDER the judgment of the district court AFFIRMED.[2]

_____, C.J.
Silver

_____, J.
Tao

_____, J.
Gibbons

cc: Hon. Kimberly A. Wanker, District Judge
Julia L. Musall
Wilson, Elser, Moskowitz, Edelman & Dicker, LLP/Las Vegas
Nye County Clerk

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[2]Given our disposition of this appeal, we need not consider Musall's remaining arguments.