

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 CA 1229

DAISY BALLARD

VERSUS

PLANTATION MANAGEMENT COMPANY, LLC
D/B/A HARVEST MANOR NURSING HOME

Judgment Rendered: MAR 23 2012

Appealed from the
Twenty-First Judicial District Court
In and for the Parish of Livingston
State of Louisiana
Suit Number 92,455

Honorable Elizabeth P. Wolfe, Presiding

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BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

Whipple, J. concurs in the result.

GUIDRY, J.

In this wrongful death and survival action, plaintiff, Daisy Ballard, appeals from a judgment of the trial court, granting summary judgment in favor of defendant, Plantation Management Company, LLC d/b/a Harvest Manor Nursing Home (Plantation Management), and dismissing Ms. Ballard's wrongful death claim, and also sustaining a peremptory exception raising the objection of prescription, finding any claims arising before May 26, 2000 are prescribed. For the reasons that follow, we affirm in part and reverse in part.

FACTS AND PROCEDURAL HISTORY

On May 26, 2000, Alma Noble Stubbs fell from her bed and broke her hip while a resident at Harvest Manor Nursing Home (Harvest Manor). Mrs. Stubbs subsequently died on April 13, 2001. Ms. Ballard, the decedent's daughter, filed a petition for damages on May 25, 2001, asserting that Plantation Management failed to properly care for and was negligent in caring for the decedent, causing permanent injuries that assisted in her death. Ms. Ballard sought damages for survival and wrongful death, as well as damages for violation of the Nursing Home Residents Bill of Rights (NHRBR) under La. R.S. 40:2010.6, including court costs and attorney's fees. Thereafter, Plantation Management filed a dilatory exception raising the objection of prematurity, asserting that the claims alleged in the lawsuit are malpractice claims, and because Harvest Manor is a qualified healthcare provider, Ms. Ballard must first have these claims reviewed by a medical review panel. On September 27, 2002, Ms. Ballard filed a supplemental and amending petition, stating that since the time of filing of the original petition, a medical review panel had been empanelled, and that it rendered a decision on August 15, 2002.

Thereafter, on October 1, 2009, Plantation Management filed a motion for summary judgment, asserting that expert medical testimony is required to prove the legal elements of a medical malpractice claim, and that Ms. Ballard has not produced a medical expert to testify as to the standard of care, breach of the standard of care, and causation. Plantation Management also filed on that same date a peremptory exception raising the objection of prescription, asserting that any claim based upon an act or omission of the defendant occurring more than one year prior to the filing of the petition is prescribed. A hearing on the motion and the exception was set for October 19, 2009. On October 15, 2009, Ms. Ballard filed a motion to continue, which the trial court granted and the hearing was reset for November 16, 2009. Ms. Ballard, thereafter, filed another motion to continue on October 20, 2009, to allow for additional discovery. The trial court granted the motion to continue. After the filing of several additional motions to continue, the trial court ultimately reset the hearing for August 16, 2010.

On May 24, 2010, Ms. Ballard filed an opposition to Plantation Management's motion for summary judgment, with affidavits from Renee Bridges, RN, and Dr. Amy Gruszecki attached thereto, and also filed an opposition to the exception raising the objection of prescription. Thereafter, Plantation Management filed a motion to exclude the affidavit of Dr. Gruszecki, because she was not identified as an expert until May 20, 2010.

Following the August 16, 2010 hearing, the trial court signed a judgment granting Plantation Management's motion for summary judgment as to the wrongful death action only, granting Plantation Management's exception raising the objection of prescription as to all claims arising prior to May 26, 2000, and denying Plantation Management's motion to exclude the affidavit of Dr.

Gruszecki. The trial court designated the judgment as a final judgment. Ms. Ballard now appeals.

APPELLATE JURISDICTION

The trial court designated the judgment at issue as final, but it did not provide reasons to support this designation. See La. C.C.P. art. 1915(B). Since we cannot determine the merits of this appeal unless our jurisdiction is properly invoked by a valid final judgment, we must make a de novo determination of whether the designation is proper. See R.J. Messinger, Inc. v. Rosenblum, 04-1664, pp. 13-14 (La. 3/2/05), 894 So. 2d 1113, 1122. Some of the factors we are advised to consider in our de novo determination of whether the judgment is properly designated as a final judgment include: (1) the relationship between the adjudicated and the unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; and (4) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like. R.J. Messinger, Inc., 04-1664 at p. 14, 894 So. 2d at 1122. However, the overriding inquiry is whether there is no just reason for delay. R.J. Messinger, Inc., 04-1664 at p. 14, 894 So. 2d at 1122-1123.

Based upon our consideration of all relevant factors, we find that the trial court's designation was appropriate. We note that the adjudicated claims and unadjudicated claims are certainly related. However, the Louisiana Supreme Court has noted that the NHRBR contemplates matters far beyond the scope of the Medical Malpractice Act. Richard v. Louisiana Extended Care Centers, Inc., 02-0978, p. 10 (La. 1/14/03), 835 So. 2d 460, 467.

Further, there is little likelihood that future developments in the trial court will moot the need to review the issues raised in the appeal, nor that this court will be required to consider Ms. Ballard's wrongful death claim a second time. Finally, resolution of the wrongful death claim and elimination of claims arising prior to May 26, 2000, will expedite the trial of this action and will save the parties considerable expense in litigating these issues. Accordingly, we conclude that the trial court's designation was proper, and that the jurisdiction of this court has been properly invoked.

MOTION FOR SUMMARY JUDGMENT

Appellate courts review summary judgments de novo, using the same criteria as the trial court in determining whether summary judgment is appropriate. Bickham v. Louisiana Emergency Medical Consultants, Inc., 10-0535, p. 4 (La. App. 1st Cir. 11/1/10), 52 So. 3d 162, 164. The motion should be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B).

On a motion for summary judgment, the initial burden is on the moving party. However, when the movant will not bear the burden of proof at trial on the matter that is before the court, the movant's burden on the motion does not require him to negate all of the essential elements of the adverse party's claim, but rather to point out to the court an absence of factual support for one or more of the elements essential to the adverse party's claim. Thereafter, if the adverse party fails to provide factual evidence sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact and summary judgment is properly granted. La. C.C.P. art. 966(C)(2).

A plaintiff pursuing a claim against a nursing home for medical negligence must prove, by a preponderance of the evidence, the applicable standard of care, the breach of that standard of care, and a causal connection between the medical negligence and the patient's injuries. Sepulvado v. Toledo Nursing Center, Inc., 07-122, p. 5 (La. App. 3rd Cir. 5/30/07), 958 So. 2d 135, 139, writ denied, 07-1583 (La. 10/12/07), 965 So. 2d 406; Hinson v. The Glen Oak Retirement System, 37,550, p. 5 (La. App. 2nd Cir. 8/20/03), 853 So. 2d 726, 729, writ denied, 03-2835 (La. 12/19/03), 861 So. 2d 572. Generally, expert medical testimony is required to meet this burden of proof. See McGregor v. Hospice Care of Louisiana in Baton Rouge, L.L.C., 09-1355, p. 6 (La. App. 1st Cir. 2/12/10), 36 So. 3d 281, 285, writ denied, 10-0832 (La. 5/28/10), 36 So. 3d 258.

In moving for summary judgment, Plantation Management asserted that Ms. Ballard had not produced a medical expert to testify as to the applicable standard of care for Harvest Manor, any breach of the standard of care, or any causal connection between any breach and the injuries or death to Ms. Stubbs. As such, Plantation Management asserted that Ms. Ballard lacks factual support for the essential elements of her claim for wrongful death, and consequently, there is no genuine issue of material fact and it is entitled to summary judgment as a matter of law. In support thereof, it attached to the motion for summary judgment a copy of the decedent's medical records, a copy of the medical review panel opinion, Ms. Ballard's answers to interrogatories, Ms. Ballard's responses to requests for production of documents, and deposition excerpts of Renee Bridges, RN. The medical review panel unanimously determined that there was no evidence of a deviation from the appropriate standard of care of nursing homes. Further, Ms. Ballard admitted in her answers to interrogatories and requests for production of documents that she had not retained an expert witness. Finally, Renee Bridges,

RN, states in her deposition that she is not qualified to render an opinion as to what caused the decedent's death. Accordingly, the burden shifted to Ms. Ballard to demonstrate that a genuine issue of material fact exists for trial. See Samaha v. Rau, 07-1726, pp. 7-9, 11-12 (La. 2/26/08), 977 So. 2d 880, 884-886, 887-888.

In response, Ms. Ballard filed an opposition to the motion for summary judgment, attaching: an affidavit of Renee Bridges, RN; an affidavit of Amy Gruszecki, M.D.; the deposition of Denise Hart, RN; the deposition of Dr. Richard Goodel; and a copy of decedent's medical records.¹ Ms. Bridges, who is licensed as a registered nurse in Louisiana and is nationally certified as a geriatric registered nurse, stated that she has served as a Director of Nursing for a nursing home in Louisiana and has extensive knowledge and experience in Louisiana nursing home standards of care, rules, and regulations. Ms. Bridges stated that she reviewed the medical records of the decedent, and that in her opinion Harvest Manor breached the standards of care required by a nursing home and nursing staff in their care of the decedent resulting in her suffering numerous injuries, including a decline in her condition, fall, hip fracture, and complications of immobility including pneumonia and death. Particularly, Ms. Bridges opined that Harvest Manor violated the standards of care by failing to provide a safe environment resulting in injury from a fall, failing to implement adequate nursing interventions to prevent falls, failing to properly and adequately observe the resident, and failing to complete fall risk assessments. Additionally, Ms. Bridges noted that Harvest Manor gave little attention to implementing/revising clinical interventions to address the decedent's safety needs in light of her obvious "high risk" for falls, and that the records fail to demonstrate that Harvest Manor investigated the cause of her falls, revised her care

¹ Denise Hart, RN, is an expert listed by Plantation Management and Dr. Richard Goodel was a member of the medical review panel. However, neither person testified as to the standard of care, breach of the standard of care, or causation necessary to support a claim for wrongful death under the circumstances of this case.

plan, instituted appropriate restraint monitoring and release, or utilized fall prevention techniques or services to protect the decedent from injury. According to Ms. Bridges, these violations resulted in the fall and subsequent hip fracture as well as her continued physical decline and death due to complications from her immobility.

Further, Dr. Gruszecki states in her affidavit that after reviewing the medical records, nursing home records, and other documents pertaining to the decedent, it is her opinion that based upon a reasonable degree of medical certainty, that the fall and hip fracture suffered at Harvest Manor nursing home significantly contributed to the decedent's death.² Specifically, Dr. Gruszecki stated that the decedent had been ambulatory prior to the hip fracture and was unable to return to her baseline functional status after her fall and surgery, and she became bedridden and immobile. According to Dr. Gruszecki, the decedent died as a result of complications of dementia, Alzheimer's-type, hypertensive and atherosclerotic cardiovascular disease, and the left hip fracture, which contributed significantly to her death because it caused a marked decline in her status.

From our review of the record, we find the evidence presented by Ms. Ballard was not sufficient to establish that she will be able to satisfy her evidentiary burden of proof at trial. Though Ms. Bridges refers to numerous generalized breaches in the standard of care, she does not specifically detail the standard of care applicable to Harvest Manor in the instant case. Additionally, she admitted in her deposition testimony that she was not qualified to give an expert opinion as to the cause of the decedent's death. Finally, Dr. Gruszecki did not

² We note that the trial court apparently did not consider the Dr. Gruszecki's affidavit, but only considered evidence identified as of the original November 2009 hearing date. However, the hearing on the motion for summary judgment was continued multiple times, one of which was to allow for additional discovery. Additionally, Ms. Ballard's opposition to the motion for summary judgment, along with the accompanying affidavits, was filed well before the August 10, 2010 hearing date, and was therefore appropriate under La. C.C.P. art. 966(B).

define the standard of care, nor did she state that Harvest Manor breached the standard of care in this case. Rather, she merely stated that the fall and hip fracture were contributing causes of the decedent's death. Therefore, based on our review of the record, we find that Ms. Ballard failed to establish that she will be able to satisfy her evidentiary burden of proof at trial, and Plantation Management is entitled to summary judgment as to Ms. Ballard's wrongful death claim.³

PRESCRIPTION

A party urging an exception of prescription has the burden of proving facts to support the exception unless the petition is prescribed on its face. Cichirillo v. Avondale Industries, Inc., 04-2894, 04-2918, p. 5 (La. 11/29/05), 917 So.2d 424, 428. When the face of the petition reveals that plaintiff's claim has prescribed, the burden shifts to the plaintiff to demonstrate that prescription was suspended or interrupted. In re Medical Review Panel for Claim of Moses, 00-2643, p. 6 (La. 5/25/01), 788 So.2d 1173, 1177. Evidence may be introduced to support or controvert any objection pleaded, but in the absence of evidence, an objection of prescription must be decided upon facts alleged in the petition with all allegations accepted as true. La. C.C.P. art. 931; Cichirillo, 04-2894, 04-2918 at p. 5, 917 So. 2d at p. 424.

In the instant case, Plantation Management filed an exception of prescription asserting that Ms. Ballard's expert had expressed numerous opinions that are outside the scope of the claims alleged in the lawsuit and include conduct of Plantation Management prior to May 26, 2000. In support of its exception of prescription, Plantation Management attached several exhibits, including the

³ While we question the viability of the remaining causes of action, i.e., the general damage claim and the survival action, based on the same showing made on summary judgment to support dismissal of the wrongful death action, because Plantation Management neither appealed nor filed an answer challenging the trial court's denial of that relief, the issue is not properly before us in this appeal.

deposition excerpt and report of Renee Bridges, RN. However, these exhibits were not formally introduced at the hearing on the exception. Absent formal introduction of exhibits at a hearing on an exception of prescription, those exhibits merely contained in the record or attached to a memorandum in support of an exception of prescription are not to be considered. See Denoux v. Vessel Mgmt. Servs., Inc., 07-2143, pp. 5-6 (La. 5/21/08), 983 So.2d 84, 88-89.

Accordingly, accepting the allegations in Ms. Ballard's petition as true, we find that the claims alleged therein clearly are not prescribed. In her petition, Ms. Ballard asserted that on or about May 26, 2000, decedent fell from her bed and broke her hip, and that she subsequently died on April 13, 2001. Ms. Ballard did not, however, detail any acts of Plantation Management occurring prior to May 26, 2000. Accordingly, because Ms. Ballard's petition was filed on May 25, 2001, within one year from the first date that the decedent allegedly suffered damages, it is not prescribed on its face, and Plantation Management failed to put forth evidence to establish that Ms. Ballard's claims, as alleged in her petition, are prescribed.

CONCLUSION

For the foregoing reasons, we affirm that portion of the trial court's judgment granting summary judgment in favor of Plantation Management as to Ms. Ballard's wrongful death claim and we reverse the portion of the trial court's judgment sustaining Plantation Management's peremptory exception raising the objection of prescription. All costs of this appeal are to be assessed equally between the parties.

AFFIRMED IN PART; REVERSED IN PART.