

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 CA 1314 C/W 2006 CA 1315

EBW

**EVELYN STEWARD, OBRA YOUNG JR., LEONCE YOUNG,
EDWARD YOUNG, RAYMOND YOUNG, JERALD YOUNG, LLOYD
YOUNG, WILLARD YOUNG, INDIVIDUALLY AND ON BEHALF OF
ALVIRDER YOUNG**

VERSUS

**DELTA NURSING CENTERS, INC., HAROLD J. GAMBURG AND
HIBERNIA DYESS D/B/A HERITAGE MANOR OF
NAPOLEONVILLE LIMITED**

Judgment Rendered: May 4, 2007

**Appealed from the
Twenty-Third Judicial District Court,
in and for the Parish of Assumption,
State of Louisiana
Docket Number 23987**

Honorable Ralph Tureau, Judge Presiding

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BEFORE: CARTER, C.J., WHIPPLE, AND McDONALD, JJ.

Carter J. Concur
McDonald, J. concurs and will assign reasons.

WHIPPLE, J.

This matter is before us on appeal by plaintiffs, the natural children of Alvirder and Obra Young, from a judgment of the trial court sustaining the defendants' peremptory exception of prescription and dismissing plaintiffs' survival claims, and granting defendants' motion for summary judgment and dismissing plaintiffs' wrongful death claims. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

Alvirder Young became a resident of Heritage Manor Nursing Home ("Heritage Manor") in Napoleonville, Louisiana in 1982. She remained there until June 24, 1996, when she was taken to Assumption General Hospital. Alvirder was then transferred to Thibodaux Regional Medical Center, where she died on July 21, 1996, at the age of eighty-one. Her death certificate lists the cause of her death as "pneumonic," "G-I bleeding," "bowel obstruction," and "dehydration."

Alvirder's husband, Obra Young, became a resident of Heritage Manor in 1994. He remained a resident at Heritage Manor until September 29, 1996, when he was taken to Assumption General Hospital. From there, he was transferred to Thibodaux Regional Medical Center, where he died on September 30, 1996, at the age of eighty-two. His death certificate lists the cause of his death as "acute pulmonary edema," "acute renal failure," "acute myocardial infarction," and "hypothermia."

On July 21, 1997, one year after the death of Alvirder Young, the natural children of Obra and Alvirder Young filed a wrongful death and survival action against defendants, Delta Nursing Centers, Inc., Harold J. Gamburg and Hibernia Dyess d/b/a Heritage Manor of Napoleonville Limited Partnership. In the petition, plaintiffs contended that her death was caused by

or resulted from an accumulation of physical abuse and neglect and the failure of Heritage Manor to provide timely medical attention in violation of the Nursing Home Residents' Bill of Rights (the NHRBR), codified in LSA-R.S. 40:2010.8. The Young children filed a similar suit on behalf of their father, Obra Young, on September 30, 1997, one year from the date of his death. The two suits were subsequently consolidated in the district court.

On February 2, 2005, the defendants and LIGA¹ filed a peremptory exception of prescription with regard to the survivorship claims asserted by plaintiffs.² Therein, defendants and LIGA contended that pursuant to LSA-R.S. 40:2010.8 and LSA-C.C. art. 2315, any claims that Alvirder Young would have had against Heritage Manor prescribed one year from the events in question, or on June 24, 1996, the date of her departure from Heritage Manor, and not one year from the date of her death. The defendants and LIGA further claimed that any claims that Obra Young would have had against Heritage Manor likewise prescribed one year from his departure from Heritage Manor, or on September 29, 1996, and not one year from the date of his death.

On March 31, 2005, while the exception of prescription as to the survivorship claims was pending before the trial court, the defendants and LIGA filed a motion for summary judgment seeking dismissal of plaintiffs' wrongful death claims. The defendants and LIGA contended that there was no factual basis to support plaintiffs' claims that the care rendered by Heritage Manor was deficient or caused injury to or the death of plaintiffs' parents. Thus, defendants contended they were entitled to judgment as a matter of law.

¹LIGA intervened as the statutory successor of Heritage Manor's insurer, the Virginia Reciprocal, The Reciprocal Group.

²In the exception of prescription, defendants and LIGA acknowledged that the filing of both suits was timely as to plaintiffs' **wrongful death** claims.

On July 18, 2005, the trial court rendered Reasons for Judgment, granting the peremptory exception of prescription in favor of defendants and LIGA as to the **survivorship claims** asserted by plaintiffs.³ Shortly thereafter, on July 29, 2005, the trial court rendered “Reasons for Judgment” and granted summary judgment in favor of defendants and LIGA as to plaintiffs’ **wrongful death claims**. On August 19, 2005, a judgment was signed, granting the exception of prescription and the requested summary judgment in conformity with the reasons set forth by the trial court.

Plaintiffs then filed the instant appeal, contending that the trial court erred in granting the exception of prescription and in rendering summary judgment dismissing their claims.

DISCUSSION

Peremptory Exception of Prescription

In this assignment of error, plaintiffs argue that an action under the NHRBR is one in contract, and that any breach of the statute is subject to a ten-year prescriptive period. Thus, plaintiffs contend, the trial court erred in maintaining the exception of prescription filed by defendants and LIGA.

Louisiana Revised Statute 40:2010.9, pertaining to civil enforcement of a violation of the NHRBR, provides, as follows:

A. Any resident who alleges that his rights, as specified in R.S. 40:2010.8, have been deprived or infringed upon may assert a cause of action for injunctive relief against any nursing home or health care facility responsible for the alleged violation. The action may be brought by the resident or his curator, including a curator ad hoc. The action may be brought in any court of competent jurisdiction to enforce such rights or to enjoin any deprivation or infringement on the rights of a resident. Any plaintiff who prevails in such action shall be entitled to recover reasonable attorney fees, and costs of the action, unless the court finds that the losing plaintiff has acted

³In light of this ruling, the trial court found that a determination as to whether summary judgment should be granted in defendants’ favor on of these claims was moot.

in bad faith with malicious purpose, and that there was an absence of a justiciable issue of either law or fact, in which case the court shall award the prevailing party his reasonable attorney fees.

B. The remedies provided in this Section shall not be construed to restrict other legal and administrative remedies available to a resident and to the Department of Health and Hospitals or other governmental agencies.

C. Any claim brought pursuant to R.S. 40:2010.8 et seq. shall be filed in a court of competent jurisdiction within one year from the date of the alleged act, omission or neglect, or within one year from the date of discovery of the alleged act, omission or neglect; however, even as to claims filed within one year from the date of such discovery, in all events such claims shall be filed at the latest within a period of three years from the date of the alleged act, omission or neglect. The provisions of this Section shall apply to all persons whether or not infirm or under disability of any kind and including, but not limited to, minors, interdicts and all persons adjudicated to be incompetent of handling their own affairs.⁴

(Emphasis added.)

As amended, LSA-R.S. 40:1020.9 provides for a one-year prescriptive period for claims brought pursuant to the Nursing Home Residents' Bill of Rights. Prior to this amendment, the statute did not set forth a specific prescriptive period for claims arising there under. However, the one-year prescriptive period for claims pursuant to the Medical Malpractice Act, as set forth in LSA-R.S. 9:5628,⁵ was deemed to govern claims against nursing

⁴Louisiana Revised Statute 40:2010.9 was amended by Acts 2003, No. 506, § 1, to add subsection C, which now sets forth a specific prescriptive period for claims arising under the NHRBR.

⁵Louisiana Revised Statute 9:5628(A) provides as follows:

No action for damages for injury or death against any physician, chiropractor, nurse, licensed midwife practitioner, dentist, psychologist, optometrist, hospital or nursing home duly licensed under the laws of this state, or community blood center or tissue bank as defined in R.S. 40:1299.41(A), whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought unless filed within one year from the date of the alleged act, omission, or neglect, or within one year from the date of discovery of the alleged act, omission, or neglect; however, even as to claims filed within one year from the date of such discovery, in all events such claims shall be filed at the latest within a period of three years from the date of the alleged act, omission, or neglect.

homes.⁶ See Richard v. Louisiana Extended Care Centers, Inc., 2002-0978 (La. 1/14/03), 835 So. 2d 460, 466.

Moreover, in a similar case, Helmerts v. Fernandez Nursing Home, Inc., 2004-0201 (La. App. 4th Cir. 7/6/05), 914 So. 2d 556, writ denied, 2005-2071 (La. 2/10/06), 924 So. 2d 169, our brethren in the Fourth Circuit directly addressed the issue now before us, i.e., whether the ten-year prescriptive period ordinarily applicable to breach-of-contract claims applies to claims for alleged violations of the Nursing Home Residents' Bill of Rights. In affirming a trial court's judgment sustaining an exception of prescription as to plaintiffs' claims against the nursing home and rejecting plaintiffs' argument that the ten-year prescriptive period applied, the Helmerts court explained:

[T]he appellants have presented no evidence of a contract and, therefore, have failed to establish their contract claim. The record is void of any evidence that a written contract existed with [the nursing home]. Accordingly, we find no error in the trial court's failure to apply the ten-year prescriptive period applicable for breach of contract claims.

Helmerts, 914 So. 2d at 558.

Importantly, the Helmerts court further determined, relying on Richard, that plaintiffs' **survival claims** against the nursing home, which were also filed prior to the 2003 amendments to LSA-R.S. 40:2010.9, were subject to the one-year prescriptive period set forth in LSA-R.S. 9:5628, concluding that the action was essentially grounded in medical malpractice. Helmerts, 914 So. 2d at 559. Moreover, the court determined that the prescriptive period set forth in LSA-40:2010.9(C) should be accorded retroactive application, as the amendment to LSA-R.S. 40:2010.9(C) did not shorten the one-year

⁶Our review of the record indicates that the defendants and LIGA did not file an exception of prematurity on the basis that plaintiffs failed to submit the matter before a medical review panel under the MMA prior to filing suit. As a court of appeal, however, we are prohibited from raising this objection on our own. LSA-C.C.P. art. 926 B; Noble v. Armstrong, 93-841 (La. App. 5th Cir. 3/16/94), 635 So. 2d 1199, 1203.

prescriptive period provided by LSA-R.S. 9:5628, and, thus, there was clearly no disturbance of vested rights in its retroactive application.⁷ Helmerts, 914 So. 2d at 559.

In the instant case, the record is void of any evidence of a contract between Heritage Manor and the Youngs. Accordingly, we likewise reject plaintiffs' argument that a ten-year prescriptive period applies to the survivorship claims asserted herein. Moreover, given the circumstances of this case, whether applying LSA-R.S. 40:2010.9 or LSA-R.S. 9:5628, plaintiffs' claims against Heritage Manor should have been filed within one year from the date of the alleged act, omission, or neglect, or within one year from the date of discovery of the alleged act, omission, or neglect.⁸ Thus, any claims that Alvirder Young would have had against Heritage Manor prescribed one year from June 24, 1996, the date of her departure from Heritage Manor. The petition for damages on her behalf was filed on July 21, 1997, and was therefore untimely. Further, any claims that Obra Young would have had against Heritage Manor likewise prescribed one year from September 29, 1996, the date of his departure from Heritage Manor. Thus, the petition for damages on his behalf, which was filed on September 30, 1997, is also untimely.

⁷It is a well-established general rule of law that statutes of limitation are remedial in nature and as such are generally accorded retroactive application. Green v. Southern United Fire Insurance Company, 99-1430 (La. App. 1st Cir. 6/23/00), 762 So. 2d 1156, 1158. However, as noted by the Louisiana Supreme Court in Lott v. Haley, 370 So. 2d 521, 523-524 (La. 1979), procedural and remedial laws are not accorded retroactive effect where such application would operate to unconstitutionally disturb vested rights.

⁸In their petition, plaintiffs allege that the torts herein were continuous and that the damages resulted from an accumulation of abuse and neglect. Thus, for purposes of this discussion, we will presume that the alleged acts continued until the last date the Youngs resided in Heritage Manor. With reference to the date these alleged acts were discovered, we note that plaintiffs had the opportunity to introduce evidence to controvert the objection by setting forth the date they discovered the alleged acts of abuse and neglect when the grounds thereof did not appear from the petition. See LSA-C.C.P. art. 931. Plaintiffs herein failed to do so.

We find no merit to this assignment.

Summary Judgment

In this assignment, plaintiffs contend that the trial court erred in granting summary judgment in favor of defendants and LIGA and dismissing plaintiffs' **wrongful death** claims.

In determining whether summary judgment is appropriate, appellate courts conduct a *de novo* review of the evidence, employing the same criteria that govern the trial court's determination of whether summary judgment is appropriate. Ballard v. Waitz, 2006-0307 (La. App. 1st Cir. 12/28/06), ___ So. 2d ___, ___. Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, show that there is no genuine issue of material fact and that the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(B).

When a motion for summary judgment is made and supported as provided by law, an adverse party may not rest on the mere allegations and denials of his pleading. His response, by affidavits or otherwise provided by law, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, will be rendered against him. LSA-C.C.P. art. 967; Robles v. ExxonMobile, 2002-0854 (La. App. 1st Cir. 3/28/03), 844 So. 2d 339, 341.

In order to prevail in a medical malpractice case, the plaintiff must establish the standard of care applicable to the charged health care provider, a violation by the health care provider of that standard of care, and a causal connection between the health care provider's alleged negligence and the plaintiff's injuries resulting therefrom. Walston v. Lakeview Regional Medical Center, 99-1920 (La. App. 1st Cir. 9/22/00), 768 So. 2d 238, 241,

writ denied, 2000-2936 (La. 12/15/00), 777 So. 2d 1229. Generally, a plaintiff must introduce the testimony of an expert witness to establish the applicable standard of care and a violation thereof, unless the defendant physician or a defense expert testifies regarding the standard of care, and the objective evidence at trial is such that a lay jury can infer negligence from the facts.⁹ Gisclair, 928 So. 2d at 42.

In support of their motion for summary judgment, the defendants and LIGA introduced a Statement of Undisputed Facts; the affidavit of Dr. Keith J. Landry, the primary care physician for Alvirder and Obra Young; the affidavit of Dr. Charles P. Bolotte, the secondary or “back-up” physician for Alvirder and Obra Young; the medical records from Heritage Manor; and the entire suit record in both cases.

The affidavits of both Drs. Landry and Bolotte essentially set forth that at no time throughout the Youngs’ stay at Heritage Manor did defendants receive any complaints, from a family member or anyone else, about the care provided to Alvirder and Obra Young; that throughout the Youngs’ stay at Heritage Manor, the staff provided care that was reasonable, competent, and consistent with Youngs’ needs and in full compliance with all physician’s orders; that Alvirder Young’s death was due to her age and the medical problems set forth on her death certificate, and was not caused, contributed to, or accelerated by anything done or not done by Heritage Manor; that Obra Young’s death was due to his age and the medical

⁹We recognize that in certain limited circumstances, expert testimony is not required, *i.e.*, where the physician does an obviously careless act, such as fracturing a leg during examination, amputating the wrong arm, dropping a knife, scalpel, or acid on a patient, or leaving a sponge in a patient’s body, from which a lay person can infer negligence. Gisclair v. Bonneval, 2004-2474 (La. App. 1st Cir. 12/22/05), 928 So. 2d 39, 42-43 (quoting Pfiffner v. Correa, 94-0924, 94-0963, 94-0992 (La. 10/17/94), 643 So. 2d 1228, 1233). Given the established facts of this case and the expert testimony offered by Drs. Landry and Bolotte, this exception clearly does not apply herein.

problems set forth on his death certificate, and was not caused, contributed to, or accelerated by anything done or not done by Heritage Manor; that the doctors knew of nothing improperly done by Heritage Manor; and that based on their review of the records, there was nothing to show that any action or failure to act occurred which in any way violated the standard of care required of nursing homes in the care of patients such as the Youngs.

Plaintiffs countered that issues of fact remain, citing the deposition testimony of Dr. Bolotte, which they contend is “inconsistent and incredible.” Plaintiffs further rely upon the depositions of four of the plaintiffs, which they contend are the “most important items” that should be weighed on summary judgment as the depositions allegedly show that genuine issues of material fact remain.¹⁰

We have reviewed the deposition testimony of Dr. Bolotte and do not find his statements to be inconsistent with his affidavit testimony. Moreover, as the trial court correctly noted in its reasons for judgment, to prevail in a medical malpractice case, plaintiffs must establish the applicable standard of care, a violation of that standard of care, and a causal connection between the health care provider's alleged negligence and plaintiffs' injuries resulting therefrom with expert witness testimony. Here, plaintiffs failed to counter the expert affidavit testimony of Drs. Landry and Bolotte, which testimony affirmatively set forth that no causal connection whatsoever can be shown between the deaths of Alvirder and Obra Young and the care provided them at Heritage Manor. Thus, we agree with the trial court that

¹⁰We note that although it is apparent from the Reasons for Judgment that the trial court reviewed the depositions of plaintiffs Evelyn Steward, Lloyd Young, Jerald Young, and Jennifer Steward-Butler, those depositions are not contained in the record before us for review on appeal. As the appellant is charged with the responsibility of completeness of the record for review, we find the inadequacy of the record before us imputable to plaintiffs/appellants. Carter v. Barber Brothers Contracting Company, Inc., 623 So. 2d 8, 10 (La. App. 1st Cir.), writ denied, 629 So. 2d 1180 (La. 1993).

the record is otherwise void of any medical or expert testimony to controvert this testimony.

Accordingly, after thorough review of the evidence in the record, we agree with the trial court that under the controlling law, the burden shifted to plaintiffs to come forward to make the requisite showing by medical or expert testimony. Inasmuch as plaintiffs failed to produce factual support sufficient to establish that they will be able to satisfy their evidentiary burden of proof at trial, we agree that defendants were entitled to summary judgment as a matter of law. Thus, we affirm the trial court's grant of summary judgment dismissing plaintiffs' wrongful death claims.

We likewise find no merit to this assignment.

CONCLUSION

For the reasons set forth above, the August 19, 2005 judgment of the trial court is affirmed. Costs of this appeal are assessed against the plaintiffs/appellants.

AFFIRMED.