

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 CA 0134

JKW

LW

JTP by JKW

VERSUS

DELTA CLINIC OF BATON ROUGE, INC., AND
DR. ADRIAN COLEMAN

Judgment Rendered: March 23, 2007

Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Docket Number 505,097

Honorable Timothy Kelley, Judge

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Plaintiff – Appellant
LW

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Defendants – Appellees
Delta Clinic of Baton Rouge, Inc.
and Dr. Adrian Coleman

[Signature]
KUHN, J DISSENTS & WILL ASSIGN REASONS

BEFORE: WHIPPLE, KUHN, PETTIGREW, GAIDRY, AND WELCH, JJ.

*Whipple, J. concurs, finding material issues
of fact exist precluding summary judgment re:
the administration of Phenergan.*

EJP Gaidry, J. concurs

WELCH, J.

Plaintiff appeals a trial court judgment granting the defendants' motion for summary judgment and dismissing her claims against them with prejudice. We reverse and remand.

FACTUAL AND PROCEDURAL HISTORY

In the fall of 2002, plaintiff, LW,¹ discovered that she was pregnant. Because LW suffers from epilepsy and requires medication to control her seizures, she consulted with her neurologist concerning the risks of proceeding with the pregnancy. After her doctor advised her that proceeding with her pregnancy could be life-threatening for her and the unborn child, LW went to the Delta Clinic of Baton Rouge, Inc. (Delta) for the purpose of obtaining an abortion. During her visit on October 24, 2002, Delta obtained a medical history from LW. Delta also provided her with information regarding the abortion procedure, as well as abortion alternatives.² In addition, Alexandra Engler, an ultrasound technician employed by Delta, performed an ultrasound to determine the gestational age of the fetus. Because Ms. Engler noted a discrepancy between the gestational age provided by LW and the age indicated by the ultrasound, she asked her supervisor, Betty Harrell, to perform an additional ultrasound to verify the results. Both ultrasounds indicated that the fetus had a gestational age of eleven weeks.

LW returned to Delta on the morning of October 25, 2002, and gave her written consent for a surgical abortion, which was described in the consent form as "Suction Curettage." The consent form listed Dr. Adrian Coleman as the doctor scheduled to perform the abortion procedure. Ms. Engler stated that she was intermittently in and out of the room occupied by LW prior to the actual procedure. Dr. Coleman maintains that he performed an ultrasound on LW when Ms. Engler

¹ The record in this matter was sealed at the request of the plaintiff.

² LW acknowledged on the form entitled, "Certification of Informed Consent – Abortion," that she received this information on October 24, 2002, at 12:30 p.m.

was out of the room; however, LW denies that Dr. Coleman performed an ultrasound on her. Dr. Coleman noted on LW's chart that there was no fetal heart motion, which indicated that the fetus was dead. Dr. Coleman contends that because the fetus was dead, he intended to perform a "Dilation and Curettage" (D&C) on LW. According to Dr. Coleman's deposition testimony, a surgical abortion is the same procedure as a D&C, except that in a surgical abortion, the fetus is alive prior to the procedure, and in a D&C, the fetus is already dead.

After injecting LW in the right arm with a combination of Phenergan and Nubain, Dr. Coleman, with Ms. Engler present, performed the curettage procedure at 10:45 a.m. Shortly after the injection, LW complained of pain at the injection site. The area subsequently developed into a necrotic lesion approximately three to four centimeters in diameter. The lesion took two months to heal and left a scar.

On February 28, 2003, LW filed suit against Delta and Dr. Coleman, alleging that: (1) the defendants failed to obtain her informed consent pursuant to La. R.S. 40:1299.35.6; (2) the defendants were strictly liable for her damages resulting from the lesion under La. R.S. 9:2800.12; (3) the defendants breached the standard of care and, thus, were negligent in their treatment of her; and (4) the defendants' actions constituted assault, battery, and the intentional infliction of emotional distress. Defendants responded by filing a motion for summary judgment, contending that LW lacked sufficient evidence to support her allegations.³ After a hearing, the trial court granted the defendants' motion and dismissed LW's claims against the defendants, with prejudice. LW has appealed.

³ Before considering the defendants' motion for summary judgment, the trial court ordered that the affidavit of Alexandra Engler, which had been attached as Exhibit K to LW's memorandum in opposition to the motion for summary judgment, be stricken from the record. The court granted LW time to obtain the deposition testimony of Ms. Engler; however, the court subsequently ruled that Ms. Engler's deposition, from page 18, line 24 forward, be stricken from the record.

SUMMARY JUDGMENT

Appellate courts review summary judgments *de novo* under the same criteria that govern the trial court's determination of whether a summary judgment is appropriate. **Duplantis v. Dillard's Dept. Store**, 2002-0852, p. 5 (La. App. 1st Cir. 5/9/03), 849 So.2d 675, 679, writ denied, 2003-1620 (La. 10/10/03), 855 So.2d 350. A motion for summary judgment should only be granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, 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).

The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial, its burden on the motion does not require it to negate all essential elements of the adverse party's action, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary proof at trial, there is no genuine issue of material fact. La. C.C.P. art. 966(C)(2).

DISCUSSION

In her first two assignments of error, LW contends that the trial court erred in granting summary judgment as to her claims under La. R.S. 40:1299.35.6 and La. R.S. 9:2800.12, because genuine issues of material fact remained regarding whether the fetus was dead or alive when the procedure was performed. Louisiana Revised Statutes 40:1299.35.6 proscribes the performance or induction of an abortion on a woman without her voluntary and informed consent. The statute delineates certain requirements that must be met in order for the consent to be "voluntary and informed" within the meaning of the statute. Failure to comply with these requirements may result in criminal and civil liability. In addition, La.

R.S. 9:2800.12 provides that “[a]ny person who performs an abortion is liable to the mother of the unborn child for any damage occasioned or precipitated by the abortion.” In order to sustain a cause of action pursuant to those statutes, LW would bear the burden of proving at trial the essential threshold element that an abortion had been performed. For the purposes of these statutes, the term “abortion” does not encompass the removal of an already dead fetus. La. R.S. 9:2800.12(B)(1); La. R.S. 40:1299.35.1(1).

In an effort to demonstrate that LW would be unable to satisfy her burden of proof on this issue at trial, the defendants introduced evidence tending to prove that the procedure performed on LW was a D&C rather than an abortion, because the fetus was dead prior to the procedure. Specifically, the defendants introduced the deposition testimony of Dr. Coleman in which he claimed that he performed an ultrasound on LW before the procedure and that the fetus was dead at that time. Dr. Coleman stated that he did not print any copies of the ultrasound, because the portable machine he used did not have a printer. However, he made a notation in LW’s file that there was no fetal heart motion and that he would proceed with a D&C. He also testified that he told LW the status of the fetus after performing the ultrasound.

In response to the defendants’ motion, LW introduced her affidavit in which she denied that Dr. Coleman had performed an ultrasound on her prior to the procedure. She further denied that Dr. Coleman informed her that her fetus had died.⁴ LW also stated in her affidavit that Ms. Engler had performed an ultrasound on her the day before the procedure, and that she clearly saw the heartbeat of the fetus during the ultrasound.

The conflicting testimony of LW and Dr. Coleman as to whether an ultrasound was performed prior to the procedure raises a question of the credibility

⁴ In addition, LW has argued on appeal that the notation Dr. Coleman made regarding the death of the fetus was “newly created” in an attempt to recharacterize the procedure as a D&C.

of the witnesses, which is a question of fact and cannot be resolved on a motion for summary judgment. See Hutchinson v. Knights of Columbus, Council No. 5747, 2003-1533, p. 8 (La. 2/20/04), 866 So.2d 228, 234. The status of the fetus prior to the procedure is central to the determination of whether the special consent and liability statutes apply in this matter. Accordingly, we find that the trial court erred in granting summary judgment with regard to LW's claims pursuant to La. R.S. 40:1299.35.6 and La. R.S. 9:2800.12, because genuine issues of material fact remain as to whether the fetus was dead or alive prior to the procedure.

In her third assignment of error, LW argues that the trial court erred in refusing to consider the uncontradicted evidence in the record that allegedly supported a finding that Dr. Coleman had committed medical malpractice due to his failure to comply with the requirements of the Physician's Desk Reference (PDR). Specifically, LW contends that the trial court erred in granting the defendants' motion for summary judgment because the evidence demonstrates that Dr. Coleman breached the standard of care and violated the PDR by injecting the Phenergan intravenously and in a much higher concentration than that specified in the PDR. LW further contends that Dr. Coleman administered the drug more rapidly than the rate specified in the PDR.

In his deposition, Dr. Coleman acknowledged that the PDR is a commonly accepted and recognized treatise in the field of prescription drugs. In addition, Dr. Coleman referred to the PDR in his testimony to establish the standard of care in this matter, as well as to demonstrate that he did not breach the standard of care.⁵ The relevant portions of the PDR advise that intravenous injections of Phenergan "should be given in a concentration no greater than 25 mg/mL as at rate not to

⁵ Courts have approved the use of the PDR and the manufacturer's labeling and instructions for a prescription drug to establish the standard of care owed by a physician and a *prima facie* showing of negligence. See Terrebonne v. Floyd, 99-0766, pp. 8-9 (La. App. 1st Cir. 5/23/00), 767 So.2d 758, 763, writ not considered, 2000-1931 (La. 9/29/00), 769 So.2d 549; Fournet v. Roule-Graham, 2000-1653, p. 5 (La. App. 5th Cir. 3/14/01), 783 So.2d 439, 443, writ denied, 2001-0985 (La. 6/15/01), 793 So.2d 1242.

exceed 25 mg per minute.” Despite this caution, Dr. Coleman testified that he gave LW an injection containing 50 mg of Phenergan at a concentration of 50mg/mL. Nevertheless, Dr. Coleman testified that he had complied with the PDR and had not breached the standard of care, because he administered the injection to LW over a period of two minutes. According to Dr. Coleman, the timing of the injection resulted in the Phenergan being administered at the rate of 25 mg per minute mandated by the PDR. Dr. Coleman acknowledged that he had some difficulty in administering the injection to LW because she had small veins. In fact, he initially tried to administer the injection with a 23-gauge needle on a syringe, but was unable to reach the vein with that needle. Therefore, he chose to switch to a butterfly needle, with which he successfully performed the injection.

LW contradicted Dr. Coleman’s testimony in her affidavit and deposition by stating that the injection took “less than a matter of seconds” to administer, and that Dr. Coleman did not use a butterfly needle or an IV infusion kit to administer the injection. She further testified that she immediately advised Dr. Coleman that the injection was causing her pain, and after the procedure, she went to Dr. Coleman and showed him a bruise on her arm at the injection site.

This conflicting evidence raises questions of fact and credibility concerning the issue of whether Dr. Coleman complied with the relevant portions of the PDR. As noted above, such questions cannot be resolved on a motion for summary judgment. Furthermore, the evidence in the record clearly suggests that something went wrong with the Phenergan injection. A necrotic lesion formed at the site of the injection, and the PDR indicates that such lesions may occur from the subcutaneous injection of Phenergan, which is proscribed by the PDR. Moreover, Dr. Coleman acknowledged in his deposition that one possible cause of the necrotic lesion was that a vein had been blown open during the injection, which resulted in the drug spilling into the tissue around the injection site. Accordingly,

we find that genuine issues of material fact remain as to this issue.⁶

CONCLUSION

For the foregoing reasons, the judgment of the trial court, granting the defendants' motion for summary judgment, is reversed, and the matter is remanded to the trial court for further proceedings. All costs of this appeal are assessed to defendants, Dr. Adrian Coleman and Delta Clinic of Baton Rouge, Inc.

REVERSED AND REMANDED.

⁶ Considering our findings on appellant's first three assignments of error, we do not address the fourth assignment of error.