

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 2106

MARY JANE JOHNSON

VERSUS

**CLIFFORD L. WILLIAMS, M.D.,
LOUISIANA MEDICAL MUTUAL INSURANCE COMPANY,
NORTH OAKS MEDICAL SYSTEM d/b/a NORTH OAKS HOSPITAL,
AND LOUISIANA HOSPITAL ANNUITY TRUST FUND**

Judgment Rendered:

JUN 17 2011

On Appeal from the 21st Judicial District Court
In and For the Parish of Tangipahoa
Trial Court No. 2007-0001228, Division "E"

Honorable Brenda Bedsole Ricks, Judge Presiding

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Louisiana Medical Mutual Insurance
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BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

Trinity, P. Conner

PHH

HUGHES, J.

This is an appeal of a judgment that granted a summary judgment in favor of the defendants on the issue of causation in a medical malpractice action and dismissed the plaintiff's claim. For the following reasons, we affirm the summary judgment of the district court.

FACTS AND PROCEDURAL HISTORY

On November 22, 2003 Mr. Johnnie Smith¹ sought treatment at the emergency department of North Oaks Hospital for a hip fracture he suffered from a fall at his home. Mr. Smith was an elderly blind man with a history of diabetes mellitus, Type II, and in end-stage renal failure with chronic hemodialysis. He was administered Demerol for the pain and was admitted to the hospital where he underwent surgery to repair the hip fracture. Mr. Smith was also administered Demerol a second time two days later, on November 24, 2003, just prior to his hip surgery. While in the hospital, Mr. Smith suffered periods of apnea, mental status changes, and overall, had a poor appetite. He remained on dialysis treatment throughout his stay. On December 1, 2003 Mr. Smith was transferred to the ICU where he suffered a heart attack and died.

Plaintiff Ms. Mary Jane Smith, the widow of the deceased, filed suit against the hospital and Dr. Clifford Williams, alleging that they had committed malpractice in administering Demerol² to Mr. Smith and in failing to ensure that he received the proper hydration and nutrition during his hospital stay.³ Plaintiff

¹ While the original petition was filed by Mary Jane Johnson, alleging damages for the death of Johnnie Johnson, the petition was later amended to correct the names to Mary Jane Smith and Johnnie Smith. In this opinion, we will refer to plaintiff as Mary Jane Smith and to the deceased as Johnnie Smith.

² Plaintiff alleges, and the medical records support that Demerol is a drug for the treatment of pain and is "contraindicated" for renal failure patients.

³ Because Ms. Smith's claims allege medical malpractice and both defendants are "qualified" health care providers, under the Medical Malpractice Act, LSA-R.S. 40:1299.41, *et seq.*, she was first required to file a complaint with the Patient's Compensation Fund and convene a medical review panel. On January 29, 2007 the panel rendered a unanimous opinion in favor of both Dr. Williams and North Oaks Hospital.

alleges that those acts of malpractice resulted in a lost chance of Mr. Smith surviving the subsequent heart attack and thus, plaintiff is entitled to damages.

Defendants filed a motion for partial summary judgment on the issue of causation. After a hearing on the motion, the district court entered judgment in favor of defendants, finding that plaintiff had failed to carry her burden of proof as to causation, and dismissed plaintiff's claim. This appeal followed.

LAW AND ANALYSIS

The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action, except those disallowed by LSA-C.C.P. art. 969; the procedure is favored and shall be construed to accomplish these ends. LSA-C.C.P. art. 966(A)(2). Summary judgment shall be rendered in favor of the mover 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. LSA-C.C.P. art. 966(B).

Appellate courts review summary judgments *de novo* under the same criteria that govern a district court's consideration of whether summary judgment is appropriate. **Samaha v. Rau**, 2007-1726, pp. 3-4 (La. 2/26/08), 977 So.2d 880, 882; **Allen v. State ex rel. Ernest N. Morial-New Orleans Exhibition Hall Authority**, 2002-1072, p. 5 (La. 4/9/03), 842 So.2d 373, 377; **Boudreaux v. Vankerkhove**, 2007-2555, p. 5 (La. App. 1 Cir. 8/11/08), 993 So.2d 725, 729-30. In ruling on a motion for summary judgment, the judge's role is not to evaluate the weight of the evidence or to determine the truth of the matter, but instead to determine whether there is a genuine issue of triable fact. All doubts should be resolved in the non-moving party's favor. **Hines v. Garrett**, 2004-0806, p. 1 (La. 6/25/04), 876 So.2d 764, 765.

A fact is material if it potentially insures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of the legal dispute. A genuine issue is one as to which reasonable persons could disagree; if reasonable persons could reach only one conclusion, there is no need for trial on that issue and summary judgment is appropriate. **Id.**, 2004-0806 at p. 1, 876 So.2d at 765-66.

When a motion for summary judgment is made and supported as provided in LSA-C.C.P. art. 967, an adverse party may not rest on the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in LSA-C.C.P. art. 967, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be rendered against him. LSA-C.C.P. art. 967(B). See also **Board of Supervisors of Louisiana State University v. Louisiana Agricultural Finance Authority**, 2007-0107, p. 9 (La. App. 1 Cir. 2/8/08), 984 So.2d 72, 79-80; **Cressionnie v. Intrepid, Inc.**, 2003-1714, p. 3 (La. App. 1 Cir. 5/14/04), 879 So.2d 736, 738. Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. **Richard v. Hall**, 2003-1488, p. 5 (La. 4/23/04), 874 So.2d 131, 137; **Dyess v. American National Property and Casualty Company**, 2003-1971, p. 4 (La. App. 1 Cir. 6/25/04), 886 So.2d 448, 451, writ denied, 2004-1858 (La. 10/29/04), 885 So.2d 592; **Cressionnie**, 2003-1714 at p. 3, 879 So.2d at 738-39.

While the burden of proof remains with the movant, if the moving party will not bear the burden of proof on the issue at trial and points out that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense, then the non-moving party must produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial. If the opponent of the motion fails to do so, there is no genuine issue of

material fact and summary judgment will be granted. **Cressionnie** 879 So.2d at 738.

To succeed in a medical malpractice claim, LSA-R.S. 9:2794 provides that the plaintiff must prove three elements by a preponderance of the evidence. Those elements, in summary, are: 1) the plaintiff must establish the standard of care applicable to the doctor; 2) the plaintiff must show that the doctor violated that standard of care; and 3) the plaintiff must show a causal connection between the doctor's alleged negligence and the plaintiff's injuries resulting therefrom. See **Pfiffner v. Correa**, 94-0924 (La. 10/17/94), 643 So.2d 1228, 1233.

To establish the causation element in a situation where the patient dies, the plaintiff need only prove that the defendant's malpractice resulted in the patient's loss of a chance of survival. The plaintiff is not required to shoulder the unreasonable burden of proving that the patient would have survived if properly treated. **Etcher v. Neumann, M.D.**, 2000-2282 (La. App. 1 Cir. 12/28/01), 806 So.2d 826, writ denied, 2002-0905 (La. 5/31/02), 817 So.2d 105; **Martin v. East Jefferson General Hospital**, (La. 1991), 582 So.2d 1272, 1278. The question of whether the malpractice contributed to the death, *i.e.*, lessened the chance of survival, is a question of fact for the jury. **Etcher**, 2000-2282 at p. 12, 806 So.2d at 837, **Hastings v. Baton Rouge General Hosp.**, 498 So.2d 713, 720 (La. 1986).

To meet his burden of proof regarding malpractice and causation, a plaintiff is generally required to produce expert medical testimony. **Lefort v. Venable**, 95-2345, p. 4 (La. App. 1 Cir. 6/28/96), 676 So.2d 218, 220. Although the jurisprudence has recognized exceptions in instances of obvious negligence, these exceptions are limited to "instances in which the medical and factual issues are such that a lay jury can perceive negligence in the charged physician's conduct as well as any expert can." **Pfiffner**, 94-0924 at p. 9, 643 So.2d at 1234; see also **Coleman v. Deno**, 2001-1517, p. 20 (La. 1/25/02), 813 So.2d 303, 317. Some

examples given by the supreme court of this type of injury are if a doctor fractures a patient's leg during an examination; amputates the wrong arm; drops a knife, scalpel, or acid on a patient; or leaves a sponge in a patient's body. **Pfiffner**, 94-0924 at p. 9, 643 So.2d at 1233. Otherwise, the jurisprudence has recognized that "an expert witness is generally necessary as a matter of law to prove a medical malpractice claim." **Fagan v. Leblanc**, 2004-2743, p. 6 (La. App. 1 Cir. 2/10/06), 928 So.2d 571, 575 (*citing Williams v. Metro Home Health Care Agency, Inc.*, 2002-0534, p. 5 (La. App. 4 Cir. 5/8/02), 817 So.2d 1224, 1228).

In support of their motion for summary judgment, the defendants produced the depositions of four physicians and the opinion and reasons of the medical review panel, finding that defendants did not breach the applicable standard of care in their treatment of Mr. Smith. No physician provided testimony that any actions of the defendants resulted in a lost chance of Mr. Smith's survival of the heart attack that caused his death. Ms. Smith alleges that the trial court erred in granting summary judgment. She relies solely on the medical records of Mr. Smith.

As noted above, the initial burden of proof lies with defendants as the movers. But because the defendants have specifically alleged an absence of support for Ms. Smith's claims of malpractice and a resulting lost chance of survival, which are essential to her claim, LSA-C.C.P. art. 966(C)(2) requires Ms. Smith to produce factual support sufficient to establish that she would be able to satisfy her evidentiary burden of proof at trial. If she fails to do so, there is no genuine issue of material fact and summary judgment is appropriate. Moreover, Ms. Smith cannot rest on the mere allegations or denials of her pleadings, but must present evidence that will establish that material facts are still at issue. **Cressionnie**, 2003-1714 at p. 3, 879 So.2d at 738.

Even assuming that Ms. Smith has sufficiently proven that the defendants committed malpractice in the administration of Demerol to Mr. Smith or in the

failure to ensure that Mr. Smith took in the recommended amounts of nutrition and hydration during his hospital stay, she also has the burden of providing evidence that those acts of malpractice resulted in a lost chance of survival. After review, we conclude that this is not a case that falls into the jurisprudential exception negating the necessity of supporting expert medical testimony. The medical records provided indicate that Mr. Smith suffered from a long history of diabetes, that he was in the end stages of renal failure and on hemodialysis, that he had undergone surgery days prior to the heart attack, that his appetite was poor and he was not tolerating and/or refusing to ingest adequate amounts of water and nutrition, and that further, against the recommendations of defendants, Mr. Smith's family refused the placement of a feeding tube. Those factors also impacted Mr. Smith's health and, in the opinion of the medical review panel, "the complications [Mr. Smith] encountered were consistent with end stage renal failure and diabetes." While we understand that plaintiff, in this case, is only required to prove a lost chance of survival, assuming that she has proven malpractice, we conclude that the interaction of any possible malpractice with Mr. Smith's poor health would require expert medical testimony to establish the causation of any harm suffered by Mr. Smith. Without that medical testimony to link a breach of the standard of care to a lost chance of survival of a heart attack, Ms. Smith failed to carry her burden of proof. We therefore affirm the summary judgment as granted.

CONCLUSION

For the reasons assigned herein, the portion of the judgment that granted a partial summary judgment in favor of defendants, North Oaks Hospital and Dr. Clifford Williams, is affirmed. All costs of this appeal are assessed to the plaintiff, Ms. Smith.

AFFIRMED.