

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2010 CA 1876**

**MONICA A. MAJOR AND CEDRIC ALLEN**

**VERSUS**

**BATON ROUGE GENERAL MEDICAL CENTER, ET AL.**

Judgment Rendered: May 6, 2011

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On Appeal from the 19th Judicial District Court  
In and For the Parish of East Baton Rouge  
Trial Court No. 566,590, Division "C", Section 25

Honorable Wilson E. Fields, Judge Presiding

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Herbert J. Mang, Jr.  
Tara S. Bourgeois  
Lauren Byrd Reed  
Garrett S. Callaway  
Baton Rouge, Louisiana

Counsel for Defendant/Appellant  
Dr. Leland C. Lenahan, III

Sumpter B. Davis, III  
Baton Rouge, Louisiana

Counsel for Plaintiffs/Appellees  
Monica A. Major and Cedric Allen

\*\*\*\*\*

BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

## **HUGHES, J.**

This is an appeal of the portion of a judgment<sup>1</sup> that granted a partial summary judgment in favor of plaintiffs, Monica A. Major and Cedric Allen, holding that defendant, Leland C. Lenahan, M.D., breached the standard of care applicable to the treatment of their mother, Julia Allen. For the following reasons, we reverse that portion of the judgment of the district court.

### **FACTS AND PROCEDURAL HISTORY**

On August 7, 2005 Ms. Julia Allen, plaintiffs' mother, sought treatment at the Baton Rouge General Medical Center's emergency room for pain caused by an abscess in her abdomen. Dr. Leland C. Lenahan was the emergency room physician who treated Ms. Allen. The lab work that was ordered during Ms. Allen's treatment revealed that she had a low serum potassium level of 2.9.<sup>2</sup> According to Dr. Lenahan, he ordered oral potassium to be administered to Ms. Allen. Whether the potassium was ordered or administered is disputed. It is undisputed that no follow-up lab work was performed to recheck Ms. Allen's potassium level before she was discharged from the emergency room that same evening. Within an hour after returning home, Ms. Allen awoke with shortness of breath and difficulty breathing. An ambulance was called, Ms. Allen was transported to River West Medical Center, and she was pronounced dead at 6:43 a.m. on August 8, 2005.

On May 1, 2008 the plaintiffs filed suit against Baton Rouge General Medical Center and Dr. Lenahan for the wrongful death of their mother and damages arising therefrom. Because Baton Rouge General Medical Center and Dr. Lenahan are qualified healthcare providers, plaintiffs were required to seek the

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<sup>1</sup> The judgment on appeal both grants plaintiffs' motion for partial summary judgment on the issue of breach of the standard of care against Dr. Lenahan and denies plaintiffs' motion for partial summary judgment on the issue of causation. The only issue on appeal is the grant of the motion for partial summary judgment on the issue of breach of the standard of care.

<sup>2</sup> The normal serum potassium level range is 3.6-5.1, according to the affidavit of Dr. Lenahan.

opinion of a medical review panel prior to filing suit. The medical review panel was convened and met on December 3, 2007. The panel found that Dr. Lenahan breached the standard of care regarding the treatment of Ms. Allen's hypokalemia (low potassium level), but it could not render an opinion regarding whether that caused or contributed to Ms. Allen's death.

On June 11, 2010 plaintiffs filed a motion for partial summary judgment on the issues of fault and causation, claiming that there were no genuine issues of material fact regarding the appropriate standard of care, whether Dr. Lenahan breached that standard of care, and whether that breach caused their mother's death. In support of their motion, plaintiffs relied on four exhibits: 1.) the opinion of the medical review panel, 2.) an affidavit of Wesley Blocker, M.D., stating that he found that Dr. Lenahan had breached the applicable standard of care, 3.) excerpts from the deposition of Jonathan Marmur, M.D., and 4.) excerpts from the deposition of Monica Major.

Dr. Lenahan filed an opposition to the partial motion for summary judgment and attached to his opposition an affidavit wherein he attested:

That he was and is a medical doctor, licensed to practice medicine in the State of Louisiana, both in August of 2005 and at the present time.

That he practices the medical specialty of emergency medicine.

\* \* \*

That affiant is well aware of the standard of care applicable to physicians who practice in the medical specialty of emergency medicine.

That it is affiant's expert medical opinion that the treatment of Julia Allen was at all times appropriate and well within the standard of care applicable to the medical specialty of emergency medicine.

That it is affiant's expert medical opinion that a potassium level of 2.9 is not indicative of life-threatening hypokalemia and is not a sufficiently low level of potassium to cause a cardiac arrhythmia.

That affiant did order that KCl (potassium chloride) 40 be administered to Julia Allen by mouth.

That it is affiant's expert medical opinion that administration of KCl (potassium chloride) 40 by mouth, as was ordered by affiant, is a reasonable and appropriate treatment for Julia Allen's potassium level of 2.9 under the circumstances then presented.

That it is affiant's expert medical opinion that, contrary to the opinion of the medical review panel, affiant did not fail to properly monitor Julia Allen's response to his intervention.

That it is affiant's expert medical opinion that, contrary to the opinion of the medical review panel, the standard of care applicable to physicians practicing the medical specialty of emergency medicine does not, and did not at the time, require that the potassium level of a patient with a potassium level of 2.9 be rechecked to measure the effectiveness of the original intervention or to determine whether further treatment or observation was necessary prior to discharge under the circumstances then presented.

That no autopsy was performed to determine the cause of Julia Allen's death.

That it is affiant's expert medical opinion that, judging from Julia Allen's symptoms as described in the depositions of Monica Major and Brione Major, hypokalemia (low potassium level) did not cause or contribute to Julia Allen's death, but, instead, that Julia Allen's death was the result of her long history of uncontrolled diabetes mellitus, hypertension, hyperlipidemia and congestive heart failure rather than her potassium level.

That the death certificate and Dr. Antonio Edwards' statement regarding Mrs. Allen's death further confirm that her death was the result of her long history of uncontrolled diabetes mellitus, hypertension, and hyperlipidemia rather than her potassium level.

After a hearing, the trial court granted plaintiffs' motion for partial summary judgment on the issue of fault, finding that there was no genuine issue of material fact concerning whether Dr. Lenahan breached the applicable standard of care. Dr. Lenahan appeals.

## **LAW AND ANALYSIS**

### **I. Summary Judgment**

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 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.

On motion for summary judgment, the burden of proof is with the movant. If the issue before the court on the motion for summary judgment is one on which the party bringing the motion will bear the burden of proof at trial, the burden of showing that there is no genuine issue of material fact remains on the party bringing the motion. See LSA-C.C.P. art. 966(C)(2). **Buck's Run Enterprises**,

**Inc. v. Mapp Const., Inc.**, 1999-3054, p. 4 (La. App. 1 Cir. 2/16/01), 808 So.2d 428, 431.

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.

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 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.

To meet this burden of proof, 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 (La. App. 1 Cir. 2/10/06), 928 So.2d 571 (*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).

To satisfy their burden of proving the applicable standard of care and Dr. Lenahan’s breach of that standard, plaintiffs relied upon the opinion of the medical review panel. However, Dr. Lenahan opposed the motion by providing his own affidavit wherein he contradicted plaintiffs’ experts’ version of the applicable standard of care, and consequently, whether he breached the standard of care owed to Ms. Allen. While the report of the expert opinion reached by the medical review panel is admissible as evidence in any action subsequently brought by the claimant in a court of law, it is not conclusive. LSA-R.S. 40:1299.47(H). Moreover, the fact that a witness is a party does not preclude that witness from being qualified as an expert. **Bozarth v. State LSU Medical Center/Chabert Medical Center**, 2009-1393 (La. App. 1 Cir. 2/12/10), 35 So.3d 316, **Pelts & Skins Export, Ltd. v. State ex rel. Department of Wildlife and Fisheries**, 97–2300, p. 4 (La. App. 1 Cir. 4/1/99), 735 So.2d 116, 122, writs denied, 99–2036 and 99–2042 (La.

10/29/99), 748 So.2d 1167 and 1168. Additionally, LSA-R.S. 9:2794(D)(5) specifically provides that a physician shall not be prohibited from qualifying as an expert solely because he is a defendant in a medical malpractice claim.

On review, Dr. Lenahan's affidavit clearly states his competence to provide expert testimony regarding his emergency treatment of Julia Allen. He is actively working in the field of emergency medicine and was the emergency room physician responsible for Ms. Allen's care. Therefore, the affidavit provided is based upon his personal knowledge and meets the requirements of LSA-C.C.P. art. 967.<sup>3</sup> His expert medical opinion directly opposes the opinions of the members of the medical review panel, and thus, creates a genuine issue of material fact as to the standard of care applicable to the treatment of Ms. Allen under the circumstances presented, and his breach thereof. We therefore conclude that the trial court erred in granting summary judgment in part.

## **II. Plaintiff's failure to formally introduce affidavits**

Dr. Lenahan also argues that the partial motion for summary judgment should be reversed due to the plaintiffs' failure to formally introduce their affidavits at the hearing on the motion for summary judgment, even though the affidavits were attached to the motion for summary judgment and memorandum in support of, and were filed into the trial court record. While we have mooted any discussion of this assignment of error with our conclusion above, we note that there is no procedural requirement for evidence such as affidavits, depositions, or

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<sup>3</sup> LSA-C.C.P. art. 967, in pertinent part, states:

A. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. The supporting and opposing affidavits of experts may set forth such experts' opinions on the facts as would be admissible in evidence under Louisiana Code of Evidence Article 702, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or by further affidavits.



admissions to be formally introduced into evidence at the hearing on a motion for summary judgment; all that LSA-C.C.P. art. 966(B) requires is that such evidence be "on file" in the record. See **Aydell v. Sterns**, 1998-3135 (La. 2/26/99), 731 So.2d 189. See also **Cichirillo v. Avondale Industries, Inc.**, 2004-2894 (La. 11/29/05), 917 So.2d 424; **Anderson v. Allstate Ins. Co.**, 93-1102 (La. App. 1 Cir. 4/8/94), 642 So.2d 208, writ denied, 1994-2400 (La. 11/29/94, 646 So.2d 404; **Hopper v. Crown**, 560 So.2d 890 (La. App. 1 Cir. 1990); **Johnson v. Slidell Mem'l Hosp.**, 552 So.2d 1022, 1023 (La. App. 1 Cir. 1989), writ denied, 558 So.2d 571 (La. 1990).

### CONCLUSION

For the reasons assigned herein, the portion of the judgment that granted a partial summary judgment in favor of plaintiffs, Monica A. Major and Cedric Allen , and against Dr. Leland C. Lenahan, finding that Dr. Lenahan breached the standard of care, is reversed. All costs of this appeal are assessed to plaintiffs, Monica A. Major and Cedric Allen.

**REVERSED.**