

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2009 CA 0412

NORMA FAYE REPP

VERSUS

SHERWOOD MANOR REHABILITATION AND  
NURSING HOME LIMITED PARTNERSHIP, ET AL.

Judgment Rendered: December 23, 2009

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Appealed from the  
Nineteenth Judicial District Court  
In and for the Parish of East Baton Rouge, Louisiana  
Trial Court Number 518,036

Honorable William A. Morvant, Judge

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BEFORE: WHIPPLE, HUGHES, AND WELCH, JJ.

WELCH, J.

Plaintiff, Norma Faye Repp, appeals a summary judgment rendered in favor of defendants, Sherwood Manor Rehabilitation & Nursing Home Limited Partnership, SMRN, Inc., DDB Enterprises, Inc., and Karen Lee Fontenot, Trustee of the Brown Children Class Trust (collectively referred to as Sherwood Manor), dismissing this negligence action. We reverse and remand.

### **BACKGROUND**

On March 12, 2004, Ms. Repp filed this lawsuit against Sherwood Manor, the owner and operator of a nursing home, seeking damages for an injury she sustained while she was a resident at the nursing home. She alleged that on February 15, 2002, she was admitted to Sherwood Manor for complications following a stroke. Ms. Repp averred that while she was a resident of Sherwood Manor, she was a victim of abuse and/or neglect by the employees and staff of Sherwood Manor, including assault and battery. She further alleged that on March 27, 2002, while she was being moved by Sherwood Manor staff from her bed to a wheelchair, she was dropped, causing her to break her arm. Ms. Repp charged that these acts constituted “fault” under Louisiana law and/or violations of the Louisiana Nursing Home Residents Bill of Rights, La. R.S. 40:2010.8.

Sherwood Manor filed a motion for summary judgment on the sole basis that Ms. Repp did not have expert testimony in support of her claim, asserting that without such testimony, Ms. Repp could not meet her burden of establishing negligence as a matter of law. In support of its motion for summary judgment, Sherwood Manor offered the opinion of the medical review panel, which found that the evidence did not support the conclusion that Sherwood Manor failed to meet the applicable standard of care. In reasons for ruling, the panel stated:

The panel feels that this was really an accident which did not reflect poor care nor a breach of the standard of care. According to the patient’s functional rating, under the category of “transfers”, the

patient was required to have only one assistant for transfer as was the case in this matter.

The panel feels that the medical assistant had to move the wheel chair in order to adequately use proper body mechanics in order to put the patient in a reclined position in bed. When she turned to move the wheelchair, the patient likely shifted her weight and fell. This is not a reflection of negligent care of the nursing home or the medical assistant.

Sherwood Manor also offered the affidavit of panel member Dr. Gerald Barber, who attested that the panel's ruling was unanimous and that the ruling continued to be his opinion. Additionally, Sherwood Manor offered its interrogatories asking Ms. Repp to identify each expert she intended to use to establish a breach of the standard of care, and Ms. Repp's answer thereto that she had not retained any expert witnesses, but reserved the right to supplement the answer in the future. Ms. Repp also stated that she may call her treating physician to testify as to her medical condition.

In its motion for summary judgment, Sherwood Manor claimed that upon her admission to Sherwood Manor, Ms. Repp was determined to need "maximal assistance" for bed to chair transfers, but by March 21, 2002, she had improved to need only "moderate assistance" for bed to chair transfers. Sherwood Manor urged that expert testimony was needed to establish what level of assistance it was obligated to provide to Ms. Repp. Sherwood Manor argued that it was entitled to summary judgment based on the opinion of the medical review panel that Ms. Repp failed to show that the standard of care was breached and the absence of any expert testimony in support of Ms. Repp's claim regarding the appropriate standard of care and breach thereof.

In opposition to the motion for summary judgment, Ms. Repp asserted that there are genuine issues of material fact as to Sherwood Manor's fault, precluding summary judgment. She submitted that this case did not involve medical decision making or medical treatment, but presented the issue of whether a resident of a

nursing home fell because the nursing home did not follow its own rules for preventing this type of accident, a decision a jury could easily make without expert testimony regarding the standard of care.

In opposition to the motion, Ms. Repp submitted hospital records, some assessment forms, the deposition testimony of Dwanda Polk, who assisted in her transfer, the incident report following her fall, the affidavit of Susan Jones, Ms. Repp's daughter, an excerpt of the deposition of Susan Thoms, Sherwood Manor's Director of Nursing who investigated the incident, and two unsworn statements.<sup>1</sup>

It is undisputed that Ms. Repp suffered a stroke and was admitted to Sherwood Manor on February 15, 2002, for inpatient care. Upon her admission, she was determined to need "maximal assistance" for bed to chair transfers. However, by March 21, 2002, Ms. Repp was determined to need only "moderate assistance" for bed to chair transfers.

The evidence on the motion for summary judgment shows that on March 27, 2002, Ms. Polk, a nurse's assistant in training, assisted in transferring Ms. Repp from her wheelchair to her bed. While Ms. Repp was sitting on the bed, she attempted to move further back onto the bed. However, Ms. Repp fell off the bed, and Ms. Polk failed to prevent Ms. Repp's fall to the floor, from which Ms. Repp sustained a fractured shoulder and a fractured wrist.

In her deposition, Ms. Polk stated that she had been working at Sherwood Manor for a couple of months before the incident, had never worked in a nursing home before, and had not received nurse's training before working for Sherwood Manor. Ms. Polk stated that she understood that as part of her training, she was

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<sup>1</sup> Ms. Repp attached unsworn statements of Ms. Polk and Ms. Thoms and unverified medical records to her motion for summary judgment. Louisiana Code of Civil Procedure articles 966 and 967 do not permit a party to utilize unsworn and unverified documents as summary judgment evidence. **Sanders v. J. Ray McDermott, Inc.**, 2003-0064, p. 6 (La. App. 1<sup>st</sup> Cir. 11/7/03), 867 So.2d 771, 775. Thus, in our *de novo* review of the record, we shall not consider the medical records or the statements, all of which were not verified or not in affidavit form. Also, we do not consider the affidavit of Susan Jones, which contains hearsay statements, and which was objected to at the hearing on the motion for summary judgment.

supposed to have a certified nurse's assistant or CNA with her at all times because she was not certified. Ms. Polk could not recall if she had any actual training in wheelchair to bed transfers.

Ms. Polk stated that on the day in question, Ms. Repp was wearing a boot or had a plastic brace on her leg. Ms. Polk, who was pregnant at the time, transferred Ms. Repp from the wheelchair to the bed. Ms. Polk did not remove Ms. Repp's boot prior to the transfer, but acknowledged that normally, patients were transferred without the boot. According to Ms. Polk, Ms. Repp tried to push herself back onto the bed, but slipped because she had a cast on her leg without any rubber underneath it. Ms. Polk, who weighed 103 pounds at the time, attested that she tried to hold onto Ms. Repp to keep her from falling but could not because of Ms. Repp's weight. She agreed that two people were required to assist in wheelchair to bed transfers.

Ms. Repp also attached an excerpt of the deposition of Susan Thoms, Sherwood Manor's Director of Nursing, who investigated Ms. Repp's fall. Ms. Thoms was asked about an incident report generated after Ms. Repp's fall containing comments and/or steps to prevent the occurrence. As to the first, to take the boot off prior to transfer, Ms. Thoms acknowledged that prior to the fall, Ms. Repp was wearing a boot on her foot. She stated that because Ms. Repp fell when she tried to lift herself back on the bed, it was assumed that the boot prevented her from scooting back on the bed. She also admitted that in hindsight, had Ms. Repp had the boot off, she might not have fallen. Ms. Thoms stated that she wrote the second recommendation on the report -- to provide two people to assist in transfer. She stated that one person always handled Ms. Repp's transfers before this fall with no problem, but she wrote the recommendation to prevent future problems. She also acknowledged, however, that Ms. Repp had fallen before. Additionally, Ms. Thoms stated that the term "maximum assistance" as it

related to bed to chair transfers meant that a person could not weight-bear on either extremity and would take the full assistance of a staff member to lift the person from a bed to a chair.

After considering the evidence, the trial court granted Sherwood Manor's motion for summary judgment, finding that Ms. Repp's evidence in opposition to the motion reflected no negligence on the part of Ms. Polk or a breach of the appropriate standard of care. The court concluded that in the absence of such evidence, in order to determine the appropriate standard of care, a determination would have to be made as to the difference between maximum assistance and minimum assistance, and without expert testimony to establish the standard of care for the nursing home and that there was a breach of that standard of care, Ms. Repp would be unable to meet her burden of proof at trial.

This appeal, in which Ms. Repp challenges the granting of summary judgment in favor of Sherwood Manor, followed.

### **DISCUSSION**

This court reviews a trial court's decision to grant or deny a motion for summary judgment *de novo*, using the same criteria that govern whether consideration of summary judgment is appropriate. **Boudreaux v. Vankerkhove**, 2007-2555, p. 5 (La. App. 1<sup>st</sup> Cir. 8/11/08), 993 So.2d 725, 729-730. The motion should be granted 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. La. C.C.P. art. 966(B). In determining whether an issue is genuine, courts cannot consider the merits, make credibility determinations, evaluate testimony, or weigh evidence. Any doubt as to a dispute regarding a material issue of fact must be resolved against granting the motion and in favor of a trial on the merits. **Haydel v. State Farm Insurance Co.**, 2005-0701, p. 4 (La. App. 1<sup>st</sup> Cir. 3/24/06), 934

So.2d 726, 728.

On a motion for summary judgment, the initial burden of proof is on the moving party. However, on issues for which the nonmoving party will not bear the burden of proof at trial, the moving party must only 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, action, or defense. Thereafter, the nonmoving party must produce factual support to satisfy its evidentiary burden at trial; if the nonmoving party fails to do so, there is no genuine issue of material fact. La. C.C.P. art. 966(C)(2); **Boudreaux**, 2007-2555 at p. 5, 993 So.2d at 730.

A plaintiff pursuing a claim against a nursing home 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.**, 2007-122, p. 5 (La. App. 3<sup>rd</sup> Cir. 5/30/07), 958 So.2d 135, 139, writ denied, 2007-1583 (La. 10/12/07), 965 So.2d 406; **Hinson v. The Glen Oak Retirement System**, 37,550, p. 5 (La. App. 2<sup>nd</sup> Cir. 8/20/03), 853 So.2d 726, 729, writ denied, 2003-2835 (La. 12/19/03), 861 So.2d 572. Generally, expert medical testimony is required to meet this burden of proof, especially when the defendant has filed a motion for summary judgment that is supported with expert opinion evidence. **Boudreaux v. Mid-Continent Casualty**, 2005-2453, p. 6 (La. App. 1<sup>st</sup> Cir. 11/3/06), 950 So.2d 839, 844, writ denied, 2006-2775 (La. 1/26/07) 948 So.2d 171. However, expert testimony is not required where a lay person can infer negligence from the facts. **Pfiffner v. Correa**, 94-0924, 94-0963, 94-0992, pp. 1-2 (La. 10/17/94), 643 So.2d 1228, 1230; **Gisclair v. Bonneval, M.D.**, 2004-2474, p. 5 (La. App. 1<sup>st</sup> Cir. 12/22/05), 928 So.2d 39, 42.

Ms. Repp contends that the trial court erred in granting the motion for summary judgment solely on the basis that she did not offer expert medical

testimony in support of her claim. She points out that this is not a case involving medical decision making or treatment; rather, it is a simple case of whether a nursing home is negligent for allowing a resident to fall because Ms. Polk, a nurse's aide in training, failed to follow Sherwood Manor's internal rules relative to patient transfers. Ms. Repp points to Ms. Polk's deposition testimony, in which Ms. Polk: could not recall being trained in wheelchair to bed transfers; acknowledged that as part of her training, she was supposed to have a CNA with her at all times; and acknowledged that patient transfers were one of her duties requiring that a CNA be with her. She also points to evidence involving Ms. Polk's failure to remove her boot prior to the transfer. According to Ms. Thoms, the boot may have prevented Ms. Repp from scooting back on the bed, and Ms. Thoms admitted that had Ms. Repp not had the boot on, she may not have fallen.

Sherwood Manor argues that in the expert opinion of the medical review panel, Ms. Repp was required to have only one assistant for transfers, as was the case in this matter. To overcome this expert opinion, Sherwood Manor insists, Ms. Repp will need to present testimony as to her medical condition, the assessments Sherwood Manor should have performed, the type of transfer assistance that was required for a patient in Ms. Repp's condition, and whether the appropriate level of assistance was provided. Without expert testimony, Sherwood Manor argues, Ms. Repp will not be able to establish the appropriate standard of care or a breach of the standard of care and will be unable to carry her burden at trial.

We disagree. Under the facts of this case, Ms. Repp's failure to produce expert medical testimony to establish what level of assistance Sherwood Manor was required to provide her with in wheelchair to bed transfers based on her medical condition does not entitle Sherwood Manor to summary judgment. Even if, from a medical standpoint, Ms. Repp's medical condition was such that only one person was required to assist her in wheelchair to bed transfers, a jury could

find negligence in the one-person transfer that in fact occurred in this case. A jury could find that Sherwood Manor was negligent in allowing Ms. Polk, an untrained, unsupervised, 103-pound nurse's assistant, to provide the sole assistance in the transfer of a heavier non-ambulatory patient from a wheelchair to her bed, particularly in light of Ms. Polk's testimony that she was supposed to have a CNA with her at all times and her admission that she could not prevent Ms. Repp from falling because Ms. Repp was too heavy. Additionally, if it is shown at trial that the boot should have been removed prior to the transfer and Ms. Polk's failure to remove the boot contributed to Ms. Repp's fall, a jury could find negligence on that basis. In either scenario, if the facts are proven at trial, certainly a lay jury could perceive negligence in that conduct as well as any expert could. See Schilling v. Grace Health and Rehabilitation, 2007-0424, pp. 2-3 (La. App. 1<sup>st</sup> Cir. 11/2/07)(unpublished), wherein another panel of this court held that expert medical testimony was not required to meet the plaintiff's burden of proving negligence against a nursing home where the allegation was that an elderly, non-ambulatory nursing home resident was dropped and her resulting injury was left untreated. Therefore, we find that the trial court erred in granting summary judgment in favor of Sherwood Manor solely on the basis that Ms. Repp did not offer expert evidence in support of her claim.

### **CONCLUSION**

Based on the foregoing, the judgment appealed from is reversed, and the case is remanded to the trial court for proceedings consistent with this opinion. All costs of this appeal are assessed to Sherwood Manor Rehabilitation and Nursing Limited Partnership, et al.

**REVERSED AND REMANDED.**