

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

*JAW*

**2009 CA 0544**

**PHYLLIS NASH**

**VERSUS**

**STATE OF LOUISIANA THROUGH THE  
DEPARTMENT OF CORRECTIONS**

Judgment Rendered: December 23, 2009

\*\*\*\*\*

On Appeal from the 18<sup>th</sup> Judicial District Court  
In and For the Parish of Iberville  
Trial Court No. 63,266, Division "D"

Honorable William C. Dupont, Judge Presiding

\*\*\*\*\*

J. Courtney Wilson  
Metairie, LA

Counsel for Plaintiff/Appellant  
Phyllis Nash

James "Buddy" Caldwell  
Attorney General  
Rodney Ramsey  
Assistant Attorney General  
Baton Rouge, LA

Counsel for Defendant/Appellee  
State of Louisiana, through the  
Department of Corrections

\*\*\*\*\*

**BEFORE: WHIPPLE, HUGHES, AND WELCH, JJ.**

*UCW concurs and assigns reasons by JAW*

## **HUGHES, J.**

This is an appeal of a judgment which granted summary judgment in favor of the defendant, State of Louisiana, through the Department of Public Safety and Corrections (DPSC), and dismissed the claims of the plaintiff, Phyllis Nash.

### **FACTS AND PROCEDURAL HISTORY**

The plaintiff is a former inmate of the Louisiana Correctional Institute for Women (LCIW). Ms. Nash was originally incarcerated in Jefferson Parish, but in April 2004 she was transferred to LCIW, St. Gabriel. At the time that Ms. Nash was incarcerated, she suffered from a hip injury that was caused by a motor vehicle accident in 1992. According to Ms. Nash, at the time that she was transferred to LCIW she was in need of a right hip replacement for that injury.

On December 16, 2005 Ms. Nash filed a petition for damages against DPSC, alleging that “[d]espite repeated requests and assurances [from its LCIW employees] that [s]he would get an orthopedic appointment, she was never seen by an orthopedic doctor such that her hip continued to deteriorate and cause her increased pain, disability, and emotional distress.” Plaintiff alleged that the actions (or inactions) of DPSC amounted to negligence and she prayed for damages. Ms. Nash later urged negligence in DPSC’s failure to follow up on her orthopedic referrals.

DPSC responded by filing objections raising the peremptory exceptions of no cause of action for failure to exhaust administrative remedies, no cause of action for failure to state a claim upon which relief could be granted, prescription, and, alternatively, a motion for summary judgment. DPSC voluntarily withdrew its objection raising the exception of no cause of action for failure to exhaust administrative remedies due to “new evidence being provided to the client.”<sup>1</sup> As

---

<sup>1</sup> This issue was not addressed by the trial court and is not before us on appeal.

such, a hearing was held only on the objections raising the exceptions of no cause of action for failure to state a claim upon which relief may be granted, prescription, and the motion for summary judgment. Following that hearing, the trial court denied the exceptions and granted the motion for summary judgment. In oral reasons for judgment, the trial court stated:

Well, I've looked at the petition, I've read the petition and the petition is – I mean, it's only one page, okay, and I have problems as I said when I started I wanted to try and figure out exactly what it was saying, okay. I truly do not believe from what I see said here, whether you call it a No Cause of Action, whether you call it a Summary Judgment, I'm going to grant the Summary Judgment because I do not believe we have a case here against the State of Louisiana for not treating – for this lady who comes in with an existing condition of just pain. I have no indication she even needs a hip replacement or any of this nature of whether it would have or would not have – I just do not see enough in this petition. You may be right on the prescriptive issue; I'm not even going to go there. If it gets up, the Court of Appeal can handle that aspect of it, but the Court is going to grant the Summary Judgment in regard to this matter.

The written judgment was signed on June 19, 2008. The judgment holds that “the Motion for Summary Judgment is hereby granted” and that “the Exceptions of No Cause of Action and Prescription are denied.” Ms. Nash appealed the judgment but DPSC did not. As such, the issue of the trial court's denial of the objections raising the exceptions of no cause of action and prescription are not before us on appeal.

Regarding Ms. Nash's appeal, she asserts one assignment of error: The summary judgment should not have been granted because there are issues of material fact in dispute. While DPSC did not appeal, it has filed a motion to dismiss the appeal on the basis that Ms. Nash has not paid the court costs in the trial court below.

### **MOTION TO DISMISS**

On September 24, 2009 appellee filed in this court a motion to dismiss the

appeal, alleging that Ms. Nash did not timely pay the costs of appeal under LSA-C.C.P. art. 2126, nor did she pay the court costs of the trial court.

Under LSA-C.C.P. art. 2126, the clerk of the trial court, after the granting of an order of appeal, shall estimate the cost of the preparation of the record on appeal and shall send a notice to the attorneys involved. The appellant must pay the estimated preparation costs within twenty days of the mailing of the notice. The trial court may grant one twenty-day extension. Upon the failure of the appellant to pay the estimated costs, the trial judge, on his own motion or upon motion by the clerk or by any party, and after a hearing, shall either enter an order of dismissal of the appeal on the grounds of abandonment or grant a ten-day period within which costs must be paid in full.

The dismissal of an appeal for irregularities is controlled by LSA-C.C.P. art. 2161, which provides:

An appeal shall not be dismissed because the trial record is missing, incomplete or in error no matter who is responsible, and the court may remand the case either for retrial or for correction of the record. An appeal shall not be dismissed because of any other irregularity, error or defect unless it is imputable to the appellant. Except as provided in Article 2162, a motion to dismiss an appeal because of any irregularity, error, or defect which is imputable to the appellant must be filed within three days, exclusive of holidays, of the return day or the date on which the record on appeal is lodged in the appellate court, whichever is later.

The return date of the appeal was January 23, 2009 and the record was lodged on March 25, 2009. Thus, under LSA-C.C.P. art. 2161, appellee had until March 30, 2009 to file the motion to dismiss. Appellee's motion was filed on the day of submission of this case, September 24, 2009, and is thus untimely. **Ware v. Duplechain**, 583 So.2d 162 (La. App. 3 Cir. 7/25/91). We also note that Ms. Nash was granted pauper status in November, 2008 which released her from the

necessity of paying the estimated costs. Moreover, a motion to dismiss for failure to pay appellate costs must be brought before the trial court. LSA-C.C.P. arts. 2088 and 2126(E), **Bezot v. Original Library Joe's, Inc.**, 2001-1586, p. 7 (La. App. 1 Cir. 11/8/02), 838 So.2d 796, 799. The motion is denied.

### **MOTION FOR 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. **Hines**, 2004-0806 at p. 1, 876 So.2d at 765-66.

In support of its motion for summary judgment, DPSC provided the following:

1. Affidavit of Larry Caldwell, the Medical Director at LCIW
2. The Physician's Orders that indicate an orthopedic referral is needed, dated October 7, 2004
3. The Orthopedic Referral stamped "FAXED" and dated October 11, 2004
4. The Consultant Referral stamped "FAXED" and dated October 11, 2004
5. The Physician's Orders that again indicate an orthopedic referral is needed, and containing the notation "faxed 12/14/04"

A review of LCIW's medical records, found in the administrative file, show that Ms. Nash was seen by an LCIW physician at St. Gabriel on October 7, 2004. That physician (employed by LCIW) referred her to an orthopedic specialist. The record of this visit contains a hand-written notation that states "received 10/8/04."

The record also contains an "Orthopedic Referral to Earl K. Long from LCIW" with a stamp indicating it was faxed on 10/11/04. This form indicates Ms. Nash's diagnosis to be "Rt. Hip pain-uses w/c"<sup>2</sup> and is accompanied by a "Consultant Referral."

On December 13, 2004 Ms. Nash was again seen by the LCIW physician who again noted Ms. Nash's need of an orthopedic consultation in a "Physician's Orders." The notes on the "Physician's Orders" read "faxed 12/14/04."

On March 9, 2005 Ms. Nash returned to the LCIW physician who noted to check on the orthopedic appointment. The "Physician's Orders" note that Ms. Nash was complaining of burning inside her right leg from her hip to her knee and

---

<sup>2</sup> The record indicates that Ms. Nash was provided with a wheelchair while incarcerated.

pain in her lower right back radiating down her right leg and “hip MVA.” Her duty status was given as: bottom bunk, downstairs, sit for work, w/c [wheelchair] for ambulating x 6 months.

On May 25, 2005 Ms. Nash filed a “Request for Medical Treatment” pleading to “see a doctor on the outside” due to the pain in her hip. The disposition section of the form states that Ms. Nash was in need of an orthopedic appointment and that the referral needed to be rewritten. Again on June 13, 2005 Ms. Nash filed a “Request for Medical Treatment” requesting to go to the hospital for her hip because she was “hurting bad.” She was again seen at the infirmary in the prison. The “Health Care Provider Screening” section of the form indicates that Ms. Nash was complaining of “burning” and pain in her right hip and was injected with Toradol.<sup>3</sup> The “MD notes” acknowledge that she had a referral for an orthopedic appointment and notes “check on appt.”

The medical evidence in the record supports Ms. Nash’s claim. LCIW was aware that Ms. Nash needed medical treatment beyond what it could provide. The records evidence that although Ms. Nash was able to walk under her own power at the time that she arrived at the facility, over the course of her incarceration she was eventually reduced to a wheelchair. Her condition was obviously worsening. Although DPSC makes the argument that its employees are not responsible for actually scheduling the appointment, but rather only for requesting it, we take note that the affidavit of Larry Caldwell, DPSC’s employee, states that Earl K. Long would make the decision whether or not to grant an appointment based on the need of the patient. The referral form is filled out by a DPSC employee and therefore Earl K. Long must make its determination of necessity based exclusively on the information provided by DPSC. As such, DPSC must assume responsibility for

---

<sup>3</sup> Toradol is a brand name for the drug Ketorolac, a non-steroidal anti-inflammatory drug that works by reducing hormones that cause inflammation and pain in the body.

making a complete and accurate report of the patient's condition so that Earl K. Long could make a proper assessment of the patient's need. In this case, although the records indicate that Ms. Nash's condition was severe and seeming to worsen rapidly, the referral request, presumably faxed to Earl K. Long, simply states "Rt. Hip pain-uses w/c."

The record contains no evidence to establish whether Earl K. Long ever received Ms. Nash's referrals. Moreover, there is absolutely no evidence in the record to indicate that LCIW made any additional attempt to secure an orthopedic appointment on behalf of Ms. Nash after December 14, 2004 despite repeated orders by its physician to do so.

If a patient's condition is serious enough to warrant referral to a specialist (several, in fact), then DPSC has a duty to follow up on its referral. We note that defendant placed plaintiff in a wheelchair and injected her with Toradol. Whether DPSC was negligent in its failure to take some type of positive action such as making a phone call or writing a letter, instead of simply faxing another form (of which there is no evidence of receipt by Earl K. Long), is one of many issues of fact left to be resolved at a trial. This case was not appropriate for disposition via summary judgment. This assignment of error has merit.

### **CONCLUSION**

The motion to dismiss the appeal is denied. That portion of the judgment of the trial court that granted DPSC's motion for summary judgment is reversed. The judgment is affirmed in all other respects. This case is remanded for further proceedings. All costs of this appeal are assessed against appellee, DPSC, in the amount of \$533.00

**MOTION TO DISMISS DENIED; AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**



**PHYLLIS NASH**

**STATE OF LOUISIANA**

**VERSUS**

**COURT OF APPEAL**

**LOUISIANA DEPARTMENT OF  
CORRECTIONS**

**FIRST CIRCUIT**

**NUMBER 2009 CA 0544**

**WHIPPLE, J. concurs.**

*V6W  
Jaw*

The Department has not shown its entitlement to summary judgment and in my view the petition states a cause of action.