NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2008 CA 2029

ROBERT THOMAS McGREGOR, RUTH S. McGREGOR, INDIVIDUALLY AND ON BEHALF OF HER DECEASED HUSBAND, DONALD McGREGOR

VERSUS

HOSPICE CARE OF LOUISIANA IN BATON ROUGE, LLC, HOSPICE CARE OF LOUISIANA, INC., THE HOSPICE FOUNDATION OF GREATER BATON ROUGE, D/B/A HOSPICE OF BATON ROUGE, DR. GERALD P. MILETELLO, DR. GEORGIA REINE, CYNTHIA LOGAN, MELANIE HYATT, KATHRYN BRAUD

Judgment Rendered: March 27, 2009

Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Docket Number 509,929

Honorable R. Michael Caldwell, Judge Presiding

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Roy Raspanti **Metairie, LA**	**Counsel for Plaintiffs/Appellants, Robert Thomas McGregor and Ruth McGregor, individually and on behalf of her deceased husband, Donald H. McGregor**
Myron A. Walker, Jr. **William H. Burris** **Baton Rouge, LA**	**Counsel for Defendants/Appellees, Hospice Care of Louisiana in Baton Rouge, L.L.C., Hospice Care of Louisiana, Inc., Cynthia Logan, Melanie Hyatt, Katherine Braud, American Alternative Insurance Corporation, and the Hospice Foundation of Greater Baton Rouge, d/b/a Hospice of Baton Rouge**

Downing, J. concurs and assigns reasons.

Vance A. Gibbs
Linda G. Rodrigue
Deborah J. Juneau
Baton Rouge, LA

Counsel for Defendants/Appellees,
Dr. Gerald P. Miletello and
Dr. Georgia Reine

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BEFORE: CARTER, C.J., WHIPPLE AND DOWNING, JJ.

WHIPPLE, J.

This is an appeal from a judgment of the trial court, granting defendants' motion for involuntary dismissal and dismissing plaintiffs' claims of breach of contract based on alleged promises of death with dignity and without pain with regard to plaintiffs' deceased relative. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

On April 30, 2002, Donald McGregor, who was suffering from terminal prostate cancer, was admitted to hospice care as a patient of the Hospice Foundation of Greater Baton Rouge, Inc. ("Hospice of Baton Rouge"), to receive palliative care services at his home. Donald McGregor continued to receive such services until Hospice of Baton Rouge discharged him as one of its patients on July 21, 2002.[1] Donald McGregor died later that day.

On July 21, 2003, plaintiffs, Robert McGregor and Ruth McGregor, individually and as succession representative of the estate of Donald H. McGregor, her deceased husband, filed a Petition for Violation of Contract

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[1]The reason for the discharge of Donald McGregor was disputed. Hospice personnel testified that Donald McGregor's son Robert had called on Sunday, July 21, 2002, demanding that the on-call nurse deliver more pain medication to their home. According to the nurse, Robert was verbally abusive and threatening during the telephone conversation, and when she explained that she could not just deliver pain medication, but that, instead, she needed to visit to their home to evaluate Donald McGregor in order to check his comfort level, Robert McGregor refused to allow the nurse to evaluate his father. Instead, the nurse testified, Robert McGregor told her that she was to come out to the home only to bring more pain medication. Thus, according to Hospice of Baton Rouge, because its personnel were denied the ability to evaluate Donald McGregor's needs that day and because of Robert McGregor's threatening manner, Hospice of Baton Rouge discharged Donald McGregor as a patient.

Robert McGregor, on the other hand, denied that he had refused to allow Hospice of Baton Rouge personnel to come out and evaluate his father or that he was verbally abusive or threatening to the nurse during their telephone conversation. Rather, he testified that the Hospice nurse was "very hostile" and "arrogant" and that he asked the nurse to come out and evaluate his father, but the nurse indicated that she was too busy playing with her daughter and that his father would be dead in twenty-four to seventy-two hours anyway.

and Damages against Hospice Care of Louisiana in Baton Rouge, L.L.C.; Hospice Care of Louisiana, Inc.; Hospice of Baton Rouge; Dr. Gerald Miletello, Donald McGregor's treating oncologist; Dr. Georgia Reine, Dr. Miletello's medical partner; and Cynthia Logan, Melanie Hyatt, and Katherine Braud, nurses who rendered care to Donald McGregor.[2] Plaintiffs also later amended their petition to name American Alternative Insurance Corporation as an additional defendant.

In their original and amending petitions, plaintiffs alleged that "plaintiffs expected and defendants contracted for and promised 'death with dignity' as stated in the hospice form entitled 'Patient Rights and Responsibilities.'" Further, plaintiffs alleged that the nurses, defendants Logan, Braud, and Hyatt, as well as Hospice Care of Louisiana in Baton Rouge, L.L.C., Hospice Care of Louisiana, Inc., and Hospice of Baton Rouge, through their employees and representatives Leslie Payne, Martha Webb, and Leighann Mayeux, had orally promised plaintiffs that Donald McGregor would have a "death with dignity." Finally, plaintiffs asserted that defendants had "orally contracted" with plaintiffs to provide the care necessary to give Donald McGregor a "death with dignity."[3]

In their petitions, plaintiffs further alleged that, despite these promises, defendants violated the contract by failing to ensure that Donald McGregor had adequate pain medication during the weekend of Friday, July

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[2]Katherine Braud's name was incorrectly spelled as "Kathryn" in the petition.

[3]Plaintiffs attempted to file a fifth supplemental and amending petition, averring that Leslie Payne, a representative of Hospice of Baton Rouge, came to plaintiffs' home prior to their entry into the Hospice of Baton Rouge program to enter into a contract with plaintiffs for the provision of services to Donald McGregor and the family and that, at that time, Payne promised, on behalf of Hospice of Baton Rouge, that Hospice of Baton Rouge would provide Donald McGregor a "death with dignity" and would ensure that Donald McGregor "would not die alone or in pain in accordance with the Hospice brochure which she presented to them." The trial court denied plaintiffs leave to file this fifth amending petition. Nonetheless, plaintiffs testified at trial that Hospice of Baton Rouge personnel also promised death without pain, in addition to death with dignity.

19, 2002, through Sunday, July 21, 2002, causing him "to needlessly suffer excruciating pain and anguish throughout the last 72 hours of his life."

With regard to the Hospice defendants, plaintiffs' petitions were answered by Hospice of Baton Rouge only. Also, plaintiffs' claims against Dr. Miletello and Dr. Reine were dismissed without prejudice given that plaintiffs' claims against the doctors were at the time pending before a Medical Review Panel in accordance with the Louisiana Medical Malpractice Act.[4] Additionally, Cynthia Logan filed a motion for summary judgment seeking dismissal of plaintiffs' claims against her on the basis that she had no contact with Donald McGregor or the McGregor family during the weekend of July 19, 2002, and the trial court granted Logan's motion, dismissing plaintiffs' claims against her with prejudice.

Accordingly, the matter proceeded to trial on March 10, 2008, against Hospice of Baton Rouge, Hyatt, Braud, and American Alternative Insurance Corporation. In their case in chief, plaintiffs presented testimony and evidence to establish an alleged oral contract promising death with dignity and without pain. At the close of plaintiffs' case, defendants moved for an involuntary dismissal, averring, first, that plaintiffs' claims against Hyatt and Braud individually should be dismissed given the absence of proof that either operated in their own personal capacities and, secondly, that plaintiffs had failed to prove the existence of an oral contract whereby Hospice of Baton Rouge promised or guaranteed that Donald McGregor would die with dignity and without pain. Additionally, defendants averred that aside from the question of whether plaintiffs had established the existence of an oral contract, the object of the alleged contract, i.e., death with dignity, was not

[4]After the medical review panel proceedings were complete, plaintiffs instituted a separate suit against Drs. Miletello and Reine for medical malpractice.

defined and was an impossible object, thus rendering any alleged contract unenforceable. Finally, defendants argued that any alleged contract was rendered unenforceable by Robert McGregor's conduct in threatening Hospice personnel and, thus, preventing them from coming to the home to assess Donald McGregor.

The trial court granted the motion for involuntary dismissal as to plaintiffs' claims against Hyatt and Braud, concluding that plaintiffs had failed to present any proof to establish that these defendants had acted individually. With regard to whether plaintiffs had proved the existence of a contract promising or guaranteeing death with dignity and without pain, the court noted that there was no written contract and further found that plaintiffs had failed to establish the existence of such an oral contract. In so concluding, the court noted that such an oral contract had to be proven by the testimony of a witness and other corroborating circumstances, coming from a source other than the plaintiffs. The court found that the Hospice of Baton Rouge brochure, as well as other documents introduced into evidence by plaintiffs, did not contain any promissory language regarding death with dignity or without pain. Moreover, while the Patient's Rights and Responsibilities form stated that a patient had the right to die with dignity, the court found that there was no clear understanding of what "death with dignity," an oral promise allegedly made by Payne, would have entailed.

The court further noted that while Payne, who allegedly entered into the oral contract with plaintiffs, was present at trial, plaintiffs did not call her as a witness. Thus, the court, in essence, concluded that plaintiffs failed to establish a meeting of the minds necessary for the existence of an oral contract between the McGregors and Hospice of Baton Rouge.

Additionally, the court, noting that the object of a contract must be lawful, possible, and either determined or determinable, found that plaintiffs had vacillated in their testimony as to what they thought death with dignity entailed. The court observed that pain is subjective and questioned who would decide if the patient were in pain and how it would be determined. Therefore, the court further concluded that the object of the alleged oral contract was either impossible or indeterminable. Accordingly, the court granted defendants' motion for involuntary dismissal on the basis that plaintiffs had failed to prove the existence of a contract between the McGregors and Hospice of Baton Rouge.

From a judgment granting defendants' motion for involuntary dismissal and dismissing plaintiffs' claims in their entirety, with prejudice, plaintiffs appeal, averring that the trial court erred in: (1) denying plaintiffs' motion for partial summary judgment; (2) granting defendants' motion for involuntary dismissal; and (3) disqualifying plaintiffs' witnesses Dr. Bruce Samuels and Merrill Patin, prohibiting Dr. Miletello and Dr. Reine from testifying as to any medical opinion, and failing to continue the trial to allow plaintiffs to obtain the testimony of Dr. Philip Cenac.

DENIAL OF MOTION FOR CONTINUANCE
(Assignment of Error No. 3)

In this assignment of error, plaintiffs contend that the trial court erred in denying their motion for a continuance so that they could obtain the testimony of Dr. Philip Cenac, the psychiatrist who had treated them and who had subsequently moved to American Samoa. However, at the outset, we note that plaintiffs did not brief this assignment of error, stating only in brief that "the Trial Court disqualified all five of plaintiffs' expert witnesses, ... [including] Dr. Philip Cenac, the psychiatrist who saw plaintiffs on three

occasions ... [and who] had moved to American Samoa," but providing no legal argument as to why the court erred in denying their motion for continuance. Pursuant to Uniform Rules—Courts of Appeal, Rule 2-12.4, "[a]ll specifications or assignments of error must be briefed," and "[t]he court may consider as abandoned any specification or assignment of error which has not been briefed."

Nonetheless, we note that this matter had been pending in the trial court since July 1, 2003, approximately four and one-half years, and plaintiffs filed their motion for continuance just weeks before the March 10, 2008 scheduled trial date, seeking a continuance of the trial pursuant to LSA-C.C.P. art. 1602. Louisiana Code of Civil Procedure article 1602 provides that a continuance shall be granted if at the time the case is to be tried, the party applying for the continuance shows that a material witness has absented himself without the contrivance of the party applying for the continuance. The party seeking a continuance bears the burden of proving that his motion falls within these peremptory grounds. To meet his burden, the party must establish: (1) either that he exercised due diligence, yet was unsuccessful in obtaining material evidence; or (2) that a material witness absented himself contrary to the arrangement made by the party for the witness to appear. Armstrong v. State Farm Fire and Casualty Company, 423 So. 2d 79, 81 (La. App. 1st Cir. 1982). The party seeking the continuance must also demonstrate that the missing evidence or testimony is material or essential to that party's presentation of his case. Burgess v. City of Baton Rouge, 477 So. 2d 143, 145 (La. App. 1st Cir. 1985); Moore v. Wilson, 34,135 (La. App. 2nd Cir. 11/3/00), 772 So. 2d 373, 378.

In a one-paragraph memorandum in support of their motion for continuance, plaintiffs stated simply that Dr. Cenac was a material witness

as to their claim for damages and that he had moved to American Samoa, but plaintiffs did not contend that Dr. Cenac had absented himself contrary to any arrangement made by plaintiffs for Dr. Cenac to appear. Moreover, plaintiffs offered no explanation in their memorandum as to any efforts they made to obtain the testimony of Dr. Cenac.

Additionally, while the record does not contain a transcript of the hearing on plaintiffs' motion for continuance, the March 3, 2008 minute entry for the hearing on this motion for continuance indicates that, while plaintiffs offered documentary evidence in support of their motion for continuance, defendants' objection to the introduction of plaintiffs' documents was sustained. Thus, there was no evidence admitted at the hearing to support plaintiffs' motion for continuance.

Furthermore, we note that article 1604 of the Code of Civil Procedure provides that when a party applies for a continuance on the basis of the absence of a material witness, the adverse party may require him to disclose under oath what facts he intends to prove by the testimony of the absent witness. Moreover, if the adverse party admits that if the absent witness were present, the witness would testify as stated in the affidavit, then the court shall proceed to the trial of the case. LSA-C.C.P. art. 1604.

In the instant case, defendants invoked the provisions of LSA-C.C.P. art. 1604 by filing a "Request for Sworn Disclosure Pursuant to LSA-C.C.P. Article 1604," wherein they sought to have plaintiffs disclose what facts they intended to prove by Dr. Cenac's testimony. In response, plaintiffs' counsel filed an affidavit stating that he had "never spoken with Dr. Philip Louis Cenac," who had treated plaintiffs approximately two and one-half years earlier, and that he "[did] not know what Dr. Cenac's specific diagnosis or prognosis" was for plaintiffs or "what his specific expert

opinion [would] be." Also, plaintiffs' counsel stated in his affidavit that Dr. Cenac's office informed him on February 11, 2008, that Dr. Cenac had moved to American Samoa, indicating that plaintiffs' counsel did not even attempt to determine Dr. Cenac's whereabouts until the month before the scheduled trial date herein.

Thus, on the record before us, plaintiffs made no showing that Dr. Cenac absented himself contrary to any arrangement made with plaintiffs for him to appear at trial, that Dr. Cenac's testimony would have been material, or that despite due diligence, they were unable to obtain material evidence. See Armstrong, 423 So. 2d at 81-82. Accordingly, even if this court were to consider plaintiffs' assignment of error on this issue as properly before us, we would find no merit to plaintiffs' unsupported assertion that the trial court erred in denying the motion for continuance.

INVOLUNTARY DISMISSAL
(Assignment of Error No. 2)

In this assignment of error, plaintiffs contend that they did prove, through the testimony of one witness and other corroborating circumstances, the existence of an oral contract between themselves and Hospice of Baton Rouge whereby Hospice of Baton Rouge promised that Donald McGregor would die a death with dignity and without pain. Thus, they contend that the trial court erred in granting defendants' motion for involuntary dismissal and dismissing plaintiffs' claims in their entirety.

Louisiana Code of Civil Procedure article 1672(B) provides the basis for an involuntary dismissal at the close of a plaintiff's case in an action tried by the court without a jury. In determining whether involuntary dismissal should be granted, the appropriate standard is whether the plaintiff has presented sufficient evidence on his case-in-chief to establish his claim

by a preponderance of the evidence. Robinson v. Dunn, 96-0341 (La. App. 1st Cir. 11/8/96), 683 So. 2d 894, 896, writ denied, 96-2965 (La. 1/31/97), 687 So. 2d 410. Unlike a directed verdict in a jury case, the judge is free to evaluate the evidence and render a decision based upon a preponderance of the evidence, without any special inferences in favor of the party opposed to the motion. Robinson, 683 So. 2d at 896.

In other words, on a motion for involuntary dismissal, the trial court is only required to weigh and evaluate all of the evidence presented up to that point and grant a dismissal if the plaintiff has failed to establish his claim by a preponderance of the evidence. McCurdy v. Ault, 94-1449 (La. App. 1st Cir. 4/7/95), 654 So. 2d 716, 720, writ denied, 95-1712 (La. 10/13/95), 661 So. 2d 498. Proof by a preponderance simply means that, taking the evidence as a whole, the evidence shows the fact or cause sought to be proved is more probable than not. McCurdy, 654 So. 2d at 720. A dismissal based on LSA-C.C.P. art. 1672(B) should not be reversed by an appellate court in the absence of manifest error. Robinson, 683 So. 2d at 896.

As a general rule, when a health care provider undertakes the treatment of a patient, he does not guarantee a cure, nor is any promise to effect a cure or even a partial healing to be implied. Moreover, the law does not impose an implied undertaking to cure, but only an undertaking to use ordinary skill and care. See Phelps v. Donaldson, 243 La. 1118, 1123, 150 So. 2d 35, 37 (1963). However, a health care provider may, by express contract, agree to effect a cure or warrant that a particular result will be obtained. In such instances, an action in contract may lie against the health

care provider.[5] See Sciacca v. Polizzi, 403 So. 2d 728, 730 (La. 1981). 1981).

A contract is an agreement by two or more parties whereby obligations are created, modified, or extinguished. LSA-C.C. art. 1906; Ricky's Diesel Service, Inc. v. Pinell, 2004-0202 (La. App. 1st Cir. 2/11/05), 906 So. 2d 536, 538. A party claiming the existence of a contract has the burden of proving that the contract was perfected between himself and his opponent. LSA-C.C. art. 1831; Pennington Construction, Inc. v. R A Eagle Corporation, 94-0575 (La. App. 1st Cir. 3/3/95), 652 So. 2d 637, 639. A contract is formed by consent of the parties established through offer and acceptance. LSA-C.C. art. 1927; Imperial Chemicals Limited v. PKB Scania (USA), Inc., 2004-2742 (La. App. 1st Cir. 2/22/06), 929 So. 2d 84, 90, writ denied, 2006-0665 (La. 5/26/06), 930 So. 2d 31. Where there is no "meeting of the minds" between the parties, there is no consent, and, thus, no enforceable contract. Ricky's Diesel Service, Inc., 906 So. 2d at 538.

Moreover, Louisiana Civil Code article 1846 provides:

> When a writing is not required by law, a contract not reduced to writing, for a price or, in the absence of a price, for a value not in excess of five hundred dollars may be proved by competent evidence.
>
> If the price or value is in excess of five hundred dollars, the contract must be proved by at least one witness and other corroborating circumstances.

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[5]We note that LSA-R.S. 40:1299.41C of the Louisiana Medical Malpractice Act provides qualified health care providers with certain protections with regard to suits based on alleged oral contracts, as follows:

> **No liability shall be imposed upon any health care provider on the basis of an alleged breach of contract**, whether by express or implied warranty, **assuring results to be obtained** from any procedure undertaken in the course of health care, **unless such contract is expressly set forth in writing and signed by such health care provider** or by an authorized agent of such health care provider. (Emphasis added).

However, Hospice of Baton Rouge was not a qualified health care provider under the Louisiana Medical Malpractice Act, LSA-R.S. 40:1299.41 et seq., and thus was not covered by the provisions of the Act. See LSA-R.S. 40:1299.41D.

To meet the burden of proving an oral contract by a witness and other corroborating circumstances, a party may serve as his own witness and the "other corroborating circumstances" may be general and need not prove every detail of the plaintiff's case.[6] However, the corroborating circumstances that are required must come from a source other than the plaintiff. Pennington Construction, Inc., 652 So. 2d at 639.

The existence or non-existence of a contract is a question of fact, and the trial court's determination of this issue will not be disturbed unless manifestly erroneous or clearly wrong. Townsend v. Urie, 2000-0730 (La. App. 1st Cir. 5/11/01), 800 So. 2d 11, 15, writ denied, 2001-1678 (La. 9/21/01), 797 So. 2d 674. Similarly, the issue of whether there were corroborating circumstances sufficient to establish an oral contract is a question of fact. Pennington Construction, Inc., 652 So. 2d at 639. Moreover, when evaluating the evidence needed to establish the existence or non-existence of a contract, the trial court is allowed to make credibility determinations. Imperial Chemicals Limited, 929 So. 2d at 93.

At the trial of this matter, plaintiffs presented their own testimony and several documents they received from Hospice of Baton Rouge to establish their claim that Hospice of Baton Rouge entered into an oral contract with them promising or guaranteeing that Donald McGregor would die with

[6]In reasons for judgment, the trial court stated that plaintiffs had to prove the existence of the alleged oral contract through the testimony of one witness and other corroborating circumstances. In brief to this court, plaintiffs cite LSA-C.C. art. 1846 and contend that they proved the existence of an oral contract through the testimony of one witness (Ruth McGregor) and other corroborating circumstances. Thus, while the exact value of the alleged oral contract at issue is not apparent from the record, plaintiffs obviously do not contest the trial court's implicit finding that the value of the alleged contract would have been in excess of $500.00.

dignity and without pain.[7] Ruth McGregor testified that when she called called Hospice of Baton Rouge to obtain services for Donald McGregor, Hospice of Baton Rouge sent Leslie Payne to her home to "sign [them] up." According to Ruth McGregor, she, Donald, and Robert were all present when Payne discussed hospice services with them, and during that presentation, Payne made promises to them. When specifically asked what promises Payne made to them, Ruth McGregor testified, "To die with dignity, and they said that they would provide adequate medication so that my husband would not die in pain. They said that they would provide services until the very end, and then they said that they would not let my husband die alone."

When further asked if Payne had led her to understand what "dying with dignity" meant, Ruth McGregor responded, "Yes, it was dying without – lying there dying in pain. ... That the person would be **somewhat comfortable**, and they could just ease away and go," an explanation different from death with no pain. (Emphasis added). However, when later asked whether Payne intended to guarantee that Donald McGregor would die without pain or die with dignity, Ruth McGregor acknowledged, "I don't know what she was thinking or what her intentions were."

Moreover, Robert McGregor's testimony at trial further highlighted the uncertainty as to what was allegedly agreed upon by the parties. Similar to his mother's testimony, Robert McGregor testified that on the day Payne

[7]Plaintiffs also presented testimony of Kathryn Grigsby, the administrator of Hospice of Baton Rouge, Dr. Miletello, and Dr. Reine and the deposition testimony of Hyatt and Braud. However, to the extent that these individuals were not present when the alleged oral agreement was entered into herein, their testimony provides no insight as to whether there was a meeting of the minds between plaintiffs and Hospice of Baton Rouge for the promises and guarantees plaintiffs allege were made.

visited their home, she promised Donald McGregor "death with dignity" and that "he would not suffer pain." According to Robert McGregor, in making those promises, Payne addressed all three of the McGregors, himself, his mother, and his father. Additionally, when asked what Payne provided to him to establish what "death with dignity" meant, Robert McGregor responded, "I don't know if it was in a brochure or it was her – just her verbal communication, but she did say – looking directly at me saying it – death with dignity is a pain free death."

However, on cross-examination, Robert McGregor acknowledged that in his earlier deposition testimony he had agreed that no one told him that his father would have no pain, that he expected his father to have some pain, and that he expected Hospice of Baton Rouge to "lessen" his father's pain. He then stated that while at the time of his deposition, his interpretation of "death with dignity" was not a completely pain-free death, as of the time of trial, he "now [saw] death with dignity would be with no pain" and that "the oral contract was supposed to be pain free." Nonetheless, Robert McGregor acknowledged that he did not know what the Hospice of Baton Rouge representative meant by the alleged promise of death with dignity.

Furthermore, when asked on cross-examination if in fact he did not know who made these alleged oral promises on behalf of Hospice of Baton Rouge, Robert McGregor responded, "Unless it would have been Leslie Payne." He then admitted that in his earlier deposition testimony he had testified that he did not know who had made the alleged oral promise. Also, contrary to his direct and explicit trial testimony that Payne had promised him and his family death with dignity and a pain-free death for his father on the day she came to their home to sign his father up for hospice services, when Robert McGregor was asked in his deposition if the alleged oral

contract was made at the same meeting his father enrolled in Hospice of Baton Rouge, Robert McGregor had responded, "It may have." Robert McGregor had further contended in his deposition that the alleged oral contract was an "ongoing contract" and that just about everyone who worked for Hospice of Baton Rouge made that same guarantee to him, although he could not recall exactly what was said.[8]

While both Ruth and Robert McGregor acknowledged that they did not know what Payne intended to promise, they contend on appeal that Ruth McGregor's testimony as to Payne's alleged oral promises of death with dignity and a pain-free death was corroborated by certain documents presented to them by Hospice of Baton Rouge, which were introduced into evidence at trial.[9] According to Ruth McGregor, during the course of their discussion at the McGregor home on April 30, 2002, Payne presented the McGregors with some materials and forms. These documents included: an

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[8]We further note that both Robert and Ruth McGregor's credibility was called into question at trial. Specifically, Robert McGregor was questioned about previous lawsuits he had filed. Although in his deposition he had testified that he recalled previously filing two lawsuits, at trial he acknowledged by case name twenty-one lawsuits previously filed by him. At that point, the trial court cut off questioning as to additional suits filed by Robert McGregor.

Additionally, while he initially contended he could not recall a federal district judge issuing an order limiting his ability to file more suits *in forma pauperis*, Robert McGregor admitted that such an order had been entered. He further acknowledged that in that order, the federal district judge referred to thirty-nine suits filed by Robert McGregor in that court as a "flagrant abuse of the judicial process" and stated that Robert McGregor "consistently resorts to the legal process without any regard to the merits of the claim" and "invokes the legal process mainly to harass those defendants who have had the misfortune to cross his path."

With regard to Ruth McGregor's credibility, when questioned at trial about whether a complaint had been filed against Robert McGregor with the sheriff's office based on an alleged statement by Robert that he would go to the Hospice of Baton Rouge office and shoot Hospice of Baton Rouge personnel, Ruth McGregor responded, "Indeed not. That is ridiculous." However, she then admitted that in her previous deposition testimony she had acknowledged that a complaint had been filed on that basis. Ruth McGregor then stated at trial that she had forgotten many things "on purpose" because they were "painful."

[9]Notably, in brief on appeal, plaintiffs rely only on Ruth McGregor's testimony and do not argue that Robert McGregor's testimony, together with the documents presented, supported or established the existence of the alleged oral contract. Indeed, in designating the record for appeal purposes, plaintiffs attempted to specifically exclude Robert McGregor's trial testimony from the appellate record.

Informed Consent Form, a Hospice Medicare Benefit—Election Statement, Statement, a document entitled Patient Rights and Responsibilities, a form (the title of which appears to be obscured) listing items and services not covered by Hospice of Baton Rouge, and a Hospice of Baton Rouge brochure.

The Informed Consent Form, which was signed by Ruth McGregor, as her husband's representative, and by Payne, as a witness, makes no promise, and indeed makes no mention, of death with dignity or a pain-free death.[10] The Hospice Medicare Benefit—Election Statement, signed by Ruth McGregor as her husband's representative and by Payne as the Hospice of Baton Rouge representative, also makes no promise or mention of death with dignity or a pain-free death. Similarly, the form listing items and services not covered by Hospice of Baton, which was signed by Ruth McGregor as her husband's representative and by Payne as a witness, does not promise, guarantee or mention death with dignity or a pain-free death.

The Patient Rights and Responsibilities form was not signed by any party, but does state that "[a]s a patient...[y]ou have the right to die with dignity." However, dying "with dignity" is not defined, nor does Hospice of Baton Rouge state in this document that it **promised** or **guaranteed** that a patient in its care would die with dignity. Moreover, given the uncertainty in the record as to the parties' understanding of death with dignity and what precisely such a promise would have entailed, this simple statement that a patient has the right to die with dignity is insufficient to corroborate plaintiffs' contentions of a promise or guarantee of a particular result. See e.g. Ferlito v. Cecola, 419 So. 2d 102, 105 (La. App. 2nd Cir.), writ denied,

[10]Ruth McGregor signed various forms that day as her husband's representative because Donald McGregor was unable to sign the documents himself at that time.

422 So. 2d 157 (La. 1982) (A purported promise by a dentist to "please" a patient and make her teeth "pretty" was not such a guarantee of a result as to establish a contract between the parties).

Finally, plaintiffs relied upon a Hospice of Baton Rouge brochure, which they acknowledged was printed several years after Donald McGregor's death, but which they claimed was similar to one given to them by Payne. In setting forth Hospice of Baton Rouge's purpose and mission in this brochure, which also was not signed by any party, the following statement was made, "Our **vision** is to ensure that no one dies alone or in pain." While the brochure indicates that the "vision" of Hospice of Baton Rouge is that no one die in pain, this document also contains no promises or guarantees by Hospice of Baton Rouge that its patients will die a pain-free death.

Thus, while these documents provided the type of general corroboration needed to establish the existence of an agreement between the parties herein for the providing of hospice services, we find no manifest error in the trial court's determination that, in light of all the testimony and evidence presented, these documents did not provide corroborating evidence to establish a meeting of the minds as to an express promise or contractual guarantee of a particular result, i.e., death with dignity or a pain-free death.[11]

Considering the foregoing and the record as a whole, and mindful of the credibility determinations inherent in the trial court's findings herein, we cannot conclude that the trial court committed manifest error in finding that plaintiffs failed to prove the existence of an oral contract between the

[11]Likewise, we find no merit to plaintiffs' arguments that the testimony of Grigsby, to the effect that Donald McGregor's hospice care was to be paid for by Medicare and private insurance, or Dr. Miletello's narrative statement of the pain medication prescribed for Donald McGregor corroborated the plaintiffs' testimony of an oral contract guaranteeing the particular result they allege.

McGregors and Hospice of Baton Rouge whereby Hospice of Baton Rouge promised or guaranteed a particular result in the care of Donald McGregor, i.e., that he would die with dignity or would have a pain-free death. Accordingly, we find no error in the trial court's granting of defendants' motion for involuntary dismissal of plaintiffs' claims. This assignment of error lacks merit.

Given our conclusion that the trial court's finding that plaintiffs failed to prove the existence of an oral contract guaranteeing a particular result was not manifestly erroneous, we pretermit consideration and review of the trial court's additional finding that the object of the alleged oral contract was impossible or indeterminable.

EVIDENTIARY RULINGS
(Assignment of Error No. 3)

Plaintiffs also aver that the trial court erred in disqualifying Dr. Bruce Samuels and Merrill Patin as expert witnesses and limiting the testimony of Dr. Miletello and Dr. Reine to factual testimony about the events of July 19, 2002 through July 21, 2002, thereby preventing plaintiffs from seeking medical opinions from these witnesses.[12]

According to plaintiffs, they would have established through the expert testimony of Dr. Bruce Samuels and Merrill Patin, the pharmacist who filled the prescriptions of Donald McGregor, that the quantity of morphine suppositories released for Donald McGregor on Friday, July 19, 2002, was insufficient to last him until Monday, July 22, 2002, when the remaining quantity of the partial-fill prescription was scheduled to be

[12]On a motion for protective order filed by Drs. Miletello and Reine, against whom plaintiffs had a pending medical malpractice suit, the trial court ordered that their testimony at trial in this breach of contract suit be limited to factual occurrences during the period of July 19, 2002 through July 21, 2002, and that the doctors were not to be asked any questions regarding "standard of care, medical negligence, medical opinions, reasons for medical actions, or anything to that effect."

released to him. Additionally, plaintiffs contend that because of the court's ruling preventing plaintiffs from eliciting medical opinions from Dr. Miletello, they were prevented from asking Dr. Miletello to describe what a "partial-fill" prescription was and from eliciting Dr. Miletto's opinion testimony to the effect that pain can be controlled with pain medication, thus allowing them to establish that a pain-free death was possible.

If a trial court commits evidentiary error that interdicts its fact-finding process, this court must conduct a *de novo* review. Thus, this court ordinarily addresses any alleged evidentiary errors first on appeal, inasmuch as a finding of error may affect the applicable standard of review. Wright v. Bennett, 2004-1944 (La. App. 1st Cir. 9/28/05), 924 So. 2d 178, 182. However, a *de novo* review should not be undertaken for every evidentiary exclusion error. Unnecessary or added steps of review not only usurp the jury's function, but are a clear waste of judicial economy. Therefore, a *de novo* review should be limited to consequential errors, errors that prejudice or taint the trier of fact's findings. Wingfield v. State Department of Transportation and Development, 2001-2668 (La. App. 1st Cir. 11/8/02), 835 So. 2d 785, 799, writs denied, 2003-0313, 2003-0339, 2003-0349 (La. 5/30/03), 845 So. 2d 1059, 1060, cert. denied, 540 U.S. 950, 124 S. Ct. 419, 157 L. Ed. 2d 282.

In the instant case, we pretermit consideration of the issue of whether the trial court erred in disallowing the testimony of Dr. Samuels and Patin or in limiting the testimony of Drs. Miletello and Reine to fact testimony only because the testimony of these individuals would not have been relevant to the threshold issue herein: whether plaintiffs proved the existence of an oral contract promising or guaranteeing death with dignity and without pain. Simply stated, because the evidence of record demonstrates that none of

these individuals were present when the alleged oral contract was confected, a purported error attributable to the trial court's ruling limiting or disallowing their testimony is inconsequential, given the court's finding that no oral contract was established.[13]

DENIAL OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT
(Assignment of Error No. 1)

In this assignment of error, plaintiffs aver that the trial court erred in denying their motion for partial summary judgment on the issues of the existence of an oral contract between the parties and violation of that contract by Hospice of Baton Rouge.

A judgment denying a motion for summary judgment is an interlocutory judgment that is not immediately appealable. See LSA-C.C.P. arts. 968 and 2083. However, as with other interlocutory rulings, this court has held, in some instances, the denial of a motion for summary judgment may be reviewed, and such review is not prohibited or proscribed when an appeal is taken from a final judgment and the matter at issue in the interlocutory ruling is raised on appeal. See Johnson v. State, Department of Social Services, 2005-1597 (La. App. 1st Cir. 6/9/06), 943 So. 2d 374, 377 n.8, writ denied, 2006-2866 (La. 2/2/07), 948 So. 2d 1085, and Dean v. Griffin Crane and Steel, Inc., 2005-1226 (La. App. 1st Cir. 5/5/06), 935 So. 2d 186, 189 n.3, writ denied, 2006-1334 (La. 9/22/06), 937 So. 2d 387.

However, the Supreme Court held that an appellate court should not

[13]While plaintiffs assert that Dr. Miletello's expert opinion testimony would have been relevant to the trial court's finding that the object of the alleged oral contract, i.e., a pain-free death, was impossible or indeterminable, because we affirm the trial court's judgment on the basis of its finding that plaintiffs failed to prove the existence of such an oral contract, as stated above, we have also pretermitted consideration of the trial court's additional finding that the object of the alleged oral contract was impossible or indeterminable. Thus, Dr. Miletello's testimony in that regard is likewise irrelevant to this court's ruling herein.

restrict its fact review to affidavits and pleadings in support of the motion for motion for summary judgment where the denial of the motion for summary judgment is appealed after the matter has been fully tried. Hopkins v. American Cyanamid Company, 95-1088 (La. 1/16/96), 666 So. 2d 615, 617. In so ruling, the Supreme Court explained as follows:

> [O]nce a case is fully tried, the affidavits and other limited evidence presented with a motion for summary judgment-later denied by the district court-are of little or no value. Appellate courts should not rule on appeal after a full merits trial on the strength alone of affidavits in support of a motion for summary judgment that was not sustained in the district court. In such cases, appellate courts should review the **entire record**.

Hopkins, 666 So. 2d at 624 (emphasis added).

In the instant case, we note that the matter was not fully tried below, in that plaintiffs' suit was dismissed on defendants' motion for involuntary dismissal. However, because the dismissal came at the close of plaintiffs' case, plaintiffs had a full opportunity at trial to establish their claims. As such, and in light of the pronouncements in Hopkins, we conclude that any review at this juncture of the denial of plaintiffs' motion for partial summary judgment should likewise be based on the entire record. See Hopkins, 666 So. 2d at 624.

Based upon our review of the entire record before us, and for the reasons more fully set forth above, we find no merit to plaintiffs' argument that the trial court erred in denying their motion for summary judgment on the issues of the existence of an alleged oral contract promising a particular result and the alleged breach of same. This assignment of error also lacks merit.

CONCLUSION

For the above and foregoing reasons, the March 28, 2008 judgment of the trial court, dismissing with prejudice plaintiffs' claims in their entirety, is

affirmed. Costs of this appeal are assessed against plaintiffs Ruth McGregor and Robert McGregor.

AFFIRMED.

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

NUMBER 2008 CA 2029

ROBERT THOMAS McGREGOR, RUTH S. McGREGOR, INDIVIDUALLY AND ON BEHALF OF HER DECEASED HUSBAND, DONALD McGREGOR

VERSUS

HOSPICE CARE OF LOUISIANA IN BATON ROUGE, LLC, HOSPICE CARE OF LOUISIANA, INC., THE HOSPICE FOUNDATION OF GREATER BATON ROUGE, D/B/A HOSPICE OF BATON ROUGE, DR. GERALD P. MILETELLO, DR. GEORGIA REINE, CYNTHIA LOGAN, MELANIE HYATT, KATHRYN BRAUD

RDD

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DOWNING, J., concurs and assigns reasons

The majority's discussion notwithstanding, "[a] trial court's denial of a motion for summary judgment is not reviewable even upon appeal from a final judgment on the merits." **Towles v. Heirs of Morrison**, 428 So.2d 1029, 132 (La.App. 1 Cir.1983). *See also* **CITGO Petroleum Corp. v. State ex rel. Dept. of Revenue and Taxation**, 02-0999, p. 10 n.8 (La.App. 1 Cir. 4/2/03), 845 So.2d 558, 563 n.8. *See also* La. C.C.P. art. 968, which provides in pertinent part: "An appeal does not lie from the court's refusal to render any judgment on the pleading or summary judgment." Accordingly, we have no authority to conduct the review of the denial of the motion for summary judgment.

The majority's opinion in this regard suggests that an appellate court would reverse a judgment rendered after a trial on the merits if it concludes on review that a summary judgment should have been granted, citing **Hopkins v. American Cyanamid Company**, 95-1088 (La. 1/16/96), 666 So. 2d 615, 617, 624. **Hopkins**, however, stands for the proposition that after a trial on

the merits, review is not limited to "affidavits and other limited evidence presented with a motion for summary judgment." **Id.** at 924. Rather, review should be of "the entire record," as would be appropriate in reviewing the final judgment. The Court in **Pamplin v. Bossier Parish Community College**, 38,533 (La.App. 2 Cir. 7/14/04), 878 So.2d 889, 892, explained the holding in **Hopkins** as follows: **"our Supreme Court instructed that appellate review of a trial court's denial of a motion for summary judgment is foreclosed after a full trial on the merits."** (Emphasis added.) Additionally, a motion for summary judgment does not allow live testimony, La. C.C.P. art. 966B, so when we review live testimony in our review of the entire record, we cannot be reviewing a motion for summary judgment.

Even so, the majority's review of the denial of the motion for summary judgment does not affect the result and is harmless here. Therefore, I concur in the result, and I agree with the remainder of the analysis.