NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2007 CA 0938

VALERIA ANN PRICE AND WALTER KROUSEL, III

VERSUS

WILBERT McCLAY, JR., M.D.,
RISK MANAGEMENT SERVICES, L.L.C., AND
STATE OF LOUISIANA DEPARTMENT OF HEALTH AND HOSPITALS

Judgment Rendered: December 21, 2007

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Appealed from the Nineteenth Judicial District Court
in and for the Parish of East Baton Rouge
State of Louisiana
Suit Number 546,319

Honorable R. Michael Caldwell, Judge

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Walter Krousel, III Baton Rouge, LA	Counsel for Plaintiffs/Appellees Valeria Ann Price and Walter Krousel, III
Otha Curtis Nelson, Sr. Baton Rouge, LA	Counsel for Defendant/Appellant Wilbert McClay, Jr., M.D.
Matthew W. Tierney Kristine D. Smiley Baton Rouge, LA	Counsel for Defendants/Appellees Risk Management Services, L.L.C., Louisiana Automobile Dealers Association Self Insured Fund, and Gerry Lane Chevrolet

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BEFORE: GAIDRY, McDONALD, AND McCLENDON, JJ.

McCLENDON, J.

This is an appeal of a summary judgment rendered in a concursus proceeding. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL HISTORY

Valeria Ann Price was injured in an automobile accident during the course and scope of her employment with Gerry Lane Chevrolet (Gerry Lane). Ms. Price subsequently received benefits from Gerry Lane's workers' compensation insurer, Louisiana Automobile Dealers' Association Self Insured Fund (LADASIF), which was administered by Risk Management Services, L.L.C. (RMS).

As a result of her injuries, Ms. Price sought and received medical treatment from Dr. Wilbert McClay, Jr., thereby incurring certain charges. The State of Louisiana, Department of Health and Hospitals (DHH) paid a portion of Ms. Price's medical bills through its Medicaid program.

Ms. Price retained attorney Walter Krousel, III, to represent her in a third party action against the tortfeasor, by virtue of which, Ms. Price ultimately recovered $10,000.00. Thereafter, Ms. Price and her attorney instituted a concursus proceeding in order for RMS, Dr. McClay, and DHH to assert their respective claims to the $10,000.00 contradictorily against all other parties to the proceeding.

RMS, Gerry Lane, and LADASIF collectively filed an answer asserting their entitlement to the disputed funds pursuant to LSA-R.S. 23:1101, *et seq.*[1] Thereafter, Dr. McClay also filed an answer asserting a right to the funds; however, DHH failed to do so. In November 2006, RMS, Gerry Lane, and LADASIF filed a motion seeking a summary judgment recognizing their interests

[1] Specifically, LSA-R.S. 23:1103(A)(1) provides in pertinent part that when an employee becomes party plaintiff in a suit against a third person and damages are recovered, such damages shall be so apportioned in the judgment that the claim of the employer for the compensation actually paid shall take precedence over that of the injured employee.

in the funds. Therein, they argued that Dr. McClay had chosen not to file the charges for his services with Gerry Lane and its workers' compensation carrier because he did not accept workers' compensation. While the movers conceded that LSA-R.S. 9:4752 allows a health care provider to assert a lien or privilege on funds obtained by an injured party he or she has treated, they contended that Dr. McClay had failed to perfect such a lien or privilege in accordance with LSA-R.S. 9:4753. That statute provides, in pertinent part, as follows:

> The privilege [of a health care provider] shall become effective if, prior to the payment of insurance proceeds, or to the payment of any judgment, settlement, or compromise on account of injuries, a written notice containing the name and address of the injured person and the name and location of the interested health care provider ... is mailed by the interested health care provider ... [via] certified mail, return receipt requested, to the injured person, to his attorney, to the person alleged to be liable to the injured person on account of the injuries sustained, to any insurance carrier which has insured such person against liability, **and to any insurance company obligated by contract to pay indemnity or compensation to the injured person.** (Emphasis added.)

Movers further assert Dr. McClay never sent written notice via certified mail to RMS containing all of the information required by the statute, and that movers were therefore entitled to recover reimbursement for the benefits paid on behalf of Ms. Price, subject only to a one-third reduction for attorney fees in favor of Ms. Price's attorney.

Appended to the motion for summary judgment was the affidavit of Jodi Jacobsen, the RMS adjuster who handled Ms. Price's workers' compensation claim. Ms. Jacobsen established the amount of benefits that had been paid to Ms. Price and further testified that Dr. McClay had never provided a written notice of his lien as required by LSA-R.S. 9:4753.

In opposing the motion, Dr. McClay contended that he had properly perfected a lien by sending the required written notice via certified mail. Although he argued in his memorandum that the notice contained all the information

prescribed by law, he did not submit a copy of his alleged notification. He merely offered return receipts indicating that he had sent some certified mail to Mr. Krousel and to an entity known as "Investigative Excellence, LLC."

A hearing on the motion for summary judgment was held on January 29, 2007. Finding that Dr. McClay had not perfected his lien due to his failure to send the statutorily required notice to RMS, the trial court rendered judgment in favor of RMS, Gerry Lane, and LADASIF, awarding them $8,827.51 of the disputed funds as reimbursement "subject to a 1/3 attorney fee of Mr. Walter Kroussel [sic] and 1/2 proportionate share of costs of Mr. Kroussel [sic] on the corresponding third party claim." The trial court further ordered Dr. McClay to pay all costs of the concursus proceeding pursuant to LSA-C.C.P. art. 4659. From this summary judgment, Dr. McClay appeals.

ANAYLSIS

Appellate courts review summary judgments *de novo* under the same criteria that govern the trial court's determination of whether a summary judgment is appropriate. **Duplantis v. Dillard's Dept. Store**, 2002-0852, p. 5 (La. App. 1 Cir. 5/9/03), 849 So.2d 675, 679, writ denied, 2003-1620 (La. 10/10/03), 855 So.2d 350. A motion for summary judgment should be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. LSA-C.C.P. 966(B). The initial burden of proof is on the moving party. However, on issues for which the moving party will not bear the burden of proof at trial, the moving party's burden of proof on the motion is satisfied by pointing 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 adverse party must produce factual support sufficient to establish that it will be able to satisfy its evidentiary burden of

proof at trial; failure to do so shows there is no genuine issue of material fact. LSA-C.C.P. art. 966(C)(2); **Duplantis**, 2002-0852 at p. 5, 849 So.2d at 679-80.

On appeal, Dr. McClay asserts that the trial court erred in failing to find a genuine issue of material fact as to whether he properly perfected his lien based on the evidence he submitted. Dr. McClay argues that said evidence indicates that he actually sent certified letters with return receipts to Ms. Price's attorney, Walter Krousel, as well as to Investigative Excellence, LLC, which he contends works for or through Workers' Compensation as its collecting agent.

In a concursus proceeding, each defendant is considered as being both plaintiff and defendant with respect to all other parties. LSA-C.C.P. art. 4656. Accordingly, at trial, RMS, Gerry Lane, and LADASIF would bear the burden of proving their entitlement to reimbursement from the disputed funds. In support of their motion for summary judgment, they provided the affidavit of RMS's adjuster, Jodi Jacobson, which provided sufficient factual evidence that they would be able to establish their evidentiary burden of proof at trial.

Similarly, at trial, Dr. McClay would bear the burden of proving that he had perfected a lien that primed the movers' claim to reimbursement. In her affidavit, Ms. Jacobson stated that Dr. McClay had never provided the written notice required by LSA-R.S. 9:4753. In opposing the motion, Dr. McClay submitted nothing more than a return receipt showing that he sent some certified mail to a company called Investigative Excellence, LLC. Patently, this does not demonstrate that he sent notice via certified mail to RMS, much less that such notice contained all of the information required by the pertinent statute. Accordingly, we agree with the trial court that Dr. McClay failed to establish a genuine issue of material fact regarding whether he had properly perfected a lien.

Although on appeal Dr. McClay contends that Investigative Excellence, LLC, works with or through "workers' compensation," there is absolutely nothing

in the record to substantiate this allegation. Even if there were, Dr. McClay offers no authority to support a finding that his alleged notice to Investigative Excellence, LLC, should be construed as compliance with LSA-R.S. 9:4753.

Alternatively, Dr. McClay argues that the trial court erred in assessing him with costs and in denying his motion for new trial. At the outset, we note that Dr. McClay listed certain issues for appeal that he failed to brief. Accordingly, we consider those particular alleged errors as abandoned pursuant to Rule 2-12.4 of the Uniform Rules of Louisiana Courts of Appeal and decline to address them.

Moreover, having thoroughly reviewed the record, we find no error on the part of the trial court in making the pertinent rulings. It was clearly empowered to assess costs against Dr. McClay under the plain language of LSA-C.C.P. art. 4659.[2] Additionally, Dr. McClay has failed to demonstrate either peremptory or discretionary grounds justifying a new trial as set forth in LSA-C.C.P. arts. 1972 and 1973.[3]

CONCLUSION

For the foregoing reasons, the summary judgment is hereby affirmed. All costs of this appeal are assessed to Dr. Wilbert McClay.

AFFIRMED.

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[2] Louisiana Code of Civil Procedure art. 4659 provides, in part:

> When money has been deposited into the registry of the court by the plaintiff, neither he nor any other party shall be required to pay any of the costs of the [concursus] proceeding as they accrue, but these shall be deducted from the money on deposit. The court may award the successful claimant judgment for the costs of the proceeding which have been deducted from the money on deposit, or any portion thereof, against any other claimant who contested his right thereto, as in its judgment may be considered equitable.

[3] The peremptory grounds for a new trial are set forth in LSA-C.C.P. art. 1972, which provides, in part:

> A new trial shall be granted, upon contradictory motion of any party…
>
> (1) When the verdict or judgment appears clearly contrary to the law and the evidence.
>
> (2) When the party has discovered, since the trial, evidence important to the cause, which he could not, with due diligence, have obtained before or during the trial.
>
> (3) When the jury was bribed or has behaved improperly so that impartial justice has not been done.

Pursuant to LSA-C.C.P. art. 1973, the trial court has the discretion to grant a new trial if there exists "good ground therefor…."