NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 CA 1702

YOLANDA VESSELL AND ROGERS VESSELL

VERSUS

FALLIN FAMILY DENTISTRY AND WAL-MART STORES, INC.

Judgment Rendered: May 3, 2012

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On Appeal from the
19th Judicial District Court,
In and for the Parish of East Baton Rouge,
State of Louisiana
Trial Court No. 551,067

Honorable Kay Bates, Judge Presiding

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BEFORE: CARTER, C.J., PARRO AND HIGGINBOTHAM, JJ.

HIGGINBOTHAM, J.

Plaintiffs, Yolanda Vessell and Rogers Vessell, challenge the trial court's granting of summary judgment in favor of defendant, Wal-Mart Stores, Inc. (Wal-Mart) and dismissing their claims for damages, with prejudice. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

Plaintiff, Yolanda Vessell, alleges that she ingested a wrongfully-prescribed antibiotic distributed by defendant, Wal-Mart, causing her to become ill. The antibiotic plaintiff was given was not prescribed for her, but was for a patient with the exact same name. In November 2005, Dr. Lance Fallin, a licensed dentist for Fallin Family Dentistry, prescribed for his patient, Yolanda Vessell (Vessell 2), the antibiotic Amoxicillin in anticipation of a dental procedure. Plaintiff, unlike Vessell 2, has never been a patient of Dr. Fallin; however, she was a former patient of Dr. Beier from 1987 to 1993. Dr. Beier retired and his practice was purchased by Fallin Family Dentistry. According to the record, some of Dr. Beier's patients' information was commingled with Dr. Fallin's patients' information.

On November 10, 2005, Dr. Fallin's office manager, Henri Rabalais, called in the prescription for Amoxicillin for Yolanda Vessell to Wal-Mart. A Wal-Mart pharmacist took down the prescription. Wal-Mart noticed that there was an allergy contraindication in its system, called Dr. Fallin's office, and again spoke with Rabalais. After consulting Dr. Fallin, Rabalais was instructed by him to change the prescription to Clindamycin. She then called Wal-Mart again with the prescription for Clindamycin for Yolanda Vessell. William Gleason, the Wal-Mart pharmacist who spoke with Rabalais, took down the prescription for Yolanda Vessell, date of birth October 19, 1955, which is the date of birth of the plaintiff and is not believed to be the date of birth of Vessell 2. On November 17, 2005, Rogers Vessell, plaintiff's husband, went to Wal-Mart to pick up other

prescriptions for plaintiff, and on that day, was given the prescription for Clyndamycin. Plaintiff ingested the medication.

As a result of taking the medication not actually prescribed for her, plaintiff alleges that she suffered physical injury and her husband, Rogers Vessell alleges loss of consortium. Plaintiffs filed the instant suit in the 19th Judicial District Court against Wal-Mart and Fallin Family Dentistry, seeking damages for their injuries. In response, Wal-Mart filed a motion for summary judgment, therein alleging Wal-Mart's actions were not the cause-in-fact of plaintiffs' damages and there was no evidence Wal-Mart breached a duty it owed plaintiffs. Plaintiffs opposed the motion for summary judgment, arguing that factual disputes existed as to who was negligent in distributing the wrong prescription. Exhibits offered by the parties included excerpts of the deposition of Yolanda Vessell, the affidavit of William Gleason, the discovery responses of Dr. Fallin, and the depositions of Dr. Fallin, Henri Rabalais, and William Gleason. The trial court granted summary judgment in favor of Wal-Mart, finding Wal-Mart accurately filled and dispensed the prescription. Plaintiffs appeal alleging three assignment of error: (1) the court erred in granting the motion for summary judgment filed by Wal-Mart because Wal-Mart did not met the burden of demonstrating that there is no genuine issue of material fact; (2) the court erred in granting the motion for summary judgment filed by Wal-Mart because a reasonable jury could find Wal-Mart liable to plaintiffs for negligence; and (3) the court erred in awarding costs to Wal-Mart.[1]

SUMMARY JUDMENT

An appellate court reviews a district court's decision to grant a motion for summary judgment *de novo*, using the same criteria that govern the district court's consideration of whether summary judgment is appropriate. **Granda v. State**

[1] Under Rule 2-12.4 of the Uniform Rules, Courts of Appeal, all specifications or assignments of error must be briefed, and the appellate court may consider as abandoned any specification or assignment of error that has not been briefed. This issue was not briefed, therefore, we consider it abandoned.

Farm Mut. Ins. Co., 2004-2012 (La. App. 1st Cir. 2/10/06), 935 So.2d 698, 701. The motion should be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show there is no genuine issue of material fact and the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B). On a motion for summary judgment, if 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. If the adverse party then fails to produce factual support sufficient to establish that it will be able to satisfy its evidentiary burden of proof at trial, there is no genuine issue of material fact and summary judgment must be granted. La. C.C.P. art. 966(C)(2).

Wal-Mart would not bear the burden of proof at trial; therefore, its burden on the motion for summary judgment did not require that it negate all essential elements of plaintiffs' negligence claims. Rather, its burden on the motion for summary judgment was to point out to the court that there is an absence of support for one or more elements essential to plaintiffs' negligence claims. See La. C.C.P. art. 966(C)(2); **Babin v. Winn-Dixie Louisiana, Inc.**, 2000-0078 (La. 6/30/00), 764 So.2d 37, 39. See also **Robles v. ExxonMobile**, 2002-0854 (La. App. 1st Cir. 3/28/03), 844 So.2d 339, 341. At that point, the burden shifted to plaintiffs to present evidence that genuine issues of material fact existed as to whether Wal-Mart was negligent and whether that negligence caused the injury at issue.

Material facts are those that potentially insure or preclude recovery, affect the litigant's success, or determine the outcome of a legal dispute. **Gatlin v. Kleinheitz**, 2009-0828 (La. App. 1st Cir. 12/23/09), 34 So.3d 872, 875, writ denied, 2010-0084 (La. 2/26/10), 28 So.3d 280. Because the applicable substantive law determines materiality, whether a particular fact in dispute is

material can be seen only in light of the substantive law applicable to the case. **Lemann v. Essen Lane Daiquiris, Inc.**, 2005-1095 (La. 3/10/06), 923 So.2d 627, 632. Plaintiffs' claims in this case are based upon Wal-Mart's alleged negligence. Louisiana courts have adopted a duty-risk analysis in determining whether to impose liability under general negligence principles. **Id.** at 632-33. For liability to attach under a duty-risk analysis, a plaintiff must prove five separate elements: (1) the defendant had a duty to conform its conduct to a specific standard of care (the duty element); (2) the defendant failed to conform its conduct to the appropriate standard of care (the breach of duty element); (3) the defendant's substandard conduct was a cause-in-fact of the plaintiffs' injuries (the cause-in-fact element); (4) the defendant's substandard conduct was a legal cause of the plaintiffs' injuries (the scope of protection element); and (5) the actual damages (the damage element). **Id.**, 923 So.2d at 633. A negative answer to any of the elements of the duty-risk analysis prompts a no-liability determination. **Joseph v. Dickerson**, 99-1046 (La. 1/19/00), 754 So.2d 912, 916. Therefore, to carry its burden on summary judgment, Wal-Mart must show that there is an absence of factual support for any of the elements of the negligence cause of action.

ANALYSIS

Plaintiffs' two briefed assignments of error are based on their contention that there remain genuine issues of material fact and that summary judgment was not appropriate. In support of their position, plaintiffs rely on the alleged inconsistencies in William Gleason's affidavit and his deposition, Wal-Mart's failure to verify plaintiff's information, including name, date of birth, address, and social security number, and Wal-Mart's failure to warn plaintiff of the possible side effects of Clindamycin.

In support of its motion for summary judgment, Wal-Mart relies on the deposition testimony of Dr. Fallin, Henri Rabalais, and William Gleason. During

his deposition, Dr. Fallin was asked if October 19, 1955, which was on the prescription from Wal-Mart, was the date of birth in their system for Yolanda Vessell. He answered "I believe that was the date of birth that was in our system." He further stated that he assumed Wal-Mart used the date they were given. He also admitted that the date of birth for his patient, Vessel 2, was corrected in their system. In her deposition, Henri Rabalais said she called in the first prescription and called back to change the prescription. According to Rabalais, she gave the pharmacist the name and date of birth of Yolanda Vessell as reflected in Dr. Fallin's computer system.[2]

William Gleason testified that Wal-Mart's procedure is to write down the name and date of birth as conveyed to them over the phone. He further testified that the information on the prescription written in his handwriting, to the best of his knowledge is the information he was given about Yolanda Vessell. The date of birth on the hand-written prescription was that of the plaintiff. There are some discrepancies in Gleason's affidavit and deposition. However, it is clear that he took down the second prescription for Clindamycin called in for Yolanda Vessell per Wal-Mart's usual procedure and used the information given to him by Rabalais. Plaintiffs failed to introduce any evidence that the prescription taken down by Wal-Mart contained anything other than the information that was given to them by Dr. Fallin's office.

Plaintiffs also contend that Wal-Mart should have verified the plaintiff's name, date of birth, address, and social security number, and Wal-Mart should have warned the plaintiff of the possible side effects of Clindamycin. Under current Louisiana jurisprudence, the physician, rather than the pharmacist bears the onus to prescribe correct medications for a patient, as well as to warn the patient of

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[2] Dr. Fallin and Henri Rabalais testified that their computer system had two entries for the name Yolanda Vessell; however, they both stated that the date of birth was the same on the two entries.

side effects. A pharmacist has a duty to accurately fill a prescription and to be alert for clear errors or mistakes in the prescription, but the pharmacist does not have a duty to question a judgment made by the physician as to the propriety of a prescription, or to warn customers of the hazardous side effects associated with a drug, either orally or by way of the manufacturer's package insert. **Gassen v. East Jefferson General Hosp.**, 628 So.2d 256, 259 (La. App. 5 Cir.1993).

Louisiana Revised Statute 37:1164(41) provides; in pertinent part;

> Practice of pharmacy means and includes the compounding, filling, dispensing, exchanging, giving, offering for sale, or selling, drugs, medicines, or poisons, pursuant to prescriptions or orders of ... dentists, ... or any other act, service operation or transaction incidental to or forming a part of any of the foregoing acts, requiring, involving or employing the science or art of any branch of the pharmacy profession, study or training.

That is what the Wal-Mart pharmacy did in this case. It dispensed the medicine as prescribed by a licensed dentist. There was no evidence, statute, jurisprudence or regulation presented to show Wal-Mart should have required any additional information when taking down the prescription or that it breached any duty to warn about potential side effects. Further, testimony from Gleason revealed that pharmacists have a duty to confirm the patient's identity via their name and date of birth unless a scheduled narcotic is involved, in which case the patient's address and physician's license number are obtained as well. Since Clyndamycin is not a scheduled narcotic, this additional information was not required. Rabalais also testified that it is commonplace with all pharmacies that she calls in prescriptions to that they ask only for the name and date of birth of the intended patient. We find Wal-Mart fulfilled all duties owed to plaintiff under the facts of this case, and there was no evidence of negligence on its part.

CONCLUSION

We find, as did the district court, that Wal-Mart accurately filled and dispensed the prescription as it was called in by Dr. Fallin's office. Wal-Mart met

its burden of pointing out that plaintiffs could not show that Wal-Mart's conduct constituted a breach of any duty owed by them. Plaintiffs failed to introduce any evidence that Wal-Mart failed to conform their conduct to the appropriate standard of care (the breach of duty element). Therefore, we conclude there is an absence of factual support for the breach of duty element of the duty risk analysis and Wal-Mart is entitled to summary judgment as a matter of law. Accordingly, after a *de novo* review, we affirm the judgment of the district court. All costs of this appeal are assessed to plaintiffs, Yolanda and Rogers Vessell.

AFFIRMED.