JEANA O. KIEFFER & LOUIS KIEFFER

VERSUS

JO PLUNKETT-KUSPA, M.D., A/K/A JO ELLEN PLUNKETT-KASPAREK, ALTON OCHSNER MEDICAL FOUNDATION HOSPITAL, AND OCHSNER CLINIC, L.L.C.

NO. 13-CA-499

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 586-725, DIVISION "P"
HONORABLE LEE V. FAULKNER, JR., JUDGE PRESIDING

MARCH 26, 2014

SUSAN M. CHEHARDY
CHIEF JUDGE

Panel composed of Judges Susan M. Chehardy, Jude G. Gravois, Robert A. Chaisson, Stephen J. Windhorst, and Hans J. Liljeberg

WINDHORST, J., DISSENTS WITH REASONS

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REVERSED AND REMANDED

Plaintiffs appeal the trial court's grant of defendants' motion for summary judgment and dismissal of their medical malpractice claims with prejudice. For the following reasons, we reverse that ruling and remand for further proceedings.

Facts and Procedural History

On April 27, 1998, Jeana Kieffer presented to Ochsner Clinic in Metairie with complaints of "headache, inner cranial pressure, fever, heightened sensitivity to odors, ... congestion," nausea and vomiting. Dr. Jo Ellen Plunkett, a physician at Ochsner Clinic, diagnosed Mrs. Kieffer with a sinus infection and prescribed medication.

On April 29, 1998, Mrs. Kieffer awoke with no memory of herself or her husband. Her husband, Louis, immediately brought her to Ochsner Hospital. When they arrived, she was having trouble breathing on her own so she was placed on a ventilator. The emergency room physician diagnosed her with viral meningitis/encephalopathy and transferred Mrs. Kieffer to the Intensive Care Unit at Ochsner. Further medical testing revealed that Mrs. Kieffer had herpetic encephalitis, LE venous insufficiency, and hypertension. Eventually, Mrs. Kieffer was stabilized, treated, and released from the hospital, but, for almost a year, Mrs.

Kieffer complained of frequent severe headaches and increased sensitivity to odors, and regularly experienced fever, seizures, and amnesia.

On April 16, 1999, the Kieffers filed a Petition for Medical Review Panel alleging that Dr. Plunkett committed medical malpractice by failing to properly diagnose and treat her. The review panel, which convened on August 29, 2002, found that "[t]he evidence does not support the conclusion that the defendant ... failed to meet the applicable standard of care as charged[.]" In support of its conclusion, the panel stated, "There were no mental status changes or physical findings (including stiff neck or focal neurological deficits) that would have indicated to a reasonable primary care physician that the primary care physician should have taken further action, such as a lumbar puncture or admission of the patient to the hospital for evaluation."

On October 15, 2002, Mr. and Mrs. Kieffer filed this lawsuit against Dr. Plunkett and her employer, Ochsner Clinic, L.L.C.,[1] alleging that Dr. Plunkett's medical treatment of Mrs. Kieffer was below the acceptable standard of care, causing Mrs. Kieffer to suffer mental and physical damage, permanent injury, medical expenses, and loss of earnings. The plaintiffs also sought *Lejeune*[2] damages and loss of consortium damages for Mr. Kieffer.

On November 16, 2012, defendants filed their motion for summary judgment, alleging that plaintiffs "could not offer expert testimony to meet their burden of proof." Specifically, defendants argued that plaintiffs had failed to identify a qualified medical expert to bear their burden of proof. In support of their motion for summary judgment, defendants attached the medical review panel's "Expert Opinion and Written Reasons;" interrogatories; and request for production

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[1] Under the doctrine of *respondeat superior*, employers are responsible for the torts of their employees committed during the course and scope of employment. *See* La. C.C. art. 2320.

[2] *Lejeune v. Rayne Branch Hosp.*, 556 So.2d 559 (La. 1990).

of documents. That same day, defendants also filed their Statement of Undisputed Facts.

On December 11, 2012, plaintiffs filed their opposition to the motion for summary judgment, asserting that there existed a genuine issue of material fact because their expert, Daniel Trahant, M.D., would testify regarding the standard of care and causation in this case. In support of their opposition, plaintiffs attached Dr. Trahant's deposition.

On January 23, 2013, the trial court granted defendants' motion for summary judgment and dismissed plaintiffs' suit. This timely appeal follows.

Standard of Review

Summary judgment "shall be rendered ... if the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any, admitted for purposes of the motion for summary judgment, show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law." La. C.C.P. art. 966(B)(2). The party bringing the motion bears the burden of proof; however, where the moving party will not bear the burden of proof at trial, the moving party must only point out that there is an absence of factual support for one or more elements essential to the adverse party's claim. La. C.C.P. art. 966(C)(2). Thereafter, if the adverse party fails to produce factual support sufficient to show that he will be able to meet his evidentiary burden of proof at trial, no issue of material fact exists and the moving party is entitled to summary judgment. *Id.*

On appeal, our review of summary judgments is *de novo* under the same criteria that govern the district court's consideration of whether summary judgment is appropriate. *Pizani v. Progressive Ins. Co.*, 98-225 (La. App. 5 Cir. 9/16/98), 719 So.2d 1086, 1087. The decision as to the propriety of a grant of a motion for

summary judgment must be made with reference to the substantive law applicable to the case. *Muller v. Carrier Corp.*, 07-770 (La. App. 5 Cir. 4/15/08), 984 So.2d 883, 885.

Law and Argument

In a medical malpractice action against a physician, the plaintiff has the burden of proving (1) the degree of care ordinarily practiced by physicians in the defendant physician's specialty, (2) that the defendant either lacked this degree of skill or failed to use reasonable care and diligence, along with his best judgment in the application of that skill, and (3) that as a proximate result of the breach the plaintiff suffered injuries that would not otherwise have been incurred. La. R.S. 9:2794(A); *Fischer v. Megison*, 07-1023 (La. App. 5 Cir. 5/27/08), 986 So.2d 95, 101.

In determining the degree of care ordinarily practiced by physicians, La. R.S. 9:2794(A)(1) sets forth the applicable standard of care:

> The degree of knowledge or skill possessed or the degree of care ordinarily exercised by physicians, dentists, optometrists, or chiropractic physicians licensed to practice in the state of Louisiana and actively practicing in a similar community or locale and under similar circumstances; and where the defendant practices in a particular specialty and where the alleged acts of medical negligence raise issues peculiar to the particular medical specialty involved, then the plaintiff has the burden of proving the degree of care ordinarily practiced by physicians, dentists, optometrists, or chiropractic physicians within the involved medical specialty.

Essentially, La. R.S. 9:2794(A)(1) provides two standards – one for specialists and one for general practitioners. Specialists are subject to a common standard to be discerned from within their specialty (generally referred to as "the national standard"), while general practitioners are held to the standards prevailing in the community or locale in which they practice and under similar circumstances (generally referred to as "the local standard"). *See Leyva v. Iberia General*

Hospital, 94-0795 (La. 10/17/94), 643 So.2d 1236, 1238-1239; *Ardoin v. Hartford Ace. & Indem. Co.,* 360 So.2d 1331, 1340 (La. 1978). A specialist with knowledge of the requisite subject matter may be qualified to testify regarding the standard of care in a general practitioner's locale. *Leyva, supra*; *McLean v. Hunter*, 495 So.2d 1298, 1302 (La. 1986).

In *McLean v. Hunter, supra,* the Louisiana Supreme Court found that a periodontist was qualified to testify as to the standard of care expected of general dentists practicing in the same locale as the defendant regarding periodontal care.

Similarly, in *Roberts v. Warren,* 01-1342 (La. 6/29/01), 791 So.2d 1278, the Louisiana Supreme Court held that a board certified oral surgeon was qualified to testify as an expert in a dental malpractice case against a general dentist regarding the applicable standard of care in dealing with the extraction of teeth from a site at which a bacterial infection was present. The Court found that the oral surgeon's affidavit and the depositions in evidence, including that of the defendant, established that the treatment at issue involved basic general dentistry and dental principles that are universally recognized by all dentists, and taught in all dental schools.

In *Leyva v. Iberia General Hospital, supra*, the Louisiana Supreme Court found that a board certified obstetrical surgeon was qualified to testify as an expert as to the standard of care applicable to a general practitioner from a different locale who performed a tubal ligation. *Leyva,* 643 So.2d at 1239 (citing *Piazza v. Behrman Chiropractic Clinic, Inc.,* 601 So.2d 1378 (La. 1992)).

Regarding a medical diagnosis rather than a procedure, in *Slavich v. Knox,* 99-1540 (La. App. 4 Cir. 12/15/99), 750 So.2d 301, this Court held that the trial court did not err in allowing a general surgeon to testify as to the standard of care applicable to an internist who failed to diagnose a liposarcoma in a female patient.

In this case, plaintiffs introduced the deposition of Dr. Trahant, a board certified neurologist who has practiced medicine for over 30 years in this locale. Dr. Trahant stated that, early in his career, he had worked as an emergency room physician for one year. He also noted that, whenever he is making a differential diagnosis, he works from the perspective of a primary care physician and a neurologist.

When asked about a hypothetical patient, Dr. Trahant stated, "if a person comes in with high fever – and I consider 101.6 high fever – chills and headache unrelieved by narcotics, that patient would have a spinal tap." Dr. Trahant further opined, "I don't think the standard of care for primary care physicians are any different than anybody else when faced with an illness of this type with the potential implications." Ultimately, Dr. Trahant stated, "the internist should have taken further action such as a lumbar puncture or admit her to the hospital for evaluation."

Accordingly, upon *de novo* review of the evidence presented and the applicable law, we find that the trial court erred in granting summary judgment in favor of defendants. We find that plaintiffs, as the party with the burden of proof at trial, produced sufficient factual support to show that they will be able to meet their evidentiary burden of proof at trial as required by law; therefore, summary judgment was inappropriate. La. C.C.P. art. 966(C)(2). Accordingly, we reverse the trial court's grant of summary judgment and remand for further proceedings.

REVERSED AND REMANDED

JEANA O. KIEFFER & LOUIS KIEFFER	NO. 13-CA-499
VERSUS	FIFTH CIRCUIT
JO PLUNKETT-KUSPA, M.D., A/K/A JO ELLEN PLUNKETT-KASPAREK, ALTON OCHSNER MEDICAL FOUNDATION HOSPITAL, AND OCHSNER CLINIC, L.L.C.	COURT OF APPEAL STATE OF LOUISIANA

WINDHORST, J., DISSENTS WITH REASONS

I respectfully dissent and would affirm the decision of the trial court. In this case, the trial court found that plaintiff failed to present a competent medical expert to support her claims of malpractice.

It is well established that the trial court has great discretion in determining the competence of an expert witness and that determination will not be overturned on appeal absent an abuse of that discretion. Foster v. Parwardhan, 48,575 (La. App. 2 Cir. 1/22/14), — So.3d —.

As stated by my colleagues in their opinion, in a medical malpractice action against a physician, the plaintiff has the burden of proving (1) the degree of care ordinarily practiced by physicians in the defendant physician's specialty, (2) that the defendant either lacked this degree of skill or failed to use reasonable care and diligence, along with his best judgment in the application of that skill, and (3) that as a proximate result of the breach the plaintiff suffered injuries that would not otherwise have been incurred. La. R.S. 9:2794A; Fischer v. Megison, 07-1023 (La. App. 5 Cir. 5/27/08), 986 So.2d 95, 101.

In determining the degree of care ordinarily practiced by physicians in the defendant's physician's specialty, La. R.S. 9:2794A(1) sets forth the applicable standard of care for physicians:

> The degree of knowledge or skill possessed or the degree of care ordinarily exercised by physicians, dentists, optometrists, or chiropractic physicians licensed to practice in the state of Louisiana and actively practicing in a similar community or locale and under similar circumstances; and where the defendant practices in a particular specialty and where the alleged acts of medical negligence raise issues peculiar to the particular medical specialty involved, then the plaintiff has the burden of proving the degree of care ordinarily practiced by physicians, dentists, optometrists, or chiropractic physicians within the involved medical specialty.

The first part of La. R.S. 2794A(1) governs non-specialists and requires that the degree of care to which the physician, dentist or chiropractor is to be held is based upon the standard of practice in a similar community or locale and under similar circumstances, referred to as the "locality rule." The second part of La. R.S. 2794A(1) governs specialists and requires specialists to be held to a national standard, which is that degree of care ordinarily practiced by physicians within the involved medical specialty. Piazza v. Behrman Chiropractic Clinic, Inc., 601 So.2d 1378, 1380 (La. 1992).

In opposition to defendant's motion for summary judgment, plaintiffs offer the deposition of Dr. Daniel J. Trahant, a practicing neurologist. However, Dr. Plunkett-Kuspa has not limited her practice to the specialized field of neurology, nor has she held herself out as a specialist in treating neurological disorders. Therefore, the "locality rule" applies to defendant's standard of care. See LeBlanc v. Landry, 08-1643 (La. App. 1 Cir. 6/24/09), 21 So.3d 353, 359-360. See also Iseah v. E.A. Conway Memorial Hospital, 591 So.2d 767 (La. App. 2 Cir. 1991), writ denied, 595 So.2d 657 (La. 1992); citing to Parmelee v. Kline, 579 So.2d 1008 (La. App. 5 Cir. 1991), writ denied, 586 So.2d 564 (La. 1991).

The Louisiana Supreme Court has stated that a specialist may testify as an expert witness in a case involving a general practitioner only if the

specialist has sufficient knowledge of the requisite subject matter. McLean v. Hunter, 495 So.2d 1298 (La.1986). However, the specialist must also be familiar with the standard required of a physician (here a general practitioner/internist) under similar circumstances and in a similar community. See Sam v. XYZ Ins. Co., 489 So.2d 907 (La.1986). A particular specialist's knowledge of the subject matter on which he is to offer expert testimony should be determined on a case by case basis. McLean, supra, at 1302.

I find that the plaintiff's expert, Daniel Trahant, M.D., is unable to present sufficient medical testimony and evidence to support plaintiff's claims of medical negligence. As previously stated, the plaintiff must present evidence of the degree of knowledge or skill possessed or the degree of care ordinarily exercised by physicians that are actively practicing in a similar community or locale and under similar circumstances. Dr. Trahant is a neurologist, while the defendant, Dr. Plunkett, is an internist. It is unquestionable, and not largely in dispute, that the standard of care applicable to a neurologist with regard to testing for and diagnosing a rare condition such as herpetic encephalitis is substantially different from that of an internist. Additionally, the degree of knowledge or skill possessed or the degree of care ordinarily exercised by a neurologist varies greatly from that exercised by an internist with regard to the detection and diagnosis of herpetic encephalitis. I agree with the trial judge, who stated in his reasons for judgment, that

> . . . it is unquestionable, and not largely in dispute, that the standard of care applicable to a neurologist as opposed to that of an internist, with regard to testing and diagnosing a rare condition such as herpetic encephalitis is substantially different. Additionally, the degree of knowledge or skill possessed of the degree of care ordinarily exercised by a neurologist varies

> greatly from that exercised by an internist with regard to the detection and diagnosis of herpetic encephalitis.

In deposition, when asked if he had ever practiced as a primary care physician, Dr. Trahant replied that he had not. He stated that he worked as an emergency room physician for one year during his residency in 1973. Dr. Trahant further stated that he had never *testified*—a factor in qualifying as an expert—in a matter on the standard of care for diagnosing either encephalitis or meningitis. He had only participated in a medical review panel concerning the practice of a primary care physician, five to seven times, but those cases were "mostly involving injections, blood drawing, that type of thing" and that the cases he could recall had involved "venous punctures that have damaged the median nerve or the sciatic nerve in a gluteal injection." At no time during his deposition did Dr. Trahant state that he was familiar with the standard of care for a primary care physician in this locale, or in any locale. I believe that the trial court did not abuse its discretion in finding that Dr. Trahant was not qualified to testify as to the standard of care for internist in this locale. Because there are complex medical and factual issues involved in this case, the plaintiffs must provide appropriate expert evidence in order to sustain their burden of proof as to the standard of care applicable in this case. Compare Pierre-Ancar v. Browne McHardy Clinic, 00-2410 (La. App. 4 Cir 1/16/02), 807 So.2d 344, citing Pfiffner v. Correa, 94-0992 (La. 10/17/19), 643 So.2d 1234. In the absence of a competent expert witness, plaintiffs are unable to provide evidence for an essential element of their claim. La. C.C.P. art. 966C.

Further, Mrs. Kieffer was seen by Dr. Plunkett-Kuspa only one time. The following day, Ms. Kieffer called Dr. Plunkett-Kuspa, as instructed. Ms. Kieffer relayed that she still had nausea, and she also admitted that she

had not taken the prescribed medicine. According to Dr. Plunkett-Kuspa's notes reviewed by Dr. Trahan, there was no mention of headaches during this phone call. Dr. Plunklett-Kuspa instructed Ms. Kieffer to take the prescribed medicine and call the next day. According to the conclusion of the medical review panel, Dr. Plunkett-Kuspa's treatment did not fall below the accepted standard of care for a primary care physician.

In this case, the alleged malpractice occurred over sixteen years ago. This suit was filed more than eleven years ago. Plaintiffs have had more than ample time to obtain an expert who could testify as to the standard of care expected from an internist, which is necessary to prove their malpractice claim. Perricone v. East Jefferson General Hosp., 98-343 (La. App. 5 Cir. 10/14/98), 721 So.2d 48.

Accordingly, I do not believe that the trial court erred in finding that there was no issue of fact and that the plaintiffs could not provide evidence to support an essential element of their case, specifically, the appropriate standard of care of a primary care physician practicing internal medicine. Plaintiffs' expert, a neurologist, could not testify to the standard of care applicable to a primary care physician, as is evident from his deposition. I would affirm the trial court's ruling granting summary judgment, dismissing plaintiffs' claims against Dr. Plunkett-Kuspa.

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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **Uniform Rules - Court of Appeal, Rule 2-20** THIS DAY **MARCH 26, 2014** TO THE TRIAL JUDGE, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

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CLERK OF COURT

13-CA-499

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