

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2007 CA 0424

**EVELYN SCHILLING, LAWRENCE CONLEAY,
RONALD CONLEAY, NELDA CARROL
AND BETTY VERRET**

VERSUS

GRACE HEALTH AND REHABILITATION

BJP
J.P.P.
JEW

Judgment Rendered: November 2, 2007.

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On Appeal from the
20th Judicial District Court,
In and for the Parish of East Feliciana,
State of Louisiana
Trial Court No. 37202

Honorable George H. Ware, Jr., Judge Presiding

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BEFORE: CARTER, C.J., PETTIGREW AND WELCH, JJ.

CARTER, C. J.

Plaintiffs, Evelyn Schilling, Lawrence Conleay, Ronald Conleay, Nelda Sue Carrol, and Betty Verret, appeal a judgment of the trial court granting summary judgment and dismissing their medical malpractice suit against Grace Health and Rehabilitation Center (“Grace”). For the following reasons, we reverse.

FACTS AND PROCEDURAL HISTORY

This suit arises from a hip fracture that the plaintiffs’ 79-year-old mother, Bernice Juanita Conleay, suffered while a non-ambulatory nursing home resident at Grace. Following complaints of leg pain and notations by nurses of swelling, Ms. Conleay was transported to a hospital by ambulance where she was diagnosed with the hip fracture. Dr. Janet Lewis, an orthopedic surgeon, examined Ms. Conleay and performed surgery. Dr. Lewis opined that the fracture was approximately three weeks old and further that the fracture had most likely been caused by Ms. Conleay falling. The records from Grace contain no documentation of Ms. Conleay being dropped or falling.

The plaintiffs instituted medical malpractice proceedings¹ complaining that Grace’s employees dropped Ms. Conleay, then failed to timely treat Ms. Conleay’s resulting hip injury. A medical review panel found no deviation of the standard of care by Grace. Specifically, the panel noted that the record contained no evidence Ms. Conleay was dropped or

¹ During oral argument before this court, the parties indicated that plaintiffs originally filed suit in district court against Grace, but the suit was dismissed pursuant to Grace’s exception raising the objection of prematurity for failure to proceed before a medical review panel. On appeal, the parties do not dispute that this is a medical malpractice claim. However, we note that the trier of fact will ultimately decide at trial whether this case is one in medical malpractice or negligence. **Lacoste v. Pendleton Methodist Hosp., L.L.C.**, 07-0008, 07-0016 (La. 9/5/07), ___ So.2d ___, ___ n.2.

complained of hip pain, concluding nothing in the record would lead a reasonable nurse to suspect a hip fracture prior to the day before Ms. Conleay was transferred to the hospital.

Plaintiffs then instituted suit alleging that one of Grace's orderlies dropped Ms. Conleay while attempting to transfer her from her bed to a wheelchair so that he could take her to dinner. Plaintiffs further allege that the orderly threatened Ms. Conleay not to reveal that she had been dropped, that Grace's employees refused to report the incident to proper authorities, and that the injury went untreated until plaintiffs visited Ms. Conleay and noticed her pain, contusions, and a large hematoma. Plaintiffs allege multiple acts of negligence by Grace, including: negligently dropping Ms. Conleay; failure to report the injury; ignoring Ms. Conleay's complaints of pain; and failing to record Ms. Conleay's complaints of pain.

Grace answered the petition, then moved for summary judgment contending plaintiffs could not carry their burden of proof on essential elements of their medical malpractice claim. Grace argued there was no evidence of any fall or dropping incident at Grace and there was no breach of the standard of care by Grace. In support thereof, Grace submitted the decision of the medical review panel, as well as the affidavit of one of the medical review panel members who attested that after reviewing the evidence, he and the panel members found that plaintiffs did not establish that Grace deviated from the applicable standard of care.

Plaintiffs opposed Grace's motion for summary judgment arguing that issues of material fact exist as to whether a Grace employee dropped Ms. Conleay and whether Grace failed to report and treat Ms. Conleay's hip fracture. Plaintiffs supported their position with various medical records and

excerpts of Dr. Lewis's deposition testimony in which she testified that the fracture was two to four weeks old at the time of diagnosis, that it was most likely caused by a fall, and that such a fracture would be obvious to her by looking at the leg. Finally, plaintiffs submitted excerpts of two of their own depositions, in which they consistently testified that after the hip surgery they spoke to their mother, who indicated she was scared. They further testified that in response to their questions, Ms. Conleay acknowledged that she had been dropped and had been threatened not to reveal what happened.

After reviewing all of the evidence before it, the trial court granted the motion for summary judgment. In oral reasons, the trial judge stated:

[I]t does not appear to me that at trial you're going to be able to prove that it's more probable than not that if it did, in fact, happen that it happened at Grace or that it happened through the negligence of someone at Grace. And Dr. Lewis can only say that there is an injury and in her opinion that it was probably caused by some type of trauma.

Plaintiffs now appeal.

DISCUSSION

Summary judgments are reviewed on appeal *de novo*, with the appellate court using the same criteria that govern the trial court's determination of whether summary judgment is appropriate. A motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine issue of material fact. **Southern Silica of Louisiana, Inc. v. Louisiana Ins. Guar. Ass'n**, 06-2023 (La. App. 1 Cir. 7/13/07), ___ So.2d ___, ___. The motion should be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to material fact and that mover is entitled to judgment as a matter of law. LSA-

C.C.P. art. 966B. In determining whether an issue is genuine, courts cannot consider the merits, make credibility determinations, evaluate testimony, or weigh evidence. Any doubt as to a dispute regarding a material issue of fact must be resolved against granting the motion and in favor of a trial on the merits. **Haydel v. State Farm Ins. Co.**, 05-0701 (La. App. 1 Cir. 3/24/06), 934 So.2d 726, 728.

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 nonmoving 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 that there is no genuine issue of material fact. LSA-C.C.P. art. 966C(2); **Southern Silica of Louisiana, Inc.**, ___ So.2d at ___.

The plaintiffs in a medical malpractice suit must establish the applicable standard of care, a violation of that standard of care, and a causal connection between the medical negligence and the patient's injuries. Generally, expert medical testimony is required to meet this burden of proof, especially when the defendant has filed a motion for summary judgment that is supported with expert opinion evidence. **Boudreaux v. Mid-Continent Cas. Co.**, 05-2453 (La. App. 1 Cir. 11/3/06), 950 So.2d 839, 844, writ denied, 06-2775 (La. 1/26/07), 948 So.2d 171. However, expert testimony is not required in limited instances of obvious carelessness in which a lay person can infer negligence, i.e., fracturing a bone during examination, amputating the wrong appendage, dropping a knife, scalpel, or acid on a

patient, leaving a sponge in a person's body, or failing to attend a patient when the circumstances demonstrate the serious consequences of this failure. **Pfiffner v. Correa**, 94-0924, 94-0963, 94-0992 (La. 10/17/94), 643 So.2d 1228, 1233-1234.

Plaintiffs have alleged two causes of action based on: 1) dropping Ms. Conleay; and 2) failure to treat Ms. Conleay's injury. Grace supported its motion for summary judgment with the medical review panel opinion and the affidavit of one of the panel members attesting to the opinion's correctness. Plaintiffs countered with portions of Dr. Lewis's deposition testimony, various medical records, as well as portions of two of the plaintiffs' deposition testimony.

After reviewing all of the evidence contained in the record before us, we find that genuine issues of material fact exist regarding both causes of action. The testimony of Dr. Lewis, together with that of the two plaintiffs, creates a genuine issue of fact as to whether Ms. Conleay was dropped at Grace. Moreover, Dr. Lewis's testimony together with the medical records creates a genuine issue of fact as to whether Grace failed to treat Ms. Conleay timely. In reaching this decision, we are mindful that it is improper for the court to weigh credibility or consider the merits of the case in reviewing the motion for summary judgment. See **Haydel**, 934 So.2d at 728.

Grace argues that it is entitled to summary judgment because plaintiffs have not produced expert medical testimony that will preclude plaintiffs from meeting their burden of proof at trial. However, at this stage of the proceedings and based on the record as it stands before us, we find that plaintiffs' failure to produce expert medical testimony in addition to that of

Dr. Lewis does not entitle Grace to summary judgment. Expert testimony is not always required in a medical malpractice case. Herein, plaintiffs allege Ms. Conleay, an elderly, non-ambulatory nursing home resident, was dropped and that the resulting injury was left untreated. If plaintiffs prove those facts at trial, certainly a lay jury can perceive negligence in that conduct as well as any expert can.² Moreover, plaintiffs have offered the medical testimony of Dr. Lewis, Ms. Conleay's treating surgeon.

After de novo review, we find that genuine issues of material fact are present in this case and that summary judgment was improperly granted.

CONCLUSION

The trial court's judgment is reversed and the matter is remanded for further proceedings.³ Costs of appeal are assessed to Grace Health and Rehabilitation Center.

REVERSED AND REMANDED.

² However, we base our conclusion only on the record presented herein and do not rule out the possibility that medical expert testimony may become necessary at a later stage of the proceedings.

³ Based on the record before us, we question plaintiffs' right to assert their claims. However, Grace did not raise the issue during proceedings before the trial court or on appeal. During oral argument, plaintiffs' counsel indicated that Ms. Conleay is now deceased and the plaintiffs are her heirs. Counsel for Grace stated they do not object to plaintiffs' right of action at this time. We do not raise the exception of no right of action here, but note that there is a question in this regard so that it may be addressed on remand.