

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 CA 0439

LACY JOHNSON, HATTIE OKOYE AS TUTRIX OF KEITH
BOSLEY AND LASHAE BOSLEY, AND ROSIE WATSON AS
TUTRIX OF LARISE BOSLEY

VERSUS

PETER J. BOSTICK, M.D., DEBORAH CAVALIER, M.D., DAVID
BOUDREAU, M.D., PATHOLOGY GROUP OF LOUISIANA,
WOMAN'S HOSPITAL FOUNDATION, AND ABC INSURANCE
COMPANY

Judgment Rendered: NOV 01 2013

On Appeal from the
19th Judicial District Court,
In and for the Parish of East Baton Rouge,
State of Louisiana
Trial Court No. 569,619

Honorable R. Michael Caldwell, Judge Presiding

*KUHN, J DISSENTS *** ASSIGNS REASONS*

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BEFORE: KUHN, HIGGINBOTHAM, AND THERIOT, JJ.

HIGGINBOTHAM, J.

In this medical malpractice action, the plaintiffs, Lacy Johnson and Hattie Okoye, as tutrix of Keith Bosely and LaShae Bosley, and Rosie Watson as tutrix of Larise Bosley¹ (Plaintiffs), appeal the trial court's granting of a motion for summary judgment in favor of defendant, Peter James Bostick, M.D. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

In May 2004, Myrinda Bosley, who had previously battled and survived both colon and breast cancer, sought treatment from Dr. Bostick for pain in her left arm. In June and July 2004, Dr. Bostick ordered biopsies of Ms. Bosley's chest and left axillary mass. None of the biopsies revealed evidence of metastatic disease. Ms. Bosley had follow-up appointments with Dr. Bostick on July 29, 2004, and September 16, 2004, after which, Dr. Bostick prescribed medication for pain. On October, 21, 2004 Ms. Bosley returned to Dr. Bostick's office with complaints of pain on her left side. Dr. Bostick found no palpable mass and diagnosed her with lymphedema of her upper left extremity. On December 21, 2004, when Ms. Bosley returned to Dr. Bostick for follow-up, he scheduled her for a set of diagnostic studies to be performed in March 2005. Ms. Bosley did not follow through with the diagnostic testing scheduled by Dr. Bostick. Instead, on March 21, 2005, Ms. Bosley saw Dr. Carl G. Kardinal, an oncologist at Ochsner Medical Center. Dr. Kardinal ordered several tests, including a PET scan performed on March 30, 2005, and a needle biopsy performed on April 25, 2005. The results of the needle biopsy were positive for metastatic breast cancer. Sadly, after having no response to chemotherapy, Ms. Bosley passed away.

On April 25, 2006, Plaintiffs filed a medical review panel complaint with the Patient Compensation Fund. On May 12, 2008, the Medical Review Panel issued

¹ Keith Bosely, LaShae Bosley, and Larise Bosley are the minor children of decedent, Ms. Myrinda Bosley.

its findings. As to Dr. Bostick, the panel found that he failed to meet the applicable standard of care but that the complained of conduct was not a factor in the resultant damages.

On August 8, 2008, plaintiffs filed a "Petition for Damages" in the 19th Judicial District Court against Dr. Bostick.² In their petition, Plaintiffs contend that due to the sub-standard treatment by Dr. Bostick, their mother "suffered permanent injuries including recurrence and progression of cancer, undue pain and suffering, loss of consortium, as well as mental anguish and distress."

On August 6, 2012, Dr. Bostick filed a motion for summary judgment, in which he maintained that there were no issues of material fact in this matter and that he was entitled to summary judgment as a matter of law. Specifically, Dr. Bostick contended that Plaintiffs failed to produce an expert report proving the causation element, which is required in a medical malpractice case.

Prior to the hearing on the motion for summary judgment, Plaintiffs filed a motion to continue, which the trial court denied. The matter was heard on October 22, 2012. During the hearing, Plaintiffs offered an affidavit of their expert, Ronald Citron, M.D., and requested that he be allowed to testify during the hearing. The trial court denied the introduction of the affidavit and Dr. Citron's testimony. In their motions to the court and during the summary judgment hearing, the parties discussed Ms. Bosley's cause of action for lost chance of survival. After the hearing, on November 2, 2012, judgment was signed, granting summary judgment in favor of Dr. Bostick and dismissing with prejudice all claims asserted by the plaintiffs against Dr. Bostick.

Plaintiffs timely filed this appeal, asserting that the trial court erred in 1) granting Dr. Bostick's motion for summary judgment because genuine issues of

² Plaintiffs also named Deborah Shackleton Cavalier, M.D., David Alvin Boudreaux, M.D., the Pathology Group of Louisiana, APMC, and the Women's Hospital Foundation as defendants. These defendants were dismissed by summary judgment on December 7, 2009, and May 23, 2011.

material fact remain; 2) denying Dr. Citron the opportunity to authenticate his report with live testimony; and 3) denying Plaintiffs' motion to continue the hearing on Dr. Botick's motion for summary judgment.

DISCUSSION

Motion to Continue

Initially, we address Plaintiffs' contention that the trial court erred in denying their motion to continue the summary judgment hearing. Plaintiffs maintain that Dr. Bostick raised for the first time loss chance of survival in his reply memorandum in support of his motion for summary judgment and that they needed additional time to respond to that assertion. In denying Plaintiffs' motion to continue, the trial court stated "defendants have raised no new issues in their reply memorandum. The motion for continuance is denied." The trial court pointed out that Dr. Bostick discussed lost chance of survival in his reply memorandum in response to a statement made in the letter written by Dr. Ronald Citron that was attached to Plaintiffs' memorandum in opposition to Dr. Bostick's motion for summary judgment.

A continuance rests within the sound discretion of the trial court, and may be granted under La. Code Civ. P. art. 1601 "if there is good ground therefor." The trial court must consider the particular facts of a case when deciding whether to grant or deny a continuance. The trial court should consider the diligence and good faith of the party seeking the continuance and other reasonable grounds, and may also weigh the condition of the court docket, fairness to the parties and other litigants before the court, and the need for orderly and prompt administration of justice. **St. Tammany Parish Hosp. v. Burris**, 2000-2639 (La. App. 1st Cir. 12/28/01), 804 So.2d 960, 963. Absent a clear abuse of discretion in granting or denying a continuance, the ruling of the trial court should not be disturbed on appeal. **Id.**

After careful review of the record, we agree with the trial court's assertion that Dr. Bostick raised no new issues in his reply memorandum because he discussed lost chance of survival in direct response to Plaintiffs' memorandum in opposition to summary judgment. Further, the case had been pending for over six years. Therefore, the trial court did not abuse its discretion in denying Plaintiffs' motion for continuance.

Live Testimony at the Summary Judgment Hearing and denial of the Motion for Summary Judgment

Appellate courts review summary judgments *de novo* under the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. **Duncan v. U.S.A.A. Ins. Co.**, 2006-363 (La. 11/29/06), 950 So.2d 544, 547. Though the trial court's decision to grant or deny a motion for summary judgment is subject to this court's *de novo* review, the trial court's evidentiary rulings are subject to an abuse of discretion standard. See **Devall v. Baton Rouge Fire Department**, 2007-0156 (La. App. 1st Cir. 11/2/07), 979 So.2d 500, 503.

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law. La. Code Civ. P. art. 966(B)(2). When a motion for summary judgment is made and properly supported, an adverse party may not rest on the mere allegations of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. La. Code Civ. P. art. 967(B). If the plaintiff fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. La. Code Civ. P. art. 966(C)(2).

In a medical malpractice action against a physician, the plaintiff must establish by a preponderance of the evidence the applicable standard of care, a

violation of that standard of care, and a causal connection between the alleged negligence and the plaintiff's injuries. See La. R.S. 9:2794(A); see also **Pfiffner v. Correa**, 94-0924 (La. 10/17/94), 643 So.2d 1228, 1233. An expert witness is generally necessary as a matter of law to meet the burden of proof on a medical malpractice claim. **Lieux v. Mitchell**, 2006-0382 (La. App. 1st Cir. 12/28/06), 951 So.2d 307, 314, writ denied, 2007-0905 (La. 6/15/07), 958 So.2d 1199. Although the jurisprudence has recognized exceptions in instances of obvious negligence, those exceptions are limited to instances in which the medical and factual issues are such that a lay person can perceive negligence in the charged physician's conduct as well as any expert can. **Pfiffner**, 643 So.2d at 1234.

The test for determining the causal connection is whether the plaintiff proved through medical testimony that it is more probable than not that the injuries were caused by the substandard care. **Hoot v. Woman's Hospital Foundation**, 96-1136 (La. App. 1st Cir. 3/27/97), 691 So.2d 786, 789, writ denied, 97-1651 (La. 10/3/97), 701 So.2d 209.

In a medical malpractice case seeking damages for the loss of a less-than-even chance of survival because of negligent treatment of a pre-existing condition, the plaintiff must prove by a preponderance of the evidence that the tort victim had a chance of survival at the time of the professional negligence and that the tortfeasor's action or inaction deprived the victim of all or part of that chance, and must further prove the value of the lost chance, which is the only item of damages at issue in such a case. **Smith v. State, Department of Health and Hospitals**, 95-0038 (La. 6/25/96), 676 So.2d 543, 546-547.

Louisiana Code of Civil Procedure article 967 describes the type of documentation a party may submit in support of or in opposition to a motion for summary judgment. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth facts that would be admissible in evidence, and shall

show affirmatively that the affiant is competent to testify to the matters stated therein. A document that is not an affidavit or sworn to in any way, or is not certified or attached to an affidavit, is not of sufficient evidentiary quality on summary judgment to be given weight in determining whether or not there remain genuine issues of material fact. **Boland v. West Feliciana Parish Police Jury**, 2003-1297 (La. App. 1st Cir. 6/25/04), 878 So.3d 808, 813, writ denied, 2004-2286 (La. 11/24/04), 888 So.2d 231.

In moving for summary judgment, Dr. Bostick asserted that Plaintiffs had not produced a medical expert to testify that there was a causal connection between his alleged negligence and Ms. Bosley's injuries. As such, Dr. Bostick asserted that Plaintiffs lack factual support for an essential element of their claims, and consequently, there is no genuine issue of material fact and he is entitled to summary judgment as a matter of law. In support thereof, Dr. Bostick attached to the motion for summary judgment a copy of the medical review panel opinion, the affidavit of panelist, Dr. Carmen Espinoza, Plaintiffs' petition for damages, the case management order, and correspondence between the parties.

The medical review panel determined that Dr. Bostick treated the patient appropriately, and the only issue that the panel had with his care was that he should have referred the patient to hematology/oncology during the work-up because of the high index of suspicion due to Ms. Bosley's known cancer history. For that reason, the panel determined that Dr. Bostick breached the standard of care. However, the panel found the complained of conduct was not a factor in the resultant damages because the PET scan ordered by Dr. Kardinal in March 2005 showed "only focal areas (not extensive disease) worrisome or malignancy. Logically, an earlier study would likely have been less revealing. Considering her lack of response to chemotherapy, the benefits of earlier treatment would not have altered her outcome."

At the time Dr. Bostick filed his motion for summary judgment, Plaintiffs had not provided any expert reports to prove the causation element. According to the case management schedule and the correspondence between the parties attached to the motion for summary judgment, July 20, 2012 was the deadline for Plaintiffs to identify any experts they intended to call and to provide an expert witness report for each such expert. By agreement of the parties, the deadline was extended to July 30, 2012. On August 2, 2012, Plaintiffs sent to Dr. Bostick correspondence naming an expert and providing his address, but they did not provide an expert witness report.

On October 12, 2012, Plaintiffs filed an opposition to the motion for summary judgment, attaching a letter signed by Dr. Citron regarding Dr. Bostick's care of Ms. Bosley. The letter was dated nine days after the extended deadline for filing an expert witness report in the scheduling order and, was not certified or attached to an affidavit.

Dr. Bostick responded contending that the letter written by Dr. Citron was untimely, and was inadmissible hearsay. He further contended that even if the letter was admitted it did not raise genuine issues of material fact. Dr. Bostick also argued that Plaintiffs failed to prove the elements for a claim of lost chance of survival as laid out in **Smith**, 676 So.2d at 547.

On the day of the hearing on the motion for summary judgment, in an effort to authenticate the letter written by Dr. Citron, Plaintiffs requested that an affidavit by Dr. Citron be admitted into evidence, and they further requested that he be allowed to testify during the hearing to verify his report. Dr. Bostick was not aware that Dr. Citron would be there to testify until the morning of the hearing. The trial court denied the introduction of Dr. Citron's affidavit and Plaintiffs' request to allow Dr. Citron to testify. Plaintiffs proffered Dr. Citron's live testimony and his affidavit.

In denying the request to admit the affidavit of Dr. Citron or to allow him to testify,³ the trial court noted that the case had been pending for over six years, the suit was filed in August 2008 and Plaintiffs never identified an expert of any kind until August 2012. Plaintiffs did not provide an expert witness report until after the extended deadline in the case management and, even then it was not competent evidence on summary judgment. According to the record, Plaintiffs did not offer evidence to authenticate the letter of Dr. Citron until the day of the hearing.

It has long been settled that oral testimony should not be received or considered at the hearing on a motion for summary judgment, even with the consent of counsel, because to sanction such procedure can have no practical effect save the fostering and encouragement of piecemeal trials and appeals. See Hemphill v. Strain, 341 So.2d 1186, 1188 (La. App. 1st Cir. 1976), writ denied, 343 So.2d 1072 (La. 1977). Therefore, the trial court did not abuse its discretion in denying Plaintiffs' request to allow Dr. Citron to testify at the summary judgment hearing.⁴ See Devall, 979 So.2d at 503.

Considering that the trial court denied Plaintiffs' attempts to authenticate the letter written by Dr. Citron, the letter remained unsworn, uncertified, or otherwise unauthenticated, and accordingly not of sufficient evidentiary quality on summary judgment to be given weight in determining whether there remain genuine issues of material fact.

Plaintiffs introduced no admissible evidence to prove that Ms. Bosley had a chance of survival at the time of the professional negligence and that Dr. Bostick's

³ We note that although the trial court determined that Dr. Citron's letter was not of sufficient evidentiary value on the motion for summary judgment the trial court did state that even if it were to admit the letter it did not raise any genuine issues of material fact that would preclude summary judgment. Dr. Citron's letter acknowledged that Ms. Bosley's cancer was not curable, but concluded that timely diagnosis and treatment would have resulted in a better response to therapy which would have resulted longer survival. We agree with the trial court that this conclusory statement did not raise a genuine issue of material fact.

⁴ In favor of their position that oral testimony should be allowed Plaintiffs cite Leflore v. Coburn, 95-0690 (La. App. 4th Cir. 12/28/95), 665 So.2d 1323, 1331 n. 5, writs denied, 96-0411, 96-0453 (La. 3/29/96), 670 So.2d 1234, where the trial court received live testimony and reasoned that it was permissible as long as he did not weigh it or make any credibility calls. However, even in the Leflore case the decision was left to the discretion of the trial court.

inaction deprived Ms. Bosley of all or part of that chance. Further, Plaintiffs failed to introduce any evidence as to the value of any alleged lost chance of survival.

CONCLUSION

In the absence of admissible expert testimony proving that there is a causal connection between the alleged negligence and Ms. Bosley's damages and sad death, Plaintiffs have not presented factual support sufficient to establish that genuine issues for trial exist. Thus, Dr. Bostick is entitled to summary judgment as a matter of law. Finally, even if the court considered the contested letter, it does not fully address Plaintiffs' burden for a medical malpractice action or for an action regarding the lost chance of survival. For these reasons, the judgment of the trial court is affirmed. Costs of the appeal are assessed to Plaintiffs.

AFFIRMED.

LACY JOHNSON
ET AL.

VERSUS

PETER J. BOSTICK, M.D.
ET AL.

FIRST CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

NO. 2013 CA 0439

 KUHNS, J., dissenting.

I disagree with the majority's conclusion that absent expert evidence, the trial court correctly dismissed plaintiffs' lawsuit. The object of the claim is a *chance* of survival. As the majority correctly determined, plaintiffs are required to prove by a preponderance of the evidence that Ms. Bosley had a chance of survival at the time of the professional negligence, that Dr. Bostick's inaction deprived her of part of that chance, and the value of that lost chance. See *Smith v. State, Dep't of Health and Hospitals*, 95-0038 (La. 6/25/96), 676 So.2d 543, 546-47. But plaintiffs do not have to prove a reasonable or substantial chance of survival; the only issue is whether the patient lost *any* chance of survival because of Dr. Bostick's negligence. *Id.*

With the introduction of the medical panel's conclusion – expressly finding that Dr. Bostick should have referred Ms. Bosley to hematology/oncology during the work-up because of the high index of suspicion due to Ms. Bosley's known cancer history – plaintiffs introduced evidence that supports a finding that Dr. Bostick breached the standard of care. A trier of fact could reasonably infer from that same evidence that “but for” Dr. Bostick's breach, Ms. Bosley would have been timely diagnosed and treated, resulting in a better response to the chemotherapy and, therefore, a longer survival, even if that was one additional day of life. This is a common sense finding for which no expert opinion is required. And clearly a trier of fact can conclude that an additional day of life is of some value.

Thus, because plaintiffs produced sufficient fact support to establish that they are able to satisfy their evidentiary burden of proof at trial on all the requisite issues to prove their case including the issue of causation, the trial court usurped the role of the trier of fact in granting summary judgment. Accordingly, I dissent.