

****THIS OPINION HAS BEEN DESIGNATED AS NOT FOR PUBLICATION****

LUIS AQUINO AND DOMINGA CABRERA
ON BEHALF OF THEIR MINOR CHILD,
RAYSEL AQUINO

NO. 18-CA-285

FIFTH CIRCUIT

VERSUS

COURT OF APPEAL

EVELYN WALKER, WEST QUALITY FOOD
SERVICE, INC. D/B/A KFC, INC. AND
COMPANION PROPERTY AND CASUALTY
INSURANCE COMPANY

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 725-869, DIVISION "L"
HONORABLE DONALD A. ROWAN, JR., JUDGE PRESIDING

December 12, 2018

**SUSAN M. CHEHARDY
CHIEF JUDGE**

Panel composed of Judges Susan M. Chehardy,
Hans J. Liljeberg, and John J. Molaison, Jr.

AFFIRMED IN ACCORDANCE WITH
U.R.C.A. 2-16.2 A(2), (6), AND (10)

SMC

HJL

JJM

COUNSEL FOR PLAINTIFF/APPELLANT,
LUIS AQUINO AND DOMINGA CABRERA ON BEHALF OF THEIR MINOR
CHILD, RAYSEL AQUINO

Ron A. Austin

Jevan S. Fleming

CHEHARDY, C.J.

On April 20, 2012, at approximately 9:15 p.m., Raysel Aquino, the minor child of plaintiffs-appellants, Luis Aquino and Dominga Cabrera, ingested four pieces of grilled chicken purchased at a Kentucky Fried Chicken Restaurant located in Kenner, Louisiana. Within hours of eating the chicken, Raysel succumbed to violent nausea, vomiting and diarrhea. The onset of his symptoms occurred just before midnight on April 20, 2012. It was later opined that Raysel “had a clinical course consistent with acute salmonella enterocolitis.” Plaintiffs filed suit on behalf of their minor son against Evelyn Walker,¹ West Quality Food Service, Inc. d/b/a KFC, Inc., and Companion Property and Casualty Insurance Company (“defendants-appellees”), seeking damages for the personal injuries Raysel purportedly sustained as a result of consuming KFC’s chicken.

Defendants-appellees first moved for summary judgment in 2014 claiming that plaintiffs would not be able to carry their burden of proving at trial that Raysel more likely than not contracted salmonella poisoning by eating grilled chicken sold by KFC. Specifically, defendants-appellees argued that plaintiffs had not produced any evidence establishing that they could prove that either a deleterious condition existed in the chicken at the time it was purchased, or that a causal relationship existed between Raysel’s ingestion of the chicken and his subsequent illness. Defendants-appellees further argued that plaintiffs had produced no medical evidence or testimony even suggesting that it was more probable than not that Raysel’s illness was caused by the chicken he consumed from KFC. It was their contention that, without medical evidence creating the causal link between Raysel’s consumption of the chicken and his illness, plaintiffs would be unable to carry their burden of proof. On December 15, 2014, the trial judge denied

¹ On December 15, 2014, the trial court issued judgment granting summary judgment in favor of defendant, Evelyn Walker, dismissing her as a defendant in this litigation. Plaintiffs did not appeal that judgment.

defendants-appellees' first summary judgment motion in order to give plaintiffs more time to develop their case; *i.e.*, to retain a medical expert.

Over three years later, on January 19, 2018, defendants-appellees re-urged their motion for summary judgment claiming that plaintiffs had yet to retain a medical expert to provide the requisite medical evidence to establish the causal relationship between KFC's chicken and Raysel's salmonella poisoning. Defendants-appellees reiterated that without medical evidence, plaintiffs would not be able to carry their burden of proof at trial.² In support of their motion, defendants-appellees offered the affidavit and expert report of Dr. Brobson Lutz, an expert in internal medicine, infectious disease and public health. Dr. Lutz opined that it is medically impossible for a salmonella infection to incubate into enteric symptoms less than four hours after ingestion of contaminated food or drink. He stated that most commonly, the incubation period for salmonella enterocolitis is one to three days. Additionally, Dr. Lutz opined that the lack of other reported cases meant there were no epidemiologic findings consistent with a foodborne infection from the KFC food products.

In opposition to defendants-appellees' motion, despite having been given three additional years to obtain it, plaintiffs offered no medical evidence to refute Dr. Lutz's findings or his expert opinion on causation. Instead, counsel for plaintiffs attached her own affidavit attesting that though plaintiffs have retained a medical expert—whose name or expertise was not disclosed—they were still awaiting an expert report. According to plaintiffs' counsel, the expert "will testify" that the incubation period for salmonella ranges from "2 to 101 hours."

² To meet their burden of proof in this food poisoning case, plaintiffs bore the burden of proving by a preponderance of the evidence that (1) a deleterious condition existed in the chicken at the time it was purchased; and (2) a causal connection existed between Raysel's consumption of the chicken and his subsequent illness. *See Landreneau v. Copeland's Cheese Cake Bistro, L.L.C.*, 08-647 (La. App. 5 Cir. 1/13/09), 7 So.3d 703, 706.

The matter came for hearing on March 5, 2018. On March 22, 2018, the trial court issued judgment granting summary judgment in favor of defendants-appellees dismissing any and all claims filed against them by plaintiffs, with prejudice. From this judgment, plaintiffs filed the instant appeal.

It is well settled that appellate courts review summary judgments *de novo* using the same criteria applied by the trial courts to determine whether summary judgment is appropriate. *Landreneau*, 7 So.3d at 705-06. Summary judgment procedure is designed to secure the just, speedy and inexpensive determination of every action, except those disallowed by law; the procedure is favored and must be construed to accomplish these ends. La. C.C.P. art. 966(A)(2). A motion for summary judgment should be granted if, after an opportunity for adequate discovery, the motion, memorandum, and supporting documents 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(A)(3). The only documents that may be filed in support or opposition to the motion are pleadings, memoranda, affidavits, depositions, answers to interrogatories, certified medical records, written stipulations, and admissions. La. C.C.P. art. 966(A)(4). The mover has the burden of establishing the absence of a genuine issue of material fact. If, however, the mover will not bear the burden of proof on the issue that is before the court on the motion for summary judgment, the mover need not negate all of the necessary elements of the opposing party's claim. The mover need only point out to the court the absence of factual support for one or more of the elements necessary for the opposing party to prove his claim. La. C.C.P. art. 966(D)(1). Moreover, when a motion for summary judgment has been filed and supported by evidence, the adverse party may no longer rely on the mere allegations or denial of his pleadings, but his responses, through affidavits or otherwise, must set forth evidence demonstrating that there is a genuine issue for trial. La. C.C.P. art. 967(B). "If he

does not so respond, summary judgment, if appropriate, shall be rendered against him.” *Id.* Put simply, once the motion for summary judgment has been properly supported by the moving party, the failure of the adverse party to produce evidence of a material factual dispute mandates the granting of the motion. *Landreneau*, 7 So.3d at 705.

On appeal, plaintiffs argued the trial court erred in granting defendants-appellees’ motion for summary judgment when plaintiffs requested more time to provide an affidavit to refute the expert opinion of Dr. Lutz. We disagree. The record clearly shows that in December 2014, following the hearing on defendants-appellees’ first motion for summary judgment averring plaintiffs lacked the requisite medical evidence to prove their claim, the trial court denied the motion in order to give plaintiffs more time to obtain the necessary medical proof. By August 30, 2017—*nearly three years after* the trial court’s judgment—when Dr. Lutz issued his expert report opining that it was physiologically impossible for a salmonella infection to incubate into enteric symptoms less than four hours after ingestion of contaminated food, plaintiffs still had not retained an expert. Moreover, plaintiffs had six additional months until the hearing on defendants-appellees’ motion to retain an expert to refute Dr. Lutz’s opinion, to no avail. We agree with the trial judge that more than three additional years was sufficient time to allow plaintiffs to obtain the necessary medical evidence to be able to carry their burden of proof at trial.

Based on our *de novo* review of the record, we find that defendants-appellees properly supported their motion for summary judgment with the affidavit of their medical expert, Dr. Lutz, which established the absence of factual support for an element essential to plaintiffs’ claim; *i.e.*, medical causation. Because plaintiffs failed to respond with an affidavit or any other evidence to establish that there was a genuine issue for trial, the trial judge was required to grant defendants-

appellees' motion for summary judgment. La. C.C.P. art. 967(B). Consequently, we find no error on the part of the trial court.

Therefore, this matter is affirmed in accordance with U.R.C.A. 2-16.2 A(2), (6), and (10).

**AFFIRMED IN ACCORDANCE WITH
U.R.C.A. 2-16.2 A(2), (6), and (10)**

SUSAN M. CHEHARDY
CHIEF JUDGE

FREDERICKA H. WICKER
JUDE G. GRAVOIS
MARC E. JOHNSON
ROBERT A. CHAISSON
STEPHEN J. WINDHORST
HANS J. LILJEBERG
JOHN J. MOLAISSON, JR.

JUDGES



FIFTH CIRCUIT

101 DERBIGNY STREET (70053)

POST OFFICE BOX 489

GRETNA, LOUISIANA 70054

www.fifthcircuit.org

CHERYL Q. LANDRIEU
CLERK OF COURT

MARY E. LEGNON
CHIEF DEPUTY CLERK

SUSAN BUCHHOLZ
FIRST DEPUTY CLERK

MELISSA C. LEDET
DIRECTOR OF CENTRAL STAFF

(504) 376-1400

(504) 376-1498 FAX

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 2-16.4 AND 2-16.5** THIS DAY **DECEMBER 12, 2018** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

CHERYL Q. LANDRIEU
CLERK OF COURT

18-CA-285

E-NOTIFIED

24TH JUDICIAL DISTRICT COURT (CLERK)

HONORABLE DONALD A. ROWAN, JR. (DISTRICT JUDGE)

RON A. AUSTIN (APPELLANT)

LAWRENCE B. FRIEMAN (APPELLEE)

MAILED

BRADLEY P. NACCARI (APPELLEE)

ATTORNEY AT LAW

330 NORTH NEW HAMPSHIRE STREET

COVINGTON, LA 70433

JEVAN S. FLEMING (APPELLANT)

ATTORNEY AT RECORD

920 FOURTH STREET

GRETNA, LA 70053