

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**NUMBER 2008 CA 0665**

**MOSES AND SANDRA FOSTER, INDIVIDUALLY  
AND ON BEHALF OF HARRIET FOSTER**

**VERSUS**

**OCEANS BEHAVIORAL HOSPITAL OF BATON ROUGE, LLC**

Judgment Rendered: DEC 23 2008



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Appealed from the  
Nineteenth Judicial District Court  
in and for the Parish of East Baton Rouge  
State of Louisiana  
Docket Number 553, 871

Honorable Timothy E. Kelley, Judge

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**BEFORE: PETTIGREW, McDONALD, AND HUGHES, JJ.**

## **HUGHES, J.**

This is an appeal of a judgment rendered in favor of the defendant, Oceans Behavioral Hospital of Baton Rouge, LLC (Oceans), granting its exception raising the objection of prematurity and dismissing the claims of the plaintiffs. The judgment granting the exception of prematurity was based on the trial court's finding that the plaintiffs' claims, seeking damages for injuries allegedly sustained by Harriet Foster at the defendant's healthcare facility, sound in medical malpractice and fall within the scope of the Louisiana Medical Malpractice Act (LMMA), La. R.S. 40:1299.41(A), which requires the matter first be presented to a Medical Review Panel. For the following reasons, we reverse in part and remand.

### **FACTS AND PROCEDURAL HISTORY**

In July 2006, Harriet Foster, a seventy-year-old female suffering from schizophrenia and Alzheimer's disease, became a resident of Oceans upon the recommendation of her treating physician. According to the allegations of the petition, on July 16, 2006, Harriet Foster's daughter-in-law, plaintiff Sandra Foster, visited her at the facility and found her to be in a heavily medicated state, unable to walk or communicate. Sandra Foster alleged that after investigating the matter with employees of Oceans she was told that her mother-in-law mistakenly had been administered medications that had been discontinued by her treating physician three days prior. Sandra Foster was assured that the employee who made the mistake would be terminated and that the Oceans staff would ensure that Harriet Foster received adequate care.

However, just two days later, on July 18, 2006, Sandra Foster again visited Oceans and found her mother-in-law lying in bed, lethargic. Sandra Foster alleged that she also observed a large contusion over Harriet Foster's "entire left occipital area." According to the petition, Harriet Foster told her daughter-in-law that someone had struck her. Sandra Foster alleged that she questioned the employees

who were unable to provide any explanation or information about Harriet Foster's contusion. However, upon further inquiry, she was presented with an "incident/accident report" allegedly prepared on July 16, 2006, which stated that Harriet Foster had sustained a fall and injured her right shoulder when she was "ambulating **very fast** in the hallway."<sup>1</sup>

After the July 18, 2006 incident, Harriet Foster's son, Moses, and his wife, Sandra Foster, immediately removed Harriet Foster from the Oceans facility and subsequently filed suit on her behalf seeking damages.<sup>2</sup>

### THE PETITION

The plaintiffs filed a petition for damages naming Oceans as the defendant and claiming that it is liable for injuries sustained by Harriet Foster at the facility on two separate bases: Oceans own acts of negligence and also through vicarious liability for the acts of its employees committed in the course and scope of their employment, pursuant to La. C.C. art. 2320.

The allegations of negligence as to Oceans are detailed in paragraph 11 of the petition as follows:

Failing to hire agents and/or employees qualified to care for its elderly and ill patients;

Failing to properly supervise its agents and/or employees.

Failing to protect its residents from inadequate treatment rendered by its agents and/or employees;

Failing to protect its elderly and ill patients from intentional harm caused by its agents and/or employees;

Failing to protect its elderly and ill patients from harm caused by the negligent supervision and/or conduct of its employees;

Failing to provide adequate medical treatment to Harriet Foster;

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<sup>1</sup> The emphasis is contained in the petition. Although the existence of this document has not been disputed, we note that this report is not contained in the record before us.

<sup>2</sup> According to the petition, Moses and Sandra Foster are Harriet Foster's general agents under a power of attorney signed and authorized on December 9, 2002. This document is also not contained in the record before us; however, this representation has not been disputed.

Failing to notify Harriet Foster's treating physicians and/or family members of her medical conditions in a timely manner, thus preventing Ms. Foster from receiving adequate emergency care;

Failing to recognize and correct Harriet Foster's injuries;

Failing to anticipate the possibility of injury posed by an elderly patient walking unassisted while sedated;

Any other acts of negligence which may be proven at the trial of this matter.

The allegations as to Oceans' vicarious liability are detailed in paragraph 10 of the petition as follows:

Petitioners show that the injuries sustained by Harriet Foster during the time period between July 16, 2006 and July 18, 2006 were the result of a battery and/or batteries committed by agents and/or employees of [Oceans] while in the course and scope of their job duties. Thus, [Oceans] is vicariously liable for the actions of these agents and/or employees and any and all damages proven to have arisen therefrom.

#### **Dilatory Exception Raising the Objection of Prematurity**

Oceans responded to the petition with a dilatory exception raising the objection of prematurity pursuant to La. C.C.P. art. 926, based on the provisions of La. R.S. 40:1299.47(B). Oceans provided proof of its status as a qualified healthcare provider within the scope of the LMMA, and contended that since the plaintiffs' claims were based on medical malpractice allegations, and had not first been submitted to a medical review pursuant to La. R.S. 40:1299.47(B), they should be dismissed as premature.

Where no evidence is presented at trial of a dilatory exception, such as prematurity, the court must render its decision on the exception based on the facts as alleged in the petition, and all allegations therein shall be accepted as true. **LaCoste v. Pendleton Methodist Hospital, L.L.C.**, 07-0008, p. 8 (La. 9/5/07), 966 So.2d 519, 526.

In the instant case, the transcript in the record reveals that only arguments were presented; no evidence was introduced at the trial of the exception. Thus,

accepting the allegations of the petition as true, the trial court had to consider the parties' arguments and determine if the plaintiffs' allegations are based on claims of medical malpractice.

The plaintiffs opposed the exception; however, neither that opposition nor the memorandum in support is included in the record before this court. Nevertheless, in brief on appeal, the plaintiffs "readily admit that any allegations of negligence raised against this defendant-appellee were, indeed, prematurely brought before the district court." Thus, the trial court's finding that these claims sounding in medical malpractice were premature is affirmed.

As to the claims of an intentional battery, which is the only claim at issue in this appeal, Oceans acknowledges that the express language of the statute designates intentional acts as sounding in general tort principles and not within the scope of the medical malpractice acts contemplated and covered by the LMMA. However, Oceans argues that the allegations in paragraph 10 of the petition, although claiming a battery (intentional act) was committed, nonetheless alleges medical malpractice against *it* (Oceans) for its negligence in failing to prevent intentional acts by its employees against the patients at its facility.

Additionally and in the alternative, Oceans suggests that the allegation in the petition of an intentional act of battery fails to sufficiently state a cause of action against Oceans.<sup>3</sup> In particular, Oceans notes that the allegation fails to provide any specific facts surrounding the alleged battery, the specific act(s) that comprised the alleged intentional battery, the name or identity of the person(s) (employee(s)) who committed the battery, and the date, location, or time that the alleged battery was committed. According to Oceans, without factual support to establish the

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<sup>3</sup> Although raised for the first time on appeal, the nonjoinder of a party, or the failure to disclose a cause of action or a right or interest in the plaintiff to institute the suit may be noticed by either the trial or appellate court of its own motion. La.-C.C.P. art. 927(B). For reasons explained later herein, on our own motion, we have considered the defendant's arguments regarding the no cause of action and found them to lack merit.

commission of an intentional battery by an Oceans' employee, there can be no vicarious liability upon it for that alleged act.

### **ACTION OF THE TRIAL COURT**

Without specifically addressing the intentional battery claim or the alleged insufficiency of the petition to state a cause of action for such a claim, the trial court concluded that, taking the petition as a whole, the allegations against Oceans "all sound in negligence, and would be referred to the Med-Mal Statute." The trial court then granted Oceans's exception, finding all of the plaintiffs' claims to be medical malpractice allegations, required by law to first be presented to a medical review panel. The plaintiffs have appealed.

### **APPLICABLE LAW**

Under the LMMA, a medical malpractice claim against a private healthcare provider is subject to dismissal on an exception of prematurity if such claim has not first been presented to a medical review panel. **Williamson v. Hospital Service Dist. No. 1 of Jefferson**, 04-0451, p. 4 (La. 12/1/04), 888 So.2d 782, 785. This exception is the proper procedural mechanism for a qualified health care provider to invoke when a medical malpractice plaintiff has failed to submit the claim for consideration by a medical review panel before filing suit against the provider. La. C.C.P. art. 926, **Spradlin v. Acadia-St. Landry Medical Foundation**, 98-1977, p. 4 (La. 2/29/00), 758 So.2d 116, 119.

The burden of proving prematurity is on the exceptor. Thus, Oceans must prove that the plaintiffs' claims sound in medical malpractice and must be presented to a medical review panel. **Williamson**, 04-0451 at p. 4, 888 So.2d at 785. This is because the limitations on the legal liability of qualified healthcare providers in Louisiana is applied only and strictly to claims arising out of medical malpractice as defined in the LMMA. All other tort liability on the part of a qualified healthcare provider is governed by general tort law. **LaCoste v.**

**Pendleton Methodist Hospital, L.L.C.**, 07-0008, p. 6 (La. 9/5/07), 966 So.2d 519, 524.

The LMMA defines “malpractice” in pertinent part as “any *unintentional tort* or any breach of contract *based on health care or professional services rendered*, or which should have been rendered, by a health care provider, to a patient ...” La. R.S. 40:1299.41(A)(8) (Emphasis added.)

### ANALYSIS

Thus, the issue before us is whether the trial court erred in finding that the plaintiffs’ claims regarding an alleged battery committed by an Oceans employee sound in medical malpractice negligence and are subject to the provisions of the LMMA, requiring that they first be presented to a medical review panel.

Plaintiffs maintain that a battery, by definition, is an intentional act; therefore, the LMMA, expressly applicable only to *unintentional* torts, is inapplicable to that claim, which sounds in general tort, and is not subject to the requirement that it first be presented to a medical review panel. Moreover, plaintiffs contend they have sufficiently alleged two separate causes of action against Oceans; one cause of action is based on Oceans’ own alleged negligent acts (detailed in paragraph 11 of the petition) and the other is based on Oceans’ vicarious liability for the acts of its employees (detailed in paragraph 10 of the petition). In this case, the act underlying the vicarious liability was an intentional tort, thus, plaintiffs maintain that as to this claim, the trial court erred in concluding it sounded in medical malpractice.

Oceans, on the other hand, while acknowledging that a battery is an intentional tort, maintains that the claim alleges an employee committed the intentional act. The petition then seeks to hold Oceans vicariously liable for the tort of its employee committed while in the course and scope of employment. Oceans asserts that the claim of vicarious liability made against *it* in regard to the

battery is nevertheless grounded in a claim that Oceans was negligent “in failing to protect its elderly and ill patients from harm caused by the negligent supervision and/or conduct of its employees.”

The trial court, without making specific reference to the allegation of a battery, concluded that *all* of the plaintiffs’ claims against Oceans, whether based on direct or vicarious liability, are within the scope of medical malpractice as defined in the statute.

Our review of the record reveals that the plaintiffs’ petition does indeed allege two separate bases for liability: vicarious liability for an intentional act in paragraph 10, and the separate allegations of Oceans’ direct liability for its own negligence in paragraph 11. We also agree that as a matter of law, the intentional act claim falls outside of the express scope of the LMMA.

We also find that the plaintiffs have sufficiently stated a cause of action as to the alleged battery. The petition alleges that Harriet Foster told her daughter-in-law that someone struck her when asked about the large contusion on the side of her face. Although this allegation will have to be proven at trial, it is sufficient to state a cause of action in tort for a battery, which falls outside of the scope of the LMMA. Our conclusion is further bolstered by the jurisprudential tenant that any ambiguities must be construed against coverage under the LMMA because that act curtails the liability of health care providers in derogation of the general rights of tort victims. **See Hutchinson v. Patel**, 93-2156 (La. 5/23/94), 637 So.2d 415, 420.

Accordingly, as to the claim of an intentional tort, we find the trial court erred in granting the exception raising the objection of prematurity. Therefore, the judgment of the trial court dismissing the plaintiffs’ claim is reversed in part; plaintiffs’ claim regarding the intentional tort of battery is reinstated.



## **CONCLUSION**

Therefore, we affirm in part, reverse in part, and remand for further proceedings consistent herewith. Costs of this appeal are assessed equally to both parties.

**AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.**