

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

JMM

2012 CA 1970

OUIDA NUGENT, INDIVIDUALLY AND
ON BEHALF OF DENNIS NUGENT AND RICK NUGENT
AND ROSS NUGENT

VERSUS

LOUISIANA MEDICAL MUTUAL INSURANCE COMPANY,
WAREF AZMEH, M.D., AND G. MICHAEL BLANCHARD, JR., M.D.

Judgment Rendered: JUN 07 2013

APPEALED FROM THE NINETEENTH JUDICIAL DISTRICT COURT,
IN AND FOR THE PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
DOCKET NUMBER 602004

HONORABLE TODD W. HERNANDEZ, JUDGE

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Company, Waref Azmeh, M.D., and
G. Michael Blanchard, Jr. M.D.

Kuhn, J. concurs and assigns reasons

BEFORE: KUHN, PETTIGREW, AND McDONALD, JJ.

9/11 Pettigrew, J. Dissents

McDONALD, J.

This case is an appeal of a motion for summary judgment granted on behalf of a medical practitioner and his insurer. For the following reasons we affirm.

The plaintiffs, Ouida Nugent, individually and on behalf of Dennis, Rick and Ross Nugent filed suit against doctors, Waref Azmeh and G. Michael Blanchard, and their insurer, Louisiana Medical Mutual Insurance Co. (LAMMICO), alleging failure to appropriately treat Mr. Nugent. The doctors' alleged fault resulted in the death of Mr. Nugent and the loss of love and affection, companionship, and service and society to his wife, Ouida and two sons, Rick and Ross.

Dennis Nugent, a diabetic, died of complications from an ulcerated right heel that resulted in an infection that spread through his body causing an acute cardiac endocarditis, (an infection of the heart). Mr. Nugent's cardiologist referred him to Dr. Azmeh, an infectious disease physician, following a four day admission for congestive heart failure in September, 2008. Dr. Azmeh examined Mr. Nugent's infected right heel at the hospital and initially prescribed an oral antibiotic.

Dr. Azmeh next saw Mr. Nugent in his office on September 30, 2008. Because Mr. Nugent's heel did not appear to be improving, Dr. Azmeh changed the oral antibiotic to an intravenous antibiotic and referred him to Dr. Blanchard, an orthopedic surgeon, for evaluation for possible below the knee amputation. Dr. Blanchard saw Mr. Nugent on October 6, 2008, and recommended a below the knee amputation. The amputation was scheduled for October 23, 2008.¹

Mr. Nugent was admitted to the hospital on October 20, 2008, for inpatient evaluation and cardiac work up prior to surgery. Following the cardiac assessment and evaluation, he was not approved for the surgery. The scheduled amputation

¹ Plaintiff's petition indicates the amputation was scheduled for October 16, 2008. However, this date is inconsistent with the other dates.

was canceled and arrangements were made for Mr. Nugent to receive hospice care. On October 27, 2008, Mr. Nugent died.

On September 14, 2009, the plaintiffs filed a request for a medical review panel. The medical review panel expired without rendering an opinion and was dismissed on March 7, 2011. Plaintiffs filed a lawsuit in the Nineteenth Judicial District Court on May 23, 2011.

A motion for summary judgment was filed in the trial court on behalf of Drs. Azmeh and Blanchard, which was set for hearing on April 16, 2012. Prior to the hearing, Dr. Azmeh was removed as a movant, and the hearing was held on behalf of Dr. Blanchard only. After argument of the parties, the matter was taken under advisement. The district court judge issued his ruling on May 29, 2012. Judgment granting Dr. Blanchard's motion for summary judgment was signed on June 26, 2012. This appeal followed.

Appellate courts review a motion for summary judgment *de novo* under the same criteria that govern a district courts consideration of whether summary judgment is appropriate, and in the light most favorable to the to the non-movant. *Yokum v. 615 Bourbon Street, L.L.C.*, 07-1785 (La. 2/26/08), 977 So.2d 859, 876. The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action, and this procedure is favored and shall be construed to accomplish these ends. See La. C.C.P. art. 966(A)(2). If the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact, then judgment shall be granted as a matter of law. La. C.C.P. art. 966(B)(2). Defendant, as the movant, bears the initial burden of proof and must show that no genuine issue of material fact exists. See La. C.C.P. art. 966(C)(2). If a defendant successfully meets their burden, then the burden shifts to the plaintiff to present

factual support adequate to establish that he will be able to satisfy his evidentiary burden at trial. See La. C.C.P. art. 966(C)(2).

A fact is material if it potentially insures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of the legal dispute. *Smith v. Our Lady of the Lake Hosp., Inc.*, 93-2512, (La. 7/5/94), 639 So.2d 730, 751. A genuine issue is one to which reasonable persons could disagree; if reasonable persons could reach only one conclusion, there is no need for trial on that issue and summary judgment is appropriate. *Id.*

Appellants raise one assignment of error, alleging that the trial court erred in finding that an internal medicine and infectious disease specialist could not testify to the standard of care practiced by an orthopedist, and as a result, the trial court erred in granting summary judgment in favor of the defendant, Dr. Michael Blanchard, M.D.

Appellant raises issues regarding the treatment of Mr. Nugent's infected heel by Dr. Blanchard. Specifically, they assert that Dr. Blanchard failed to use an antibiotic appropriate for the type infection Mr. Nugent had. Also, they contend that he failed to review the wound culture. Dr. Blanchard's affidavit asserts that as an orthopedic surgeon, he was consulted for evaluation of a possible below the knee amputation only, and did not treat Mr. Nugent. Appellants offered no evidence to dispute Dr. Blanchard's affidavit.

The trial court issued reasons for his ruling, which we adopt, as follows:

Plaintiffs are the surviving family members of Dennis Nugent. Nugent suffered from various ailments and in September 2008 was hospitalized at Our Lady of the Lake Hospital for congestive heart failure. At the time, he was also suffering from an ulcer of his foot. Prior to leaving the hospital, he was examined by a doctor for this condition. An antibiotic was prescribed and he was instructed to see the doctor in his office. The wound however failed to improve despite the administration of IV antibiotics and he was referred to Dr. Michael Blanchard, an orthopedist, for a consultation regarding possible amputation. Dr. Blanchard recommended the amputation but wanted Nugent to get pre-operative clearance from his treating physician and

cardiologist. The surgery was not approved by his doctors. Within a month, Nugent returned to Dr. Blanchard with a worsening condition. Nugent elected not to undergo the [amputation] but a month later with his condition deteriorating further, he made the decision to undergo surgery. However, upon being admitted to the hospital for his pre-surgery work up, his doctors determined that he would not be able to withstand the surgery. Shortly thereafter he was discharged to hospice care and died within a few days.

Plaintiffs' cause of action alleges that Dr. Blanchard failed to adequately treat the ulcer on his foot. In particular, plaintiff claims that he failed to order appropriate and adequate antibiotics in treatment of Mr. Nugent's wound infection, failed to follow up on wound cultures and failed to timely perform the amputation of Mr. Nugent's right leg. Plaintiff's expert witness in support of this theory is Dr. David McKinsey, an infectious disease specialist. He opined that Dr. Blanchard did not order the appropriate antibiotic therapy and did not recognize the importance of removing the infected source in an expedited fashion.

In support of his motion, Dr. Blanchard argues Dr. McKinsey's opinion and affidavit [are] inadmissible because he is not qualified to testify regarding the standard of care for an orthopedic surgeon. La. R.S. 9:2794 provides the qualifications for a physician to testify as an expert witness on the issue of whether the defendant physician deviated from the accepted standards of care. A person is qualified if 1) he was practicing medicine at the time such testimony is given or was practicing at the time of the incident 2) he has knowledge of accepted standards of medical care for the diagnosis, care or treatment of the illness, injury or condition in the claim 3) he is qualified on the basis of training or experience to offer an expert opinion regarding those accepted standards of care and 4) [he] is licensed to practice medicine by any other jurisdiction in the United States...[.] In addition, R.S. 9:2794(D)(3) provides that in determining qualifications, the court shall consider whether the "witness is board certified or has other substantial training or experience in an area of medical practice relevant to the claim and is actively practicing in that area." Defendant argues that Dr. McKinsey is not an orthopedic surgeon, therefore, he does not have knowledge of the accepted standards of medicine for orthopedics nor the training or experience to offer an opinion in that field. Additionally, plaintiff asserts that Dr. Blanchard did not order the correct antibiotic for the type of infection that Nugent was suffering from. Dr. Blanchard notes that when he initially saw Nugent he was already receiving antibiotic therapy prescribed by the other treating doctor, an infectious disease physician, and he was consulted solely for an evaluation regarding amputation.

After a review of the argument of the parties, the court grants defendant Dr. Blanchard's motion for summary judgment. This lawsuit was filed against two physicians who treated Nugent regarding this ulcer. Dr. Blanchard's only role in his [Mr. Nugent's] treatment was a consultation regarding possible amputation. Dr.

Blanchard did not prescribe antibiotics nor make any decisions regarding what antibiotics Nugent should be treated with. Dr. Blanchard was seen for a consultation, recommended amputation and then attempted to schedule this surgery. The surgery however was never performed because it was determined that his medical condition was too poor for him to survive it. With regard to the testimony of plaintiff's expert, the court determines that Dr. McKinsey is not qualified to testify regarding the standard of care of an orthopedist. The court does not find that he is qualified based on his training and experience to offer an expert opinion on the expertise of an orthopedist.

We have thoroughly conducted a *de novo* review of the law, record, and evidence in this appeal. We find no error on the part of the trial court judge. Accordingly, the judgment is affirmed. Costs are assessed to the plaintiff.

AFFIRMED.

OUIDA NUGENT ET AL

FIRST CIRCUIT

VERSUS

COURT OF APPEAL

STATE OF LOUISIANA

**LOUISIANA MEDICAL MUTUAL
INSURANCE COMPANY ET AL**

NO. 2012 CA 1970



KUHN, J., concurring.

I agree that Dr. David McKinsey, a board certified physician in internal medicine and infectious diseases licensed to practice medicine in the state of Missouri, was not qualified to offer expert testimony on the issue of whether Dr. Michael Blanchard, Jr., an orthopedic surgeon, departed from the accepted standards of medical care relative to his specialty in his treatment of Dennis Nugent. See La. R.S. 9:2794D. Specifically, Dr. McKinsey attested that Dr. Blanchard's: failure to order appropriate antibiotic therapy; inadequate treatment of the infection; and failure to recognize the importance of removal of the infective source in an expedited fashion were more likely than not substantial factors in Dennis's death. But in support of summary judgment, Dr. Blanchard attested that he: was consulted solely for surgical management of Dennis's right heel ulcer; did not prescribe any antibiotics or other medications; and did not participate in any decisions regarding the antibiotic therapy administered to Dennis. Because Dr. McKinsey is not board certified and failed in his affidavit to demonstrate knowledge of substantial training or experience in an area of orthopedic surgery, he is not qualified to opine whether Dr. Blanchard should have intervened in the treatment rendered by the infectious disease physician who was treating Dennis at the same time that Dr. Blanchard was consulted. Thus, the trial court correctly concluded Dr. McKinsey was not qualified to offer an expert opinion about whether Dr. Blanchard departed from the acceptable standard of care.

Because an expert witness is generally necessary as a matter of law to meet the burden of proof on a medical malpractice claim, see *McGregor v. Hospice Care of Louisiana in Baton Rouge L.L.C.*, 2009-1355 (La. App. 1st Cir. 2/12/10), 36 So.3d 281, 285, writ denied, 2010-0832 (La. 5/28/10), 36 So.3d 258, Dr. Blanchard and his insurer have successfully pointed out an absence of factual support for one or more elements essential to the medical malpractice claim against him. Thus, the Nugents, having failed to produce factual support sufficient to establish that they will be able to satisfy their evidentiary burden of proof against Dr. Blanchard at the trial, cannot demonstrate a genuine issue of material fact, see La. C.C.P. art. 966C(2), and the trial court correctly granted summary judgment. For these reasons, I concur.