

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 CA 0240

WALTER WILLIAMS

VERSUS

NIELS J. LINSCHOTEN, M.D.

Judgment Rendered: NOV 01 2013

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On Appeal from the  
19th Judicial District Court,  
In and for the Parish of East Baton Rouge,  
State of Louisiana  
Trial Court No. 607,188

Honorable Kay Bates, Judge Presiding

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Monique Fields  
Baker, LA

Attorney for Plaintiff-Appellant,  
Walter Williams

Herbert J. Mang, Jr.  
Tara S. Bourgeois  
Carey M. Nichols  
Baton Rouge, LA

Attorneys for Defendant-Appellee,  
Niels J. Linschoten, M.D.

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BEFORE: KUHN, HIGGINBOTHAM, AND THERIOT, JJ.

*THH*  
*MSH*  
*CEW*

## **HIGGINBOTHAM, J.**

In this medical malpractice action, the plaintiff, Walter Williams, appeals the trial court's granting of a motion for summary judgment in favor of defendant, Niels J. Linschoten, M.D. For the reasons that follow, we affirm.

### **FACTS AND PROCEDURAL HISTORY**

On November 24, 2008, Mr. Williams was admitted to Baton Rouge General Medical Center to undergo a total left hip revision. Dr. Linschoten performed the operation. Prior to surgery, Dr. Linschoten discussed with Mr. Williams the possibility of lengthening his left leg, as it was two inches shorter than his right leg. During the operation, excessive bleeding occurred from one of Mr. Williams' arteries and a vascular surgeon was consulted. After the surgery, Mr. Williams suffered complications, including pain and tingling in his left foot, swelling of his ankles, feet, and toes, and partial paralysis of the left leg.

On November 28, 2011, Mr. Williams filed a petition for damages against Dr. Linschoten. In his petition, Mr. Williams asserts that Dr. Linschoten was negligent in failing to render the reasonable standard of care, and the complications he suffered were the "direct result of the botched surgery performed by [Dr. Linschoten]."

On June 11, 2012, Dr. Linschoten filed a motion for summary judgment asserting that he was entitled to judgment as a matter of law as there is no genuine issue as to material fact regarding Mr. Williams' claim that Dr. Linschoten caused or contributed to his alleged injury. Dr. Linschoten also noted that Mr. Williams, in his answer to interrogatories, stated that he did not have an expert witness at this time.

On October 3, 2012, Mr. Williams filed an amended petition for damages, adding Louisiana Medical Mutual Insurance Company as a defendant and asserting that Dr. Linschoten lengthened Mr. Williams' leg during the surgery without

having obtained consent from Mr. Williams to do so and without advising him of the risks involved in the procedure. Mr. Williams also filed an opposition to Dr. Linschoten's motion for summary judgment and attached a document entitled "Review of Records" signed by Gordon M. Mead, M.D.

Dr. Linschoten filed a motion to strike the "Review of Records" submitted in opposition to the motion for summary judgment because it failed to establish that Dr. Mead is qualified to testify as to the standard of care and it was not sworn testimony in the form of an affidavit.

The motion for summary judgment came before the trial court on November 19, 2012. During the hearing, the trial court granted Dr. Linschoten's motion to strike the "Review of Record" and granted his motion for summary judgment, finding that Mr. Williams failed to present expert testimony sufficient to support a breach of the applicable standard of care by Dr. Linschoten. On December 17, 2012, judgment was signed granting summary judgment in favor of Dr. Linschoten and dismissing with prejudice all claims asserted by Mr. Williams against Dr. Linschoten. Mr. Williams timely filed this appeal.

### **DISCUSSION**

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. 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.

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.2d 808, 813, writ denied, 2004-2286 (La. 11/24/04), 888 So.2d 231.

At the summary judgment hearing, Mr. Williams relied on the "Review of Records," a report prepared and signed by Dr. Mead in which Dr. Mead summarized the medical history of Mr. Williams, including his review of the surgical procedure performed by Dr. Linschoten. The document submitted by Mr. Williams was not certified or attached to an affidavit, or sworn to in anyway and, therefore, the trial court correctly determined that it had no evidentiary value on the motion for summary judgment. See Bunge North America v. Board of Commerce & Industry and Louisiana Department of Economic Development, 2007-1746 (La. App. 1st Cir. 5/2/08), 991 So.2d 511, 530, writ denied, 2008-1594 (La. 11/21/08).

Mr. Williams did not submit any other expert evidence in opposition to the motion for summary judgment. Mr. Williams produced no admissible testimony of an expert witness which is generally necessary as a matter of law to meet the burden of proof on a medical malpractice claim. Further, as noted by the trial court, this case involved a complicated procedure and does not fit into the exception of obvious negligence. Therefore, Mr. Williams failed to present competent evidence in support of his claim of negligence on the part of Dr. Linschoten, because Mr. Williams failed to establish the standard of care, that Dr. Linschoten breached the standard of care, or a causal connection between the alleged negligence and Mr. Williams' injuries, as required by La. R.S. 9:2794(A).

Mr. Williams also alleges that during the procedure, Dr. Linschoten proceeded to lengthen Mr. Williams' leg without having obtained consent or advising him of the risks involved. At the time of the surgery, the duty to obtain informed consent was found at La. R.S. 40:1299.40,<sup>1</sup> known as Louisiana Uniform Consent law. The informed consent doctrine is based on the principle that every human being of adult years and sound mind has a right to determine what shall be

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<sup>1</sup> La. R.S. 40:1299.40 was repealed by Acts 2012, No. 759, § 3 effective June 12, 2012 and is now contained in La. R.S. 40:1299.39.5.

done to his or her own body. **Hondroulis v. Schuhmacher**, 553 So.2d 398, 411 (La. 1988). Surgeons and other doctors are thus required to provide their patients with sufficient information to permit the patient himself to make an informed and intelligent decision on whether to submit to a proposed course of treatment. **Id.** Where circumstances permit, the patient should be told the nature of the pertinent ailment or condition, the general nature of the proposed treatment or procedure, the risks involved in the proposed treatment or procedure, the prospects of success, the risks of failing to undergo any treatment or procedure at all, and the risks of any alternate methods of treatment. **Id.**

Mr. Williams again relied on the inadmissible report of Dr. Mead to prove that he did not consent to the lengthening of his leg. After thorough review of the record presented in this case and the applicable law, we conclude that Mr. Williams failed to produce factual support to show that he will be able to bear his burden of proof under the Uniform Consent Law. Mr. Williams did not attach the informed consent document he signed prior to surgery that he alleges did not include informed consent for the lengthening of his leg. He provided no evidence to prove that the leg lengthening was done, or if it was done, that Dr. Linschoten did not have informed consent to perform the procedure. Further, we note that Mr. Williams' original petition states "The revision of the left hip replacement was to be performed by [Dr. Linschoten] and the objective was to lengthen Mr. Williams' leg due to the fact that one leg was two (2) inches shorter than the other."

When a motion for summary judgment is made and supported as provided in La. Code Civ. P. art. 967, an adverse party may not rely on the mere allegations or denials of his pleading, but must respond with affirmative evidence. See Thomas v. Hodges, 2010-0678 (La. App. 1st Cir. 10/29/10), 48 So.3d 1274, 1281, writ denied, 2010-2637 (La. 2/11/11), 54 So.3d 1109.

Mr. Williams has failed to produce any affirmative evidence that Dr. Linschoten was negligent or violated the Uniform Consent Law in this case; therefore, we find no error in the summary judgment granted by the trial court.

### **CONCLUSION**

For the foregoing reasons, the judgment of the trial court granting summary judgment in favor of defendant-appellee, Dr. Niels J. Linschoten, is affirmed. All costs of this appeal are assessed to plaintiff-appellant, Mr. Walter Williams.

**AFFIRMED.**