

NOT DESIGNATED FOR PUBLICATION

Jeh
W&W
WJ

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2013 CA 0977

ROBERT W. PECUE, MARIE ADELE PECUE LAMBERT
AND WILLIAM B. PECUE, INDIVIDUALLY AND ON BEHALF
OF THEIR DECEASED MOTHER, JUANITA PECUE

VERSUS

PLANTATION MANAGEMENT CO., L.L.C.,
D/B/A THE GUEST HOUSE

Judgment Rendered: FEB 18 2014

Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 509298

Honorable R. Michael Caldwell, Judge

Kearney S. Loughlin
New Orleans, LA

Attorney for Appellants
Plaintiffs – Robert W. Pecue, et al.

Charles A. Schutte, Jr.
Baton Rouge, LA

Attorney for Appellee
Defendant – Plantation Management
Company, L.L.C., d/b/a The
Guest House

BEFORE: WHIPPLE, C.J., WELCH, AND CRAIN, JJ.

WELCH, J.

The plaintiffs, Robert W. Pecue, Marie Adele Pecue Lambert, and William Pecue, appeal judgments in favor of Plantation Management Co., L.L.C., d/b/a The Guest House (“Guest House”), granting Guest House’s motions for summary judgment and dismissing the plaintiffs’ claims for damages against Guest House arising under the Louisiana Medical Malpractice Act (La. R.S. 40:1299.41, *et seq.*) and the Nursing Home Residents’ Bill of Rights (“NHRBR”) (La. R.S. 40:2010.6, *et seq.*). For reasons that follow, we affirm the judgments of the trial court.

FACTUAL AND PROCEDURAL HISTORY

On December 12, 1997, Juanita Pecue, who was then 80 years old, was admitted to the Guest House, a nursing home. On March 8, 2003, she was transferred to Our Lady of the Lake Regional Medical Center (“OLOL”) for evaluation, and on March 12, 2003, she died at OLOL at the age of 85.

On June 30, 2003, the plaintiffs herein filed a petition for damages asserting claims against the Guest House based on medical malpractice (including breach of contract) (La. R.S. 40:1299.41, *et seq.*) and the NHRBR (La. R.S. 40:2010.8 and 40:2010.9).¹ According to the plaintiffs’ petition, in December 2002, the staff of the Guest House informed them that Ms. Pecue had developed a decubitus ulcer (a bed or pressure sore) and that she would be treated by a wound care nurse, and in January 2003, they were informed by the staff of the Guest House that Ms. Pecue’s decubitus ulcer was responding well to treatment. The plaintiffs further alleged that on March 8, 2003, the staff of the Guest House informed them that Ms. Pecue was being transported from the Guest House to the emergency room at OLOL. The plaintiffs claimed that upon Ms. Pecue’s arrival at the emergency room, she

¹ On May 27, 2003, the plaintiffs filed a complaint with the Division of Administration asserting a medical malpractice claim against the Guest House arising out of the care provided to Ms. Pecue while she was a resident of the Guest House. A medical review panel was convened and rendered a unanimous opinion in favor of the Guest House finding that the evidence did not support the conclusion that the Guest House failed to meet the applicable standard of care as alleged in the complaint.

was febrile and in an advanced state of malnutrition and dehydration, that she had not been given food or water in some time, had a bolus of dried food lodged in her throat, and that she was suffering from a large, untreated, advanced-stage decubitus ulcer on her tailbone. The plaintiffs further alleged that on March 12, 2003, Ms. Pecue died from an infection caused by the untreated decubitus ulcer.

Based on these allegations, the plaintiffs claimed that the Guest House was liable to them for damages under the NHRBR because the Guest House violated Ms. Pecue's rights in that: (1) Ms. Pecue and/or her family were not adequately informed of her medical condition and proposed treatment; (2) Ms. Pecue and/or her family were not allowed to participate in the planning of all medical treatment; (3) Ms. Pecue and/or her family were not informed of the consequences of medical decisions; (4) Ms. Pecue did not receive adequate and appropriate health care and protective and support services; (4) Ms. Pecue was not treated courteously, fairly, and with the fullest measure of dignity and that she and/or her family did not receive a written statement and oral explanation of the services provided by the home; (5) Ms. Pecue was not cared for in a manner free from mental and physical abuse and from physical and chemical restraints; (6) Ms. Pecue and/or her family were not notified in writing thirty days in advance of her transfer to OLOL; and (7) Ms. Pecue did not have the significant change in her health status immediately reported to her interested family members as soon as such change was known to the Guest House's staff.² Based on these same alleged violations, the plaintiffs also claimed that the Guest House was liable to them for breach of contract and breach of fiduciary duty.³

² The plaintiffs' allegations in this regard essentially mirror the statutory provisions of the Nursing Home Residents Bill of Rights, as set forth in La. R.S. 40:2010.8(A)(6), (7), (9), (10), (11)(a), (11)(b), and (22).

³ See La. R.S. 40:1299.41(A)(13) (defining malpractice as any unintentional tort or any breach of contract based on health care or professional services rendered to a patient).

On June 21, 2011, the Guest House filed a motion for summary judgment seeking the dismissal of the plaintiffs' claims on the basis that the plaintiffs had failed to produce a medical expert qualified to testify as to any causal connection between a breach of the standard of care on the part of the staff at the Guest House and the injury to the plaintiffs' mother, Ms. Pecue, including her decubitus ulcers, malnutrition, and/or her death, and that without such evidence, the plaintiffs were lacking factual support for an essential element of their medical malpractice claim, thus making summary judgment in favor of the Guest House appropriate. After a hearing on August 15, 2011, the trial court granted partial summary judgment in favor of the Guest House and against the plaintiffs, dismissing all of their malpractice claims, but reserving unto them their remaining claims under the NHRBR. A judgment in accordance with the trial court's ruling was signed on August 29, 2011.

On March 21, 2012, the Guest House filed a motion for summary judgment seeking the dismissal of the plaintiffs' remaining claims on the basis that the plaintiffs had no evidence to establish a factual basis for their NHRBR claims, and particularly, that they had no factual support to establish breach, causation, and damages. After a hearing, the trial court rendered judgment in favor of the Guest House and against the plaintiffs, dismissing their remaining claims against the Guest House. A judgment in accordance with the trial court's ruling was signed on July 16, 2012.

The plaintiffs now appeal the August 29, 2011 partial summary judgment dismissing their medical malpractice claims against the Guest House and the July 16, 2012 judgment dismissing their remaining claims under the NHRBR.

LAW AND DISCUSSION

Summary Judgment

Summary judgment is subject to *de novo* review on appeal, using the same standards applicable to the trial court's determination of the issues. **Berard v. L-3 Communications Vertex Aerospace, LLC**, 2009-1202 (La. App. 1st Cir. 2/12/10), 35 So.3d 334, 339-340, writ denied, 2010-0715 (La. 6/4/10), 38 So.3d 302. The summary judgment procedure is expressly favored in the law and is designed to secure the just, speedy, and inexpensive determination of non-domestic civil actions. La. C.C.P. art. 966(A)(2). Its purpose is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. **Hines v. Garrett**, 2004-0806 (La. 6/25/04), 876 So.2d 764, 769. Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, admissions, and affidavits in the record 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(B)(2).

On a motion for summary judgment, the burden of proof is on the mover. If, however, the mover will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the mover's burden on the motion does not require that all essential elements of the adverse party's claim, action, or defense be negated. Instead, the mover must point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, the adverse party must produce factual evidence sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial. If the adverse party fails to meet this burden, there is no genuine issue of material fact, and the mover is entitled to summary judgment. La. C.C.P. art. 966(C)(2); **Janney v. Pearce**, 2009-2103 (La. App. 1st

Cir. 5/7/10), 40 So.3d 285, 288–289, writ denied, 2010–1356 (La. 9/24/10), 45 So.3d 1078.

Medical Malpractice

A plaintiff pursuing a medical malpractice claim against a nursing home must prove, by a preponderance of the evidence, the applicable standard of care, the breach of that standard of care, and a causal connection between the medical negligence and the patient's injuries. See Vanner v. Lakewood Quarters Retirement Community, 2012-1828 (La. App. 1st Cir. 6/7/13), 120 So.3d 752, 755-756; Pfiffner v. Correa, 94–0992 (La. 10/17/94), 643 So.2d 1228, 1233; Ballard v. Plantation Management Co., LLC, 2011-1229, p. 3 (La. App. 1st Cir. 3/23/12) (*unpublished*).

Expert testimony is generally required to establish the applicable standard of care and whether that standard was breached, except where the negligence is so obvious that a lay person can infer negligence without the guidance of expert testimony. Vanner, 120 So.3d at 756. This requirement of producing expert medical testimony is especially apt when the defendant has filed a motion for summary judgment and support such motion with expert opinion evidence that the treatment met the applicable standard of care. *Id.*

In support of the Guest House's motion for summary judgment, it offered the plaintiffs' original and supplemental and amending petition for damages, the opinion of the medical review panel,⁴ excerpts from the deposition testimony of John S. Rive, Jr. (the plaintiffs' expert), and excerpts from the deposition

⁴ The opinion of the medical review panel, which included the oaths of the member physicians, satisfies the procedural requirements of La. C.C.P. art. 967 and is proper summary judgment evidence. See Samaha v. Rau, 2007-1726 (La. 2/26/08), 977 So.2d 880, 890-891; La. R.S. 40:1299.47(H); see also Hubbard v. North Monroe Medical Center, 42, 744 (La. App. 2nd Cir. 12/12/07), 973 So.2d 847, 850, writ denied, 2008-0101 (La. 3/7/08), 977 So.2d 907.

testimony of Drs. James Westerfield and Paul Murphree.⁵ In opposition to the Guest House's motion for summary judgment, the plaintiffs offered the previous sworn testimony of Kevin Butler (the executive director of Plantation Management, who was accepted by the trial court as an expert in nursing home administration),⁶ and the affidavit and attached opinion of John S. Rive, Jr. regarding the care and treatment of Ms. Pecue at the Guest House.⁷

After a thorough review of the record, we conclude that the circumstances of this case do not fall within the category of exceptions to the general rule requiring expert medical testimony to establish the particular medical standard of care and the breach of that standard of care. The Guest House supported the motion for summary judgment with evidence that it did not fail to meet the applicable standard of care with regard to Ms. Pecue. The medical review panel determined that Ms. Pecue was 85 years old and extremely debilitated. They noted that she had end stage Parkinson's, dementia, diabetes, and hypertension, that she needed assistance to eat, was totally dependent for transfers, was totally incontinent of bowel and bladder, and had contractures that progressively worsened. The medical review panel concluded that all of these conditions, over time, reduced her skin integrity and increased the risk of skin breakdown and that Ms. Pecue was thought

⁵ The Guest House also offered excerpts of the medical records of Ms. Pecue from the Guest House and OLOL. However, those records were not affidavits or sworn to in any way, were not certified or attached to an affidavit, and therefore, had no evidentiary value on a motion for summary judgment. Accordingly, we find those records are not proper summary judgment evidence and will not be considered by this court on *de novo* review. See **Bunge North America, Inc. v. Board of Commerce & Industry, and Louisiana Department of Economic Development**, 2007-1746 (La. App. 1st Cir. 5/2/08), 991 So.2d 511, 527, writ denied, 2008-1594 (La. 11/21/08), 996 So.2d 1106.

⁶ This testimony was from the hearing on the Guest House's previously adjudicated dilatory exception raising the objection of prematurity.

⁷ The plaintiffs also offered the "death summary" and certificate of death for Ms. Pecue. However, those documents were not affidavits or sworn to in any way, were not certified or attached to an affidavit, and therefore, had no evidentiary value on a motion for summary judgment. Accordingly, we find those documents are not proper summary judgment evidence and will not be considered by this court on *de novo* review. See **Bunge North America, Inc.**, 991 So.2d at 527.

to be so debilitated prior to her admission to the nursing home that her femoral neck fracture was managed without surgery and she was made a "DNR" (Do Not Resuscitate). The medical review panel determined that Ms. Pecue's wounds were being treated appropriately, that she was receiving nutritional supplements as adjunct therapy to promote healing, that her wounds initially showed signs of healing with wound management, and that when the wounds deteriorated, the Guest House intensified its wound care management by consulting with an outside wound care nurse and providing a specialty mattress.

Thus, given this evidence, as well as the other evidence offered by the Guest House in support of its motion for summary judgment, the plaintiffs were required to come forward with medical expert testimony sufficient to satisfy their evidentiary burden of proof at trial. We find that they failed in this burden.

The plaintiffs contend that they established the applicable standard of care as it is set forth in 42 C.F.R. §483.25(c),⁸ which provides:

(c) Pressure sores. Based on the comprehensive assessment of a resident, the facility must ensure that--

- (1) A resident who enters the facility without pressure sores does not develop pressure sores unless the individual's clinical condition demonstrates that they were unavoidable; and
- (2) A resident having pressure sores receives necessary treatment and services to promote healing, prevent infection and prevent new sores from developing.

Based on this provision, the plaintiffs contend that once it established the standard of care, the burden then shifted to the defendants to prove that Ms. Pecue's clinical condition demonstrated that the pressure sores were unavoidable.

⁸ The plaintiffs claim that this same standard was incorporated into the nursing home's policies and procedures manual, and that under **Hastings v. Baton Rouge General Hospital**, 498 So.2d 713, 722, it constitutes the standard of care. We agree that in **Hastings**, 498 So.2d at 722, the supreme court held that there was no necessity for expert evidence about the standard of care required from a hospital when the standard was clearly delineated in state statutes and bylaws. However, in this case, the plaintiffs failed to offer a copy of the nursing home's policies and procedures manual in opposition to the Guest House's motion for summary judgment. Therefore, we are unable to consider those policies and procedures.

We disagree. As previously stated, a plaintiff pursuing a medical malpractice claim against a nursing home must prove the applicable standard of care, the breach of that standard of care, and a causal connection between the medical negligence and the patient's injuries. There is no testimony or evidence in the record that the Guest House violated any standard of care applicable to it in the care and treatment of Ms. Pecue, or that any negligent action or omission on the part of the Guest House caused or contributed to Ms. Pecue's alleged injuries.⁹

While the plaintiffs essentially relied on the testimony of John S. Rive, Jr., a nursing home administrator, Mr. Rive was not a medical expert and admitted that he was not qualified to make medical diagnoses, set out a plan of treatment for residents, diagnose or treat pressure sores, make determinations regarding the chances of a resident's survival, or assess the nutritional status of a resident. He also acknowledged that he was not qualified to render an expert opinion regarding the cause of Ms. Pecue's wounds, infection, malnutrition and her death. Thus, he was unable to give an expert medical opinion on causation issues in this matter, and his testimony does not help the plaintiffs in satisfying their burden of proof on the motion for summary judgment filed by the Guest House. The Guest House having established its burden of proof on the motion for summary judgment, it was incumbent upon the plaintiffs to produce factual support in the form of expert testimony sufficient to establish that they would be able to satisfy their evidentiary burden of proof at trial on this issue. The plaintiffs failed to do so, and summary judgment dismissing the plaintiffs' medical malpractice claims was, therefore, appropriate.

⁹ Since the plaintiffs' failed to offer any evidence on the issues of breach and causation, essential elements to their claim of medical malpractice, we need not address whether 42 C.F.R. § 483.25(c) does or does not establish the applicable standard of care. Cf. **Satterwhite v. Reilly**, 35,926 (La. App. 2nd Cir. 5/8/02), 817 So.2d 407, 412 and 413 (declining to hold that another federal regulation applicable to a nursing home established the standard of care or that a violation of the regulation was negligence *per se*, as the purpose of the regulation was to qualify providers for the Medicare and Medicaid programs.

Nursing Home Residents Bill of Rights

The purpose of the NHRBR is “to preserve the dignity and personal integrity of residents of nursing homes through the recognition and declaration of rights safeguarding against encroachments upon nursing home residents’ right to self determination.” La. R.S. 40:2010.6. Louisiana Revised Statutes 40:2010.8 sets forth the rights provided and La. R.S. 40:2010.9¹⁰ provides the remedy for the violation of such rights.

As previously set forth, the plaintiffs claim that the Guest House violated the rights set forth in La. R.S. 40:2010.8(A)(6), (7), (9), (10), (11)(a), (11)(b) and (22),¹¹ alleging that Ms. Pecue and/or her family were not adequately informed of

¹⁰ At the applicable time period, La. R.S. 40:2010.9 provided that a resident whose rights, as specified in La. R.S. 40:2010.8, had been violated, had a cause of action against the nursing home to enforce such rights and to recover actual damages, plus attorney fees and costs of the action.

¹¹ Louisiana Revised Statutes 40:2010.8(A) provides, in pertinent part as follows:

A. All nursing homes shall adopt and make public a statement of the rights and responsibilities of the residents residing therein and shall treat such residents in accordance with the provisions of the statement. The statement shall assure each resident the following:

* * *

(6) The right to be adequately informed of his medical condition and proposed treatment; to participate in the planning of all medical treatment, including the right to refuse medication and treatment; and to be informed of the consequences of such actions.

(7) The right to receive adequate and appropriate health care and protective and support services, including services consistent with the resident care plan, with established and recognized practice standards within the community, and with rules promulgated by the Department of Health and Hospitals.

* * *

(9) The right to be treated courteously, fairly, and with the fullest measure of dignity and to receive a written statement and oral explanations of the services provided by the home, including statements and explanations required to be offered on an as-needed basis.

(10) The right to be free from mental and physical abuse; and the right to be free from any physical or chemical restraint imposed for the purposes of discipline or convenience, and not required to treat the resident's medical symptoms.

(11)(a) The right to be transferred or discharged only if necessary for his welfare and if his needs cannot be met in the facility; his health has improved sufficiently

her medical condition and proposed treatment, were not allowed to participate in the planning of all medical treatment, were not informed of the consequences of medical decisions, did not receive a written statement and oral explanation of the services provided by the home, and were not notified in writing thirty days in advance of Ms. Pecue's transfer to OLOL; that Ms. Pecue did not receive adequate and appropriate health care and protective and support services, was not treated courteously, fairly, and with the fullest measure of dignity, and was not cared for in a manner free from mental and physical abuse and from physical and chemical restraints; and that Ms. Pecue did not have the significant change in her health status immediately reported to her interested family members as soon as such change was known to the Guest House's staff.

In support of the Guest House's motion for summary judgment on the Nursing Home Residents Bill of Rights claims, the Guest House relied on the previously offered affidavit of John S. Rive, Jr. (the plaintiffs' proposed expert in nursing home administration), and the deposition testimony of Dr. Gerald Barber, Dr. James Westerfield, Dr. Paul Murphree, Marie Adele Pecue Lambert, Shelley Lambert Boudreaux, Dorothy Pecue, Robert Pecue, John S. Rive, Jr., and Linda

so that he no longer needs the services provided by the facility; the safety of individuals in the facility is endangered; the health of individuals in the facility would otherwise be endangered; he has failed after reasonable and appropriate notice to pay or have paid for a stay at the facility; or the facility ceases to operate.

(b) Both the resident and his legal representative or interested family member, if known and available, have the right to be notified in writing in a language and manner they understand of the transfer and discharge. The notice must be given no less than thirty days in advance of the proposed action, except that the notice may be given as soon as is practicable prior to the action in the case of an emergency. ...

* * *

(22) The right to have any significant change in his health status immediately reported to him and his legal representative or interested family member, if known and available, as soon as such a change is known to the home's staff.

DeFelice, R.N. In opposition to the Guest House's motion for summary judgment, the plaintiffs offered no competent summary judgment evidence.¹²

Based on our *de novo* review of the record, we find the evidence offered by the Guest House in support of its motion for summary judgment pointed out the absence of factual support for the plaintiffs' claims, set forth above, under the NHRBR. The depositions of the physicians and of the plaintiffs fail to provide any factual support for the plaintiffs' allegations that the Guest House violated Ms. Pecue's rights, and the plaintiffs' petition does not contain any specific factual allegations or instances of such conduct. In response to the motion for summary judgment, the plaintiffs failed to offer any proper summary judgment evidence sufficient to establish that they would be able to carry their evidentiary burden of proof at trial on these claims. Thus, there is no genuine issue of material fact and summary judgment dismissing those claims was appropriately granted.

CONCLUSION

For all of the above and foregoing reasons, the August 29, 2011 judgment dismissing the plaintiffs' claims arising under the Louisiana Medical Malpractice Act is affirmed, and the July 16, 2012 judgment dismissing the plaintiffs' claims arising under the Nursing Home Residents Bill of Rights is affirmed.

All costs of this appeal are assessed to the plaintiffs/appellants, Robert W. Pecue, Marie Adele Pecue Lambert, and William Pecue, individually and on behalf of their deceased mother, Juanita Pecue.

AUGUST 29, 2011 JUDGMENT AFFIRMED; JULY 16, 2012 JUDGMENT AFFIRMED.

¹² We note that the plaintiff offered part of the medical records for Ms. Pecue from OLOL and a document entitled "Pressure Sores." However, those unverified documents are not competent summary judgment evidence and will not be considered by this court on *de novo* review. See footnotes 5 and 7 herein; **Bunge North America, Inc.**, 991 So.2d at 527.