

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

FIRST CIRCUIT

NUMBER 2013 CA 1979

ROBERT THOMAS MCGREGOR, SON OF DONALD H. MCGREGOR, AND  
RUTH MCGREGOR, INDIVIDUALLY AND ON BEHALF OF HER  
DECEASED HUSBAND, DONALD H. MCGREGOR

VERSUS

HOSPICE CARE OF LOUISIANA IN BATON ROUGE, LLC, HOSPICE CARE  
OF LOUISIANA, INC., THE HOSPICE FOUNDATION OF GREATER BATON  
ROUGE D/B/A HOSPICE OF BATON ROUGE, KATHRYN GRIGSBY,  
CYNTHIA LOGAN, MELANIE HYATT, AND KATHERINE BRAUD

*EGD*  
*RHP*  
*EGD*  
CONSOLIDATED WITH

NUMBER 2013 CA 1980

ROBERT THOMAS MCGREGOR, INDIVIDUALLY AND RUTH  
MCGREGOR, INDIVIDUALLY AND ON BEHALF OF THE SUCCESSION OF  
DONALD H. MCGREGOR

VERSUS

DR. GERALD P. MILETELLO AND DR. GEORGIA A. REINE

Judgment Rendered: OCT 24 2014

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Appealed from the  
Nineteenth Judicial District Court  
In and for the Parish of East Baton Rouge  
State of Louisiana  
Suit Number C512840 c/w C524336

Honorable Wilson Fields, Presiding

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Rouge, Inc., Kathryn Grigsby,

Baton Rouge, LA

Melanie Hyatt, Cynthia Logan &  
Katherine Braud

BEFORE: PARRO, GUIDRY, AND DRAKE, JJ.

**GUIDRY, J.**

In this medical malpractice action, plaintiff, Ruth McGregor, appeals from a judgment in favor of defendant, Hospice Foundation of Greater Baton Rouge, Inc. d/b/a Hospice of Baton Rouge (Hospice), denying Mrs. McGregor's motion to extend cut-off dates and dismissing her claims, individually and as the administratrix of the succession of Donald McGregor. For the reasons that follow, we affirm.

**FACTS AND PROCEDURAL HISTORY**

Donald McGregor had terminal metastatic prostate cancer. He was treated for this disease by Dr. Gerald Miletello, an oncologist, from 1997 through his death on July 21, 2002. On April 30, 2002, Donald enrolled as a patient of Hospice, because he could no longer visit Dr. Miletello in his office. Thereafter, Hospice nurses visited Donald in his home several times a week and reported their findings to Dr. Miletello.

In June and early July 2002, Dr. Miletello prescribed Duragesic patches for Donald's long-term pain control and morphine suppositories for his breakthrough pain. On July 19, 2002, a Hospice nurse visited Donald, and based on her assessment, Dr. Miletello wrote a prescription for 40 morphine suppositories to be administered 1-2 per hour as needed for pain. The prescription also noted that it may be partially filled; however, Dr. Miletello had instructed Hospice that 20 suppositories should be released on July 19, and the remaining 20 suppositories were not to be released until Monday, July 22.

Donald's son, Robert McGregor, called Hospice several times between July 19 and July 21, concerned that the 20 morphine suppositories were not enough medication to last Donald until Monday and stating that his father was in pain and needed the additional 20 suppositories. After his last call on Sunday, July 21, 2002, Hospice's on call nurse, Melanie Hyatt, informed Hospice's Director of

Nurses, Katherine Braud, and Dr. Reine, a member of Dr. Miletello's oncology group who was on call for Dr. Miletello that weekend, that Robert refused to allow her to go and assess Donald and that Robert was exhibiting threatening behavior toward her. Thereafter, Nurse Hyatt called Robert and informed him that Hospice was discharging Donald from their care.

After receiving the call from Nurse Hyatt, Robert called Dr. Reine directly, asking if she was aware that Hospice had discharged his father, and she stated that she concurred in Hospice's decision. Later that day, Donald's family called an ambulance and took Donald to the hospital where he died that evening.

On October 14, 2003, Robert McGregor and Ruth McGregor filed a petition for damages against Hospice; Kathryn Grigsby, the CEO and administrator of Hospice; Melanie Hyatt; and Katherine Braud (collectively "Hospice defendants"), asserting that they were negligent in failing to release the remaining 20 morphine suppositories between July 19 and 21, 2002, and in abandoning Donald by discharging him from their care on Sunday, July 21, 2002.<sup>1</sup>

Thereafter, the Hospice defendants filed a motion for summary judgment, asserting that *res judicata* precluded the plaintiffs from asserting their claims against the Hospice defendants, and alternatively, that the plaintiffs lacked expert testimony to establish that there was a deviation from the standard of care of the Hospice defendants.

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<sup>1</sup> Robert McGregor and Ruth McGregor initially filed a complaint against Hospice, Kathryn Grigsby, Melanie Hyatt, and Katherine Braud with the Commissioner of Administration requesting formation of a medical review panel. However, the plaintiffs were advised that none of these providers were qualified with the patient's compensation fund.

The plaintiffs also filed a complaint against Drs. Miletello and Reine. A medical review panel subsequently issued an opinion finding that the evidence did not support the conclusion that Dr. Miletello or Dr. Reine failed to meet the applicable standard of care. Robert McGregor and Ruth McGregor thereafter filed a separate action for negligence against Dr. Miletello and Dr. Reine, and in McGregor v. Hospice Care of Louisiana in Baton Rouge, LLC, 09-1355 (La. App. 1st Cir. 2/12/10), 36 So. 3d 281, writ denied, 10-0832 (La. 5/28/10), 36 So. 3d 258, this court affirmed the trial court judgments, granting summary judgment in favor of Dr. Miletello and Dr. Reine and dismissing the plaintiffs' claims against them with prejudice.

Following a hearing on the Hospice defendants' motion, the trial court rendered judgment in favor of the defendants, dismissing the plaintiffs' claims against them with prejudice. Plaintiffs appealed the trial court's judgment, and in McGregor v. Hospice Care of Louisiana in Baton Rouge, LLC, 09-1357 (La. App. 1st Cir. 2/12/10), 36 So. 3d 272, writ denied, 10-0701 (La. 5/28/10), 36 So. 3d 253, this court reversed the trial court's judgment, noting that the plaintiffs presented the expert testimony of Dr. Bruce Samuels, who stated unequivocally that Hospice breached the standard of care by discharging Donald McGregor on July 21, 2002, without proper notification, and his unrebutted testimony stated that the standard of care for discharging a patient is not limited to a particular specialty. McGregor, 09-1357 at p. 8, 36 So. 3d at 277. Accordingly, this court remanded the matter to the district court for further proceedings.

The matter proceeded to a jury trial on November 7 through 9, 2012. On the morning of the first day of trial, Mrs. McGregor filed a motion to extend the cut-off date in order to file a supplemental petition. Mrs. McGregor asserted that Robert McGregor, the other plaintiff in this action, had died on September 28, 2011, and that she wished to file a supplemental petition substituting the name of Ruth McGregor as independent administratrix of the estate of Robert McGregor for the name of Robert McGregor. Following a brief argument on the motion at the beginning of the trial, the trial court denied the motion. Thereafter, the Hospice defendants moved to dismiss the claims of Robert McGregor pursuant to La. C.C.P. art. 1672, and after argument of counsel, the trial court granted the motion.

On the second day of trial, Mrs. McGregor called Dr. Samuels as a witness, tendering him as an expert in internal medicine and also as an expert in treating and/or taking care of terminally ill cancer patients for pain due to cancer, and relieving their pain due to cancer through various pain medications. The court, however, did not accept Dr. Samuels as an expert.

On the third day of trial, Mrs. McGregor voluntarily moved to dismiss defendants Kathryn Grigsby, Katherine Braud, and Melanie Hyatt with prejudice, reserving her rights against Hospice, which motion was granted by the trial court.

At the conclusion of trial, the jury rendered a verdict in favor of Hospice, finding that Hospice, through its employees, did not breach the standard of care in its treatment of Donald McGregor. Thereafter, the trial court signed a judgment: denying Mrs. McGregor's motion to extend cut-off date; granting Hospice's motion to dismiss the claims of Robert McGregor and dismissing the claims of Robert McGregor with prejudice; granting Mrs. McGregor's motion to dismiss her claims against Kathryn Grigsby, Melanie Hyatt, and Katherine Braud; and based on the jury's verdict, dismissing all remaining claims of Ruth McGregor, individually and as administratrix of the succession of Donald McGregor, with prejudice, in their entirety. Mrs. McGregor now appeals from the trial court's judgment.

## **DISCUSSION**

### **Claims of Robert McGregor**

Mrs. McGregor first asserts that the trial court erred in denying her motion to extend the cut-off date, which sought leave of court to file a third supplemental and amending petition beyond the time permitted for filing such a pleading in order to substitute herself, as the independent administratrix of the estate of Robert McGregor, for Robert McGregor as the proper party plaintiff.

Louisiana Code of Civil Procedure article 1151 provides, in pertinent part:

A plaintiff may amend his petition without leave of court at any time before the answer thereto is served. ... Otherwise, the petition ... may be amended only by leave of court or by written consent of the adverse party.

Amendment of pleadings should be liberally allowed, provided that the movant is acting in good faith, the amendment is not sought as a delaying tactic,

the opponent will not be unduly prejudiced, and trial on the issues will not be unduly delayed. Stockstill v. C.F. Industries, Inc., 94-2072, p. 7 (La. App. 1st Cir. 12/15/95), 665 So. 2d 802, 810, writ denied, 96-0149 (La. 3/15/96), 669 So. 2d 428. The decision as to whether to grant leave to amend or supplement a pleading is within the sound discretion of the trial court, and its ruling will not be disturbed on appeal except where an abuse of discretion has occurred and indicates a possibility of resulting injustice. Stockstill, 94-2072 at p. 7, 665 So. 2d at 810.

According to the record, Robert McGregor died on September 28, 2011, over a year prior to the November 7, 2012 trial date. At no point during that year did counsel for Mrs. McGregor, who has represented the plaintiffs throughout this ongoing litigation, seek to substitute Mrs. McGregor, as the administratrix of Robert's estate, for Robert McGregor in his action for damages against Hospice. Rather, counsel for Mrs. McGregor sought on the first day of trial to amend the pleadings to reflect said substitution. Hospice objected to the amendment, noting that it had no notice of the substitution, and that it would be unduly prejudiced if Mrs. McGregor were called to testify as to Robert's damages, as Hospice had not been given the opportunity to depose Mrs. McGregor as to those damages. The trial court, after hearing the argument of counsel, determined that Hospice had a right to know what it had to defend against, and because the motion was filed on the first day of trial, Hospice was not given an opportunity to prepare its defense.

From our review of the record, we do not find that the trial court abused its discretion in denying Mrs. McGregor's motion to extend the cut-off date and thereby denying Mrs. McGregor the opportunity to file a third supplemental and amending petition to substitute herself, as independent administratrix for the estate of Robert McGregor, for Robert McGregor. Further, because the trial court denied Mrs. McGregor's motion, and Robert McGregor was deceased, we find no error in

the trial court's judgment dismissing his claims against Hospice pursuant to La. C.C.P. art. 1672(A)(1).

**Motion in Limine/Jury Interrogatories**

Mrs. McGregor next asserts that the trial court erred in denying a July 26, 2012 motion *in limine* wherein she requested that the court determine her burden of proof at trial. Specifically, Mrs. McGregor argued in her motion that: (1) Hospice was not a health care provider; (2) this is not a medical malpractice case; and (3) La. R.S. 9:2794, concerning the burden of proof in medical malpractice actions, does not apply to this case, and the case is governed by ordinary negligence standards. Although the trial court denied Mrs. McGregor's motion, counsel for Mrs. McGregor re-urged his objection to consideration of these issues at trial when he objected to reference of the standard of care in the jury interrogatories.

It is undisputed that neither Hospice nor the nurse employees thereof are qualified health care providers in accordance with La. R.S. 40:1299.42. However, simply because a party is not "qualified" does not change the inherent nature of the type of action as one for medical malpractice. Hardy v. Blood Systems, Inc., 01-0134, p. 6 (La. App. 3rd Cir. 5/2/01), 794 So. 2d 13, 18, writs denied, 01-1395, 01-1928 (La. 1/11/02), 807 So. 2d 234. A non-qualified health care provider still commits "medical malpractice" when it commits an unintentional tort or breach of contract of the type described in La. R.S. 40:1299.41(A)(13). Hardy, 01-0134 at p. 6, 794 So. 2d at 18. Accordingly, the requirements for proving a claim against a physician or other health care provider in a malpractice action based on negligence set forth in La. R.S. 9:2794, including establishing the standard of care and a violation thereof, still apply regardless of the defendant's status as a qualified health care provider. See Hardy, 01-0134 at p. 6, 794 So. 2d at 18.

Accordingly, because Mrs. McGregor asserts in her motion that Hospice is negligent based on the conduct of its nurse employees, who failed to release the



standard of care is different in each discipline. See Ricker v. Hebert, 94-1743, p. 4 (La. App. 1st Cir. 5/5/95), 655 So. 2d 493, 495; Corley v. State, Department of Health and Hospitals, 32,613, p. 7-8 (La. App. 2nd Cir. 12/30/99), 749 So. 2d 926, 931-932.

In the instant case, Dr. Samuels testified that he practices general internal medicine, and that he has experience treating terminally ill cancer patients for pain. However, Dr. Samuels also testified that he has never written a partial fill prescription and has never had to make decisions about the release of remaining medication on a partial fill prescription. Further, Dr. Samuels stated that he has never worked as a hospice doctor, and that he is unfamiliar with the standard of care of hospice nurses. Counsel for Mrs. McGregor tendered Dr. Samuels as an expert in internal medicine and also as an expert in treating/taking care of terminally ill cancer patients for pain.

From our review of the record, Dr. Samuels failed to demonstrate that he had the requisite knowledge of the standard of care of hospice nursing or administration of partial fill prescriptions, which are the key issues in establishing the negligence of the defendant in this matter.<sup>2</sup> As such, we find no abuse of the trial court's discretion in failing to qualify Dr. Samuels as an expert.

### **Testimony of Dr. Miletello**

Mrs. McGregor also asserts that the trial court erred in allowing Dr. Gerald Miletello to give expert testimony and opinions at trial when he was offered by Hospice as a fact witness. Generally, the trial court is granted broad discretion on its evidentiary rulings, and its determination will not be disturbed on appeal absent a clear abuse of that discretion. Odyssea Vessels, Inc. v. A & B Industries of Morgan City, Inc., 11-2009, p. 15 (La. App. 1st Cir. 6/13/12), 94 So. 3d 182, 192.

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<sup>2</sup> We note that although Dr. Samuels *may* have been qualified to testify as to the standard of care for discharging hospice patients, see McGregor, 09-1357 at p. 8, 36 So. 3d at 277, counsel did not elicit any testimony from Dr. Samuels at trial suggesting that he was qualified to give testimony on this issue.

Moreover, an error may not be predicated upon a ruling that admits or excludes evidence unless a substantial right of the party is affected. La. C.E. art. 103(A). The party alleging prejudice by the evidentiary ruling of the trial court bears the burden of so proving. Mapp Construction, LLC v. Southgate Penthouses, LLC, 09-0850, p. 18 (La. App. 1st Cir. 10/23/09), 29 So. 3d 548, 561, writ denied, 09-2743 (La. 2/26/10), 28 So. 3d 275.

At the trial of this matter, Dr. Miletello was called by Hospice to testify as a fact witness. However, during his testimony, Dr. Miletello offered opinions regarding the quality of Hospice's services as well as the appropriateness of Hospice's discharge of Donald McGregor.<sup>3</sup> While it was arguably erroneous for the trial court to allow Dr. Miletello to offer expert opinion testimony when he was only being offered as a fact witness, we find that Mrs. McGregor has failed to establish that a substantial right was affected by such error. First, Dr. Miletello's statement that he used Hospice because they do an outstanding job and he had never gotten complaints from patients about them does not address the particular issue of Hospice's care of Donald McGregor in the instant case. Further, even Mrs. McGregor admitted in her testimony that she had not previously had any problems with Hospice, and that she had no complaints regarding their care, other than the events surrounding the weekend at issue. Additionally, although Dr. Miletello offered his opinion as to the appropriateness of Hospice's discharge of Donald McGregor from its care, we find that it did not affect a substantial right of Mrs. McGregor, because from our review of the record, she failed to offer any evidence, expert or otherwise, as to the appropriateness of Hospice's discharge. Rather, the entirety of her case centered on whether Hospice was negligent in failing to release the remaining 20 morphine suppositories. Accordingly, because

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<sup>3</sup> We note that it was only during this questioning, and following a question regarding the effectiveness of a Duragesic patch, that counsel for Mrs. McGregor lodged an objection to Dr. Miletello's testimony.

Mrs. McGregor did not meet her burden on the issue of discharge at trial, any error in the admission of Dr. Miletello's testimony on this issue was not prejudicial.

### **Dismissal of Ruth McGregor's Claims**

Finally, Mrs. McGregor asserts that the trial court erred in dismissing her claims against Hospice with prejudice. In the instant case, the jury found that Mrs. McGregor failed to establish that Hospice, through its employees, breached the standard of care in its treatment of Donald McGregor. It is well-settled that an appellate court may not disturb a jury's factual findings in the absence of manifest error. Rosell v. ESCO, 549 So. 2d 840, 844 (La. 1989). On review, the appellate court does not decide whether the jury was right or wrong; rather, it must consider the entire record to determine whether a reasonable factual basis exists for the finding, and whether the finding is manifestly erroneous. Stobart v. State, through Department of Transportation and Development, 617 So. 2d 880, 882 (La. 1993).

From our review of the entire record, we find no error in the jury's determination that Mrs. McGregor failed to establish that Hospice, through its employees, breached the standard of care. The witnesses at trial acknowledged that Dr. Miletello wrote the prescription for the morphine suppositories, and that he instructed Hospice that the remaining twenty could be released if needed, but only after Hospice assessed Donald McGregor's condition. The nurse defendants testified that Robert McGregor was hostile and threatening on the telephone when he called demanding the remaining morphine suppositories, and that they were unable to go to the home to assess Donald. According to the nurse defendants and Dr. Miletello, Hospice instructed Robert McGregor to take Donald to the emergency room to be assessed, which Robert and Mrs. McGregor ultimately did.

Accordingly, based on our review of the record, and considering the absence of any expert testimony contradicting the care provided by Hospice through its nurse employees, we find that the jury had a reasonable factual basis for

determining that Mrs. McGregor failed to establish that Hospice, through its employees, breached the standard of care in its treatment of Donald McGregor, and as such, we find no error in the trial court's judgment dismissing Mrs. McGregor's claims against Hospice with prejudice.

### **CONCLUSION**

For the foregoing reasons, we affirm the judgment of the trial court. All costs of this appeal are assessed to Ruth McGregor, individually and as the administratrix of the estate of Donald McGregor.

**AFFIRMED.**