

NOT DESIGNATED FOR PUBLICATION

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JJP

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2014 CA 0261

PATRICIA ANDRE AND RICHARD ANDRE

VERSUS

PATIENTS' COMPENSATION FUND OVERSIGHT BOARD
AND/OR PATIENT COMPENSATION FUND, THE INFUSION
NETWORK OF LOUISIANA, INC., DR. SCOTT H. LANDRY,
AND OUR LADY OF THE LAKE HOSPITAL

Judgment Rendered: DEC 23 2014

Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 562,666

Honorable William A. Morvant, Judge

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BEFORE: KUHN, PETTIGREW, AND WELCH, JJ.

WELCH, J.

The plaintiffs, Patricia Andre and Richard Andre, appeal a judgment denying their motion for a continuance, granting a motion for summary judgment filed by the defendant, The Infusion Network of Louisiana, Inc., d/b/a HCS Infusion Network (“HCS”), and dismissing their claims against HCS with prejudice.¹ We reverse the judgment of the trial court insofar as it denied the motion for a continuance, vacate the remainder of the judgment, and remand for further proceedings.

The plaintiff, Patricia Andre, is a cystic fibrosis patient. On September 21, 2006, she sought treatment with Dr. David E. Thomas regarding a cough. Eventually, on October 31, 2006, Mrs. Andre was admitted to Our Lady of the Lake Regional Medical Center (“OLOL”) and Dr. Thomas ordered the intravenous administration of the antibiotic drug Tobramycin, which was to be closely monitored with laboratory studies. On November 6, 2006, Mrs. Andre was discharged from OLOL, and the intravenous Tobramycin treatments were continued on an outpatient basis by HCS, a duly licensed outpatient pharmacy and infusion center. On December 6, 2006, Mrs. Andre made complaints to HCS regarding dizziness, altered gait, and loss of balance. However, she continued to receive the Tobramycin treatments until December 11, 2006, when she was admitted to OLOL with acute renal failure, vestibular toxicity, and aminoglycoside toxicity which was allegedly caused by the Tobramycin treatments.

¹ Although the denial of a motion to continue is generally considered an interlocutory, non-appealable judgment, *see* La. C.C.P. arts. 1841 and 2083, when an appeal is taken from a final judgment, the appellant is entitled to seek review of all adverse interlocutory judgments prejudicial to him in addition to the review of the final judgment. *See Judson v. Davis*, 2004-1699 (La. App. 1st Cir. 6/29/05), 916 So.2d 1106, 1112-1113, *writ denied*, 2005-1998 (La. 2/10/06), 924 So.2d 167. Thus, in this case, we can consider the correctness of that interlocutory judgment in conjunction with the appeal of the judgment granting HCS’s motion for summary judgment, which is a final and appealable judgment. *See Ballard v. Waitz*, 2006-0307 (La. App. 1st Cir. 12/28/06), 951 So.2d 335, 338, *writ denied*, 2007-0846 (La. 6/15/07), 958 So.2d 1193; *People of Living God v. Chantilly Corporation*, 251 La. 943, 947-948, 207 So.2d 752, 753 (1968).

On January 8, 2008, the plaintiffs filed a petition for damages against Dr. Thomas, individually and/or Children's Respiratory and Sleep Center, and HCS, alleging that the Tobramycin treatments were neither properly dosed nor monitored. With regard to HCS,² the plaintiffs alleged that Mrs. Andre's injuries were caused by the gross negligence of HCS for: (1) failing to properly monitor the actions and abilities of its staff and employees; (2) failing to closely and timely assess, monitor, implement, and evaluate a plan for care for Mrs. Andre; (3) failing to evaluate Mrs. Andre's medications for drug reactions and interactions and to question her physicians about the amount and kinds of antibiotic drug therapy; (4) failing to order and monitor Mrs. Andre's antibiotic levels and kidney function studies in a timely manner and on a routine and regular basis; (5) failing to communicate Mrs. Andre's plan of care, lab results, and planned interventions to Mrs. Andre's physicians; (6) failing to provide consistent and thorough documentation; (7) failing to question the adequacy of Mrs. Andre's renal function in light of an increase in her serum creatinine from its baseline; (8) failing to question Mrs. Andre's renal insufficiency related to continued elevated antibiotic toxic levels, despite HCS's attempt to reduce the dosage and its interval; (9) failing to ensure that renal function studies were drawn as scheduled or followed up to be redrawn despite a canceled order; and (10) failing to ensure Mrs. Andre's safety. The plaintiffs subsequently amended their petition for damages to add as defendants: LAMMICO Insurance Agency, Inc.; Praxair, Inc. d/b/a Praxair Health Services, d/b/a The Infusion Network of Louisiana, Inc. d/b/a HCS Infusion; Dr. Scott H. Landry; and OLOL.

On June 5, 2013, HCS filed a motion for summary judgment claiming that it was entitled to summary judgment dismissing the plaintiffs' claims against it on the basis that it owed no duty to Mrs. Andre other than to properly fill Mrs.

² There are no issues in this appeal concerning the plaintiffs' claims against the other defendants.

Andre's prescription and to report any obvious errors in the prescription to the treating physician and further, that there was no evidence supporting the plaintiffs' claims that it breached a duty to Mrs. Andre. In support of its motion for summary judgment, HCS relied on the decision of the medical review panel, dated January 31, 2011, wherein the panel found that Dr. Thomas, Dr. Landry, and OLOL failed to meet the standard of care and that their conduct was a factor in Mrs. Andre's damages.³ The medical review panel found that as to Dr. Thomas and Dr. Landry, communication was inadequate such that there was no clear delineation following Mrs. Andre's discharge from OLOL as to who was in charge of monitoring her outpatient intravenous Tobramycin treatments. The panel also found that Dr. Thomas failed to adequately monitor Mrs. Andre's outpatient serum creatinine and Tobramycin levels, and that his failure to recognize the developing renal insufficiency was a breach of the standard of care.⁴ Based on this evidence, HCS claims that it was Dr. Thomas's and Dr. Landry's responsibilities to monitor Mrs. Andre's condition and thus, was not HCS's responsibility to do so. The hearing on the motion for summary judgment was scheduled for Monday, July 29, 2013.

On July 22, 2013, the plaintiffs filed an opposition to the motion for summary judgment, claiming that HCS was not entitled to summary judgment because there were issues of fact as to whose responsibility it was to monitor Mrs. Andre and whether the dosage and instructions were excessive for Mrs. Andre.⁵ In opposition to the motion for summary judgment, it appears that the plaintiffs

³ The opinion of the medical review panel may be considered by a court when ruling on a summary judgment motion. See **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. Cf. **Samaha v. Rau**, 2007-1726 (La. 2/26/08), 977 So.2d 880, 890-891; **Pecue v. Plantation Management Co., L.L.C.**, 2013-0977 (La. App. 1st Cir. 2/18/14) (*unpublished*).

⁴ HCS is not a qualified health care provider, and therefore, was not part of the medical review panel proceedings. See La. R.S. 40:1299.47.

⁵ The plaintiffs' opposition to the motion for summary judgment was filed by facsimile transmission on July 22, 2013, and the original signed pleading was filed on July 26, 2013. See La. R.S. 13:850.

intended to rely on the expert pharmacological opinions of Gary J. McGarity and H. Joseph Byrd, a pharmacologist. However, the documents relative to the expert opinion of Gary McGarity were unsigned. With regard to Joseph Byrd, the plaintiffs attached his signed expert report, dated January 12, 2009; however, the report was not an affidavit or sworn to in any way and was not certified or attached to an affidavit. Therefore, the documents offered by the plaintiffs were not proper summary judgment evidence that could be considered by the court.⁶

On July 25, 2013, the plaintiffs filed a motion seeking to continue the hearing on the motion for summary judgment.⁷ According to the motion, the plaintiffs asserted that they had recently become aware that their expert, Byrd, had retired and had not left forwarding contact information. The plaintiffs asserted that although they had been diligent in their efforts to contact Byrd, a continuance of the hearing was necessary. HCS subsequently opposed the motion to continue, asserting that the continuance was moot in that the plaintiffs had apparently located Joseph Byrd and obtained an affidavit from him and that the plaintiffs provided the affidavit to HCS on Friday, July 26, 2013.

On the day of the hearing on the motion for summary judgment (Monday, July 29, 2013), the trial court denied the plaintiffs' motion to continue, refused to consider the expert reports and affidavits of McGarity and Byrd, granted HCS's motion for summary judgment, and dismissed the plaintiffs' claims against HCS. A judgment in accordance with the trial court's ruling was signed on August 16, 2013, and an amended judgment was signed on April 10, 2014.⁸

⁶ See La. C.C.P. art. 966(B); **Bunge North America, Inc. v. Board of Commerce and 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.

⁷ The plaintiffs' motion to continue was filed by facsimile transmission on July 25, 2013, and the original signed pleading was filed on July 31, 2013. See La. R.S. 13:850.

⁸ The original judgment lacked appropriate decretal language disposing of and/or dismissing the plaintiffs' claims. Following a rule to show cause issued by this court, an amended judgment that complied with La. C.C.P. arts. 1911 and 1918 was issued by the trial court, and this appeal

The plaintiffs then filed a motion urging the trial court to reconsider its decision to grant summary judgment in favor of HCS on the basis that the ruling was contrary to the law and the evidence, that good cause existed under La. C.C.P. art. 966, such that the plaintiffs should be allowed to supplement the record with the properly executed affidavits of Gary McGarity and Joseph Byrd and the signed expert report of Gary McGarity (which were attached to the motion), and that there were issues of fact which precluded summary judgment. Additionally, attached to the motion was an affidavit from a paralegal employed by counsel for the plaintiffs stating that after HCS's motion for summary judgment was filed, she discovered Byrd had retired without leaving forwarding information; that she continued searching for Byrd, but because he could not be located, the plaintiffs hired another expert, McGarity, and that his report and affidavit was provided to HCS seven days before the hearing; and that when she finally located Byrd, they obtained his affidavit and it was immediately provided to HCS on July 26, 2013. The trial court denied this motion.

The plaintiffs now appeal, arguing that the trial court abused its discretion in refusing the plaintiffs additional time to respond to the motion for summary judgment since their expert had retired and disappeared during the span of the litigation and was unable to be timely located despite diligent effort by the plaintiffs' counsel. We agree.⁹

Louisiana Code of Civil Procedure article 966 provides, in pertinent part, as follows:

was maintained See **Patricia Andre and Richard Andre v. Dr. David Thomas and HCS Infusion Network**, 2014-0261 (La. App. 1st Cir. 6/16/14) (*unpublished action*).

⁹ Because we find merit to the plaintiffs' assignment of error with regard to the continuance or additional time to file opposing affidavits, we preterm consideration of the plaintiffs' other assignments of error, *i.e.*, whether the defendants met their initial burden of proof on the motion for summary judgment, whether the amendments to La. C.C.P. art. 966 by 2013 La. Acts, No. 391 should be retroactively applied, and whether the defendants should have been compelled to answer a request for admission sought after the suit had been dismissed.

B. (1) The motion for summary judgment, memorandum in support thereof, and supporting affidavits shall be served within the time limits provided in District Court Rule 9.9. *For good cause, the court shall give the adverse party additional time to file a response, including opposing affidavits or depositions.* The adverse party may serve opposing affidavits, and if such opposing affidavits are served, the opposing affidavits and any memorandum in support thereof shall be served pursuant to Article 1313 within the time limits provided in District Court Rule 9.9.
(Emphasis added).

Additionally, La. C.C.P. art. 967 provides:

C. If it appears from the affidavits of a party opposing the motion that for reasons stated he cannot present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or *may order a continuance to permit affidavits to be obtained* or depositions to be taken or discovery to be had or may make such other order as is just.

The trial court's decision as to whether good cause exists to allow a party additional time to file a response to a motion for summary judgment and/or to order a continuance to obtain affidavits or additional discovery is reviewed for abuse of discretion. See Advance Products and Systems, Inc. v. Simon, 2006-0609 (La. App. 3rd Cir. 12/6/06), 944 So.2d 788, 791-792; Rogers v. Hilltop Retirement & Rehabilitation Center, 2013-0867 (La. App. 3rd Cir. 2/12/14), ___ So.3d ___, ___. The only requirement is that the parties be given a fair opportunity to present their claim. Advance Products and Systems, Inc., 944 So.2d at 792, citing Simoneaux v. E.I. du Pont de Nemours and Co., Inc., 483 So.2d 908, 913 (La. 1986).

In this case, the trial court found that there was no "good basis for a continuance" because the plaintiffs had had "[two] and half years to move this thing forward" and had an "opportunity to conduct discovery in [that time]." While we recognize that the trial court had vast discretion in this case to determine whether good cause existed to allow the plaintiffs additional time to file their response and supporting affidavits or whether to grant a continuance so that the plaintiffs could obtain the affidavits of their experts, that discretion is not

unfettered. From the trial court's oral reasons for denying the continuance, it is evident that the trial court focused solely on the length of time the suit had been pending and the opportunity therein for the plaintiffs to conduct discovery, rather than evaluating what the plaintiffs had done during that time period and whether the plaintiffs were being given a fair opportunity to present their claims. The record herein establishes that the parties engaged in discovery, that plaintiffs hired Byrd as an expert witness, that Byrd provided an expert report in January 2009, and that Byrd's report was provided to HCS. However, through no fault of the plaintiffs, Byrd retired during the pendency of this litigation without contacting the plaintiffs or providing any forwarding contact information, and the plaintiffs did not learn of his retirement until well after HCS filed its motion for summary judgment and set the motion for hearing. Upon realizing that Byrd had retired, the plaintiffs continuously attempted to locate Byrd to obtain an affidavit to attach to his expert report (such that it would be competent summary judgment evidence). When the plaintiffs realized that they would probably not be able to locate Byrd, they immediately hired another expert, McGarity, and provided his report to HCS as diligently as possible. In addition, once the plaintiffs were finally able to locate Byrd, they obtained his affidavit and provided it immediately to HCS in opposition to the motion for summary judgment. Unfortunately, by the time the affidavits of both Byrd and McGarity were provided to HCS, the plaintiffs were unable to comply with La. C.C.P. art. 966 (B)(1) and the time limits set forth in Uniform Rules—District Courts, Rule 9.9.

Under the particular factual circumstances of this case, the plaintiffs undoubtedly established good cause warranting additional time and/or a continuance so that they could obtain the affidavits of their experts and comply with the prescribed time delays to oppose the motion for summary judgment and to have a fair opportunity to present their claim. Since the trial court concluded

otherwise, we find that it was a clear abuse of the trial court's discretion. Accordingly, the April 10, 2014 judgment of the trial court is reversed insofar as it denied the plaintiffs' motion for a continuance. Additionally, since the summary judgment granted in favor of HCS, which dismissed the plaintiffs' claims against HCS, was rendered in furtherance of the denial of the motion to continue, that portion of the April 10, 2014 judgment is vacated. This matter is remanded to the trial court with instructions to set HCS's motion for summary judgment for hearing and to give the plaintiffs the opportunity to comply with La. C.C.P. art. 966(B)(1).¹⁰ We issue this memorandum opinion in accordance with Uniform Rules--Courts of Appeal, Rule 2-16.1(B).

All costs of this appeal are assessed to the defendant/appellee, The Infusion Network of Louisiana, Inc., d/b/a HCS Infusion Network.

REVERSED IN PART; VACATED IN PART; REMANDED.

¹⁰ We note that HCS claims that since its motion for summary judgment raised the issue of duty, which is a question of law, a continuance or additional time for the plaintiffs to obtain factual affidavits of their experts was not necessary. We disagree. While HCS's motion for summary judgment raises the issue of whether HCS owed a duty to plaintiffs and whether a duty is owed is a question of law, in deciding whether to impose a duty in a particular case, the court must make a policy decision in light of the unique facts and circumstances presented. See **Socorro v. City of New Orleans**, 579 So.2d 931, 938 (La. 1991). Thus, the inquiry to be made by the trial court will be whether the plaintiffs have any law (statutory, jurisprudential or arising from general principles of fault) to support the claim that HCS owed or *assumed* a duty to the plaintiffs. See **Faucheaux v. Terrebonne Consol. Government**, 615 So.2d 289, 292 (La. 1993); **Crane v. Exxon Corp., U.S.A.**, 613 So.2d 214 (La. App. 1st Cir. 1992), writs denied in part, granted in part on other grounds, and remanded, 620 So.2d 858 (La. 1993). Herein, it appears that the plaintiffs, through their experts, are seeking to establish the existence of standards for clinical pharmacies and pharmacists for dispensing and monitoring Tobramycin, which is relevant to determining whether a general duty is owed, and to establish that HCS assumed a duty to the plaintiffs when HCS accepted Mrs. Andre as a patient for Tobramycin therapy. Therefore, even though HCS's motion for summary judgment may have raised the legal issue of duty, the plaintiffs were entitled to the opportunity to present their claim that there was a factual basis for a duty on the part of HCS. See generally **Carrier v. City of Amite**, 2010-0007 (La. 10/19/10), 50 So.3d 1247, 1248-1251.