

STATE OF LOUISIANA


COURT OF APPEAL

FIRST CIRCUIT

2017 CA 0321

CURTIS SHEPHERD SR., DEBRA WILLIAMS, MICHAEL SHEPHERD,
LINDA SHEPHERD, NATHANIEL SHEPHERD JR., STEHPEN SHEPHERD,
CHRISTOPHER SHEPHERD, AND RODNEY SHEPHERD,
INDIVIDUALLY AND AS THE HEIRS OF NADINE
SHEPHERD AND ON BEHALF OF THE ESTATE
OF NADINE SHEPHERD

VERSUS

BATON ROUGE CARDIOLOGY CENTER, DR. RODNEY EVENS,
DR. VENKAT SURAKANTI, OUR LADY OF THE LAKE
REGIONAL MEDICAL CENTER, [AND EAST] BATON
ROUGE PARISH EMERGENCY MEDICAL SERVICES

Judgment Rendered: NOV 01 2017

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APPEALED FROM THE NINETEENTH JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
DOCKET NUMBER C644828

HONORABLE R. MICHAEL CALDWELL, JUDGE

* * * * *

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BEFORE: WHIPPLE, C.J., McDONALD, AND CHUTZ, JJ.

McDONALD, J.

In this case the plaintiffs, Curtis Shepherd, Sr., Debra Williams, Michael Shepherd, Linda Shepherd, Nathaniel Shepherd, Jr., Stephen Shepherd, Christopher Shepherd, and Rodney Shepherd, appeal a summary judgment rendered in favor of the defendants, Baton Rouge Cardiology Center, L.L.C. (Baton Rouge Cardiology Center), Dr. Evens Rodney,¹ Dr. Venkat Surakanti, and Our Lady of the Lake Hospital d/b/a Our Lady of The Lake Regional Medical Center (OLOL), dismissing all claims asserted by the plaintiffs, with prejudice. After a *de novo* review, we affirm.

FACTS AND PROCEDURAL HISTORY

On January 8, 2016, the plaintiffs filed this suit for damages, individually and as the heirs of Nadine Shepherd (their mother, hereafter Ms. Shepherd), and on behalf of the estate of Nadine Shepherd, naming as defendants Dr. Rodney, Dr. Surakanti, Baton Rouge Cardiology Center, and OLOL. The plaintiffs maintained that the defendants were liable to them for general and special damages following treatment of Ms. Shepherd by Dr. Rodney and Dr. Surakanti at the Baton Rouge Cardiology Center and an angioplasty procedure performed on Ms. Shepherd by Dr. Surakanti at OLOL on June 14, 2012. The plaintiffs alleged that Dr. Surakanti performed an unnecessary angioplasty on Ms. Shepherd, who was 74 years old, diabetic, morbidly obese, and unable to walk. The plaintiffs maintained that Ms. Shepherd suffered ongoing health issues “resulting from the failed procedure” but nonetheless was discharged from OLOL and passed away less than three weeks later.

¹ We note that Dr. Evens Rodney is at times erroneously referred to in the record as Dr. Rodney Evens or Dr. Rodney Evans.

The plaintiffs alleged that Dr. Surakanti and Dr. Rodney were acting within the course and scope of their employment with Baton Rouge Cardiology Center, rendering Baton Rouge Cardiology Center liable under the theories of respondeat superior and/or strict liability. The plaintiffs maintained the defendants' treatment of Ms. Shepherd was careless, negligent, and improper, and that she did not give informed consent to the cardiac surgical procedure. The plaintiffs asserted that the defendants' treatment amounted to malpractice. They averred that the defendants caused Ms. Shepherd serious, severe, and permanent physical injuries and emotional distress, and caused her death. The plaintiffs asked for damages for Ms. Shepherd's pain and suffering, loss of enjoyment of life, loss of chance of survival, and her wrongful death, including medical expenses, funeral and burial expenses, the loss of affection and companionship, and all general and special damages allowed by law.

The plaintiffs maintained that their claims were presented to a Medical Review Panel, which was extended from Sunday, April 4, 2015 to Monday, October 4, 2015. They maintained that a Medical Review Panel hearing was set for September 3, 2015 and then cancelled, and that the Sunday, October 4, 2015 deadline passed without a decision; thus, they asserted the panel had dissolved automatically. The plaintiffs asserted that on Monday, October 5, 2015, OLOL filed a motion to extend the life of the panel, but that it was too late as it had already dissolved. The plaintiffs asked for judgment in their favor and against the defendants for damages, court costs and expenses, interest, expert witness fees, and all other general equitable relief.

Dr. Rodney, Dr. Surakanti, and Baton Rouge Cardiology Center answered the suit, denying liability and asserting that the petition was only partially accurate and that it used the medical records in a way that was conclusory, selective, and misleading. Dr. Rodney, Dr. Surakanti, and Baton Rouge Cardiology Center

averred that they were qualified health care providers under La. R.S. 40:1231.2, pled the fault of third parties for whom they were not legally responsible, pled the negligence and fault of Ms. Shepherd for her failure to follow medical advice and instruction and other omissions in mitigation or bar of recovery. Dr. Rodney, Dr. Surakanti, and Baton Rouge Cardiology Center asked for judgment in their favor, and against the plaintiffs, and that the case be dismissed with prejudice at the plaintiffs' cost, and for all general, legal, declaratory, and equitable relief available.

OLOL answered the suit, denying liability, and maintained that the medical record information presented in the petition was incomplete. OLOL pled the entirety of Ms. Shepherd's medical records in response to the allegations and asserted that the care it provided to Ms. Shepherd was within the standard of care. OLOL asserted that Judge Timothy Kelley signed an order in Nineteenth Judicial District Court case number 631,952² on October 19, 2015, extending the life of the Medical Review Panel until October 4, 2015, and that the plaintiff's allegations in paragraphs 38 through 41 contained an improper collateral attack upon Judge Kelley's ruling.

OLOL asserted that it was a qualified health care provider under La. R.S. 40:1231.1, et seq., that the Medical Review Panel had found no deviation from the standard of care by OLOL, and that the care rendered by the staff at OLOL was within the standard of care. OLOL pled the failure of Ms. Shepherd to follow the instructions of doctors, nurses, or other healthcare providers, and her failure to provide correct information to healthcare providers, as a bar or reduction to the plaintiffs' recovery. OLOL also pled the fault of third parties for whom it was not

² Case number 631,952 was filed during the pendency of the Medical Review Panel to resolve discovery disputes and procedural matters and was presided over by Judge Kelley. Excerpts from the record in case number 631,952 were attached as exhibits in the record in this case.

responsible as a bar or reduction of recovery. OLOL prayed for judgment in its favor and against the plaintiffs, and for dismissal of the plaintiffs' claims against it with prejudice. In the alternative, and only in the event of a judgment rendered against it, OLOL pled the limitation of liability in accordance with La. R.S. 40:1231.1, et seq., and the reduction in recovery by an amount commensurate with the fault of Ms. Shepherd and by an amount commensurate with the fault of third parties for whom it was not responsible.

Thereafter, OLOL filed a motion to strike paragraphs 38 through 41 of the plaintiffs' petition as an improper collateral attack on Judge Kelley's ruling in case number 631,952 that extended the life of the Medical Review Panel. After a hearing on April 11, 2016, the motion to strike was granted as to all parties by judgment dated April 26, 2016.

On May 20, 2016, Dr. Rodney, Dr. Surakanti, and Baton Rouge Cardiology Center filed a motion for summary judgment, maintaining that a Medical Review Panel had determined that they did not breach the standard of care in their treatment of Ms. Shepherd, that the plaintiffs had not identified an expert witness to testify that they had breached the standard of care, that expert testimony was required to prove Mrs. Shepherd's lack of consent, and that therefore, there was no genuine issue of material fact and summary judgment in their favor was appropriate. They prayed for summary judgment in their favor, dismissing the plaintiffs' claims with prejudice, at the plaintiffs' cost.

On May 25, 2016, OLOL filed a motion for summary judgment, asserting that there were no genuine issues of material fact, that the Medical Review Panel had determined that there was no deviation from the standard of care by OLOL, that the plaintiffs had no expert witness to give an opinion as to the standard of care OLOL owed to Ms. Shepherd, to offer an opinion that OLOL had breached the standard of care owed to Ms. Shepherd, or to formulate an opinion that OLOL's

actions were a cause of or contributed to Ms. Shepherd's death. Thus, OLOL asserted that the plaintiffs had identified no experts to establish the essential elements of their claim. The plaintiffs did not file an opposition to the motion for summary judgment.

At the hearing on both motions for summary judgment on August 8, 2016, the plaintiffs did not make an appearance. The district court found no genuine issue as to any material fact regarding the claims made by the plaintiffs against Dr. Rodney, Dr. Surakanti, Baton Rouge Cardiology Center, and OLOL, and dismissed with prejudice all of the plaintiffs' claims against them. The judgment was signed on September 12, 2016.

On appeal, the plaintiffs make five assignments of error. Assignments of error numbers one and two address rulings made in case number 631,952. In their assignments of error, the plaintiffs assert that 1) the district court erred in granting the City of Baton Rouge/Parish of East Baton Rouge Department of Medical Services' (EMS's) exception of no right of action;³ 2) the district court lacked the authority to extend the life of the medical review panel once it had expired; 3) OLOL's motion for security for costs of the Medical Review Panel should have been denied; 4) the defendants' request that paragraphs 38 through 41 of the plaintiffs' petition for damages be stricken as an improper collateral attack on Judge Kelley's ruling should have been denied; and 5) the defendants' motion for summary judgment was not supported by sufficient evidence.

Assignment of error number one addresses Judge Kelley's judgment granting EMS's exception of no right of action in case number 631,952. In that proceeding, EMS raised an exception of no right of action, which was granted. After the Medical Review Panel made its ruling, this suit for damages was filed in

³ In addition to the discovery and procedural matters presided over by Judge Kelley in case number 631,952, he granted an exception of no right of action filed by EMS. We are not aware of any appeal from this ruling.

case number 644,828, and the motions for summary judgment were filed, were unopposed, and were granted. This assignment of error is a collateral attack on a ruling made in case number 631,952 and that ruling is not before us in the appeal of an unopposed summary judgment rendered in case number 644,828.⁴ Thus, we need not address assignment of error number one.

Assignment of error number two addresses Judge Kelley's ruling granting a motion to extend the life of the Medical Review Panel in case number 631,952. That ruling is not before us in the appeal of an unopposed summary judgment rendered in case number 644,828; thus, we need not address this assignment of error.⁵

Assignment of error number three addresses an interlocutory ruling granting OLOL's motion for the plaintiffs to post security for costs of the Medical Review Panel. Louisiana Revised Statute 40:1231.8(1)(2)(c) provides:

In a medical malpractice suit filed by the claimant in which a unanimous opinion was rendered in favor of the defendant health care provider as provided in the expert opinion stated in Paragraph (G)(2) of this Section, the claimant who proceeds to file such a suit shall be required to post a cash or surety bond, approved by the court, in the amount of all costs of the medical review panel. Upon the conclusion of the medical malpractice suit, the court shall order that the cash or surety bond be forfeited to the defendant health care provider for reimbursement of the costs of the medical review panel, unless a final judgment is rendered finding the defendant liable to the claimant for any damages. If a final judgment is rendered finding the defendant liable to the claimant for any damages, the court shall order that the defendant health care provider reimburse the claimant an amount equal to the cost of obtaining the cash or surety bond posted by the

⁴ Under La. R.S. 13:4231, *res judicata* bars relitigation of a subject matter arising from the same transaction or occurrence as a previous suit. **Mandalay Oil & Gas, L.L.C. v. Energy Dev. Corp.**, 2001-0993 (La. App. 1 Cir. 8/4/04), 880 So.2d 129, 135, *writ denied*, 2004-2426 (La. 1/28/05), 893 So.2d 72.

⁵ We note, however, that the Medical Review Panel had been extended to Sunday, October 4, 2015, which was a legal holiday. *See* La. R.S. 1:55A(1). Louisiana Code of Criminal Procedure art. 5059 provides that when computing time, the last day of the period is to be included, unless it is a legal holiday, in which event the period runs until the end of the next day which is not a legal holiday. Thus, the motion to extend the life of the Medical Review Panel was filed Monday, October 5, 2015, the last day of the extended time period.

claimant.

Louisiana Revised Statute 40:1231.8(G)(2) provides:

G. The panel shall have the sole duty to express its expert opinion as to whether or not the evidence supports the conclusion that the defendant or defendants acted or failed to act within the appropriate standards of care. After reviewing all evidence and after any examination of the panel by counsel representing either party, the panel shall, within thirty days, render one or more of the following expert opinions, which shall be in writing and signed by the panelists, together with written reasons for their conclusions:

* * * * *

(2) The evidence does not support the conclusion that the defendant or defendants failed to meet the applicable standard of care as charged in the complaint.

The Medical Review Panel determined unanimously that that there was no deviation from the appropriate standard of care and that all phases of care were appropriate, in accordance with La. R.S. 40:1231.8(G)(2). Thus, we find no abuse of discretion by the district court in granting OLOL's motion for the plaintiffs to post security for costs for the Medical Review Panel in accordance with La. R.S. 40:1231.8(I)(2)(c). This assignment of error has no merit.

Assignment of error number four addresses an interlocutory ruling granting OLOL's motion to strike paragraphs 38 through 41 of the plaintiffs' petition, which contain a collateral attack on a ruling by Judge Kelley in case number 631,952 that extended the life of the Medical Review Panel. We find no abuse of discretion by the district court in granting the motion to strike the paragraphs which contained a collateral attack on a ruling in the previous case. This assignment of error has no merit.

Assignment of error number five asserts that the defendants' motion for summary judgment was not supported by sufficient evidence.

SUMMARY JUDGMENT

A motion for summary judgment is a procedural device used when there is

no genuine issue of material fact for all or part of the relief prayed for by a litigant. A summary judgment is reviewed on appeal *de novo*, with the appellate court using the same criteria that govern the trial court's determination of whether summary judgment is appropriate; i.e., whether there is any genuine issue of material fact, and whether the movant is entitled to judgment as a matter of law. **Samaha v. Rau**, 2007-1726 (La. 2/26/08), 977 So.2d 880, 882-883.

The burden of proof rests with the mover. Nevertheless, if the mover will not bear the burden of proof at trial on the issue that is before the court on the motion for summary judgment, the mover's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court the absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. The burden is on the adverse party to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law. La. C.C.P. art. 966D(1). Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can only be seen in light of the substantive law applicable to the case. **Pumphrey v. Harris**, 2012-0405 (La. App. 1 Cir. 11/2/12), 111 So.3d 86, 89.

Louisiana Revised Statute 9:2794(A) provides that in a medical malpractice action, the plaintiff has the burden of proving:

(1) The degree of knowledge or skill possessed or the degree of care ordinarily exercised by physicians . . . licensed to practice in the state of Louisiana and actively practicing in a similar community or locale and under similar circumstances; and where the defendant practices in a particular specialty and where the alleged acts of medical negligence raise issues peculiar to the particular medical specialty involved, then the plaintiff has the burden of proving the degree of care ordinarily practiced by physicians . . . within the involved medical specialty.

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. Likewise, in a medical malpractice action against a hospital, the plaintiff must prove that the hospital caused the injury when it breached its duty. Expert testimony is generally required to establish the applicable standard of care and whether that standard of care was breached, except where the negligence is so obvious that a lay person can infer negligence without the guidance of expert testimony. **Penn v. CarePoint Partners of Louisiana, L.L.C.**, 2014-1621 (La. App. 1 Cir. 7/30/15), 181 So.3d 26, 30.

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 breach of that standard of care. Thus, the plaintiffs were required to come forward with expert medical testimony sufficient to satisfy their evidentiary burden of proof at trial. They failed in this burden. Specifically, there is no testimony or evidence in the record that sets forth the standard of care applicable to Dr. Rodney, Dr. Surakanti, Baton Rouge Cardiology Center, or OLOL in the care and treatment of Ms. Shepherd, or that establishes any negligent action or omission on the defendants' part caused or contributed to Ms. Shepherd's decline and demise. To the contrary, the un rebutted opinion of the Medical Review Panel was that there was no evidence that Dr. Rodney, Dr. Surakanti, Baton Rouge Cardiology Center, or OLOL failed to meet the applicable standard of care. See Vanner v. Lakewood Quarters Ret. Cmty., 2012-1828 (La. App. 1 Cir. 6/7/13), 120 So. 3d 752, 756.

The Medical Review Panel found that "there was no deviation from the appropriate standard of medical care by Baton Rouge Cardiology Center, [Dr. Rodney], [Dr. Surakanti], and [OLOL], and that "[u]nfortunately the patient had a recognized, while uncommon, complication from this indicated procedure." The Medical Review Panel further found:

There was proper documentation of the risks and benefits of the procedure as well as the post-operative care. Dr. Rodney appropriately performed stress testing which led to an appropriate angiogram[.] The patient was also treated with appropriate anti-anginal medical therapy as tolerated by her blood pressure and continued to have restanginal interfering with dialysis and her quality of life. This led to the surgical rejection and refusal for an open, bypass surgery. Dr. Surakanti attempted angioplasty which was appropriate. All phases of care were appropriate. The care rendered by the staff of [OLOL] was within the standard of care.

The defendants' having established their burden of proof on the motion, 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 these issues. The plaintiffs failed to do so, and summary judgment was therefore appropriate. See Vanner, 120 So. 3d at 757.

CONCLUSION

Thus, for the foregoing reasons, we affirm the district court's September 12, 2016 judgment dismissing with prejudice the claims of Curtis Shepherd, Sr., Debra Williams, Michael Shepherd, Linda Shepherd, Nathaniel Shepherd, Jr., Stehpen Shepherd, Christopher Shepherd, and Rodney Shepherd, individually and as the heirs of Nadine Shepherd, and on behalf of the estate of Nadine Shepherd, against Dr. Evens Rodney, Dr. Venkat Surakanti, Baton Rouge Cardiology Center, L.L.C., and Our Lady of the Lake Hospital d/b/a Our Lady of The Lake Regional Medical Center. Costs of this appeal are assessed against Curtis Shepherd, Sr., Debra Williams, Michael Shepherd, Linda Shepherd, Nathaniel Shepherd, Jr., Stehpen Shepherd, Christopher Shepherd, and Rodney Shepherd.

AFFIRMED.