

TMH
mt.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2020 CA 0265

TIFFANY BELL

VERSUS

SUSAN PUYAU, M.D., INDIVIDUALLY

Judgment Rendered: DEC 30 2020

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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. 656847
Honorable Richard "Chip" Moore, III, Judge Presiding

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BEFORE: HIGGINBOTHAM, THERIOT, AND WOLFE, JJ.

Wolfe, J. Concur

HIGGINBOTHAM, J.

In this medical malpractice case, plaintiff, Ms. Tiffany Bell appeals the district court's grant of summary judgment in favor of defendant, Dr. Susan Puyau, and dismissal of all claims asserted by Ms. Bell against Dr. Puyau.

FACTS AND PROCEDURAL HISTORY

On December 27, 2010, at Dr. Puyau's office, Ms. Bell underwent a surgery to implant the permanent birth control device Essure. Three days after surgery, she returned to Dr. Puyau's office complaining of pain and bleeding. On that day, Dr. Puyau's colleague, Dr. Terry Thomas, treated her. Dr. Thomas's evaluation of Ms. Bell revealed that the right Essure device was properly located in the right fallopian tube, but the left Essure device was not in the correct location. Thereafter, Dr. Puyau made two attempts to remove the left Essure device, but was unsuccessful. Ms. Bell then sought treatment from another physician and, according to her petition, was told that the only way to be certain that the left Essure device was safely removed without causing further damage would be a hysterectomy.

Ms. Bell instituted a medical malpractice action against Dr. Puyau, requesting the formation of a medical review panel under La. R.S. 40:1231.8. A medical review panel was formed, and the panel issued a unanimous opinion on July 6, 2016, finding "there was no deviation from the appropriate standard of medical care ... by Dr. Susan Puyau."

After receiving the medical review panel opinion, Ms. Bell filed suit in the 19th Judicial District Court contending that Dr. Puyau breached the standard of care, and her breach resulted in Ms. Bell undergoing a hysterectomy. In response, Dr. Puyau filed a motion for summary judgment on October 22, 2018, seeking dismissal of the claims against her. In her motion, Dr. Puyau asserted that Ms. Bell was without evidence essential to support her claim because, "[t]o date, [Ms. Bell] has not provided any affidavit, testimony, or any other competent expert medical

evidence that the treatment provided by [her] to [Ms. Bell] failed to meet the required standard of care.” Dr. Puyau attached several documents to her motion for summary judgment including the opinion of the medical review panel. Dr. Puyau’s motion was set for hearing on February 4, 2019. On February 1, 2019, Ms. Bell filed an opposition to the motion for summary judgment as well as a motion for continuance. Attached to Ms. Bell’s opposition to the motion for summary judgment was an affidavit of Dr. Shawn Tassone. Ms. Bell requested a continuance because her counsel was directed to report to temporary duty with the United States Army on February 4, 2019, the same day as the hearing.

At the hearing on February 4, 2019, Dr. Puyau opposed the continuance and argued that Ms. Bell’s opposition to the motion for summary judgment, which was filed just three days before the hearing, was not timely under La. Code Civ. P. art. 966, which requires filing and opposition fifteen days before the hearing. Therefore, Dr. Puyau argued that Ms. Bell’s opposition should not be considered. After argument, the district court granted the continuance, pointing out that Ms. Bell’s attorney was ordered to report to temporary military duty on the day of the hearing. However, the district court stated “when we take this up, I’ll let both sides argue whether or not I should allow [Ms. Bell] to oppose the motion through her memorandum.”

The hearing on the motion for summary was continued to March 11, but was reset again by agreement of the parties, and was heard on May 13, 2019. At the hearing, Dr. Puyau again argued that Ms. Bell’s opposition to the motion for summary judgment was not timely filed. Ms. Bell and her attorney were not present. The district court granted the motion for summary judgment in favor of Dr. Puyau. On May 28, 2019, the district court signed a judgment in conformance with its ruling granting the motion for summary judgment and dismissing Ms. Bell’s claims against Dr. Puyau. Ms. Bell filed a motion for new trial, which was denied by the district

court in a judgment signed on October 9, 2019. It is from “the Final Judgment rendered in this action” that Ms. Bell appeals.¹

LAW AND ANALYSIS

A motion for summary judgment is reviewed on appeal *de novo*, with the appellate court using the same criteria that govern the district court’s determination of whether summary judgment is appropriate; *i.e.*, whether there is any genuine issue of material fact, and whether the mover is entitled to judgment as a matter of law. La. Code Civ. P. art. 966(A)(3); **Turner v. Rabalais**, 2017-0741 (La. App. 1st Cir. 12/21/17), 240 So.3d 251, 255, writ denied, 2018-0123 (La. 3/9/18), 237 So.3d 1193.

The burden of proof is on the mover to show that no material factual issues exist. However, if the mover will not bear the burden of proof at trial, the mover is not required to negate all essential elements of the adverse party’s claim. Rather, the mover must point out to the district court that there is an absence of factual support for one or more elements essential to the adverse party’s claim. Thereafter, the burden shifts to 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. See La. Code Civ. P. art. 966(D)(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. 1st Cir. 11/2/12), 111 So.3d 86, 89.

¹ Although Ms. Bell appeals “the Final Judgment rendered in this action” her motion for appeal appears to be from the judgment denying her motion for new trial, rather than the judgment granting Dr. Puyau’s motion for summary judgment. A judgment denying a motion for new trial is an interlocutory order and is normally not appealable. See La. Code Civ. P. art. 2083(C). However, when a motion for appeal refers by date to the judgment denying a motion for new trial, but the circumstances indicate that the appellant actually intended to appeal from the final judgment on the merits, the appeal should be maintained as being taken from the judgment on the merits. **Byrd v. Pulmonary Care Specialists, Inc.**, 2016-0485 (La. App. 1st Cir. 12/22/16), 209 So.3d 192, 195. It is clear from Ms. Bell’s assignments of error that she sought to appeal from the final judgment that granted summary judgment in favor of Dr. Puyau and dismissed all claims against her. Thus, the merits of the summary judgment of May 28, 2019, are properly before us.

To establish a claim for medical malpractice, a plaintiff must prove the following by a preponderance of the evidence: (1) the standard of care applicable to the defendant; (2) the defendant breached that standard of care; and (3) there was a causal connection between the breach and the resulting injury. La. R.S. 9:2794(A). Expert testimony is generally required, except where the negligence is so obvious that a lay person can infer negligence without the guidance of expert testimony. **Aymami v. St. Tammany Parish Hospital Service District No. 1**, 2013-1034 (La. App. 1st Cir. 5/7/14), 145 So.3d 439, 447.

In her motion and supporting documents, including the opinion of the medical review panel, Dr. Puyau sufficiently pointed out an absence of factual support for one or more elements essential to Ms. Bell's claims. The burden then shifted to Ms. Bell to produce factual support sufficient to establish the existence of a genuine issue of material fact. To meet this burden, Ms. Bell filed with her opposition to summary judgment, the affidavit of Dr. Tassone.²

In response to the opposition, Dr. Puyau timely filed³ a reply memorandum objecting to the continuance and the admission of Ms. Bell's opposition. In her response, she objected to any opposition and any affidavit attached thereto on the grounds that they were not timely filed under the mandatory deadlines provided in La. Code Civ. P. art. 966(B)(2). As previously noted, the district court granted Ms. Bell's motion for continuance,⁴ but reserved Dr. Puyau's argument on the

² Dr. Tassone, as confirmed in his affidavit, is a board certified OBGYN with twenty years as a clinician in the field of gynecology. Dr. Tassone states in his affidavit that his opinion is based on his certification and experience as well as a review of materials provided to him by Ms. Bell's counsel including records from the office of Dr. Puyau, medical records at Women's Hospital, and depositions of Dr. Puyau. In his affidavit he concludes that Dr. Puyau "fell below the standard of care in multiple aspects that I believe contributed to improper removal thus necessitating an additional surgery for the patient that could have been avoided."

³ Dr. Puyau's reply memorandum objecting to the timeliness of Ms. Bell's opposition and affidavit of Dr. Tassone was filed on February 6, 2019, more than five days before the May 13, 2019 hearing as required by La. Code Civ. P. art. 966(B)(3).

⁴ Louisiana Civil Code art. 966(C)(2) provides that the district court "[f]or good cause shown" may order a continuance of the hearing. Herein, the district court pointed out that Ms. Bell's

timeliness of Ms. Bell's opposition. At the May 13, 2019 hearing, counsel for Dr. Puyau argued that the affidavit was not timely filed and should not be considered. The district court did not directly address her argument, but appeared to agree that the affidavit of Dr. Tassone was untimely and granted Dr. Puyau's motion for summary judgment.⁵

In her first assignment of error, Ms. Bell contends that the district court erred in disregarding the affidavit of her expert witness, Dr. Tassone, since it granted two motions to continue, not solely to allow Ms. Bell to file her expert's affidavit, without resetting the filing deadlines provided in La Code Civ. P. art. 966. Louisiana Code of Civil Procedure article 966(B)(2) provides in pertinent part:

(B) Unless extended by the court and agreed to by all of the parties, a motion for summary judgment shall be filed, opposed, or replied to in accordance with the following provisions:

(2) Any opposition to the motion and all documents in support of the opposition shall be filed and served in accordance with Article 1313 not less than fifteen days prior to the hearing on the motion. (Emphasis added.)

After the ruling of the district court granting the motion for summary judgment in this case, the issue of timeliness of the opposition to a motion for summary judgment and supporting documents when the hearing has been continued

counsel was ordered to temporary military duty on the day of the hearing. We find no error in the district court's finding that good cause was shown to grant the continuance. Further, we find this matter distinguishable from **Newsome v. Homer Memorial Medical Center**, 2010-0564 (La. 4/9/10), 32 So. 3d 800, where the supreme court determined that district court abused its discretion in granting a motion for continuance solely in order to allow plaintiff's expert's affidavit to be filed in compliance with the limit contained in La. Code Civ. P. art. 966.

⁵ Louisiana Revised Statutes art. 966(D)(2) states:

The court may consider only those documents filed in support of or in opposition to the motion for summary judgment and shall consider any documents to which no objection is made. Any objection to a document shall be raised in a timely filed opposition or reply memorandum. The court shall consider all objections prior to rendering judgment. The court shall specifically state on the record or in writing which documents, if any, it held to be inadmissible or declined to consider. (Emphasis added.)

The district court did not specifically state which documents it held inadmissible as required by the statute, but based on the record, wherein the district court acknowledged that the affidavit was executed after it was "due timely" for the first hearing and then granted Dr. Puyau's motion, we conclude that it did not consider the affidavit.

came before the supreme court in **Reed v. Restorative Home Health Care, LLC**, 2019-1974 (La. 2/26/20), 289 So.3d 1028. Therein, the trial judge continued a motion for summary judgment solely to hear oral argument while closing the record to further filings pursuant to La. Code Civ. P. art. 966. Fifteen days prior to the rescheduled hearing, the plaintiffs filed a motion to substitute an unsigned affidavit with a signed affidavit. At the summary judgment hearing, the district court denied the plaintiffs' motion to substitute the original affidavit and granted summary judgment in favor of the defendants. On rehearing, the court of appeal affirmed the judgment of the district court. **Reed v. Restorative Home Health Care, LLC**, 52,645 (La. App. 2 Cir. 6/5/19), 281 So. 3d 788, 798, writ granted, 2019-01974 (La. 2/26/20), 289 So.3d 1028. The plaintiff then filed an application for supervisory writs with the supreme court and the supreme court reversed the decision of the district court stating:

[Louisiana Code of Civil Procedure article 966] was revised in 2015, and the Official Revision Comments make the legislative intent of the 2015 amendments clear:

(d) Subparagraphs (B)(1), (B)(2) and (B)(3) are new. They establish the time periods for filing or opposing motions for summary judgment. These provisions supersede Rule 9.9 of the District Court Rules but at the same time recognize the ability of the trial court and all of the parties to enter in to a case management or scheduling order or other order to establish deadlines different from those provided by this Article. *Nevertheless, these orders may not shorten the period of time allowed for a party to file or oppose a motion for summary judgment under this Article....*

(Emphasis added). Thus, when a court grants a motion to continue a hearing on a motion for summary judgment, the filing deadlines are reset. In this case, the trial court did not permit a resetting of the deadlines in conjunction with a grant of the continuance. Therefore, we reverse the rulings of the lower courts.

Reed, 289 So.3d at 1028.

Considering the holding of the supreme court in **Reed**, we find merit to Ms. Bell's first assignment of error. Under the holding in **Reed**, the fifteen-day filing deadline under article 966 for Ms. Bell to file her opposition to the motion and all documents in support of the opposition was reset when the district court granted, with good cause shown and not solely for the purpose of allowing Ms. Bell to file her expert's affidavit, Ms. Bell's request for continuance.⁶ Ms. Bell's opposition to the motion for summary judgment, which included the affidavit of Dr. Tassone, was filed on February 1, 2019, more than fifteen days before the May 13, 2019 hearing on the motion for summary judgment and within the statutory time period. Because the deadlines for filing the opposition were reset, Ms. Bell's opposition to the motion for summary judgment, including the affidavit of Dr. Tassone, was timely filed and should have been considered by the trial court.

CONCLUSION

For the foregoing reason, the judgment of the district court granting summary judgment in favor of Dr. Puyau and dismissing Ms. Bell's claims against Dr. Puyau is vacated, and this matter is remanded to the district court. All costs of the appeal are assessed to Dr. Susan Puyau.

VACATED; REMANDED.

⁶ The district court reserved both parties' right to argue about the timeliness of the opposition, but as discussed by the supreme court, an order of the district court may not shorten the period of time allowed for a party to oppose a motion for summary judgment.