

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2020 CA 0408

LAWRENCE TURNER

VERSUS

DR. GEORGE ISA AND OCHSNER CLINIC FOUNDATION

Judgment Rendered: DEC 30 2020

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APPEALED FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT  
IN AND FOR THE PARISH OF ST. TAMMANY  
STATE OF LOUISIANA  
DOCKET NUMBER 18-13774, DIVISION "I"

HONORABLE REGINALD T. BADEAUX, III, JUDGE

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**BEFORE: McDONALD, HOLDRIDGE, and PENZATO, JJ.**

*MM*  
*alp*  
*GA*

**McDONALD, J.**

This is an appeal from a summary judgment dismissing plaintiff's medical malpractice claim against the defendants with prejudice. After review, we affirm.

### **FACTS AND PROCEDURAL HISTORY**

The plaintiff, Lawrence Turner, filed suit on August 13, 2018, against Dr. George Isa and Ochsner Clinic Foundation (the defendants). Mr. Turner maintained that on May 1, 2014, he was treated at St. Tammany Parish Hospital, where Dr. Isa performed a heart catheterization and placed two stents in his heart. He asserted that after the procedure, Dr. Isa wrote in his chart a recommendation that he take Plavix, which prevents stent occlusions, for a minimum of two years, but that, at the time of his discharge, on May 4, 2014, he was only given a prescription for thirty days of Plavix, with no refills. The prescription was written by Dr. David Eric Baumgartner. Mr. Turner had a follow-up appointment at Ochsner Foundation Clinic where he was not provided a refill.

Mr. Turner maintained that on June 19, 2014, he suffered an acute myocardial infarction with stent occlusion, which required another heart catheterization and further stenting, and that he suffered significant permanent cardiac damage.

Prior to filing suit, Mr. Turner filed a request for a Medical Review Panel. On April 18, 2018, the Medical Review Panel unanimously found that the evidence did not support the conclusion that the defendants failed to meet the applicable standard of care. In its reasons, the panel found that Dr. Isa appropriately recommended the use of Plavix for a minimum of two years, that both he and another physician documented that Mr. Turner was informed of the need to continue Plavix as the benefits outweighed the risks, and that Dr. Isa was not made aware of Mr. Turner's prescription for a one-month supply of Plavix, nor was he

made aware of the need for a Plavix refill. As to Ochsner Clinic Foundation, the panel found that Mr. Turner was counseled on the need to inquire about refills on numerous occasions by different physicians and numerous healthcare providers, and that on June 13, 2014, the records indicated that Mr. Turner was informed of the need to contact Dr. Isa to inquire about the necessity of Plavix refills as none were remaining.

After Mr. Turner filed suit, the defendants filed an answer denying that any acts on their part contributed to Mr. Turner's injuries, denying liability, and maintaining that they were qualified health care providers entitled to the protections of La. R.S. 40:1231, *et seq.*, the Louisiana Medical Malpractice Act. They maintained that all care and treatment of Mr. Turner was within the appropriate standard of care, and they asked that his claims be dismissed with prejudice.

Thereafter, the defendants filed a motion for summary judgment, maintaining that Mr. Turner would need an expert to establish the appropriate standard of care, a breach of that standard, and causation, and that he did not have an expert. After a hearing on October 22, 2019, the trial court granted the motion for summary judgment filed by the defendants and dismissed Mr. Turner's claims with prejudice. The judgment was signed on November 4, 2019. Mr. Turner appealed that judgment.

On appeal, Mr. Turner maintains that the trial court erred in granting the defendants' motion for summary judgment and dismissing his suit with prejudice because a Medical Review Panel had not yet issued an opinion in his related claims against Dr. Baumgartner and because the case had not been abandoned under La. C.C.P. art. 561.

## **DISCUSSION**

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, 882-83.

After an opportunity for adequate discovery, a motion for summary judgment shall be granted if the motion, memorandum, and supporting documents 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. 966A(3).

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).

Louisiana Revised Statute 9:2794 provides in part that:

A. In a malpractice action based on the negligence of a physician . . . , the plaintiff shall have 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.

(2) That the defendant either lacked this degree of knowledge or skill or failed to use reasonable care and diligence, along with his best judgment in the application of that skill.

(3) That as a proximate result of this lack of knowledge or skill or the failure to exercise this degree of care the plaintiff suffered injuries that would not otherwise have been incurred.

An expert witness is generally necessary as a matter of law to meet the plaintiff's burden of proof in a medical malpractice claim. Although the jurisprudence has recognized exceptions in instances of obvious negligence, those exceptions are limited to instances in which the medical and factual issues are such that a lay jury can perceive negligence in the charged physician's conduct as well as any expert can. **McGregor v. Hospice Care of Louisiana in Baton Rouge, L.L.C.**, 2009-1357 (La. App. 1 Cir. 2/12/10), 36 So.3d 272, 276, writ denied, 2010-0701 (La. 5/28/10), 36 So.3d 253.

In this case, expert medical testimony would be needed for Mr. Turner to satisfy his burden under La. C.C.P. art. 966D(1) in order to create a genuine issue of material fact. *See Samaha*, 977 So.2d at 884. In his opposition to the motion for summary judgment, Mr. Turner admitted in his counsel's affidavit that he had not engaged in discovery in this case, and that he had not retained an expert witness.

In support of their motion for summary judgment, the defendants produced the Medical Review Panel opinion which found that the evidence did not support the conclusion that the defendants failed to meet the applicable standard of care.<sup>1</sup> The defendants' challenge, pointing out that Mr. Turner did not

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<sup>1</sup> The defendants also produced their interrogatories requesting Mr. Turner reveal the names of his witnesses, including expert witnesses, as well as summaries of any opinions any witness had and the facts upon which those opinion were based. Mr. Turner never responded.

have expert medical testimony to prove his claim, was dispositive, if unmet, as to the plaintiff's ability to prevail at trial. *See Samaha*, 977 So.2d at 884.

At the time of the trial court's ruling on the motion for summary judgment, five years had passed since the alleged malpractice; a year and a half had passed since the Medical Review Panel had issued its opinion; a year had lapsed since Mr. Turner had filed suit; and more than two months had passed since the defendants filed their motion for summary judgment.

In his opposition to the motion for summary judgment, Mr. Turner admitted that he had not actively pursued his case against the defendants. He did not dispute the necessity of an expert witness to prove the standard of care in this case, rather, he maintained that he was waiting for the Medical Review Panel decision in his related claim against Dr. Baumgartner before proceeding with this case.<sup>2</sup>

As to Mr. Turner's assertion that he had not retained an expert because he wanted to avoid piecemeal litigation due to his related claim against Dr. Baumgartner, we note that he could have included Dr. Baumgartner as a defendant in the present suit. Further, he could have conducted simultaneous discovery in both cases.

Mr. Turner also maintains that summary judgment should not have been granted because he had not abandoned the case, citing La. C.C.P. art. 561, which provides that an action is abandoned when the parties fail to take any step in its prosecution or defense in the trial court for a period of three years, unless it is a succession proceeding. However, the motion for summary judgment was not based on abandonment, nor was the judgment based on abandonment. The summary judgment was based on the defendants' entitlement to judgment as a matter of law

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<sup>2</sup> When Mr. Turner filed an opposition to the motion for summary judgment, he also filed a motion to stay the proceedings in the case until the Medical Review Panel issued an opinion in his claim against Dr. Baumgartner. The motion to stay was set for hearing after the hearing on the motion for summary judgment. Mr. Turner did not move the court for an earlier setting on the motion to stay, nor did he move to continue the hearing on the motion for summary judgment.

because Mr. Turner had no expert to meet the burden of proof in his medical malpractice claim. *See* **McGregor**, 36 So.3d at 276. We find no merit to Mr. Turner's arguments on appeal.

### **CONCLUSION**

After *de novo* review, we find that defendants are entitled to judgment as a matter of law because Mr. Turner has no expert to meet the burden of proof in this medical malpractice claim; thus, we affirm the summary judgment.

### **DECREE**

For the foregoing reasons, the trial court's November 4, 2019 judgment, dismissing the claims of the plaintiff, Lawrence Turner, against the defendants, Dr. George Isa and Ochsner Clinic Foundation, is affirmed. Costs are assessed against Lawrence Turner.

**AFFIRMED.**