

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2020 CA 0496

NICOLE ALEX, INDIVIDUALLY AND O/B/O HER MINOR SON, JUSTIN  
ROWLEY

VERSUS

JOSEPH HALPHEN, P.A.

*Judgment Rendered:* DEC 30 2020

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Appealed from the 19<sup>th</sup> Judicial District Court  
In and for the Parish of East Baton Rouge  
State of Louisiana  
Suit No. C633762

The Honorable Timothy Kelley, Judge Presiding

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Craig S. Watson  
Baton Rouge, Louisiana

Counsel for Plaintiff/Appellant  
Nicole Alex and Justin Rowley

Jason R. Cashio  
Vance A. Gibbs  
Randal R. Cangelosi  
Baton Rouge, Louisiana

Counsel for Defendant/Appellee  
Joseph Halphen, P. A.

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BEFORE: GUIDRY, McCLENDON, AND LANIER, JJ.

WIL III  
by JFJ  
PMC by JFJ  
JFJ

**LANIER, J.**

Nicole Alex, individually and on behalf of her son, Justin Rowley<sup>1</sup>, appeals the judgment of the 19<sup>th</sup> Judicial District Court granting summary judgment in favor of the defendant/appellee, Joseph Halphen, P.A. For the following reasons, we reverse and remand.

### **FACTS AND PROCEDURAL HISTORY**

Ms. Alex has alleged that on November 14, 2012, her son Justin, then fourteen years old, called her and said that he was suffering from testicular pain. Ms. Alex advised Justin to apply ice to the area in order to relieve the pain. Five minutes later, Justin called again to advise her that applying ice to his scrotum did not relieve the pain. Ms. Alex then called Justin's pediatrician, Dr. Rosalyn Slaughter, and advised her of her son's condition. Dr. Slaughter advised Ms. Alex to take Justin to Our Lady of the Lake After Hours (Lake After Hours) right away.

Upon arriving at Lake After Hours, approximately two hours after Justin's onset of pain, Ms. Alex and Justin were met by Mr. Halphen, who allegedly found Justin lying on the examination table in the fetal position. Ms. Alex asked Mr. Halphen if Justin's pain could have been caused by a special soap or shampoo that had been prescribed to him. Ms. Alex alleged she jokingly asked Justin if he had masturbated, to which Justin responded negatively. Ms. Alex told Justin to take off his pants so Mr. Halphen could conduct a physical examination, but Mr. Halphen allegedly raised his hands and told Justin "don't do that." Mr. Halphen asked for the name of the shampoo Justin used, and after learning the name of the shampoo, Mr. Halphen advised that it was the cause of Justin's pain. Mr. Halphen discharged Justin, advising him to thoroughly rinse his genital area with water and take Benedryl. According to Justin, Mr. Halphen never conducted a medical

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<sup>1</sup> At the time the lawsuit was filed, Justin was a minor. He was added as a co-plaintiff by leave of court on October 5, 2016, after reaching the age of majority.

examination and never asked him any questions concerning his condition, but that if he had been so asked, he would have stated that he felt a painful pressure inside his scrotum.

On November 16, 2012, Justin was still suffering from testicular pain and consulted his pediatrician. Dr. Slaughter physically examined Justin, and she noted swelling on the left side of Justin's scrotum and around the shaft of the penis. Justin then went to Our Lady of the Lake Regional Medical Center (OLOL), where he presented to urologist Dr. Kelly Boudreaux, Jr., telling him that he felt worsening pain in his lower left abdomen and had nausea. There was also increased swelling in the area of his scrotum. An ultrasound revealed that Justin was suffering from testicular torsion and a lack of blood supply to his left testicle. Justin's left testicle was deemed unsalvageable at that point and was surgically removed by Dr. Boudreaux.

Ms. Alex requested a medical review panel (MRP) on January 10, 2013. The MRP found that there was an issue of material fact as to Mr. Halphen's liability, since whether Mr. Halphen conducted a physical exam was in dispute. The MRP stated that the physical exam was the applicable standard of care, and while Ms. Alex claimed that Mr. Halphen performed no such exam, Mr. Halphen claimed that he did.

Ms. Alex filed a petition for damages on September 23, 2014. Mr. Halphen filed a motion for summary judgment on June 11, 2019, claiming there were no genuine issues of material fact, and that the plaintiffs could not establish all elements of their medical malpractice claim. Following a hearing on the motion for summary judgment, the trial court signed a judgment on October 15, 2019, granting summary judgment in favor of Mr. Halphen and dismissing the plaintiffs' petition for damages with prejudice. The plaintiffs now appeal this judgment.

## ASSIGNMENTS OF ERROR

The plaintiffs allege two assignments of error:

1. The district court committed manifest error by disallowing into evidence the affidavit of Dr. Pasquale Casale prior to Mr. Halphen's hearing on the motion for summary judgment.
2. The district court committed manifest error by granting Mr. Halphen's motion for summary judgment where there existed genuine issues of material fact.

## STANDARD OF REVIEW

In ruling on a motion for summary judgment, the trial court's role is not to evaluate the weight of the evidence or to determine the truth of the matter, but rather to determine whether there is a genuine issue of triable fact. *Raborn v. Albea*, 2016-1468 (La. App. 1 Cir. 5/11/17), 221 So.3d 104, 113. In determining whether summary judgment is appropriate on appeal, we review evidence *de novo*, using the same criteria that govern the trial court's determination of whether summary judgment is appropriate. Because it is the 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. *Id.* at 114.

The burden of proof on a motion for summary judgment rests with the movant. Nevertheless, if the movant will not bear the burden of proof at trial on the issue that is before the court on the motion for summary judgment, the movant'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 then on the adverse party to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the movant is not entitled to judgment as a matter of law. See La. C.C.P. art. 966(D)(1).

## DISCUSSION

Initially we must address the plaintiffs' first assignment of error, which relates to an evidentiary ruling by the trial court to exclude the affidavit of Dr. Pasquale Casale, who gave an expert opinion on behalf of the plaintiffs. Mr. Halphen had objected to the affidavit, stating that Dr. Casale had rendered an expert opinion based on incorrect facts. At the hearing, the trial court noted the factual inaccuracy in the affidavit, but was going to allow the affidavit into evidence despite the inaccuracy. However, after further discussion regarding the affidavit with defense counsel, the trial court ultimately ruled to exclude the affidavit.

Counsel for the plaintiffs made no objection to the trial court's evidentiary ruling. Plaintiffs' counsel subsequently made a brief argument concerning Dr. Casale's affidavit, but still did not make an objection to the trial court's ruling at that time. To preserve an evidentiary issue for appellate review, it is essential that the complaining party enter a contemporaneous objection to the evidence or testimony and state the reasons for the objection. *Etcher v. Neumann*, 2000-2282 (La. App. 1 Cir. 12/28/01), 806 So.2d 826, 838, writ denied, 2002-0905 (La. 5/31/02), 817 So.2d 105. Thus, this issue is not properly preserved for review on appeal.

Moving on to the summary judgment itself, there is a clear issue of fact as to whether Mr. Halphen performed a physical examination of Justin. The plaintiffs allege that Mr. Halphen did not perform a visual examination of Justin's affected area, while Mr. Halphen testified in his deposition that he did perform a visual examination, and the medical report from Lake After Hours also suggests that Mr. Halphen performed an examination of Justin's genital area. The MRP determined that a physical examination was the appropriate standard of care in the instant case.

Louisiana Revised Statutes 9:2794 sets forth the burden of proof imposed upon the plaintiff in establishing his malpractice claim. The plaintiff must prove by a preponderance of the evidence:

- (1) The degree of knowledge or skill possessed or the degree of care ordinarily exercised by physicians, dentists, or chiropractic 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, dentists, or chiropractic 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.

Thus, the plaintiff must establish the standard of care applicable to the charged physician, a violation by the physician of that standard of care, and a causal connection between the physician's alleged negligence and the plaintiff's injuries resulting therefrom. *Pfiffner v. Correa*, 94-0992, 94-0963, 94-0924 (La. 10/17/94), 643 So.2d 1228, 1233 (La. 10/17/94). Even if there is a genuine issue of material fact concerning whether Mr. Halphen met the established standard of care, summary judgment would still be appropriate if there is no genuine issue of material fact concerning whether a deviation from the standard of care actually caused Justin's injuries.

Excluding Dr. Casale's affidavit, all depositions, affidavits, and documents submitted by the parties to the trial court were admitted without objection. According to Mr. Halphen's medical report, the onset of Justin's testicular pain came two hours before he presented at Lake After Hours. Mr. Halphen reported the following:

Patient masturbated [sic] with a prescription he was given by his dermatologist, his balls and shaft are now burning as a result. He was instructed to go home and irrigate the area copiously. If the problem is still present after this he needs to proceed to the ER with the medication so they can contact poison control for further instructions. They do not have the medication nor do they know the name of the medication. The mom states that he (the patient) was instructed to use the medication only below the neck and above the waist because it was “strong.”<sup>2</sup>

In his review of symptoms, Mr. Halphen wrote that Justin reported “testicular pain/lumps.” In his deposition, Mr. Halphen explained that in using his computer to fill out the report, he had limited choices in how to describe Justin’s symptoms, and “testicular pain” was the best option he had to describe the symptom, although it was inaccurate. He stated it was more accurate to say that Justin experienced burning in the affected area. Mr. Halphen also stated that Ms. Alex described the symptom to him as testicular or scrotum pain when he first met her, but that Justin described it as “burning.” In his deposition, Mr. Halphen described what he saw in the visual examination:

Okay, Justin is a pretty dark kid... but you could still tell there was some irritation in that area. And that’s when I knew testicular torsion... was out, this was strictly something in contact that had been put on there based on him putting it on there and the time frame from which he walked into my clinic. You know, it was clean cut.

The plaintiffs retained urologist Dr. Jeffrey J. Thibodeaux, who was deposed. Dr. Thibodeaux did examine Justin, but he did review the medical reports of Mr. Halphen from Lake After Hours, the pediatric records of Dr. Slaughter, and the surgical report of Dr. Boudreaux from OLOL. In his deposition, Dr. Thibodeaux stated that he believed that Justin presented to Mr. Halphen with an “old torsion,” a testicular torsion that had existed for at least 24 or 48 hours, resulting in visual changes to the skin of the scrotum. Dr. Thibodeaux found that it

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<sup>2</sup> In his deposition, Mr. Halphen stated he incorrectly stated that Justin masturbated with the medication because he assumed that was what Justin had done, although Justin had never explicitly stated that he did so. Mr. Halphen also stated that the word “balls” was the terminology Justin had used in speaking to him and that he should have put that phrase in quotation marks when writing the report.

was very possible, or more likely than not, that at the time Justin presented to Mr. Halphen, the testicle was already unsalvageable due to the extent of time the testicle had been twisted. Dr. Thibodeaux further stated that he believed Mr. Halphen had deviated from the standard of care due to giving an inadequate examination, but that deviation more likely than not did not cause the harm to Justin since the testicle was already unsalvageable at the visit to Lake After Hours.

In Dr. Slaughter's deposition, she stated that when she examined Justin on November 16, 2012, he reported that he had been in pain for the two days since he was seen at Lake After Hours. It seemed to Dr. Slaughter that the amount of pain Justin was experiencing was inconsistent with the use of a topical agent, such as the medicated shampoo. In her experience with treating testicular torsion, Dr. Slaughter stated that the pain is not characterized as burning. Upon examining Justin, Dr. Slaughter noted the increased swelling extending to the shaft of the penis.

In Dr. Boudreaux's deposition, he testified that the common symptoms of testicular torsion are scrotal testicular pain with associated nausea and vomiting. A rash is not one of the symptoms of testicular torsion. At the time Justin presented to Dr. Boudreaux, there was swelling on the left side of the scrotum, and Justin did not report that his scrotum or penis were burning. However, Dr. Boudreaux opined that Mr. Halphen's treatment of Justin was reasonable and not below the standard of care. He also believed that Justin was not suffering from testicular torsion when he presented at Lake After Hours. Dr. Boudreaux thought it was possible that Justin could have caused the torsion himself when he was irrigating the affected area according to Dr. Halphen's orders.

In Dr. Boudreaux's consultation report, he indicated that Justin described pain in his lower abdominal area with associated nausea, with progressive swelling and discomfort. Dr. Boudreaux confirmed that the ultrasound indicated testicular



torsion. Upon examining Justin directly, Dr. Boudreaux noted the left side of the scrotum was tender with inflammation around the testicle. The ultrasound further indicated no blood flow to the testicle, which was another sign of testicular torsion. Justin indicated to Dr. Boudreaux he had been in pain for two days prior to reporting to OLOL. Dr. Boudreaux discussed with Justin's father<sup>3</sup> that he would attempt to untwist the testicle, but given the length of time that had passed, the testicle would likely be unsalvageable.

After a thorough review of the depositions and medical reports submitted with the motion for summary judgment, we find genuine issues of material fact as to whether Mr. Halphen deviated from his standard of care and as to when Justin's testicular torsion actually started. It is certain from the evidence presented that Justin had testicular torsion on November 16, 2012, when he presented at OLOL. Both Dr. Slaughter and Dr. Boudreaux confirm this.

There is conflicting evidence as to what kind of examination Mr. Halphen performed, if any at all. If he performed no physical or visual examination as Ms. Alex and Justin allege, then that would be a deviation from the standard of care. Both Mr. Halphen's testimony and his report support his conclusion that Justin had skin irritation due to Justin's use of the medicated shampoo, thereby ruling out testicular torsion. He never stated to the plaintiffs the possibility that Justin had testicular torsion, but instead instructed Justin to wash the affected area thoroughly. If Justin did have testicular torsion when he visited Lake After Hours, as Dr. Thibodeaux believed, Mr. Halphen would have misdiagnosed Justin's testicular pain. Even if the torsion would have rendered the testicle unsalvageable, as Dr. Thibodeaux testified, the misdiagnosis would have still subjected Justin to two days of needless pain and suffering.

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<sup>3</sup> Dr. Boudreaux also refers to Justin's father in the report as the "stepdad," who is likely Kerwyn Simms, Ms. Alex's boyfriend.

At the hearing on the motion for summary judgment, the trial court stated that there was no evidence in the record to controvert Dr. Thibodeaux opinion that the testicle was unsalvageable at the time he presented to Mr. Halphen. This is simply not the case. Both Dr. Slaughter and Dr. Boudreaux noted swelling on the left side of the scrotum and shaft of the penis, indicative of testicular torsion, which Mr. Halphen did not note two days prior. It was Dr. Boudreaux's opinion that Justin did not have testicular torsion at the time he visited Lake After Hours, and that Justin might have twisted his testicle while washing himself afterward. Dr. Boudreaux's report indicated lower abdominal pain and nausea, symptoms of testicular torsion, whereas Mr. Halphen's report indicated burning, which is not a symptom of testicular torsion.

At the least, there is a genuine issue of material fact as to whether Mr. Halphen deviated from the standard of care, which led to Justin needlessly suffering for two days. At the most, there is a genuine issue of material fact as to whether Mr. Halphen deviated from the standard of care, which led to Justin's loss of his left testicle. It is also possible that Mr. Halphen's actions did not lead to any of Justin's injuries. The instant case is a fact-intensive inquiry clearly not ripe for resolution on summary judgment. *See Thibodeaux v. Arvie*, 2017-0625 (La. App. 3 Cir. 8/31/17), 226 So.3d 1229, 1235, writ denied, 2017-1666 (La. 10/27/17), 228 So.3d 1207. Therefore, the decision of the trial court is reversed and remanded for further proceedings.

**REVERSED AND REMANDED.**