

NOT DESIGNATED FOR PUBLICATION

GENEVIEVE BROWN * **NO. 2001-CA-1482**
VERSUS * **COURT OF APPEAL**
METROPOLITAN HOSPICE, * **FOURTH CIRCUIT**
INC. AND ABC INSURANCE * **STATE OF LOUISIANA**
COMPANY *
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 99-17690, DIVISION "A-5"
Honorable Carolyn Gill-Jefferson, Judge
* * * * *
Judge Terri F. Love
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(Court composed of Judge Joan Bernard Armstrong, Judge Patricia Rivet Murray, Judge Terri F. Love)

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AFFIRMED

Plaintiff contracted with defendant Hospice for home health care for her dying husband. She filed suit for intentional infliction of emotional distress based on acts of negligence by the defendant while administering care to the plaintiff's husband. The defendant filed a motion for summary judgment that was granted. The plaintiff filed a motion for new trial that was denied, and the instant appeal follows. Plaintiff argues that the trial court erred in finding that the plaintiff had to prove compliance with La. R.S. 2794, the Medical Malpractice Act, and in finding that the plaintiff had to have seen a psychiatrist in order to prove her claim.

Summary judgment is properly granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. Art. 966. If the mover will not bear the burden of proof at trial, his burden on the motion does not require him to negate all essential elements of the plaintiff's claim, but rather to point out that there is an absence of factual support for

one or more elements essential to the claim. La. C.C. art. 966 (C)(2); See also Fairbanks v. Tulane University, 98-1228 (La.App. 4 Cir. 3/31/99), 731 So.2d 983. After the mover has met the initial burden of proof, the burden shifts to the non-moving party to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden at trial. See Smith v. General Motors Corp., 31-258 (La.App. 2 Cir. 12/9/98), 722 So.2d 348. If the non-moving party fails to meet this burden, there is no genuine issue of material fact and the mover is entitled to summary judgment. See Schwarz v. Administrators of Tulane Educational Fund, 97-0222 (La.App. 4 Cir. 9/10/97), 699 So.2d 895. It is well settled that appellate courts review summary judgments de novo, using the same criteria applied by trial courts to determine whether summary judgment is appropriate. See Stevedoring Services of America/Logistic Services, v. Kahn, 98-0926 (La.App. 4 Cir. 12/9/98), 726 So.2d 53. An appellate court thus asks the same questions as does the trial court in determining whether summary judgment is appropriate: whether there is any genuine issue of material fact, and whether the mover- appellant is entitled to judgment as a matter of law. *Magnon v. Collins*, 98-2822 (La.7/7/99), 739 So.2d 191, 195.

Contrary to Plaintiff's allegation, the trial court stated, at the summary judgment motion, that La. R.S. 2794 **did not** apply to Hospice; Plaintiff's

counsel concurred in this finding. This assignment of error is totally unfounded.

As to the claim of intentional infliction of emotional distress, it was shown at trial that the plaintiff never sought any psychiatric care. Again, contrary to Plaintiff's allegation, the trial court stated that Plaintiff **did not** need to see a psychiatrist in order to prove this claim. Plaintiff, however, did not produce any medical records or other medical evidence to support her claim of severe depression, nor did she provide any specific testimony to the seriousness of her emotional problems.

La. C.C.P. 966(C)(2) states in pertinent part:

...[I]f the movant will not bear the burden of proof at trial on the matter 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 that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no issue of material fact.

In this case, once the defendant established there was a lack of evidence to support Plaintiff's claim, the burden shifted to Plaintiff to prove that she would be able to satisfy her evidentiary burden at trial. The Plaintiff offered no evidence that she would be able to meet the threshold

requirements for intentional infliction of emotional distress set out by *Moresi v. State*, 567 So.2d 1081,1096 (La.1990), which requires a showing of serious mental distress arising from special circumstances. In opposition to the defendant's summary judgment motion, Plaintiff said only that she would produce witnesses at trial.

We find that the trial court did not err in granting Defendant's Motion for Summary Judgment. There is no genuine issue of material fact in dispute and, therefore, the defendant is entitled to judgment as a matter of law.

AFFIRME

D.