

NOT DESIGNATED FOR PUBLICATION

WILL HARRIS, JR. * **NO. 2017-CA-0801**
VERSUS * **COURT OF APPEAL**
AMERICAN HOME * **FOURTH CIRCUIT**
ASSURANCE COMPANY, * **STATE OF LOUISIANA**
HEALTHCARE CASUALTY *
INSURANCE LIMITED, *
AGGREKO, LLC AND TOURO * * * * *
INFIRMARY

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2014-00479, DIVISION “M-13”
Honorable Paulette R. Irons, Judge

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Judge Dennis R. Bagneris, Pro Tempore

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(Court composed of Judge Terri F. Love, Judge Paula A. Brown, Judge Dennis R. Bagneris, Pro Tempore)

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AND HEALTHCARE CASUALTY INS. LIMITED**

AFFIRMED

FEBRUARY 28, 2018

Will Harris, Jr. was a patient at Touro Infirmary when Hurricane Katrina devastated New Orleans and the Gulf Coast. Mr. Harris was originally a putative member of a proposed class seeking damages from Touro and its insurer for alleged injuries arising out of their stay at Touro during Katrina. When certification of the class was denied,¹ this lawsuit followed.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The appellant, Will Harris, Jr., was admitted to Touro Infirmary on August 24, 2005, for evaluation of a lung mass and complaints of rectal bleeding. The intake records indicate he presented with gastrointestinal bleeding, recurrent gross hematuria, a lung mass, and possible mental retardation. On August 25 and 26, 2005, consulting physicians Leonard Glade and David Oelsner noted their impressions of gastrointestinal bleed, history of a lung mass, and anemia. Dr. Oelsner discovered that the patient had never had a colonoscopy and ordered the procedure to take place Monday, August 29, 2005.

But on August 29th, Hurricane Katrina made landfall. Touro lost electricity and running water, and conditions at the hospital gradually became intolerable. Touro began evacuating patients on August 30, 2005. Mr. Harris was eventually evacuated by helicopter to the New Orleans airport, where he waited to be transported to Baton Rouge.

Mr. Harris alleges in his petition for damages that the unreasonably dangerous conditions at Touro before, during, and after Hurricane Katrina caused or contributed to his injuries. Mr. Harris alleges that he suffered from dehydration,

¹ The trial court denied class certification in *Weems, et al. v. Touro Infirmary, et al.*, Civil District Court for the Parish of Orleans No. 06-6372, Div. D-16 (August 9, 2013).

over-heating, profuse sweating, exhaustion, severe mental anguish, fear, extreme stress, anxiety, depression, and confusion.

Defendants Touro and its insurer, Healthcare Casualty Insurance Limited (HCIL), filed a motion for summary judgment on May 11, 2016, arguing that Mr. Harris failed to offer evidence to support the elements of causation and damages that were necessary to prove his claim. The trial court dismissed the defendants' 2016 motion as premature and granted plaintiff an additional six months to conduct discovery. On February 17, 2017, Touro and HCIL re-urged their motion for summary judgment, again arguing that Mr. Harris would not be able to meet his burden of proof at trial because he had no reliable evidence to prove that Touro's alleged negligence caused him any injury.

The summary judgment evidence includes incomplete records from Mr. Harris's 2005 admission to Touro, as well as Mr. Harris's April 2013 admission to Baton Rouge General for an endoscopy, after which he was diagnosed with "active and chronic colitis." The record on appeal is devoid of any medical records or other evidence to indicate that Mr. Harris sought care for any injuries after he was evacuated from Touro and the New Orleans area in 2005.

The record evidence also includes Mr. Harris's own deposition testimony; the deposition testimony from Mr. Harris's regular attending physician, Dr. Mayer Heiman; the statements of former Touro Chief Executive Officer Leslie Hirsch; the testimony of Dr. Victor E. Tedesco, IV; the June 16, 2016 affidavit and the March 15, 2017 expert report of Dr. Kevin Stephens; and Dr. Stephens' April 4, 2017 deposition testimony.

After considering the evidence and arguments of the parties, the trial court granted in part the motion for summary judgment in favor of Touro and HCIL and

against Mr. Harris, dismissing all of plaintiff's claims with prejudice except for his claim for loss of personal property.² The trial court further certified the partial summary judgment dismissing the negligence claims as final and appealable under La. Code Civ. P. art. 1915 B.

On appeal, Mr. Harris seeks reversal of the trial court's summary dismissal of his negligence claims against Touro and HCIL. For the reasons that follow, we affirm the trial court's ruling.

DISCUSSION

Appellate courts review the grant or denial of a motion for summary judgment *de novo*, using the same criteria applied by the trial courts to determine whether summary judgment is appropriate. *Kurz v. Milano*, 08-1090, p. 3 (La. App. 4 Cir. 2/18/09), 6 So.3d 916, 918. "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. Code Civ. P. art. 966 (A)(3); *Klutz v. New Orleans Pub. Facility Mgmt., Inc.*, 05-0327, p. 2 (La. App. 4 Cir. 12/21/05), 921 So.2d 1021, 1023. The burden rests with the mover, unless the mover will not bear the burden of proof at trial. La. Code Civ. P. art. 966(D)(1). If the mover does not bear the burden of proof at trial, 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." *Id.* The burden is on the adverse party to produce factual support

² According to the record, Mr. Harris asserts a lost property claim for personal belongings that were left at the hospital, including a robe, clothes, shoes, slippers, and house keys.

sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to summary judgment as a matter of law. *Id.* A “genuine issue” is one as to which reasonable persons could disagree; if reasonable persons could reach only one conclusion, there is no need for trial on that issue, and summary judgment is appropriate. *Kurz*, 08-1090, p. 3, 6 So.3d at 918.

Defendants contend that plaintiff has failed to set forth sufficient reliable evidence to establish that Touro caused him any damages as a result of his admission to Touro during Hurricane Katrina. Plaintiff responds that the statements by Touro’s former Chief Executive Officer, Leslie Hirsch, as well as the sworn testimony of Dr. Victor E. Tedesco, IV, and the affidavit and report of Dr. Kevin Stephens, create genuine issues of material fact that preclude summary judgment.

A plaintiff must prove five elements to succeed on a negligence claim: (1) whether the defendant had a duty to conform his conduct to a specific standard of care; (2) whether the defendant’s conduct failed to conform to the appropriate standard of care; (3) whether the defendant’s substandard conduct was a cause-in-fact of the plaintiff’s injuries; (4) whether the defendant’s substandard conduct was a legal cause of the plaintiff’s injuries; and (5) whether the plaintiff was damaged. *Falcone v. Touro Infirmary*, 13-0015, p. 4 (La. App. 4 Cir. 11/6/13), 129 So.3d 641, 645 (citing *Milbert v. Answering Bureau, Inc.*, 13-0022, p. 8 (La. 6/28/13), 120 So.3d 678, 687-88). “The threshold issue in any negligence action is whether the defendant owed the plaintiff a duty, and whether a duty is owed is a question of law.” *Milbert*, 13-0022, p. 15, 120 So.3d at 688 (quoting *Hanks v. Entergy Corp.*, 06-0477, pp. 20-21 (La. 12/18/06), 944 So.2d 564, 579).

This court has addressed Touro’s duty to its patients during Hurricane Katrina in previous cases. In *Serou v. Touro Infirmary*, 12-0089, p. 30 (La. App. 4

Cir. 1/9/13), 105 So.3d 1068, 1090, *writ denied*, 13-0377 (La. 4/1/13), 110 So.3d 588, this court held that Touro had a duty to provide ventilation but recognized that under the requirements of the Joint Commission on Accreditation of Healthcare Organizations (JCAHO), the hospital was not required to provide refrigerated air to any part of the hospital. This court affirmed the trial judge's ruling that Touro was negligent, as plaintiffs introduced sufficient evidence to support the district court's finding of causation. *Id.*, 12-0089, p. 33, 105 So.3d at 1092.

By contrast, in *Falcone*, this court affirmed the jury's verdict that Touro was not negligent. The patient, Mr. Michael Falcone, was the roommate of the patient in *Serou*. While Touro had a duty to provide ventilation, based on the evidence presented, this court could not say in *Falcone* that the jury was manifestly erroneous or clearly in error in the jury's evaluation of the evidence or determination that Touro was not negligent. *Falcone*, 13-0015, p. 19, 129 So.3d at 653.

More recently, in *Ainsworth v. American Home Assurance Co., et al.*, 2017-CA-0778 (La. App. 4 Cir. 2/21/18), this court determined that expert testimony was necessary to establish whether the conditions at Touro contributed to or caused Ms. Taylor's death in light of her pre-existing conditions. Because no discovery deadline had passed, we reversed and remanded the trial court's summary dismissal of plaintiff's claims in *Ainsworth* to give plaintiff additional time to conduct discovery and potentially offer expert testimony in support of her claims.

Falcone, *Serou*, and *Ainsworth* demonstrate that each factual scenario must be considered on its own, and the existence of a duty of care alone does not constitute proof of causation and damages. With these precepts in mind, we consider the summary judgment evidence offered in the present case *de novo*.

Touro's former CEO, Mr. Hirsch, stated that the hospital suffered "oppressive heat and humidity" and that the hospital lost water and power and that it had issues with its generators that required evacuation of the facility. Dr. Tedesco, who remained at the hospital during and after the Hurricane, testified that he tried to walk every floor at Touro several times a day. He confirmed that the entire hospital lost air conditioning and that the conditions were hot.

Mr. Harris remembers the hospital getting hot the second or third day he was at Touro. He does not remember seeing any fans and does not remember whether windows and doors were cracked to help air circulate. He also states that he was dehydrated, but he admits that the hospital staff gave him water. Mr. Harris further testified that he was evacuated from the hospital and claims that he remained for two or three days in the Touro parking garage before a helicopter evacuated him to the New Orleans airport. From the airport, Mr. Harris was transported by bus to Baton Rouge, where he met one of his sisters.

Mr. Harris denied seeing a doctor for his shortness of breath or for blood in his stool after he was evacuated from New Orleans; he denied seeking treatment for dehydration or malnutrition; and he denied seeing a psychologist or psychiatrist for treatment for any mental anguish, depression, or anxiety. His deposition testimony fails to identify any other injury related to the hot conditions besides dehydration.

Dr. Kevin Stephens was the Assistant Coroner for the Parish of Orleans and is a former Director of the City of New Orleans Department of Health. He was not a treating physician to Mr. Harris. In his June 16, 2016, affidavit that plaintiff offered in opposition to the defendants' first motion for summary judgment, Dr. Stephens' sole statement relating to Mr. Harris was that "it is more probable than

not that patients and others exposed to high heat, including but not limited to Will Harris, Jr., experienced ill effects in the form of biological functioning such as dehydration, reduced urine output, increased heart rate, decreased skin turgor and other ill effects of heat exhaustion.” Dr. Stephens’ 2016 affidavit does not indicate that he reviewed any of the medical records related to Mr. Harris’s Touro admission, however.

Dr. Stephens’ subsequent March 15, 2017 report, which plaintiff submitted in opposition to defendants’ re-urged motion for summary judgment, indicates that Dr. Stephens reviewed Mr. Harris’s medical records. Dr. Stephens opines “to a reasonable degree of medical probability” that Mr. Harris’s “medical conditions of shortness of breath and rectal bleeding were worsened due to the conditions at Touro.” Dr. Stephens’ report states: “it is not clear what causes this shortness of breath, however, being placed in a hot environment without adequate ventilation most likely worsened his condition. Furthermore, his rectal bleeding most likely was negatively impacted in a hot and humid environment where there was sparse [sic] water and food.”

After issuing his report, the defendants deposed Dr. Stephens, who testified that he would have liked to have seen follow-up records after Mr. Harris’s evacuation from New Orleans, but Dr. Stephens received no such records. When asked about the basis for his opinion that Mr. Harris’s shortness of breath and rectal bleeding were worsened by the conditions at Touro, Dr. Stephens indicated that he relied on the deposition testimony of Mr. Harris, yet Dr. Stephens admitted that there was no evidence in Mr. Harris’s deposition to indicate that Mr. Harris’s shortness of breath and rectal bleeding were worsened because of the conditions at Touro. Dr. Stephens further admitted that with regard to the diagnosis and

treatment decisions related to a patient's lung mass or a patient's rectal bleeding, he would consult with a specialist and that he would not manage these conditions himself.

With regard to the allegations of dehydration, Dr. Stephens indicated that dehydration may be diagnosed in many ways, including "looking at the mucous, the skin, the turgor of the skin." Dr. Stephens explained: "You can look at people who are dehydrated[; they] have sunken eyes. They have loss of saliva, sweating, the body conserving fluids. They have very little urination. ... Laboratory, you can look at the ketones in the urine." Dr. Stephens indicated that he relied upon the statement in Mr. Harris's deposition that he (Mr. Harris) "got dehydrated because it was so hot," but Dr. Stephens acknowledged that Mr. Harris admitted the hospital staff gave him "a little water." Dr. Stephens acknowledged that there were no laboratory values to evaluate Mr. Harris's alleged dehydration, and he agreed that he was relying only on Mr. Harris's deposition testimony when he stated that Mr. Harris was dehydrated.

A plaintiff must demonstrate by a preponderance of the evidence a causal connection between the defendant's fault, or breach of duty, and the alleged injury. *Pfiffner v. Correa*, 94-0924, 94-0963, 94-0992, p. 10 (La. 10/17/94), 643 So.2d 1228, 1234. Although expert testimony is not always necessary, where a patient has complex medical conditions that pre-exist any alleged injury, medical causation is likely "beyond the province of lay persons to assess." *Id.*

While the question of causation is usually an issue for the factfinder, it is possible to determine the issue of causation on summary judgment if reasonable minds could not differ. *Henderson v. Homer Memorial Hosp.*, 40,585, p. 11 (La. App. 2 Cir. 1/27/06), 920 So.2d 988, 994. The mere scintilla of evidence in support

of a plaintiff's position will be insufficient; "there must be evidence on which a jury could reasonably find for [the plaintiff]." *Huber v. Liberty Mut. Ins. Co.*, 00-0679, p. 7 (La. App. 4 Cir. 2/7/01), 780 So.2d 551, 555 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 2512 (1986)).

Dr. Stephens' expert report and deposition testimony fail to establish an issue of fact for trial. When evaluating expert opinion evidence on summary judgment, the court is not permitted to make credibility determinations, but "the court must 'focus solely on principles and methodology, not on the conclusions they generate.'" *Indep. Fire Ins. Co. v. Sunbeam Corp.*, 99-2181, p. 17 (La. 2/29/00), 755 So.2d 226, 236 (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 595 n.6, 113 S.Ct. 2786 (1993)).

Dr. Stephens' report contains statements that were either withdrawn or contradicted by his own deposition testimony offered a few days after his report was issued. The record contains no other evidence to show that Mr. Harris's pre-existing medical conditions were exacerbated at Touro, nor is there any evidence to prove that Mr. Harris was dehydrated. Mr. Harris admits that the hospital gave him "a little water." Dr. Stephens was unable to point to any other facts in the record to show that Mr. Harris experienced dehydration as a result of Touro's negligence, nor have we been able to find any additional evidence upon which a reasonable factfinder could conclude that Touro's alleged negligence caused Mr. Harris to suffer from dehydration. Finally, Mr. Harris's deposition testimony that he was dehydrated is insufficient to create a genuine issue of material fact where there is no other record evidence to corroborate Mr. Harris's allegation.

DECREE

Mr. Harris was given ample time to conduct discovery. The expert testimony he offered to support his claims of injury as a result of Touro's alleged negligence were negated by that same expert's subsequent deposition testimony. No other sufficient evidence was offered to satisfy plaintiff's burden of proving causation and damages at trial. Accordingly, we find summary judgment dismissing plaintiff's negligence claims against Touro and Healthcare Casualty Insurance Limited to be appropriate. The trial court's ruling granting summary judgment is affirmed.³

AFFIRMED

³ We recognize that plaintiff's lost-property claims remain viable.

