

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 CA 2233

ALMA MIMS

VERSUS

HOOD MEMORIAL HOSPITAL, TANGI PINES NURSING CENTER,
ACADIAN AMBULANCE SERVICES, AND DR. THOMAS C. EVANS

Judgment rendered JUN 28 2012



Appealed from the
21st Judicial District Court
in and for the Parish of Tangipahoa, Louisiana
Trial Court No. 2011-0000351
Honorable Douglas Hughes, Judge

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BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

*PMC
by JWP
J.E.W.
6/29/12*
McCLENDON, J. Concurs
Welch, J. Dissents and assigns Reason

PETTIGREW, J.

In this medical malpractice action filed January 31, 2011, plaintiff, Alma Mims on behalf of her deceased brother, appeals the trial court judgment, which sustained the exception raising the objection of no cause of action and motion for summary judgment filed by defendant, Tangi Pines Nursing Center ("Tangi Pines"), on April 1, 2011, and dismissed Ms. Mims' claims with prejudice. The hearing on the motion was held on June 20, 2011, almost five months after filing of the petition. On appeal, Ms. Mims argues the trial court erred in sustaining Tangi Pines' no cause of action exception because the petition, as stated, was sufficient to state a cause of action against Tangi Pines. Ms. Mims further asserts the trial court erred in granting the motion for summary judgment and in dismissing the suit, as she did not have adequate time to complete discovery and the motion was premature.

Plaintiff did not file a motion to continue the hearing, nor orally move for a continuance at the hearing on the motion for summary judgment. Additionally, plaintiff did not introduce an opposing affidavit in accordance with La. Code Civ. P. art. 967(C), which provides that a party may oppose a motion for summary judgment by filing an affidavit asserting that "for reasons stated he cannot present by affidavit facts essential to justify his opposition." See **Dardar v. Bridgestone/Firestone, Inc.**, 2003-1462 (La. App. 1 Cir. 5/14/04) 879 So.2d 735, 736.

Following our *de novo* review¹ of the record and relevant jurisprudence, we conclude that the record does not demonstrate any error in the trial court's judgment. The trial court correctly concluded that Ms. Mims' petition failed to state a cause of action against Tangi Pines. Moreover, after Tangi Pines submitted its motion for summary judgment (properly supported by the opinion of the medical review panel that Tangi Pines

¹ See **Torbert Land Co., L.L.C. v. Montgomery**, 2009-1955, p. 4 (La. App. 1 Cir. 7/9/10), 42 So.3d 1132, 1135, *writ denied*, 2010-2009 (La. 12/17/10), 51 So.3d 16 (holding that appellate review of a trial court's ruling on a no cause of action exception is *de novo* because the exception raises a question of law and the trial court's decision is based only on the sufficiency of the petition); **Berard v. L-3 Communications Vertex Aerospace, LLC**, 2009-1202, p. 5 (La. App. 1 Cir. 2/12/10), 35 So.3d 334, 339-340, *writ denied*, 2010-0715 (La. 6/4/10), 38 So.3d 302, (explaining that summary judgment is subject to *de novo* review on appeal, using the same standards applicable to the trial court's determination of the issues).

did not deviate from the applicable standard of care with regard to decedent), Ms. Mims failed to bear her burden of producing evidence that there were genuine issues of material fact remaining as to her alleged claims against Tangi Pines. La. Code Civ. P. art. 966(C)(2); **Robles v. Exxonmobile**, 2002-0854, p. 4 (La. App. 1 Cir. 3/28/03), 844 So.2d 339, 341. Thus, in accordance with Uniform Rules--Courts of Appeal, Rule 2-16.2A(2), (4), and (6), the trial court's judgment is affirmed. All costs associated with this appeal are assessed against plaintiff/appellant, Alma Mims.

AFFIRMED.

ALMA MIMS

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THOMAS C. EVANS

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WELCH, J., dissenting.

JW I disagree with the majority opinion in this matter. While I agree that the trial court may have properly sustained the peremptory exception raising the objection of no cause of action, the plaintiff should have been given the opportunity to amend her petition pursuant to La. C.C.P. art. 934. As such, I would vacate the judgment of the trial court insofar as it dismissed the plaintiff's suit and would amend the judgment to allow the plaintiff the opportunity to amend her petition.

Furthermore, with regard to the motion for summary judgment, which was filed approximately three months after the petition was filed, the record reveals that the plaintiff was not given sufficient time to conduct adequate discovery as required by La. C.C.P. art. 966 (C)(1), despite a specific request for the opportunity to do so. The trial court should have continued the hearing on the motion in order to give the plaintiff the opportunity to conduct adequate discovery, and its failure to do so was erroneous. Accordingly, I would reverse this portion of the judgment of the trial court.

Thus, I respectfully dissent.