

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 CA 0126

**CATHERINE HALL AND MICHAEL HALL, INDIVIDUALLY AND
ON BEHALF OF THEIR MINOR CHILD, DONALD HALL**

VERSUS

DR. ERIC RAU

Judgment Rendered: September 14, 2011

**Appealed from the
32nd Judicial District Court
In and for the Parish of Terrebonne
State of Louisiana
Case No. 155,742**

The Honorable Timothy C. Ellender, Judge Presiding

**David W. Ardoin
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**Counsel for Plaintiffs/Appellants
Catherine Hall and Michael Hall,
individually and on behalf of their
minor child, Donald Hall**

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**Counsel for Defendant/Appellee
Dr. Eric Rau**

BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

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GAIDRY, J.

The plaintiff spouses appeal a summary judgment dismissing their medical malpractice action against the wife's physician. We affirm.

FACTS AND PROCEDURAL HISTORY

The plaintiffs, Catherine Hall and Michael Hall, are married. On August 11, 2005, Ms. Hall underwent a cholecystectomy, or the surgical removal of her gallbladder. The surgery was performed at Terrebonne General Medical Center in Houma, Louisiana, by Dr. Donald Schwab, a general surgeon. Ms. Hall was discharged from the hospital, but three days later, on the morning of Sunday, August 14, 2005, she began to experience nausea, vomiting, upper abdominal and chest pain, arm pain, and shortness of breath. She telephoned Dr. Schwab's office that morning, and her call was directed to his partner, Dr. Eric H. Rau, who was on call for their practice.

When she first spoke to Dr. Rau on the telephone, Ms. Hall's primary complaint was of nausea, although she also complained of upper abdominal, chest, and right arm pain. She informed him that she had been evaluated by her cardiologist for similar complaints a few weeks earlier and had been told that she had no heart disease. Dr. Rau advised her that if her complaints of pain did not resolve with use of the pain medication previously prescribed, she should go to the hospital emergency room. After that conversation concluded, Ms. Hall telephoned Dr. Rau again to advise him that she was going to the emergency room. Dr. Rau telephoned the emergency room to facilitate her evaluation there and left instructions as to necessary laboratory work and testing.

Upon her arrival at the hospital emergency room at approximately 12:39 p.m., Ms. Hall related her complaints to the nursing staff, including

the triage nurse on duty. Dr. Rau's orders were recorded and followed, including administration of intravenous pain and nausea medication. Dr. Rau was subsequently in telephone contact with the nursing staff on several occasions regarding the test results. Dr. Rau did not specifically request consultation with the emergency room physician or any other physician on duty.

Dr. Rau also recommended a CT scan of the abdomen, which was performed later that afternoon. After returning to the emergency room, Ms. Hall was placed in one of the emergency treatment rooms. While straining due to an episode of nausea, Ms. Hall urinated on herself and asked to use the bathroom. After walking to and from the bathroom, she was placed back into the bed. Approximately ten minutes later, at about 5:18 p.m., Ms. Hall's sister noticed that she was unresponsive and that her lips were blue, and immediately notified the nursing staff. A "code blue" emergency response was initiated, and the emergency room physician and another physician responded and undertook evaluation and treatment. It was eventually determined that Ms. Hall had sustained a myocardial infarction, or heart attack, with a complete occlusion or blocking of one artery.

Ms. Hall and her husband, Michael Hall, instituted this medical malpractice action on April 20, 2006, by requesting that a medical review panel be convened pursuant to La. R.S. 40:1299.41, *et seq.* The medical review panel was formed, with three general surgeons and an attorney chairman.

The medical review panel's opinion was issued on August 6, 2008. The unanimous opinion stated that "[t]he evidence does not support the conclusion that the defendant, DR. ERIC RAU, failed to meet the applicable standard of care as charged in the complaint." In its supporting reasons, the

panel concluded that “[b]ased upon the information received from the patient, Catherine Hall, and the nurse at the emergency room of Terrebonne General Medical Center, Dr. Eric Rau acted appropriately and ordered the appropriate tests.”

Plaintiffs then filed a petition for damages against Dr. Rau on November 3, 2008. They alleged that Dr. Rau breached the applicable standard of medical care by “failing to adequately assess, monitor and treat” Ms. Hall, causing her to suffer “an otherwise avoidable myocardial infarction.” Dr. Rau answered the petition, denying its allegations of negligence on his part.

On April 8, 2010, Dr. Rau filed a motion for summary judgment, seeking the dismissal of plaintiffs’ causes of action. In his motion, Dr. Rau emphasized the medical review’s panel’s opinion and the fact that plaintiffs failed to identify an expert witness in the specialty of general surgery to support their allegations of his violation of the standard of care. The motion was supported by plaintiffs’ answers to interrogatories relating to expert witnesses, the medical review panel opinion and reasons, and Dr. Rau’s affidavit. Plaintiffs opposed the motion, filing the depositions of Dr. Rau and two emergency room nurses in the record.

The hearing on the motion for summary judgment was held on June 11, 2010. At the conclusion of the hearing, the trial court ruled in favor of Dr. Rau, and its judgment granting the motion and dismissing plaintiffs’ action with prejudice was signed on June 21, 2010.

Plaintiffs then instituted the present appeal, assigning as error the trial court’s determination that summary judgment was appropriate based upon the absence of expert testimony sufficient to demonstrate that they would be able to meet their burden of proof on the merits.

LAW AND ANALYSIS

Standard of Review and General Principles of Summary Judgment

Summary judgment is subject to *de novo* review on appeal, using the same standards applicable to the trial court's determination of the issues. *Berard v. L-3 Communications Vertex Aerospace, LLC*, 09-1202, p. 5 (La. App. 1st Cir. 2/12/10), 35 So.3d 334, 339-40, *writ denied*, 10-0715 (La. 6/4/10), 38 So.3d 302. The summary judgment procedure is expressly favored in the law and is designed to secure the just, speedy, and inexpensive determination of non-domestic civil actions. La. C.C.P. art. 966(A)(2). Its purpose is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. *Hines v. Garrett*, 04-0806, p. 7 (La. 6/25/04), 876 So.2d 764, 769. Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, admissions, and affidavits in the record 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. 966(B).

A fact is material if it potentially insures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of the legal dispute. *Hines*, 04-0806 at p. 1, 876 So.2d at 765. A genuine issue is one as to which reasonable persons could disagree; if reasonable persons could only reach one conclusion, there is no need for trial on that issue and summary judgment is appropriate. *Id.*, 04-0806 at p. 1, 876 So.2d at 765-66. Because it is the substantive law applicable to the case that determines materiality, whether a particular fact in dispute is material can be seen only in light of that substantive law. *Cressionie v. Intrepid, Inc.*, 03-1714, p. 3 (La. 4/23/04), 879 So.2d 736, 738-39.

The mover has the burden of proof that he is entitled to summary judgment. *See* La. C.C.P. art. 966(C)(2). If the mover will not bear the burden of proof at trial on the subject matter of the motion, he need only demonstrate the absence of factual support for one or more essential elements of his opponent's claim, action, or defense. *Id.* If the moving party points out that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense, then the nonmoving party must produce factual support sufficient to satisfy his evidentiary burden at trial. *Id.* If the mover has put forth supporting proof through affidavits or otherwise, the adverse party may not rest on the mere allegations or denials of his pleading, but his response, by affidavits or otherwise, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party fails to do so, summary judgment shall be rendered against him if appropriate. La. C.C.P. art. 967(B).

In ruling on a motion for summary judgment, the judge's role is not to evaluate the weight of the evidence or to determine the truth of the matter, but instead to determine whether there is a genuine issue of triable fact. *Hines*, 04-0806 at p. 1, 876 So.2d at 765. Despite the legislative mandate that summary judgments are now favored, factual inferences reasonably drawn from the evidence must be construed in favor of the party opposing the motion, and all doubt must be resolved in the opponent's favor. *Willis v. Medders*, 00-2507, p. 2 (La. 12/8/00), 775 So.2d 1049, 1050.

Was Summary Judgment Appropriate Under the Applicable Law?

Louisiana Revised Statutes 9:2794 sets forth the elements that a plaintiff must prove to succeed in a medical malpractice claim against a physician. In summary, the plaintiff must prove, by a preponderance of the evidence: (1) the standard of care applicable to the physician; (2) a violation

of that standard of care by the physician; and (3) a causal connection between the physician's alleged negligence and the claimed injuries. *See Pfiffner v Correa*, 94-0924, p. 8 (La. 10/17/94), 643 So.2d 1228, 1233. Where the defendant physician practices in a particular specialty and 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 that specialty. *Lieux v. Mitchell*, 06-0382, p. 10 (La. App. 1st Cir. 12/28/06), 951 So.2d 307, 314, writ denied, 07-0905 (La. 6/15/07), 958 So.2d 1199.

An expert witness is generally necessary as a matter of law to meet the burden of proof in a medical malpractice action. *Id.* at p. 11, 951 So.2d at 314. This general requirement is especially apt when the defendant has filed a motion for summary judgment supported by expert opinion evidence that the treatment met the applicable standard of care. *Id.* at p. 11, 951 So.2d at 315. In *Pfiffner*, the supreme court observed that expert testimony is not always necessary to meet the burden of proof in a medical malpractice case, including "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." *Pfiffner*, 94-0924 at p. 9, 643 So.2d at 1234. Other examples of such obvious negligence include "obvious unnecessary delays in treatment," "[f]ailure to attend a patient when the circumstances demonstrate the serious consequences of this failure," and "failure of an on-call physician to respond to an emergency when he knows or should know that his presence is necessary." *Id.*, 94-0924 at pp. 9-10, 643 So.2d at 1234.

Plaintiffs contend that because Dr. Rau was the only physician responsible for Ms. Hall's care from the time she consulted him through the time of the "code blue" crisis, his failure to seek the consultation of

physicians in other practice areas or specialties led to a delay in her treatment, and, in turn, her heart attack. They further contend that Dr. Rau failed to follow protocol in doing so, and that his failure to do so constitutes such an obvious breach of the standard of care that expert testimony on that issue is unnecessary. Dr. Rau, on the other hand, contends that resolution of the issues requires knowledge of the proper medical standard for a general surgeon's actions, in order to determine if his response was appropriate given the particular history and symptoms presented.

In his affidavit, Dr. Rau recounted his telephone conversations with Ms. Hall prior to her arrival at the emergency room. He attested that the treatment of cardiac disease was not within the purview of his hospital privileges and that patients referred by him to the emergency room for evaluation are turned over to the emergency room physician unless it has been determined that their problems are surgical problems within his field of practice. According to Dr. Rau, Ms. Hall was the responsibility of the emergency room staff upon her arrival at the hospital emergency room, and she was to undergo a "tandem" evaluation between the orders he called in "related to her gallbladder surgery" and any orders by the emergency room staff for any other suspected medical problem. He explained that his instructions to the emergency room triage nurse as to laboratory work and medical testing were for the purpose of evaluating any surgical causes of Ms. Hall's symptoms, as a supplement to the evaluation and orders of the examining emergency room physician. Based upon her history of recent surgery and an elevated white blood cell count revealed from testing, he requested that a diagnostic CT scan be performed to determine the existence of a possible source of intra-abdominal infection, but the results showed only normal postoperative findings.

In his deposition, Dr. Rau admitted that based upon the symptoms described by Ms. Hall when he first spoke with her on the telephone, he suspected a potential heart attack. However, he explained that while her symptoms were consistent with a heart attack, they were also consistent with a number of other problems as well. He further explained that he was also concerned about a surgical condition being the cause of her symptoms, in light of the negative preoperative cardiac evaluation performed weeks earlier. He also explained that Ms. Hall was referred to the emergency room for evaluation of her symptoms and condition, rather than for admission to the hospital under his care. His orders relating to the referral were limited to testing that would be useful for his purposes as a general surgeon, focusing on a postoperative surgical problem. In doing so, he did not notify the emergency room personnel of the potential differential diagnoses considered, in order not to "taint" any independent diagnosis of the emergency room physician. Dr. Rau explained that as a general surgeon, he does not treat cardiac disease and therefore does not order testing that he cannot interpret and that does not fall within the purview of his hospital privileges.

The deposition testimony of the emergency room nurses conflicted with that of Dr. Rau regarding any role or responsibility of the emergency room physician in Ms. Hall's evaluation or care prior to the "code blue" crisis. Their testimony was also equivocal on the issue of whether the hospital's "advanced triage/clinical protocols" dictated the physician or health care provider responsible for consultation of physician specialists under these circumstances. The language of the protocols document itself, however, states that its purpose "is to *direct the RN* [registered nurse] *Staff in ordering tests* appropriate to injury, illness at the point of triage or

assessment *and to initiate treatment where appropriate.*” (Emphasis added.)

The protocol process is “applicable to those patients that will be cared for by the ED [emergency department] physician.” Significantly, the document plainly states that “[c]onsultation with the Emergency Department physician is appropriate at any time if a question arises about the clinical condition of the patient.” In virtually all other respects, the nurses’ testimony regarding the nature and range of potential causes of Ms. Hall’s reported symptoms corroborated that of Dr. Rau. At any rate, their testimony is of little, if any, relevance in determining the standard of care applicable to Dr. Rau’s surgical specialty and whether his actions deviated from that standard.

After a thorough review of the record, we conclude that the circumstances of this case do not fall within the category of exceptions to the general rule requiring expert medical testimony to establish the particular medical standard of care and breach of that standard of care. Specifically, there is no testimony or evidence in the record that the hospital “advanced triage/clinical protocols” set forth a standard of care applicable to Dr. Rau as a general surgeon, that Dr. Rau violated any standard of care applicable to a general surgeon by not ordering additional testing or consultation with other physicians, or that any negligent action or omission on his part caused or contributed to Ms. Hall’s cardiac injury. To the contrary, the un rebutted opinion of the medical review panel was that there was no evidence of deviation from the applicable standard of care and that Dr. Rau acted appropriately based upon the information available to him. Dr. Rau having established his burden of proof on his motion, it was incumbent upon plaintiffs to produce factual support in the form of expert testimony sufficient to establish that they would be able to satisfy their evidentiary

burden of proof at trial on these issues. Plaintiffs failed to do so, and summary judgment was therefore appropriate.

The judgment of the trial court is affirmed. All costs of this appeal are assessed to the plaintiffs-appellants, Catherine Hall and Michael Hall.

AFFIRMED.