NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2005 CA 1932

ROBERT S. HOLCOMB, MARIAN H. DELANEY, NANCY H. EVANS, AND BETH H. MALONE, ON BEHALF OF ANN HOLCOMB AND METROPOLITAN LIFE INSURANCE

VERSUS

ETHICON, INC., JOHNSON AND JOHNSON, INC., PATRICK F. DIAL, M.D., ANDREW HARGRODER, M.D., JED L. MORRIS, M.D., AND OUR LADY OF THE LAKE REGIONAL MEDICAL CENTER

CONSOLIDATED WITH

NUMBER 2005 CA 1933

ROBERT S. HOLCOMB, WIDOWER OF MRS. ANN HOLCOMB, DECEASED, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF MRS. ANN HOLCOMB, MARIAN H. DELANEY, NANCY H. EVANS, BETH H. MALONE, AND METROPOLITAN LIFE INSURANCE

VERSUS

PATRICK F. DIAL, M.D., ANDREW F. HARGRODER, M.D., JED LANE MORRIS, M.D., OUR LADY OF THE LAKE REGIONAL MEDICAL CENTER, AND THE ATTORNEY GENERAL IN AND FOR THE STATE OF LOUISIANA

CONSOLIDATED WITH

NUMBER 2005 CA 1934

ROBERT S. HOLCOMB, WIDOWER OF MRS. ANN HOLCOMB, DECEASED, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF MRS. ANN HOLCOMB, MARIAN H. DELANEY, NANCY H. EVANS, BETH H. MALONE, AND METROPOLITAN LIFE INSURANCE

VERSUS

OUR LADY OF THE LAKE REGIONAL MEDICAL CENTER

Judgment Rendered: September 20, 2006

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Suit Numbers 415,512, 433,003 and 433,004
Honorable William A. Morvant, Presiding

* * * * * *

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* * * * * *

BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

GUIDRY, J.

In this medical malpractice action, plaintiffs, Robert S. Holcomb, individually and as administrator of the estate of Ann Holcomb, Marion Delaney, Nancy Evans, Beth Malone, and Metropolitan Life Insurance, appeal the district court's granting of defendant's, Patrick F. Dial, M.D., motion for summary judgment. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

On March 29, 1994, Ann Holcomb was admitted to Baton Rouge General Regional Medical Center (BRGRMC) under the care of Dr. Jed Morris and Dr. Patrick Dial for performance of a ventral hernia repair and cholecystectomy. Following her discharge from BRGRMC, Mrs. Holcomb was admitted to Our Lady of the Lake Regional Medical Center (OLOLRMC) on April 12, 1994, for questionable abdominal pain and a wound infection. Thereafter, Dr. Dial performed surgery on April 15, 1994, to repair a mesh implant from the prior hernia surgery and also performed an exploratory laparotomy to locate the source of Mrs. Holcomb's pain and infection. During the exploratory laparotomy, Dr. Dial discovered a retrocecal appendix and performed an appendectomy. Following her discharge from these procedures, Mrs. Holcomb was readmitted to OLOLRMC by Dr. Morris for a urinary tract infection, whereupon a fluid collection in Mrs. Holcomb's upper abdomen was discovered and drained. Mrs. Holcomb was discharged by Dr. Morris on June 7, 1994, but was readmitted on June 14, 1994, for further investigation of the source of her abdominal pain. Following a CT scan, an abscess in the lower right quadrant of Mrs. Holcomb's abdomen was discovered, which was later determined to contain hetero-resistant staph. Mrs. Holcomb subsequently fell while a patient at OLOLRMC, underwent surgery to correct a hip and femur fracture, and on September 4, 1994, was diagnosed with

deep vein thrombosis, experienced swelling in her arm, suffered respiratory failure, and died.

On March 28, 1995, plaintiffs filed a petition seeking damages from Dr. Dial for various acts of medical negligence, including lack of informed consent for the appendectomy.[1] Dr. Dial filed a motion for summary judgment, which was granted by the district court on November 25, 2002, dismissing all of plaintiffs' claims against him except for the claim of lack of informed consent with regard to the appendectomy performed on April 15, 1994. Thereafter, Dr. Dial filed another motion for summary judgment on December 15, 2004, regarding the informed consent claim. Following a hearing on May 9, 2005, the district court signed a judgment, granting Dr. Dial's motion and dismissing plaintiffs' case against him with prejudice, and certified the judgment as final for purposes of appeal.[2] Plaintiffs now appeal from this judgment.

DISCUSSION

An appellate court reviews the district court's decision to grant a motion for summary judgment *de novo*, using the same criteria that govern the district court's consideration of whether summary judgment is appropriate. Boland v. West Feliciana Parish Police Jury, 03-1297, p. 4 (La. App. 1st Cir. 6/25/04), 878 So. 2d 808, 812, writ denied, 04-2286 (La. 11/24/04), 888 So. 2d 231. A motion for summary judgment should be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, 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); Independent Fire Insurance

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[1] Plaintiffs also named several other defendants; however, the instant appeal only involves the claims asserted against Dr. Dial.

[2] The district court determined that because this judgment dismissed the last remaining claim against Dr. Dial, effectively dismissing him as a party to the suit, certification was proper under La. C.C.P. art. 1915. We agree certification was proper.

Company v. Sunbeam Corporation, 99-2181, p. 7 (La. 2/29/00), 755 So. 2d 226, 230-31.

On the motion for summary judgment, if the moving party will not bear the burden of proof at trial on the matter before the court on the motion, the moving party must 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. If the adverse party then 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 genuine issue of material fact and summary judgment must be granted. La. C.C.P. art. 966(C)(2); Boland, 03-1297 at p. 4, 878 So. 2d at 813.

Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. Craig v. Bantek West, Inc., 04-0229, p. 7 (La. App. 1st Cir. 9/17/04), 885 So. 2d 1241, 1245. The applicable version of La. R.S. 40:1299.40A, relative to informed consent to medical treatment, provided:

> Notwithstanding any other law to the contrary, written consent to medical treatment means a consent in writing to any medical or surgical procedure or course of procedures which (a) sets forth in general terms the nature and purpose of the procedure or procedures, together with the known risks, if any, of death, brain damage, quadriplegia, paraplegia, the loss or loss of function of any organ or limb, of disfiguring scars associated with such procedure or procedures, (b) acknowledges that such disclosure of information has been made and that all questions asked about the procedure or procedures have been answered in a satisfactory manner, and (c) is signed by the patient for whom the procedure is to be performed, or if the patient for any reason lacks legal capacity to consent by a person who has legal authority to consent on behalf of such patient in such circumstances. Such consent shall be presumed to be valid and effective, in the absence of proof that execution of the consent was induced by misrepresentation of material facts.

Thus, a physician has a duty to inform a patient of (1) the nature and purpose of the procedure, and (2) the known material risks that may arise from the noticed procedure. La. R.S. 40:1299.40 A; Richard v. Colomb, 04-1145, p. 5 (La. App. 1st

Cir. 6/29/05), 916 So. 2d 1122, 1127, writ denied, 05-1939 (La. 2/3/06), 922 So. 2d 1182.

In order to recover damages, the plaintiff must prove not only the existence of a material risk unknown to the patient and a failure of the physician to inform the patient of a procedure or the attendant material risks, but also that there was a causal relationship between the physician's failure to inform and the claimed damages. See Richard, 04-1145 at p. 6, 916 So. 2d at 1128. There are two aspects to the proof of causation in a lack of informed consent case. First, the plaintiff must prove, as in any other tort action, that the defendant's breach of duty was a cause-in-fact of the claimed damages. Second, the plaintiff must further prove that a reasonable patient in the plaintiff's position would not have consented to the treatment or procedure had the material information and risks been disclosed. Lugenbuhl v. Dowling, 96-1575, p. 12 (La. 10/10/97), 701 So. 2d 447, 454.

In support of his motion for summary judgment, Dr. Dial introduced his deposition testimony, as well as deposition testimony from plaintiffs' expert, Edward Klotz, M.D., and an affidavit from Chapman Lee, M.D. According to this testimony, Dr. Dial obtained written consent to perform an exploratory laparotomy, which Dr. Dial describes as a complete examination of the intra-abdominal contents to determine the source of Mrs. Holcomb's questionable abdominal pain and wound infection. The written consent contained a description of the risks associated with that procedure. In addition, the consent form authorized Dr. Dial "to perform any procedure different from those listed above if during the course of the operation or procedure or thereafter any conditions occur or are encountered which in his judgment make such different procedures necessary or desirable." Dr. Dial stated that he discussed the nature of the procedure with Mrs. Holcomb, who was a nurse, and that she told him "whatever [he] had to do, do it." Dr. Dial stated that he was taught if a retrocecal appendix was discovered during the course of an

exploratory laparotomy, it should be removed. Further, Dr. Dial stated that due to Mrs. Holcomb's weight, which was estimated at 450 pounds, and ongoing abdominal problems, he thought it was in her best interest to remove the retrocecal appendix, because if she were to develop a problem later, it would be difficult to diagnose and could result in another reason for an operation for her, and possibly death. Plaintiffs offered no evidence to refute these facts.

However, assuming arguendo that the appendectomy was not within the realm of the written and verbal consent obtained from Mrs. Holcomb prior to her surgery, plaintiffs have failed to demonstrate that they will be able to satisfy their evidentiary burden of proof at trial as to all essential elements of their claim. Specifically, in support of his motion for summary judgment, Dr. Dial introduced testimony, which refutes plaintiffs' argument that the performance of the appendectomy caused any injury to Mrs. Holcomb. Dr. Dial's deposition testimony and the affidavit from Dr. Lee state that in their expert opinion, the appendectomy did not result in any injury to Mrs. Holcomb. Additionally, Dr. Klotz, who is plaintiffs' expert, specifically states that he has no opinion about the appendectomy, does not intend to comment on the consent for that procedure, and does not have an opinion as to whether the appendectomy caused any harm or injury to Mrs. Holcomb.

Further, plaintiffs have failed to produce any medical evidence from which a rational factfinder could conclude that the performance of the appendectomy caused injury to Mrs. Holcomb. See Lugenbuhl, 96-1575 at p. 13, 701 So. 2d at 454. Plaintiffs rely on isolated facts and opinions from portions of deposition testimony from several experts, reviewing and opining on Mrs. Holcomb's medical condition over the course of approximately five months, to speculate that the performance of the appendectomy resulted in an infection and Mrs. Holcomb's death. However, after reviewing the entirety of the record, none of these experts

specifically address the appendectomy, nor do they suggest that the performance of an appendectomy caused any injury to Mrs. Holcomb. Therefore, in the absence of any direct evidence to controvert that offered by Dr. Dial, plaintiffs have failed to establish that they will be able to prove causation by a preponderance of the evidence. As such, the district court properly granted Dr. Dial's motion for summary judgment.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court, granting Dr. Dial's motion for summary judgment and dismissing all of plaintiffs' claims against him with prejudice. All costs of this appeal are to be borne equally by the plaintiffs, Robert S. Holcomb, individually and as administrator of the estate of Ann Holcomb, Marion H. Delaney, Nancy H. Evans, Beth H. Malone, and Metropolitan Life Insurance.

AFFIRMED.