

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**NUMBER 2005 CA 2117**

**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 2118**

**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 2119**

**ROBERT S. HOLCOMB, WIDOWER OF MRS. ANN HOLCOMB,  
DECEASED, INDIVIDUALLY AND AS ADMINISTRATOR OF THE  
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**VERSUS**

**OUR LADY OF THE LAKE REGIONAL MEDICAL CENTER**

**Judgment Rendered: NOV - 8 2006**

*RHB*

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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.**

*Parro, J. disposes and assigns reasons.*

## **McCLENDON, 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 grant of summary judgment by the trial court in favor of the defendant, Jed L. Morris, M.D. For the reasons that follow, we affirm in part, reverse in part, and remand for further proceedings.

### **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 after 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. During this time, Mrs. Holcomb continued to complain of abdominal pain and show signs of infection. Dr. Morris discharged Mrs. Holcomb on June 7, 1994, but she was readmitted on June 14, 1994, for further investigation into 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 staphylococcus, and was drained. Thereafter, Mrs. Holcomb fell while a patient at

OLOLRMC, and underwent surgery to correct the resultant hip and femur fracture. Following the orthopedic surgery, Mrs. Holcomb developed deep vein thrombosis in her arm, and on September 4, 1994, suffered a pulmonary embolism and died.

On March 28, 1995, plaintiffs filed a petition seeking damages from Dr. Morris and alleging various acts of medical negligence.<sup>1</sup> Particularly, plaintiffs alleged that Dr. Morris was negligent 1) in clearing Mrs. Holcomb for her gallbladder and hernia repair surgery on March 29, 1994; 2) in failing to timely discover an abdominal abscess that was causing a major infectious disease process; and 3) in discharging Mrs. Holcomb from the hospital on June 7, 1994. Dr. Morris subsequently filed a motion for summary judgment on July 23, 2002, which was denied. Thereafter, on December 15, 2004, Dr. Morris filed another motion for summary judgment. Alternatively, Dr. Morris also requested partial summary judgment as to each claim in which the court did not find a genuine issue of material fact. Following a hearing on May 9, 2005, the trial court granted Dr. Morris' motion and dismissed all of plaintiffs' claims against him with prejudice. The trial court also certified the judgment as final for purposes of appeal.<sup>2</sup> Plaintiffs now appeal, seeking reversal of the summary judgment as to all three claims.

## DISCUSSION

An appellate court reviews a trial 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. **Smith v. Our Lady of the Lake Hosp., Inc.**, 93-2512, p. 26 (La. 7/5/94), 639 So.2d 730, 750; **Boland v. West Feliciana Parish Police Jury**, 03-1297, p. 4 (La.App. 1 Cir. 6/25/04), 878

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<sup>1</sup> Plaintiffs also named several other defendants; however, the instant appeal only involves the claims asserted against Dr. Morris.

<sup>2</sup> The district court determined that because this judgment dismissed all claims against Dr. Morris, certification was proper under LSA-C.C.P. art. 1915. We agree that certification was proper.

So. 2d 808, 812, writ denied, 04-2286 (La. 11/24/04), 888 So.2d 231. A motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine issue of material fact. The motion 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. LSA-C.C.P. art. 966(B); **Boland**, 03-1297 at p. 4, 878 So.2d at 812.

On a 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. LSA-C.C.P. art. 966(C)(2); **Boland**, 03-1297 at p. 4, 878 So.2d at 813.

An issue is "genuine" if reasonable persons could disagree. In determining whether an issue is genuine, courts cannot consider the merits, make credibility determinations, evaluate testimony, or weigh evidence. A fact is "material" when its existence or nonexistence may be essential to the plaintiff's cause of action under the applicable substantive theory of recovery. **Smith**, 93-2512 at p. 26, 639 So.2d at 751. 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. 1 Cir. 9/17/04), 885 So.2d 1241, 1245.

The applicable version of LSA-R.S. 9:2794A provided:

In a malpractice action based on the negligence of a physician licensed under R.S. 37:1261 et seq., a dentist licensed under R.S.

37:751 et seq., or a chiropractic physician licensed under R.S. 37:2801 et seq., the plaintiff shall have the burden of proving:

(1) The degree of knowledge or skill possessed or the degree of care ordinarily exercised by physicians, dentists, or chiropractic physicians licensed to practice in the state of Louisiana and actively practicing in a similar community or locale and under similar circumstances; and where the defendant practices in a particular specialty and where 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, dentists, or chiropractic physicians within the involved medical specialty.

(2) That the defendant either lacked this degree of knowledge or skill or failed to use reasonable care and diligence, along with his best judgment in the application of that skill.

(3) That as a proximate result of this lack of knowledge or skill or the failure to exercise this degree of care the plaintiff suffered injuries that would not otherwise have been incurred.

In other words, in suits alleging medical malpractice, the plaintiff must prove the applicable standard of care, the breach of that standard, and that the substandard care caused an injury that the plaintiff otherwise would not have suffered. **Hoot v. Woman's Hospital Foundation**, 96-1136, p. 5 (La.App. 1 Cir. 3/27/97), 691 So.2d 786, 789, writ denied, 97-1651 (La. 10/3/97), 701 So.2d 209. The plaintiff need not show that the physician's conduct was the only cause of harm, nor must all other possibilities be negated, but the plaintiff must show by a preponderance of the evidence that she suffered injury because of the physician's conduct. **Dumont v. Maaliki**, 99-1850, p. 4 (La.App. 1 Cir. 9/22/00), 769 So.2d 1230, 1232; **Hoot**, 96-1136 at p. 5, 691 So.2d at 789. Further, a party's conduct is a cause-in-fact of the harm if it was a substantial factor in bringing about the harm. **Toston v. Pardon**, 03-1747, p. 11 (La. 4/23/04), 874 So.2d 791, 799.

In the instant case, plaintiffs first claim that Dr. Morris was negligent in clearing Mrs. Holcomb for the gallbladder and hernia repair surgery on March 29, 1994. In support of his motion for summary judgment, Dr. Morris introduced his deposition testimony, the deposition testimony of Dr. Patrick Dial, who performed

the surgery, and an affidavit from Dr. Frederick Cerise, a board certified internal medicine physician. Dr. Morris testified that he had been Mrs. Holcomb's physician for a number of years and that she had a history of medical problems, including obesity, hypertension, arthritis, and gallbladder disease. Dr. Morris stated that after Mrs. Holcomb's last gallbladder episode, he recommended surgery because she had severe recurrent pain and he was afraid her gallbladder would rupture. He admitted she was a poor surgical risk, but because her recurrent condition could produce a surgical catastrophe at any time, he thought surgery was in her best interest. Additionally, Dr. Dial testified in his deposition that Mrs. Holcomb had an immediate need for the surgery, although it was not an emergency situation. Dr. Dial further stated he thought the surgery was appropriate and that he did not have any problem operating on her in her condition. Further, Dr. Cerise stated in his affidavit that after reviewing hospital records and the deposition of Dr. Morris, he was of the opinion that Dr. Morris appropriately cleared Mrs. Holcomb for surgery. Finally, Dr. Morris and Dr. Dial testified that on the date of her discharge from the March 29, 1994 surgery, Mrs. Holcomb did not have any noted incisional drainage or complications from the surgery.

Plaintiffs, however, relied on deposition testimony from their expert, Dr. Edward Klotz, a board certified internal medicine physician, who testified that the gallbladder surgery was not necessary. Dr. Klotz stated that he reviewed Mrs. Holcomb's history as outlined in Dr. Morris' deposition, and that based on her medical conditions and the fact that she did not have an emergent or urgent condition, she should not have been cleared for surgery. According to Dr. Klotz, because Mrs. Holcomb was a very high-risk surgical candidate, her gallbladder condition would not warrant surgery unless she had a gallstone in her bile duct or a distended gallbladder. In his opinion, absent these conditions, Dr. Morris' clearing of Mrs. Holcomb for surgery was a breach of the standard of care.

Further, with regard to causation, it was Dr. Klotz's opinion that as a result of undergoing the March 29, 1994 surgery, Mrs. Holcomb died. According to Dr. Klotz, the first surgery was the initial cause, or the initial reason, for the development of her subsequent medical conditions, which all led to her death. Specifically, Dr. Klotz stated that if Mrs. Holcomb had not had the first surgery, she would not have developed a dehiscence of the wound and a wound infection, she would not have had to undergo a second surgery, and she would not have developed an abdominal abscess nor been in the hospital necessarily to fall and break her hip.

However, when asked, Dr. Klotz would not comment on whether there were any intervening causes between the initial surgery and Mrs. Holcomb's death. He stated that that was irrelevant because if Mrs. Holcomb had not had the first surgery, the subsequent events would not have happened. Nor would Dr. Klotz opine as to whether the first surgery or the second surgery was the cause of Mrs. Holcomb's multiple seromas (the build-up of fluid in the tissue), stating only that the first surgery was the cause of the second surgery. Importantly, Dr. Klotz conceded that he did not know of or review Mrs. Holcomb's prior history of hospital admissions regarding her gallbladder problems. Further, he acknowledged that determining the condition of a patient is based in part on having a relationship with the patient over a period of time and knowing the patient's clinical status over time. Dr. Klotz also recognized that the decision to recommend surgery is based in part on medical judgment.

Plaintiffs argue that Dr. Klotz' testimony is sufficient to prevent summary judgment on this claim. Having thoroughly reviewed the record before us, we must disagree. Plaintiffs' expert's testimony simply does not causally connect the clearing of Mrs. Holcomb for surgery to her death more than five months later. Dr. Klotz's testimony failed to establish that clearing Mrs. Holcomb for surgery was a



substantial factor in her death. Dr. Klotz merely stated that if Mrs. Holcomb had not been cleared for surgery, the other events would not have followed. Accordingly, plaintiffs have failed to produce factual support sufficient to establish that Mrs. Holcomb was injured by Dr. Morris's act of clearing her for the first surgery. Therefore, based on our review of the record and the evidence as outlined above, we find that no genuine issues of material fact remain as to whether Dr. Morris committed malpractice by clearing Mrs. Holcomb for surgery. As such, the trial court did not err in granting summary judgment on this claim.

Plaintiffs next allege that Dr. Morris was negligent in failing to timely discover the infectious abdominal abscess in the lower right quadrant of Mrs. Holcomb's abdomen. In support of his motion for summary judgment as to this claim, Dr. Morris again relied on his deposition testimony wherein he stated he called in infectious disease and surgical consults, as well as a gastroenterologist, to try to determine the source of Mrs. Holcomb's complaints, and ordered several complete abdominal and pelvic ultrasounds, as well as gallium and indium scans, all of which came back negative for an abdominal abscess in the lower right quadrant of her abdomen. Dr. Morris also stated that he ordered a CT scan when he became aware that a machine capable of accommodating Mrs. Holcomb was available. Once the abscess was discovered on the CT scan, Dr. Morris ordered that it be aspirated and cultured, and received several negative reports. Upon receiving a positive growth report, Dr. Morris had the abscess drained and administered Vancomycin. Additionally, Dr. Morris introduced the deposition of Dr. Mark Hausman, a general surgeon, who stated Dr. Morris used every appropriate modality he had available to try to find the abdominal abscess, including ordering a complete abdominal ultrasound and pelvic ultrasound. The affidavit testimony of Dr. Cerise was also that Dr. Morris acted diligently in trying to find an explanation

for Mrs. Holcomb's complaints, including obtaining the appropriate consults and ordering additional tests and cultures.

Finally, Dr. Morris stated that following a course of Vancomycin, the abscess cleared prior to Mrs. Holcomb's surgery to correct her hip and femur fracture, and that Mrs. Holcomb became re-infected from an IV following that surgery. According to Dr. Morris, if it had not been for her fall, Mrs. Holcomb would have had a better chance of recovery from her other medical conditions.

Plaintiffs, however, relied on the deposition testimony of Dr. Klotz, who stated that Dr. Morris should have ordered an ultrasound and tests of the lower right quadrant of Mrs. Holcomb's abdomen, the area that she repeatedly complained about. According to Dr. Klotz, regardless of the fact that complete abdominal and pelvic ultrasounds were ordered, the radiologist's reports never indicated any findings in the lower right quadrant and therefore, because Mrs. Holcomb had persistent complaints in that area, Dr. Morris should have ordered tests localized to that area. Additionally, Dr. J. Benton Dupont, a general surgeon, stated in his deposition that he would have ordered an ultrasound with a request to perform a study of the particular area of the body in question. Further, Dr. Hausman stated if he was concerned about a certain area, he would sometimes call the radiologist and tell them what he was looking for.

Finally, Dr. Klotz stated if the abscess had been discovered sooner, there would have been a greater likelihood that Mrs. Holcomb would not have developed cardiopulmonary problems and the blood clot, which ultimately caused her death. Dr. Klotz opined that Mrs. Holcomb never recovered from the infected abdominal abscess and that she died as a result of this infection.

According to the testimony as outlined above, and our review of the record as a whole, we agree with plaintiffs and find that the trial court erred in granting Dr. Morris' motion for summary judgment on this claim. The trial court was

presented with competing scientific opinions as to the standard of care in diagnosing an abdominal abscess, whether that standard of care was breached, and whether that breach caused any injury to Mrs. Holcomb. Therefore, we reverse the trial court's granting of summary judgment on the issue of whether Dr. Morris was negligent in failing to timely discover the abdominal abscess.

Plaintiffs' final claim is that Dr. Morris was negligent in discharging Mrs. Holcomb from OLOLRMC on June 7, 1994. In support of his motion for summary judgment on this issue, Dr. Morris relied on his deposition testimony wherein he stated he heavily protested Mrs. Holcomb's discharge because he was still trying to investigate the source of her continued infection and abdominal complaints, but that Mrs. Holcomb's insurance company would not pay for her continued hospitalization. Dr. Morris stated he worked with Mr. Holcomb to try to get Mrs. Holcomb readmitted to the hospital. Dr. Morris was able to get Mrs. Holcomb readmitted to OLOLRMC seven days later, on June 14, 1994, for continued investigation of her abdominal problems and, according to Dr. Morris, her condition was unchanged upon readmission.

Plaintiffs again relied on the testimony of Dr. Klotz, who stated it was his understanding that the insurance company only needed a diagnosis from Dr. Morris in order to continue Mrs. Holcomb's hospitalization, and Dr. Morris should have provided them with one. According to Dr. Klotz, Dr. Morris could have told the insurance company that Mrs. Holcomb had a fever of unknown origin, which was an accurate diagnosis since Mrs. Holcomb had a low-grade fever at that time.

From our review of the record, we find that the trial court correctly granted summary judgment as to this claim. Dr. Morris testified that upon readmission Mrs. Holcomb's condition was unchanged, and the testimony of Dr. Klotz does not contradict that of Dr. Morris on this issue. Thus, plaintiffs have failed to point out

a genuine issue of material fact as to whether discharging Mrs. Holcomb caused her any harm, which is a necessary element of malpractice.

### **CONCLUSION**

For the foregoing reasons, we affirm the judgment of the trial court insofar as it granted Dr. Morris' motion for summary judgment, dismissing plaintiffs' claims relating to the clearing of Mrs. Holcomb for the March 29, 1994 surgery and to the discharge of Mrs. Holcomb from OLOLRMC on June 7, 1994. However, we reverse the judgment of the trial court insofar as it granted Dr. Morris' motion for summary judgment and dismissed plaintiffs' claim relating to Dr. Morris' failure to timely discover the infectious abdominal abscess. This matter is remanded to the trial court for further proceedings consistent with this opinion. All costs of this appeal shall be split equally between Dr. Morris and the plaintiffs.

**AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.**



**GUIDRY, J., dissents in part and assigns reasons.**

**GUIDRY, J. dissenting in part.**

I respectfully dissent from those portions of the majority opinion affirming the judgment of the district court granting Dr. Morris' motion for summary judgment and dismissing those claims of plaintiff that relate to the clearance of Mrs. Holcomb for the March 29, 1994 surgery and her discharge from the hospital on June 7, 1994. I believe genuine issues of material fact exist as to both these claims that preclude summary judgment.

With respect to plaintiffs' claim that Dr. Morris was negligent in clearing Mrs. Holcomb for surgery, Dr. Morris and the plaintiffs presented conflicting medical testimony as to the appropriate standard of care to be exercised in recommending elective surgery for a high-risk patient such as Mrs. Holcomb. Further, although Dr. Morris and Dr. Dial stated that Mrs. Holcomb did not have any noted complications from the surgery upon her discharge, she was readmitted approximately one week later for abdominal pain and wound infection, and subsequently underwent a second surgery to repair the prolene mesh utilized in the first surgery, as well as to investigate the source of abdominal pain and infection. Therefore, I believe genuine issues of material fact existed as to whether Dr. Morris breached the standard of care in clearing Mrs. Holcomb for surgery and whether that breach caused her injury. In view of these unresolved issues of material fact, summary judgment was inappropriate.

Additionally, I believe there were also genuine issues of material fact that precluded summary judgment as to the claim regarding the discharge of Mrs. Holcomb from the hospital, since conflicting opinions were presented as to the standard of care and whether it was breached. Dr. Morris testified he strongly protested Mrs. Holcomb's discharge, but the insurance company refused to pay for her continued hospitalization. However, Dr. Klotz's testimony indicated it was his

understanding that the insurance company would have continued to pay for her hospitalization if Dr. Morris had provided it with a diagnosis of a fever of unknown origin, which was an accurate diagnosis under the circumstances. Additionally, Dr. Morris' own testimony created a genuine issue of material fact as to causation in that he characterized Mrs. Holcomb's condition upon her readmission on June 14, 1994, as **basically** unchanged.

For the reasons assigned, I respectfully dissent from those portions of the majority opinion that affirm the district court's granting of summary judgment with respect to the clearance of Mrs. Holcomb for the March 29, 1994 surgery and her discharge from the hospital on June 7, 1994. Further, I also dissent from that portion of the majority opinion splitting all appeal costs equally between Dr. Morris and plaintiffs. Since I believe the summary judgment was improperly granted in its entirety, I believe all appeal costs should be assessed to Dr. Morris.