

LW

COURT OF APPEAL

VERSUS

FIRST CIRCUIT

DELTA CLINIC OF
BATON ROUGE, INC., AND
DR. ADRIAN COLEMAN

STATE OF LOUISIANA

NO. 2006 CA 0134

MAR 30 2007

*J.F.K.
by Q.2.P.*

Kuhn, J., dissenting.

The majority incorrectly suggests that genuine issues of material fact exist. Not all disputed facts are material, and summary judgment may be granted if contested facts present no legal issues. **Henderson v. Union Pacific R.R.**, 41,596, p. 4 (La.App. 2d Cir. 11/15/06), 942 So.2d 1259, 1262. If the movant will not bear the burden of proof at trial, its burden on a motion for summary judgment does not require it to negate all essential elements of the adverse party's action, but rather to 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. LSA-C.C.P. art. 966(C)(2). Thereafter, if the adverse party fails to produce factual support sufficient to establish they will be able to satisfy their evidentiary burden of proof at trial, there is no genuine issue of material fact. **Richard v. Hall**, 2003-1488, pp. 4-5 (La. 4/23/04), 874 So.2d 131, 137.

Because the defendants would not bear the burden of proof at trial, they were only required to point out an absence of support for one or more elements essential to the plaintiff's claims against them. Specifically, they contended that the plaintiff lacked the expert medical testimony necessary to satisfy her evidentiary burden at trial.

To establish claims under LSA-R.S. 40:1299.35.6 and LSA-R.S. 9:2800.12, plaintiff bears the burden of proving that an abortion was

performed; the removal of a dead fetus does not constitute an abortion. LSA-R.S. 9:2800.12(B)(1); LSA-R.S. 40:1299.35.1(1). In support of their motion for summary judgment, defendants submitted objective evidence from plaintiff's chart as well as Dr. Coleman's expert medical testimony that the fetus was dead before the procedure was performed. At such an early stage of pregnancy, a determination of whether a fetus is dead or alive would necessarily require expert medical testimony. Therefore, it was incumbent on the plaintiff to produce sufficient expert testimony to demonstrate that she would be able to satisfy her evidentiary burden at trial of proving that the fetus was, in fact, alive at the time that the procedure was performed. This she failed to do.

Likewise, to establish a claim for medical malpractice, plaintiff bears the burden of proving: (1) the degree of knowledge or skill possessed or the degree of care ordinarily exercised by physicians licensed to practice in the state of Louisiana and actively practicing in a similar community or locale under similar circumstances; (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; and (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. See LSA-R.S 9:2794(A). Simply put, a plaintiff must establish the standard of care applicable to the doctor, a breach of that standard of care, and that the substandard care caused an injury the plaintiff otherwise would not have suffered. **Hoot v. Woman's Hospital Foundation**, 96-1136, p. 5 (La.App. 1st Cir. 3/27/97), 691 So.2d 786, 789, writ denied, 97-1651 (La. 10/3/97), 701 So.2d 209.

To meet this burden of proof, a plaintiff generally is required to produce expert medical testimony. **Lefort v. Venable**, 95-2345, p. 4 (La.App. 1st Cir. 6/28/96), 676 So.2d 218, 220. The jurisprudence has recognized limited exceptions to this requirement in instances where the physician does an obviously careless act from which a lay person can infer negligence, i.e. amputating the wrong arm, or when the defendant/physician testifies as to the standard of care and his breach thereof. **Pfiffner v. Correa**, 94-0924, 94-0963, 94-0992, p. 9 (La. 10/17/94), 643 So.2d 1228, 1233-34. However, an expert witness is generally necessary as a matter of law to meet the burden of proof regarding claims of medical malpractice. **Fagan v. LeBlanc**, 2004-2743, p. 6 (La.App. 1st Cir. 2/10/06), 928 So.2d 571, 575. Moreover, the requirement of producing expert medical testimony is especially apt when the defendant has filed a motion for summary judgment and supported such motion with expert opinion evidence that the treatment met the applicable standard of care. **Fagan**, 928 So.2d at 575-76.

In support of their motion for summary judgment, the defendants submitted the expert medical testimony of Dr. Coleman wherein he stated that it was within the standard of care to inject Phenergan intravenously in a concentration of 50 mg/mL without utilizing an infusion set. He adamantly maintained that the manner in which he administered the Phenergan did not breach the standard of care and opined that the plaintiff's lesion was most likely caused by a bacterial infection.

Accordingly, the plaintiff was required to produce factual evidence sufficient to establish that she would be able to satisfy her evidentiary burden of proof on this issue at trial. The nature of her claim was not such that a lay person could perceive negligence in Dr. Coleman's conduct as

well as any expert could; however, the plaintiff failed to offer the testimony of any medical expert.¹

Assuming, solely for the sake of argument, that given the PDR excerpt and/or Dr. Coleman's testimony, it was unnecessary for plaintiff to submit independent expert medical testimony regarding the applicable standard of care and Dr. Coleman's alleged breach thereof, she was nonetheless required to demonstrate the causal nexus between the alleged breach and her injury. **Pfiffner**, 643 So.2d at 1234. However, the plaintiff fails to even make an allegation regarding how the purported breach caused her lesion, much less support such an allegation with argument and necessary medical evidence. Plaintiff submitted no competent expert medical testimony (via affidavit or deposition) regarding causation, and neither the PDR excerpt nor the deposition of Dr. Coleman aids her in satisfying this essential element of her claim. See **Pfiffner**, 643 So.2d at 1234-35.

According to the PDR, subcutaneous injections are contraindicated; however, it is undisputed that Dr. Coleman injected the Phenergan intravenously. While the PDR states that an intravenous injection "should be given in a concentration no greater than 25 mg/mL as at rate [sic] not to exceed 25 mg per minute," it does not explain the basis for this instruction or warn of possible risks when it is not followed.

In his deposition, Dr. Coleman stated that, based on plaintiff's description of its oozing nature, the most likely cause of her lesion was a

¹ See **Edwards v. Raines**, 35,284, pp. 6-7 (La.App. 2d Cir. 10/31/01) 799 So.2d 1184, 1188 (When a patient went into surgery without a perforated bowel, but after surgery had a perforated bowel, negligence could not be inferred by lay persons, thus expert testimony was necessary to establish standard of care and breach.); **Pugh v. Beach**, 31,361, pp. 5-6 (La.App. 2d Cir. 12/11/98), 722 So.2d 442, 445 (When physician bruised a nerve root while using a high-speed drill during surgery, negligence could not be inferred by a lay person, and thus medical expert testimony was required to establish standard of care and breach.); **Blankenship v. Ochsner Clinic Foundation**, 2006-0242, pp. 6-8 (La.App. 4th Cir. 8/16/06), 940 So.2d 12, 16-17, writ denied, 2006-2291 (La. 11/22/06), 942 So.2d 560 (When an artery was severed while conducting a biopsy, negligence could not be inferred by a lay person, and thus medical expert testimony was required to establish standard of care and breach.)

subsequent bacterial infection. Moreover, his deposition does not provide any support for the inference that if an injection is given at a different rate, a vein will, or is more likely to blow, than if it is given at the specified rate. Thus, if her vein was blown, it can be equally inferred that this would have occurred even if the injection had been given in strict accordance with the instructions. Indeed, his testimony that nurses “blow veins all the time” and that such occurrences were “not unusual” supports the latter inference. Finally, and not least importantly, it was Dr. Coleman’s medical opinion that it was unlikely that plaintiff’s vein blew because he did not observe a resultant bubble near the injection site.

Because plaintiff failed to establish that she would be able to sufficiently satisfy her evidentiary burden of proving that Dr. Coleman’s alleged breach caused her to suffer an injury that she would not otherwise have incurred, plaintiff simply cannot prevail. Thus, any disputed facts regarding Dr. Coleman’s alleged breach of the standard of care are not material facts that would preclude summary judgment in this case. Therefore, I respectfully dissent.