

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2013 CA 1979R

ROBERT THOMAS MCGREGOR, SON OF DONALD H. MCGREGOR, AND
RUTH MCGREGOR, INDIVIDUALLY AND ON BEHALF OF HER
DECEASED HUSBAND, DONALD H. MCGREGOR

VERSUS

HOSPICE CARE OF LOUISIANA IN BATON ROUGE, LLC,
HOSPICE CARE OF LOUISIANA, INC., THE HOSPICE FOUNDATION
OF GREATER BATON ROUGE D/B/A HOSPICE OF BATON ROUGE,
KATHRYN GRIGSBY, CYNTHIA LOGAN, MELANIE HYATT, AND
KATHERINE BRAUD

CONSOLIDATED WITH

2013CA1980R

ROBERT THOMAS MCGREGOR, INDIVIDUALLY, AND RUTH
MCGREGOR, INDIVIDUALLY AND ON BEHALF OF THE SUCCESSION OF
DONALD H. MCGREGOR

VERSUS

DR. GERALD MILETELLO AND DR. GEORGIA A. REINE

Judgment Rendered: SEP 21 2015

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Suit Number C512840 c/w C524336

Honorable Wilson E. Fields, Presiding

* * * * *

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Melanie Hyatt, Cynthia Logan, and
Katherine Braud

BEFORE: GUIDRY, DRAKE, AND HOLDRIDGE, JJ.

GUIDRY, J.

This case is before us on remand from the Louisiana Supreme Court for consideration of whether the testimony of plaintiffs' expert, Dr. Bruce Samuels, was properly proffered, and if so, whether this court can fairly find a preponderance of the evidence from the cold record. See McGregor v. Hospice Care of Louisiana in Baton Rouge, LLC, 14-2591 (La. 4/24/15), ___ So. 3d ___.

FACTS AND PROCEDURAL HISTORY

The essential facts and procedural history of this case have been previously set forth in several opinions of this court as follows. See McGregor v. Hospice Care of Louisiana in Baton Rouge, LLC, 13-1979 (La. App. 1st Cir. 10/24/14) (unpublished opinion); McGregor v. Hospice Care of Louisiana in Baton Rouge, LLC, 09-1355 (La. App. 1st Cir. 2/2/10), 36 So. 3d 281, writ denied, 10-0832 (La. 5/28/10), 36 So. 3d 258; McGregor v. Hospice Care of Louisiana in Baton Rouge, LLC, 09-1357 (La. App. 1st Cir. 2/2/10), 36 So. 3d 272, writ denied, 10-0701 (La. 5/28/10), 36 So. 3d 253.

Donald McGregor had terminal metastatic prostate cancer. He was treated for this disease by Dr. Gerald Miletello, an oncologist, from 1997 through his death on July 21, 2002. On April 30, 2002, Donald enrolled as a patient of Hospice of Baton Rouge (Hospice), because he could no longer visit Dr. Miletello in his office. Thereafter, Hospice nurses visited Donald in his home several times a week and reported their findings to Dr. Miletello. In turn, Dr. Miletello would make determinations based on those findings, which included prescribing pain medication.

In June and early July 2002, Dr. Miletello prescribed Duragesic patches for Donald's long-term pain control and morphine suppositories for his breakthrough pain. On Friday, July 19, 2002, a Hospice nurse visited Donald and, based on her assessment and Donald's medication history, Dr. Miletello wrote a prescription for

40 morphine suppositories to be administered 1-2 per hour as needed for pain. The prescription also noted that it may be partially filled; however, Dr. Miletello had instructed Hospice that 20 suppositories should be released on July 19, and the remaining 20 suppositories were not to be released until Monday, July 22.

Donald's son, Robert McGregor, called Hospice several times between July 19 and July 21, insisting that the 20 morphine suppositories were not enough medication to last Donald until Monday, stating that his father was in pain, and demanding a release of the additional 20 morphine suppositories. On Sunday, July 21, 2002, Hospice's on call nurse, Melanie Hyatt, spoke with Robert on the phone and thereafter informed Hospice's Director of Nurses, Katherine Braud, and Dr. Georgia Reine, a member of Dr. Miletello's oncology group who was on call for Dr. Miletello that weekend, that Robert refused to allow her to go and assess Donald and that Robert was exhibiting threatening behavior toward her. After conferring with Dr. Reine, Nurse Hyatt called Robert and informed him that Hospice was discharging Donald from its care.

Robert, thereafter, called Dr. Reine directly, asking if she was aware that Hospice had discharged his father, and she stated that she concurred in Hospice's decision. Later that day, Donald's family called an ambulance and took Donald to the hospital where he died that evening.

On October 14, 2003, Robert McGregor and Ruth McGregor, Donald's wife, filed a petition for damages against Hospice; Kathryn Grigsby, the CEO and administrator of Hospice; Melanie Hyatt; and Katherine Braud (collectively "Hospice defendants"), asserting that they were negligent in failing to release the remaining 20 morphine suppositories between July 19 and 21, 2002, and in abandoning Donald by discharging him from Hospice's care on Sunday, July 21,

2002.¹

Thereafter, the Hospice defendants filed a motion for summary judgment, asserting that *res judicata* precluded the plaintiffs from asserting their claims against the Hospice defendants,² and alternatively, that the plaintiffs lacked expert testimony to establish that there was a deviation from the standard of care of the Hospice defendants.

Following a hearing on the Hospice defendants' motion, the trial court rendered judgment in favor of the defendants, dismissing the plaintiffs' claims against them with prejudice. The plaintiffs appealed the trial court's judgment, and in McGregor, 09-1357 at p. 8, 36 So. 3d at 277, this court reversed the trial court's judgment, noting that the plaintiffs presented expert testimony of Dr. Samuels, who stated unequivocally that Hospice breached the standard of care by discharging Donald McGregor on July 21, 2002, without proper notification, and his unrebutted testimony stated that the standard of care for discharging a patient is not limited to a particular specialty.³ Accordingly, this court remanded the matter to the district court for further proceedings.

¹ Robert McGregor and Ruth McGregor initially filed a complaint against the Hospice defendants with the Commissioner of Administration requesting formation of a medical review panel; however, they were advised that none of these providers were qualified with the patient's compensation fund. Robert McGregor and Ruth McGregor also filed a complaint against Drs. Miletello and Reine. A medical review panel subsequently issued an opinion finding that the evidence did not support the conclusion that Dr. Miletello or Dr. Reine failed to meet the applicable standard of care. Robert McGregor and Ruth McGregor thereafter filed a separate action for negligence against Dr. Miletello and Dr. Reine, and in McGregor, 09-1355 at pp. 8-9, 36 So. 3d at 285-287, this court affirmed the trial court judgments granting summary judgment in favor of Dr. Miletello and Dr. Reine and dismissing the plaintiffs' claims against them with prejudice.

² The Hospice defendants asserted that the plaintiffs' claims were precluded by *res judicata* based on a judgment rendered in a previous contract suit involving the same parties and based on the same transaction and occurrence.

³ In reversing the trial court's judgment, this court also found that exceptional circumstances existed justifying relief from the *res judicata* effect of the prior judgment in the contract suit, because we had previously ordered, pursuant to an application for supervisory writs, that the contract and malpractice actions be remanded to the trial court to be maintained as separate suits. McGregor, 09-1357 at p. 12, 36 So. 3d at 280.

The matter proceeded to a jury trial on November 7 through 9, 2012. On the morning of the first day of trial, Mrs. McGregor filed a motion to extend cut-off date in order to file a supplemental petition. Mrs. McGregor asserted that Robert McGregor, the other plaintiff in this action, had died on September 28, 2011, and that she wished to file a supplemental petition substituting the name of Ruth McGregor as independent administratrix of the estate of Robert McGregor for the name of Robert McGregor. Following a brief argument on the motion at the beginning of the trial, the trial court denied the motion. Thereafter, the Hospice defendants moved to dismiss the claims of Robert McGregor pursuant to La. C.C.P. art. 1672, and after argument of counsel, the trial court granted the motion.

On the second day of trial, Mrs. McGregor called Dr. Samuels as a witness, tendering him as an expert in internal medicine and also as an expert in treating and/or taking care of terminally ill cancer patients for pain due to cancer and relieving their pain due to cancer through various pain medications. The court, however, did not accept Dr. Samuels as an expert.

On the third day of trial, Mrs. McGregor voluntarily moved to dismiss defendants Kathryn Grigsby, Katherine Braud, and Melanie Hyatt with prejudice, reserving her rights against Hospice, which motion was granted by the trial court.

At the conclusion of trial, the jury rendered a verdict in favor of Hospice, finding that Hospice, through its employees, did not breach the standard of care in its treatment of Donald McGregor. Thereafter, the trial court signed a judgment: denying Mrs. McGregor's motion to extend cut-off date; granting Hospice's motion to dismiss the claims of Robert McGregor and dismissing the claims of Robert McGregor with prejudice; granting Mrs. McGregor's motion to dismiss her claims against Kathryn Grigsby, Melanie Hyatt, and Katherine Braud; and based on the jury's verdict, dismissing all remaining claims of Ruth McGregor,

individually and as administratrix of the succession of Donald McGregor, with prejudice, in their entirety.

Thereafter, Mrs. McGregor filed an appeal with this court. In McGregor v. Hospice Care of Louisiana in Baton Rouge, LLC, 13-1979 (La. App. 1st Cir. 10/24/14) (unpublished opinion), this court affirmed the trial court's judgment. Specifically, we found no abuse of the trial court's discretion in denying Mrs. McGregor's motion to extend cut-off date, thereby denying Mrs. McGregor the opportunity to file a third supplemental and amending petition to substitute herself as independent administratrix for the estate of Robert McGregor, and found no error in the trial court's dismissal of Robert McGregor's claims against Hospice pursuant to La. C.C.P. art. 1672(A)(1). We also found no abuse of discretion in the district court's failure to qualify Dr. Samuels as an expert, because Dr. Samuels failed to demonstrate that he had the requisite knowledge of the standard of care of hospice nursing or administration of partial fill prescriptions, which are the key issues in establishing negligence of Hospice in this matter. We likewise noted, in conformity with our previous opinion, that Dr. Samuels may have been qualified to testify as to the standard of care for discharging hospice patients, but plaintiffs' counsel did not elicit any testimony from Dr. Samuels at trial suggesting that he was qualified to give testimony on this issue. After reviewing the entire record, we found that the jury had a reasonable factual basis for determining that Mrs. McGregor failed to establish that Hospice, through its employees, breached the standard of care, and as such, found no error in the district court's judgment dismissing Mrs. McGregor's claims against Hospice with prejudice.

The plaintiffs sought review of our decision with the Louisiana Supreme Court, which granted writs and rendered an opinion finding that the trial court erred in excluding the testimony of plaintiffs' expert, because "Hospice nursing" and "partial fill prescriptions" are not separately recognized areas of expertise but

are subsumed within the expertise of plaintiffs' expert. McGregor, 14-2591 at 1, ___ So. 3d at ___. Accordingly, the supreme court remanded the matter to this court to determine whether the excluded evidence was properly proffered and, if so, whether we can fairly find a preponderance of the evidence from the cold record. Additionally, the supreme court found that the trial court erred in failing to allow the substitution of the succession representative for the deceased plaintiff, Robert McGregor, as the substitution did not bring a new substantive matter before the court but was an administrative, housekeeping matter.

We now review this matter in conformity with the supreme court's directive.

DISCUSSION

Proffer of Expert Testimony

In the instant case, the trial court permitted the plaintiffs to proffer the testimony of their expert, Dr. Samuels. Louisiana Code of Civil Procedure article 1636(B) provides, in pertinent part:

At the request of any party, the court may allow any excluded evidence to be offered, subject to cross examination: on the record during a recess or such other time as the court shall designate; or by deposition taken before a person authorized by Article 1434 within thirty days subsequent to the exclusion of any such evidence or the completion of the trial or hearing, whichever is later.

Following the trial in the instant matter, plaintiffs' counsel attempted to schedule the deposition of Dr. Samuels. However, due to scheduling conflicts, counsel for Hospice was not available within the thirty-day prescribed period contained in La. C.C.P. art. 1636(B). As such, Hospice agreed to waive any objection to the taking of the deposition outside of the thirty-day period and, on December 6, 2012, signed a Joint Motion to Take Proffer Out of Time, which was prepared by counsel for the plaintiffs. Counsel for the plaintiffs filed the motion with the trial court on the same date. The thirty-day period, however, was set to expire on December 10, 2012, and as of that date, the trial court had not signed the

joint motion submitted by the parties. As such, counsel for the plaintiffs took the deposition of Dr. Samuels on December 10, 2012, and left the matter open to allow counsel for Hospice an opportunity to cross examine Dr. Samuels. Counsel for Hospice was notified by a court reporter the following day that counsel for the plaintiffs had taken the deposition of Dr. Samuels.⁴ Thereafter, on January 24, 2013, an additional deposition of Dr. Samuels was taken, wherein counsel for Hospice cross-examined Dr. Samuels' testimony.

Hospice asserts, on remand, that Dr. Samuels' deposition testimony was not properly proffered because it was not subject to cross examination and because it was not properly noticed in accordance with La. C.C.P. art. 1438.⁵ However, from our review of the record, we find that the deposition testimony of Dr. Samuels was properly proffered. Despite Hospice's argument, the deposition was subject to cross examination in accordance with La. C.C.P. art. 1636(B). The plaintiffs conducted the deposition on December 10, 2012, out of an abundance of caution, since the thirty-day period was about to expire and the district court had not yet ruled on the Joint Motion to Take Proffer Out of Time.⁶ Counsel for plaintiffs was aware that counsel for Hospice had stated he could not attend any of the proposed dates in December due to scheduling conflicts and specifically left the deposition open in order to allow counsel for Hospice the opportunity to cross examine Dr. Samuels at his convenience. Counsel for Hospice, thereafter, received notice of the January 24, 2013 deposition and had over one month to prepare for the cross examination of Dr. Samuels; which, due to the substance of his testimony,

⁴ On December 21, 2012, counsel for Hospice filed a motion to strike the proffer of Dr. Samuels' testimony because counsel was not notified of the taking of Dr. Samuels' deposition nor did he have the opportunity to cross examine Dr. Samuels. The motion to strike was subsequently denied by the trial court in a June 10, 2013 judgment.

⁵ Louisiana Code of Civil Procedure article 1438 provides, in pertinent part, that "[a] party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action."

⁶ In fact, the district court did not rule on the Joint Motion to Take Proffer Out of Time until February 7, 2013.

consisted mainly of reurging questions that had been posed during a previous, pre-trial deposition. Therefore, considering the circumstances of this case, we find that the plaintiffs offered the deposition of Dr. Samuels, which was subject to cross-examination by counsel for Hospice, in accordance with La. C.C.P. art. 1636(B) and as such, was properly proffered for this court's consideration.

Review on Remand

In the instant case, the supreme court found that the trial court erred in excluding the testimony of plaintiffs' expert, Dr. Samuels, and remanded the matter to this court to determine whether we can fairly find a preponderance of the evidence from the cold record. When the trial court has made a consequential but erroneous ruling on the exclusion or admission of evidence, and the record is otherwise complete, the appellate court should, if it can, render judgment on the record. McGregor v. Hospice Care of Louisiana in Baton Rouge, LLC, 14-2591, p. 1 (La. 4/24/15), __ So. 3d __ (citing Gonzales v. Xerox Corporation, 254 La. 182, 320 So. 2d 163, 165 (1975)). However, where a view of the witnesses is essential to a fair resolution of conflicting evidence, the case should be remanded to the trial court for a new trial. Ragas v. Argonaut Southwest Insurance Co., 388 So. 2d 707, 708 (La. 1980).

From our review of the record in the instant case, we find that the record is otherwise complete and remand for a new trial is not necessary for a fair resolution of the issues. Accordingly, we will review the record, including the proffered evidence, *de novo* and determine a preponderance of the evidence. See Shih Chang Hu v. Evergreen of the South, Inc., 13-1773, p. 8 (La. App. 1st Cir. 5/29/14), 148 So. 3d 1, 6, writ denied, 14-1645 (La. 11/7/14), 152 So. 3d 176.

Analysis

At issue before the trial court were plaintiffs' claims against Hospice for its alleged negligence in failing to release the remaining 20 morphine suppositories

from a partial fill prescription between July 19 and 21, 2002, and its discharge of Donald from Hospice on July 21, 2002. This court has previously determined that the requirements for proving a claim against a physician or other health care provider in a malpractice action based on negligence set forth in La. R.S. 9:2794 apply to the present action. See McGregor, 13-1979 at p. 4 and McGregor, 09-1357 at pp. 6-8, 36 So. 3d at 276-277. As such, the plaintiffs are required to prove, by a preponderance of the evidence: (1) the standard of care applicable to the defendant; (2) that the defendant breached that standard of care; and (3) that there is a causal connection between the breach and the resulting injury. See La. R.S. 9:2794(A); see also Pfiffner v. Correa, 94-0924, p. 8 (La. 10/17/94), 643 So. 2d 1228, 1233. An expert witness is generally necessary, as a matter of law, to meet the burden of proof on a medical malpractice claim. Lieux v. Mitchell, 06-0382, p. 11 (La. App. 1st Cir. 12/28/06), 951 So. 2d 307, 314, writ denied, 07-0905 (La. 6/15/07), 958 So. 2d 1199.

It is well settled in Louisiana that the court is not bound by the testimony of an expert, but such testimony is to be weighed the same as any other evidence. Harris v. State, Department of Transportation and Development, 07-1566, p. 25 (La. App. 1st Cir. 11/10/08), 997 So. 2d 849, 866, writ denied, 08-2886 (La. 2/6/09), 999 So. 2d 785. The weight to be given to the testimony of experts is largely dependent upon their qualifications and the facts upon which their opinion is based. Quinones v. United States Fidelity Guaranty Company, 93-1648 (La. 1/14/94), 630 So. 2d 1303, 1308. For an expert opinion to be valid and to merit much weight, the facts on which it is based must be substantiated by the record. Barry v. Plaquemine Towing Corporation, 96-0979, p. 5 (La. App. 1 Cir. 8/4/97), 698 So. 2d 1017, 1020, writ denied, 97-2579 (La. 1/9/98), 705 So. 2d 1102. If the opinion is based on facts not supported by the record, the opinion may be rejected. Meany v. Meany, 94-0251, p. 11 (La. 7/5/94), 639 So. 2d 229, 236.

In support of their claims against Hospice, the plaintiffs rely on the testimony of their expert, Dr. Samuels. Dr. Samuels, a doctor in internal medicine, stated that the standard of care, no matter what the relationship, in treating terminally ill cancer patients for pain due to cancer and in relieving their pain due to cancer is to supply the highest degree of pain control that keeps the patient comfortable to the patient's wishes. Based on the chronology and history of Donald being in pain and needing more medicine on Saturday, July 20, 2002, Dr. Samuels stated that release of the remainder of the partial fill prescription written by Dr. Miletello was indicated. According to Dr. Samuels, Hospice and its nurses should have authorized the release of the remainder of the prescription or alternatively, should have made a request of Dr. Miletello for that medication, and by failing to do either, Hospice breached the standard of care. Dr. Samuels further stated that even if the Hospice nurses were threatened by Robert or were refused access to Donald's house to conduct an assessment of the patient, all the nurses had to do was call the doctor for instructions. Dr. Samuels opined that in this situation, knowing that Donald had been using a certain amount of morphine suppositories over a certain period of time, you can "get away" without examining the patient, and it was the job of Hospice and its nurses to get in touch with the doctor, ask for instructions, and ask the doctor to release the medication. Furthermore, Dr. Samuels stated that there was no excuse not to call Dr. Miletello in this situation because he was Donald's treating physician and the failure to call Dr. Miletello was a breach of the standard of care.

However, Dr. Samuels admitted during his cross examination that he had never written a partial fill prescription before and that he did not know who had the authority to authorize the pharmacist to release the remainder of the partial fill prescription in this case. Additionally, Dr. Samuels acknowledged that a nurse has the obligation to assess a patient and report her findings to the physician and

follow any orders of the physician. Furthermore, Dr. Samuels stated that he had no opinion adverse to Dr. Miletello, and specifically, that he did not have an opinion that Dr. Miletello deviated from the standard of care in this case.

Merrill Patin and Mike Bourg, pharmacists called to testify on behalf of the plaintiffs, further stated that the ultimate decision as to the amount of pain medication to prescribe and/or dispense is up to the treating physician. Mr. Bourg stated that even if the prescription is written as a partial fill prescription, the doctor's orders control, and if the treating physician tells the nurse not to release the remaining medication until Monday morning, that controls. Accordingly, Mr. Bourg stated that he could not say that Hospice did anything wrong in not releasing the remaining 20 morphine suppositories if the treating physician told them not to.

Dr. Miletello, Donald's treating physician since Donald's diagnosis with cancer in 1997, testified at trial as a fact witness. Dr. Miletello stated that he prescribed Duragesic patches and morphine suppositories to control Donald's pain. The Duragesic patches are long-acting, whereas the morphine suppositories are short-acting and are used for breakthrough pain. Dr. Miletello stated that when he writes a prescription, he has an expectation as to the amount that will be used over a given period of time. Dr. Miletello stated that on the weekend in question, he wrote the prescription for 20 morphine suppositories to be released on Friday afternoon because, from his conversation with the Hospice nurse after her assessment of Donald on Friday and knowing what Donald had been taking over the past 2 or 3 days and how much he had increased Donald's Duragesic patches, he felt confident that 20 morphine suppositories would be more than enough to last Donald over the weekend. Dr. Miletello stated that he informed his partner and on-call physician for the weekend, Dr. Reine, that if the Hospice nurse should call and say that she has assessed Donald and his pain has gotten a lot worse, they can have the extra 20 morphine suppositories, but that was only if the nurse assessed

Donald and felt the pain was worse. Dr. Miletello stated that he also left instructions with Hospice that if the nurse assessed Donald and felt like his pain was out of control, the nurse was to call him or the doctor on call for him, and that he had notified the on-call doctor that she may get a call from Hospice asking for more morphine suppositories and that it was fine. Dr. Miletello stated that he left these specific orders because Robert had called his office on Friday afternoon, hostile and screaming for more pain medicine, and Robert's expectations did not coincide with the information he had received from the Hospice nurse nor with Donald's pain medication dosage and usage. Dr. Miletello stated that no one with Hospice had authority to release, on their own initiative, the remaining suppositories. Rather, his order as Donald's treating physician controlled what Hospice did, and his order to Hospice was that a Hospice nurse would have to call him or the doctor on call for him after the nurse assessed the patient, in person, in order to obtain the release of the additional 20 morphine suppositories.

Melanie Hyatt, the Hospice nurse on call during the weekend at issue, testified that she received a report when she came on call on Friday, July 19, 2002, from the Director of Nurses, Katherine Braud. The report noted that Dr. Miletello had written a prescription for morphine suppositories, that 20 were dispensed on Friday for the patient, that there were 20 more suppositories that could be dispensed on Monday morning at 9:00 a.m., and that Hospice was not allowed to dispense the additional 20 morphine suppositories before Monday morning without a physician's order. Nurse Hyatt stated that based on Dr. Miletello's orders, she would have to personally assess the patient by checking his vitals, looking for outward signs of pain, patterns, etc., before contacting the doctor or the doctor on call to obtain a release of additional medication. Nurse Hyatt stated that Robert left a message with the Hospice answering service on Sunday demanding more pain medication. Nurse Hyatt stated that she returned Robert's phone call and

explained to him that she could not deliver medication but that if she went out to the house and assessed Donald, she could see if the additional morphine suppositories were needed and call the doctor and request release of the medication. Nurse Hyatt stated that Robert became very angry and upset, screamed at her, and threatened her by telling her if she didn't get in her car and deliver the medication, he would deal with her at another time, in another jurisdiction. Nurse Hyatt also stated that he refused to allow her to go to the home and assess Donald. Nurse Hyatt stated that she reported the situation to Ms. Braud and called Dr. Reine, as the physician on call that weekend for Dr. Miletello, who told her that Hospice needed to discharge Donald so that he could be seen by her at the hospital.

From our review of the evidence in the record, we find that the plaintiffs failed to meet their burden of proof in establishing that Hospice was negligent in failing to release the remaining 20 morphine suppositories from the partial fill prescription written by Dr. Miletello. Although Dr. Samuels stated that the Hospice nurses should have authorized the release of the remainder of the partial fill prescription and their failure to do so was a breach of the standard of care, Dr. Samuels admitted that he had never written a partial fill prescription before and, more importantly, that he did not know who had authority to release the remainder of the partial fill prescription in this case. Conversely, Dr. Miletello stated that in this case, Hospice did not have the authority to release, on its own initiative, the remaining medication, but rather, Hospice was bound to follow his orders. The clear weight of the testimony in the record, even that of the plaintiffs' witnesses, supports Dr. Miletello's testimony that Hospice is bound to follow the orders of the treating physician. Furthermore, Mr. Bourg stated that he could not say that Hospice did anything wrong in not releasing the remaining medication if the treating physician told them not to. Accordingly, we find that the plaintiffs failed

to establish that Hospice breached the standard of care by failing to authorize the release of the remaining 20 morphine suppositories from the partial fill prescription written by Dr. Miletello on July 19, 2002.

Furthermore, Dr. Samuels' opinion that in this case that you can "get away" without examining the patient and that Hospice and its nurses should have made a request of Dr. Miletello for the medication and their failure to do so was a breach of the standard of care fails to consider that in this case, Dr. Miletello left specific orders with Hospice that the remaining 20 morphine suppositories could not be released unless a Hospice nurse assessed the patient, in person, and called him or the physician on call for him. These specific instructions were based on the facts of this particular case, including the nurse's assessment of Donald on Friday, Donald's medication dosage and usage history, including the recent increase in Donald's long-acting pain medicine, and Dr. Miletello's concerns regarding Robert's administration of Donald's pain medication and Robert's seemingly unreasonable characterization of Donald's condition. Nurse Hyatt's uncontradicted testimony established that when she was unable to assess Donald due to Robert's hostile and threatening behavior toward her and Robert's refusal to permit her to go to the home, she reported the matter to Ms. Braud and called Dr. Reine, as the on-call physician, for instructions. And, while Dr. Samuels contends that it was a breach of the standard of care not to call Dr. Miletello, the orders specifically directed Hospice to contact Dr. Miletello *or* Dr. Reine, who was on call for Dr. Miletello during the weekend in question. Dr. Reine was aware of Dr. Miletello's order and instructions to Hospice, and other than a statement made by plaintiffs' counsel during questioning of Dr. Samuels, there is no evidence admitted at the trial of this matter supporting any contention that Dr. Reine was not aware of and/or following Dr. Miletello's instructions. Accordingly, we likewise find that plaintiffs failed to meet their burden of proving that Hospice breached the

standard of care by failing to make a request of Dr. Miletello to release the remaining medication or in failing to call Dr. Miletello.

With regard to the plaintiffs' claim against Hospice for its discharge of Donald on July 21, 2002, we also find that the plaintiffs failed to establish that Hospice was negligent in discharging Donald from its services. The plaintiffs rely on the testimony of Dr. Samuels, who stated that Hospice's discharge of Donald on a weekend without formal notification was a breach of the standard of care. According to Dr. Samuels, the standard of care requires that if a doctor wants to stop treating a patient for whatever reason, he has to send the patient a certified letter, offering the patient a two week window to find other care and telling the patient that the doctor will send his records to the new health care provider. Additionally, the doctor has to continue to treat the patient if the patient goes to the doctor's office or the emergency room within those two weeks. Dr. Samuels was of the opinion that under no circumstances should Hospice have discharged Donald on a Sunday without a two-week notice given by certified letter and without notifying the treating physician.

However, during his cross-examination, Dr. Samuels admitted that it was his understanding that Dr. Reine worked for Hospice, and therefore, Hospice's discharge of Donald from its care also terminated Donald's care with his physician. This assumption, however, was established to be false at trial. Dr. Miletello stated that he did not work for Hospice. Additionally, Kathryn Grigsby, the Executive Director of Hospice, stated that Dr. Miletello and Dr. Reine were not employees of Hospice and a discharge by Hospice did not discharge the patient from the doctor's care. Further, Nurse Hyatt stated that Dr. Reine told her to discharge Donald so that he could be treated by her at the hospital and there was no indication that Donald was being discharged from the doctor's care. The plaintiffs, however,

provided no evidence to support Dr. Samuels' conclusion that a discharge by Hospice was also a discharge by the treating physician.

Furthermore, the testimony at trial established a pattern of behavior over the course of the weekend, which rendered Hospice unable to continue to provide services to Donald. In addition to Nurse Hyatt's telephone confrontation with Robert on Sunday, July 21, 2002, Ms. Braud testified that Robert had also exhibited hostile and threatening behavior toward her in a telephone conversation on Friday, July 19, 2002. Additionally, Ms. Grigsby stated that Robert had exhibited threatening and intimidating behavior toward her in a phone call in late June and that he had also threatened and/or mistreated several members of Hospice's staff who went into the home.

Dr. Miletello, Ms. Grigsby, and Ms. Braud established that given Robert's behavior and conduct toward Hospice and Hospice's resulting inability to have access to Donald to assess his condition, the only choice Hospice had to ensure that Donald received the care that he needed was to discharge Donald from Hospice so that he could be treated by Dr. Reine in the emergency room. Ms. Grigsby stated the policy of Hospice is that it can discharge a patient if the safety of the patient or the safety of the staff is in jeopardy, and that in this case, both were in jeopardy. Although Dr. Reine did not testify at trial, Nurse Hyatt stated that she called Dr. Reine, who was on call for Dr. Miletello, and informed her of the events that occurred on Sunday, July 21, 2002, and Dr. Reine told her to discharge Donald from Hospice so that he could be seen by her at the hospital. Nurse Hyatt's note to Ms. Braud, dated July 22, 2002, states that she called Robert on Sunday, July 21, 2002, and informed him that Hospice was discharging Donald from its services and that he could contact Dr. Reine or call Dr. Miletello for any medical attention.

Accordingly, the weight of the evidence establishes that Hospice could no longer provide care to Donald, and Hospice's decision to discharge Donald from

its services not only followed Hospice policy but ensured that Donald received the health care that he needed by enabling him to see Dr. Reine at the hospital. Furthermore, because the discharge by Hospice did not terminate the physician's care, we reject Dr. Samuels' opinion regarding the failure to provide formal notification, as that opinion is based on facts not supported by the record. See Meany, 94-0251 at p. 11, 639 So. 2d at 236. As such, we find that the plaintiffs have failed to establish that Hospice breached the standard of care by discharging Donald from its services.

CONCLUSION

For the foregoing reasons, we find that the plaintiffs have failed to meet their burden of proof in establishing that Hospice was negligent in failing to release the remaining 20 morphine suppositories and in establishing that Hospice was negligent in discharging Donald from its care. Therefore, we affirm the judgment of the trial court, dismissing plaintiffs' remaining claims against Hospice with prejudice. All costs of this appeal are assessed to the plaintiffs.

AFFIRMED.