NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2015 CA 1584

HOMER HARRIS AND AMANDA HARRIS ELLIOTT,
INDIVIDUALLY AND ON BEHALF OF THE
ESTATE OF CAROLYN C. HARRIS

VERSUS

LOUISIANA MEDICAL MUTUAL INSURANCE COMPANY,
CHRISTOPHER CHRISTENSEN, M.D., CHARLES C. BERGGREEN,
M.D., EDMOND TIPTON, M.D., GASTROENTEROLOGY
ASSOCIATES, L.L.C. AND OUR LADY OF THE LAKE REGIONAL
MEDICAL CENTER

Judgment Rendered: APR 15 2016

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Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 616507

Honorable Todd W. Hernandez, Judge

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Harry T. Widmann Metairie, LA	Attorney for Appellants Plaintiffs – Homer Harris & Amanda Harris Elliott, Individually and on Behalf of the Estate of Carolyn C. Harris
Tara S. Bourgeois Garrett S. Callaway Baton Rouge, LA	Attorneys for Appellees Defendants – Christopher Christensen, M.D., Charles Bergreen, M.D., Gastroenterology Associates, LLC, and Louisiana Medical Mutual Insurance Co.

* * * * * *

BEFORE: WHIPPLE, C.J., WELCH, AND DRAKE, JJ.

WELCH, J.

The plaintiffs, Homer Harris and Amanda Harris Elliott, individually and on behalf of the Estate of Carolyn C. Harris, appeal a trial court judgment granting summary judgment in favor of the defendants, Christopher Christensen, M.D., Charles C. Berggreen, M.D., Gastroenterology Associates, L.L.C., and Louisiana Medical Mutual Insurance Company (collectively referred to herein as "the defendants"), dismissing with prejudice all of the plaintiffs' claims. For reasons that follow, we reverse the judgment of the trial court and remand the matter for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

The limited medical evidence contained in the record establishes that on December 28, 2008, Carolyn C. Harris, was admitted to Our Lady of the Lake Regional Medical Center ("OLOL") due to a lack of bowel movements later learned to be related to a bowel obstruction. The defendants herein, gastroenterologists, were members of the healthcare team treating Ms. Harris during her stay in the hospital. Following an examination on December 29, 2008, Dr. Berggreen, ordered antibiotics and colon prep in anticipation of a colonoscopy scheduled for December 30, 2008. At that time, Dr. Berggreen was suspicions that Ms. Harris may be suffering from ileus and segmental colitis and/or ischemic colitis in the sigmoid colon. However, the scheduled colonoscopy did not take place on December 30, 2008, and at midnight on January 1, 2009, Ms. Harris was moved to ICU due to respiratory issues. Ms. Harris was administered various purgatives based on the defendants' orders over the course of her stay at OLOL, including on January 4, 2009, in preparation for a colonoscopy scheduled the following day. On January 5, 2009, the defendant, Dr. Christensen, performed a colonoscopy on Ms. Harris whereupon he encountered a possible volvulus of the sigmoid. Ms. Harris's colon was perforated during the colonoscopy, and she

experienced vomiting, which she aspirated. Shortly thereafter, Ms. Harris went into cardiorespiratory arrest and died.

The plaintiffs filed a request for a medical review panel against multiple health care providers, including the defendants. On September 24, 2012, the medical review panel issued a unanimous opinion finding that there was no evidence to support the conclusion that any of the named health care providers failed to meet the applicable standard of care as charged in the plaintiffs' complaint. The plaintiffs filed suit in district court on October 24, 2012, naming as defendants, Dr. Berggreen, Dr. Christenson, Gastroenterology Associates, LLC, OLOL, and Edmond Tipton, M.D. Dr. Tipton and OLOL were dismissed from the action with prejudice following the submission of an unopposed motion for summary judgment.

On December 2, 2013, the defendants propounded interrogatories on the plaintiffs requesting the name of any expert who may testify at the trial that the defendants had breached the standard of care in connection with their treatment of Ms. Harris. On December 19, 2013, counsel for the defendants sent follow-up correspondence requesting that the plaintiffs respond to the outstanding interrogatories.

On February 12, 2014, after receiving no response to their interrogatories from the plaintiffs, the defendants filed a motion for summary judgment.[1] The defendants asserted that they were entitled to summary judgment based on the plaintiffs' failure to identify an expert witness to testify that defendants breached the applicable standard of care in treating Ms. Harris. The defendants attached an uncertified copy of the medical review panel's opinion and the unanswered

[1] Louisiana Code of Civil Procedure article 966 was amended by Acts 2015, No. 422, § 1, effective January 1, 2016. Section 2 of the Acts 2015, No. 422, provides that: "[t]he provisions of this Act shall not apply to any motion for summary judgment pending adjudication or appeal on the effective date of this Act." Here, the pendency of the instant appeal on the effective date of Acts 2015, No. 422 results in the application of the prior version of La C.C.P. art. 966 to the instant matter.

discovery requests propounded on the plaintiffs to their motion for summary judgment. The trial court set the hearing on the defendants' motion for summary judgment for March 31, 2014. The plaintiffs failed to file an opposition to the motion for summary judgment eight days prior to the scheduled hearing. Instead, on the morning of the March 31, 2014 hearing, counsel for the plaintiffs, filed an "Emergency Motion to Continue."

In the motion to continue, counsel for the plaintiffs asserted that he had a scheduling conflict in the form of a trial in Jefferson Parish beginning on March 31, 2014. Counsel for the plaintiffs alleged that he erroneously believed that he had brought this conflict to the attention of counsel for the defendants. Also, attached to the motion to continue was a copy of the plaintiffs' responses to the defendants' December 2, 2013 interrogatories, which identified Norman Haines, M.D., as an expert for the plaintiffs. The plaintiffs' discovery responses were also faxed to the defendants on Sunday, March 30, 2014.

The record contains no transcript of the March 31, 2014 hearing on the motion to continue. However, according to the minutes of court and the trial court's order signed March 31, 2014, the trial court granted the plaintiffs a continuance of the hearing on the defendants' motion for summary judgment. The minutes of court note that attorney, Mary Beck Widmann, appeared on behalf of plaintiffs' counsel, Harry T. Widmann. Ms. Widman reiterated that Mr. Widmann mistakenly believed that he had notified defense counsel of his scheduling conflict. Despite the objection of defendants, the trial court granted the continuance and rescheduled the hearing on the defendants' motion for summary judgment for May 19, 2014. An order continuing the hearing was signed on March 31, 2014.

The defendants maintain that the trial court took notice in open court on March 31, 2014, that the plaintiffs had not filed an opposition memorandum and/or affidavit prior to or at the hearing on the defendants' motion for summary

judgment and informed all parties that if the plaintiffs filed an opposition memorandum and/or expert affidavit prior to the rescheduled hearing date of May 19, 2014, the trial court would consider a motion to strike any such memorandum and/or affidavit as untimely filed. However, there is no reference in the minutes of court or the order granting the continuance referencing modified filing deadlines, or restricting the plaintiffs from filing an opposition. The defendants did not seek review of the trial court's March 31, 2014 decision at the time it was issued, nor have they challenged the granting of the continuance in the instant appeal.

On May 8, 2014, in opposition to the defendants' motion for summary judgment, the plaintiffs filed an opposition memorandum and the expert affidavit of Dr. Haines. Dr. Haines, who is board certified in gastroenterology and internal medicine, opined that the care and treatment of Ms. Harris rendered by the defendants did not comply with the standard of care in gastroenterology in 2008 to a reasonable degree of medical certainty, and said failure to comply with the standard of care was a substantial cause of Ms. Harris's death. The defendants moved to strike the plaintiffs' opposition memorandum and affidavit averring that the plaintiffs' failure to file an opposition memorandum and affidavit prior to the March 31, 2014 hearing, rendered the plaintiffs' May 8, 2014 filing untimely pursuant to La. Code Civ. P. art. 966(B) and the holding of **Newsome v. Homer Memorial Medical Center**, 2010-0564 (La. 4/9/10), 32 So.3d 800 (*per curiam*). Additionally, the defendants' motion to strike alleged that at the March 31, 2014 hearing on the motion to continue, the trial court had recognized the defendants' right to seek the exclusion of any opposition memorandum and affidavit filed by the plaintiffs.

The defendants' motion to strike and motion for summary judgment were heard on May 19, 2014. The trial court granted both motions in the defendants' favor in a judgment signed on June 11, 2014. The plaintiffs responded with a

motion for a new trial asserting that the trial court's judgment granting the defendants' motion to strike and motion for summary judgment was a legal error, because the plaintiffs had timely submitted sufficient evidence to defeat the motion.[2] Alternatively, the plaintiffs maintained that the defendants' evidence, including the uncertified medical review panel opinion, was insufficient to shift the burden of proof to the plaintiffs. Finding its earlier decisions supported by the law and evidence, the trial court denied the plaintiffs' motion for new trial in a judgment signed June 17, 2015. The instant devolutive appeal filed by the plaintiffs followed.

ASSIGNMENTS OF ERROR

In the plaintiffs' first two assignments of error, they assert that the trial court erred as a matter of law in striking the plaintiffs' opposition memorandum and affidavit. First, the plaintiffs contend that the opposition memorandum and affidavit should have been considered by the trial court as they were timely filed more than eight days prior to the May 19, 2014 hearing. Second, the plaintiffs contend that the defense failed to make a showing of prejudice sufficient to justify

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[2] Louisiana Code of Civil Procedure article 1974 provides that "[t]he delay for applying for a new trial shall be seven days, exclusive of legal holidays[,]" and commences to run on the day after the clerk has mailed, or the sheriff has served, the notice of judgment as required by La. C.C.P. art. 1913. Under La. C.C.P. art. 1913(D), the clerk is required to file a certificate in the record showing the date on which, and the counsel and parties to whom, notice of the signing of the judgment was mailed. A clerk's certificate is not conclusively presumed to be correct and may be corrected on proper showing. See **Soileau v. Tri-State Mutual Insurance Co.**, 206 So.2d 716, 718 (La. App. 3rd Cir. 1967).

In the instant appeal, the clerk's certificate of mailing states that the June 11, 2014 judgment of the trial court was mailed on June 13, 2014. The plaintiffs' motion for new trial was filed on June 27, 2014. The plaintiffs asserted that their motion for new trial was timely, despite the recitation of mailing by the clerk on June 13, 2014, because the trial court's judgment was actually mailed on June 18, 2014. To support their assertion that the notice of judgment was mailed on June 18, 2014, at the hearing on the motion for new trial, the plaintiffs entered into evidence the notice of judgment and envelope from the clerk evidencing a June 18, 2014 postmark. At the hearing on the motion for new trial, after discussing the discrepancy between the postmark and the clerk's certificate of mailing, counsel for the defendants stated that to the extent the trial court would go by the postmarked date as the actual date of mailing, they would accept the January 18, 2014 mailing date. The defendants did not present any evidence to counter the plaintiffs' evidence and the trial court ruled on the merits of the motion. The defendants have not challenged the timeliness of the plaintiffs' filing of the motion for new trial in the instant appeal. Here, mindful that appeals are favored, we find that based on the evidence presented at the hearing, the plaintiffs' motion for new trial was timely filed.

the trial court striking the opposition memorandum and Dr. Haines's affidavit. The plaintiffs' third assignment of error contends that the trial court erred in granting the defendants' motion for summary judgment, because said motion was not supported by evidence sufficient to shift the burden of proof to the plaintiffs under La. C.C.P. art. 966(B). Finally, the plaintiffs assert that because the trial court's rulings on the motion to strike and motion for summary judgment were in error, the trial court's denial of the plaintiffs' motion for new trial was also in error.

STANDARD OF REVIEW

Appellate courts review the trial court's exclusion of an opposition or affidavit to a motion for summary judgment for abuse of discretion as long as there is no prejudice to the other party. See **Buggage v. Volks Constructors**, 2006-0175 (La. 5/5/06), 928 So.2d 536 (*per curiam*); **James Construction Group, L.L.C. v. State ex rel. Department of Transportation & Development**, 2007-0225 (La. App. 1st Cir. 11/2/07), 977 So.2d 989, 999-1000. Summary judgments are reviewed on appeal *de novo* using the same criteria as the trial court in determining whether summary judgment is appropriate. **Jones v. Estate of Santiago**, 2003-1424 (La. 4/14/04), 870 So.2d 1002, 1006.

APPLICABLE LAW AND DISCUSSION

MOTION TO STRIKE

We first address the plaintiffs' contention that the trial court erred in granting the motion to strike, and erroneously found that that the plaintiffs' opposition memorandum and affidavit filed on May 8, 2014 were untimely under La. C.C.P. art. 966(B) and Rule 9.9. Louisiana Code of Civil Procedure article 966(B)(1) provides that unless the trial court grants the adverse party additional time, a party opposing a motion for summary judgment shall serve opposing affidavits and any memorandum in support pursuant to La. C.C.P. art. 1313, and

within the time limits set forth in the Uniform Rules of Louisiana District Courts, Rule 9.9. Rule 9.9(c) provides in pertinent part:

> A party who opposes an exception or motion shall concurrently furnish the trial judge and serve on all other parties an opposition memorandum at least *eight calendar days before the scheduled hearing*. [Emphasis added.]

Rule 1.4 of the Uniform Rules of Louisiana District Courts provides as follows regarding deviations from the Rules:

> An individual judge may, in the interest of justice and upon notice to all parties, permit deviations from these Rules in a particular proceeding. Any such deviation shall be noted on the record in open court in the presence of all parties or by written order filed into the record of the proceedings and mailed to all parties or their counsel of record.

"The purpose of requiring the opposition memorandum to be served on the mover 'at least' eight days before the hearing is to allow both the court and mover sufficient time to narrow the issues in dispute and prepare for argument at the hearing." **Mahoney v. East Carroll Parish Police Jury**, 47,494 (La. App. 2nd Cir. 9/26/12), 105 So.3d 144, 151, writ denied, 2012-2684 (La. 2/8/13), 108 So.3d 88. The time limitation established by La. C.C.P. art. 966(B) for the serving of affidavits in opposition to a motion for summary judgment is mandatory; thus, "affidavits not timely filed can be ruled inadmissible and properly excluded by the trial court." **Buggage**, 928 So.2d at 536. However, absent prejudice, the decision to allow a late-filed opposition or affidavit is within the discretion of the trial court. See *Id.*; **James Construction Group, L.L.C.** 977 So.2d at 999.

The plaintiffs argue that they complied with La. C.C.P. art. 966(B) and Rule 9.9 by submitting their opposition memorandum and supporting affidavit at least eight days prior to the scheduled May 19, 2014 hearing. The plaintiffs maintain that good grounds existed for the granting of the continuance of the March 31, 2014 hearing on the defendants' motion for summary judgment based on plaintiffs' counsel's trial pending in Jefferson Parish. See La. C.C.P. art. 1601. The plaintiffs

aver that the effect of the granting of the continuance of the hearing until May 19, 2014 also served to allow for the filing of the plaintiffs' opposition memorandum and affidavit at least eight days before the scheduled May 19, 2014 hearing date. Finally, the plaintiffs contend that the defendants failed to demonstrate that they were prejudiced by the continuance of the March 31, 2014 hearing.

The defendants counter that the plaintiffs' failure to file an opposition memorandum or affidavit at least eight days before the originally set March 31, 2014 hearing precluded the later filing of an opposition memorandum and/or affidavit. Essentially, the defendants maintain that the only effect of continuing the hearing was to allow counsel for the plaintiffs to be present at the rescheduled hearing on the motion for summary judgment, but that the continuance did not effectuate an extension of the filing deadlines for plaintiffs' opposition memorandum or affidavit. The defendants contend that allowing the plaintiffs to file an opposition memorandum and affidavit after the March 31, 2014 hearing would have impermissibly created a situation whereby a continuance was utilized to allow a late-filed affidavit to be considered timely. The defendants contend that the Louisiana Supreme Court decision in **Newsome** supports their position and controls the outcome herein.

In **Newsome**, the supreme court considered whether the trial court had abused its discretion by granting a second motion to continue filed by the plaintiff in a medical malpractice action for the purpose of allowing the plaintiff to timely file an affidavit in support of plaintiff's opposition. There, plaintiff requested a second continuance of a motion for summary judgment hearing seven days prior to the date of the second scheduled hearing and also attempted to file an expert affidavit on the date of the rescheduled hearing. The plaintiff represented to the trial court that granting a second continuance would allow the affidavit to be filed at least eight days before the scheduled hearing and be considered timely. The trial

court granted the requested second continuance, rescheduled the hearing on the motion, and allowed the late-filed affidavit to be filed into the record. The court of appeal affirmed the lower court.

However, the supreme court found the trial court had abused its discretion in granting the continuance because the "good cause" for the second continuance was only to allow plaintiff's counsel to comply with Rule 9.9 requiring the affidavit supporting the opposition to be filed at least eight days before the hearing. **Newsome**, 32 So.2d at 802. The supreme court found little merit in the plaintiff's counsel's assertion that she was unable to obtain an expert or an expert's affidavit earlier because a trial scheduled for one week turned into a three-week trial. The supreme court found, "[u]nder the facts of this case, the trial court abused its discretion in granting the motion for continuance solely in order to allow plaintiff's expert's affidavit to be filed in compliance with the eight-day limit contained in Article 966." **Newsome**, 32 So.3d at 802.

We find **Newsome** and other similar Louisiana Supreme Court cases addressing the admission of late-filed opposition affidavits distinguishable from the instant matter. See **Guillory v. Chapman**, 2010-1370 (La. 9/24/10), 44 So.3d 272 (*per curiam*); **Sims v. Hawkins-Sheppard**, 2011-0678 (La. 7/1/11), 65 So.3d 154 (*per curiam*).[3] In **Newsome**, **Guillory**, and **Sims**, the plaintiffs had previously

[3] In **Guillory**, the supreme court reinstated the trial court's granting of a motion for summary judgment, finding that the trial court did not abuse its discretion in excluding the late-filed affidavit of the plaintiff. **Guillory**, 44 So.3d at 272. Review of the facts reveals that the original hearing on the defendants' motion for summary judgment was set for February 9, 2009, but then rescheduled for March 9, 2009 upon plaintiff's request. The affidavit was considered late-filed by the trial court when it was filed seven days before the March 9, 2009 hearing. See **Guillory v. Chapman**, 2009-1005 (La. App. 3rd Cir. 5/12/10) 38 So.3d 573, 575. In **Sims**, the original hearing on the motion for summary judgment was also continued. Prior to the second hearing on the motion, the plaintiff attempted to oppose the motion for summary judgment with an unsigned affidavit from a doctor and indicated that a signed affidavit would be produced at the hearing. **Sims**, 65 So.3d at 155-156. On the date of the rescheduled hearing the plaintiff was unable to produce a signed affidavit. Also, the plaintiff informed the trial court that she wished to terminate counsel. The trial court informed the plaintiff that terminating counsel would not delay the proceedings, which had already been continued at the plaintiff's request, and granted both the defendant's motion for summary judgment and the plaintiff's motion to terminate counsel. **Sims**, 65 So.3d at 156-157. The court of appeal reversed finding that the trial court should have granted the plaintiff additional time to secure new counsel and a signed affidavit.

been granted motions to continue the original hearing on the defendants' motions for summary judgment. **Newsome**, 32 So.3d at 801; **Guillory v. Chapman**, 2009-1005 (La. App. 3rd Cir. 5/12/10) 38 So.3d 573, 575; **Sims**, 65 So.3d at 155. Further, in those three cases, the challenged affidavits were filed late in relation to the *second* scheduled hearing on the motion for summary judgment. Notably, review of the facts in those cases indicates that the eight-day deadline was calculated from the date of the second scheduled setting of the motion for summary judgment. **Newsome**, 32 So.3d at 801; **Guillory**, 38 So.3d at 272; **Sims**, 65 So.3d at 155-156. In other words, the determination of whether the affidavits were timely under La. C.C.P. art. 966(B) and Rule 9.9 in those cases was calculated from the date of the "*rescheduled*" hearing. Further, there is no indication in the record herein that the continuance granted on March 31, 2014 was solely for the purpose of allowing the plaintiffs to timely file an opposition memorandum and affidavit in compliance with the eight-day limit contained in La. C.C.P. art. 966. Based on these distinctions, we find nothing in **Newsome**, **Guillory**, or **Sims**, to support the defendants' position that the plaintiffs' failure to file their opposition memorandum and affidavit prior to the first continuance on March 31, 2014 precludes the application of the filing deadlines set forth in La. C.C.P. art. 966(B) and Rule 9.9 to the rescheduled hearing on May 19, 2014. As such, we find the plaintiffs' memorandum in opposition and affidavit filed on May 8, 2014 timely, as they were filed more than eight days before the May 19, 2014 scheduled hearing,

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The supreme court reversed the court of appeal and citing **Newsome** and **Guillory**, held that the trial court did not abuse its discretion in refusing to allow the plaintiff additional time to secure a proper affidavit. In particular, the supreme court noted that the plaintiff's counsel had known of the expert doctor's willingness to serve as an expert for some time, but did not send the doctor medical records or a copy of the affidavit until two weeks before the second rescheduled hearing. The supreme court concluded that "[t]hese facts do not constitute 'good cause' for failing to comply with the time limits found in La. C.C.P. art. 966(B) or District Court Rule 9.9(b), which require serving opposing affidavits eight calendar days before the scheduled hearing." **Sims,** 65 So.3d at 156-157.

and in compliance with the controlling filing deadlines set forth in La. C.C.P. art. 966(B) and Rule 9.9.

We note that the defendants' contention that at the March 31, 2014 hearing the trial court informed counsel for the defendants that they could file a motion to strike if the plaintiffs later opposed the summary judgment by submitting an expert affidavit "after the deadline for doing so had already passed." The trial court also references this statement in its later issued judgments on the motion to strike, motion for summary judgment, and motion for new trial. Based on our finding that the deadlines set forth in La. C.C.P. art. 966(B) and Rule 9.9 apply to the May 19, 2014 hearing, an order by the trial court prohibiting the filing of an opposition memorandum or affidavit following the granting of the March 31, 2014 continuance would constitute a deviation from Rule 9.9. As noted above, Rule 1.4 of the Uniform Rules of Louisiana District Courts permits deviations from the rules in a particular proceeding; however, any such deviation shall be noted either (1) on the record in open court in the presence of all parties, or (2) by written order filed into the record of the proceedings and mailed to all parties or their counsel of record. Here, the record lacks a transcript of the March 31, 2014 hearing and the court minutes and order granting the continuance contained in the record contain no mention of an order constituting a deviation from the filing deadlines for opposition memorandums and affidavits set forth in in La. C.C.P. art. 966(B) and Rule 9.9. In light of the above, we can find no basis in the record to support a finding that the trial court deviated from the applicable filing deadlines when granting the motion to continue on March 31, 2014.

For the above reasons, we find no legal basis to support the trial court's finding that the plaintiffs' opposition memorandum and affidavit filed on May 8, 2014 were untimely; therefore, we are constrained to find that the trial court

abused its discretion in granting the defendants' motion to strike and excluding the plaintiffs' opposition memorandum and affidavit.

SUMMARY JUDGMENT

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. **Granda v. State Farm Mutual Insurance Company**, 2004-2012 (La. App. 1st Cir. 2/10/06), 935 So.2d 698, 701. Summary judgment is proper only if the pleadings, depositions, answers to interrogatories, and admissions, together with any affidavits, if any, admitted for purposes of the motion for summary judgment, show there is no genuine issue of material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B)(2).

To establish a claim for medical malpractice, a plaintiff must 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 was a causal connection between the breach and the resulting injury. La. R.S. 9:2794; **Hoot v. Woman's Hospital Foundation**, 96-1136 (La. App. 1st Cir. 3/27/97), 691 So.2d 786, 789, writ denied, 97-1651 (La. 10/3/97), 701 So.2d 209.

The initial burden of proof rests on the defendants to show that no genuine issue of material fact exists. La. C.C.P. art. 966(C)(2). In motions for summary judgment in the context of medical malpractice, the burden of proof does not require the medical care provider to disprove medical malpractice, but only to raise as the basis of their motion that the plaintiffs cannot support their burden of proof at trial to demonstrate medical malpractice. **Samaha v. Rau**, 2007-1726 (La. 2/26/08), 977 So.2d 880, 884. Once the medical care provider has made a prima facie showing that the motion should be granted, then the burden shifts to the plaintiffs to present evidence sufficient to establish that they will be able to meet their burden of proof at trial. See La. C.C.P. art. 966(C)(2).

To meet the burden of proof in a medical malpractice action, the plaintiff is generally required to produce medical expert testimony as a matter of law. **Fagan v. LeBlanc**, 2004-2743 (La. App. 1st Cir. 2/10/06), 928 So.2d 571, 575. Notably, the jurisprudence recognizes limited exceptions to the requirement of expert testimony in those instances where the claim arises out of an "obviously careless act" from which a lay person can infer negligence. **Pfiffner v. Correa**, 94-0924, 94-0963, 94-0992 (La. 10/17/94), 643 So.2d 1228, 1233. Here, the pleadings demonstrate that the medical malpractice alleged by the plaintiffs was not of the type which was so egregious that malpractice would be obvious to a lay person.

In light of our finding that the trial court improperly excluded the plaintiffs' opposition memorandum and affidavit, we now conduct a *de novo* review of the evidence submitted on the motion for summary judgment at issue herein. We first must address the plaintiffs' assertions that the defendants' motion for summary judgment contained insufficient evidence to shift the burden of proof to the plaintiffs under La. C.C.P. art. 966(C)(2). In particular, the plaintiffs challenge the trial court's consideration of an uncertified copy of the medical review panel opinion attached to the motion for summary judgment. The plaintiffs also maintain that their discovery responses submitted in March of 2014 identifying Dr. Haines as their expert demonstrated that they could meet their burden of proof at trial.

We agree that the uncertified and unsupported opinion of the medical review panel opinion attached to the defendants' motion for summary judgment was insufficient under La. C.C.P. arts. 966 and 967 to serve as evidence properly considered on a motion for summary judgment.[4] See **Simmons v. Berry**, 98-0660,

[4] The plaintiffs challenge the trial court's decision to allow the defendants to admit into the record a copy of the medical review panel opinion with affidavits containing the oaths of the medical review panel members at the hearing on the motion for new trial. Review of the transcript reveals that the trial court admitted the exhibit for purposes of the motion for new trial only and not in connection for any other hearing in the matter. Regardless, our finding herein that the plaintiffs presented sufficient timely evidence to defeat the motion for summary judgment and related finding that the trial court erred in denying the plaintiffs' motion for new

(La. App. 1st Cir. 12/22/00), 779 So.2d 910, 916. However, as noted above, the defendants were required only to show that the plaintiffs had not produced medical expert testimony necessary to support their burden of proof to demonstrate medical malpractice. The defendants demonstrated that the plaintiffs had not produced expert medical testimony to support their claim by attaching unanswered interrogatories propounded on the plaintiffs to their motion for summary judgment. Mindful that the plaintiffs were required to produce expert opinion evidence, we disagree with the plaintiffs' contention that their discovery responses dated March 30, 2014, identifying Dr. Haines without an attached expert opinion was sufficient evidence to prevent the defendants from meeting their initial burden of proof. See **Samaha**, 977 So.2d at 886; **Richardson ex rel. Brown v. Lagniappe Hospital Corporation**, 33,378 (La. App. 2nd Cir. 5/15/00), 764 So.2d 1094, 1099, on rehearing in part, 33,378 (La. App. 2nd Cir. 6/21/00), 801 So.2d 386. As such, we find no merit in the plaintiffs' argument that the defendants failed to meet their initial burden of proof on summary judgment.

Regardless, we find that Dr. Haines's affidavit creates an issue of material fact as to whether the defendants breached the standard of care in their treatment of Ms. Harris, and whether said breach resulted in injury to Ms. Harris. As to Dr. Berggreen, Dr. Haines attested that Ms. Harris's physical symptoms, signs, and CT Scan results pointed to a bowel obstruction as a consequence of a volvulus. According to Dr. Haines's report, the standard of care required that Dr. Berggreen perform a colonoscopy with air insufflation, which, to a reasonable degree of medical certainty, would have resulted in an untwisting of the volvulus and resolution of the obstruction. Dr. Haines further attested that in the event the colonoscopy failed, Dr. Berggreen should have proceeded with a Barium enema

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trial renders the plaintiffs' objection to the trial court's admission of the medical review panel opinion at the hearing on the motion for new trial moot.

with pressure in rectum, which also would have, to a reasonable degree of medical certainty, resulted in an untwisting of the bowel. However, in the event either of the two above mentioned procedures failed, Dr. Haines opined that the volvulus could have been surgically resolved.

Additionally, Dr. Haines attested that it is an absolute contraindication and below the standard of care to give anything orally to a patient with bowel obstruction; thus, Dr. Haines opined that Dr. Berggreen's and other members of Gastroenterology Associates, LLC's, administering of oral fluids and purgatives over the course of Ms. Harris's stay at OLOL was a breach of the standard of care. Dr. Haines's affidavit opines that in light of the obstruction, the administration of oral fluids and purgatives would have caused dilation and ischemia of the bowel, which would lead to perforation. Finally, with regard to Dr. Christensen, Dr. Haines attested that his orders for oral purgatives and water to evacuate the bowel prior to the January 5, 2009 colonoscopy were contraindicated and below the standard of care. Dr. Haines opined that Ms. Harris's colon perforation, aspiration and death would not have occurred had the defendants' care team complied with the standard of care outlined in his report.

We find that the affidavit of Dr. Haines creates a factual dispute as to whether the defendants breached the standard of care, and whether there was a causal connection between the defendants' breach and the resulting injury to Ms. Harris. For the foregoing reasons, we find the trial court erred in granting summary judgment in favor of the defendants. Moreover, based on our findings that the trial court improperly granted the motion for summary judgment, we find the trial court's denial of the plaintiffs' motion for new trial was in error.

CONCLUSION

For the above reasons, we reverse the June 11, 2014 and June 17, 2015, judgments of the trial court resulting in the dismissal of the claims by

plaintiffs/appellants, Homer Harris and Amanda Harris Elliott, individually, and on behalf of the Estate of Carolyn C. Harris, against the defendants/appellees, Christopher Christensen, M.D., Charles C. Berggreen, M.D., Gastroenterology Associates, L.L.C., and Louisiana Medical Mutual Insurance Company, and remand this matter to the trial court for further proceedings.

All costs of this appeal are to be paid by the defendants/appellees, Christopher Christensen, M.D., Charles C. Berggreen, M.D., Gastroenterology Associates, L.L.C., and Louisiana Medical Mutual Insurance Company.

REVERSED AND REMANDED.