

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2017 CA 0382

DANELL BRICE

VERSUS



TIMOTHY BRAGGS, SHIFA HEALTH ASSOCIATES, L.L.C., SHIFA MEDICAL
TRANSPORTATION, L.L.C., SERENITY CENTER, L.L.C., SERENITY
COMMUNITY MENTAL HEALTH CENTER, L.L.C., HOPE VILLAGE, INC., HOPE
VILLAGE PROPERTIES, L.L.C., NEEMWOOD VILLAGE, PSYCHCARE OF
LOUISIANA, L.L.C., PSYCHCARE SOLUTIONS, L.L.C., PSYCH MANAGEMENT,
L.L.C., ZAHID IMRAN, M.D., VASANTHI VINAYAGAM, M.D. AND JANE DOE

Judgment rendered **NOV 01 2017**

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Appealed from the
19th Judicial District Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court No. C589145
Honorable William A. Morvant, Judge

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VASANTHI VINAYAGAM, M.D. AND
LYNN SIMON, M.D.

* * * * *

BEFORE: GUIDRY, PETTIGREW, AND CRAIN, JJ.



PETTIGREW, J.

In this case arising from an attack on a home health nurse by a patient, the nurse appeals a summary judgment dismissing her claims against two physicians. We affirm.

FACTS AND PROCEDURAL HISTORY

Plaintiff, Danell Brice, a home health nurse, was attacked by a patient, Timothy Braggs, during a home health visit in Mr. Braggs' apartment on April 2, 2009. Ms. Brice filed a petition for damages against a number of defendants, including Mr. Braggs' treating physicians, for injuries she allegedly sustained in the attack.

Mr. Braggs was admitted to Serenity Community Mental Health Center ("Serenity"), an outpatient partial day program and group therapy center for psychiatric patients, on March 3, 2009. Upon admission to Serenity, it was noted that Mr. Braggs was "poorly integrated and very psychotic" and that he had a history of noncompliance with medication. His initial psychiatric evaluation on the date of his admission includes a note to "add Haldol." While being treated at Serenity, Mr. Braggs lived independently at Hope Village, Inc., a residential facility for psychiatric patients, and began receiving home health services on March 13, 2009. A Home Health Certification and Plan of Care form dated March 13, 2009, and signed by Danell Brice, R.N. as the nurse completing or reviewing the form, lists Mr. Braggs' diagnoses as Paranoid Schizophrenia and Benign Hypertension, and included maintaining medication compliance as one treatment goal. A March 17, 2009 Physician Progress Note states that Mr. Braggs had "responded favorably" to medication, although he remained "poorly integrated [and] essentially out of contact."

On April 2, 2009, Ms. Brice was sent to Hope Village for home health visits with several patients, including Mr. Braggs. Ms. Brice alleges that as she was checking Mr. Braggs' blood pressure in his apartment, he began to make inappropriate sexual advances towards her and touched her leg. She became fearful and started to leave the apartment, but Mr. Braggs "shoved [her] in a corner by the door." She pushed him away from her and left the apartment. Ms. Brice claims that she sustained injuries in the act of pushing Mr. Braggs away from her.

In her suit for damages arising from the attack, Ms. Brice made claims against Dr. Lynn Simon, a psychiatrist who treated Mr. Braggs at Serenity for psychiatric conditions and complaints, and Dr. Vasanthi Vinayagam, a Family Medicine physician who treated Mr. Braggs at Serenity for minor medical issues. Ms. Brice claimed that these two doctors were negligent in failing to warn her that Mr. Braggs' medication had been changed, failing to provide her with adequate security when treating Mr. Braggs, failing to protect her from the predictable risk of assault by Mr. Braggs, and failing to maintain the applicable standard of care.

Drs. Vinayagam and Simon filed motions for summary judgment, which were granted by the court, and Ms. Brice's claims against the doctors were dismissed with prejudice on October 31, 2016. Ms. Brice appealed, arguing that the trial court erred in finding that there was no genuine issue of material fact as to whether Mr. Braggs' treating physicians observed violent and/or sexually assaultive behavior prior to the alleged attack and in finding that Drs. Vinayagam and Simon did not have a duty to communicate information, such as medication changes or violent or sexually assaultive behavior, to other healthcare providers so that they could guard against the risks presented.

DISCUSSION

A motion for summary judgment shall be granted if the motion, memorandum, and supporting documents show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(A)(3). The burden of proof rests with the mover; however, if the mover will not bear the burden of proof at trial on the issue that is before the court, then the mover is only required to point out to the court the absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, the burden is on the adverse party to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law. La. C.C.P. art. 966(D)(1).

An appellate court reviews a trial court's granting of a motion for summary judgment de novo, using the same criteria that govern the trial court's consideration of

whether summary judgment is appropriate. **Smith v. Northshore Regional Medical Center, Inc.**, 14-0628, p. 3 (La. App. 1 Cir. 1/26/15), 170 So.3d 173, 176. Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material, for purposes of summary judgment, can be seen only in light of the substantive law applicable to the case. **Id.**

Louisiana Revised Statutes 9:2800.2 governs a psychiatrist's duty to warn a potential victim or victims or to take reasonable precautions to provide protection from violent behavior:

- A. When a patient has communicated a threat of physical violence, which is deemed to be significant in the clinical judgment of the treating psychologist or psychiatrist, or marriage and family therapist, or licensed professional counselor, or social worker, against a clearly identified victim or victims, coupled with the apparent intent and ability to carry out such threat, the psychologist, licensed under R.S. 37:2351 through 2369, the medical psychologist, licensed under R.S. 37:1360.51 through 1360.72, the psychiatrist, licensed under R.S. 37:1261 through 1291, or the social worker, credentialed under R.S. 37:2701 through 2723, treating such patient and exercising reasonable professional judgment, shall not be liable for a breach of confidentiality for warning of such threat or taking precautions to provide protection from the patient's violent behavior.
- B. A psychologist's, psychiatrist's, or marriage and family therapist, or licensed professional counselor, or social worker's duty to warn or to take reasonable precautions to provide protection from violent behavior arises only under the circumstance specified in Subsection A of this Section. This duty shall be discharged by the psychologist, psychiatrist, or marriage and family therapist, or licensed professional counselor, or social worker if the treating professional makes a reasonable effort to communicate the threat to the potential victim or victims and to notify law enforcement authorities in the vicinity of the patient's or potential victim's residence.
- C. No liability or cause of action shall arise against any psychologist, psychiatrist, or marriage and family therapist, or licensed professional counselor, or social worker based on an invasion of privacy or breach of confidentiality for any confidence disclosed to a third party in an effort to discharge the duty arising under Subsection A of this Section.

Thus, a psychiatrist owes a duty to protect third persons from physical violence by a patient only in the limited scenario set forth in the statute – a threat of physical violence, deemed significant by the treating psychiatrist, against a clearly identified victim, with apparent intent and ability to carry it out. **Dunnington v. Silva**, 04-1788, p. 4 (La. App. 1 Cir. 9/28/05), 916 So.2d 1166, 1168-69. Furthermore, La. R.S. 9:2800.2 provides an

exclusive remedy, and there can be no liability by a psychiatrist for a failure to warn or to take reasonable precautions to provide protection from violent behavior outside of the statute. **Id.**, 04-1788 at p. 7, 916 So.2d at 1170.

The allegations of Ms. Brice's petition against Dr. Simon are clearly governed by La. R.S. 9:2800.2. Therefore, Dr. Simon can only be liable for failing to warn or protect Ms. Brice from his patient in accordance with the terms of that statute; i.e., if Mr. Braggs communicated a threat of physical violence, which was deemed to be significant in Dr. Simon's clinical judgment, against Ms. Brice, coupled with the apparent intent and ability to carry out the threat, and Dr. Simon failed to warn her or take reasonable precautions to protect her from the violent behavior.

In support of his motion for summary judgment, Dr. Simon submitted his own affidavit, which stated that he had never observed any violent or assaultive behavior by Mr. Braggs, nor did Mr. Braggs ever communicate any threat of violence against any person, from the date of his admission through the date of the alleged attack on Ms. Brice. Dr. Simon further stated that no person ever communicated to him that Mr. Braggs was violent or exhibited any signs of violence during that time frame, and upon review of Mr. Braggs' medical records, Dr. Simon found no documentation of any signs of violence or indication that Mr. Braggs was a danger to anyone prior to the alleged attack.

Thus, Dr. Simon pointed out an absence of factual support for an element of Ms. Brice's claim. The burden then shifted to Ms. Brice, who was required in order to defeat Dr. Simon's motion for summary judgment, to set forth specific facts to prove that a specific threat of physical violence against a clearly identified victim was communicated to Dr. Simon by Mr. Braggs in order to show that there was a genuine issue of material fact for trial.

In opposition to summary judgment, Ms. Brice pointed to a Progress Note in Mr. Braggs' medical records dated 3/31/09,¹ which states that Mr. Braggs was "increasingly

¹ This Progress Note is marked "Late Entry." It is not clear whether "3/31/09" was the date the comment was made in group therapy or the date the note was written.

inappropriate, both in and out of group,” and that he made an inappropriate sexual remark in group therapy. The note also states that Mr. Braggs commented, “I don’t think I will celebrate Easter.” However, Ms. Brice offered no evidence which would create a genuine issue of fact as to whether Mr. Braggs made a threat of violence against a clearly identifiable victim or whether any threat was communicated to Dr. Simon. Absent this, there can be no liability on Dr. Simon for failure to warn or to provide protection, and summary judgment on Ms. Brice’s claims against Dr. Simon is appropriate.

Ms. Brice’s claims against Dr. Vasanthi Vinayagam, a primary care physician board certified in Family Medicine, are not governed by La. R.S. 9:2800.2, since that statute only addresses the duty to warn owed by a psychologist, psychiatrist, marriage and family therapist, licensed professional counselor, or social worker. Thus, the issue of Dr. Vinayagam’s liability for failure to warn or to provide protection to Ms. Brice is determined under a duty-risk analysis. Under this analysis, the plaintiff must prove that the conduct in question was a cause-in-fact of the resulting harm, the defendant owed a duty of care to the plaintiff, the requisite duty was breached by the defendant, and the risk of harm was within the scope of protection afforded by the duty breached. **Berry v. State, Through Dep’t of Health and Human Resources**, 93-2748 (La. 5/23/94), 637 So.2d 412, 414. A negative answer to any of the inquiries of the duty-risk analysis results in a determination of no liability. **Paul v. Louisiana State Employees’ Grp. Ben. Program**, 99-0897, pp. 8-9 (La. App. 1 Cir. 5/12/00), 762 So. 2d 136, 142.

According to Dr. Vinayagam’s affidavit, she made rounds once a week at Serenity to treat patients for minor medical issues within the scope of her family medicine practice. She did not treat Mr. Braggs or any other patient at Serenity for psychiatric conditions or complaints and did not order or alter any psychiatric medications. Although Dr. Vinayagam is listed as Mr. Braggs’ physician on his Home Health Certification Plan of Care form, the form is not signed by her, and she stated that this form was not a physician’s order for home health services, nor is there an order by her for home health services in the medical records. Dr. Vinayagam stated that she did not have any role in admitting Mr. Braggs to Serenity, and she treated him only once prior to the alleged attack on Ms.

Brice, on March 5, 2009, for a complaint of left rib pain. She stated that at no time during her treatment of Mr. Braggs did he ever show any signs of violence or give her any indication that he was dangerous to himself or others; further, she stated that no one ever communicated to her that Mr. Braggs was violent or exhibited any signs of violence.

Despite Ms. Brice's assertions that Dr. Vinayagam was substantially involved in Mr. Braggs' care, the evidence in the record does not support this allegation. Ms. Brice offered no evidence to create an issue of fact as to whether Dr. Vinayagam knew or should have known that Mr. Braggs posed any sort of threat to Ms. Brice. She likewise offered no evidence to show that Dr. Vinayagam, who treated Mr. Braggs only once for rib pain almost a month prior to the attack, knew or should have known that Mr. Braggs had made a sexually inappropriate comment in group therapy several days before the attack. Because Ms. Brice has presented no evidence to support the creation of duty on the part of Dr. Vinayagam to warn her or protect her from impending danger, summary judgment dismissing her claims against Dr. Vinayagam was appropriate.

CONCLUSION

The October 31, 2016 summary judgment in favor of Drs. Simon and Vinayagam dismissing Ms. Brice's claims against them with prejudice is affirmed. Costs of this appeal are assessed to plaintiff, Danell Brice.

AFFIRMED.