NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 0149

JOANN ZAUNBRECHER

VERSUS

**GENERAL HEALTH SYSTEM, INC.,
d/b/a BATON ROUGE GENERAL MEDICAL CENTER,
DR. CLINT B. GRIFFIN, DR. PAMELA E. PAYMENT
AND DR. JIM CROWELL**

BJC by TMH
RHP by TMH
TMH

**On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, Louisiana
Docket No. 468,476, Division "I"
Honorable R. Michael Caldwell, Judge Presiding**

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Louisiana Patient's Compensation Fund
and Louisiana Patient's Compensation
Fund Oversight Board**

BEFORE: CARTER, C.J., PARRO, AND HIGGINBOTHAM, JJ.

Judgment rendered OCT 28 2011

PARRO, J.

Plaintiffs, Joann Zaunbrecher, Mary Catherine Zaunbrecher, Donald Glynn, and Kelson Zaunbrecher, appeal the judgment of the trial court, granting a motion for summary judgment in favor of the defendant, the Louisiana Patient's Compensation Fund and the Louisiana Patient's Compensation Fund Oversight Board (PCF), and dismissing the plaintiffs' claims, with prejudice. For the reasons that follow, we affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On January 10, 1998, at approximately 8:00 p.m., Ms. Zaunbrecher was driving her vehicle, when she began suffering a severe headache, which caused her vision to blur. Because the pain was so severe, Ms. Zaunbrecher drove her vehicle to the side of the road, where, in addition to the pain and blurred vision, she began to experience cold sweats, nausea, and vomiting. Ms. Zaunbrecher then called a friend and 911 for assistance.

Eventually, an ambulance responded to Ms. Zaunbrecher's call for emergency assistance, and she was transported to the Baton Rouge General Medical Center (Baton Rouge General) for medical treatment. While in the ambulance, Ms. Zaunbrecher apparently vomited numerous times, and in an attempt to stabilize her, one of the ambulance attendants inserted an IV into her right arm. In the emergency room, Ms. Zaunbrecher continued to experience numerous episodes of vomiting, as well as diarrhea. She was given Compazine through her IV to help control these symptoms, and a lumbar puncture procedure was performed on her in an effort to diagnose her illness.

At some point during her stay in the emergency room, Ms. Zaunbrecher and her children pressed the call button to request that the nursing staff assist Ms. Zaunbrecher in walking to the restroom; however, no one responded to the call for assistance. Eventually, one of the children helped Ms. Zaunbrecher to the restroom, without incident. Because their earlier requests for assistance had gone unanswered, the children continued to assist their mother in her trips to the restroom, without requesting

additional assistance from the nurses or other hospital staff.

After several such trips to the restroom had occurred without incident, Ms. Zaunbrecher again went to the restroom, with her daughter's assistance, at approximately 2:25 a.m. on January 11, 1998. While in the restroom, Ms. Zaunbrecher apparently suffered from another bout of diarrhea and vomiting, after which she fell and dislocated and fractured her right shoulder. Her daughter subsequently discovered her on the floor of the restroom, experiencing a seizure, or symptoms similar to those of a seizure.

A medical review panel was convened concerning the actions of Dr. Pamela E. Payment, one of Ms. Zaunbrecher's treating physicians, and Baton Rouge General. The panel unanimously determined that there had been no breach of the standard of care provided by Dr. Payment or employees of Baton Rouge General. Thereafter, Ms. Zaunbrecher filed the underlying petition, seeking damages for her injuries as a result of her fall. The petition named Baton Rouge General,[1] Dr. Pamela E. Payment, Dr. Clint B. Griffin, and Dr. Jim Crowell as defendants. The claim against Dr. Crowell was not raised before the medical review panel; therefore, Dr. Crowell filed a dilatory exception pleading the objection of prematurity, and the claim against him was dismissed, without prejudice.[2] In addition, Dr. Griffin was never served with any petition in this matter.[3] Finally, the claims against Dr. Payment were dismissed pursuant to a motion for summary judgment filed by her.[4]

The petition was subsequently amended to add as plaintiffs Ms. Zaunbrecher's children, Mary Catherine Zaunbrecher, Donald Glynn, and Kelson Zaunbrecher, and to

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[1] The petition erroneously named this defendant as General Health System, Inc. d/b/a Baton Rouge General Medical Center. According to the defendant's answer, its proper name is Baton Rouge General Medical Center, which is a subsidiary of General Health Center.

[2] The dilatory exception pleading the objection of prematurity filed by Dr. Crowell noted that his proper name was Dr. James A. Crowell, III.

[3] It should also be noted that the claim against Dr. Griffin was never raised before the medical review panel.

[4] According to Dr. Payment's motion for summary judgment, she had gone off-duty at midnight on the night of January 10, 1998; therefore, she could not have been responsible for any alleged act of negligence or malpractice that had occurred at 2:25 a.m. on January 11, 1998, when Ms. Zaunbrecher fell. Dr. Payment's motion was granted, and a judgment granting that motion and dismissing the claims against her was signed in July 2001. That judgment is not before this court.

allow them to state claims for loss of consortium. In addition, Mary Catherine Zaunbrecher attempted to assert a claim for mental anguish, emotional distress, and depression, which she allegedly suffered as a result of witnessing the injury to her mother. Subsequent to settling with Baton Rouge General, the plaintiffs again amended their petition to name the PCF as an additional defendant.

Thereafter, the PCF filed a motion for summary judgment, seeking dismissal of the plaintiffs' claims against it. In support of its motion, the PCF relied primarily on the opinion of the medical review panel and the alleged inability of the plaintiffs to prove causation through competent medical testimony. The PCF further contended that the claims of the children for loss of consortium and for mental anguish for witnessing Ms. Zaunbrecher's injury were prescribed. Finally, the PCF claimed that the allegations of negligence in this matter fell outside the purview of the Medical Malpractice Act.

After a hearing, the trial court denied the PCF's motion for summary judgment with regard to the non-applicability of the Medical Malpractice Act. However, the trial court granted the motion for summary judgment as to the defense of prescription with respect to the claims of Ms. Zaunbrecher's children. The trial court further granted the motion for summary judgment as to the lack of evidence on the issue of causation and dismissed the plaintiffs' claims, with prejudice. It is from this judgment that the plaintiffs have appealed.[5]

SUMMARY JUDGMENT

An appellate court reviews a trial court's decision to grant a motion for summary judgment *de novo*, using the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. Smith v. Our Lady of the Lake Hosp., Inc., 93-2512 (La. 7/5/94), 639 So.2d 730, 750. 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. West v. Clarendon Nat. Ins. Co., 99-1687 (La. App. 1st Cir. 7/31/00), 767

[5] Although the appellate brief has been filed on behalf of all plaintiffs in this matter, the plaintiffs have not sought appellate review of that portion of the trial court's judgment granting summary judgment on the issue of prescription as to the claims stated by Ms. Zaunbrecher's children for loss of consortium or for witnessing the fall in the hospital. Therefore, that portion of the judgment is now final.

So.2d 877, 879. The summary judgment procedure is favored and is designed to secure the just, speedy, and inexpensive determination of every action. LSA-C.C.P. art. 966(A)(2); Lee v. Grimmer, 99-2196 (La. App. 1st Cir. 12/22/00), 775 So.2d 1223, 1225. The motion should be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(B); Perry v. City of Bogalusa, 00-2281 (La. App. 1st Cir. 12/28/01), 804 So.2d 895, 899. The initial burden of proof is on the moving party. However, on issues for which the moving party will not bear the burden of proof at trial, the moving party's burden of proof on the motion is satisfied by pointing out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, the nonmoving party must produce factual support sufficient to establish that it will be able to satisfy its evidentiary burden of proof at trial; failure to do so shows that there is no genuine issue of material fact. LSA-C.C.P. art. 966(C)(2); Washauer v. J.C. Penney Co., Inc., 03-0642 (La. App. 1st Cir. 4/21/04), 879 So.2d 195, 197.

DISCUSSION

It is well-settled that a hospital is liable for its employee's negligence, including its doctors and nurses, under the doctrine of *respondeat superior*. Little v. Pou, 42,872 (La. App. 2nd Cir. 1/30/08), 975 So.2d 666, 674, writ denied, 08-0806 (La. 6/6/08), 983 So.2d 920. In a medical malpractice claim against a hospital, the plaintiff is required to prove by a preponderance of the evidence, as in any negligence action, that the defendant owed the plaintiff a duty to protect him against the risk involved, that the defendant breached its duty, and that the injury was caused by the breach. Id. Because Ms. Zaunbrecher would bear the burden of proving the element of medical causation at the trial of the matter, the PCF's motion for summary judgment only needed to point out to the trial court that Ms. Zaunbrecher lacked support for that element of her claim.

In an effort to point out that Ms. Zaunbrecher lacked support to prove medical causation, the PCF submitted excerpts of the deposition of the plaintiff's expert, Margaret Blansett, a registered nurse, in which she acknowledged that she was not offering any opinion regarding the issue of causation. Specifically, Nurse Blansett acknowledged that she was not permitted to testify or give any opinions with regard to causation, and she further acknowledged that she was not attempting to address issues of causation of injury in her deposition. With this testimony, the PCF was able to point out to the trial court that there was an absence of factual support for this element of the plaintiff's claims. Therefore, the burden then shifted to Ms. Zaunbrecher to produce factual support sufficient to establish that she would be able to satisfy her evidentiary burden of proof at trial. See LSA-C.C.P. art. 966(C)(2).

To meet the burden of proof regarding malpractice and causation, a plaintiff is generally required to produce expert medical testimony. Lefort v. Venable, 95-2345 (La. App. 1st Cir. 6/28/96), 676 So.2d 218, 220. Although the jurisprudence has recognized exceptions in instances of obvious negligence, these exceptions are limited to "instances in which the medical and factual issues are such that a lay jury can perceive negligence in the charged physician's conduct as well as any expert can." Pfiffner v. Correa, 94-0924 (La. 10/17/94), 643 So.2d 1228, 1234; see also Coleman v. Deno, 01-1517 (La. 1/25/02), 813 So.2d 303, 317. According to the supreme court, the jurisprudence has recognized that expert medical testimony is not necessary to prove malpractice if a doctor fractures a patient's leg during an examination; amputates the wrong arm; drops a knife, scalpel, or acid on a patient; or leaves a sponge in a patient's body. Pfiffner, 643 So.2d at 1233. Otherwise, the jurisprudence has recognized that an expert witness is generally necessary as a matter of law to prove a medical malpractice claim. Fagan v. LeBlanc, 04-2743 (La. App. 1st Cir. 2/10/06), 928 So.2d 571, 575. Nevertheless, in either situation, the plaintiff must still demonstrate, by a preponderance of the evidence, a causal nexus between the defendant's fault and the injury alleged. Pfiffner, 634 So.2d at 1234.

In an effort to carry her burden of proof, Ms. Zaunbrecher opposed the motion and attached the complete deposition of Nurse Blansett, along with copies of Ms. Zaunbrecher's medical records pertaining to her emergency room visit and her follow-up care. However, a review of Nurse Blansett's entire deposition reveals that she was unable to offer any insight into how Ms. Zaunbrecher's injuries occurred, as she admitted that the cause of Ms. Zaunbrecher's fall was a mystery to her. At most, Nurse Blansett offered suggestions for conditions that could have contributed to Ms. Zaunbrecher's fall; yet, she was unable to state with any degree of certainty whether these conditions did contribute to the fall. For example, she contended that the nursing staff's failure to advise Ms. Zaunbrecher and her family to avoid getting up to go to the bathroom after the lumbar puncture and the intravenous administration of Compazine, as well as the nursing staff's alleged failure to instruct Ms. Zaunbrecher and her family on the use of the bed pan to promote safety, may have contributed to her fall. Although Nurse Blansett believed that this lack of education on the part of the nursing staff to Ms. Zaunbrecher and her children "could have contributed" to Ms. Zaunbrecher's fall, she was unable to state with any degree of medical probability that it did.

However, when questioned about these assertions, Nurse Blansett acknowledged that she did not know whether the Compazine contributed to Ms. Zaunbrecher's fall, because she was not aware of what the peak and duration of the medication would be when it was administered intravenously, as it was in this case. In addition, Nurse Blansett conceded that she could not say whether the lumbar puncture procedure contributed to the fall, because she did not know whether Ms. Zaunbrecher had any ill effects from the lumbar puncture. Finally, Nurse Blansett acknowledged that ultimately Ms. Zaunbrecher was found having a seizure, but that she does not know whether it was the seizure itself, or something that occurred just prior to the seizure, that caused her to fall. Therefore, it is clear that Nurse Blansett is unable to offer any testimony pertaining to the issue of medical causation in this matter.

In her arguments to this court, Ms. Zaunbrecher contends that the deposition testimony by Nurse Blansett was sufficient to carry her burden of proof concerning causation. She further contends that the trial court either overlooked Nurse Blansett's testimony or found it to be unconvincing. In addition, she relies on Pfiffner for the proposition that she does not need expert testimony in this matter, because the failure of the nursing staff to respond to the initial calls for assistance constituted an unnecessary delay in treatment. According to Ms. Zaunbrecher, this unnecessary delay in treatment was medical malpractice in which causation was evident. A review of the record does not support this argument.

Certainly, the failure to respond to a call button requesting assistance for the patient to walk to the restroom, while not excusable for a health care professional, is not on the same level as a doctor amputating the wrong arm, such that a lay jury can perceive negligence and causation in the charged physician's conduct as well as any expert can. See Pfiffner, 643 So.2d at 1233-34. Furthermore, even if the failure to respond were considered a breach of the standard of care, which the medical review panel apparently did not find, there is nothing in the record to suggest that this failure contributed in any way to Ms. Zaunbrecher's fall. In addition, as discussed above, nothing in Nurse Blansett's testimony provides any evidence to support any causal nexus between the actions or inactions of the nursing staff and Ms. Zaunbrecher's injury. Therefore, Ms. Zaunbrecher has failed to produce factual support sufficient to establish that she will be able to satisfy her evidentiary burden of proof at trial; thus, there are no genuine issues of material fact remaining. Accordingly, after a *de novo* review of the record, we find no error in the trial court's judgment granting the PCF's motion for summary judgment.

CONCLUSION

For the foregoing reasons, the judgment of the trial court granting the motion for summary judgment on behalf of the Louisiana Patient's Compensation Fund and the Louisiana Patient's Compensation Fund Oversight Board is affirmed. All costs of this appeal are assessed to the plaintiffs, Joann Zaunbrecher, Mary Catherine Zaunbrecher, Donald Glynn, and Kelson Zaunbrecher.

AFFIRMED.