

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 CA 0713

OLIVIA T. BETHLEY, PERCY BETHLEY, JR., BILLY BETHLEY, DARLENE
BETHLEY AND DONNIE BETHLEY

VERSUS

DR. REZA SHEYBANI, LOUISIANA MEDICAL MUTUAL INSURANCE COMPANY
AND BATON ROUGE GENERAL MEDICAL CENTER, MID CITY

Judgment rendered October 29, 2010.

Appealed from the
19th Judicial District Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court No. C580834
Honorable Todd W. Hernandez, Judge

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BEFORE: KUHN, PETTIGREW, JJ. and KLINE, J. Pro Tem.¹

¹ Judge William F. Kline, Jr., retired, is serving as judge *pro tempore* pursuant to special appointment of the Louisiana Supreme Court.

PETTIGREW, J.

This is an action for medical malpractice wherein plaintiffs filed suit against the hospital, physician, and physician's insurer, asserting that said defendants failed to meet the applicable standard of care and that said negligence was a factor that contributed to the death of their husband and father.

In response, the hospital filed a motion for summary judgment asserting that the evidence does not support the conclusion that its employees were negligent in failing to meet the applicable standard of care in their treatment of decedent. In response, plaintiffs indicated they agreed with the hospital and did not oppose the motion for summary judgment. Defendant physician filed an opposition to the motion for summary judgment of the hospital, which opposition included an expert affidavit by the defendant physician. The hospital filed a motion to strike said affidavit.

Following a hearing, the trial court granted the hospital's motion to strike the defendant physician's affidavit and granted the hospital's motion for summary judgment thereby dismissing plaintiffs' claims against the hospital with prejudice. Defendant physician and his insurer applied for supervisory writs following the grant of the hospital's motion to strike the doctor's affidavit. Defendant physician and his insurer have also appealed the granting of the hospital's motion for summary judgment that dismissed plaintiffs' claims against the hospital.

FACTS

Percy Bethley, an 80-year old male, ex-smoker with a five-year history of chronic obstructive pulmonary disease ("COPD"), a lung disease that rendered him oxygen dependent, and cardiomyopathy (heart muscle disease), was admitted to Baton Rouge General Medical Center Mid-City ("BRGMC") on June 9, 2007. His principal complaints were shortness of breath and stridor, for which he had been seen in the emergency room two days earlier and discharged home on oral medications.

On that date, Mr. Bethley was admitted initially to the telemetry floor with a diagnosis of respiratory distress secondary to COPD and was treated accordingly. Mr. Bethley developed expiratory stridor which increased over his first twenty-four hours of

admission and began to deteriorate clinically with increased shortness of breath. This development ultimately prompted a transfer to the intensive care unit ("ICU"). An examination of Mr. Bethley's airway was conducted revealing that his glottic opening was almost completely occluded. A #8 non-fenestrated tracheostomy or "trach" tube was eventually inserted although with considerable difficulty.

On June 12, 2007, Mr. Bethley underwent a bronchoscopy and tracheostomy without incident. Blood cultures proved positive for influenza, and Mr. Bethley was continued on antibiotics and steroids. Mr. Bethley's clinical condition improved on this regimen to the point that he was successfully weaned from the ventilator. The patient was then transferred from the ICU back to the floor, and Dr. Reza Sheybani was asked to provide a pulmonary consult.

At the request of Mr. Bethley's primary care physician, Dr. Sheybani evaluated Mr. Bethley for the first time on June 21, 2007. Dr. Sheybani ultimately made the decision to replace Mr. Bethley's trach tube from a #8 non-fenestrated to a smaller #6 fenestrated tube. On the morning of June 22, 2007, respiratory therapist Cecilia Eason began the process of changing Mr. Bethley's trach tube. The deposition testimony provided by Ms. Eason and Dr. Sheybani differ with respect to whether Dr. Sheybani was actually present in Mr. Bethley's room at the point Ms. Eason initiated the change in his trach tube. The deposition testimony of Olivia Bethley indicates Dr. Sheybani was not in the patient's room when Ms. Eason initiated the change in Mr. Bethley's trach tube, but entered in the middle of the process of Ms. Eason removing the old trach tube and inserting the new tube.

It is undisputed that after his trach tube was changed, Mr. Bethley began coughing and Ms. Eason was instructed by Dr. Sheybani to administer suction. Ms. Eason experienced difficulty in getting the catheter inserted, so Dr. Sheybani recommended that she start Mr. Bethley on oxygen. At 10:05 a.m., an Endo lab RN was called to Mr. Bethley's bedside, and Dr. Sheybani administered a battery-powered bronchoscope on Mr. Bethley.

Ms. Eason continued to monitor Mr. Bethley's oxygen levels and administered oxygen to him through his nose. At 10:30 a.m., Mr. Bethley's oxygen levels dropped to 88 percent and a crash cart was pulled into his room. Anesthesia was called in, and attempts were made to intubate Mr. Bethley, but these attempts were not successful until after Mr. Bethley had already arrested. A "code blue" was called at 10:35 a.m., and Ms. Eason immediately began bagging Mr. Bethley and initiating CPR. Efforts to administer CPR proved unsuccessful, and Mr. Bethley was pronounced dead at 11:00 a.m.

ACTION OF THE TRIAL COURT

Following Mr. Bethley's death on June 21, 2007, his widow and children, plaintiffs herein, filed a medical malpractice complaint with the Louisiana Patients' Compensation Fund on December 12, 2007. After plaintiffs' malpractice claims were presented to a medical review panel and all parties were given the opportunity to submit evidence, the medical review panel, in a unanimous opinion rendered June 16, 2009, found that the evidence did not support the conclusion that Baton Rouge General Medical Center, Mid-City ("BRGMC") failed to meet the applicable standard of care as charged in the plaintiffs' complaint. The panel found, however, that the evidence did support the conclusion that Dr. Sheybani failed to meet the applicable standard of care and that his conduct had been a factor in Mr. Bethley's demise.

Upon receipt of the unanimous opinion of the medical review panel, plaintiffs filed a Petition for Damages on July 30, 2009, naming Baton Rouge General Medical Center, Mid-City ("BRGMC"), Dr. Reza Sheybani, and Louisiana Medical Mutual Insurance Company ("LAMMICO") as defendants therein. Plaintiffs alleged therein that the aforementioned defendants failed to meet the applicable standard of care and that said negligence was a factor that contributed to the death of their husband and father, Percy Bethley, Sr.

Dr. Sheybani and LAMMICO filed an answer on August 14, 2009, generally denying the allegations set forth in the plaintiffs' petition except to admit that although Dr. Sheybani was on the floor, he was not present in Mr. Bethley's hospital room when Ms. Eason, as ordered, changed but then misplaced Mr. Bethley's trach tube. In connection

with their answer, Dr. Sheybani and LAMMICO further set forth various affirmative defenses including the defenses of third party fault, fault of other parties, and comparative fault. BRGMC also filed an answer on September 16, 2009, raising affirmative defenses including third party fault, contributory negligence, and comparative fault.

Additionally, on October 21, 2009, BRGMC filed a motion for summary judgment asserting that the evidence did not support the conclusion that BRGMC's employees were negligent in failing to meet the applicable standard of care with respect to their treatment of Mr. Bethley and that BRGMC was entitled to summary judgment and a dismissal with prejudice of plaintiffs' claims against it. In support of their motion for summary judgment, BRGMC attached the following exhibits:

1. Medical Review Panel Complaint filed December 12, 2007;
2. A copy of the Medical Review Panel opinion from meeting on June 16, 2009, including Reasons for the opinion;
3. Petition for Damages filed July 28, 2009;
4. Affidavit of Dr. Zohair Pirzadah;
5. Statement of Essential Legal Elements;
6. Statement of undisputed facts; and
7. Memorandum in Support of Motion for Summary Judgment.

Thereafter, on November 16, 2009, plaintiffs filed a pleading in response to BRGMC's motion for summary judgment indicating they were in agreement with BRGMC's position and would not oppose BRGMC's motion for summary judgment.

Dr. Sheybani, no later than February 11, 2010, responded to BRGMC's motion for summary judgment by submitting a personal affidavit that contained his own expert medical testimony in an effort to prove the existence of genuine issues of material fact that would preclude the granting of summary judgment. In his affidavit, Dr. Sheybani opined that Ms. Eason, an employee of BRGMC, had been negligent or otherwise breached the applicable standard of care in connection with her treatment of Mr. Bethley. Dr. Sheybani also attached various exhibits to his affidavit: namely, the medical records of

Mr. Bethley from BRGMC, his personal deposition, the deposition of Ms. Eason, and the deposition of Mr. Bethley's widow, plaintiff Olivia Bethley.²

BRGMC thereafter filed a motion to strike the affidavit of Dr. Sheybani, together with a memorandum in response to Dr. Sheybani's opposition to its motion for summary judgment. BRGMC's motion to strike was set for hearing on the same date as BRGMC's motion for summary judgment.

A hearing was held on February 22, 2010, regarding BRGMC's motion for summary judgment and motion to strike the affidavit of Dr. Sheybani. At the conclusion of the hearing, the trial court granted BRGMC's motion to strike and thereby excluded the expert evidence produced by Dr. Sheybani that he claimed was sufficient to defeat summary judgment. The trial court thereafter granted BRGMC's motion for summary judgment, and counsel for Dr. Sheybani and LAMMICO proffered the evidence excluded by the trial court. On March 3, 2010, the trial court signed two judgments; the first granted BRGMC's motion to strike while the second granted BRGMC's motion for summary judgment and dismissed with prejudice plaintiffs' claims against BRGMC.

Dr. Sheybani and LAMMICO then filed a motion for devolutive appeal from the grant of summary judgment. Dr. Sheybani and LAMMICO also sought supervisory writs from this court challenging the trial court's judgment granting BRGMC's motion to strike. Noting that the issues raised in their appeal were substantially similar to those raised in conjunction with their writ application, Dr. Sheybani and LAMMICO suggested that their writ application and appeal be consolidated. In response to the writ application of Dr. Sheybani and LAMMICO, this court referred the writ application to the panel handling the appeal from the grant of summary judgment.³ The plaintiffs did not appeal the summary judgment rendered in favor of BRGMC.

² The opposition memorandum, affidavit, and exhibits filed on behalf of Dr. Sheybani in response to BRGMC's motion for summary judgment, together with Dr. Sheybani's memorandum in opposition to BRGMC's subsequent motion to strike, are not contained within the record of this matter due to the trial court's grant of BRGMC's motion to strike. Said pleadings are nevertheless made a part hereof through a proffer of evidence.

³ See, **Bethley v. Sheybani**, 2010-CW-0575 (La. App. 1 Cir. 6/21/10).

ASSIGNMENT OF ERRORS ON APPEAL

In connection with their appeal in this matter, Dr. Sheybani and LAMMICO set forth the following errors for consideration by this court on appeal:

1. The trial court committed reversible error when it granted BRGMC's motion for summary judgment;
2. The trial court committed reversible error when it held that the legal issues and/or theories of recovery addressed in Dr. Sheybani's affidavit fell outside the scope of the petition for damages; and
3. Given that the trial court improperly excluded the admissible expert evidence put forth by Dr. Sheybani and LAMMICO, its decision to grant BRGMC's motion for summary judgment should be overturned.

STANDARD OF REVIEW

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. **Johnson v. Evan Hall Sugar Co-op, Inc.**, 2001-2956, p. 3 (La. App. 1 Cir. 12/30/02), 836 So.2d 484, 486. Summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact, and that mover is entitled to judgment as a matter of law. La. Code Civ. P. art. 966(B). Summary judgment is favored and is designed to secure the just, speedy and inexpensive determination of every action. La. Code Civ. P. art. 966(A)(2); **Thomas v. Fina Oil and Chemical Co.**, 2002-0338, pp. 4-5 (La. App. 1 Cir. 2/14/03), 845 So.2d 498, 501-502.

On a motion for summary judgment, the burden of proof is on the mover. If, however, the mover will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the mover's burden on the motion does not require that all essential elements of the adverse party's claim, action or defense be negated. Instead, the mover must point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action or defense. Thereafter, the adverse party must produce factual evidence sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial. If the adverse party fails to meet this burden, there is no genuine issue of material fact, and the

mover is entitled to summary judgment. La. Code Civ. P. art. 966(C)(2); **Robles v. ExxonMobile**, 2002-0854, p. 4 (La. App. 1 Cir. 3/28/03), 844 So.2d 339, 341.

In determining whether summary judgment is appropriate, appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. **Allen v. State ex rel. Ernest N. Morial-New Orleans Exhibition Hall Authority**, 2002-1072, p. 5 (La. 4/9/03), 842 So.2d 373, 377. Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to this case. **Foreman v. Danos and Curole Marine Contractors, Inc.**, 97-2038, p. 7 (La. App. 1 Cir. 9/25/98), 722 So.2d 1, 4, writ denied, 98-2703 (La. 12/18/98), 734 So.2d 637.

LAW AND ANALYSIS

The initial error assigned by Dr. Sheybani and LAMMICO concerns propriety of the trial court's grant of BRGMC's motion for summary judgment. We note at the outset, and as correctly pointed out by BRGMC in its appellee brief, that our decision as to whether BRGMC was entitled to summary judgment can have no effect on the plaintiffs in this matter. Due to the fact that plaintiffs did not oppose BRGMC's motion for summary judgment, and did not thereafter appeal, or file an answer to the appeal of Dr. Sheybani and LAMMICO, the judgment of the trial court has now become final as between the plaintiffs and BRGMC and is not subject to reversal and/or remand by this court. See, **Grimes v. Louisiana Medical Mutual Insurance Company**, 2010-0039 (La. 5/28/10), 36 So.3d 215. We must now decide whether the remaining defendants, i.e., Dr. Sheybani and LAMMICO, may reduce or defeat their liability to the plaintiffs by establishing the fault, negligence and/or breach of care by BRGMC and/or its employees.

On appeal, BRGMC contends that the trial court's grant of its motion for summary judgment was proper for the reason that the affidavit of Dr. Sheybani was self-serving and drafted in an attempt to create a false issue of material fact sufficient to defeat summary judgment. BRGMC cites and relies upon **Douglas v. Hillhaven Rest Home, Inc.**, 97-0596 (La. App. 1 Cir. 4/8/98), 709 So.2d 1079, a case in which this court

concluded that a subsequent affidavit in contradiction of prior deposition testimony is not sufficient to create an issue of fact precluding summary judgment. **Douglas**, 97-0596 at p. 6, 709 So.2d at 1083. BRGMC further cites **Wheelock v. Winn-Dixie Louisiana, Inc.**, 01-1584, pp. 5-7 (La. App. 1 Cir. 6/21/02), 822 So.2d 94, 97, as authority for the proposition that where there are unexplained inconsistencies between deposition testimony and a subsequent affidavit, the affidavit is not sufficient to create a genuine issue of material fact with regard to the temporal element in order to defeat a motion for summary judgment.

By way of response, Dr. Sheybani cites La. Code Civ. P. art. 967 for the proposition that when a motion for summary judgment is properly supported, he, as the adverse party may not rest on the mere allegations or denials of his pleadings, but must generally respond by affidavit to provide evidence of a material dispute that precludes the granting of summary judgment. Despite the fact that Dr. Sheybani is an expert in the field of pulmonology, the trial court, without assigning specific oral or written reasons, deemed Dr. Sheybani's affidavit inadmissible. Given the trial court's failure to assign specific reasons for its ruling, it must be presumed that the trial court's failure to admit the affidavit of Dr. Sheybani resulted from arguments put forth at the hearing by BRGMC.

At the hearing on its motion for summary judgment, BRGMC contended that the affidavit of Dr. Sheybani, which was submitted in opposition to its motion, was merely a self-serving, last-minute attempt by Dr. Sheybani to avoid summary judgment. BRGMC argued that Dr. Sheybani's affidavit contradicted his earlier deposition testimony and also created issues of fact that were outside the scope of the plaintiffs' cause of action and should accordingly be stricken from the record.

BRGMC claimed that Dr. Sheybani's affidavit contained three basic allegations regarding a breach in the standard of care by Ms. Eason. Dr. Sheybani attested that: 1) Ms. Eason was negligent or otherwise breached the applicable standard of care in failing to advise Dr. Sheybani as to the limitations of her expertise, capability and experience in changing the trach tube; 2) Ms. Eason undertook the changing of Mr. Bethley's trach tube without first reviewing Mr. Bethley's chart; and 3) Ms. Eason was negligent or otherwise

breached the applicable standard of care in failing to summon Dr. Sheybani when she first experienced difficulty in changing the trach tube or observed signs that Mr. Bethley was in respiratory distress. BRGMC further claimed that Dr. Sheybani's affidavit contained no reference or indication that the actions of Ms. Eason fell below the applicable standard of care with respect to the misplacement of Mr. Bethley's trach tube.

Counsel for Dr. Sheybani argued in response that the cases of **Douglas** and **Wheelock** involved instances where the plaintiffs provided affidavits that differed substantially from, or were inconsistent with, the testimony given by said plaintiffs in their previous depositions. Counsel for Dr. Sheybani pointed to the fact that in his earlier deposition testimony, Dr. Sheybani stated that he had known Ms. Eason for years and that she was a "wonderful therapist." Dr. Sheybani was emphatic that contrary to Ms. Eason's testimony, it had been Ms. Eason who changed Mr. Bethley's trach tube prior to the time he happened to stop by Mr. Bethley's room. Although Dr. Sheybani declined to give an opinion as to whether Ms. Eason had breached the applicable standard of care, Dr. Sheybani stated that Mr. Bethley's trach tube was misplaced and done incorrectly. Mrs. Bethley's deposition testimony generally supported Dr. Sheybani's testimony as to the pertinent facts regarding who performed the procedure and at what time Dr. Sheybani entered the room.

It was asserted that the statements set forth in Dr. Sheybani's affidavit did not contradict his earlier deposition testimony, but rather merely clarified or supplemented Dr. Sheybani's previous deposition testimony. Counsel for Dr. Sheybani cited **Terrebonne v. Floyd**, 99-1036, p. 6 (La. App. 1 Cir. 5/23/00), 767 So.2d 754, 757, for the proposition that when an affidavit merely supplements rather than contradicts prior deposition testimony, a court may consider the affidavit when evaluating genuine issues of material fact when ruling on a motion for summary judgment.

Since the statements made by Dr. Sheybani in his subsequent affidavit merely clarified and were not inconsistent with testimony given by Dr. Sheybani in his earlier deposition, we conclude the affidavit and the attached exhibits were admissible. For these reasons, we grant the writ in the matter of **Bethley v. Sheybani**, 2010-CW-0575

(La. App. 1 Cir. 6/21/2010) and reverse the judgment rendered by the trial court on March 3, 2010, which granted BRGMC's motion to strike Dr. Sheybani's affidavit.

Dr. Sheybani's affidavit with attached exhibits, including the deposition of Mrs. Bethley, should have been considered by the trial court in evaluating BRGMC's motion for summary judgment. After a *de novo* review by this court of the entire record and exhibits, including the affidavit of Dr. Sheybani with its attached exhibits, we conclude that there are genuine issues of material fact regarding whether BRGMC and/or its employees failed to meet the applicable standard of care with respect to their treatment of Mr. Bethley.

CONCLUSION

For the above and foregoing reasons, in civil writ **Bethley v. Sheybani**, 2010-CW-0575 (La. App. 1 Cir. 6/21/2010) the judgment of the trial court granting BRGMC's motion to strike the affidavit of Dr. Sheybani and its attached exhibits is hereby reversed. We affirm the trial court's summary judgment insofar as it dismissed the plaintiffs' claim against BRGMC. Since the plaintiffs have failed to appeal that judgment, it has acquired the authority of a thing adjudged and is final between plaintiffs and BRGMC. However, we conclude that genuine issues of material fact remain regarding the issues raised in that motion for summary judgment, which may ultimately have bearing on plaintiffs' claims against Dr. Sheybani and LAMMICO, and the judgment is not final as to these parties. This matter is hereby remanded to the trial court for further proceedings consistent with this opinion, and all costs associated with the filing of said motions and the costs of this appeal shall be assessed against BRGMC.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.