

SANDRA LOUISE BRYDE, ET AL

NO. 19-CA-166

VERSUS

FIFTH CIRCUIT

LAKEVIEW REGIONAL MEDICAL CENTER,  
LLC, ET AL

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT  
PARISH OF JEFFERSON, STATE OF LOUISIANA  
NO. 775-867, DIVISION "N"  
HONORABLE STEPHEN D. ENRIGHT, JR., JUDGE PRESIDING

December 11, 2019

**FREDERICKA HOMBERG WICKER**  
**JUDGE**

Panel composed of Judges Fredericka Homberg Wicker,  
Stephen J. Windhorst, and John J. Molaison, Jr.

**REVERSED AND REMANDED**

**FHW**

**SJW**

**JJM**

COUNSEL FOR PLAINTIFF/APPELLANT,  
SANDRA LOUISE BRYDE (DECEASED), B. B., D. B., SHELLY BRYDE,  
INIDIVIDUALLY AND ON BEHALF OF THE MINOR CHILD, B. B., AND  
STEVEN GALBREATH, INIDIVIDUALLY AND ON BEHALF OF THE MINOR  
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## **WICKER, J.**

Appellants, the children of Sandra Bryde, appeal the trial court's granting of the appellee, Dr. Jay DeSalvo's motion for summary judgment in their medical malpractice suit for the wrongful death of Ms. Bryde while a patient at Lakeview Regional Medical Center. As we find that the trial court erred when it found that appellant's witness was unqualified to testify as an expert, we vacate the ruling of the trial court and reverse the granting of appellee's motion for summary judgment.

### **FACTUAL AND PROCEDURAL BACKGROUND**

This case arises out of the death of thirty-nine year old Sandra Bryde, the appellants' mother. On June 19, 2015, Bryde arrived at the emergency room at Lakeview Regional Medical Center (Lakeview) by ambulance at 8:57 p.m. and was admitted with a diagnosis of seizure and hyperammonemia.<sup>1</sup> Appellee, Dr. Jay DeSalvo, an emergency room physician, evaluated, managed and treated Ms. Bryde for elevated ammonia levels and electrolyte imbalances. Dr. DeSalvo reviewed and interpreted the electrocardiogram (alternatively referred to as "ECG" or "EKG" throughout the record) results; in his opinion, the computer misinterpreted the EKG results. He diagnosed Ms. Bryde with alcohol-related seizures and treated her with potassium, Zofran, and Ativan. She was admitted to the medical/surgical floor of the hospital at 5:00 a.m., placed in a non-monitored room, found unresponsive during shift change rounds on the morning of June 20, 2015, and pronounced dead at 8:02 a.m. Appellants allege Dr. DeSalvo and Lakeview provided substandard care to Ms. Bryde by failing to further monitor her or admit her to the Intensive Care Unit despite critical, life-threatening laboratory results and physical findings. Appellants further allege that, as a result, Ms. Bryde suffered from undetected cardiac arrhythmia resulting in her death.

On June 17, 2016, appellants filed a request for a medical review panel with the Louisiana Patient's Compensation Fund against Dr. DeSalvo, Lakeview, and Dr. Charles Muntan, alleging medical malpractice in connection with Ms. Bryde's treatment that proximately caused her death. The panel unanimously concluded on August 11, 2017, that the evidence did not support an allegation that Appellee, Lakeview, or Dr. Charles Muntan had failed to meet the applicable standard of care.

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<sup>1</sup> Earlier in the morning of June 19, 2015, Ms. Bryde had been seen in the emergency room for chest wall soreness after an altercation with her boyfriend/father of appellant, Steven Galbreadth.

On September 13, 2017, appellants filed a petition for damages against appellee Dr. Jay DeSalvo, raising both wrongful death and survival causes of action arising out of medical malpractice resulting in Bryde's death at Lakeview on July 20, 2015. The petition alleges, among other failures, that Dr. DeSalvo failed to order a repeat ECG. On February 21, 2018, Dr. DeSalvo provided discovery answers. Dr. DeSalvo's deposition was taken on March 29, 2018. Appellant's counsel thereafter reached out to defense counsel to set a trial date on July 23, 2018. On July 24, 2018, Dr. DeSalvo filed an answer to the petition.

On July 25, 2018, Dr. DeSalvo filed a motion for summary judgment (MSJ) alleging that appellants could not meet their burden to produce expert opinion evidence of a material factual dispute as to whether Dr. DeSalvo violated the appropriate standard of care in his treatment of Ms. Bryde and that his violation was a cause of Ms. Bryde's death.<sup>2</sup> Appellants filed an opposition to the MSJ on September 13, 2018, without a motion for a continuance, stating that there were triable issues of fact with regard to medical expert opinions and attached four exhibits including a signed opinion letter from Dr. Brian Fuller, a physician certified in Critical Care Medicine and Emergency Medicine in St. Louis, Missouri and a signed report from Dr. John Norris, a physician board certified in Cardiac Electrophysiology, Cardiovascular Disease and Internal Medicine in Clearwater, Florida. These reports were not in sworn or verified form.

On September 26, 2018, Dr. DeSalvo filed a reply to the MSJ objecting to appellant's exhibits for failing to comply with the affidavit form required by La. C.C.P. 966(A)(4) and (D)(2).<sup>3</sup> Appellant's filed a reply memorandum in support of their opposition on September 27, 2018, stating that MSJ should not be granted until after there has been an opportunity for adequate discovery; that this case had no expert report cutoff; and that appellant had been attempting to have their expert reports authenticated by a notary public. On September 28, 2018, Appellants filed

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<sup>2</sup> The hearing was set for September 19, 2018, but continued to October 2, 2018 at appellant's request, with no objection from Dr. DeSalvo.

<sup>3</sup> Louisiana Code of Civil Procedure art. 966 was amended and reenacted by La. Acts 2015, No. 422, § 1, with an effective date of January 1, 2016. The amended version of Article 966 governs the summary judgment proceedings in this case. La. C.C.P. art. 966(A)(4) now provides, "[t]he only documents that may be filed in support of or in opposition to the motion are pleadings, memoranda, affidavits, depositions, answers to interrogatories, certified medical records, written stipulations, and admissions." The legislative comments to the amended version of Article 966 clarify that Subparagraph (A)(4), which is new, sets forth the exclusive list of documents that may be filed in support of or in opposition to a motion for summary judgment, and intentionally does not allow the filing of documents that are not included in the exclusive list, such as photographs, pictures, video images, or contracts, unless they are properly authenticated by an affidavit or deposition to which they are attached. *Raborn v. Albea*, 16–1468 (La. App. 1st Cir. App.5/11/17), 221 So.3d 104, 111 (quotations omitted) (citing La. C.C.P. art. 966, cmt. (c) (2015)).

motions to substitute notarized, sealed, and witnessed copies of Dr. Norris's and Dr. Fuller's reports for the ones previously attached to their opposition. On October 1, 2018, Dr. DeSalvo filed a motion to strike appellants' motions to substitute documents and/or memorandum in opposition.

On October 1, 2018, appellants filed a motion to continue the October 2, 2018 hearing on the MSJ.<sup>4</sup> The trial court granted appellants' motion to continue the MSJ hearing until January 8, 2019, in a signed judgment of November 20, 2018.<sup>5</sup> On December 18, 2018, appellants filed a motion for permission to file a supplementary memorandum in opposition to the summary judgment motion attaching seven exhibits. On December 31, 2018, Dr. Desalvo filed a memorandum in opposition to the appellant's motion arguing that appellants should not be allowed to supplement their opposition with any documents that they were already in possession of before filing the motion to continue. As the trial court had granted the continuance to allow appellants to review discovery responses which were not incorporated into their opposition, Dr. DeSalvo asserted that appellants were only seeking more time to correct defects in their expert documents and to have the "exhibits considered as timely-filed, admissible evidence."

On January 2, 2019, six days before the hearing on the MSJ, Dr. DeSalvo filed a second reply memorandum in support of his MSJ.<sup>6</sup> In his second reply memorandum, Dr. DeSalvo objected to Exhibit 1, Dr. Norris's affidavit and report as an attempt to circumvent procedural rules by substituting a properly sworn statement, also arguing for the first time that Dr. Norris was not qualified to offer an opinion on the standard of care applicable to an emergency room physician as he has no post-graduate training or clinical experience in emergency medicine.<sup>7</sup>

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<sup>4</sup> The trial court withheld ruling on the motion to continue until Dr. DeSalvo filed a memorandum in opposition to the motion to continue the hearing, which was filed on October 15, 2018.

<sup>5</sup> On December 26, 2018, Dr. DeSalvo filed an application for supervisory writs to this Court complaining of the trial court's judgment granting the continuance. This Court denied supervisory relief to Dr. DeSalvo finding no abuse in the trial court's discretion to continue the hearing since the litigation "has proceeded in a timely and expeditious manner" and the matter was not yet set for trial. *Bryde v. Lakeview Regional Medical Center*, 18-C-741, (La. App. 5th Cir. 12/28/18) (unpublished writ opinion).

<sup>6</sup> Appellants also filed a reply memorandum on this date defending their use of the continuance granted to carry out additional discovery for their new exhibits.

<sup>7</sup> Dr. DeSalvo also objected to all the other exhibits offered with appellant's December 18, 2018 motion to supplement: Exhibit 2, Dr. Fuller's letter as it was not sworn or in affidavit form and did not fall into the exclusive list of documents that may be admitted into evidence in support or in opposition to a motion for summary judgment. Dr. DeSalvo also objected to Exhibit 3, his own deposition, as it was not originally included in the appellant's first opposition; Exhibit 4, Cory Lacrouts' deposition transcription as it had no relevance to the standard of care, breach, or causation; Exhibit 5, Lakeview medical records, as not previously included; Exhibit 6, Lakeview letter with policies, as they are not within exclusive list of admissible summary judgment evidence; and Exhibit 7, Transcript of medical review panel as not within the exclusive list of allowable summary judgment evidence.

The trial court held a hearing on the motion for summary judgment on January 8, 2019. The court granted appellants' motion to supplement their opposition with all seven exhibits.<sup>8</sup> Dr. DeSalvo thereafter offered the panel opinion and oaths into evidence. The trial court found appellants' exhibits 1, 3, 4, 5, and 6 were admissible and would be taken into consideration.<sup>9</sup> After taking the matter under advisement, the trial court found no genuine issues of material fact and granted Dr. DeSalvo's motion for summary judgment. In an order signed February 5, 2019, the trial court dismissed appellants' claims with prejudice. Thereafter, appellants timely filed this appeal.

## DISCUSSION

Appellants allege the trial court erred in granting Dr. DeSalvo's motion for summary judgment by finding that Dr. Norris could not offer an opinion on the standard of care applicable to the field of emergency medicine. Finding "no showing that there are areas of Dr. Norris' practice of medicine which are also common to the practice of emergency medicine," the trial court held that appellants failed to establish a "standard of care applicable to an area of medicine common to the disciplines of Dr. Norris and Dr. DeSalvo." Appellants allege that Dr. Norris's report and Dr. DeSalvo's deposition testimony establish the standard of care in the overlapping area of interpretation of an electrocardiogram ("EKG" or "ECG"). Appellants also claim that the interpretation of an EKG involves a math computation that does not require expert testimony to establish malpractice.<sup>10</sup>

### 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. *Collins v. Home Depot, U.S.A. Inc.*, 16-516 (La. App. 5 Cir. 3/15/17), 215 So.3d 918, 920; *Bell v. Parry*, 10-369 (La. App. 5 Cir. 11/23/10), 61 So.3d 1, 2. The summary judgment procedure is favored and is designed to secure the just, speedy, and inexpensive determination of every action. La. C.C.P. art. 966(A)(2). 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

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<sup>8</sup> Appellant's original Exhibits A. the unnotarized opinion letter of Dr. Fuller, B. the unnotarized panel transcript, C. Dr. Norris's unnotarized opinion letter and D. email between counsel were struck without objection.

<sup>9</sup> Exhibit 2, the letter of Dr. Fuller, an emergency medicine physician, was not considered as it was not in proper affidavit form; Exhibit 7, the transcript of the panel, was neither admitted nor taken into consideration.

<sup>10</sup> We find no merit to this argument contained in the third assignment of error as the medical and factual issues in appellants' claims are beyond the province of lay persons to assess without expert testimony. *Pfiffner v. Correa*, 94-0924 (La. 10/17/94), 643 So. 2d 1228, 1234.

to judgment as a matter of law.” La. C.C.P. art. 966(A)(3); *see also Chauvin v. Shell Oil Co.*, 16-609 (La. App. 5 Cir. 10/25/17), 231 So.3d 903. The mover’s burden on the motion for summary judgment, when he does not bear the burden of proof at trial, requires him “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.” La. C.C.P. art. 966(D)(1). The opposing party’s burden is 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.” *Id.*

Appellate courts review a judgment granting or denying a motion for summary judgment *de novo*. Thus, appellate courts ask the same questions the trial court does in determining whether summary judgment is appropriate: whether there is any genuine issue of material fact, and whether the mover is entitled to judgment as a matter of law. *Sarasino v. State*, 16-408 (La. App. 5 Cir. 3/15/17), 215 So.3d 923, 927–28.

To establish a claim for medical malpractice, a plaintiff must prove, by a preponderance of the evidence, the standard of care applicable to the defendant, a breach of that standard of care, and a causal connection between the breach and the claimed injury. *Samaha v. Rau*, 07-1726 (La. 2/26/08), 977 So.2d 880, 883–84. Louisiana Revised Statute 9:2794(A) provides that in a medical malpractice action, the plaintiff has the burden of proving the degree of knowledge or skill possessed or the degree of care ordinarily exercised by physicians practicing in a similar community under similar circumstances. Expert testimony is generally required, except where the negligence is so obvious that a lay person can infer negligence without the guidance of expert testimony. *Johnson v. Morehouse* (La. 5/10/11), 63 So.3d 87, 96.

### Qualification of Medical Experts

La. R.S. 9:2794 states no absolute requirement that a proffered expert must practice in the same specialty as the defendant, or be board certified in that specialty. Rather, the statute allows that an expert may be qualified on the basis of her “training or experience,” and that board certification and practice in the area of specialty are factors that the trial court must consider in making this determination. In determining whether testimony regarding the standard of care will be limited under La R.S. 9:2794(A) to a specialist who practices the same specialty as the defendant, the operative statutory phrase is “where the alleged acts of medical

negligence raise issues peculiar to the particular medical specialty involved.” *Howard v. Vincent*, 11–0912 (La. App. 4 Cir. 03/28/12), 88 So.3d 1219, 1222, writ denied, 12–0967 (La. 6/22/12), 91 So.3d 970.

A physician practicing in a different discipline than the defendant doctor may offer expert testimony as to a common standard of care where medical disciplines overlap. *Thompson v. The Center for Pediatric and Adolescent Medicine LLC*, (La. App. 1 Cir. 3/15/18) 244 So.3d 441. Where the procedure alleged to be negligently performed is one that is not limited to a particular specialty, and where there is no showing that the standard of care is different for different medical disciplines, an expert with knowledge of the requisite procedure should be permitted to testify regarding the standard of care for performing that procedure. *Ricker v. Hebert*, 94-1743 (La. App. 1 Cir. 5/5/95), 655 So. 2d 493, 495. The Louisiana Supreme Court has held that it is “a specialist’s knowledge of the requisite subject matter, rather than the specialty or sub-specialty within which the specialist practices, which determines whether a specialist may testify as to the degree of care which should be exercised by general practitioners.” *McLean v. Hunter*, 495 So.2d 1298, 1302 (La. 1986).

This Court previously held that the plaintiff’s expert’s specialty is not dispositive of the issue of her qualifications to testify as an expert. *Pertuit v. Jefferson Parish Hospital Service District*, 14-752 (La. App. 5 Cir. 5/14/15) 170 So.3d 1106. In the *Pertuit* case, the plaintiff alleged negligence on the part of Dr. Johnston, a neurosurgeon, relating to his failure to review the patient’s medical chart which revealed that the patient’s blood pressure was unstable before removal of the frontoventriculostomy tube. *Id.* at 1110. While the plaintiff’s expert, Dr. Wojak was an interventional neuroradiologist, and not a neurosurgeon, “further inquiry is necessary to determine whether she is able to testify based upon her training and experience” and whether the alleged act of negligence falls within an area of overlap between Dr. Wojak’s and Dr. Johnston’s specialties. *Id.* at 1111.

In the present case, Dr. DeSalvo sufficiently pointed out in his motion for summary judgment an absence of factual support for one or more elements essential to the appellants’ claim by submitting the medical review panel’s opinion that Dr. DeSalvo complied with the applicable standard of care. *See* La. Code Civ. Pro. art. 966(D)(1). The burden of proof then shifted to the appellants 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. *See* La. Code

Civ. Pro. art. 966(D)(1). To meet that burden, the appellants relied on the affidavit (and accompanying medical report) of Dr. Norris, the deposition of Nurse Corey Lacrouts, the deposition of Dr. DeSalvo, and the medical records from Lakeview.

*Dr. Norris's report*

Dr. John Norris, as confirmed in his affidavit, is a board certified cardiac electrophysiologist with 18 years of experience as an assistant professor of medicine. His report states that his opinions therein are based on a review of Ms. Bryde's medical records, the depositions of Dr. DeSalvo and other hospital employees, as well as the expert opinion letter from Dr. Fuller. His bibliography lists journal articles from American Journal of Cardiology as well as Emergency Medicine Practice. In listing the data reviewed he cites the article *Clinical Decision Making in Seizures and Status Epilepticus*. Teran F., Harper-Kirksey K., Jagoda A., 17 EMERG. MED. PRACT. 1-24 (2015).<sup>11</sup> Dr. Norris stated he was "well-versed with the standard of care in the case of Sandra Bryde by my training, education and experience in the field of cardiac electrophysiology." He further states that as he has "treated thousands of arrhythmia patients and dozens of people like Ms. Bryde in my career, I can fairly and accurately evaluate the care she was provided."

Dr. Norris's report includes the ECG of Ms. Byrde, performed at 9:00 p.m. on June 19, 2015, and interpreted by Dr. DeSalvo, which he states shows significant QTc prolongation of close to 600 milliseconds, with a QT interval measuring 380 to 400 milliseconds.<sup>12</sup> He defines the QT interval as the EKG measurement of electrical signals from the onset of the lower chamber activation to the end of the lower chamber recovery. Dr. Norris opined that Dr. DeSalvo failed to meet the standard of care by: 1) failure to adequately treat the profound potassium deficiency; 2) failure to recognize QTc prolongation on ECG; 3) failure to identify the proximate cause of the QTc prolongation on the ECG; 4) ordering the administration of IV ondasetron in patient with QTc prolongation; and 5) failure to admit Ms. Bryde to monitored bed for correction of potassium deficiency while prolonging medications were held, leading to arrhythmia and cardiac arrest.

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<sup>11</sup> This journal article which was attached as an exhibit to Dr. DeSalvo's deposition states that an ECG can identify a prolonged QT. Dr. DeSalvo testified at his deposition that he is a subscriber to this journal and finds the articles to be well reviewed.

<sup>12</sup> The QTc interval is a corrected QT interval calculated by using mathematical formulas, with 500ms being considered highly abnormal.

*Dr. DeSalvo's deposition*

Dr. DeSalvo testified in his deposition that he can order and interpret an EKG himself without going through another specialist. As an emergency room physician, he would be required to consult a neurologist to order and interpret an EEG. He has authority to order a CT scan, but final interpretation of a CT scan would require a radiologist. He admitted that interpretation of an EKG is a necessary for the performance of his duties an emergency room physician. He further testified that the standard of care of an ER doctor would be an understanding of the importance of QTc being prolonged because a patient is more likely to have an arrhythmia and should be admitted to a monitored bed. His deposition testimony states that it would be below the standard of care to not list in the medical reports that an EKG was obtained and contained a prolonged QTc.

In his deposition, Dr. DeSalvo did not dispute the standard of care regarding the alleged act of malpractice. He disputes the allegation of a breach in the standard of care in this case because in his opinion the EKG did not actually show a prolonged QTc. Dr. DeSalvo testified that despite the EKG machine's interpretation of a prolonged QTc, in his opinion, the computer misinterpreted due to artifact on the EKG (abnormalities associated with patient movement). After examining Ms. Bryde's EKG strips during his deposition and indicating that "I have to do a little math," he concluded, "I do not believe this is a prolonged QTC. . .[i]f what you circled demonstrates it, then I would be wrong." As appellants allege in their second assignment of error, Dr. DeSalvo's testimony established the standard of care for an emergency medicine physician in interpreting ECG results for QTc elongation.

The trial court found Dr. Norris's affidavit provides no showing that areas of his practice of medicine are also common to the practice of emergency medicine, and even construing all reasonable inferences in favor of appellants, it cannot reasonably be inferred that Dr. Norris is familiar with the standard of care applicable to Emergency Medicine. However, a showing was made that administering and interpreting an EKG are areas common to the practice of both Dr. Norris and Dr. DeSalvo. Appellees failed to offer evidence that the EKG procedure is peculiar to a particular specialty or that the standard of care is different for electrocardiologists and emergency room physicians such that Dr. Norris should not be allowed to testify regarding the standard of care for interpreting an EKG.

In *Campbell v. Hospital Service Dist. 1, Caldwell Parish*, the Second Circuit found that cardiologist expert witnesses “were more than qualified to establish the standard applicable” to a physician in the practice of emergency room medicine. (La. App. 2 Cir. 10/4/00), 768 So.2d 803, 811. In that case, the court found that the record showed that the diagnosis and treatment of angina is “not peculiar to the practice of emergency room medicine.” *Id.* The court further noted that the expert cardiologist opined that the EKG showed a subtle abnormality which should have alerted the defendant doctor to an imminent myocardial infarction when coupled with other factors.<sup>13</sup> This Court has previously held that a specialist with knowledge of the requisite subject matter may be qualified to testify regarding the standard of care in a general practitioner’s locale, allowing the deposition of a board certified neurologist who had worked as an emergency room physician for one year. *Kieffer v. Plunkett-Kuspa*, 13-499 (La. App. 5 Cir. 3/26/14), 138 So. 3d 682, 684–85 (per curiam). *See also, Steinbach v. Barfield*, (La. App. 1 Cir. 2/22/1983), 428 So.2d 915, 920–921 (finding there was no evidence to show that the standards required of a specialist in internal medical for diagnosing colon cancer were “different (higher or lower) from those required of specialist in family and colon rectal surgery.”)

In this case, however, there was insufficient evidence before the trial court to support a finding that the issue of malpractice was peculiar to an emergency room physician, both Dr. DeSalvo’s deposition and Dr. Norris’s expert report provides evidence to show that each has knowledge, training, and experience in the interpretation of an EKG. There was no evidence that the standard of care for interpretation of an EKG is different for emergency room physicians and electrocardiologists. Although Dr. DeSalvo’s brief argues a “hyper-specialist” such as Dr. Norris cannot testify as to the standard of care for a “generalist” emergency room physician, in his challenge to Dr. Norris in his reply to the MSJ, there was no assertion or evidence that electrocardiologists are held to a higher standards than emergency room physicians. Claiming an expert is not qualified without any facts or competing expert opinion is insufficient to withstand summary judgment. *Hayne v. Woodbridge Condominiums, Inc.*, 06-923 (La. App. 5 Cir. 4/11/07), 957 So.2d 804, 809.

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<sup>13</sup> Dr. Nguyen, the emergency room physician believed the EKG was unremarkable and admitted the plaintiff patient to the ICU for observation. The expert cardiologist testified that the EKG’s abnormality would not be as discernable to a non-cardiology resident but coupled with the clinical presentation and worsening condition should have alerted Dr. Nguyen.

Construing all reasonable inferences in favor of appellants, the evidence before this Court in the present case demonstrates an area of overlap between specialties in the interpretation of an EKG without the necessity of further inquiry. There was no evidence offered to show that EKG interpretation is unique to a particular specialty, in fact, both Dr. DeSalvo's deposition and Dr. Norris's expert report provide sufficient evidence to show that each has knowledge, training, and experience in the procedure. As such, we find the trial court erred in finding that Dr. Norris, as an electrocardiologist, was not qualified to give his opinion on the standard of care required for accurate interpretation of an EKG.

### Procedure for Challenging Experts

The trial judge is tasked with ensuring that expert testimony is relevant and reliable. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).<sup>14</sup> Under La. C.C.P. art. 1425(F) any party may file a motion for a pretrial hearing for a court determination of whether a witness qualifies as an expert upon a showing of sufficient allegations no later than sixty days prior to trial. Dr. DeSalvo argues that a separate Article 1425 *Daubert* hearing is not procedurally required to challenge the qualifications of a countervailing expert to resolve a motion for summary judgment.

While this Court has previously stated that the Louisiana Supreme Court contemplates the holding of an evidentiary hearing in most cases where an expert's qualifications are challenged, the necessity of an evidentiary hearing should be determined on a case by case basis. *Pertuit*, 170 So.3d at 1111-12 (examining *State v. Foret*, 628 So.2d 1116 (La. 1993)). In the *Pertuit* case, we acknowledged that a trial court may conduct a *Daubert* analysis of an expert's qualifications in a motion for summary judgment upon a challenge in the reply memorandum to determine if an issue of malpractice is unique to the defendant's specialty requiring the testimony of an expert in that specialty. *Id*; *See also Thomas v. Drew*, 17-818 (La. App. 3rd Cir. 3/7/18) 240 So.3d 980.<sup>15</sup> The trial court cannot, however, make credibility determinations, evaluate testimony, or weigh conflicting evidence in

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<sup>14</sup> The Louisiana Supreme Court has adopted a three-prong inquiry in determining the admissibility of expert testimony: 1) the expert must be qualified to testify competently regarding the matters; 2) the methodology must be sufficiently reliable; and 3) the testimony will assist the trier of fact to determine a fact in issue. *Cheairs v. State ex rel. Department of Transp. and Dev.*, 03-680 (La. 12/3/03), 861 So.2d 536, 542.

<sup>15</sup> In that case the Louisiana Third Circuit found that the trial court should, and did, consider *Daubert* standards before admitting an expert opinion affidavit at the summary judgment stage. *Thomas*, 240 So.3d at 983. The plaintiff's expert did not establish what standard of care was owed and failed to support his conclusions with underlying facts warranting summary judgment, but the Third Circuit noted that the malpractice did not involve an issue peculiar to the defendant's specialty. *Id.* at 985.

making its decision whether to grant or deny a motion for summary judgment. *Smith v. Our Lady of the Lake Hosp., Inc.*, 93–2512, p. 27 (La.7/5/94), 639 So.2d 730, 751.

In this case, Dr. DeSalvo’s challenge to Dr. Norris’s qualifications were not supported by evidence that electrocardiologists are held to a higher standard than emergency room physicians, such as an affidavit of an emergency room physician (including Dr. DeSalvo) or cross-examination of Dr. Norris. Due to the revisions to the rules for motions for summary judgment, the introduction of this evidence could not have been included in Dr. DeSalvo’s reply memorandum as La. C.C.P. art. 966(B)(3) prohibits the filing of additional documents with a reply memorandum. *See supra* note 3; *See also Adolph v. Lighthouse Property Ins. Corp.*, 2016-1275 (La. App. 1 Cir. 9/18/17) 227 So.3d 316, 320 (The First Circuit discussed the problems which exist in challenging an expert’s qualifications after the 2015 revisions to La. C.C.P. Art. 966.). If Dr. DeSalvo had filed a motion for an article 1425 evidentiary hearing, he could have challenged Dr. Norris’s qualifications without formal constraints on evidence. *See Guardia v. Lakeview*, 08–1369 (La. App. 1 Cir. 05/08/09), 13 So.3d 625 (appellate court found summary judgment premature where the trial court disqualified plaintiff's expert without first conducting a hearing to determine if the expert’s testimony complied with *Cheairs*). The evidence before the trial court on the MSJ was insufficient to challenge Dr. Norris’s qualifications to give his opinion on the standard of care required for accurate interpretation of an EKG on the basis of his specialty.

## CONCLUSION

Therefore, on the particular facts of the case before us, where there appears to be a colorable claim of overlap between the two disciplines of cardiac electrophysiology and emergency medicine as it pertains to the procedure of interpreting EKG results, we find that the appellants provided a material issue of fact as to whether Dr. DeSalvo breached the standard of care in interpreting Ms. Bryde’s EKG. Accordingly, we reverse the decision of the trial court, and vacate the judgment on Dr. DeSalvo’s motion for summary judgment, and remand for further proceedings.

REVERSED AND REMANDED

SUSAN M. CHEHARDY  
CHIEF JUDGE

FREDERICKA H. WICKER  
JUDE G. GRAVOIS  
MARC E. JOHNSON  
ROBERT A. CHAISSON  
STEPHEN J. WINDHORST  
HANS J. LILJEBERG  
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**NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY**

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED  
IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY  
**DECEMBER 11, 2019** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES  
NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

A handwritten signature in blue ink, reading "Curtis B. Pursell", is written over a horizontal line.

**CURTIS B. PURSELL**  
CLERK OF COURT

**19-CA-166**

**E-NOTIFIED**

24TH JUDICIAL DISTRICT COURT (CLERK)  
HONORABLE STEPHEN D. ENRIGHT, JR. (DISTRICT JUDGE)  
RANDY J. UNGAR (APPELLANT)                      C. WILLIAM BRADLEY, JR. (APPELLEE)

BENJAMIN J. BILLER (APPELLEE)

**MAILED**

ALDRIC C. POIRIER, JR. (APPELLEE)	JAMES P. DESONIER (APPELLANT)	S. CATHERINE LEARY (APPELLANT)
ELIZABETH S. SCONZERT (APPELLEE)	ATTORNEY AT LAW	ATTORNEY AT LAW
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