

KRISTY SMITH

NO. 24-CA-538

VERSUS

FIFTH CIRCUIT

LISA DEVENPORT M.D, ET AL

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 815-733, DIVISION "M"
HONORABLE SHAYNA BEEVERS MORVANT, JUDGE PRESIDING

April 02, 2025

SCOTT U. SCHLEGEL
JUDGE

Panel composed of Judges Jude G. Gravois,
Stephen J. Windhorst, and Scott U. Schlegel

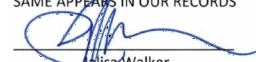
AFFIRMED

SUS

JGG

SJW

FIFTH CIRCUIT COURT OF APPEAL
A TRUE COPY OF DOCUMENTS AS
SAME APPEARS IN OUR RECORDS


Alisa Walker
Deputy, Clerk of Court

COUNSEL FOR PLAINTIFF/APPELLANT,
KRISTY SMITH

Marie C. Williams

COUNSEL FOR DEFENDANT/APPELLEE,
OCHSNER MEDICAL CENTER - WESTBANK, LLC AND LISA
DEVENPORT, M.D.

Nairda T. Colon

SCHLEGEL, J.

Plaintiff, Kristy Smith, appeals the trial court's September 26, 2024 judgment granting summary judgment in favor of defendants, Ochsner Medical Center – Westbank, LLC and Lisa Devenport, M.D., and dismissing her claims against them, with prejudice. For the reasons stated more fully below, we affirm.

FACTS AND PROCEDURAL BACKGROUND

This matter involves a medical malpractice claim. Ms. Smith alleges that on April 10, 2019, she went to the LCMC Health Urgent Care in Gretna, La., where she was diagnosed with unspecified abdominal pain. She was prescribed an injection for nausea/vomiting, and told to go immediately to the emergency room for further evaluation. Ms. Smith then went to the emergency room at Ochsner Medical Center – West Bank Campus where she was treated by Dr. Lisa Devenport. Ms. Smith alleges that she complained of severe abdominal pain, but contends that Dr. Devenport did not touch her abdomen to determine the location of the pain or order an imaging test. She alleges that Dr. Devenport gave her IV fluids, discharged her with a prescription for nausea medication, and told her to return within two to three days if her condition worsened. Several days later on April 14, 2019, Ms. Smith went to the Tulane Medical Center Emergency Room. After conducting a CT scan, the attending physician diagnosed Ms. Smith with a ruptured appendix. She underwent emergency surgery shortly thereafter.

On January 7, 2020, Ms. Smith filed a request for formation of a medical review panel alleging that Dr. Devenport breached the standard of care by failing to order imaging and blood work after Ms. Smith complained of severe abdominal pain. The medical review panel issued a unanimous decision on November 19, 2020, finding that the evidence did not support a finding that Dr. Devenport failed to meet the applicable standard of care. On March 16, 2021, Ms. Smith filed her petition for damages against Dr. Devenport and Ochsner.

Over three years later, on August 7, 2024, defendants filed a motion for summary judgment on the grounds that Ms. Smith failed to identify an expert physician to meet her burden of proof pursuant to La. R.S. 9:2794. Defendants argued that this matter involves complex medical issues associated with the diagnosis and treatment of unspecified abdominal pain in an emergency medicine healthcare setting. Thus, they argued that an expert is necessary to explain the standard of care, as well as the relationship between the treatment provided and Ms. Smith's alleged damages.

In further support of their summary judgment motion, defendants attached affidavits from two members of the medical review panel, Dr. Brian Dehart and Dr. John Krieg. In their affidavits, these doctors explained that after reviewing Ms. Smith's complaint and her medical records, the panel convened and rendered a unanimous opinion that Dr. Devenport did not breach the standard of care in providing medical treatment to Ms. Smith. The medical review panel opinion contains the following conclusions:

- 1) The patient presented with generalized abdominal pain. Dr. Davenport (sic) took a detailed history, performed a thorough examination of the abdomen and ordered appropriate laboratory tests.
- 2) Based on Dr. Davenport's evaluation Dr. Davenport felt the patient did not have any worrisome findings.
- 3) Appendicitis can be difficult to diagnose on an initial evaluation. Because of this Dr. Davenport gave the patient a very detailed instruction on when to seek medical attention including for worsening pain or pain in the right lower abdomen.

Dr. Dehart and Dr. Kreig further stated in their affidavits that after reviewing the petition for damages, it was still their opinion that Dr. Devenport did not deviate from the standard of care in treating Ms. Smith.

The trial court set the summary judgment motion for hearing on September 24, 2024. Ms. Smith filed an untimely opposition to the summary judgment

motion on September 19, 2024.¹ In her opposition, Ms. Smith argued that discovery was still ongoing and that defendants had not responded to her discovery requests. She did not attach any exhibits or expert affidavits in support of her opposition memorandum. Plaintiff's counsel also indicated that defendants had not sent discovery asking for the identity of Ms. Smith's trial experts, and defense counsel would not return her phone calls to discuss the matter.

Following oral argument, the trial court granted defendants' motion for summary judgment. The trial court signed a written judgment on September 25, 2024, dismissing Ms. Smith's claims against defendants with prejudice. Ms. Smith filed a timely motion for devolutive appeal, which the trial court also granted on September 25, 2024.

LAW AND DISCUSSION

On appeal, Ms. Smith contends that the trial court erred by granting defendants' summary judgment motion based on her failure to identify an expert witness. Ms. Smith further claims that she requires additional time for discovery. Defendants argue in response that Louisiana law requires a plaintiff to prove medical malpractice claims through medical experts, and that Ms. Smith failed to identify any medical expert testimony to establish the elements of her claims or to rebut the expert opinion of the medical review panel. Defendants contend that Ms. Smith also failed to establish any obvious act of malpractice by defendants that would dispense with the requirement for expert testimony. Finally, defendants argue that Ms. Smith had ample time and opportunity to procure a medical expert and her request for additional discovery is a dilatory tactic.

¹ La. C.C.P. art. 966(B)(2) provides "[e]xcept for any document provided for under Subsubparagraph (A)(4)(b) of this Article, any opposition to the motion and all documents in support of the opposition shall be filed and served in accordance with Article 1313(A)(4) not less than fifteen days prior to the hearing on the motion."

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). After an adequate time for discovery, 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. La. C.C.P. art. 966(D)(1). However, if the mover will not bear the burden of proof at trial on the issue before the trial court on the motion for summary judgment, the mover is not required to negate all essential elements of the plaintiff's claim, but is only required to point out the absence of factual support for one or more elements essential to the plaintiff's claim. *Id.* The burden then shifts to the plaintiff to produce factual support sufficient to show 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 summary judgments *de novo* using the same criteria that govern the trial court's determination of whether summary judgment is appropriate. *Reed v. Landry*, 21-589 (La. App. 5 Cir. 6/3/22), 343 So.3d 874, 880.

To establish a claim for medical malpractice, a plaintiff must prove by a preponderance of evidence: 1) the standard of care applicable to the defendant; (2) the defendant breached that standard of care; and (3) there was a causal connection between the breach and the resulting injury. La. R.S. 9:2794. Unless the case involves some obviously careless act from which a lay person can infer negligence, such as amputating the wrong limb or leaving a sponge in a patient's body, the absence of expert testimony as to any of the essential elements of the plaintiff's malpractice claim will preclude the imposition of liability. *Pfiffner v. Correa*, 94-924, 94-963, 94-992 (La. 10/17/94), 643 So.2d 1228, 1233-34. Generally, because of the complex medical and factual issues involved, a plaintiff will likely fail to

sustain his burden of proving his claim under La. R.S. 9:2794's requirements without expert testimony. *Id.* at 1234. We agree with defendants that this matter requires expert medical testimony regarding the applicable standard of care, the alleged breach of the standard of care, and the causal connection between the alleged breach and resulting injury.

In *Samaha v. Rau*, 07-1726 (La. 2/26/08), 977 So.2d 880, 890, the defendant doctor filed a motion for summary judgment in a medical malpractice case, contending that the plaintiffs lacked the expert medical testimony necessary to support their claims against him. The trial court granted the motion for summary judgment. *Id.* at 881. The court of appeal reversed and found that the defendant did not properly support his motion for summary judgment with either an affidavit or deposition from an expert medical provider to prove that his medical treatment was not below the applicable standard of care. *Id.* at 881-82. The Louisiana Supreme Court disagreed and found that because the defendant did not bear the burden of proof at trial on the issue of whether he committed medical malpractice, he was under no burden to present expert medical testimony. *Id.* at 887. The court found that the defendant only had the burden of raising as the basis of his motion that plaintiffs could not support their claim. The burden then shifted to the plaintiffs to produce evidence sufficient to establish that they would be able to satisfy their burden at trial. *Id.* at 887-88.

In the instant matter, defendants satisfied their burden by pointing out the absence of proof for an essential element of Ms. Smith's claim, specifically a lack of expert medical evidence. Defendants also pointed out that the medical review panel unanimously found that Dr. Devenport did not breach the applicable standard of care. The burden then shifted to Ms. Smith to produce evidence sufficient to establish a genuine issue of material fact. Ms. Smith complains that discovery was incomplete, but fails to explain what additional discovery she required to obtain a

medical expert. In addition, at the time defendants filed their summary judgment motion, this lawsuit had been pending for over three years. Ms. Smith has had more than adequate time to conduct discovery. Because Ms. Smith failed to produce expert medical testimony that defendants breached the applicable standard of care, or any other admissible medical evidence to satisfy the requirements of La. R.S. 9:2794, no genuine issues of material fact exist and defendants are entitled to summary judgment as a matter of law.

Ms. Smith also includes an assignment of error regarding the alleged lack of a hearing and notice of the prior trial judge's recusal from this matter in 2022. However, the prior trial judge recused himself pursuant to La. C.C.P. art. 153 on his own motion, and therefore, no hearing was required. Further, Ms. Smith did not raise this issue with the trial court, and as a general rule, appellate courts do not consider issues that were not raised with the trial court for the first time on appeal. See Uniform Rules – Courts of Appeal, Rule 1-3; *Lepine v. Lepine*, 17-45 (La. App. 5 Cir. 6/15/17), 223 So.3d 666, 673.²

DECREE

Accordingly, we affirm the judgment of the trial court granting summary judgment in favor of defendants, Ochsner Medical Center –Westbank, LLC and Lisa Devenport, M.D., and dismissing Ms. Smith's claims against them, with prejudice.

AFFIRMED

² Ms. Smith also briefly mentions for the first time in her appellate brief that defendants did not serve or email notice of the September 24, 2024 hearing date for their summary judgment motion. She did not raise this issue with the trial court. And as stated above, we generally do not consider such issues for the first time on appeal. However, contrary to Ms. Smith's claims, our review of the record indicates that defense counsel filed an affidavit of service in the record confirming that notice of the hearing date was emailed to plaintiff's counsel on August 22, 2024. Further, the exhibits attached to the affidavit indicate that defense counsel received electronic confirmation of delivery of the email in accordance with La. C.C.P. arts. 966(C)(1)(b) and 1313(C).

SUSAN M. CHEHARDY
CHIEF JUDGE

FREDERICKA H. WICKER
JUDE G. GRAVOIS
MARC E. JOHNSON
STEPHEN J. WINDHORST
JOHN J. MOLAISSON, JR.
SCOTT U. SCHLEGEL
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JUDGES



FIFTH CIRCUIT

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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 **APRIL 2, 2025** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

CURTIS B. PURSELL
CLERK OF COURT

24-CA-538

E-NOTIFIED

24TH JUDICIAL DISTRICT COURT (CLERK)
HONORABLE SHAYNA BEEVERS MORVANT (DISTRICT JUDGE)
NAIRDA T. COLON (APPELLEE)

MAILED

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