VICKYANN CORTES

VERSUS

UNIVERSITY HEALTHCARE SYSTEM, ET AL

NO. 24-CA-543

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 852-845, DIVISION "I"
HONORABLE NANCY A. MILLER, JUDGE PRESIDING

April 02, 2025

JOHN J. MOLAISON, JR.
JUDGE

Panel composed of Judges Marc E. Johnson,
John J. Molaison, Jr., and Timothy S. Marcel

AFFIRMED IN PART; REVERSED IN PART; REMANDED WITH INSTRUCTIONS

JJM
MEJ

DISSENTS WITH REASONS

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MOLAISON, J.

In this medical malpractice case, the appellant, Vickyann Cortes, seeks review of the Twenty-Fourth Judicial District Court's final judgments sustaining the appellees' separate peremptory exceptions of no cause of action and dismissing the case against the appellees without prejudice. We affirm in part, reverse in part, and remand with instructions for the following reasons.

PROCEDURAL HISTORY

Plaintiff/appellant, Ms. Cortes, filed a petition on March 28, 2024, alleging that the defendants/appellees (University Healthcare System, L.L.C. d/b/a Tulane Lakeside Hospital, Dr. Gabriella Pridjian, Dr. Eric Schwartz, Dr. Stacy Tran, Dr. Chi Dola, and Dr. Eduardo Herra-Husband) committed medical malpractice in their treatment of her nonviable pregnancy[1] that resulted in the removal of her fallopian tube. Ms. Cortes had previously convened a medical review panel that issued its Opinion and Reasons on November 9, 2023, finding no breach in the standard of her care by Drs. Pridjian, Herrera, Burra, Dola, Ngoc Tran, Schwartz,[2] and Tulane Lakeside Hospital. Individually, the defendants filed exceptions of no cause of action because of statutory immunity provided under La. R.S. 29:771(B)(2)(c)(i), which is part of the Louisiana Health Emergency Powers Act ("LHEPA"). Ms. Cortes filed a supplemental and amending petition on June 5, 2024, to specifically include "her allegation of gross negligence."[3] On June 27, 2024, the district court held a hearing on the no cause of action exceptions.[4] On July 8, 2024, the court granted all of the exceptions and dismissed the defendants

[1] In this context "nonviable" means that it was not an intrauterine pregnancy. Ms. Cortes claims in her petition that her pregnancy was "ectopic."

[2] The medical review panel's report partially concluded that "[t]he patient had an unfortunate outcome that was not caused by a breach in the standard of care."

[3] After the petition was amended, the appellees also supplemented their exceptions to address the new issues raised.

[4] Dr. Tran's exception of no cause of action was tried separately on September 5, 2024. The court granted Dr. Tran's exception on September 16, 2024. A separate motion to appeal this ruling was granted on September 24, 2024. The appellate record was supplemented with this judgment on December 10, 2024.

without prejudice. The court granted Ms. Cortes' motion for appeal on August 19, 2024.

ASSIGNMENT OF ERROR

The trial court erred in granting the exceptions of no cause of action upon finding that Ms. Cortes failed to state a cause of action for gross negligence.

LAW AND ANALYSIS

An affirmative defense

This Court has previously acknowledged that the question of immunity under La. R.S. 29:771(B)(2)(c)(i) is an affirmative defense not correctly raised as a peremptory exception of no cause of action. However, we have held that the trial court can still consider the merits of such a defense, even if improperly filed, under La. C.C.P. art. 1005, which provides in part, "If a party has mistakenly designated an affirmative defense as a peremptory exception or as an incidental demand, or a peremptory exception as an affirmative defense, and if justice so requires, the court, on such terms as it may prescribe, shall treat the pleading as if there had been a proper designation." *Welch v. United Med. Healthwest-New Orleans, L.L.C.*, 21-684 (La. App. 5 Cir. 8/24/22), 348 So.3d 216, 221-22. We see no error in the trial court's consideration of the appellees' immunity claims as we did in *Welch*.

The party raising an affirmative defense is burdened to prove it by a preponderance of the evidence. *Norton v. Norton*, 21-212 (La. App. 5 Cir. 12/22/21), 335 So.3d 371, 386. On legal issues, the appellate court gives no special weight to the findings of the trial court; still, this court must exercise its constitutional duty to review questions of law *de novo* and render judgment on the record. *Anderson v. Dean*, 22-233 (La. App. 5 Cir. 7/25/22), 346 So.3d 356, 364.

LHEPA

On March 11, 2020, Governor John Bel Edwards declared a public health emergency in Proclamation No. 25 JBE 2020 due to COVID-19. The Louisiana Health Emergency Powers Act (LHEPA) provides that during a public health emergency, no healthcare provider shall be civilly liable for causing the death of, or injury to, any person or damage to any property except in the event of gross negligence or willful misconduct. La. R.S. 29:771(B)(2)(c). *Welch, supra*. Ms. Cortes' treatment dates, July 21 through August 5, 2021, occurred while LHEPA was in effect. The public health emergency ended in March 2022.

Gross negligence and willful misconduct

After review, we find the petition, as amended, does not allege that the defendants committed acts of willful misconduct during Ms. Cortes' treatment. The term "gross negligence" in the context of medical malpractice claims that arose during the time La. R.S. 29:771(B)(2)(c)(i) and LHEPA were in effect, was clarified by the Louisiana Supreme Court as follows:

> Gross negligence has been defined as the "want of even slight care and diligence" and the "want of that diligence which even careless men are accustomed to exercise." Gross negligence has also been termed the "entire absence of care" and the "utter disregard of the dictates of prudence, amounting to complete neglect of the rights of others." Additionally, gross negligence has been described as an "extreme departure from ordinary care or the want of even scant care." "There is often no clear distinction between such [willful, wanton, or reckless] conduct and 'gross' negligence, and the two have tended to merge and take on the same meaning." Gross negligence, therefore, has a well-defined legal meaning distinctly separate, and different, from ordinary negligence.

Sebble on Behalf of Est. of Brown v. St. Luke's #2, LLC, 23-483 (La. 10/20/23), 379 So.3d 615, 628 n.3, *reh'g denied*, 23-483 (La. 12/7/23), 374 So.3d 138.

The allegations, as stated in Ms. Cortes' original petition, were that the defendants were negligent in the following respects:

> A. Failing to timely and adequately manage an ectopic pregnancy;
> B. Failure to timely diagnose and treat an ectopic pregnancy;

C. Failing to determine and/ or rule out "pregnancy of unknown location" by laparoscopic exploration;
D. Failure to timely initiate Methotrexate therapy following:
a. The confirmation of a nonviable pregnancy indicated by the beta-hCG drop from 7/21 to 7/23;
b. The 7/26 visit for repeat beta-hCG indicating a nonviable pregnancy and the likelihood of ectopic;
c. The 08/02 ER visit when she was experiencing pelvic pain, with nonresolving hCG levels, and free fluid in the U/S; and
E. Failure to adequately manage Ms. Cortes' care after Methotrexate was finally initiated[.]

In her amended petition, Ms. Cortes added these allegations of "gross negligence":

> During her visits with the Defendants, Vickyann Cortes always had an ectopic pregnancy which is a nonviable pregnancy in a woman's fallopian tube. Never, at any time, did Vickyann Cortes have a viable intrauterine pregnancy. All of the defendants are aware or should have been aware that an ectopic pregnancy is a serious life-threatening condition in which the ectopic pregnancy can rupture. All Defendants are aware or should have been aware that treatment for an ectopic pregnancy cannot be unreasonably delayed.
>
> As such, Defendants had a subjective awareness of the risk of harm for delaying treatment of Ms. Cortes's ectopic pregnancy, and Defendants ignored that risk and proceeded with conscious indifference choosing instead to call her condition "pregnancy of unknown location" without making a reasonable attempt to identify the location of the pregnancy.

We next determine whether the allegations in the petition, alone, rise to gross negligence. First, sections A-E of Ms. Cortes' original petition only alleged that the defendants' acts were "negligent." These alleged failures included untimely diagnosis and treatment of an ectopic pregnancy, untimely initiation of Methotrexate therapy, and providing inadequate care once Methotrexate therapy had begun. Reading the original petition, we conclude that these allegations are for "ordinary" negligence,[5] which would likely survive an exception of no cause of action if statutory immunity was not a factor. The plaintiff amended her petition after the defense filed the exceptions of no cause of action, ostensibly to include

[5] In *Rabalais v. Nash*, 06-0999 (La. 3/9/07), 952 So.2d 653, 658, the Louisiana Supreme Court explained that "[t]he failure of 'due care' is synonymous with ordinary negligence."

the term "gross negligence," which was not in the original petition. The added allegations, which lack specificity, assert that the defendants were aware, or should have been aware, of the risks of an ectopic pregnancy and treated Ms. Cortes faster. Finally, Ms. Cortes claims that the defendants treated her with "conscious indifference" while not actively seeking the location of the pregnancy.

Do the alleged actions of the defendants in this case rise to an "extreme departure from ordinary care or the want of even scant care" or an "entire absence of care"? We cannot say that the trial court erred in concluding that the amended petition does not meet the definition of gross negligence. In her estimation, from July 21, 2021, through August 18, 2021, Ms. Cortes identified five doctors who performed several ultrasounds, conducted Beta-hCG monitoring every two to three days, and administered Methotrexate therapy. Ms. Cortes claims that medical providers made errors in her treatment. Based on our *de novo* review of the allegations, even accepted as true, these are descriptive of negligent acts but not "extreme departures" from ordinary care.

However, according to La. C.C. P. art. 934, "[w]hen the grounds of the objection pleaded by the peremptory exception may be removed by amendment of the petition, the judgment sustaining the exception shall order such amendment within the delay allowed by the court." Accordingly, we find that Ms. Cortes should be allowed the opportunity to amend her petition to state a cause of action against the defendants in conformity with La. R.S. 29:771(B)(2)(c)(i). Therefore, we remand the matter to the trial court with an instruction to allow Ms. Cortes the opportunity to amendment her petition, should she choose to do so.

Conclusion

It is undisputed that Ms. Cortes' treatment occurred during the COVID-19 pandemic when medical providers had statutory immunity for acts that were not grossly negligent, as per La. R.S. 29:771(B)(2)(c)(i). After a *de novo* review of

the amended petition, we find no error in the trial court's determination that Ms. Cortes' allegations describe acts of ordinary negligence. However, we reverse the dismissal of Ms. Cortes' petition and remand the matter with instructions.

AFFIRMED IN PART;
REVERSED IN PART;
REMANDED WITH INSTRUCTIONS

VICKYANN CORTES

VERSUS

UNIVERSITY HEALTHCARE SYSTEM, ET AL

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FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

MARCEL, J., DISSENTS WITH REASONS

Respectfully, I disagree with the majority's finding that plaintiff's original and first amended and supplemental petitions (hereafter collectively referred to as "petition") fail to state a cause of action for medical malpractice for both procedural and substantive reasons articulated more fully below.

La. C.C.P. 1005 and the Exception of No Cause of Action

Procedurally, I disagree with the majority's use of La. C.C.P. art. 1005 to convert what should be test of the legal sufficiency of the petition into a trial on the merits of the defendants' affirmative defense. La. C.C.P. art. 1005 states in pertinent part:

> If a party has mistakenly designated an affirmative defense as a peremptory exception or as an incidental demand, or a peremptory exception as an affirmative defense, and if justice so requires, the court, on such terms as it may prescribe, shall treat the pleading as if there had been a proper designation.

Since this Court's decision in *Welch v. United Med. Healthwest-New Orleans, L.L.C.*, 21-684 (La. App. 5 Cir. 8/24/22), 348 So.3d 216, the Louisiana Supreme Court has stated that, when considering the statutory immunity afforded by La. R.S. 29:771(c)(i), the degree of a breach in the standard of care by a medical provider is to be determined by the trier of fact. *Sebble on Behalf of Estate of Brown v. St. Luke's #2, LLC*, 23-00483 (La. 10/20/23), 379 So.3d 615, 622, *reh'g denied*, 23-00483 (La. 12/7/23), 374 So.3d 138. While La. C.C.P. art. 1005 may authorize the trial court to treat an affirmative defense as a peremptory

exception if justice so requires[1], I do not believe that article should be applied here. I believe its application creates confusion as to the parties' burden at the hearing: is the court to examine only the four corners of the petition or do the defendants have the burden to prove their affirmative defense by a preponderance of the evidence? No evidence was introduced at the hearing, therefore this latter burden could not have been met. The hearing on the peremptory exception of no cause of action is not the place to resolve disputed questions of fact. On this basis alone the judgments of the trial court should be reversed. Nevertheless, even applying the normal rules applicable to peremptory exceptions, I would find that plaintiff's petition states a cause of action.

Reviewing the Four Corners of the Petition

The exception of no cause of action tests the legal sufficiency of the petition by determining whether the law affords a remedy on the facts alleged in the pleading. *Gibson v. Jefferson Par. Hosp. Serv. Dist. No 2*, 19-283, p. 18 (La. App. 5 Cir. 6/27/19), 275 So.3d 482, 495 (citing *Khoobehi Props., LLC v. Baronne Dev. No. 2, L.L.C.*, 16-506 (La. App. 5 Cir. 3/29/17), 216 So.3d 287, 297.) The appellate court reviews a trial court's ruling sustaining an exception of no cause of action *de novo* because the exception raises a question of law and the court's decision is based solely on the sufficiency of the petition. *Id*. The peremptory exception of no cause of action is triable on the face of the pleadings, and, for purposes of resolving issues raised by the exception, the well-pleaded facts in the petition must be accepted as true. *Id*. *No evidence may be introduced at any time to support or controvert the objection that the petition fails to state a cause of action*. La. C.C.P. art. 931. In evaluating the merits of an exception of no cause of action, a petition should only be dismissed when no reasonable interpretation of the

[1] There is no indication that such has been argued by defendants or found by the trial court.

allegations supports any claim which would entitle the plaintiff to relief. *Industrial Companies, Inc. v. Durbin*, 2002-0665 (La. 1/28/2003), 837 So.2d 1207, 1213.

The petition contains a chronological description of treatment appellee allegedly provided. Therein, plaintiff alleges defendants acted negligently in failing to timely and adequately manage her ectopic pregnancy, failing to timely diagnose and treat her ectopic pregnancy, and initiating treatment for her ectopic pregnancy in a dilatory manner. Plaintiff also alleges that defendants "had a subjective awareness of the risk of harm for delaying [her] treatment …, and [d]efendants ignored that risk and proceeded with conscious indifference choosing instead to call her condition a 'pregnancy of unknown location' without making a reasonable attempt to identify the location of the pregnancy."

In their peremptory exceptions and on appeal, defendants argue that plaintiff's petition does not allege facts which constitute gross negligence or willful misconduct. In support of their exceptions, defendants essentially contend that they cannot be found "grossly negligent" because the facts alleged in the petition indicate Ms. Cortes merely had an unfortunate outcome from adequately rendered medical care.[2] They argue that the medical services provided as alleged in the petition do not show a complete lack of care. In support of this claim, defendants refer to the decision of the medical review panel, copies of which they attached to their memoranda in support of the peremptory exceptions but which were never introduced at the trial of the exceptions. (*See* La. C.C.P. art. 931, *supra*.)

Gross negligence has been described as an aggravated form of negligence, and defined as an extreme departure from ordinary care. *Falkowski v. Maurus*, 92-0102 (La. App. 1 Cir. 9/9/1993); 637 So.2d 522, 528 (*citing* W. Page Keeton, et

[2] We note that the word "care" in the context of the ubiquitous phrase "medical care" should not be confused with the use of "care" in the context of describing gross negligence. For example, a doctor may provide medical "care" when operating on a patient and amputate the wrong limb and therefore also be said to have acted with a lack of "care".

al., Prosser and Keeton on the Law of Torts, § 34, at 212, 214 (5th ed. 1984); 65 C.J.S. Negligence § 8(4)(a), at 539–540 (1966 & Supp.1993)). The difference between ordinary negligence and gross negligence is the level or degree of lack of care shown by the offending party. *Binkley v. Landry*, 2000-1710, p. 11 (La. App. 1 Cir. 9/28/01), 811 So.2d 18, *writ denied*, 2001-2934 (La. 3/8/02), 811 So.2d 887. Gross negligence has also been termed the entire absence of care and the utter disregard of the dictates of prudence, amounting to complete neglect of the rights of others. *Orlando v. Corps de Napoleon*, 96-991, p. 5 (La. App. 5 Cir. 12/20/96), 687 So.2d 117, 119.

Upon *de novo* review, I find plaintiff's amended petition states sufficient facts to set forth a cause of action for negligence against her medical providers. She has alleged that the defendants acted with 'conscious indifference' in their treatment of her. Whether that negligence arises to "gross negligence" is a question of fact not appropriately resolved on an exception of no cause of action. Further, the question of whether defendants are entitled to statutory immunity is an affirmative defense, and the party raising an affirmative defense has the burden of proving it by a preponderance of the evidence. *Norton v. Norton*, 21-212 (La. App. 5 Cir. 12/22/21), 335 So.3d 371, 386. For the reasons set forth herein, the judgment of the trial court granting the exception of no cause of action and dismissing plaintiff's claims should be reversed.

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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

CURTIS B. PURSELL
CLERK OF COURT

24-CA-543

E-NOTIFIED
24TH JUDICIAL DISTRICT COURT (CLERK)
HONORABLE NANCY A. MILLER (DISTRICT JUDGE)
ROBERT W. HALLACK (APPELLANT)
KAREN M. FONTANA YOUNG (APPELLEE)
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