2013 WL 578303 (La.App. 3 Cir.) (Appellate Brief)
Court of Appeal of Louisiana, Third Circuit.

Roland ROBIN, et al., Appellants/Plaintiffs,
v.
Russell HEBERT, et al., Appellees/Defendants.

No. 12 -- 01417 - CA.
January 9, 2013.

On Appeal From the 16th Judicial District Court Parish of St. Martin Case Number 078079 - A Hon. Gerard B. Wattigny, Judge

Appellants' Brief

Soileau Law Office, Jacques Pierre Soileau (#29677), P.O. Box 344, Breaux Bridge, LA 70517, (337) 332-4561, Counsel for Appellants/Plaintiffs.

***i** *TABLE OF CONTENTS*

Note: Table of Contents page numbers missing in original document

***ii** *TABLE OF AUTHORITIES*

Statutes

Jurisprudence

Louisiana:

Terrebone v. Floyd, 767 So. 2d 758 (La. App. 1st Cir. 2000) 7, 9, 10

***1** *JURISDICTIONAL STATEMENT*

This Honorable Court has jurisdiction over the instant appeal pursuant to the Louisiana Constitution, Article V, Section 10 and La. Rev. Stat. § 13:312.

The judgment(s) in question is a final judgment under La. C.C.P. Art. 1915(A), because it dismisses the suit as to both of the two defendants. Therefore, it is an appealable judgment under La. C.C.P. Art. 1911.

***2** *STATEMENT OF THE CASE*

On or about August 29, 2009, Betty Robin was found by her family unresponsive on her sofa at her home. Her family immediately brought her to the emergency room for treatment. It was determined that Ms. Robin had suffered an overdose of Xanax. *Medical Records of Betty Robin from Dr. Mounir.* Several bottles of Xanax had been found with Ms. Robin by her family which had been prescribed by Dr. Mike Mounir (Defendant), and had been filled by Boyer's pharmacy (Defendant). *Photographs of Betty Robin Medication.* Ms. Robin eventually died from the Xanax overdose, on or about September 3, 2009. *Death Certificate of Betty Robin.*

Ms. Robin had had a history of suicide attempts, depression, and anxiety. *Affidavit of Carolynn Serrette; Affidavit of Penny Robin.* She should not have been prescribed Xanax in such a state, and as an **elderly** cardiac patient, which the manufacturer's warnings explicitly indicate. *Xananx Manufacturer's Warnings.*

On the date of the overdose, Carolyn Serrette, the daughter of Betty Robin -- and Penny Robin, the daughter-in-law of Betty Robin -- were the two family members who accompanied Betty Robin to the emergency room. They stated that when they told Dr. Mounir that Ms. Robin had been taking Xanax, he responded, “Who would have prescribed her Xanax?” Carolyn Serrette and Penny Robin then told Dr. Mounir that *he* had prescribed the Xanax, and they then proceeded to show him the bottles of medication. *Affidavit of Carolyn Serrette; Affidavit of Penny Robin.* The decedent, Ms. Betty Robin, had received multiple prescriptions for benzodiapezine medications (Xanax) that had been filled at Boyer's pharmacy, and at least on one occasion the medication had been filled in duplicate. *Records of Prescriptions Filled for Betty Robin at Boyer's Pharmacy.*

The Plaintiffs, Roland Robin and Carolyn Serrette, are the surviving children of Betty Robin. They instituted a medical review panel against Dr. Mike Mounir. ***3** They also instituted a medical review panel against Boyer's pharmacy; however, it was determined by the PCF that the pharmacy was not a qualified care provider under the act. The review panel concluded against Dr. Mounir, and then the Plaintiffs filed the instant suit making both Dr. Mike Mounir and Boyer's pharmacy Defendants.

In response to the lawsuit, counsel for Defendant, Dr. Mike Mounir, filed a motion for summary judgment, alleging, essentially, that since Plaintiffs had not disclosed an expert witness at the time that they filed suit, the Defendant should, by default, be granted a motion for summary judgment. However, at the time that the motion for summary judgment was filed, Plaintiffs *had* consulted an expert, who was waiting for the deposition of Dr. Mike Mounir to be taken before offering his definitive analysis. In fact, as of the time of the hearing on said motion for summary judgment, the deposition of Dr. Mike Mounir had just been completed. The Plaintiffs' had chosen Chris Morrow, B.S. Pharm., R.Ph. as their expert. Chris Morrow, however, never had a chance to issue his opinion since the trial court ultimately granted the Defendant medical provider, Dr. Mounir's, motion for summary judgment, a ruling which Plaintiffs now appeal.

On the date of the hearing of Dr Mounir's motion for summary judgment, the trial court also heard an exception of prescription that had been filed by the pharmacy Defendant, Boyer's Pharmacy. Due to the length of the medical review panel process, the lawsuit against Dr. Mounir and Boyer's had been filed more than one year after the death of the decedent Betty Robin. Thus, Boyer's argued in their exception that the action against them was prescribed. However, LSA RS -- 1299.47 A (2) (a),

specifically provides that prescription in circumstances such as those in this case will be interrupted as to a joint and/or solidary tortfeasor of the medical provider defendant until 90 days from the conclusion of the medical review panel. The trial court granted Boyer's exception of prescription, however, ***4** despite the clear mandate of LSA RS -- 1299.47 A (2) (a), claiming that Boyer's was not a joint and/or solidary tortfeasor under the circumstances of this particular case; the trial court found this to be the case even though the decedent could not have gotten the subject medication without it first being prescribed by her physician, and then being dispensed by her pharmacy. Plaintiffs pointed out that the decedent could not have overdosed and died without the aforesaid actions on the part of either of the two Defendants, and that their combined **neglect** in prescribing and dispensing the subject medication was precisely what the Plaintiffs were claiming had led to her untimely death. But the trial court disregarded Plaintiffs contentions and dismissed the action against the Boyer's Defendant also, a ruling from which Plaintiffs now appeal.

It should be noted that some of the evidence referred to herein and throughout was offered by Plaintiffs on the date of the hearing before the trial court, but was excluded on the basis that it should have been provided to the Defendants earlier. *However,* those exhibits had been produced to Defendants through discovery during the medical review panel process, and *in fact* had actually been submitted and made part of the record in the context of the medical review panel proceeding. Plaintiffs therefore proffered said exhibits for the purpose of preserving the record for the instant appeal.

5** ***ASSIGNMENTS OF ERROR

(1) The trial court erred in finding that an expert witness report was necessary in order for the Plaintiffs to avoid summary judgment being rendered against them, and specifically in finding that because no expert report had yet been generated by Plaintiffs, there was *de facto* no genuine issue of material fact as to the negligence of the Defendant medical provider, Dr. Mounir, thereby dismissing Plaintiffs' cause of action against said Defendant.

(2) The trial court erred in finding that the Defendant pharmacy was not a joint and/or solidary torfeasor within the meaning of LSA RS -- 1299.47 A (2) (a); and, consequently, in dismissing the Defendant pharmacy, Boyer's, on Boyer's exception of prescription.

6** ***ISSUES FOR REVIEW

(1) Whether the trial court erred in finding that an expert witness report was necessary in order for the Plaintiffs to avoid summary judgment being rendered against them, and specifically in finding that because no expert report had yet been generated by Plaintiffs, there was *de facto* no genuine issue of material fact as to the negligence of the Defendant medical provider, Dr. Mounir.

(2) Whether the trial court erred in finding that the Defendant pharmacy

was not a joint and/or solidary torfeasor within the meaning of LSA RS -- 1299.47 A (2) (a), which lead the trial court to conclude that the action against Boyer's had prescribed.

7** ***LAW, ARGUMENT & ANALYSIS

1. Argument on Assignment of Error Number 1:

The trial court erred in finding that an expert witness report was necessary in order for the Plaintiffs to avoid summary judgment being rendered against them, and specifically in finding that because no expert report had yet been generated by Plaintiffs, there was "de facto" no genuine issue of material fact as to the negligence of the Defendant medical provider, Dr. Mounir, thereby dismissing Plaintiffs' cause of action against said Defendant.

The precedent of this Honorable Court and that of other Louisiana Circuits indicates that even if the Plaintiffs in this case had not provided an expert report under circumstances such as these, that fact alone would not be sufficient grounds for the Defendant medical provider to obtain summary judgment. In, *Terrebone v. Floyd*, 767 So. 2d 758 (La. 1st Cir. 2000) [1] the plaintiffs sued a physician who prescribed Depo-Vero and Xanax to her while she was pregnant (allegedly resulting in a birth defect), in contradiction to the manufacturer's warnings on those medication. The medical review panel concluded and found that the prescribing physician had not deviated from the standard of care. The plaintiff then filed suit. The physician, in response to the suit, filed a motion for summary judgment alleging that, since the plaintiff had not named an expert, the physician was entitled to summary judgment. The district court granted the motion, and the appellate court reversed. The court held that the mere fact that an expert had not been named did not automatically entitle the physician to summary judgment. Specifically, the court noted that the medication had been prescribed in direct contradiction to the manufacturer's warning.

***8** The court explained:
The jurisprudence has also recognized that *there are situations in which expert testimony is not necessary*. Expert testimony is not required where the physician does an obviously careless act, such as fracturing a leg during examination, amputating the wrong arm, dropping a knife, scalpel, or acid on a patient, or leaving a sponge in a patient's body, from which a lay person can infer negligence. *See Hastings v. Baton Rouge Gen. Hosp.*, 498 So.2d 713, 719 (La. 1986). Failure to attend a patient when the circumstances demonstrate the serious consequences of this failure, and failure of an on-call physician to respond to an emergency when he knows or should know that his presence is necessary are also examples of obvious negligence which require no expert testimony to demonstrate the physician's fault. *See id.* at 719-20. Likewise, where the defendant/physician testifies as to the standard of care and his breach thereof, see, e.g., *Riser v. American Medical Int'l Inc.*, 620 So.2d 372, 377 (La.Ct.App. 5th Cir. 1993), or the alleged negligence consists of violating a statute and/or the hospital's bylaws, see, e.g., *Hastings*, 498 So.2d at 722 (violation of LSA-R. S. 40:2113.4 which imposes duty on a hospital to make emergency services available to all persons in the community without regard to income or insurance protection and hospital bylaws establishing duties for on-call physicians), expert testimony is also unnecessary to establish a malpractice claim.

We hold that expert testimony is not always necessary in order for a plaintiff to meet his burden of proof in establishing a medical malpractice claim. Though in most cases, because of the complex medical and factual issues involved, a plaintiff will likely fail to sustain his burden of proving his claim under LSA-R.S. 9:2794's requirements without medical experts, *there are 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, or in which the defendant/physician testifies as to the standard of care and there is objective evidence, including the testimony of the defendant/physician, which demonstrates a breach thereof*

Id. at 1233-34. (Emphasis ours.)

The Depo-Provera labeling expressly provides “it is important that the first injection be given *only* during the first 5 days after the onset of a normal menstrual period.” (Emphasis added.) Dr. Floyd argues this language is beyond the understanding of a layperson. We disagree. The manufacturer's instructions regarding the administration of Depo-Provera are clear and require little knowledge of technical terminology. As Plaintiffs note in their brief, although questions regarding the *appropriateness* or *correct dosage* of Depo-Provera to treat symptoms could very well involve complex medical issues, the *timing* of the administration to premenopausal females presents a simple straight forward inquiry. The manufacturer's label instructs that the medication should not be prescribed “to a woman of child-bearing potential after the fifth day of her menstrual cycle.” Dr. Floyd does not contend that the administration of Depo-Provera to a pregnant ***9** woman is medically advisable contrary to the manufacturer's label; or, in this instance, Mrs. Terrebonne's health risks were so great and life threatening that using the drug was the only reasonable alternative.

Dr. Floyd candidly admits in brief on September 1st and 2nd, when he ordered the urine pregnancy tests to determine whether Rachel was pregnant, he knew “[t]he pregnancy was not sufficiently advanced to produce a positive pregnancy test at that time.”

Whether Dr. Floyd violated the standard of care by relying on the results of a test he admittedly knew may have been false and then administering Depo-Provera contrary to the manufacturer's label are issues well within a lay jury's grasp.

In *Mulder v. Parke Davis & Co.*, 288 Minn. 332, 339-340, 181 N.W.2d 882, 887 (1970) the Minnesota Supreme Court stated "[w]here a drug manufacturer recommends to the medical profession (1) the conditions under which its drug should be prescribed; (2) the disorders it is designed to relieve; (3) the precautionary measures which should be observed; and (4) warns of the dangers which are inherent in its use, a doctor's deviation from such recommendations is *prima facie* evidence of negligence if there is competent medical testimony that his patient's injury or death resulted from the doctor's failure to adhere to the recommendations." The Mississippi Supreme Court in *Thompson v. Carter*, 518 So.2d 609 (Miss.1987) held that information contained in package inserts and the Physician's Desk Reference constituted *prima facie* proof of the proper use of a drug and a deviation from established negligence unless rebutted by a physician.

Although this case may present the first instance in Louisiana where a plaintiff seeks to rely *solely* on an admitted deviation from the manufacturer's specific warning to establish the standard of care owed, the Louisiana Supreme Court's holding in *Pfiffner* and the jurisprudence referenced by plaintiffs soundly points in favor of considering such evidence sufficient to make *a prima facie* showing of negligence.

Of course, in this case, Plaintiffs had consulted an expert (although he had not yet rendered a report), thus making the granting of summary judgment even more inappropriate in the instant case case. *See also, Dupree v. Louisiana Med. Mut. Ins. Co.*, 74 So. 3d 880 (La. 3d Cir. 2011) (reversing summary judgment where expert was disclosed by plaintiff in response to defendant's motion for summary judgment, at or after the actual hearing). But as noted in *Terrebone, supra*, even if the Plaintiff had not yet retained an expert, the nature of this case ***10** was such that the jury could understand the deviation from the standard of care; that is, an explicit manufacturer's warning. Thus, no expert was necessary. Indeed, this may well be a text book example of the type of case for which an expert would not be required to submit the case to a jury, as was recognized by the members of this Honorable Court in *Terrebonne, supra*, a case with substantially similar facts to those in the case at bar.

Furthermore, in the instant case, there are substantial and genuine disputes as to material fact surrounding the negligence and degree of culpability as it pertains to Dr. Mounir. Notably, the Plaintiffs claim that they have firsthand knowledge that the prescribing physician knew or should have known of Ms. Robin's history of drug overdose and her suicidal condition, but prescribed the medication to her anyway, all in contradiction to the manufacturer's warning. An expert is not needed to establish this fact. In fact, the doctor's own medical records document at least one instance of Ms. Robin's presenting with symptoms of drug overdose. Likewise, an expert is not needed to establish this fact.

The doctor, however, claims, that despite the notation in his medical records which suggest otherwise, he did not know of Ms. Robin's previous history of depression and her suicide attempts by drug overdose. *Deposition of Dr. Mike Mounir.* A jury can assess the credibility of the witness and make its own determination as to this fact; and again, an expert would not be needed for a lay person to discern these details from the evidence and testimony. Also, the doctor *does* admit that he knew of the patient's history of taking medication for depression and anxiety, since his medical records indisputably indicate that such medications had been prescribed to Ms. Robin years earlier. Again, this is not a fact that requires an expert's opinion to establish, and can be weighed by the jury in its consideration of the credibility of the witnesses testimony.

***11** Another pertinent fact is that, in his deposition, Dr. Mounir indicated that, prior to his prescribing the Xanax to Ms. Robin, no questionnaire was ever given to determine if the patient had any of the risk factors warned of by the manufacturer, and that he never even questioned Ms. Robin as to her history of those risk factors, including but not limited to suicide and drug overdose. This is in contradiction to what is recommended by the manufacturer, a fact which can be comprehended plainly by a jury without the help of an expert. The manufacturer's warnings also flag the prescription of the subject medication to the

elderly, who may be hypersensitive to it, as well as heart patients. The decedent in this case was an **elderly** heart patient with a history of suicide attempts; no expert is needed in order for a jury to be able to understand these details.

When confronted by the family, the doctor expressed shock that Ms. Robin had been prescribed the medication, and asked who had prescribed it, only to learn that *he himself* had prescribed that medication. Indeed, the doctor acknowledged that Ms. Robin, given her condition, should not have been taking the Xanax medication; he only asserts, in hindsight, that he did not know of Ms. Robin's condition, which the medical records tend to refute. But again, a jury is perfectly capable of assessing this information without the assistance of an expert.

And yet another pertinent fact that is perfectly comprehensible to a jury of lay persons, is that although Dr. Mounir acknowledged that the decedent's unresponsive state upon presenting to the emergency room was due to a Xanax overdose, he never ordered that the (widely available) antidote medication be administered to Ms. Robin in order to counter the symptoms of her Xanax poisoning. Instead, Ms. Robin was simply allowed to expire.

Thus, it is plainly the case that, given the straight forward and non-technical nature of the foregoing factual evidence, no expert assessment would have been necessary for a reasonable lay person to comprehend the evidence -- although ***12** Plaintiffs in this case did actually retain an expert in pharmacology. Given the corresponding jurisprudence on this point, there is no question but that there were still genuine issues of material fact, none of which required expert testimony to comprehend, and that the trial court erroneously found otherwise in granting the Defendant medical provider's motion for summary judgment.

2. Argument on Assignment of Error Number 2:

The trial court erred in finding that the Defendant pharmacy was not a joint and/or solidary torfeasor within the meaning of LSA RS -- 1299.47 A (2) (a); and, consequently, in dismissing the Defendant pharmacy, Boyer's, on Boyer's exception of prescription.

The applicable statute is clear and unambiguous, and provides in pertinent part:

LSA RS -- 1299.47 A (2) (a):

> "The filing of a request for a review of a claim shall suspend the time within which suit must be instituted, in accordance with this Part, until *ninety days* following notification, by certified mail, as provided in Subsection J of this section, to the claimant or his attorney of the *issuance of the opinion by the review panel*, in the case of those health care providers covered by this part, or in the case of a health care provider against whom a claim has been filed under the provisions of this part, but who has not qualified under this part, until ninety days following notification by certified mail to the claimant or his attorney by the board that the health care provider is not covered by this part. ***The filing of a request for review of a claim shall suspend the running of prescription against all joint and solidary obligors, and all joint tortfeasors, including but not limited to health care providers, both qualified and not qualified, to the same extent that* ***13** *prescription is suspended against the party or parties that are the subject of the request for review.*

In the instant case, the medical provider and pharmacist were jointly liable for the death of Ms. Robin as joint tortfeasors, inasmuch as it took one party to prescribe the medication at issue (or overprescribe it), and another party to dispense the medication at issue (or overdispense it). Both parties knew that the decedent, Ms. Robin, should not be receiving the subject medication, nor in the amounts that she did. Neither party could operate without coordination from the other. Thus, as the facts are alleged in the original petition and proposed amending petition, the parties are "joint and solidary obligors", and/or "joint tortfeasors" [2] under law. Thus, prescription of the action against Boyer's was suspended, by law, until 90 days after the rendering of the decision from the review panel. Suit against Boyer's was filed well within that time period (the review panel decision was rendered on March 19, 2012). *Cf., Milbert v. Answering Bureau Inc.*, No. 12-632 (La. App. 3d Cir. 2012)

(this Court holding that prescription had run against non-healthcare provider defendant because that defendant was not a "joint tortfeasor", but acknowledging that if such a defendant had been a "joint tortfeasor, as in this ***14** case, prescription would have been suspended as to that defendant). The trial court thus erroneously granted Boyer's exception of prescription and dismissed them from the law suit.

FN

B. [L] iability for damages *caused by two or more persons shall* be a *joint* and divisible obligation. A joint tortfeasor shall not be liable for more than his degree of fault and shall not be solidarity liable with any other person for damages attributable to the fault of such other person, including the person suffering injury, *death*, or loss, regardless of such other person's insolvency, ability to pay, degree of fault, immunity by statute or otherwise...

C. Interruption of prescription against one joint tortfeasor is effective against all joint tortfeasors.

CONCLUSION

This Honorable Court should reverse the trial court's dismissal of the two Defendants in the instant case, and remand the matter back to the district court for further proceedings.

Appendix not available.

Footnotes

1 Although this is a Louisiana 1st Circuit Court of Appeal case, Judge Sylvia Cooks and Judge Marc Amy of the Louisiana 3rd Circuit Court of Appeal had been appointed, as part of a three judge panel, to review the case *pro temp* by the Louisiana Supreme Court. Judge Cooks delivered the opinion for the court.

2 LSA-C.C. art. 2324 B defines "joint tortfeasor", providing in pertinent part: