

Judgment rendered June 5, 2019.  
Application for rehearing may be filed  
within the delay allowed by Art. 2166,  
La. C.C.P.

No. 52,645-CA

COURT OF APPEAL  
SECOND CIRCUIT  
STATE OF LOUISIANA

\* \* \* \* \*

BEVERLY REED, LISA REED,  
RICKY REED, KENT REED,  
PATRICIA ANDING, KIRBY  
REED, LARRY REED, ELIJAH  
REED AS THE SURVIVING  
CHILDREN OF LELA KINDLE

Plaintiffs-Appellants

versus

RESTORATIVE HOME HEALTH  
CARE, LLC

Defendants-Appellees

\* \* \* \* \*

Appealed from the  
Fourth Judicial District Court for the  
Parish of Ouachita, Louisiana  
Trial Court No. 20151589

Honorable Alvin Rue Sharp, Judge

\* \* \* \* \*

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\* \* \* \* \*

Before WILLIAMS, STONE, and McCALLUM, JJ.

McCALLUM, J., concur in the result.

## **STONE, J.**

The plaintiffs, Beverly Reed, Lisa Reed, Ricky Reed, Kent Reed, Patricia Anding, Kirby Reed, Larry Reed, and Elijah Reed (collectively referred to as “the plaintiffs”), appeal the trial court judgment which denied their motion to substitute original affidavit. For the following reasons, we reverse.

### **FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

#### *Medical Review Panel*

On April 5, 2015, the plaintiffs, as the surviving children of decedent Lela Kindle (“Ms. Kindle”) filed a request for medical review panel against the following 7 qualified health care providers: Dr. Frank Sartor (“Dr. Sartor”); Dr. Donna Donald (“Dr. Donald”); Dr. Nilgun Frengell (“Dr. Frengell”); Dr. Priscilla Navarro (“Dr. Navarro”); Dr. Grant Dona (“Dr. Dona”), Dr. Charles Simmons (“Dr. Simmons”), and the St. Francis Medical Center (“St. Francis”) or (collectively referred to as “the named defendants”).

In their request, the plaintiffs alleged that Ms. Kindle suffered a severe injury and died as a result of the negligent care provided by the named defendants.<sup>1</sup> On May 9, 2017, the medical review panel rendered a decision finding that the evidence presented does not support the conclusion that the named defendants failed to meet the applicable standard of care as charged in the complaint.

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<sup>1</sup> On April, 8, 2014, Ms. Kindle was admitted to St. Francis Medical Center because of the development of an ulcer on her foot. The ulcer was treated with medication, debridement, and other medical procedures. Following these procedures, Ms. Kindle’s foot was wrapped and she was discharged to Restorative Home Health Care 6 days later on April 14, 2014. On April 24, 2014, Ms. Kindle was admitted to Glenwood Regional Medical Center where it was discovered that her foot had become infected and gangrenous. Laboratory analysis indicated that Ms. Kindle had also developed sepsis as a result of the infection of her foot. On May 6, 2014, Ms. Kindle died due to septic shock secondary to fungemia.

*Suit for Damages*

On June 1, 2015, the plaintiffs filed a suit for damages naming Restorative as the sole defendant. Restorative Home Health Care, LLC (“Restorative”) was not named in the plaintiffs’ medical review panel request because it did not meet the statutory requirements of a qualified health care provider. On August 24, 2017, the plaintiffs filed a first amending and supplemental petition to include the named defendants in their suit for damages against Restorative.

On November 6, 2017, Dr. Dona filed a motion for summary judgment (“MSJ”) alleging that the plaintiffs failed to “identify any expert medical witness who they might present in support of their claims or any part of them,” and are therefore without evidence essential to support their claim. In support of his motion for summary judgment, Dr. Dona attached a copy of the medical review panel’s unanimous opinion. Two days later on November 8, 2017, a motion for summary judgment was filed on behalf of the defendants, Dr. Sartor, Dr. Donald, Dr. Frengell, and Dr. Navarro.

This MSJ was based on the same argument advanced in Dr. Dona’s motion for summary judgment. Finally, on January 3, 2018, Restorative filed a motion summary judgment. Dr. Dona’s motion for summary judgment was originally set for hearing on January 5, 2018; however, this hearing was continued because plaintiff’s counsel was not timely served. The unopposed motion was granted and the matter was continued without a new hearing date. The defendants filed motions to re-fix the hearing date, and the trial court issued an order setting March 27, 2018, as the new hearing date for all the previously filed motions.

On March 12, 2018, the plaintiffs filed a motion to continue and incorporated oppositions to the defendants' motions for summary judgment. This motion to continue alleged both of the plaintiffs' attorneys had a conflicting trial in Baton Rouge on the March 27, 2018 hearing date. In support of their opposition, the plaintiffs attached the sworn, but unsigned expert affidavit of Dr. Christopher Davey ("Dr. Davey").

The defendants opposed the continuance. An informal telephone conference with Judge Sharp and all counsels of record took place on March 16, 2018, and the trial court granted the plaintiffs' motion to continue. All parties conferred with the trial court and agreed that the new date for the hearings on the motions for summary judgment would be May 22, 2018.

The trial court scheduled a formal telephone conference on March 19, 2018, to make a record of the granting of the continuance. Therein, all parties made arguments on the record. However, the plaintiffs' counsel advised the trial court that his scheduling conflict was resolved, but argued that a continuance was still warranted because the plaintiffs needed an additional opportunity for discovery. At the conclusion of the formal telephone conference, the trial judge took the matter under advisement. Subsequently, the next day on March 20, 2018, the trial court rescinded the continuance, ordered that all deadlines and cutoff dates associated with the March 27, 2018 hearing remain, and reserved the May 22, 2018 hearing date for oral arguments only.

On March 21, 2018, the plaintiffs' counsel also informed the trial court in his unrelated case in Baton Rouge that his need for a continuance

therein had been resolved<sup>2</sup>, and that court also rescinded its previous order continuing the case.

On March 22, 2018, the plaintiffs' counsel sent a letter to Judge Sharp indicating that his conflict in the present case had arisen yet again, as the Baton Rouge trial was again scheduled for March 27, 2018. On March 23, 2018, the plaintiffs herein filed a motion for reconsideration/new trial motion to continue hearing date on motions for summary judgment, to which all defendants filed oppositions thereto.

During the MSJ hearing on March 27, 2018, neither the plaintiffs, nor their counsel, Mr. Simien, were present. Mr. Simien's absence was due to his conflicting trial in Baton Rouge. At the conclusion of the hearing, the trial court rendered a judgment in open court stating:

...[T]hat only those documents in support of the motions for summary judgment, in opposition to the motions for summary judgment, and any reply memoranda and objections timely filed and served in accordance with La. Code of Civil Procedure Article 966(B) prior to the March 27, 2018 hearing date shall be considered by the Court. In all further respects, the record for purposes of consideration of Defendants' Motions for Summary Judgment is closed.

The trial court judgment was filed on April 4, 2018, and the clerk's office sent notice of that judgment to all parties on April 19, 2018.

On May 7, 2018, exactly 15 days prior to the upcoming May 22, 2018 hearing, the plaintiffs' filed a motion to substitute original affidavit requesting that the original unsigned affidavit of Dr. Christopher Davey which had been filed in opposition to the defendants' motions for summary

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<sup>2</sup> The plaintiffs' counsel advised the trial court in Baton Rouge that he was having problems locating a witness for an unrelated trial scheduled on March 27, 2018, and the trial court issued an order continuing the trial. Subsequently, the plaintiffs' counsel resolved issues with the witness, and the trial court also rescinded its order granting a continuance for the trial scheduled on March 27, 2018.

judgment be substituted for a properly executed copy.<sup>3</sup> Counsel for the plaintiffs alleged that he noted that the original affidavit filed on March 12, 2018, did not bear the signature of the affiant Dr. Christopher Davey, and had been merely sworn before the notary. All defendants opposed the plaintiffs' motion to substitute original affidavit. Counsel for Dr. Dona sent the trial judge letters on both May 11 and 14, 2018, expressing his objection to the plaintiffs' motion. Defendants, Restorative and Dr. Sartor, filed oppositions to the plaintiffs' motion to substitute original affidavit.

At the MSJ hearing on May 22, 2018, the trial court sustained the defendants' objections and further denied the plaintiffs' motion to substitute original affidavit. The trial court granted summary judgment in favor of Dr. Dona, Dr. Sartor, and Restorative with oral reasons given on the record. The plaintiffs filed this instant appeal.

## **DISCUSSION**

The central issue before this Court is whether the trial court erred in prohibiting the plaintiffs from submitting a substituted, signed copy of Dr. Christopher Davey's affidavit in support of their opposition exactly 15 days prior to the May 22, 2018 hearing on the defendants' motions for summary judgment.

Under La. C.C.P. 966(B)(2), unless extended by the court and agreed to by all of the parties any opposition to the motion and all documents in support of the opposition shall be filed and served in accordance with Article 1313 not less than 15 days prior to the hearing on the motion. *Id.*

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<sup>3</sup> The plaintiffs' counsel fax filed the motion to substitute original affidavit, and a hard copy of the motion was filed with the clerk's office on May 14, 2018.

The court may consider only those documents filed in support of or in opposition to the motion for summary judgment and shall consider any documents to which no objection is made. *Id.* Any objection to a document shall be raised in a timely filed opposition or reply memorandum. *Id.* The court shall consider all objections prior to rendering judgment. *Id.*

Unless otherwise agreed to by all of the parties and the court, **for good cause shown**, the court may order a continuance of the hearing. La. C.C.P. art. 966(C)(1)(2). (Emphasis added.) Additionally, District Court Rule 1.4 states:

An individual judge may, in the interest of justice and upon notice to all parties, permit deviations from these Rules in a particular proceeding. Any such deviation shall be noted on the record in open court in the presence of all parties or by written order filed into the record of the proceedings and mailed to all parties or their counsel of record.

It is a well-established rule that the trial judge has wide discretion in acting upon a motion for continuance. *Howard v. Lee*, 50,366 (La. App. 2 Cir. 1/13/16), 185 So. 3d 144. A denial of a motion for continuance will not be disturbed on appeal absent a showing of an abuse of discretion by the trial court. *Davis v. European Motors*, 51,522 (La. App. 2 Cir. 8/9/17), 243 So. 3d 1100. An abuse of discretion occurs when such discretion is exercised in a way that deprives a litigant of his day in court. *Howard v. Lee, supra.*

The trial court must consider the particular facts in each case in deciding whether to grant or deny a discretionary continuance. *Id.* Some factors to consider are diligence, good faith, and reasonable grounds. *Id.* Of equal importance, however, is the other litigants' corresponding right to have the case heard as soon as practical. *Gilbert v. Visone*, 32,303 (La. App. 2d

Cir. 10/27/99), 743 So. 2d 909; *Demopoulos v. Jackson*, 33,560 (La. App. 2 Cir. 6/21/00), 765 So. 2d 484.

By their first and second assignments of error, the plaintiffs contend that the trial court erred in failing to allow and consider the substituted expert affidavit filed in support of their opposition to the defendants' motions for summary judgment. The plaintiffs maintain that once the trial court granted a continuance during the informal telephone conference, the statutory time periods for the submission of documents opposing the defendants' motions for summary judgment automatically reset based on the new hearing date. Thus, the plaintiffs conclude, the substituted affidavit submitted 15 days before the hearing on May 22, 2018, was timely and should have been considered. In support of their argument, the plaintiffs rely on *Harris v. Louisiana Medical Mutual Insurance Company*, 2015-1584 (La. App. 1 Cir. 4/15/16), *writ denied*, 2016-1161 (La. 10/10/16), 207 So. 3d 408.

In *Harris*, the plaintiffs failed to file an opposition to the motion for summary judgment. Instead their counsel filed an "emergency motion to continue" the morning of the hearing based on a scheduling conflict. The plaintiffs also attached a copy of their outstanding discovery responses which identified an expert witness. The trial court granted the plaintiffs' motion to continue and rescheduled the hearing on the defendants' motion for summary judgment. Eleven days prior to the hearing, the plaintiffs filed their opposition and expert affidavit, and the defendants moved to strike the opposition and affidavit arguing that the submissions were untimely. The trial court granted both the defendants' motion to strike and summary judgment. On appeal, the First Circuit reversed the trial court decision,

finding that the trial court should have considered the opposition that was filed after the original hearing date but prior to the re-fixed hearing.

Conversely, the defendants argue that the trial court was correct and within its vast discretion to deny the continuance, and exclude the plaintiffs' substituted affidavit. In support of their argument, they rely on *Newsome v. Homer Memorial Medical Center*, 2010-0564 (La. 04/09/10), 32 So. 3d 800; and *Mahoney v. East Carroll Parish Police Jury*, 47,494 (La. App. 2 Cir. 9/26/12), 105 So. 3d 144, *writ denied*, 2012-2684 (La. 2/8/13), 108 So. 3d 88.

In *Newsome*, the plaintiff failed to file an opposition to the defendants' motion for summary judgment. Instead, counsel for the plaintiff contacted the defendants' counsel and they agreed to continue the hearing with the caveat that the matter would not be continued again. However, 7 days prior to the new hearing date, the plaintiff filed a "motion for continuance or in the alternative permission to file affidavits late."

At the defendants' MSJ hearing, the trial court granted the plaintiff's motion. Ultimately, the Louisiana Supreme Court reversed that decision, finding: (1) that the plaintiff failed to show good cause for continuing the hearing; and (2) that the trial abused its discretion in granting the motion for continuance solely in order to allow plaintiff's expert affidavit to be filed in compliance with the 8-day limit contained in La. C.C.P. 966. *See Newsome, supra.*

Similarly, in *Mahoney*, the plaintiff did not oppose the defendants' motions for summary judgment, but moved for a continuance 3 days prior to the hearing on the basis of needing additional time for discovery. All parties were physically present at the MSJ hearing where the trial court granted the

continuance with the agreement by the plaintiff's counsel to make any filings by the specific deadline set by the trial court. Nonetheless, the plaintiff filed opposing materials 6 days after the deadline, arguing that the submission was still timely under La. C.C.P. 966(B). This Court found that the deadline to file an opposition was mandatory, and therefore the trial court did not abuse its discretion by refusing to consider the plaintiff's late-filed opposition materials. *See Mahoney, supra.*

Based on *Newsome* and *Mahoney*, the defendants argue that the trial court had the discretion to close the record at the hearing on March 27, 2018, and did not abuse its discretion in refusing to consider the substitute expert affidavit of Dr. Davey. From our view of the record and jurisprudence, we find that the trial court did abuse its discretion in resetting the MSJ hearing date, but prohibiting any further submissions in the record. Moreover, we do not find the defendants' reliance upon *Newsome* and *Mahoney* to be persuasive. Instead, we can factually distinguish this case from both *Newsome* and *Mahoney*.

In *Newsome*, counsel for the plaintiff and defendants agreed to the first continuance with the stipulation that the matter would not be continued again. Then, the plaintiffs subsequently filed a motion for continuance exactly 7 days prior to the hearing, and trial court granted the plaintiff's continuance solely to allow additional time to file an affidavit. By contrast, in our present case, the trial court originally granted a continuance based on the conflicting trial dates of the plaintiffs' counsel, and there was no stipulation that the matter would not be continued again. Further, the plaintiffs filed a motion to substitute original affidavit exactly 15 days before

the May 22, 2018 hearing which complies with La. C.C.P. 966(B)(2) and District Rule 9.9.

In addition, we find our present case is dissimilar from *Mahoney* based on a key distinguishing factor: *agreement by the parties*. (Emphasis added.) In *Mahoney*, the trial court and all the parties were physically present and agreed to the extended deadline set by the trial court. Yet, here, neither the plaintiffs nor their attorney, Mr. Simien were present during the hearing on March 27, 2018, when the trial court ordered the record closed as of that date. At that stage in this litigation, the plaintiffs had only agreed to the new hearing date of May 22, 2018.

Moreover, as illustrated in *Mahoney*, this Court has articulated 2 essential findings in evaluating whether the trial court abused its discretion in considering late-filed opposition materials to a motion for summary judgment. First, the rescheduling of the hearing reset the time for the filing of opposition documents. Second, the trial court has vast discretion in deviation from the rules “in the interest of justice and upon notice to all parties.”

Here, we find that when the trial court elected to keep May 22, 2018, as the new hearing date, the time periods under La. C.C.P. 966 were logically reset. Thus, the plaintiffs’ motion to substitute original affidavit was submitted within the statutory time periods. Moreover, the trial court’s decision to reserve May 22, 2018, for oral arguments only was an erroneous deviation from the rules because La. C.C.P. 966 does not create a distinction for submissions after a continuance is granted. Indeed, the plain wording of La. C.C.P. 966 states “not less than 15 days prior to the hearing on the motion.” From our view of the record, the trial court’s partial exercise of

discretion undermines the purpose and objectives of the legislature in allowing both the court and mover sufficient time to narrow the issues in dispute and prepare for argument at the hearing. *See Buggage, supra; Mahoney, supra.*

Accordingly, we reverse the trial court ruling which denied the plaintiffs' motion to substitute original affidavit. We reverse the trial court judgment which granted summary judgment in favor of the defendants, Dr. Sartor, Dr. Dona, and Restorative Home Health Care, LLC. We pretermitt any consideration of the plaintiffs' third and final assignment of error regarding the validity of the previous unsigned expert affidavit submitted.

#### **CONCLUSION**

For the foregoing reasons expressed, we reverse the trial court ruling which denied the plaintiffs' motion to substitute original affidavit. We reverse the trial court judgment which granted summary judgment in favor of the defendants, Dr. Sartor, Dr. Dona, and Restorative Home Health Care, LLC. Costs of this appeal are assessed to the defendants, Dr. Sartor, Dr. Dona, and Restorative Home Health Care, LLC.

**REVERSE.**