Judgment rendered February 4, 2015.
Application for rehearing may be filed
within the delay allowed by art. 2166,
La. C.C.P.

No. 49,571-CA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * *

LAURA JOINER AND CHARLES JOINER — Plaintiff-Appellant

Versus

AMERICAN CASUALTY COMPANY AND JESSE L. WIED, P.T., PHYSICAL THERAPY CLINIC, INC. — Defendant-Appellee

* * * * *

Appealed from the
Fourth Judicial District Court for the
Parish of Ouachita, Louisiana
Trial Court No. 2012-3824

Honorable Benjamin Jones, Judge

* * * * *

RICHARD L. FEWELL, JR. — Counsel for Appellant

MAYER, SMITH & ROBERTS, LLP
By: Steven Eric Soileau — Counsel for Appellee

* * * * *

Before BROWN, DREW and LOLLEY, JJ.

**DREW, J.**

Laura and Charles Joiner appealed the summary judgment dismissing at their costs their suit seeking damages for a knee injury allegedly sustained by Mrs. Joiner when she got off an exercise bicycle during a physical therapy session. Named defendants were Jesse L. Wied, P.T. Physical Therapy Clinic, Inc. aka Wied Physical Therapy ("Wied"), and Wied's insurer, American Casualty Company.

Filed December 13, 2012, the plaintiffs' petition asserted that Mrs. Joiner had neck surgery in Jackson, Mississippi, on December 1, 2011. Her surgeon prescribed physical therapy, which she began with Wied on December 20, 2011. For her first visits, the attendant adjusted the exercise bicycle for Mrs. Joiner prior to her using it and returned to assist her in getting off the machine.

On a third or fourth visit, Mrs. Joiner was placed on the same bicycle, but the attendant did not adjust it, and merely told Mrs. Joiner to get off after five minutes. The attendant left and did not return. The plaintiffs maintain Mrs. Joiner was left on the machine an excessive length of time, which resulted in her injuries: multiple tears of the posterior one-half medial meniscus, left knee and chondramalacia of medial femoral condyle. As a result of her injuries, Mrs. Joiner underwent an arthroscopic medial meniscectomy and an arthroscopic chondroplasty of the medial femoral condyle.

The plaintiffs asserted that her repair surgeries were not successful and that she had to undergo complete knee replacement surgery. Thereafter, she required surgery for the doctor to manipulate the prosthesis. Also, she

alleged further left knee surgery may be necessary and the knee replacement may need to be redone. Additionally, plaintiffs stated in the petition that she has returned to using a walker and faces the possibility of being confined to a wheelchair.

Specific allegations of negligence were that the attendant failed to properly adjust the exercise bicycle and failed to return in time to prevent Mrs. Joiner's injuries. Wied's alleged negligence was hiring an improperly trained attendant and failing to supervise the attendant to ensure that she correctly performed her duties so as to prevent harm to Mrs. Joiner. The Joiners' petition was accompanied by interrogatories and request for discovery.

In an affidavit filed December 2, 2013, Mrs. Joiner additionally asserted that in getting off the bicycle, she twisted and slightly torqued her left knee, which caused considerable pain and discomfort.

On January 16, 2013, the defendants transmitted to plaintiffs written interrogatories and requests for production of documents, as well as a medical release for Mrs. Joiner to sign. The defendants answered on January 22, 2013, asserting that Mrs. Joiner's problems were associated with a preexisting condition and excepting that Charles Joiner had not stated a cause of action.

Defendants filed a motion to compel discovery responses against the Joiners, to which they attached defendants' correspondence dated March 25, April 23, and May 5, 2013, seeking responses to their discovery requests. On November 4, 2013, the defendants filed a motion for summary judgment

accompanied by a memo of authority and exhibits supporting the motion. The trial court set the hearing on the motion for December 9, 2013. On December 2, the Joiners filed a motion to dismiss or stay the motion for summary judgment along with a memo and attached exhibits. On December 6, defendants filed an additional memo supporting their motion for summary judgment.

Notwithstanding the Joiners' late filing of their request to dismiss or stay the defendants' motion for summary judgment, the defendants wanted to proceed and noted that the Joiners had not requested a continuance of the hearing.

At the outset, the trial court heard arguments on the requested dismissal or stay. The Joiners argued that discovery was still pending and depositions needed to be taken of the Wied attendants. The trial court observed that even assuming that the depositions of the attentive and inattentive attendants confirmed all of the Joiners' allegations, not having those depositions was not significant in the trial court's view. The Joiners supported their request for dismissal or stay with excerpts from the deposition of the Wied manager and affidavits from family, friends, and from Mrs. Joiner. After hearing argument, the trial court denied the Joiners' motion to dismiss or stay, and granted the defendants' motion for summary judgment.

## DISCUSSION

The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action. The procedural tool

is favored and courts shall construe it to accomplish these ends. La. C.C.P. art. 966(A)(2).

If the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any, admitted for purposes of the motion for summary judgment, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law, summary judgment shall be rendered. La. C.C.P. art. 966(B)(2).

In *Rent-A-Center East, Inc. v. Lincoln Parish Sales & Use Tax Comm'n*, 46,054 (La. App. 2d Cir. 3/9/11), 60 So. 3d 95, *writ denied*, 2011-0713 (La. 5/20/11), 63 So. 3d 985, this court stated that appellate courts review summary judgments *de novo*, while considering the record and all reasonable inferences drawn from the record in the light most favorable to the nonmovants. The burden of proof remains with the movants. La. C.C.P. art. 966(C)(2). However, if the movants will not bear the burden of proof at trial, the movants' burden on the motion for summary judgment does not require them to negate all essential elements of the adverse parties' claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse parties' claim, action, or defense. Thereafter, if the adverse parties fail to produce factual support sufficient to establish that they will be able to satisfy their evidentiary burden of proof at trial, then there is no genuine issue of material fact. *Rent-A-Center East*, *supra*.

As provided in La. C.C.P. art. 967(B), the adverse parties may not rest on the mere allegations or denials of their pleading in response to a properly

made and supported motion for summary judgment; rather, their response, by affidavits or otherwise, must set forth specific facts showing a genuine issue for trial. Otherwise, summary judgment shall be rendered against them, if appropriate. *Jones v. Gaines*, 43,049 (La. App. 2d Cir. 3/5/08), 978 So. 2d 522, *writ denied*, 2008-0752 (La. 6/20/08), 983 So. 2d 1273.

After hearing arguments from counsel as to whether the case was a tort action or a medical malpractice action, the trial court analyzed it both ways, granting the summary judgment and dismissing plaintiffs' action at their costs. The learned trial court's detailed examination of the evidence and applicable law is incisive and thorough. We therefore adopt in its entirety the trial court's Reasons for Ruling, which is incorporated into this opinion.

**STATE OF LOUISIANA *PARISH OF OUACHITA *FOURTH JUDICIAL DISTRICT**

**LAURA JOINER AND**
**CHARLES JOINER**

**FILED:** January 31. 2014

**VERSUS NO. 12-3824**

**AMERICAN CASUALTY CO. &**
**JESSE L. WIED, P. T. CLINIC, INC.**

**BY:** Constance J. Fry
**DEPUTY CLERK COURT**

**RULING ON DEFENDANTS'**
**MOTION FOR SUMMARY JUDGMENT**

This is a suit for damages filed by Plaintiffs, Laura Joiner and Charles Joiner, against Defendants, American Casualty Company and Jesse L. Wied, P. T., Physical Therapy Clinic, Inc.

So far as relevant, the petition alleges that Plaintiff was referred for physical therapy and attended two sessions during which she rode a piece of equipment identified as a Nu Step Cycle, without incident.[1] During her third visit, Plaintiff complained that the employee of Defendant Clinic was inattentive, made no adjustments to the Cycle and was not present to help her off the Cycle. She said she got off the Cycle herself after approximately fifteen minutes of use. As she did so, she says she placed her left foot on the floor first, then her right foot, and twisted her left foot during the process of getting off the Cycle.

The Court here notes that the Plaintiff stated in her untimely affidavit that she reported to her therapist, Jesse L. Wied himself, that she experienced pain during her third visit.

The matter is now before the Court for a ruling on Defendants' Motion for Summary Judgment.

Although the individual Defendant and his Clinic were shown not to be registered with the Patients Compensation Fund as a qualified health care provider,

[1] The Court has viewed photographs of this equipment.

Defendants' argue that the Court should treat this as a medical malpractice case. There was no Panel submission or report in this case.

The facts of this case are such that it could arguably be treated as either a medical malpractice case or as a tort case. At the hearing on December 9, 2013, the Court indicated that it would treat this case as a tort case. However, upon further study of the facts and deliberation, it has decided to "straddle" in its ruling, which means ruling in the alternative. The outcome is the same.

Treated as a medical malpractice case, the Court finds that it is the kind of case where Plaintiff would be required to produce the testimony by deposition or by affidavit of a qualified doctor or, perhaps, physical therapist showing that Defendant breached the appropriate standard of care for physical therapists.

In connection with its medical malpractice case analysis, the Court studied the deposition testimony of Dr. Myron B. Bailey which does not remotely support a claim that Defendants breached the standard of care for physical therapists, nor does the deposition testimony of Dr. Robert Brian Bulloch. Certainly, the deposition testimony of Physical Therapist, Jerry Wayne Manning, Jr., does not support a finding that Defendants breached the standard of care for physical therapists. He was the Physical Therapist who personally took care of Plaintiff. He saw her five times on this referral. Plaintiff did not report to him that she fell off the Cycle, nor has she ever made such a claim.

Mr. Manning testified that Plaintiff, on 1-3 (Jan 3rd) did tell him she had increased pain in her left knee after the last visit. He said he did not recall noticing on this fourth of five visits, any bruising or swelling or anything like that.

Mr. Manning further testified that he'd never received a report of a patient sustaining a torn meniscus or cartilage from operating the Cycle.

Accordingly, treated as a malpractice case, the Court finds that there is no genuine issue of material fact, because Plaintiff has not produced an expert to testify that the Defendants breached the applicable standard of care. Therefore, Defendants are entitled to judgment as a matter of law. LSA-C.C.P. art. 966. The letter from Dr. Edward Morgan did not speak to standard of care at all, but will be discussed below. See Ex. P-1.

Now, treating this case as a regular tort case, and considering the evidence produced, the outcome is the same. Dr. Morgan's letter addresses only the Houlsey presumption.[2] But this presumption applies only when the patient was healthy before the alleged trauma occurred. The evidence show that was not the case, here, See Depo of Dr. Bailey, at P. 48, Lns. 4-19, where he says that it is "documented" that Plaintiff had had arthritic complaints in 2008 and 2009. He further opined that she likely would continue to have arthritic complaints in her left knee after 2008 and 2009.

There is no medical testimony that the physical therapy which began December 16, 2011, could have caused the condition in Plaintiff's left knee that Dr. Bailey found when he did surgery on that knee on April 24, 2012. At Pp. 21-22 of his deposition, Dr. Bailey testified that the multiple tears in the medial meniscus in Plaintiff's left knee had been there for at least six months. That means they were there **before** she began physical therapy with Defendants.

The only fair reading of the medical testimony is that the evidence does not support a finding that Plaintiff could carry her burden of proof at trial that the condition treated by Dr. Bailey was caused by any fault on the part of Defendants. And, as a matter of fact, the evidence presented does not convince this Court that

[2] *Houlsey v. Cerise, 579 So.2d 973 (La. 1991).*

Plaintiff could prove fault on the part of the Defendants, or that any fault on their part caused Plaintiff's alleged damages. Damages must also be proven by a preponderance of the evidence, and such proof is simply not going to be available in this case.

Accordingly, treating this as a tort case, the Court finds that there is no genuine issue of material fact for trial, and that Defendants are entitled to judgment as a matter of law. LSA-C.C.P. art. 966.

This case is dismissed at Plaintiffs' cost.

Monroe, Louisiana, this 31st day of January, 2014.

**BENJAMIN JONES**
**DISTRICT JUDGE**

**COPY TO ALL COUNSEL**

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## CONCLUSION

The *Housley* presumption noted in the trial court's ruling granting summary judgment is a presumption that plaintiff's injury stemmed from an accident, if before the mishap the injured person was in good health, but commencing with the trauma, the symptoms of the injury appear and continuously manifest themselves afterwards, providing that the medical evidence shows there to be a reasonable possibility of causal connection between the accident and the disabling condition. *Housley v. Cerise,* 90-2304 (La. 5/6/01), 579 So. 2d 973, 980. Since the submissions showed that Mrs. Joiner had arthritic complaints and degenerative changes predating her physical therapy incident, the trial court correctly determined this presumption was inapplicable.

For the reasons set out in the trial court's analysis of this claim, the summary judgment in favor of Jesse L. Wied, P.T. Physical Therapy Clinic, Inc. aka Wied Physical Therapy is affirmed in all aspects and with the plaintiffs cast with all costs including costs of this appeal.

## DECREE

With plaintiffs cast with all costs, the judgment is AFFIRMED.