NOT DESIGNATED FOR PUBLICATION

FLORA DUPREE, ET AL.	*	**NO. 2000-CA-2776**
VERSUS	*	**COURT OF APPEAL**
LOUISIANA MEDICAL MUTUAL INS. CO., ET AL.	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
	*	

*** * * * * * ***

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 98-15192, DIVISION "J-13"
Honorable Nadine M. Ramsey, Judge
* * * * * *
Judge David S. Gorbaty
* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge James F. McKay III, Judge David S. Gorbaty)

John E. Morton
HUNTER & MORTON
P.O. Box 11710
Alexandria, LA 71315
COUNSEL FOR PLAINTIFF/APPELLANT

W. K. Christovich
Janet L. White
CHRISTOVICH & KEARNEY, L.L.P.

601 Poydras Street
Suite 2300, Pan American Life Center
New Orleans, LA 701306078
COUNSEL FOR DEFENDANTS/APPELLEES

AFFIRMED

In this appeal, plaintiffs, Flora Dupree, surviving spouse, and the five surviving Dupree children, contend that the trial court erred in granting the motion for summary judgment filed by James A. Morock, M.D. and dismissing their medical malpractice claim against him. For the reasons set forth below, we affirm.

FACTS AND PROCEDURAL HISTORY

Dr. Morock admitted George Dupree to Pendleton Memorial Methodist Hospital ["Pendleton"] on October 2, 1995. Mr. Dupree, who was seventy-nine years old, was exhibiting symptoms of a stroke, among other complaints. Dr. Morock's diagnosis at the time of admission was a probable bilateral posterior infarction (stroke), bilateral vision loss, end-stage hypertensive renal disease, gout, metabolic acidosis, and hyperkalemia (elevated potassium) associated with renal failure.

One day after admission, Mr. Dupree experienced visual hallucinations and two grand mal seizures. The emergency room staff

consulted with Dr. Morock and a neurologist, Dr. Houser. All involved thought Dilantin, a commonly used anti-seizure drug, should be administered. Mr. Dupree responded well to the intravenous administration of the drug. He was later placed on oral Dilantin by Dr. Houser, and his blood level was monitored daily to ensure that the Dilantin blood levels were kept at therapeutic levels. Only once did Mr. Dupree's Dilantin blood level rise above the recommended level, and his medication was stopped until it returned to the acceptable range. At no time did Mr. Dupree have a rash, nor was there any indication in his records of allergies to any medications. Mr. Dupree did not experience any further seizures while hospitalized, and Dr. Morock discharged him on October 16, 1995.

On November 17, 1995, Dr. Morock again admitted Mr. Dupree for newly diagnosed diabetes mellitus, as well as to treat what appeared to be a drug-related rash that had recently developed over Mr. Dupree's arms, legs, chest, trunk, and abdomen. Mr. Dupree reported that he had just finished a seven-day course of Famvir, started on November 8, 1995, which had been prescribed by Dr. Felix Rabito, his family practice doctor, for treatment of herpes zoster (shingles) over his left flank area.

Because Famvir was the only new drug added to Mr. Dupree's medication regimen, Dr. Morock suspected that it was causing the rash. He

noted in his November 17, 1995 progress notes that allopurinal (Zyloprim, for gout) and/or Dilantin could also be causing the rash. Dr. Morock treated Mr. Dupree's rash with Aveeno baths, topical corticosterioid cream, and Benedryl (triamcinolone). Within several days, the rash improved. Dr. Morock also consulted a pharmacologist, Dr. Charles Jastram, who agreed that the rash likely was secondary to the Famvir.

On November 22, 1995, Mr. Dupree was discharged, with skilled home nursing care to be provided by the Eagan Home Health Agency. On December 5, 1995, Mr. Dupree's wife called Dr. Morock and reported that Mr. Dupree was delirious and had a fever of 103 degrees. The family was instructed to bring Mr. Dupree to the emergency room, where they reported to the emergency room staff that Mr. Dupree had developed a "blistering rash" on December 1, 1995 and became delirious by December 4.

Mr. Dupree was admitted to the hospital directly from the emergency room on December 5, 1995 with a diagnosis of Toxic Epidermal Necrolysis ("TEN"), a life-threatening skin condition often triggered by an adverse reaction to some medication. Dilantin is one drug of many known to cause TEN, and it was immediately discontinued upon admission. The blood levels of Dilantin continued to be monitored until December 11, 1995, but despite treatment and supportive care, Mr. Dupree died on December 15,

1995.

Pursuant to the Louisiana Medical Malpractice Act, plaintiffs filed a request with the Louisiana Patients' Compensation Fund on September 25, 1996, requesting the formation of a medical review panel to review the case and give an opinion on the care rendered to Mr. Dupree. The panel convened on July 22, 1998, and found no evidence to support the conclusion that any of the defendants failed to meet the applicable standard of care as charged in the complaint.

Plaintiffs subsequently filed a petition for damages in Orleans Parish Civil District Court, alleging that Drs. Morock, Rabito, Houser and Pendleton provided substandard care to George Dupree, causing his death on December 15, 1995.

On March 15, 2000 and May 15, 2000, Drs. Morock, Rabito, and Houser filed a motion for summary judgment supported by: (1) the medical review panel's report finding no evidence of failure to meet the applicable standard of care; (2) Dr. Morock's own affidavit testimony; (3) the affidavit testimony of two of Mr. Dupree's treating physicians – Dr. Rabito, the patient's family practice doctor, and Dr. Michael Hill, the emergency room physician; and (4) the affidavit testimony of Dr. Charles Paddock, a dermatologist who was consulted to treat Mr. Dupree's TEN during his last

admission. After a hearing on July 14, 2000, Judge Ramsey granted the defendants' motions for summary judgment. Plaintiffs filed this appeal only as to Dr. Morock.

DISCUSSION

Appellate courts review summary judgments *de novo*, using the same criteria applied by trial courts to determine whether summary judgment is appropriate. *Potter v. First Federal Savings & Loan Ass'n of Scotlandville*, 615 So.2d 318, 325 (La. 1993); *Schroeder v. Board of Supervisors of Louisiana State University*, 591 So.2d 342, 345 (La. 1991). A summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact, and that the mover is entitled to judgment as a matter of law. La.C.Civ.P. Art. 966(B). Because the mover has the burden of establishing that no material factual issue exists, inferences to be drawn from the underlying facts contained in the materials before the court must be viewed in the light most favorable to the party opposing the motion. *Potter*, 615 So.2d at 325; *Schroeder*, 591 So. 2d at 345.

Under La.R.S. 9:2794(A), a plaintiff in a medical malpractice action

bears the burden of proving: (1) the applicable standard of care, (2) that the defendant fell below this standard, and (3) that injuries resulted from defendant's breach. La. R.S. 9:2794.A.(1-3); *Martin v. East Jefferson General Hospital*,582 So.2d 1272, 1276 (La. 1991) ("The plaintiff must first establish by a preponderance of the evidence that the doctor's treatment fell below the ordinary standard of care expected of physicians in his medical specialty, and must then establish a causal relationship between the alleged negligent treatment and the injury sustained.")

Thus, in moving for summary judgment, the defendant-physicians had the burden of showing that no genuine issue of material fact exists as to one or more of these elements. In support of his motion for summary judgment, Dr. Morock made a strong showing that no genuine issue of material fact exists in this case. It is undisputed that a medical review panel determined that Dr. Morock did not fall below the applicable standard of care. The opinion of a medical review panel is admissible as expert evidence in a malpractice suit. *Richoux v. Tulane Medical Center*, 617 So.2d 13, 16 (La. App. 4th Cir. 1993); La.R.S. 40:1299.47(H).

Dr. Morock also relied upon the affidavits of Drs. Rabito, Hill, and Paddock, all of whom opined that Dr. Morock was reasonable in his suspicion that Famvir was causing the rash when Mr. Dupree was

hospitalized in November. Drs. Rabito and Hill confirmed that prior to Mr. Dupree's final admission on December 5, 1995, there were no indications in his medical records that he had a known sensitivity or allergy to Dilantin or any other medication.

Dr. Paddock, who treated Mr. Dupree and reviewed all of his medical records, stated that the November 17, 1995 rash was not consistent with TEN. Mr. Dupree did not have the typical symptoms of TEN such as red skin, fever, malaise, and rapid progression to blistering during his admission in November. Moreover, the initial treatment for the rash during the November hospitalization seemed to be satisfactory because Mr. Dupree's condition improved during that hospitalization and even after discharge to his home, as noted by the home health nurse, who stated in his chart that the skin was dry and flaking. According to Dr. Paddock, this improvement is not characteristic of TEN.

Further, Dr. Paddock noted that several of the medications taken by Mr. Dupree during October and November have skin rashes as a possible side effect. He thought Dr. Morock was reasonable in suspecting Famvir as the causative agent

of the November rash because it was the newest drug in the patient's regimen. Moreover, in Dr. Paddock's opinion, although Dr. Morock also

considered Dilantin or Zyloprim as possible causes of the rash, there was no clinical indication during the November hospitalization that the rash was progressing toward TEN since it improved with the treatment.

Finally, Dr. Paddock observed that the clinical presentation when Mr. Dupree was hospitalized in December was consistent with the onset of TEN. The family reported the symptoms beginning on December 1, 1995 as a progressive, blistering rash, fever, and malaise with delirium. Dr. Paddock concluded that the onset of TEN did not occur until December 1 or December 2, 1995.

The opinion of the medical review panel and the affidavits from the other physicians, together with the interrogatories showing that the plaintiffs did not intend to produce expert testimony to establish the standard of care, provide sufficient support for Dr. Morock's motion for summary judgment. When a motion for summary judgment has been made and supported, the party opposing the motion may not rest on the mere allegations or denials of his pleading, but the response, by affidavits or otherwise, must set forth specific facts showing that there is a genuine issue for trial. La.C.Civ.P. Art. 967. All properly filed allegations of the party opposing the motion must be taken as true and all doubt resolved in his favor. *Schroeder, supra*, 591 So.2d at 345.

In response to the defendants' motion for summary judgment, the plaintiffs relied only upon the hospital records, pharmacology information concerning the various medications from the Physicians Desk Reference ("PDR"), and the deposition of the forensic pathologist, Dr. George McCormick, who investigated and determined the primary cause of death to be TEN, probably precipitated by Dilantin. In fact, testimony *supportive* of Dr. Morock emerged in the plaintiffs' only medical expert, who never gave an opinion concerning the possible negligence of any of the doctors involved in this case. When Dr. McCormick was questioned at some length about the possibility of diagnosing TEN when Mr. Dupree presented the first rash on November 17, 1995, he clarified that it would have been highly unlikely:

> Q: If I told you that there's been evidence in this case that in between the diagnosis of herpes zoster and the final diagnosis of TEN there was another rash that was described as dry, erythematous and maculopapular, would that be consistent with TEN?
>
> A: A dry erythematous maculopapular rash may be the forerunner of TEN but you wouldn't make the diagnosis of TEN if you looked at that dry red – erythematous just means red. ***A dry, red rash, you wouldn't say, oh, this person is going to have TEN*** but it can be the forerunner. But you might, you might consider and should consider that it is a drug rash.

(Emphasis added.)

The plaintiffs argue that expert testimony is not necessary in this case because the medical records themselves indicate that Dr. Morock should

have investigated the possibility that Dilantin was causing the rash when Mr. Dupree was hospitalized in November with the first rash symptoms. At the time of the November hospitalization, however, the rash did not appear to be the type of rash that would progress toward the life-threatening TEN that Mr. Dupree later developed. As Dr. McCormick's above testimony explains, the rash symptoms apparent in November, which Dr. Morock suspected to be caused by the recent course of Famvir and treated the patient for accordingly, would not have been diagnosed as TEN, or even the precursor of TEN, at that point in time.

In *Martin, supra*, the Louisiana Supreme Court stated, "Expert witnesses who are members of the medical profession are necessary sources of proof in medical malpractice actions to determine whether the defendant doctor possessed the requisite degree of skill and knowledge, or failed to exercise reasonable care and diligence." *Martin*, 582 So.2d at 1277 (citing *Frasier v. Department of Health and Human Resources*, 500 So.2d 858 (La. App. 1st Cir. 1986)); *Richoux, supra*, 617 So.2d at 16. Fourth Circuit jurisprudence is well settled on this requirement as well. *See, e.g., Cox v. Board of Adm'rs of Tulane Educ. Fund*, 97-2350, 97-1320 (La. App. 4 Cir. 7/1/98, 716 So.2d 441, 444-45 (affirming the trial court's grant of summary judgment where plaintiff failed to produce expert testimony to establish the

standard of care); *Fortenberry v. Berthier*, 503 So.2d 596 (La. App. 4th Cir. 1987) (affirming the trial court's grant of defendant's motion for summary judgment where plaintiffs failed to produce expert testimony to support the malpractice claim); *Gurdin v. Dongieux*, 468 So.2d 1241 (La. App. 4th Cir. 1985) (affirming directed verdict in favor of dentist where all three experts testified that the treatment was unsuccessful, but not negligent or below the standard of care).

Without expert testimony, the plaintiffs cannot counter the medical review panel's expert opinion, coupled with the affidavit testimony of the treating physicians and even the deposition of the forensic pathologist (offered by the plaintiffs) indicating that Dr. Morock's treatment of Mr. Dupree did not fall below the applicable standard of care.

Therefore, no genuine issue of material fact exists as to whether there should have been further investigation into Dr. Morock's November progress note indicating the possibility of a reaction to Dilantin. The treatment administered while Mr. Dupree was hospitalized for the first rash in November improved his condition, and that rash diminished in severity. Mr. Dupree's skin became dry and flaky, as noted by the home health nurse, after his discharge from Pendleton. The onset of the TEN rash seemed to occur in the early days of December, and as soon as Mr. Dupree returned to

the hospital, he was treated as though he had TEN. Dilantin, the suspected precipitant, was stopped immediately.

Nothing in the record indicates that the plaintiffs intended or were able to produce an expert who could testify that Dr. Morock's treatment was substandard. Because expert testimony is necessary to prove medical malpractice under the facts presented, we conclude that Dr. Morock's showing is sufficient for summary judgment.

CONCLUSION

Accordingly, for the foregoing reasons, the judgment of the trial court is affirmed.

AFFIRMED