**NOT DESIGNATED FOR PUBLICATION**

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| **EARL PHILLIP MONK, ET UX** | * | **NO. 2004-CA-0804** |
| **VERSUS** | * | **COURT OF APPEAL** |
| **JO ELLEN SMITH MEDICAL CENTER, NME HOSPITAL, INC., ET AL** | * | **FOURTH CIRCUIT** |
| | * | **STATE OF LOUISIANA** |
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 99-19952, DIVISION "D"
Honorable Lloyd J. Medley, Judge
* * * * * *
**Judge David S. Gorbaty**
* * * * * *

(Court composed of Judge Charles R. Jones, Judge Terri F. Love, Judge David S. Gorbaty)

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**AFFIRMED**

Plaintiff/appellant, Earl Philip Monk (Monk), brought a medical malpractice action against defendant/appellee, Tenet Healthsystem Hospitals, Inc. d/b/a Rehabilitation Institute of New Orleans, also d/b/a Jo Ellen Smith Medical Center (Tenet). A Motion for Summary Judgment was granted in favor of Tenet, dismissing Monk's claims, with prejudice. We affirm.

**STATEMENT OF FACTS AND PROCEDURAL HISTORY:**

Earl Monk is a paraplegic. On January 17, 1996, he was admitted to Jo Ellen Smith Medical Center to participate in the reciprocating gait orthosis rehabilitation program (RGO program). Monk claims that he sustained a fractured ankle on March 14, 1996 while participating in the RGO program.

Mr. Monk filed a complaint with the Patient's Compensation Fund, alleging the negligence of Dr. Douglas A. Waldman and Tenet. On September 1, 1998, a Medical Review Panel ruled in favor of Dr. Waldman and Tenet. The instant lawsuit was thereafter filed on November 24, 1998.

On August 28, 2003, Tenet filed a Motion for Summary Judgment, premised on the fact that Monk failed to name a medical expert in response to discovery requests. The trial court heard the matter on February 20, 2004.

In opposition to Tenet's motion, Monk presented his own affidavit describing how he believed his ankle became fractured. Regarding medical evidence, counsel for Monk explained that he had located two experts, Dr. Luke and Dr. Silo, and that he was waiting to get the experts' affidavits. Counsel for Monk requested that he be given two weeks to produce the affidavits. The trial court granted the request, and stated on the record that the Motion for Summary Judgment would be granted if the affidavits were not produced by March 1, 2004. Counsel for Monk expressed no opposition to the court's ruling.

The affidavits of the medical experts were not produced. On March 2, 2004, a judgment was rendered, granting Tenet's Motion for Summary Judgment. This timely appeal followed.

**STANDARD OF REVIEW:**

Appellate courts review the granting of summary judgment *de novo* under the same criteria governing the trial court's consideration of whether summary judgment is appropriate. *Reynolds v. Select Properties, Ltd.*, 93-1480 (La.4/11/94), 634 So.2d 1180, 1183. The summary judgment

procedure is designed to secure the just, speedy and inexpensive determination of actions. *Two Feathers Enterprises, Inc. v. First Nat'l Bank of Commerce*, 98-0465, p. 3 (La.App. 4 Cir. 10/14/98), 720 So.2d 398, 400. This procedure is now favored and shall be construed to accomplish those ends. La. Code Civ. Proc. art. 966 A(2).

A summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to a material fact, and that the mover is entitled to judgment as a matter of law. La. Code Civ. Proc. art. 966. If the court finds that a genuine issue of material fact exists, summary judgment must be rejected. *Oakley v. Thebault*, 96-0937 (La.App. 4 Cir. 11/13/96), 684 So.2d 488, 490. The burden does not shift to the party opposing the summary judgment until the moving party first presents a *prima facie* case that no genuine issues of material fact exist. *Id.* At that point, the party opposing the motion must "make a showing sufficient to establish existence of proof of an element essential to his claim, action, or defense and on which he will bear the burden of proof at trial." La. Code Civ. Proc. art. 966(C).

**DISCUSSION:**

Monk's only argument on appeal is that the medical expert affidavits

were not necessary. More specifically, it is argued that an expert witness is not required in a medical malpractice action when the negligence is obvious. In support of this position, Monk cites *Dean v. Ochsner Med. Foundation Hosp. and Clinic*, 99-466 (La.App. 5 Cir. 11/10/99), 749 So.2d 36. Monk submits that the negligence is obvious in this case because the fractured ankle occurred during one of the physical therapy sessions performed in the RGO program.

Tenet argues that Monk has raised this new issue, *i.e.*, expert testimony is not required, for the first time on appeal. Tenet submits that Monk's only argument in opposition to the Motion for Summary Judgment was that additional time was needed to secure the affidavits of his two medical experts which he identified in response to discovery. Therefore, Tenet maintains that the new issue is not properly before this court. Uniform Rules, Courts of Appeal, Rule 1-3.

Tenet is correct in asserting that Monk did not raise the issue of the necessity of expert testimony in the trial court. However, we must address the sufficiency of Monks evidence in order to determine whether the trial court properly granted summary judgment.

In support of its motion, Tenet submitted answers to interrogatories, dated March 6, 2003, wherein Monk admitted that medical experts had not

yet been consulted. Tenet also presented the medical review panel opinion and the affidavit of panel member, Dr. Raoul Rodriguez. Dr. Rodriguez and the panel opined as follows: "[t]he records submitted for review by the panel indicated that the employees of the Rehabilitation Institute of New Orleans exercised appropriate care in their treatment of Mr. Monk. The records do not reveal any unusual or inappropriate event or care of Mr. Monk."

As in all malpractice cases, the plaintiff has the ultimate burden of proving the essential elements of his case. La. R.S. 9:2794A provides that the plaintiff in a medical malpractice case shall have the burden of proving:

> (1) The degree of knowledge or skill possessed or the degree of care ordinarily exercised by physicians, ... under similar circumstances; and where the defendant practices in a particular specialty and where the alleged acts of medical negligence raise issues peculiar to the particular specialty involved, then the plaintiff has the burden of proving the degree of care ordinarily practiced by physicians ... within the involved medical specialty.
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> (2) That the defendant either lacked this degree of knowledge or skill or failed to use reasonable care and diligence, along with his best judgment in the application of that skill.
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> (3) That as a proximate result of this lack of knowledge or skill or the failure to exercise this degree of care the plaintiff suffered injuries that would not otherwise have been incurred.

Summarizing, the plaintiff must establish the standard of care applicable to the doctor, a violation by the doctor of that standard of care,

and a causal connection between the doctor's alleged negligence and the plaintiff's injuries resulting therefrom. *Pfiffner v. Correa*, 94-0924 (La. 10/17/94), 643 So.2d 1228, 1233. To meet this burden of proof, the plaintiff generally is required to produce expert medical testimony. Although the jurisprudence has recognized exceptions in instances of obvious negligence, these exceptions are limited to "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." *Pfiffner*, 94-0924 at p. 9, 643 So.2d at 1234; *see also Williams v. Memorial Medical Center*, 03-1806, p. 16 (La.App. 4 Cir. 3/17/04), 870 So.2d 1044, 1054.

The jurisprudence has thus recognized that "an expert witness is generally necessary as a matter of law to prove a medical malpractice claim." *Williams v. Metro Home Health Care Agency, Inc.*, 02- 0534 (La. App. 4 Cir. 5/8/02), 817 So.2d 1224, 1228, *citing Russo v. Bratton*, 94-2634, p. 18 (La.App. 4 Cir. 6/29/95), 657 So.2d 777, 786. Moreover, the jurisprudence has held that this requirement of producing expert medical testimony is especially apt when the defendants have filed summary judgment motions and supported such motions with expert opinion evidence that their treatment met the applicable standard of care. *Lee v. Wall*, 31,468, p. 4 (La. App. 2 Cir. 1/20/99), 726 So.2d 1044, 1046-47.

In the present case, the only evidence submitted in opposition to the Motion for Summary Judgment was Monk's own affidavit, which presented his version of how the ankle became fractured. Summary judgment in medical malpractice cases is proper where no contradictory evidence is offered and the adverse party merely rests on allegations. *Smith v. MacArthur Surgical Clinic*, 610 So. 2d 245, 248 (La.App. 3 Cir. 1992). Allegations alone, without supporting evidence, cannot create a question of fact and will not preclude a granting of summary judgment. *Bank of Iberia v. Hewell*, 534 So.2d 143, 146 (La.App. 3 Cir. 1989).

It is clear from the record that this case does not involve an obvious act of negligence for which medical evidence was not necessary. To the contrary, the facts surrounding Monk's fractured ankle are controverted. Accordingly, Monk was required to come forward with competent medical evidence to establish that genuine issues for trial exist regarding the applicable standard of care and Tenet's alleged breach thereof. This burden was not met. Under these circumstances, the summary judgment was properly granted.

For the foregoing reasons, we affirm the judgment of the trial court.

**AFFIRMED**