TOMIKA TURNER and : NUMBER: 561,900, “B”

MICHAEL TURNER

VERSUS : FIRST JUDICIAL DISTRICT COURT

DR. CYNTHIA MONTGOMERY AND

WILLIS KNIGHTON MEDICAL CENTER : CADDO PARISH, LOUISIANA

**REASONS FOR JUDGMENT ON**

**MOTIONS FOR SUMMARY JUDGMENT**

The Court has thoroughly considered the Motion for Summary Judgment filed January 28, 2013 by Willis Knighton Medical Center, its exhibits and memoranda, the Motion for Summary Judgment filed February 7, 2013 by Cynthia Montgomery, M.D., its exhibits, including the Affidavit of Frank H. Thaxton, Chairman of the Medical Review Panel, along with the Medical Review Panel Opinion and Written Reasons for Conclusions of the Medical Review Panel, the Affidavit of Dr. Montgomery and memoranda, the Motion for Extension of Time and Motion for Brief Continuance of the April 8, 2013 hearing, filed March 28, 2013 by Tomika Turner and Michael Turner, the Plaintiffs’ Response in Opposition to Motions for Summary Judgment, filed May 8, including the Affidavits of Tomika Turner and Michael Turner and a report from Angela Harris, D.O. with attached literature.

After thorough review of the entire record and proceedings, applicable law, and for reasons that follow, specifically (1) violations of La. D. Ct. R. 9.9 (b) (time issues) and La. C.C.P. 966-967, (competent summary judgment evidence); (2) the rule of law applicable in a medical malpractice action requiring expert medical testimony from one qualified in the particular medical specialty; and (3) lack of any evidence that the criteria and elements of La. R.S. 9:2794 have been met, the Court concludes that the motions should be granted and the claims of the plaintiffs dismissed.

The motions were originally set for hearing on April 8, 2013[[1]](#footnote-1). Plaintiff counsel filed a request for continuance. Over objection of both defense counsel, the Court granted plaintiff counsel’s request. Specifically, the Court stated:

If the plaintiff does not have a medical expert that is competent to testify in the field that is at issue, and defense files a motion for summary judgment that is fatal to the case, it is over, over. That’s what the case law says, Pfiffner vs. Correa, which is a 1994 case. That’s been on the books now for a good long time and it is cited by district court judges all the time with regard to this issue, and there have since been a number of other issues and a number of other cases that have addressed this.

Again, I have ruled on this issue I don’t know how many times. This is serious, real serious, because you’re talking about potentially a fatal ending of the plaintiffs’ case without benefit of trial on the merits which is all set forth by law, all right, so I’m troubled by this. Mr. Pugh is right, on the internist versus the specialist in the field at issue here, and I can tell you that freight train –no, you’re through talking.

I’m very upset with you, Ms. Bradford, because you’ve wasted our time. I’m going to grant your motion. I don’t like it. You have made me very uncomfortable, this is embarrassing for this to even happen, and you should know better. But out of respect for your client I’m going to give you a 30 day extension to get his done. And let me tell you, if it’s not done the case is going to be dealt with in 30 days, period.

So, lawyers, get together, select a date and set this matter back on the docket for hearing on the motion for summary judgment. All deadlines must be met in accordance with the Code of Civil Procedure and the Louisiana Rules for District Courts, those being the Uniform Rules applicable to all state District Courts. If there’s one deadline missed, it’s going to be a problem.

The case was reset for hearing on the motions for May 15, 2013 (37 days following the first setting). On May 8, 2013, the Court received a request from plaintiff counsel to continue the May 13 hearing due to a scheduled juvenile case in Bossier Parish and, again, the Court granted plaintiff counsel’s request resetting the hearing as a special setting on May 15, 2013[[2]](#footnote-2). On May 8 plaintiff counsel filed an opposition, which is in derogation of the time restrains set forth in La. D. Ct. Rule 9.9(b) and the stout admonition by this Court on April 8. Furthermore, plaintiff counsel filed a report from Angela Harris, D. O., not a sworn affidavit as is required by La. Code of Civil Procedure art. 966. The unsworn medical doctor is “a doctor of osteopathic medicine and board certified in Internal Medicine” - not trained in the specialty of obstetrics and gynecology - and have even less to do with the allegations as to the hospital rendered viewpoints on the defendant doctor. Finally, the unsworn statements do not constitute competent summary judgment evidence and do not therefore establish the required elements of LSA – R.S. 9:2794.

In *Newsome v. Homer Memorial Medical Center,* 2010–0564 (La. 4/9/10), 32 So.3d 80, plaintiff’s counsel filed an untimely motion to continue a summary judgment hearing, which had previously been continued at plaintiff’s request, in a medical malpractice action or to allow the late filing of an affidavit in support of plaintiff’s opposition. The trial court granted the continuance and allowed the late filing, even though his inclination was to deny both, because he was concerned the court of appeal would send the matter back. The court of appeal affirmed, but the Louisiana Supreme Court granted writs and reversed the appellate court. The High Court found that the trial court abused its discretion in granting the continuance because the “good cause” for the continuance was only to allow plaintiff’s counsel to comply with the district court state rules which required the affidavit supporting the opposition to be filed eight days before the hearing. In other words, plaintiff’s counsel had not obtained the medical affidavit to support his opposition until after the deadline for submitting affidavits for the summary judgment hearing under La. C.C.P. art. 966 had passed. In that case, plaintiff counsel’s reason for not having obtained an expert or an expert’s affidavit earlier was that a one-week trial on her schedule turned into a three week trial. The Supreme Court found, under the facts in *Newsome*, that the trial court abused its discretion in granting the continuance and reversed, remanding the matter to the trial court so that a hearing could be conducted based on the discovery on file as of the date of the hearing.

In *Guilory v. Chapman*, 2010–1370 (La. 8/24/10), 44 So.3d 272, the Louisiana Supreme Court reinstated a trial court judgment granting summary judgment, where the trial court considered the late timing of the affidavit filed on behalf of the plaintiff, but followed the mandatory language of La. C.C.P. art. 966(B). In that case, the medical malpractice claim was six years old and the plaintiff had been aware of the expert for years. The High Court found no abuse of the trial court’s discretion in choosing to follow the mandatory language of the statute.

In *Sims v. Hawkins-Sheppard,* 2011-0678 (La. 71/1/11), 65 So.3d 154, plaintiff’s counsel stated at the hearing on the motion for summary judgment that he had spoken to the plaintiff’s treating physician after the delivery and that she was willing to serve as an expert witness for the plaintiff. Apparently, the plaintiff had known of this doctor’s willingness to serve as an expert witness for some time. Nevertheless, plaintiff’s former counsel did not send medical records or a copy of an affidavit to this medical expert until two weeks before the rescheduled hearing. Plaintiff counsel’s reasons for not obtaining the expert affidavit earlier was that the doctor was on vacation and then there was as three-day holiday. The Supreme Court found that these facts do not constitute “good cause” for failing to comply with the time limits found in La. C.C.P. art. 966(B) or District Court Rule 9.9(b), which require serving opposing affidavits eight calendar- days before the scheduled hearing.

In *Welch v. East Baton Rouge Parish Metropolitan Council,* (2010-1532), (La 3/25/11) 64 So.3d 249 the First Circuit Court of Appeal held that it was an abuse of discretion for the trial court to deny a motion for continuance of a summary judgment hearing where the plaintiff alleged sufficient reasons why additional evidence to oppose the motion for summary judgment could not be produced. Significantly the First Circuit noted that unverified documents are not competent summary judgment evidence; specifically, a document which is not an affidavit or sworn to in any way, or which is not certified or attached to an affidavit, is not of sufficient evidentiary quality to be given weight in determining whether genuine issues of material fact remain.

In accordance with *Pfiffner v. Correa*, 1994-0924 (La. 10/17/94), 643 So.2d. 1228 and *Samatia v. Rau*, 07-1726 (La. 2/26/08), 977 So.2d 880, *Schultz v. Guoth, et al*, 2010-CC-0343 (La. 1/19/11) 57 So.3d 1002 and an abundance of similar cases, because there is a lack of expert medical evidence in this summary judgment record, the Court concludes there are no genuine issues a material fact and Dr. Montgomery and Willis Knighton Medical Center are entitled to judgment as to matter of law. Accordingly, the Motion for Summary Judgment filed January 28, 2013 by Willis Knighton Medical Center and Motion for Summary Judgment filed February 7, 2013 by Cynthia Montgomery, M.D. are both granted.

Counsel shall submit a formal Judgment consistent with this ruling in accordance with La. D. Ct. Rule 9.5.

Signed this 29th day of May, 2013 in Shreveport, Caddo Parish, Louisiana.

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SCOTT J. CRICHTON

DISTRICT JUDGE

DISTRIBUTION:

Reshonda L. Bradford

Robert G. Pugh, Jr.

Craig J. Sabottke

1. A transcript of the April 8, 2013 hearing is filed in the suit record. [↑](#footnote-ref-1)
2. A transcript of the May 15, 2013 hearing is filed in the suit record. [↑](#footnote-ref-2)