NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 1260

JAMES ELLIS

VERSUS

JAMES SYLVESTER, M.D. AND STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS

Judgment Rendered: February 11, 2011

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On Appeal from the 20th Judicial District Court
In and For the Parish of West Feliciana
Trial Court Number 20,108

The Honorable William G. Carmichael, Judge Presiding

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BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

Guidry, J. concurs in the result

HUGHES, J.

This is an appeal from a summary judgment dismissing a prisoner's medical malpractice action against a physician and his employer, the State of Louisiana. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

In 2006, James Ellis, an inmate in the custody of the Louisiana Department of Public Safety and Corrections ("DPSC"), was transferred from Wade Correctional Center ("Wade") to the Louisiana State Penitentiary at Angola, Louisiana ("Angola"). While at Wade, Mr. Ellis had been prescribed certain medications, which included medication(s) for hypertension, and the use of large wrist restraints by the Wade medical personnel. However, following a routine transfer examination at Angola, by Dr. James Sylvester, a prescription for Mr. Ellis's hypertension medication was not issued.[1] Several weeks later, Mr. Ellis experienced elevated blood pressure, was treated in the prison's Assessment and Triage Unit ("ATU"), and was placed on blood pressure medication.

Mr. Ellis asserted that he thereafter filed an Administrative Remedy Procedure ("ARP"), complaining of being initially deprived of blood pressure medication by Dr. Sylvester upon his transfer to Angola by Dr. Sylvester.[2] Further, when Mr. Ellis subsequently sought to obtain medical authorization for large wrist restraints, claiming that regular restraints caused him swelling and "extreme discomfort" in his hands, Dr. Sylvester denied

[1] Mr. Ellis contends that Dr. Sylvester knew that he was taking medication for hypertension and that his discontinuance of that medication was malpractice. However, Dr. Sylvester stated that he did not recall Mr. Ellis informing him that he was taking medication for hypertension. Dr. Sylvester also stated that Wade had not transmitted Mr. Ellis's medical records by the time of the transfer interview, so he had no record of the medications Mr. Ellis had been taking at that time. Dr. Sylvester further stated that Mr. Ellis's blood pressure on that date was normal (110/70).

[2] No evidence of the ARP was filed into the instant record; however, the defendants do not dispute that the ARP took place.

the request. Mr. Ellis claims this denial was in retaliation for the filing of the ARP.

Subsequently, Mr. Ellis filed the instant suit on February 11, 2008, naming as defendants Dr. Sylvester and his employer, the DPSC. Mr. Ellis alleged that Dr. Sylvester committed malpractice in failing to diagnose his hypertension and continue medication for the condition, and also, in failing to prescribe large wrist restraints, in violation of his Eight Amendment rights against cruel and unusual punishment. Mr. Ellis further alleged that Dr. Sylvester's failure to continue hypertension medication was against his will "or substantially at variance with the consent given to [Dr. Sylvester]" and therefore constituted a battery. With respect to the DPSC, Mr. Ellis also alleged that the DPSC was negligent in failing to properly supervise Dr. Sylvester, and that the DPSC was liable, in solido, with Dr. Sylvester for failing to disavow his "intentional, willful and wanton acts."

Defendants filed their first motion for summary judgment on November 14, 2008, which was granted by the trial court by judgment dated January 30, 2009, dismissing the plaintiff's Eighth Amendment claims, but maintaining his other stated causes of action. Thereafter, on February 19, 2010, the defendants filed a written motion to challenge the admissibility of testimony by the plaintiff's expert witness, Dr. Darrell Henderson, pursuant to **Daubert v. Merrell Dow Pharmaceuticals, Inc.**, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and **Carrier v. City of Amite**, 2008-1092 (La. App. 1 Cir. 2/13/09), 6 So.3d 893, writ denied, 2009-0919 (La. 6/5/09), 9 So.3d 874. On March 4, 2010 the plaintiff filed a motion for summary judgment, seeking a ruling in his favor on the issues of liability and causation, but reserving for trial the issue of damages. On March 5, 2010 the defendants filed a supplemental motion for summary judgment,

contending the plaintiff would be unable to establish malpractice within the meaning established by the Medical Liability for State Service Act ("MLSSA"), LSA-R.S. 40:1299.39 et seq.

Following an April 21, 2010 hearing on the defendants' **Daubert** challenge and supplemental motion for summary judgment, as well as the plaintiff's motion for summary judgment, the trial court ruled in favor of the defendants, granting the motion to challenge the qualifications of Dr. Henderson, granting the motion for summary judgment, and dismissing the plaintiff's suit. The plaintiff's motion for summary judgment was denied. Plaintiff has appealed, contending that the trial court erred in granting summary judgment and dismissing his suit, because he asserts the trial court erred: (1) in holding that Dr. Henderson was not qualified to testify regarding the standard of care owed to the plaintiff by Dr. Sylvester; and (2) in holding that the plaintiff had not produced any evidence that Dr. Sylvester committed an intentional tort.

LAW AND ANALYSIS

Motion for Summary Judgment

The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action, except those disallowed by LSA-C.C.P. art. 969; the procedure is favored and shall be construed to accomplish these ends. LSA-C.C.P. art. 966(A)(2). Summary judgment shall be rendered in favor of the mover 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 material fact and that mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(B).

Appellate courts review summary judgments de novo under the same criteria that govern a district court's consideration of whether summary judgment is appropriate. **Samaha v. Rau**, 2007-1726, pp. 3-4 (La. 2/26/08), 977 So.2d 880, 882; **Allen v. State ex rel. Ernest N. Morial-New Orleans Exhibition Hall Authority**, 2002-1072, p. 5 (La. 4/9/03), 842 So.2d 373, 377; **Boudreaux v. Vankerkhove**, 2007-2555, p. 5 (La. App. 1 Cir. 8/11/08), 993 So.2d 725, 729-30.

In ruling on a motion for summary judgment, the judge's role is not to evaluate the weight of the evidence or to determine the truth of the matter, but instead to determine whether there is a genuine issue of triable fact. All doubts should be resolved in the non-moving party's favor. **Hines v. Garrett**, 2004-0806, p. 1 (La. 6/25/04), 876 So.2d 764, 765.

A fact is material if it potentially insures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of the legal dispute. A genuine issue is one as to which reasonable persons could disagree; if reasonable persons could reach only one conclusion, there is no need for trial on that issue and summary judgment is appropriate. **Id.**, 2004-0806 at p. 1, 876 So.2d at 765-66.

On motion for summary judgment, the burden of proof remains with the movant. However, if the moving party will not bear the burden of proof on the issue at trial and points out that there is an absence of factual support for one or more elements essential to the adverse party's claim, action or defense, then the non-moving party must produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial. If the opponent of the motion fails to do so, there is no genuine issue of material fact and summary judgment will be granted. See LSA-C.C.P. art. 966(C)(2).

When a motion for summary judgment is made and supported as provided in LSA-C.C.P. art. 967, an adverse party may not rest on the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be rendered against him. See LSA-C.C.P. art. 967(B). See also **Board of Supervisors of Louisiana State University v. Louisiana Agricultural Finance Authority**, 2007-0107, p. 9 (La. App. 1 Cir. 2/8/08), 984 So.2d 72, 79-80; **Cressionnie v. Intrepid, Inc.**, 2003-1714, p. 3 (La. App. 1 Cir. 5/14/04), 879 So.2d 736, 738.

Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. **Richard v. Hall**, 2003-1488, p. 5 (La. 4/23/04), 874 So.2d 131, 137; **Dyess v. American National Property and Casualty Company**, 2003-1971, p. 4 (La. App. 1 Cir. 6/25/04), 886 So.2d 448, 451, writ denied, 2004-1858 (La. 10/29/04), 885 So.2d 592; **Cressionnie v. Intrepid, Inc.**, 2003-1714 at p. 3, 879 So.2d at 738-39.

Medical Liability for State Service Act ("MLSSA")

A medical malpractice claim against a state health care provider, including a prisoner's medical malpractice claim, is governed by the MLSSA. See LSA-R.S. 40:1299.39 et seq. See also **Walker v. Appurao**, 2009-0821 (La. App. 1 Cir. 10/23/09), 29 So.3d 575, writ denied, 2009-2822 (La. 3/5/10), 28 So.3d 1010. Pursuant to LSA-R.S. 40:1299.39(G), the State shall pay any damages and other costs in connection with any claim lodged against a state health care provider when the state health care provider is acting within the terms of the definition of "state health care provider" or

"person covered by this Part," as provided in paragraph (1) of Subsection A of LSA-R.S. 40:1299.39, and has committed malpractice. **Batson v. South Louisiana Medical Center**, 2002-2381, p. 5 (La. App. 1 Cir. 6/27/03), 858 So.2d 653, 657, writ denied, 2003-2077 (La. 11/5/03), 857 So.2d 490. As provided in LSA-R.S. 40:1299.39(A)(1)(a)(iv)(cc), "no person or entity referenced in this Item shall be considered a 'state health care provider' or 'person covered by this Part' for any injury to or death of the patient resulting from any act or omission of gross negligence or any willful or wanton act or omission." Further, a health care provider who fails to qualify as a state health care provider under the MLSSA is not covered by the MLSSA and is subject to liability under the private law without regard to the MLSSA. See LSA-R.S. 40:1299.39(K).[3]

The "[r]ight to recover losses due to malpractice" is defined in the MLSSA as "the substantive right in favor of a patient or his representative to receive, subject to the fiscal legislative discretion of appropriation, some measure of compensation in money or services or both from the state, as and to the extent allowed by this Section, toward repairing any injury or losses proximately caused to him by an act of malpractice committed by a state health care provider as defined in this Section." LSA-R.S. 40:1299.39(A)(9). The MLSSA further states its underlying public policy in LSA-R.S. 40:1299.39(C):

> Since the Louisiana Civil Code was enacted only in the domain of the private law, govern[ing] only the legal relationships of private persons among themselves alone, and is inapplicable to public entities and their legal relationships, there is no right nor legal basis ex delicto, or ex quasi-delicto, for an action by a

[3] The primary purpose of the MLSSA is to attract qualified professionals to provide health care services on behalf of the State by protecting against malpractice judgments. By requiring that such providers be specifically contractually identified, the MLSSA affords the State the ability to control the identities and, presumably the qualifications, of those health care providers for whom coverage under the MLSSA will be afforded and for whom the State may ultimately be liable. **Batson v. South Louisiana Medical Center**, 2002-2381 at pp. 7-8, 858 So.2d at 658.

> patient or his representative to recover damages or any other losses, including those for the death of the patient, from the state or a state health care provider as defined in this Section as a result of malpractice in connection with state-provided or state-related health care; however, a patient, his representative properly acting for him, or his after-death representative shall have a right to recover from the state certain losses to the extent and within the limitations defined and allowed by this Section of public law due to malpractice as defined in this Section, in the circumstances and within the parameters provided by this Section, on the sole basis of this Section as a special substantive sui generis statutory grant in the domain of public law. . . .

Paragraph (1) of Subsection D in LSA-R.S. 40:1299.39 also states: "Otherwise than as provided by this Section of public law, a patient shall not have a right to recover losses due to malpractice from the state or from a state health care provider as defined in this Section." Aside from these and other restrictions stated in the MLSSA, a claimant subject to the MLSSA is provided a similar right of recovery for malpractice as a patient subject to private law under the same circumstances.[4] See LSA-R.S. 40:1299.39(D)(1).

"Malpractice" is defined by the MLSSA as "the failure to exercise the reasonable standard of care specified and required by Subsection B of this Section, in the provision of health care, when such failure proximately causes injury to a patient, as provided in Subsection B of this Section." LSA-R.S. 40:1299.39(A)(4). The standard of reasonable care specified and required by the MLSSA is "the same as that required to be proven with respect to [licensed physicians and dentists] under the provisions of R.S. 9:2794." See LSA-R.S. 40:1299.39(B)(1).

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[4] Damages under the MLSSA are capped at five hundred thousand dollars plus interest and costs, exclusive of future medical care and related benefits valued in excess of such five hundred thousand dollars. Future medical care and related benefits are paid by the Office of Risk Management. LSA-R.S. 40:1299.39(F) and (L). See also **Detillier v. Kenner Regional Medical Center**, 2003-3259, p. 14 (La. 7/6/04), 877 So.2d 100, 110; **Sibley v. Board of Supervisors of Louisiana State University**, 477 So.2d 1094, 1100 (La. 1985); **Marcel v. Louisiana State Department of Public Health**, 492 So.2d 103, 109-10 (La. App. 1 Cir.), writ denied, 494 So.2d 334 (La. 1986).

Louisiana Revised Statute 9:2794 provides, in pertinent part:

A. In a malpractice action based on the negligence of a physician licensed under R.S. 37:1261 et seq., . . . the plaintiff shall have the burden of proving:

(1) The degree of knowledge or skill possessed or the degree of care ordinarily exercised by physicians . . . licensed to practice in the state of Louisiana and actively practicing ***in a similar community or locale*** and 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 medical specialty involved, then the plaintiff has the burden of proving the degree of care ordinarily practiced by physicians . . . ***within the involved medical specialty***.

(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.

(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.

* * *

D. (1) In a medical malpractice action against a physician . . . a person may ***qualify as an expert witness*** on the issue of whether the physician departed from accepted standards of medical care ***only if the person is a physician who meets all of the following criteria***:

(a) He is ***practicing medicine*** at the time such testimony is given or was practicing medicine at the time the claim arose.

(b) He has ***knowledge of accepted standards*** of medical care for the diagnosis, care, or treatment of the illness, injury, or condition involved in the claim.

(c) He is ***qualified on the basis of training or experience*** to offer an expert opinion regarding those accepted standards of care.

(d) He is ***licensed to practice medicine*** by the Louisiana State Board of Medical Examiners under R.S. 37:1261 et seq., is licensed to practice medicine by any other jurisdiction in the United States, or is a graduate of a medical school accredited by the American Medical Association's Liaison Committee on Medical Education or the American Osteopathic Association.

(2) For the purposes of this Subsection, "practicing medicine" or "medical practice" includes but is not limited to training residents or students at an accredited school of medicine or osteopathy or serving as a consulting physician to other physicians who provide direct patient care, upon the request of such other physicians.

(3) In determining whether a witness is qualified on the basis of ***training or experience***, the court shall consider whether, at the time the claim arose or at the time the testimony is given, the witness is board certified or has other substantial

> training or experience ***in an area of medical practice relevant to the claim*** and is actively practicing in that area.
>
> (4) The court shall apply the criteria specified in Paragraphs (1), (2), and (3) of this Subsection in determining whether a person is qualified to offer expert testimony on the issue of whether the physician departed from accepted standards of medical care.
>
> (5) Nothing in this Subsection shall be construed to prohibit a physician from qualifying as an expert solely because he is a defendant in a medical malpractice claim.

(Emphasis added.)

Paragraph A of LSA-R.S. 9:2794 requires a plaintiff in a medical malpractice action to establish by a preponderance of the evidence the applicable standard of care, a violation of that standard of care, and a causal connection between the alleged negligence and the plaintiff's injuries. Further, an expert witness is generally necessary as a matter of law to meet the burden of proof on a medical malpractice claim (though the jurisprudence has recognized exceptions in instances of obvious negligence, those 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). See **McGregor v. Hospice Care of Louisiana in Baton Rouge, L.L.C.**, 2009-1357, p. 6 (La. App. 1 Cir. 2/12/10), 36 So.3d 272, 276, writ denied, 2010-0701 (La. 5/28/10), 36 So.3d 253 (citing **Pfiffner v. Correa**, 94-0924, pp. 8-9 (La. 10/17/94), 643 So.2d 1228, 1233-34; **Lieux v. Mitchell**, 2006-0382, p. 11 (La. App. 1 Cir. 12/28/06), 951 So.2d 307, 314, writ denied, 2007-0905 (La. 6/15/07), 958 So.2d 1199). Moreover, the requirement of producing expert medical testimony is especially apt when the defendant has filed a motion for summary judgment and supported such motion with expert opinion evidence that the treatment met the applicable standard of care. **Lieux v. Mitchell**, 2006-0382 at p. 11, 951 So.2d at 315; **Fagan v. LeBlanc**, 2004-2743, pp. 6-

7 (La. App. 1 Cir. 2/10/06), 928 So.2d 571, 575-76. See also **Cornwell ex rel. Cornwell v. Louisiana Medical Mutual Insurance Company**, 43,807, p. 3 (La. App. 2 Cir. 12/3/08), 999 So.2d 804, 806-7.

In a medical malpractice action based on the negligence of a non-specialist physician, the plaintiff has the burden of proving, among other elements, the degree of care ordinarily exercised by physicians in a similar community or locale and under similar circumstances, in accordance with LSA-R.S. 9:2794(A)(1). **Leyva v. Iberia General Hospital**, 94-0795 (La. 10/17/94), 643 So.2d 1236, 1239; **LeBlanc v. Landry**, 2008-1643, p. 7 (La. App. 1 Cir. 6/24/09), 21 So.3d 353, 360, writ denied, 2009-1705 (La. 10/2/09), 18 So.3d 117. Where the defendant practices in a particular specialty and the alleged acts of medical negligence raise issues peculiar to the particular medical specialty involved, the plaintiff has the burden of proving the degree of care ordinarily practiced by physicians within the involved medical specialty. **LeBlanc v. Landry**, 2008-1643 at p. 7, 21 So.3d at 360. See also **Piazza v. Behrman Chiropractic Clinic, Inc.**, 601 So.2d 1378, 1380 (La. 1992).

Expert Testimony Evaluation

In the instant case, the trial court excluded the testimony of the plaintiff's expert, Dr. Darrell Henderson, for the following reasons:

> Dr. Henderson does not meet all the criteria of Section 2794 of Title 9. Though he is practicing medicine and is licensed to practice medicine and has impressive curriculum vitae in his specialty, he has no knowledge of accepted standards of medical care for the diagnosis, care, or treatment of the illness, injury, or condition involved in this claim.
>
> This case involves the medical care of inmates in a large state penitentiary by a physician who testified that at all relevant times, he was practicing general medicine, urgent care medicine and emergency care medicine. I conclude that the penitentiary is the "community or locale" in which the relevant events took place. The Plaintiff must, therefore, prove the degree of knowledge or skill possessed or the degree of care

> ordinarily exercised by physicians, licensed to practice in the State of Louisiana and actively practicing in a similar community or locale and under similar circumstances. The expert, therefore, must be familiar with the standard of care required of a physician currently practicing general, urgent, and emergency medicine in a large penitentiary. Dr. Henderson has no experience in a prison setting. He is in private practice in Lafayette. He is a plastic and reconstructive surgeon. I note that he ran the plastic surgery clinic at a prison in Stillwater, Minnesota for two to four days per month for two years during the 1960's; but I consider that experience to be of no significant value over forty years later. Since he has no knowledge of the accepted standard of medical care, he is not qualified to offer an expert opinion regarding that standard of care.

Although, after a careful review of the record presented on appeal, we agree with the exclusion of the testimony of Dr. Darrell Henderson, we do so for reasons other than those expressed by the trial court. In particular, we find it unnecessary to disqualify Dr. Henderson simply because he is a plastic surgeon, while the defendant physician was in the practice of general medicine at all relevant times. In this regard, we note the holding of the supreme court in **McLean v. Hunter**, 495 So.2d 1298 (La. 1986), wherein it was held that the testimony of a specialist with knowledge of the requisite subject matter was qualified to testify regarding the standard of care in a general practitioner's locale. In so holding, the supreme court adopted the following reasoning:

> Where a duly licensed and practicing physician has gained knowledge of the standard of care applicable to a specialty in which he is not directly engaged but as to which he has an opinion based on education, experience, observation or association with that specialty, his opinion is competent. The reason for not requiring specialization in a certain field is obvious. Physicians are reluctant to testify against each other. Consequently, when an expert can be found, it is immaterial whether he is a general practitioner or a specialist providing he has knowledge of the standard of care in any given field; otherwise, the plaintiff could never prove a case against a specialist unless he had an expert of the particular specialty, and the plaintiff would never be able to sue a general practitioner unless he had a general practitioner who was willing to testify as an expert.

McLean v. Hunter, 495 So.2d at 1303.

Notwithstanding, we find it unnecessary to determine whether Dr. Henderson possessed the requisite knowledge to evaluate the medical practices employed by Dr. Sylvester in his practice of general medicine as to the inmate plaintiff, finding instead that the factual basis of Dr. Henderson's opinion was flawed.

Louisiana Code of Evidence Article 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Further, LSA-C.E. art. 703 states: "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time." LSA-C.E. art. 403.

The factual basis for an expert's opinion determines the reliability of the testimony. An unsupported opinion can offer no assistance to the fact finder, and should not be admitted as expert testimony. The trial court's inquiry must be tied to the specific facts of the particular case. The abuse of discretion standard applies to the district court's ultimate conclusion as to whether to exclude expert witness testimony and to the court's decisions as to how to determine reliability. **Carrier v. City of Amite**, 2008-1092 at p. 4, 6 So.3d at 897 (citing **Miramon v. Bradley**, 96-1872 (La. App. 1 Cir.

9/23/97), 701 So.2d 475, 478; **Brown v. City of Madisonville**, 2007-2104, pp. 6-7 (La. App. 1 Cir. 11/24/08), 5 So.3d 874, 880-81, writ denied, 2008-2987 (La. 2/20/09), 1 So.3d 498). To ensure reliability, an expert's opinion may not be based on subjective belief or unsupported speculation. See **Goza v. Parish of West Baton Rouge**, 2008-0086, p. 1 (La. App. 1 Cir. 5/5/09) (on rehearing), 21 So.3d 320, 340, writ denied, 2009-2146 (La. 12/11/09), 23 So.3d 919, certiorari denied, ___ U.S. ___, 130 S.Ct. 3277, 176 L.Ed.2d 1184 (2010). Nor may an expert's opinion assess credibility of other witnesses, as it is the trier of fact's exclusive province to do so. See **Schwamb v. Delta Air Lines, Inc.**, 516 So.2d 452, 460 (La. App. 1 Cir. 1987), writs denied, 520 So.2d 750 (La. 1988). The trial judge serves a "gatekeeping" function to screen and exclude invalid or improper expert testimony. See **Miramon v. Bradley**, 96-1872 at p. 6, 701 So.2d at 479.

In the instant case, Dr. Henderson stated in an affidavit filed into the record that "Dr. Sylvester knew that Mr. Ellis had a long time history of hypertension which was controlled by medication (Vasotec 10 mg per day), but chose not to refill this medication." Dr. Henderson also stated in his affidavit: "Dr. Sylvester further stated in his deposition that he did not prescribe Vasotec due to the risk of Mr. Ellis selling it to other prisoners." Dr. Henderson also recited the following as fact: "Dr. Sylvester did not furnish Mr. Ellis his blood pressure medicine when he repeatedly asked for it, in spite of feet edema and did not make it available until he had a hypertensive crisis on August 29, 2006, with a blood pressure of 190/120." However, these "facts," which formed the basis for Dr. Henderson's expert opinion, were not established in the record.

Dr. Sylvester testified by deposition as to the reason he did not prescribe hypertension medication to Mr. Ellis on his initial transfer

examination, during the following colloquy between the doctor and plaintiff's counsel:

> Q. Did you vacate Mr. Ellis'[s] prescription medication when he first came under your care?
> A. No.
> Q. Do you know why he thinks that you did?
> A. Yes.
> Q. Could you elaborate?
> A. I believe that he believes that at the time I saw him for his transfer interview, he needed blood pressure medicine. However, his -- his blood pressure at the time that I saw him was very reasonable, in fact, bordered on low. If I had prescribed blood pressure medicine for him at the time, he might have well bottomed out.
>
> And so a diagnosis of hypertension is never made on one blood pressure reading alone. You make a series of blood pressure readings, possibly a month to a month and a half apart; and if they're consistently high, then that's -- then that's the time for intervention. But if you have somebody with a blood pressure of -- I forget, but 110 over 70 or 110 over 60, you don't give them a lot of blood pressure medicines.
> Q. Were you aware of the prescription that he had from [Wade], which was for one year?
> A. As I recall, that was not immediately apparent on the medical record.

Further, even though Dr. Sylvester stated that Mr. Ellis reported to him that he had a history of hypertension during the August 7, 2006 transfer examination, Dr. Sylvester said, "I wasn't aware that he was on blood pressure medicine. I only give medicines that are appropriate for the current condition that the inmate presents as your patient." Dr. Sylvester also stated that he asked Mr. Ellis about his medications, and although he disclosed other medications, Dr. Sylvester did not recall Mr. Ellis mentioning a blood pressure medication; nor did Dr. Sylvester record any blood pressure medication on either his handwritten or transcribed examination notes. Dr. Sylvester further testified that no medical records were received from the transferring institution (Wade), either on paper or on computer, concerning medications that Mr. Ellis had been prescribed, before the August 7, 2006 transfer examination of Mr. Ellis. These records were subsequently received

from the transferring institution on August 16, 2006, but even then Dr. Sylvester did not recall seeing a blood pressure medication listed.

The only statement by Mr. Ellis, contained in the record, concerning what he may have told Dr. Sylvester about his medications, was an affidavit in which Mr. Ellis stated that "although he told James Sylvester that he had multiple medical conditions on August 7, 2006, that ***the physician did not know what medications he was cancelling***; that he simply did not review those medications and stopped all his medications at that time."[5] (Emphasis added.) Thus, Dr. Henderson's statement that Dr. Sylvester "knew" that Mr. Ellis had a "long time" history of hypertension, which was "controlled by medication (Vasotec 10 mg per day)," but chose not to "refill" this medication, as this statement was applied to Dr. Sylvester's August 7, 2006 transfer examination, was not supported by any factual testimony or documentation in the record.

Our examination of the record leads us to conclude that Dr. Henderson's assertion that "Dr. Sylvester . . . stated . . . that he did not prescribe Vasotec due to the risk of Mr. Ellis selling it to other prisoners" is also inaccurate and misleading. The reasoning articulated by Dr. Sylvester, when questioned as to why he did not prescribe Mr. Ellis hypertension medication on August 7, 2006, is evident from the colloquy quoted hereinabove and was stated numerous times during his deposition; i.e., at the time of the August 7, 2006 examination, Mr. Ellis did not present signs and symptoms of a patient who had a blood pressure problem. Dr. Sylvester's

[5] It should be noted that the Angola medical records for Mr. Ellis show that on August 7, 2006 Dr. Sylvester issued prescriptions for the following medications: Naproxen, Cipro, Glucophage, and Aspirin. Further, Dr. Sylvester ordered the following tests and/or further treatment for Mr. Ellis on that date: CBC, UA, Chem. 14, Lipid Profile, Alt., TSH, PSA, EKG, chest x-ray, eye clinic "ASAP," and a minor surgery consult (for an ingrown toenail). Dr. Sylvester further ordered that Mr. Ellis be scheduled for a clinic appointment in one month to follow-up on the ordered tests.

comments during his deposition, touching on the issue of inmates selling prescribed medications, referenced by Dr. Henderson in his affidavit, were made in a general way and not made specifically applicable to Mr. Ellis. The first of these comments by Dr. Sylvester was made during a discussion with plaintiff's counsel concerning inmate patient compliance in the taking of prescribed medication, as follows:

> Q: . . . [I]sn't the pill-call system in the prison -- isn't it regular? You have to take the medications when ordered?
>
> A: You have to be given the medications when ordered. It's very easy to -- the -- unless it's for, like, psych medicines, which are given by the psychiatric service, it's -- it's very easy to not take medicines and then possibly sell them to other inmates.

Also, Dr. Sylvester made the following similar statement, after indicating he was not aware Mr. Ellis had been previously prescribed hypertension medication, but it also was not made specifically applicable to Mr. Ellis:

> [F]irst of all, I -- I wasn't aware that he was on blood pressure medicine. He said that he was hypertensive. Inmates will sometimes say they have illnesses that they do not have in order to get medications that they can turn around and sell . . . [s]o you have to be careful about that security issue and only give medicines that are appropriate for the current condition that the inmate presents as your patient.

Dr. Henderson's inaccurate representation in his affidavit that these remarks by Dr. Sylvester were made specifically with respect to Mr. Ellis, when in fact they were made only as to inmates in general, raises further questions concerning the reliability of Dr. Henderson's opinion vis-à-vis the specific facts of this particular case.

In addition, Dr. Henderson's statement that Dr. Sylvester did not furnish Mr. Ellis hypertension medication even though Mr. Ellis "repeatedly" asked for it, was inaccurate and misleading as well. Following the August 7, 2006 transfer examination, Mr. Ellis returned to the clinic on

August 13, 2006, requesting that the dosage of his diabetes medication (Glucophage) be increased and requesting medication for his glaucoma. On that date, Mr. Ellis saw only a medical technician, not Dr. Sylvester. The medical technician filled out a form to report Mr. Ellis's requests and forwarded the form to Dr. Sylvester. Mr. Ellis was not given an appointment to see Dr. Sylvester, because he already had an appointment scheduled for a follow-up to his previously ordered medical tests. After receiving the list of Mr. Ellis's prior medications from his transferring institution, Dr. Sylvester prescribed the medication requested for glaucoma and the increased dosage of Glucophage. No mention was made in the August 13, 2006 records of any request by Mr. Ellis for hypertension medication at that time.

Mr. Ellis's next visit to the clinic was on August 20, 2006. On that date, Mr. Ellis's stated reason for the visit was that his feet were swollen and that he needed his blood pressure medicine renewed. Mr. Ellis was again seen by a medical technician, who recorded his request, measured and recorded his blood pressure as 126/80, and forwarded the form to Dr. Sylvester. Dr. Sylvester issued an order for Mr. Ellis to be given a "Priority 3" (within two to three weeks) appointment for evaluation; no higher priority for evaluation was assigned because Mr. Ellis's blood pressure on that date (August 20, 2006) was normal.

On August 27, 2006, Mr. Ellis also went to the clinic complaining of his blood pressure, but on that date he was treated by Dr. Singh, who apparently concluded that the next regularly scheduled appointment for Mr. Ellis was adequate to address his medical needs, as no earlier evaluation or treatment was ordered. Mr. Ellis went again to the clinic the next day, August 28, 2006, complaining of his blood pressure and swelling in his feet.

On that date, Mr. Ellis's blood pressure was initially measured as 190/120. He was sent to the ATU (Angola's emergency medical treatment facility), where he was treated by Dr. Sherry Huffman with a blood pressure lowering medication (Clonidine), which lowered his blood pressure to 166/85. Dr. Huffman issued Mr. Ellis prescriptions for the hypertension medications he had previously taken at Wade, and he was released from the ATU.

These medical records reveal that between the time Mr. Ellis was examined by Dr. Sylvester on August 7, 2006 and his hypertensive episode, which began on August 27, 2006, he requested blood pressure medication only once, on August 20, 2006. No factual evidence was presented by the plaintiff to the contrary. Thus, Dr. Henderson's characterization of the facts as Mr. Ellis having "repeatedly" asked for blood pressure medication prior to his hypertensive episode was inaccurate and misleading.

After placing great emphasis on "facts" that were not established by evidence filed into the record, Dr. Henderson concluded that Dr. Sylvester breached the applicable standard of care in failing to prescribe hypertension medication for Mr. Ellis on August 7, 2006 or prior to Mr. Ellis's hypertensive episode on August 27 - 28, 2006. Because Dr. Henderson's expert opinion, with respect to Dr. Sylvester's failure to prescribe hypertension medication for Mr. Ellis, was based on factual misstatements of the evidence submitted, his conclusions were unreliable and could offer no assistance to the factfinder on the issue addressed. Therefore, we find no error in the refusal of the trial court to consider this testimony as to this issue. See LSA-C.E. art. 403; **Carrier v. City of Amite**, 2008-1092 at p. 4, 6 So.3d at 897; **Miramon v. Bradley**, 96-1872 at p. 6, 701 So.2d at 479.

As to Dr. Henderson's testimony regarding the propriety of Dr. Sylvester's denial of Mr. Ellis's request for larger wrist restraints, we find no

scientific basis was shown to support the opinion, and therefore find the expert opinion expressed on this issue to also be unreliable and therefore inadmissible. Dr. Henderson's affidavit testimony on this point was as follows:

> My experience in being a medical doctor for 50 years, and being a hand surgeon for over 40 years, as well as all of the published tables I have seen on wrist size is that a circumference of 7.75 inches[6] in a male represents large wrists and frame. . . . I have personally examined a Smith and Wes[s]on Model 100 handcuff (regular size). When locked at the loosest setting (the first notch), the maximum inside perimeter (circumference) is 8.40 inches. This leaves an average free space of 0.65 inch. The diameter of the distal joint on an average male is approximately 0.80 inch thus only the tip of the finger would fit between Mr. Ellis'[s] skin and the sides of the regular handcuff and not the entirety of the first joint.[7] A large handcuff with an inside circumference of 9.4 inches would easily fit Mr. Ellis'[s] large wrist and would not have to be locked on the loosest setting. Medically, it would be more comfortable and would not cause pain and swelling. There is no medical reason why it would not restrain him as effectively as a regular size cuff.

Initially, we observe that this testimony does not give any scientific or technical standards that are customarily used in the appropriate application of wrist restraints vis-à-vis a prisoner's wrist size. Dr. Henderson's opinion, in sum, is that looser cuffs are "medically" more comfortable and do not cause pain and swelling. Such a conclusion even though labeled a "medical" conclusion is simply a common sense observation that even a non-expert might make. In contrast, the affidavit of Colonel Russell Bordelon, LPSC Training Academy Supervisor, was introduced into the record, verifying that copies of training material concerning the application of restraints filed into

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[6] Dr. Raman Singh, the former medical director at Angola who was at the time of his testimony the chief medical director for the DPSC, testified that during a physical examination he conducted of Mr. Ellis, he measured Mr. Ellis's wrists and determined that the circumference of both Mr. Ellis's left and right wrists was 7.75 inches.

[7] Both Dr. Sylvester and Dr. Raman Singh testified that regular sized wrist restraints fit properly (i.e., not too small) if an index finger fits between the wrist and the restraint, and thus large wrist restraints are not indicated.

the record were true and correct. In those materials, in a document entitled "General Principles in Use of Restraints," is the following technical guideline/policy: "Handcuffs should be applied so that they make complete contact with skin. However, they should not be so tight as to impede circulation."

Significantly, what Dr. Henderson's testimony fails to state is whether a handcuff with an "average free space of 0.65 inch" causes swelling or any other physical harm to the wearer. Furthermore, Dr. Henderson stated that he reviewed Mr. Ellis's prison medical records, but he did not indicate that there were any documented instances of swelling to Mr. Ellis's hands, caused by wrist restraints during the time of Dr. Sylvester's treatment of him, while the affidavit of Dr. Raman Singh stated that his review of Mr. Ellis's medical records uncovered no documentation evidencing any swelling of Mr. Ellis's hands caused by wrist restraints.[8] Because Dr. Henderson's affidavit testimony does not establish a scientific, technical, or medical basis on the issue of appropriate application of wrist restraints, it did not meet the **Daubert** standards for admissibility as expert testimony on this issue. See **Carrier v. City of Amite**, 2008-1092 at pp. 3-5, 6 So.3d at 895-97.

For the reasons stated, we find no error in the exclusion of the testimony of Dr. Henderson by the trial court, and as no other evidence in the record establishes any basis for a determination of medical malpractice

[8] We note that on July 14, 2007 and July 23, 2007, prison medical records show Mr. Ellis complained of hand swelling, and an appointment to see the doctor was scheduled for him. On the July 14th medical report completed by medic "B. Johnson," there was a notation of redness and "mild" swelling of the hands, along with the comment that the patient had not had a fluid pill in a week or more. Mr. Ellis was treated with anti-inflammatory medication. Subsequently, the doctor's July 26, 2007 examination notes stated only that the hand swelling was resolved and did not indicate any swelling had been observed by medical staff on that date.

in this case, the motion for summary judgment dismissing the plaintiff's claims was properly granted.[9]

CONCLUSION

For the reasons assigned herein, the summary judgment granted by the trial court in favor of the defendants, James Sylvester, M.D. and the Louisiana Department of Public Safety and Corrections, is hereby affirmed. All costs of this appeal are to be borne by the plaintiff, James Ellis.

AFFIRMED.

[9] We further find no basis in the record for the plaintiff's claim that an intentional act was committed by Dr. Sylvester, *a fortiori*, as negligence was not established.